SYMPOSIUM

A MATTER OF LIFE AND DEATH: NEW JERSEY'S DEATH PENALTY STATUTE IN THE 21ST CENTURY

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I. Introduction

On April 9, 1999, the Seton Hall Legislative Bureau presented a symposium entitled *A Matter of Life and Death: New Jersey's Death Penalty Statute in the 21st Century.* In attendance was a distinguished panel of legislators, legal scholars and practitioners who offered their insight into both the practical and theoretical issues that arise in regards to the death penalty. What appears in the following pages are reproductions of their symposium

presentations that explore a number of important issues surrounding the death penalty. Following are biographies of the symposium panelists.

II. Speakers' Biographies

John B. Wefing, Esq.
Professor of Law, Seton Hall University School of Law

Professor Wefing teaches Criminal Procedure, Constitutional Law and New Jersey Constitutional Law at the Seton Hall University School of Law. In addition, he served as Associate Dean of the law school from 1979 to 1982 and as Acting Dean from January to June of 1988.

Professor Wefing has also taught criminal law at Rutgers Law School and was a visiting professor at Catholic University in 1989 as well as a visiting professor at St. John's University in 1983.

He received his A.B. from St. Peter's College, his J.D. from Catholic University and his LL.M. from New York University. He has published extensively in the area of criminal law and procedure and is the author of *Jurisprudence Today* (1974).

Professor Wefing came to Seton Hall in 1968 and in 1988 he received the Bishop Bernard J. McQuaid Medal for outstanding service to the school.

The Honorable Richard A. Zimmer
Chairman, Commission on the Implementation of the Death Penalty

Mr. Zimmer is a former member of the United States Congress from New Jersey's 12th District, where he sat on the Ways and Means Committee, Government Operations Committee and Science, Space and Technology Committee. He has also served in state government where he was a member of the New Jersey State Assembly from 1982 to 1987 and the New Jersey State Senate from 1987 to 1991. In 1996, Mr. Zimmer was the Republican Nominee for the United States Senate from New

Jersey.

Currently, Mr. Zimmer is a member of the Corporate and Securities, Health Care Law and Government Affairs Groups at the law firm of Dechert, Price & Rhoads in Princeton. From 1975 to 1991 he was a General Attorney at Johnson & Johnson where he also served as an active member of the board of directors and de facto general counsel for a number of Johnson & Johnson subsidiaries.

Mr. Zimmer served as Co-chair for Governor Christine Todd Whitman's Gubernatorial campaign in 1993 and was counsel to former Governor Thomas H. Kean's campaign committees in 1981 and 1985. He is a former Chairman of New Jersey Common Cause and the present Chairman of Citizens for a Better New Jersey.

Mr. Zimmer was graduated from Yale University in 1966 with high honors in political science. He received his LL.B. from Yale Law School in 1969.

In 1997, he was appointed by Governor Whitman to chair the Governor's Study Commission on the Implementation of the Death Penalty. The Commission issued its final report on August 6, 1998, the sixteenth anniversary of the enactment of New Jersey's current death penalty statute.

Boris Moczula, Esq.
First Assistant Prosecutor, Passaic County

Mr. Moczula became First Assistant Prosecutor of Passaic County in 1995 after serving for fourteen years in the New Jersey Department of Law and Public Safety. As a Deputy Attorney General in the Division of Criminal Justice, he supervised capital appeals and coordinated prosecutorial efforts with respect to death penalty litigation statewide.

Mr. Moczula has argued a number of capital appeals before the New Jersey Supreme Court, including the appeal of Monmouth County "thrill killer" Richard Biegenwald (interpreting New Jersey's current death penalty law), Monmouth County defendant Marko Bey (involving the issue of the applicability of the death penalty to juveniles), and Ocean County defendant Robert Marshall (defining proportionality review of

death sentences). In addition, Mr. Moczula represented the County Prosecutors' Association before the New Jersey Supreme Court in *State v. Muhammad* (1996) in support of the admission of victim impact evidence in death penalty cases.

Mr. Moczula is the author of *'Submitted to the People': The Authority of the Electorate to Shape State Constitutional Rights,* Volume 7 *Seton Hall Const. Law J.* No. 3 (Summer 1997), which discusses state constitutional amendments in a capital context. He received his B.A. from Rutgers College in 1978 and J.D. from Seton Hall University School of Law in 1981.

In 1997, Mr. Moczula was appointed by Governor Whitman to serve as a member of the Governor's Study Commission on the Implementation of the Death Penalty.

Cathy L. Waldor, Esq.
Waldor & Carlesimo, Esqs.

Former President of the Association of Criminal Defense Lawyers of New Jersey, Ms. Waldor has been a criminal lawyer for twenty-two years. She has tried over two hundred cases including capital murders, sex offenses, racketeering, extortion, bribery, bank frauds, complex conspiracies, IRS violations, official misconduct, environmental pollution and drug offenses. She has been appointed to handle post-conviction relief and has tried three capital cases to completion in the State of New Jersey.

Ms. Waldor has served on various committees including the Merit Selection Committee of the Federal Public Defender for the District of New Jersey, Supreme Court of New Jersey District Ethics Committee, Board of Directors for the Women's Fund of New Jersey, Supreme Court Advisory Committee on Professional Ethics and Supreme Court Model Criminal Charge Committee. From 1989 to 1995 she chaired the Governor's Commission on Sex Discrimination in the Statutes. In addition, Ms. Waldor serves as a Pro Bono attorney for Hyacinth Aids Foundation.

Ms. Waldor is a member of several professional organizations, including the Federal Bar Association, the New Jersey State Bar Association, the Essex County Bar Association and the National Association of Criminal Defense Lawyers.

Ms. Waldor began her career as a public defender in Essex

County. She received her B.A. from the University of Maryland in 1974 and J.D. from Seton Hall University School of Law in 1977.

Alan L. Zegas, Esq.
President, Association of Criminal Defense Lawyers of New Jersey

A former adjunct faculty member of Rutgers Law School, Mr. Zegas has been in private practice since 1984, specializing in state and federal criminal litigation and appeals.

An accomplished criminal defense attorney, Mr. Zegas has handled many high profile cases including *State v. Martini*, a precedent-setting case where a death row inmate attempted to waive his right to post-conviction remedies, *State v. Grober*, in which he represented a defendant in "The Glen Ridge Case," and *State v. Landano*, where he served as co-counsel on the retrial of a defendant who wrongly served thirteen years in jail for murder, and in which the prosecution was found to have withheld material evidence.

Mr. Zegas chairs the Criminal Law Section of the New Jersey State Bar Association and is a member of the New Jersey Supreme Court Committee on Criminal Practice. He has also been appointed by the New Jersey Attorney General to serve on the Committee to Implement Megan's Law. He has been President of the Association of Criminal Defense Lawyers of New Jersey since 1998.

Mr. Zegas received his B.S. from the University of Pennsylvania and his J.D. from Rutgers Law School, where he was graduated with Honors and was the Editor-in-Chief of the *Rutgers Law Review*. He also holds an M.B.A. from Harvard Graduate School of Business Administration.

Mr. Zegas began his career as a law clerk to the Honorable H. Lee Sarokin of the United States District Court for the District of New Jersey. In addition, he has practiced law with the firm of Robinson, Wayne, Levin, Riccio & Lasala in Newark.

Thomas J. Critchley, Jr., Esq.
Managing Assistant Prosecutor, Morris County

Mr. Critchley is currently serving in his seventeenth year as a prosecutor and has tried capital cases since the mid-1980's.

He has been an Assistant Prosecutor in Morris County since 1982 and presently serves as the Managing Assistant Prosecutor in that county. As Chief of the Homicide Unit, Mr. Critchley has dealt with many death penalty cases and appeals involving such issues as proportionality review and post-conviction remedies.

Mr. Critchley is a 1976 graduate of Lehigh University. He received his J.D. from Seton Hall University School of Law in 1979.

Dale Jones, Esq.
New Jersey Office of the Public Defender

Mr. Jones received his B.A. from Rutgers University-Newark in 1970 and J.D. from Rutgers Law School-Newark in 1973. He is currently serving in his twenty-sixth year as a public defender.

Mr. Jones spent thirteen years as a trial attorney in the Newark office of the Office of the Public Defender. During his last four years in that office he oversaw the homicide unit.

As an Assistant Public Defender, Mr. Jones is responsible for the oversight of the day-to-day operations of the 350 attorneys in the New Jersey Office of the Public Defender. Since 1984 he has been in charge of all capital litigation conducted by the Office.

Mr. Jones tried New Jersey's first death penalty case following reenactment of the death penalty statute in 1982. He was designated by the New Jersey Supreme Court as a Certified Criminal Trial Attorney that same year and has served for the past twelve years on the Court's Criminal Practice Committee. He has also served on several Supreme Court Standing Committees including the Criminal Model Charge Committee, the Media Relations Committee and the Evidence Committee as well as numerous *ad hoc* Committees.

In addition, Mr. Jones has taught capital trial techniques at national seminars and frequently serves as a trainer for the National Institute of Trial Advocacy. He is also a member of the

Editorial Board of *New Jersey Lawyer* and the subject of biographies in *Who's Who in American Law* and *Who's Who in the East.*

James O'Brien
Advocate for Crime Victims

Mr. O'Brien is a graduate of Fordham University and is a former Freeholder in Morris County. In 1996, Governor Christine Whitman appointed him as Chairman of the New Jersey Victims of Crime Compensation Board. Mr. O'Brien is and has been Chairman of the New Jersey Coalition of Crime Victims since its formation in 1987. In that capacity, in 1996, he led the drive for ensuring the rights of crime victims in New Jersey to include Article I, par. 22 of the New Jersey Constitution. He received the New Jersey Bar Foundation Medal of Honor in 1993.

In 1992, the National Office of Victim Assistance voted him the most outstanding victim advocate in the country. In 1991, Governor James Florio presented him with an award as the most outstanding victim advocate in New Jersey and stated that "the course of history of the criminal justice system in New Jersey is in the process of being changed because of him.

III. The Symposium:

A. *Remarks of John B. Wefing, Esq.*

The death penalty has been at issue in the world since its inception, since the world began millions of years ago. Until the mid-nineteenth century, the death penalty was a normal operating procedure, but in the mid-nineteenth century, movements began in many countries, including our own, to abolish the death penalty.[1] Many states in this country abolished the death penalty, but the vast number of states continued to have the death penalty. Throughout the world, the majority of countries have now abandoned the death penalty either officially, as almost all Western European countries have done, or de facto as a number of others have done. Today, about a hundred countries do not have the death penalty and about ninety do.

In this country, the issue has come up innumerable times. Not too long ago, I was reading through my dad's papers. Back in the 1920s, he was an editorial writer for the Hudson papers and, as I was reading one of his stories, I found an editorial discussing a bill that was in the legislature in the 1920s considering the death penalty. It has been argued and debated for many, many decades.

It also is interesting that 1972 was the year of *Furman v. Georgia*.[2] In that case the United States Supreme Court decided

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[1] *See generally University of Alaska Anchorage, Focus on the Death Penalty: History & Recent Developments* (visited Apr. 11, 1999) <http://www.uaa.alaska.edu/just/death/history.html#unitedstates> [hereinafter *Death Penalty History*]. Beginning with the execution of Daniel Frank by the Colony of Virginia in 1622, the first recorded execution in the area that is now the United States of America, the death penalty has always been part of this nation's criminal justice system. *See id.*

The statistics show that 60% of the executions occurred in the South, with Georgia's criminal justice system accounting for the most: 366 (9.48%). *See id.* While most of the executed criminals in the United States were convicted of murder, 455 of them met their fate following a rape, with 90% of that number being comprised of African-Americans, and 70 people convicted of other offenses. *See id.* The United States Army put 160 persons to death during those years, with 106 of them convicted for murder, 53 for rape, and 1 person for desertion. *See id.*

[2] *See* Furman v. Georgia, 408 U.S. 238 (1972). There were many challenges to the death penalty in the late 1960s, though 40 states continued to have a death penalty law as of the end of that period. *See id.* When the issue reached the United

that all currently existing statutes in this country were unconstitutional.[3] It was one of the most interesting decisions in the history of the Supreme Court. There were nine separate opinions. None of the justices could agree, so nine separate justices wrote their own opinion.[4] The only unanimity or agreement was that five justices felt that the existing statutes were unconstitutional and four thought they were constitutional.

Not surprisingly, Justice Brennan and Justice Marshall were the ones who indicated under no circumstances was the death penalty valid. The other three members of the majority indicated that their concern was with the methodology or the way the death penalty was being done. They were concerned that there was no rhyme or reason to whom was getting the death penalty.

So at the end of 1972, virtually all death penalty executions ceased immediately. It was interesting that the Supreme Court did this. This is because a number of factors came together at that point: a decline in support in this country for the death penalty; the emergence of the civil rights movement which began to recognize that perhaps there were racial factors involved in the death penalty process,[5] and ultimately, the United States Supreme Court's liberal approach at that time through the incorporation of the *Furman* doctrines and other decisions. The vast majority of states, thirty-five, almost immediately responded to the *Furman* decision by reenacting the death penalty decisions, thus indicating a fairly strong support in this country for the death penalty.[6]

States Supreme Court in *Furman*, all nine justices authored an opinion. *See id.*

[3] *See id* at 240.

[4] *See Furman*, 408 U.S. 238 (1972). While Justices Brennan and Marshall proclaimed capital punishment to be unconstitutional in all cases, the majority's Per Curiam opinion merely invalidated the federal and state death penalty statutes at issue because they "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 240.

[5] *See Death Penalty History, supra* note 1. The government began keeping statistics of these executions in 1930. *See id.* There were 3859 nonmilitary executions during the years 1930-1967. *See id.* Fifty-four percent of those put to death were African-American, 45 percent were white, 19 were Native Americans, 13 were Filipino, 8 were Chinese, and 2 were Japanese. *See id.* Only 32 of them were female. *See id.*

[6] *See Death Penalty History, supra* note 1. Following the Supreme Court's finding that the existing death penalty statutes were arbitrary, many states enacted new laws that would satisfy the Court's requirements. *See id.* Two types of laws emerged: those

By 1975, the issue was back before the United State Supreme Court in the famous case of *Gregg v. Georgia.*[7] This time, the United States Supreme Court decided that death penalty statutes could be appropriate in certain limited situations.[8] While they didn't say it absolutely, they pretty much indicated that only in murder cases would the death penalty be appropriate, because they struck it down in a rape case, although there is some question whether or not we might see that revised in the future. *Gregg v. Georgia* stood for the proposition that you could have a death penalty statute if it was very clear, protective, and if there were sufficient guidelines to assure that the person who was going to get the death penalty had actually committed the crime, and that the person's culpability was particularly serious by requiring aggravating circumstances, along with other factors.[9]

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that provided for guided discretion and those that called for mandatory execution where the defendant was found guilty for specific crimes. *See id.* The Court invalidated a mandatory death penalty law in Woodson v. North Carolina, 428 U.S. 280 (1976). The Court reasoned that the statute violated the Eighth and Fourteenth Amendments because, among other reasons, it imposed a mandatory death penalty without considering the individual's record. *See id.* at 303.

[7] 428 U.S. 153 (1976). While North Carolina's statute was invalidated, the Court upheld the death penalty statutes of three other states that had adopted models containing guided discretion. *See id.; see also* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). In *Gregg*, the Court ruled that the death penalty punishment for murder did not violate the Eighth and Fourteenth Amendments. 428 U.S. at 206-07.

[8] *See id.* at 222. The Court noted that the state's new sentencing procedures satisfied *Furman* because "[n]o longer can a jury wantonly and freakishly impose the death sentence." *Id.* The statute guided the jury's decision by requiring the finding of at least one aggravating factor, and also called for a bifurcated trial whereby the first determined the defendant's guilt and the second considered the death penalty. *See id.* at 195. Moreover, Georgia's Supreme Court also considered the crime's circumstances to insure that the penalty is not disproportionate to the punishment of other defendants in similar situations. *See id.* at 198.

[9] 428 U.S. at 222. The Court continued to refine their death penalty jurisprudence in the years following the 1976 cases. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty for the rape of an adult woman was unconstitutional because the punishment was disproportionate compared to other crimes); Lockett v. Ohio, 438 U.S. 586 (1978) (holding that discretion to consider all mitigating factors is necessary and not just a set list); Adams v. Texas, 448 U.S. 38 (1980) (finding that prosecutors cannot exclude possible jurors who may be "affected" by the possibility of a death sentence); Ford v. Wainright, 477 U.S. 399 (1986) (holding that it was unconstitutional to put an insane person to death); Godfrey v. Georgia, 446 U.S. 420 (1980); Beck v. Alabama, 447 U.S. 625 (1980); Hopper v. Texas, 456 U.S. 605 (1982); Edmund v. Florida, 458 U.S. 782 (1982); Pulley v. Harris, 465 U.S. 37 (1984); McCleskey v. Kemp, 481 U.S. 279 (1987)

Interestingly, New Jersey was not one of those thirty-five states that immediately reenacted death penalty legislation. That was primarily because of Governor Byrne's repeated vetoing of legislation, and the legislature was never able to override the governor's veto. It was not until 1982, when Governor Kean came in, that we had our first death penalty, and we approved death penalty legislation very much based on the legislation that had already been approved from Georgia by the United States Supreme Court.[10]

My students always ask me why haven't we had an execution in New Jersey, and one answer, of course was that we didn't have a bill until 1982.[11] Then, of course, most of our judges and lawyers

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(discarding the assertion that the administration of Georgia's death penalty statute was racially biased, notwithstanding statistics showing that African-American defendants convicted of murdering white people had a greater possibility of receiving the death penalty than other defendants); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that youths under the age of 16 at the time of the crime's commission cannot be executed); Peney v. Lynaugh, 492 U.S. 302 (1989) (holding that it is constitutional to execute a mentally retarded defendant).

[10] Governor Tom Kean signed the death penalty statute into law in 1982. *See* N.J. STAT. ANN. § 2C:11-3 (West 1999).

[11] *See id.* Death was the mandatory penalty for those convicted of first degree murder from 1709-1877. *See* State v. Ramseur, 106 N.J. 123, 169, 524 A.2d 188, 210 (1987) (citing L. 1898, c. 235, sec. 108; L. 1796, c. DC, sec. 3; N.J. Revisions 1709-1877, Crimes, sec. 68 at 239). The harsh application of the death penalty was alleviated in 1893 with the adoption of the non vult plea, allowing a defendant that accepted responsibility for his actions and plead guilty to be spared his life, and receive a term of life imprisonment. *See* John J. Farmer, Jr., *The Evolution of Death-Eligibility in New Jersey*, 26 SETON HALL L. REV. 1548, 1552 (1996). The mandatory death penalty was eliminated in 1916 by legislation that permitted the jury to deliver a sentence lesser than death. *See id.* (citing Pamph. L. 1916, c.270). However, on January 17, 1972, the New Jersey Supreme Court found the death penalty to be unconstitutional. *See* State v. Funicello, 60 N.J. 60, 67, 286 A.2d 55, 59 (1972) (following the Supreme Court decision in United States v. Jackson, 390 U.S. 570, 591 (1968) which found that the federal kidnapping statute was a violation of the Sixth Amendment right to a jury trial because it encouraged one to enter a guilty plea because the sentence would be no greater than life imprisonment). Although the Supreme Court later reversed *Jackson*, New Jersey maintained that all future indictments for murder would proceed upon a jury determination of guilt that a penalty shall be life imprisonment. *See Funicello*, 60 N.J. at 68, 286 A.2d at 59. However, the death penalty was re-enacted and codified in 1982. *See* N.J. STAT. ANN. § 2C:11-3. Despite its re-enactment, no one has been executed since 1963 following the electrocution of Ralph Hudson for killing his estranged wife. *See* Thomas Martello, *Court Will Rule On Martini Case Without Hearing*, THE RECORD (Northern NJ), Oct. 7, 1998, at A22. Since the death penalty was re-enacted in 1982, 47 murderers have been sentenced to death; however, only 14 remain on death row.

had never had capital punishment cases. There were some concerns that the New Jersey Supreme Court, which tended towards a more liberal approach, might in fact strike down the death penalty under New Jersey's version of the cruel and unusual punishment clause. That did not happen, of course, and the New Jersey Supreme Court approved the death penalty legislation, finding it to be constitutional under both the New Jersey Constitution and the United States Constitution.[12]

Later, in a famous case called *State v. Gerald,* they did limit the scope of the death penalty by providing that you couldn't give the death penalty in a case in which someone had only intended to seriously injure and did not intend to kill, but did in fact kill.[13]

See James Ahern, *Contemplating Capital Crimes: N.J. Juries Don't Seem To Be Racist When Deciding If A Criminal Deserves Death,* THE HOME NEWS TRIBUNE, Feb. 7, 1999, at A-15.

[12] *See* State v. Ramseur, 106 N.J. 123, 196, 524 A.2d 188, 224 (1987). Specifically, the court concluded:

> under state and federal Constitutions that New Jersey's death penalty act sufficiently guides juries' discretion so as to achieve a capital punishment system that narrows the class, and that it defines and selects those who will be subject to the sentencing proceeding and ultimately to the death penalty with consistency and reliability. The attack on its constitutionality in this respect must fail.

Id.

Ramseur was decided on the same day as the companion case, State v. Biegenwald, in which both defendants were convicted of murder and sentenced to death. 106 N.J. at 154, 524 A.2d at 202 (citing *Biegenwald,* 106 N.J. 13, 524 A.2d 130 (1987)). Each defendant appealed the constitutionality of the death penalty. *See id.* at 154, 524 A.2d at 202. Thomas Ramseur was convicted of killing his neighbor and former girlfriend, Asaline Stokes. *See id.* at 160, 524 A.2d at 205. Ramseur had made death threats prior to the night of the fatal stabbing. *See id.* Despite the court's opinion upholding the constitutionality of the death penalty, both Ramseur and Biegenwald obtained reversals of their sentences. *See id.* at 154, 524 A.2d at 202. Specifically, in the case of *Ramseur,* the court found that the jury instructions "impermissibly coerced the jury to reach a unanimous verdict by incorrectly suggesting different kinds of adverse consequences that would be caused by a hung jury, including the suggestion that the jury would not be performing its civic duty properly unless it reach unanimity. . . ." *Id.* at 300, 524 A.2d at 277. Further, the "instructions relieved the jury of full responsibility for the death decision and instead allowed it to regard its function as mechanical, simply determining, calculating, and weighing factors regardless of outcome." *Id.*

[13] 113 N.J. 40, 90, 549 A.2d 792, 817 (1988) *overruled by* State v. Loftin, 146 N.J. 295, 348, 680 A.2d 677, 703 (1996). The court stated that

> it is thus apparent that the actor's intention to cause the victim's death was a significant factor in determining whether a murderer could be executed. When the

The New Jersey Supreme Court said you cannot get the death penalty in that instance.[14]

The people in New Jersey through constitutional amendment, one of the few constitutional amendments that directly overturned a New Jersey Supreme Court case, amended the Constitution of New Jersey to permit the death penalty in that situation.[15] However, the New Jersey Supreme Court did in fact continue to be very careful in its application, and in many cases, the New Jersey Supreme Court, while not finding the death penalty inappropriate, found that that case did not meet the strictures and procedures that the Supreme Court wanted.

It wasn't until more recently that the New Jersey Supreme Court in the Marshall case determined that in that case at least, all the procedures had been met.[16] Subsequently, in that case, also, they went through the proportionality review and Mr. Marshall still sits on death row.

> defendant possessed only the intent to do serious bodily harm, however, he or she could be convicted only of second-degree murder and was subject only to a term of imprisonment.

Id.

Walter Gerald was convicted of "conspiracy to commit burglary...; burglary...; conspiracy to commit robbery...; robbery...; aggravated assault...; felony murder...; and purposeful or knowing murder." *Id.* at 61, 549 A.2d at 803. Gerald had broken into the home of John and Paul Matusz, both of whom were disabled and required living assistance from John's daughters. *See* 106 N.J. at 48, 549 A.2d at 796. Lottie Wilson, John's daughter, was beaten by one of the three intruders, Paul was beaten and had a television thrown on his head, and John was severely beaten as well. *See id.* at 49, 549 A.2d at 797. Paul died from blunt force injuries sustained to the head. *See id.* The sentence of death was reversed because the court was unable to determine if Gerald was convicted of purposefully or knowingly causing death as opposed to knowingly causing seriously bodily injury resulting in death. *Id.* at 91, 549 A.2d at 819. This distinction between knowing and purposeful murder as opposed to knowingly causing serious bodily injury for purposes of the death penalty was eliminated by an amendment to New Jersey Constitution stating in pertinent part: "It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of... knowingly causing serious bodily injury resulting in death...." N.J. CONST. art. I, ¶ 12 (1947) (codified as N.J. STAT. ANN. § 2C:11-3(i) (West 1999)).

[14] *See id.*

[15] *See id.*

[16] *See* State v. Marshall, 148 N.J. 89, 286, 690 A.2d 1, 100 (1997). Robert Marshall was convicted of murder and conspiracy to murder of his wife, Maria Marshall. *See id.* at 136, 690 A.2d at 23. The court upheld the lower court's denial of Marshall's petition for post-conviction relief. *See id.*

Because of such results, many people in the state began to feel that we had not fulfilled the desires of the legislature. As a result, they created the commission that we are here to talk about today and they appointed Congressman Zimmer as the chief of that commission.[17] It is now my pleasure to introduce the distinguished congressman, legislator, lawyer, Congressman Richard Zimmer.

B. *Remarks of The Honorable Richard A. Zimmer*

Thank you very much, Professor. It's a real honor to be here. As you may have gathered from my brief biography, I am not a criminal lawyer. I don't purport to be one. There are on this panel some very outstanding criminal attorneys who are the leading experts in the State of New Jersey on the issue of the death penalty.

I come to this issue not as an attorney, but essentially as a layperson in the area of capital punishment. I first got involved in the issue back in 1982 when I was a rookie State Assemblyman. I had been elected in November of 1981 along with my friend Tom Kean, who became Governor that year.

Governor Kean supported the death penalty during the 1981 campaign. The legislature, which had always been pro-death penalty, passed the legislation in the first year of his term, which was the first year of my term.[18] It was sponsored by a Democrat, Senator John Russo of Ocean County, whose father was the victim of a murder. John said that that was a separate part of his life, and he drafted the legislation with considerable care and with a lot of protections for the accused murderer.

I had a hard time deciding how to vote on the issue. It was by far the most difficult issue that I had confronted in my political career and one of the most difficult issues that I had to confront in fifteen years in elected office. Because I am a conservative and because I don't trust government to do much of anything very competently, I was reluctant to give government the power to take

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[17] *See id.* Although Marshall's conviction and sentence has been upheld, he has not been executed. *See id.*; *see also* Martello, *supra* note 11 (stating that no one has been executed in New Jersey since 1963).

[18] *See* N.J. STAT. ANN. § 2C:11-3.

a human life.

I thought long and hard about this. I discussed it with my wife, who was opposed to the death penalty, and continues to be opposed to the death penalty, but allows me to live with her anyway. In the end I decided to vote for the reinstatement of the death penalty because I believed that it was probably a deterrent, although the data then, as it is now, is really equivocal on the issue of deterrence.

But, whether or not the death penalty was a deterrent, I thought that in the most heinous sorts of murders, it was an appropriate punishment. If you believe that justice involves punishment, as virtually our entire criminal justice process does, then as the crime becomes more serious and more aggravated, the punishment should be more and more severe.

The way that we define the eligibility for the death penalty is by specifying aggravating factors and mitigating factors, requiring, of course, that a jury reach a unanimous verdict beyond a reasonable doubt as to guilt.[19] Then, in a second phase of the

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[19] *See* N.J. STAT. ANN. § 2C:11-3(c)(1) which states that "[t]he court shall conduct a separate sentencing to determine whether the defendant should be sentenced to death...." N.J. STAT. ANN. § 2C:11-3(c)(4) provides the following aggravating factors which a jury or court may find:

> (a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;
>
> (b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;
>
> (c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;
>
> (d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;
>
> (e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping
detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping;

(h) The defendant murdered a public servant, as defined in N.J.
STAT. ANN. § 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant (i) as a leader of a narcotics trafficking network as defined in N.J. STAT. ANN. § 2C:35-3 and in furtherance of a conspiracy enumerated in N.J. STAT. ANN. § 2C:35-3, committed, commanded by threat or promise solicited the commission of the offense or (ii) committed the offense at the direction of a leader of a narcotics trafficking network as defined in N.J. STAT. ANN. § 2C:35-3 in furtherance of a conspiracy enumerated in N.J. STAT. ANN. § 2C:35-3;

(j) The homicidal act that the defendant committed or procured
was in violation of paragraph (1) of subsection a. of N.J. STAT. ANN. § 2C:17-2; or

(k) The victim was less than 14 years old.

N.J. STAT. ANN. § 2C:11-3(c)(4).

The mitigating factors, laid out in N.J. STAT. ANN. § 2C:11-3(c)(5) are:

(a) The defendant was under the influence of extreme mental
or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the
conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of
his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress

trial, reaching a unanimous verdict beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that this is indeed the kind of crime that is appropriately punishable by death.[20]

In the end, even though it involves the taking of a human life, which is about the most serious and consequential thing that a government can do, I voted for that. At this point, there are currently fourteen men on death row in New Jersey.[21] I'd say that every one of them is guilty of the sort of crime that I had in mind, and I think my colleagues had in mind, when we voted for that death penalty legislation back in 1982. But I do not believe that any of us thought at the time that, in the waning days of the Millennium, no one would have yet been executed.

As Professor Wefing pointed out, the first twenty-eight death penalty cases to come before our State Supreme Court had the penalty reversed. There were some of us who were getting the impression that we were never going to see any specific death

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insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

N.J. STAT. ANN. § 2C:11-3(c)(5).

[20] *See* N.J. STAT. ANN. § 2C:11-3(a).

[21] *See* Thomas Zolper, *Justices Uphold Death Penalty, Not Convinced of Racial Bias in New Jersey*, THE RECORD (Northern N.J.), Feb. 2, 1999, at 1. The fourteen men on death row are: Marko Bey, who has spent fifteen years on death row for the murder of two women; Robert Marshall, convicted of contracting to kill his wife, Maria; Nathaniel Harvey, convicted of a 1985 murder; Anthony DiFrisco, convicted of a contract murder of a Maplewood pizzeria owner; John Martini, who was convicted of murdering Irving Flax; Donald Loftin, who murdered a Trenton gas station attendant; David Cooper, who kidnapped, raped, and strangled a six-year-old girl; John Chew, convicted of killing his live-in girlfriend; Ambrose Harris, for the murder of Kristin Huggins; Richard Feaster, who shot and killed a gas station attendant; Robert Morton, also convicted of a killing during a gas station robbery; Robert Simon, who murdered a Franklin Township police officer; Jesse Timmendequas, who raped and strangled Megan Kanka; and Peter Papasavvas, who sexually assaulted and killed a six-year-old girl. *See id.*

penalty upheld. I think it was St. Augustine who was supposed to have said that good Christians must believe in Hell, but they don't have to believe anyone goes there.

It looked as though the Supreme Court, although upholding the principle of the death penalty in the abstract, was going to make sure that nobody was actually executed. But finally in 1991, nine years after we voted to reenact the death penalty, in the case of Robert Marshall, the Supreme Court actually did uphold a specific death penalty for a specific defendant.[22] This was a notorious case. There was a book and a miniseries written about Robert Marshall and how he had his wife executed by a paid hit man at a rest stop on the Garden State Parkway.

Robert Marshall was indicted in early 1985. He is the only person on death row who has exhausted his state appeals. That happened two years ago. As you know, after you exhaust your state appeals, the federal habeas corpus process beings.[23] Well, two years have gone by and Robert Marshall has yet to see the inside of a federal courtroom for his first hearing on habeas corpus. That, to my mind, is too long.

I believe that the death penalty is something that's very consequential and that every effort should be made to assure the Constitutional due process rights of the defendant and that extra care be taken because a human life is in the balance. But, to my mind, fourteen years, or however long it would take to finally exhaust the process with Robert Marshall, is far, far more than enough time to determine whether he was actually guilty and whether the imposition of death was appropriate. That is one of the reasons why the vast majority of the public, Governor Whitman included, thought we have a problem with the implementation of the death penalty.

There are fourteen people on death row, two others died of natural causes, and it looks like it's years away from Robert Marshall's execution.[24] Conceivably, the first man executed may

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[22] *See* State v. Marshall, 123 N.J. 1, 27, 586 A.2d 85, 97 (1991), *cert. denied*, Marshall v. New Jersey, 507 U.S. 929 (1993), *affirmed*, State v. Marshall, 148 N.J. 89, 286, 690 A.2d 100 (1997).

[23] *See* 28 U.S.C.A. § 2254 (West 1999).

[24] *See* Zolper, *supra* note 21.

be Martini, who murdered Irving Flax more than ten years ago.[25] He also committed murders in two other states.

We heard testimony from Irving Flax's widow, Marilyn Flax, who personally delivered a ransom to Martini in exchange for her husband's release.[26] Martini evaded the FBI and the state police and executed Irving Flax because he didn't want him to be able to testify against him. John Martini went through years of the appeals process, including the direct appeal to the State Supreme Court and proportionality review, before finally deciding that he would admit his guilt, he would accept his punishment and accept execution. That was years ago.

The Public Defender's Office and the State Supreme Court said, "Not so fast." The Public Defender's Office said you can't believe what this guy tells you; he's a convicted murderer. So here we have New Jersey as perhaps the only state in the country where someone has been found guilty, has been sentenced to the death penalty, has gone through his direct appeal and his proportionality review and wants to accept his punishment, but is not being allowed to. So John Martini may be the first person to be executed, if indeed the Supreme Court finally gives him his wish.

It was this circumstance that prompted me to think that something ought to be done about this problem. What crystallized my views was what transpired when I was sitting in the Mercer County Courthouse with Rich and Maureen Kanka while

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[25] *See* State v. Martini, 131 N.J. 176, 619 A.2d 1208 (1993), *post conviction relief denied,* State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994), *cert. denied,* Martini v. New Jersey, 516 U.S. 875 (1995), *dismissal of post conviction relief reversed,* State v. Martini, 144 N.J. 603, 677 A.2d 1106 (1996), *cert. denied,* Martini v. New Jersey, 519 U.S. 699 (1997). Approximately ten years ago, Marilyn Flax received a phone call from John Martini, the kidnapper of her husband, Irving, demanding ransom money. *See* Kathy Barrett Carter, *Widow's Pain Leaves Mark On Commission: She Asks Why Her Spouse's Killer is Still Alive,* THE STAR LEDGER (Newark, N.J.), Feb. 12, 1998, at 25. She delivered their life savings, $25,000, to Martini at a drop-off point. *See id.* Martini managed to elude FBI agents who were trailing him, then he shot Mr. Flax in the head three times and left his body five minutes from the Flax's home in Fair Lawn. *See id.* Mrs. Flax personally engaged in negotiations for her husband's life via telephone with Martini, who had provided assurances that after the ransom drop off, her husband would be released immediately. *See Excerpts From Conversation In Flax Murder Case,* THE RECORD (Northern N.J.), Sept. 13, 1990, at A9.

[26] *See* Barrett Carter, *supra* note 25. Marilyn Flax wants Martini to be "the first person executed in New Jersey. He deserves it. He wants it. It should be done." *Id.*

the jury was out during the penalty phase of the murderer of Megan Kanka, Jesse Timmendequas.[27] I had sponsored the federal Megan's Law and had become good friends with Rich and Maureen Kanka.[28]

As we sat there, we talked to Kathy Flicker, who had prosecuted the case in Mercer County and who is the expert in Mercer County on capital cases. We had a lot of time there while the jury was out. Kathy explained to me the various advantages, unreasonable she saw them, that the defense in a capital case had, the enormous expense and difficulty of prosecuting a capital case in the State of New Jersey, and the gauntlet the prosecution has to go through on appeal.

I started to do my own research on the issue in my capacity as chairman of Citizens For a Better New Jersey, and in that connection I got in touch with the Attorney General's Office and others in the executive branch to discuss some proposed reforms. That contact led Christie Whitman to decide that she would appoint a commission to study these issues, which she did on the fifteenth anniversary of the re-implementation of the death penalty, August 6, 1997.[29]

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[27] *See* Tom Hester, *Timmendequas to Get Life Term for Raping and Abducting Megan,* THE STAR LEDGER (Newark, N.J.), July 29, 1997, at 18 [hereinafter *Life Term*]; *see also* Tom Hester, *Execution Debate Set For June 9 - Jurors Glare At Megan's Killer Before Eight Convictions Are Read,* THE STAR LEDGER (Newark, N.J.), May 31, 1997, at 1. Jesse Timmendequas was convicted of raping and killing seven-year-old Megan Kanka. *See id.* Timmendequas, a convicted sex offender, lured Megan to his home across the street from her house, by promising to show her a puppy. *See id.* The Kanka's were unaware that a convicted sex offender, Timmendequas, was their neighbor. *See id.* He was sentenced to death on June 20, 1997. *See Life Term, supra.*

[28] *See* 42 U.S.C.A. §§ 14071-14073 (West 1999).

[29] *See* Whitman Exec. Order No. 72 (Aug. 6, 1997), *reprinted in* N.J. STAT. ANN. § 2C:49-12. The order established the Study Commission on the Implementation of the Death Penalty to study the current death penalty process. *See id.* N.J. STAT. ANN. § 2C:49-12 states that:

> The Judiciary, Law, Public Safety and Defense Committee of the General Assembly and the Judiciary Committee of the Senate ... are constituted a joint committee for the purposes of monitoring and evaluating the effectiveness of the implementation of this act ... [t]he Commissioner of the Department of Corrections shall ... report to the joint committee, an evaluation of the effectiveness of this act and the joint committee shall, upon receiving the report, issues as it may deemed necessary and proper, recommendations for administrative or legislative changes

The commission included representation by families of victims, former judges, proponents and opponents of the death penalty, prosecutors, and a range of experts, including representatives of law enforcement. We had several hearings throughout the state. Anyone who wanted to attend could attend and have their testimony heard. Although it was not our charge to reevaluate the wisdom of the death penalty, we heard from a number of witnesses who argued that the death penalty was wrong in principle.

We were not mandated simply to speed up the death penalty process, although that was one element of our charge. We were also mandated by the governor's executive order creating the commission to see whether the death penalty could be applied in a more fair and reliable way.[30]

At our hearings, the greatest impression was made on me by the testimony of family member of murder victims. We heard Marilyn Flax, who is a very angry woman because John Martini, who is guilty of the cold-blooded murder of her husband, as well as other people, has not be executed even though he is willing to be executed. We heard from Maria Eck, an immigrant to this country whose husband was working hard as a gas station attendant and was murdered in the process of a hold-up. His murderer is going through the lengthy process of appeals and re-hearings.

A member of our commission was Richard Kanka, the father of Megan Kanka. Megan was brutally raped and murdered by a man who lived across the street from her, who was convicted in 1997 and was sentenced to death.[31] At that time, a representative of the Public Defender's Office said that appeals would probably take fourteen years or so altogether, which is twice as long as Megan lived. That is wrong and obscene.

The commission, after hearing from these witnesses and hearing from a broad range of experts with tremendous help from the Attorney General's staff in terms of technical support and orientation, concluded that indeed, justice delayed is justice

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affecting the [capital punishment] act.

Id.

[30] *See id.*

[31] *See* Hester, *supra* note 27.

denied. When the death penalty takes so long to effectuate, its deterrent capability is undermined. It is a disservice to the victims of these crimes whose agony is prolonged as the defendant goes through appeal after appeal and rehearing and retrial. In the end, if you have a death penalty on the books that is not implemented, it discredits the entire criminal justice system.

The public consensus is in favor of the death penalty. There has never even been a bill introduced in the legislature in the past several years to repeal it, but because of the delays in its implementation, we have not had any executions. We concluded that there were some instances where defendants merit the death penalty but were avoiding that penalty because of unjustified procedural restrictions. We were all mindful of the due process obligations owed to any defendant and the obligation to exercise special care when a human life is at stake, but our recommendations certainly give recognition to these obligations and still accomplish the objectives given to the commission.

Cathy Waldor, who represented the Public Advocate's Office, expressed herself in opposition to our recommendations, as did one of the other members, but we overwhelmingly voted in favor of our report.[32] One of our members is the Attorney General, and he voted for it. It was also endorsed by all twenty-one county prosecutors.

I would say that our three most important recommendations are: the elimination of proportionality review,[33] an amendment allowing a mentally-competent defendant to waive further appeals after his first direct appeal,[34] and allowing prosecutors to retry a

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[32] *See* Michael Booth, *Death Penalty Panel Urges Limits on Trial and Appellate Procedures,* 153 N.J.L.J. 241, July 20, 1998, at 5.

[33] *See* A.R. 132, 208th Leg., 1st Sess. (N.J. 1998). The proportionality review process provides that a death sentence will be reversed, vacated, or modified if the sentence is disproportionate to the sentence imposed upon another defendant in another case. *See id.*

[34] *See* S.R. 19, 208th Leg., 1st Sess. (N.J. 1998). In State v. Martini, 144 N.J. 603, 677A.2d 1106 (1996), the New Jersey Supreme Court held that a mentally competent defendant in a death penalty case may not voluntarily waive post-conviction relief procedures. *See id.* at 617, 677 A.2d at 1113. This proposed constitutional amendment would eradicate the requirement that post-conviction relief proceedings and proportionality review be conducted when a mentally competent defendant knowingly and willingly chooses not to pursue these procedures. *See* S.R. 19, 208th Leg., 1st Sess. (N.J. 1998).

case if the jury is hung on the penalty phase.[35] Let me go through those three in detail.

Professor Wefing has described to you briefly the issue of proportionality. No state has the elaborate proportionality review process that New Jersey does. Our state statute mandates a proportionality review.[36] At the time the statute was enacted, it was assumed by many states that the United States Supreme Court was going to explicitly require proportionality review and that maybe the amalgamation of those five separate opinions forming the majority in the *Furman* case already required proportionality review.[37]

So it was put in the state statute, where it still resides. Proportionality review means that if you can convince our State Supreme Court that your punishment is disproportionate to the punishment of similar defendants who committed similar crimes, then you can avoid the death penalty.[38] The process is, first of all, time-consuming. On the average, it takes one-and-one-half years.

The most recent proportionality review decision was the *Loftin* case, which went into the issue of purported racial bias in the imposition of the death penalty.[39] The *Loftin* case took two

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[35] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998). This bill would provide the prosecution with the choice of conducting a subsequent sentencing hearing or accepting the sentence of imprisonment if the jury is unable to reach a unanimous verdict. *See id.* If the jury is unable to reach a unanimous verdict after a reasonable time, the prosecution would have the option to dismiss the jury and impanel a new jury for the purpose of sentencing. *See id.*

[36] *See* N.J. STAT. ANN. § 2C:11-3(e) which states:

> Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section.

Id.

[37] *See* State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992), *cert. denied*, 507 U.S. 929 (1993) (ruling that defendant's death sentence is not disproportionate); *see also* State v. Bey, 137 N.J. 334, 645 A.2d 685 (1994), *cert. denied*, 513 U.S. 1164 (1995); State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994), *cert. denied*, 516 U.S. 875 (1995); State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995), *cert. denied*, 516 U.S. 1129 (1996), State v. Loftin, 157 N.J. 253, 724 A.2d 129 (1999).

[38] *See* N.J. STAT. ANN. § 2C:11-3e.

[39] *See* State v. Loftin, 157 N.J. 129, 724 A.2d 129 (1999) (wherein defendant

years from the time of oral argument before the Supreme Court to the time that the decision was rendered. Although the Supreme Court ruled that the imposition of the death penalty was not disproportionate in the case of *Loftin,* and there was no racial discrimination proven, it decided that it would appoint a third special master to go back and try to make sense of all the data collected over the years. They were essentially saying that they couldn't make sense of all this data.

New Jersey's proportionality review has generated a huge morass of statistical information, much of which is highly subjective, and which is in the end, I believe, virtually useless. Those states which maintain proportionality review do it in a much less drawn-out, convoluted, and confusing way.

In New Jersey, even if we abolished proportionality review, there would, of course, still be grounds for any criminal defendant, including any convicted murderer, to claim that his conviction was the result of unconstitutional bias or done in an unconstitutionally arbitrary way. It would be his right under the State and Federal Constitutions to have his conviction overturned, let alone his death sentence under those circumstances. We would be shaving on the average one-and-one-half years off an interminable process, and we would be eliminating only one out of the three guaranteed opportunities that a convicted murderer has to appeal his sentence to the State Supreme Court. This is in addition to the appeals that are heard by the United States Supreme Court.

The Martini amendment is very straightforward.[40] It basically

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requested proportionality review of his death sentence per N.J. STAT. ANN. § 2C:11-3e). The court held that the death penalty imposed was not disproportionate and that defendant failed to demonstrate racial disparity in the imposition of his death penalty. *See id.*

Donald Loftin shot and killed Gary Marsh, a gas station attendant, during a robbery at Marsh's gas station. *See id.* at 317, 724 A.2d at 160. The police arrested him when he tried to purchase a computer with Marsh's credit card at Sears four days later. *See id.* Loftin was convicted and sentenced to death and the decision was later affirmed in State v. Loftin, 146 N.J. 295, 680 A.2d 677 (1996).

[40] *See* A.R. 131, 208th Leg., 1st Sess. (N.J. 1998) This proposed amendment would modify Article VI, Section V, paragraph 1 to read as follows:

> (c) In capital cases, provided however, that a defendant who has been convicted of murder and sentenced to death and whose death sentence has been affirmed by the Supreme Court shall have the right to waive any further

says that a competent defendant can waive further appeals after the first appeal, which is called direct appeal.[41] That is very sensible.

I want to get into the hung jury issue in a little more detail. As I said, you need a unanimous jury to rule beyond a reasonable doubt, that the murderer is in fact guilty of a capital crime.[42] Then in a second proceeding, it has to unanimously agree beyond a reasonable doubt that the murderer ought to be executed.[43] In every other criminal case, if you have a hung jury, that is if you don't have a unanimous jury decision, the prosecution has the option, not the requirement but the option, to retry the case. All we are suggesting is that in the penalty phase of a murder case, that the prosecution have the same option.

Some prosecutors may not want to use that option after they have seen that one jury was hung. But take the case, for instance, of a murderer named Biegenwald. He was convicted by a unanimous jury beyond a reasonable doubt and sentenced to death by a unanimous jury beyond a reasonable doubt.[44] That decision and penalty were reversed by the State Supreme Court on procedural grounds.[45] He went back to trial, was convicted and sentenced to death again, appealed again, and went back for a third time.[46] This time he was again convicted unanimously of a capital crime and just one recalcitrant juror held out against the

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> judicial proceedings on the defendant's behalf, including post-conviction relief, and such waiver, if made knowingly and voluntarily by a mentally competent defendant, shall have the effect of terminating any further judicial proceedings.

Id.

[41] *See* S.R. 85, 208th Leg., 1st Sess. (N.J. 1998). After a criminal conviction has been upheld on direct appeal, subsequent challenges are called post conviction motions or proceedings. *See id.* These motions seek reversal of the conviction on grounds such as ineffective counsel or new evidence. *See id.* The Martini Amendment would have the effect of allowing a mentally competent defendant to waive all proceedings subsequent to the direct appeal. *See id.*

[42] *See* N.J. STAT. ANN. § 2C:11-3(f). Current law mandates that if a jury fails to reach a unanimous verdict for sentencing, defendant's sentence will be imposed by the court pursuant to section b. of this provision. *See id.*

[43] *See id.*

[44] *See* State v. Biegenwald, 106 N.J. 13, 25, 524 A.2d 130, 136 (1987).

[45] *See id.*

[46] *See id.*

death penalty. So out of thirty-six votes on guilt or death, thirty-five were against the defendant, one was in favor of the defendant, and the defendant avoided the death penalty.

It was a particularly brutal and vicious murder. In that sort of situation, the will of the community was not represented by a non-capital sentence. The prosecution should have been allowed to go forward and try the penalty phase again.

On the Martini proposal and the proportionality review proposal, we propose not only statutory amendments, but also amendments to the State Constitution.[47] This is because we believe that the State Supreme Court may very well believe that proportionality review is not just required by the current statute, but is also inherently required by the State Constitution.

In the *Loftin* decision, the New Jersey Supreme Court gave a pretty clear indication that it believes that there is a state constitutional right to proportionality review.[48] Similarly, in the *Martini* case, we believe that the Supreme Court might decide that a statutory provision is unconstitutional.[49]

Of all the recommendations of the commission, only proportionality review and the Martini legislation are accompanied by constitutional amendments.[50] The rest are either proposed changes to the statutes or recommendations to the State Supreme Court to modify its procedures in ways that are within its discretion.

I will quickly run through the other recommendations that the commission made. We laid them out in the chronological order that a trial would unfold, beginning with a pretrial process. We recommended that the State Supreme Court appoint specific

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[47] *See* Senate Resolution No. 85 and Assembly Resolution No. 131 proposing "a constitutional amendment allowing a defendant in a capital case to waive any post-conviction relief." S.R. 85, 208th Leg., 1st Sess. (N.J. 1998); *see also* A.R. 131, 1st Sess. (N.J. 1998). This legislation would amend Article VI, Section V of the Constitution of the State of New Jersey. *See id.* Senate Resolution No. 86 and Assembly Resolution No. 132 would amend Article I, par. 12 of the Constitution of the State of New Jersey concerning proportionality review. *See* A.R. 132, 208th Leg., 1st Sess. (N.J. 1998); *see also* S.R. 86, 208th Leg., 1st Sess. (N.J. 1998). The bills were introduced by Assemblyman Guy Talarico (R-38) and Senators Matheussen (R-4) and Kosco (R-38). *See id.*

[48] *See* State v. Loftin, 157 N.J. 253, 263, 724 A.2d 129, 134 (1999).

[49] *See generally* State v. Martini, 144 N.J. 603, 677 A.2d 1106 (1996).

[50] *See* A.R. 131-132, 208th Leg., 1st Sess. (NJ 1998).

judges in each county or vicinage who would specialize in death penalty cases.[51] The death penalty has become such an arcane, difficult and dangerous part of the law for any judge who is trying a capital case that it's important that you have expertise. If you have a brand new judge doing a death penalty case, he's going to be very, very careful not to make any legal errors. A reversal would be highly embarrassing, and the bench manual for trial court judges in capital cases is 300 pages thick. There is a huge body of law that you have to master in order to get this right. We believe that once a judge gets up the learning curve, we ought to take advantage of it.[52] I don't think this is pro-prosecution. It is not pro-defendant. It is pro-competence. It is pro-efficiency.

Also in the pretrial phase we recommend something that's become fairly controversial, and that is to change the number of peremptory challenges available to the prosecution and the defense.[53] Currently in a capital case, the defense gets twenty peremptory challenges of prospective jurors.[54] That means they get to eliminate twenty members of the jury panel for any reason or for no reason at all.[55] You can always excuse any number of jurors from a panel for cause.[56] These are jurors that can be

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[51] *See* A.R. 130, 208th Leg., 1st Sess. (N.J. 1998). This resolution was prompted by the report of the Governor's Study Commission on the Implementation of the Death Penalty issued August 5, 1998. *See id.* The report noted that one of the significant factors causing delay in the implementation of the death penalty is that it takes approximately 18 months to 2 years after an indictment before a capital trial begins. *See id.* One of the significant factors contributing to the delay is due to the complexity of the capital litigation and the amount of time it takes for a judge who is inexperienced in capital cases to become familiar with the complexities of death penalty cases. *See id.* The commission recommends that this problem may be resolved by requesting the Chief Justice to assign judges in each vicinage who specialize in the handling of capital cases. *See id.*

[52] *See id.*

[53] *See* A. 2363, 208th Leg., 1st Sess. (N.J. 1998). Current law allows the defense 20 peremptory challenges if tried alone, and 10 if tried jointly. *See id.* By contrast, the prosecution is allowed 12 and 6. *See id.* This bill would allow an equal number of challenges to both sides (8 if tried alone, and 6 if tried jointly), in an effort to reduce delay in the progress of these cases. *See id.*

[54] *See* N.J. STAT. ANN. § 2B:23-13(b).

[55] *See id.*

[56] *See* N.J. STAT. ANN. § 2B:23-13(b) which states that "[t]he trial court in its discretion, may, however, increase proportionally the number or peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J. STAT. ANN. § 2C:11-3 might be

excused without cause. The defense gets twenty peremptory challenges currently, and the prosecution gets twelve.[57]

No one has been able to explain to me why there should be this disparity, other than that you want to give advantage to the defense. The problem with having a disproportionate number of peremptory challenges for the defense is that you get one or two jurors on the jury after the prosecution has run out of its peremptory challenges and the defense has not, who are going to be the ones who hang the jury. It's also very time-consuming.

So we adopted a recommendation by the Conference of Assignment Judges that we reduce the number of challenges to eight for the prosecution and eight for the defense.[58] There are states that have far fewer peremptory challenges than that. We thought that eight and eight was a fair balance.

We also recommended that at the start of the trial, when, under current rules, the prosecution is required to give notice to the defense of all the aggravating circumstances that it will invoke in the penalty phase, that the defense will have a corresponding obligation to notify the prosecution of the mitigating factors.[59] In the *Timmendequas* case, and in a lot of others, when this disclosure has been made by the defense only at the start of the penalty phase, the prosecution has very, very little time to check into the actual facts behind the alleged mitigating circumstances.[60] In the

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utilized."

[57] *See* A. 2363, 208th Leg., 1st Sess. (N.J. 1998).

[58] *See id.*

[59] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998).

[60] *See id.* which states that:

> [u]nder present law, the jury is only allowed to consider the defendant's conviction for murder as one of the aggravating factors. If a defendant has a prior criminal history which includes violent crimes this information is not presented to the jury. This bill would amend subparagraph (a) of paragraph (4) of subsection c. to add to the list of aggravating factors, a defendant's conviction for crimes of violence, such as: aggravated sexual assault or sexual assault, or any offense, other than vehicular homicide, that would constitute a crime of violence under N.J. STAT. ANN. § 2C:43-7 (any crime where the actor causes death, causes serious bodily injury or uses or threatens the immediate use of a deadly weapon).

Id.

Timmendequas case, it was only a couple of lucky breaks that allowed the prosecution to come up with information that was able to rebut some of the claims that were made by Timmendequas of mitigating circumstances. If there is a genuine problem that early disclosure would prejudice the defendant during the guilt phase, protective orders of the court would be available.

We proposed adding a couple of aggravating circumstances which would justify the death penalty. One would be if the defendant has been convicted of previous violent claims. In the *Timmendequas* case, Jesse Timmendequas, who was twice convicted of violent sexual assault of young girls, but the jury never knew that and was never allowed to be told that.[61] This is because, as you law students and lawyers know, a prosecutor is not allowed to introduce evidence of a prior crime to prove the guilt of the defendant in a subsequent crime.[62]

We are not proposing that we change that rule of evidence. What we are suggesting is that after the guilt has been ascertained, that in judging the proper penalty, prior violent crimes be considered as aggravating factors. Prior murders are already considered to be aggravating factors, but not other violent crimes. We also propose adding to the aggravating factors the fact that the victim is vulnerable to physical or mental impairment.[63]

We propose that the victim impact statement and the statement of the defendant asking the jury to save his life, the so-called statement of allocution, be governed by the same rules.[64] Currently, the victim impact statement, which is a fairly recent innovation in state law which allows the victim's family to describe the impact of the murder on them, has to be done in an emotionless way. There has to be a dress rehearsal in the judge's

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[61] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998); *see also* Ralph Siegel, *Megan's Alleged Killer Appears Before the Judge - Mercer Prosecutor Can Stay on Case,* THE RECORD (Northern N.J.), June 10, 1995, at A3. The records of Timmendequas' prior convictions and psychological reports were sealed during the hearings. *See id.*

[62] *See* N.J. R. EVID. 404 (West 1999).

[63] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998) "This bill would also include as an aggravating circumstance whether the defendant knew or reasonably should have known that the victim was particularly vulnerable or incapable of exercising normal physical or mental powers of resistance." *Id.*

[64] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998). This bill would eliminate the discrepancies between defendant's statement and the victim's statement. *See id.*

chambers.[65] When the statement is finally made, it has to be so drained of emotion that an average juror would wonder why the family of the victim is not upset by the loss of one of their close relatives. In contrast, the defendant, the murderer, when he is begging for his life can show any sort of emotion and use any kind of approach to the jury that he pleases.[66] What we are proposing is that the murderer's statement be governed by the same rules as the statement of the victim's family, so that he has to make the speech without the tears and after rehearsal in the judge's chambers.[67]

On appeal, we urge the Supreme Court to expedite the preparation of transcripts.[68] Sometimes, it takes many, many weeks simply to get the transcripts of the trial prepared. With current technology, we can accelerate that time at minimal expense.

We have also urged that the State Supreme Court adopt the recommendations of the Division of Criminal Justice regarding post-conviction review procedures and stays of execution and set specific deadlines and specific periods of time during which actions must be taken so you don't have excessive delay.[69] As a professor from John Jay College told us, a non-capital convicted criminal wants to get out of prison as soon as he can. The average criminal who is sentenced to death wants to stay in prison as long

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[65] *See id.*

[66] *See id.*

[67] See A. 2350, 208th Leg., 1st Sess. (N.J. 1998). Defendant's statement would continue to be the method which he or she uses in order to show remorse for the committed crime. *See id.* However, such statement would not include a denial of guilt, denial of evidence presented, comments on the aggravating and mitigating factors, comments on the impact of death on his or her family, or comments of the legality or morality of the proceeding. *See id.*

[68] *See* A.R. 126, 208th Leg., 1st Sess. (N.J. 1998). This would be accomplished by "directing the court reporters to make the preparation of death penalty transcripts simultaneously with the proceedings and by making the preparation of such transcripts their first priority." *Id.*

[69] *See* A.R. 131, 208th Leg., 1st Sess. (N.J. 1998). "The Division of Criminal Justice submitted several rule change proposals concerning post-conviction review applications and stays of execution. This proposal also contained suggested changes with regard to placing strict time limitations on stays pending federal review. In addition, the Division of Criminal Justice recommended certain changes with regard to the procedures for steps pending second of subsequent post-conviction applications." *Id.*

as he can, which is why in capital cases you have a great inducement and incentive for delay. Adopting these recommendations of the Division of Criminal Justice would help to deal with that problem.

We also recommended that a statute be enacted to have New Jersey comply with the standards set by the habeas corpus reform legislation passed in 1996.[70] That legislation simply establishes the qualifications of our public defenders and those who would represent the murderers on appeal.

I want to say in that regard, New Jersey is considerably different from virtually any other state with capital punishment. We provide excellent representation of criminal defendants, particularly in death penalty cases, both members of the staff of the Public Defender's Office and private attorneys who are hired for that purpose. They represent the defendant from an arraignment all the way through the final appeal and beyond.

In some states where you have a problem with ineffective assistance of counsel because you have poorly paid, inexperienced, unmotivated counsel representing capital defendants, you might have a legitimate challenge to the death penalty statute as a whole. However, in this state, we have very qualified public defenders and excellent private counsel pool. That is good. It's something we have not tried to change or modify or scrimp on in our recommendations. These standards, if made a matter of law, would qualify us for expedited habeas corpus review, which is appropriate, because the federal courts will have less need to second guess the process in New Jersey if New Jersey has a reliable process of its own.

Our final recommendation was the suggestion of Rich Kanka to allow the families of the victim to attend the execution if they choose.[71] We also proposed that the family of the murderer be allowed to attend the execution.[72] They are not criminals and one of their loved ones is being executed, so we thought that their

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[70] *See* 28 U.S.C.A. § 2254 (West 1999).

[71] *See* A. 2349, 208th Leg., 1st Sess. (N.J. 1998). The bill "would require the Commissioner [of the Department of Corrections] to allow four adult members of the victim's immediate family to be present." *Id.* "Immediate family" is defined as "a spouse, step-parent, legal guardian, grandparent, child or sibling." *Id.*

[72] *See id.* Two adult members of the condemned person's family would be allowed to attend. *See id.*

attendance was appropriate.

Those are our recommendations. Taken together, I think they would probably take three years off the average death penalty trial and appeals process, and they would make the death penalty more appropriately applied to those who deserve it. The appeals process, although it will continue to take many, many years and far longer than it does in many other states, will be shortened somewhat.

These proposals have been put into legislative form and introduced in both houses of the Legislature.[73] In the Senate, Senator Matheussen (R-4), who is a member of our commission, has sponsored the bulk of the recommendations. In the

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[73] These bills are a response to Governor Christine Todd Whitman's recommended thirteen proposals entitled "Governor's Study Commission on the Implementation of the Death Penalty," issued August 6, 1998. *See* Kathy Barrett Carter, *Thirteen ways to streamline death penalty: Governor's Commission Grants Kanka's Wish to Allow Victim's Families to Watch Execution,* THE STAR LEDGER (Newark, N.J.), July 11, 1998, at 4.

Assembly Bill No. 2363 embodies proposal number one and would reduce the number of peremptory challenges available to parties in a criminal case. *See* A. 2363, 208th Leg., 1st Sess. (N.J. 1998). This bill was sponsored by Assemblymen Guy. F. Talarico (R-38) and Peter J. Biondi (R-16). *See id.* A similar bill was sponsored by Senators John J. Matheussen (R-4) and William L. Gormley (R-2). *See* S. 1415, 208th Leg., 1st Sess. (N.J. 1998).

Assembly Bill No. 2350 embodies proposal number two and would amend the death penalty statute to make several changes in the procedural guidelines concerning the discovery process in capital cases, the aggravating factors to be considered by the jury, the composition and presentation of the defendant's statement, and the procedures involved when a jury fails to reach a unanimous verdict. *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998). This bill would also eliminate proportionality review. *See id.*

Assembly Resolution No. 131 embodies proposal number three and proposes a constitutional amendment which would allow a defendant in a capital case to waive any post-conviction relief. *See* A.R. 131, 208th 1st Sess. (N.J. 1998). Assembly Resolution No. 132 embodies proposal no. four and proposes a constitutional amendment which would provide that no death sentence could be reversed, vacated, or modified on the ground that the death sentence is disproportionate to the sentence imposed upon another defendant in another case. *See* A.R. 132, 208th Leg., 1st Sess. (N.J. 1998).

Assembly Bill No. 2438 embodies proposal number five and would provide a comprehensive and uniform set of guidelines for the appointment of counsel in post-conviction proceedings in capital cases and ensure the State's compliance with the requirements of the federal "Antiterrorism and Effective Death Penalty Act of 1996." A. 2438, 208th Leg., 1st Sess. (N.J. 1998). Assembly Bill No. 2439 embodies proposal number six and would allow the victim's family as well as the condemned person's family to attend the execution. *See* A. 2439, 208th Leg., 1st Sess. (N.J. 1998).

Assembly, they have been sponsored by Assemblyman Guy Talarico (R-38), who is a also member of the commission. The Assembly Judiciary Committee has considered some of the less controversial provisions, not proportionality review, not hung jury, not the Martini legislation, and has released them to the floor of the State Assembly.

If we are going to have the two constitutional amendments relating to the Martini issue and proportionality placed on the general election ballot, as our Constitution requires, they have to be approved by both houses of the legislature by a sixty percent vote before August. Because this is an election year and the legislature is probably going to go home for good after the budget is adopted in late June, there isn't much time to accomplish this.

Speaker Jack Collins has decided to hold off, on the issue of proportionality review at least, and some of the more controversial measures, until this third special master appointed by the Supreme Court comes back with his recommendations in May. Frankly, considering the fact that the Supreme Court has been struggling with the issue of proportionality review for years and years and years, I am not sure we will know anything more in May than we know now.

I have been urging my former colleagues in the legislature to move this along and to allow the voters to decide in November whether we should have proportionality review and whether we should let Mr. Martini have his wish. I would urge you to read the legislation and get in touch with your legislators with your views, regardless of what they are, because this is the process by which the recommendations of a small commission become public policy and actually become a reality in the courtroom and in the execution chamber.

Thank you very much.

C. *Remarks of Boris Moczula, Esq.*[*]

It is a pleasure to be part of this group which includes, not only in the audience, but on the panel, so many people that have been involved in this process from day one, have labored with the capital cases in court and the legislation and the various debates that we have had over the years, and they continue.

It is obvious that there is an ebb and a flow here. It's very interesting to note, that as the death penalty first evolved, there was a lot of attention. It was front-page news. There came a time when a death sentence would be imposed and you'd have to look not on the front page, not in the first section, but somewhere buried in the back of the second or third section of the paper to see a little blurb about someone getting the death penalty.

It seems like there is increased attention now. On Good Friday the United States Bishops Council came out with a statement calling for the abolition of capital punishment.[74] I recently received an issue of an elementary school paper put out by the Bar Foundation to educate students about various aspects of the law, and there was a big front page article on how to defend, or perspectives on defending a death row inmate. We just had the *Loftin* case decided, which talks about the issue of race. Sprinkle in a little Millennium fever and the tide is high once again in terms of interest in the death penalty.

Let me start with a quote from the testimony of a witness that we heard: "When my husband was murdered and John Martini was arrested, his first comment was, and it was reported in the press, 'I don't care if they give me the death penalty because they don't (blank) kill in New Jersey.'" He seemed to know something that day that obviously nine years later is being held true. That's really scary to me. That was Marilyn Flax, who Dick Zimmer mentioned, talking about John Martini, not only the murderer, but in a sense the prophet, for he foresaw that the state with a

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* Mr. Moczula's remarks reflect his personal opinion and do not necessarily reflect the opinion of the Passaic County Prosecutor's Office.

[74] *See* Christopher P. Winner, *Pope Focuses Message on 'Life with Dignity,'* USA TODAY, Jan. 25, 1999, at 10A. Pope John Paul II stated "No more violence, terrorism and drug trafficking! No more torture or other forms of abuse! There must be an end to the unnecessary recourse to the death penalty!" Id.

death penalty law has not implemented that law.

A law is passed which prescribes a particular penalty for a certain class of offenses.[75] Sixteen years pass and the penalty is never carried out. By any reasonable standard, a decision to review that law, to look at its workings, would be considered desirable, perhaps even necessary. Except when that law is the death penalty. When it's the death penalty, any attempt to review and implement or refine the law, is criticized as just wanting to "kill people faster." Our death penalty is sixteen-and-three-quarters years old.[76] There will have been no executions in New Jersey under our current law. Non-implementation of the law, as has already been mentioned, breeds disrespect for the law and the entire criminal justice system.

One response to that is that we are no different than any other jurisdiction. It takes time in various jurisdictions.[77] In my experience, New Jersey has never been content to stand in line with other jurisdictions in terms of dealing with major issues. Certainly our courts have not. I suggest that there is no reason for us to simply accept the fact that the national average may be ten or twelve years for purposes of actually executing someone who has been sentenced to die.[78]

Our mandate from the governor was clear, and I think it bears reemphasis that there were two separate goals, two separate purposes, in the commission's work. Because, if I can steal a phrase from Justice Scalia in an opinion he wrote last week, at least to the media, our purposes "seem[] not at all obvious [as to] precisely constitute[] obviousness."[79] Our task was not merely to expedite or to eliminate unnecessary delay.

The second aspect of our mission was to examine the statute and determine whether there should be refinements to make sure that the class of murderers that should be sentenced to death is being sentenced to death. A prime example being someone with

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[75] *See* N.J. STAT. ANN. § 2C:11-3.

[76] *See id.*

[77] *See* Evelyn Apgar, *States Take Time of First Execution: Jersey No Exception*, NEW JERSEY LAWYER, Vol. 6, No. 33 (Aug. 18, 1997), at 1.

[78] *See* Ted Koppel, *Dead Men Talking the Danger of Executing the Innocent, Nightline*, ABC News, (Nov. 18, 1998), at 1998 WL 5373180 (page no. not available online).

[79] *See* Wyoming v. Houghton, No. 98-184, 1999 WL 181177 n.2, at 5 (U.S. Wyo. Apr. 5, 1999).

a violent criminal history, but who, for whatever reason, fortuity or otherwise, has never been convicted of a prior murder. Under our current law, a capital jury cannot know about that person's criminal history. That strikes me as unfair. It is also contrary to every non-capital aspect that we have considered in terms of sentencing a criminal defendant and knowing everything about that defendant's background.

Let's talk about some of the basic goals, purposes, and issues associated with capital punishment. Non-use of this law undermines the deterrent effect completely. There is no valid deterrence dialogue until there is an execution. How do we know whether it will deter if the law is never carried out to completion? We can only speculate.

I have given you one example of a murderer who was very much aware of the state of the law in New Jersey with regard to the death penalty. I can tell you, based on talking to a colleague in my office who tried a capital case three years ago, that during jury selection, some jurors were unaware that this state had a death penalty. When it was pointed out to them that yes, we do, that normally engendered some sarcastic comment about, "Oh, yeah that's the law that's on the books, but nobody ever uses it."

Do not underestimate the awareness in this state, whether it is on the part of the public or whether it is on the part of one who kills, that the death penalty is essentially in disrepair when we are talking about carrying out the final mandate. Deterrence is not a factor until that happens.

I will throw out these figures to you, though. In 1997, the homicide rate nationwide was at its lowest in three decades. 1996 to 1997, in this state the homicide rate dropped from 410 to 337. Does that show us anything? Yes, it shows us that there were less murders the year after the previous year. That's it. There are too many factors involved in trying to make an educated guess. Does that mean we shouldn't have a death penalty? No. No law is a complete deterrent. We have burglary laws, but burglaries are committed. We have kidnapping laws, but kidnappings are committed. There's nothing wrong with having a death penalty law with the hope that it would deter at least one person from committing the crime.

Executing the innocent. The claim has been made that there is an increased risk that innocent people will be executed. I don't

agree with that. I will qualify my statement by saying I am not educated enough about the systems in other states to broadly address that claim, but neither are opponents of the death penalty who typically lump all jurisdictions into one as a basis for claiming that a particular state will execute the innocent.

I can tell you that our experience in New Jersey doesn't allow for such a conclusion. One of the witnesses who testified before our commission and generally made the statement about documented cases of innocent people being put on death row was asked very pointedly by our chair, "By any stretch of the imagination can you point to any one case, any one person on death row in New Jersey who is innocent?" The person said, "No, I can't do that." Our experience does not indicate that innocent people are being put on death row in New Jersey. The same people that claim now that we have DNA and other types of scientific evidence, from which they will be able to show how many people are wrongfully convicted, ignore the fact that the prosecution uses the very same evidence to confirm that those people who are being put into the criminal justice system are indeed deserving of prosecution, conviction, and if necessary, a sentence of death.

Race: the death penalty is being disproportionately applied on a racial basis. This claim was first asserted when the death penalty was put into effect, when the law was debated in the legislature, when the first case came along on the constitutionality of the law and ever since. The Supreme Court of New Jersey, a court which is not shy about tackling issues irrespective of whether they are raised by the parties in the case, has not come to the conclusion that race is a factor so as to undermine the validity of the law.[80] There have been numerous challenges, and undoubtedly there will be challenges in the future, but again, the Supreme Court has found insufficient evidence that race drives the decisions so as to taint the selection process with impermissible, unconstitutional motive.[81] The Court's own experts have rejected the claim that there's sufficient statistical

[80] *See* State v. Loftin, 157 N.J. 253, 316, 724 A.2d 129, 160 (1999). After an extensive review of statistical data, the court was not convinced that any racial disparity existed in New Jersey's imposition of the death penalty. *See id.*

[81] *See id.*

evidence of race-based decision-making in the administration of New Jersey's capital punishment law.

In that regard, I have to share with you something which—there's mention of Professor Baldus, the special master who created our proportionality review methodology.[82] The race-based claims really intensified with the development of a system of proportionality review in New Jersey, because inherent in that framework was the claim, and the purpose, that we will investigate prosecutorial and jury decisions to determine whether they are impermissible. One of the factors of impermissibility would be race. At the same time that Professor Baldus was appointed a special master to develop a New Jersey proportionality review system, he testified before the Senate Judiciary Committee, United States Senate, and made certain statements which I think are relevant to his perspective on capital decision-making.

The second reason we continue to see evidence of race to victim discrimination is that political, personal and economic considerations that tend to produce more or less punitive decisions in the processing of death-eligible cases have not declined in the post-*Furman* period. Indeed, they may have intensified. For one example, white victim cases generally produce greater publicity and greater public pressure on prosecutors for a punitive response than do black victim cases. Similarly, the families and friends of white victims are generally more likely to have influence with the prosecutor and are more likely to seek out prosecutors and demand the death penalty than are families of black victims. Lastly, there are economic considerations. It is possible that such decisions may be more difficult to justify in low-visibility homicides involving black victims. Third, at a personal level, to the extent prosecutors are largely white, they are more likely to identify with the families of white victims.

I find those comments disturbing on a number of grounds. As a prosecutor, I find them particularly offensive because we don't decide cases based on the color of someone's skin. Remarks of this nature unfairly disparage the integrity of the prosecutor, as

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[82] *See* David C. Baldus, Special Master, STATE V. ROBERT MARSHALL: DEATH PENALTY PROPORTIONALITY REVIEW PROJECT, FINAL REPORT TO THE NEW JERSEY SUPREME COURT (Sept. 24, 1991).

well as unfairly characterize white and black victims' families. More fundamentally, they reveal a preconceived notion of what the problem is with our capital punishment system. That notion carried over into the review of New Jersey's death penalty law, for which there was no reliable evidence of race-based decision-making, and created a situation where now racial motives, while never proven, are repeatedly alleged.

Such race-based assumptions, if made in the context of jury selection or stopping of motor vehicles, would be condemned, and rightfully so. And yet these same comments, which have influenced the special master's work on proportionality review, have gone by ignored. I have raised this issue previously and I have done it again because I understand that shortly there will be a law review article written by the same person about a survey of prosecutors nationwide and the fact that ninety-some percent of prosecutors in the country are white. Undoubtedly the same conclusions will be made. They are invalid and frankly, as I mentioned before, they are offensive.

I prepared handouts just to give an idea as to what has happened in New Jersey since the death penalty has been enacted. Sixteen and three-quarters years, just over 400 finished capital prosecutions, less than half of those resulted in capital conviction, meaning that a defendant would be eligible for a death sentence at a penalty phase. The number of death sentences imposed is fifty-four.[83] That is thirty percent of the capital convictions and only thirteen percent of the original 400. There have been thirty-four reversals, including either twenty-seven or twenty-eight in a row and twelve affirmances.[84] Fourteen people are currently on death row.[85]

The second page of the handout tells you how many death sentences have been imposed each year since enactment of the death penalty law.[86] Other than the mid-eighties where you see a high of eight and a few with seven, everywhere else the numbers

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[83] *See* Appendix A, *New Jersey Current Death Penalty Statute by the Numbers*, and Appendix B, *Death Sentences Imposed Annually Since Enactment of Current Death Penalty Statute*. Data provided by the NJ Division of Criminal Justice and compiled by the Passaic County Prosecutors Office.

[84] *See id.*

[85] *See id.*

[86] *See id.*

are pretty low. Keep in mind that 1987 was the first time the Supreme Court ruled on the constitutionality of our death penalty statute. Then there was the milestone case of *State v. Gerald* which interpreted and restricted death-eligibility under the statute in 1988.[87] After that, the numbers have dropped precipitously because we knew what the Supreme Court expected of us in terms of valid death cases.

Does this show a wanton, wild West, reckless type of capital punishment? No. I suggest it shows just the opposite: the correct, constitutionally valid funneling of cases, leaving those who truly deserve it. That is the system we have. We don't need to speculate. These are real numbers. They are not statistical distortions. They tell you what actually has been happening.

Congressman Zimmer has mentioned the proportionality review system. I have listed a number of cases in your handouts that track the proportionality review system in New Jersey. We have had five cases where the Supreme Court has considered the defendant's death sentence proportionality and found in all five that the sentences should be affirmed.[88]

The average time in my calculation is now up over eighteen months, it's closer to two years that have been added to the appeals process because of this extra step. This extra step has always involved statistical measure —in my opinion, speculation— which adds nothing to the integrity of the process. We have had a direct appeal. We have had a court affirm the sentence. Then we move to something which compares that death sentence to other sentences, but in a manner that no one can really comprehend what it's telling us about the validity of the death sentence. It's unwarranted and should be removed.

The Supreme Court has recognized, in the progression of cases right up to the *Loftin* case in February, that there is a crack in the foundation.[89] The Court, which stated in the first case deciding proportionality review that there was no need to

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[87] 113 N.J. 40, 90, 549 A.2d 792, 817 (1988).

[88] *See* State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992), *cert. denied*, 507 U.S. 929 (1993); *see also* State v. Bey, 137 N.J. 334, 645 A.2d 685 (1994), *cert. denied*, 513 U.S. 1164 (1995); State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994), *cert. denied*, 516 U.S. 875 (1995); State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995), *cert. denied*, 516 U.S. 1129 (1996), State v. Loftin, 157 N.J. 253, 724 A.2d 129 (1999).

[89] *See* State v. Loftin, 157 N.J. 253, 724 A.2d 129 (1999).

substantially address the deficiencies of the methodology applied by the special master, is now saying that its experience with capital cases and proportionality review warrants a "serious reconsideration" of our methodology and the appointment of another special master.[90] I do not understand why it took almost two years for the court to come to the conclusion that more information was needed, but, be that as it may, the Court is recognizing that this cumbersome process that moves slowly along and delays implementation of the law needs changes. Stay tuned.

The final issue I would like to talk about is victim impact. I consider it to be a significant factor in the development of capital punishment in New Jersey, and it forms the basis of two victim-based recommendations in the commission's report. One talks about the defendant's right of allocution, the plea for mercy, being identical to the victim impact statement in the courtroom.[91]

I would like to show you a brief video of an actual victim impact statement, or the process that leads up to it, where a judge asks the mother of two children who were murdered as to her understanding of what she may and may not do in giving the victim impact statement. It will be followed by about a minute of the actual statement. That's the dry run. As was mentioned, you have to do it out of the presence of the jury first. In this case there were four drafts that were reviewed and finally the Court accepted the fourth draft. Then there will be a minute of the actual delivery of the statement to the jury. This was a case, by the way, *State v. Avi Kostner.* Cathy was one of the defense attorneys in the case and it's Judge Harris in Bergen County who presided.

(Videotape played.)

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[90] *See* 157 N.J. at 454, 724 A.2d 232. The court appointed Judge David Baime as a Special Master for the New Jersey Supreme Court to conduct a study and make recommendations on proportionality review. *See id.*

> Today we have moved to reexamine the methods we use in order to improve and simplify the review process, and to better understand the effect of the legislative restriction on the proportionality review universe. We seek to carry out our appellate review function in capital causes [sic] in such manner that every defendant will be ensured a rigorous and complete review of his or her death sentence.

Id.

[91] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998) This bill would eliminate the discrepancies between defendant's statement and the victim's statement. *See id.*

I didn't see any need to go through the entire statement, although it was quite moving at times. I initially had very conflicting feelings about allowing a victim to come in, because you could see what they go through. To withstand the questioning, and acknowledgement of the fact that you have got to do this in an unemotional fashion I think is extremely difficult.

I ultimately decided that is not my decision to make. The process is a lot fairer, certainly a lot more complete, by giving victims an opportunity to go to Court and present the flesh and blood version of the actual murder victim, as opposed to simply a name of a piece of paper, or a number. But, if victims' families must abide by certain rules in describing the impact of the murder on their lives, then it is not fair to allow a defendant to emotionally plead to the jury. There have been cases such as *Loftin* where the defendant stood, ostensibly to ask for mercy, but started talking about the racism in the system, mitigating evidence in the case and everything else, and actually had to be stopped by the Court.[92] So the commission recommendation recognizes that defendants will have to play by the same rules as victims' families and, in this context, there's nothing wrong with that.

The decision to allow victims' families to give impact statements, having a law passed and having the Supreme Court affirm it, sounds the theme of the second commission recommendation regarding victims. Under current law, eight members of the media are allowed to be present for an execution, but no person related by blood or marriage to either the victim or the defendant is allowed in the execution chamber.[93] Again, unless you are a victim, that's not your decision to make, so the recommendation gives the choice to the victim's family, and suggests that the defendant's family be provided with a similar opportunity to be part of the process.

For me, ultimately that is what it gets down to. The imposition of the death penalty upholds the value of the life that

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[92] *See* State v. Loftin, 157 N.J. 253, 724 A.2d 129 (1999).

[93] *See* N.J. STAT. ANN. 2C:49-7. Also, currently, the commissioner, a person designated by the commissioner to act as an execution technician, and two licensed physicians are required to be present at the execution. *See id.* The commissioner also invites six adult citizens. *See id.* The names of the execution technicians are not disclosed, and the names of the six adult citizens who witness the execution are not disclosed until after the executions. *See id.*

has been taken. The non-imposition of the death penalty diminishes that life. Whether or not you agree with that, that is my fundamental belief.

Thank you.

D. *Remarks of Cathy L. Waldor, Esq.*

That little tape that you just saw was a case that I did try. That was *State v. Avi Kostner.*[94] Mr. Kostner was accused of killing his own two children in the name of a religious conversion his ex-wife had threatened.[95] He got a life sentence, but judgment was passed a year later when he died of cancer while serving his life term, or his "thirty years in" as we say. So there is somebody somewhere that makes the appropriate judgments. I don't think it should be the government.

I served on the commission and I represented the Public Defender's Office. I was once a public defender, and for the record, I am not a public defender and haven't been for many years. In any event, I want to make the statement initially that it was a pleasure to serve on the commission, despite the fact that I was usually the lone dissenter. Why was it a pleasure? Because despite what some people may think on my side of the bench, Congressman Zimmer, Boris, and many other people in the commission always asked my opinion and always listened to me. It was certainly interesting and oftentimes frustrating, but I will say that as you heard Congressman Zimmer, he's not a criminal lawyer, but he speaks pretty well about criminal law now, so he learned something from myself and Boris as well. It was certainly enlightening to sit on the commission. I thank the Public Defender's Office for allowing me to do so.

I come here today as a private practitioner that has tried several capital cases, have several more in the hopper, and I am

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[94] Thomas Zambito, *Kostner's Life Spared - Defiant Killer Flashes Grin as Jury Announces Verdict,* THE RECORD (Northern N.J.), Mar. 25, 1997, at A1. Kostner pled guilty to killing his two children, Ryan and Beth, ages ten and twelve. *See id.* He killed them three days prior to them moving from New Jersey to Florida with their mother. *See id.* Kostner feared that the children's mother would not raise them as Jews but as Christians, so he killed them to prevent it from occurring. *See id.*

[95] *See id.*

personally frustrated by capital punishment, personally opposed to it religiously, morally, emotionally and intelligently, so you know where I am coming from. I think the death penalty is wrong. I think it lowers all of us. It puts the government in a position to utilize the worst qualities in all of us: hate and revenge. An eye for an eye. This ideology has never elevated a society or a culture. This ideology, an eye for an eye, puts us in a category with Third World countries such as South Africa. Civilized countries do not have capital punishment.

Why am I here making this statement when you've heard the commission has nothing to do with whether or not capital punishment exists? I cannot separate it. You just cannot separate it. Why? Because you heard, with all respect to the congressman, it cuts three years off the process if we implement these. How many times did we hear that today?

We are talking about balancing, we are talking about passing or implementing directives that cut three years off and what does that mean? We bring the person to execution more speedily. We let the government kill more quickly. I do not like that.

I do want to say that I am not here to tell you that people should not spend the rest of their lives in jail. I cannot restore to Mr. O'Brien, to Mr. Kanka, to any of the victims' families the lives that were taken, but capital punishment cannot restore it either. Capital punishment three years more quickly and less assuredly when our appeals are cut off cannot bring back the tragedy of a murder.

Boris told you that we do not know that innocent people have died in the electric chair or by lethal injection. Well, let me give those innocent people some names. Charles Becker, Frank Cirofici, Thomas Bambrick, Stephen Grzechowiak, Everett Applegate, George Chew Wing, Charles Sberna, those are some of the names of people that were executed, that are dead, not by New Jersey, that were later shown to be innocent, proven to be innocent. In various cases other people came forward and confessed to the crimes. Some of these cases were identification cases. As we know, identification testimony is probably the least reliable testimony and the subject of most reversals in criminal cases.

So now you have the names of several that have been innocently executed. About three months ago on National Public

Radio they had a group of 114 people that were on death row at one time that are now out of prison telling their story, innocent people that almost died. Does it happen? Yes, it happens. We know it happens. As a society are we prepared to say let's sacrifice some lives for the greater good of mankind so that we can take an eye for an eye, so that we can take hate and revenge and legitimize it?

As far as some of the recommendations of the commission, I am not going to address all of them because some of them will be addressed by other members of the panel. Proportionality review is something that is interesting to me and it is interesting because I have heard from Boris and the congressman that proportionality is bad because it is confusing, we are all confused. Well, I am sorry that everyone is confused, but I cannot imagine that we want to stop every day of our lives, every second in the criminal justice system, stop evaluating the fairness of the application of laws. Why would we want to stop doing that? Because we can kill people three years sooner?

Let me tell you a story about a case I have in the Southern District of New York. The young man's name is Eladio Padilla. Eladio Padilla is a capital defendant and I am trying to present mitigating evidence on his behalf, because as the congressman said, you weigh the aggravating and mitigating factors and then a jury determines whether or not one set of factors outweighs the other. That is a general explanation. I need mitigating evidence. Eladio Padilla had a father in jail since he was six months old, and a mother that was undereducated, drank, and who probably abused drugs. Eladio did not speak until he was eight years old and nobody cared. Nobody did anything about it.

I am not excusing any allegations. I am discussing poverty. I am discussing proportionality. I am discussing the fact that there are people that are raised in this country, many who do not have medical insurance, do not have medical records, who cannot, in fact, present mitigation. Shouldn't we keep examining these cases on a level of facts, race, gender, application, to see if in fact everyone has a fair shot?

Eladio Padilla will not have mitigation. I cannot present hospital records because the hospital lost them. They used the wrong name. He wasn't brought to the hospital until he was nine years old. Robert Marshall, I am sure, had available mitigation.

Robert Marshall had money. That is disparity. Those are the disparities that we need to deal with. Shouldn't it be fair that everyone who is supposed to be killed by the government, shouldn't everybody have a fair shot at presenting mitigation?

So when Boris tells you that he is offended, I am telling you in the practical sense, and I do not know what professor says what statistics, I know it happens that there are people that don't have a fair shot at presenting mitigation, that there are prosecutor's offices, perhaps not Boris', that indict capital defendants that would not be indicted in other counties. Why should we stop looking at the fairness of the application of capital punishment? Just because we are confused or because we can kill people, execute them three years earlier?

The congressman talks about the ability to retry nonunanimous verdicts in capital cases.[96] Again, with all due respect, Congressman, the will of the community can be eleven to one or ten to two. The will of the community can be a hung jury. The will of the community in that case was a hung jury. It is part of the democratic process even though the will of the community may not comport with what you or I or anybody else thinks.

When a jury speaks, whether or not it is eleven to one or ten to two or twelve to nothing, that's the community speaking. That's the end. If they cannot agree, we have to respect a jury's right to disagree because we are a democracy, because the jury system is what is the basis of our criminal justice system in this country, and you have got to accept it. You may not like it, but that is the way it is.

Challenges, jury challenges, let's cut them down to eight.[97] What do we save timewise? Oh, a day, two days, ten days, who knows? Maybe you don't understand, Congressman, why defense attorneys have more challenges. Maybe to you it is an advantage. To me, it assures fairness. It assures that I can sit and pick a jury that I believe will listen to me and will make a fair consideration of my case, my mitigation, as well as the prosecutor's.

But cutting down challenges? Shouldn't we be looking, if we are going to implement capital punishment, to get the fairest jury that we possibly can? Shouldn't we be looking to maintain this

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[96] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998).

[97] *See* A. 2363, 208th Leg., 1st Sess. (N.J. 1998).

sense of due process you speak about, this fairness, rather than wondering whether my next challenge will be my last challenge because I've done seven and I only have one more?

I do not quite understand why, if you want the implementation of the death penalty, that we have to act quickly. I do not quite understand why we are unhappy because no one's been killed by the government. It is offensive to me and it is sad to me that we have to look to rush to execution, that we would sacrifice one minute of testing this system, one second of ensuring that a defendant is guilty, that he had the right state of mind, and that all his or her mitigation has been presented.

Do you know to date that there have been at least fifteen people executed in this country that are considered mentally retarded—some on which mitigation was not presented? There's something wrong with killing mentally retarded people. We need to ensure that that doesn't happen.

I also thank you for saying that many attorneys who do this work or all attorneys are competent, able, and in fact well-qualified. If only it were true. We do this not only for love of Dale Jones, our great leader, but because we are so committed to defending the application of the death penalty, so committed to ensuring fairness in the best way that we know how, that we set aside our private practices to do it.

Yes, I am looking for a pat on the back because it is not easy sitting next to some guy thinking that he may die because you screwed up. If you want to really know what it is like, sit next to somebody when that jury comes out and says that the aggravating outweigh the mitigating, and the judge says you are going to die. I can tell you there is no worse experience that I have ever had in my life. Until you can do that, you can't feel how serious this is and you can't feel how wrong this is to allow our government to put people to death all for an eye for an eye. I really don't have anything else to say. I know I have ranted and raved. I know my feelings are pretty clear. I again want to thank the commission members for putting up with me because they heard this for months, and they were, again, most well-listened and most tolerant of my ranting.

Any changes to the death penalty that are proposed by this commission, with the exception of one, and that is who may attend executions, are proposals that I dissented from. This is

because no matter how you slice it, no matter what words you use, all of them, all of them are geared toward speeding up the process by three years. I ask you to consider is it really worth it not to be sure? Is it really worth it for three lousy years to make a mistake, maybe kill the wrong person?

Thank you.

E. *Remarks of Alan L. Zegas, Esq.*

Good morning. I have been asked to speak about John Martini, whose name has come up a number of times this morning.[98] I do not know how many of you are aware of what went on with this case or how I became involved, but I would like to tell you a day in the life of a private defense attorney who found himself in very, very peculiar, very, very uncomfortable circumstances. This is the story.

Back in about October of 1996, I got a call from Dale Jones, the gentleman seated to the right of me. Dale and I had sat on a Supreme Court committee for some years together and I have the highest respect for Dale and think greatly of him. During the course of our conversation, he said to me, "Alan, there's a case pending, *State v. John Martini*[99] in Bergen County, and something just happened that it's a bit unusual. I wondered whether I could recommend your name among others to the judge to be put on a list to serve as Mr. Martini's counsel." I said, "Sure, Dale. Please tell me what happened." This is what occurred.

Mr. Martini had decided that he did not want the public defenders representing him to pursue a petition for post-conviction relief. Now what is post-conviction relief? After a defendant has gone through trial and if convicted, he has a right of appeal to the Appellate Division, then to the State Supreme Court, and if that fails, he has recourse through what is called a post-conviction relief proceeding, that is a collateral method of attacking a conviction.[100]

Mr. Martini had already been up to the Supreme Court two

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98 *See generally* State v. Martini, 144 N.J. 603, 677 A.2d 1106 (1996).

99 *See id.*

100 *See id.*

separate times.[101] The first time the Supreme Court upheld the conviction on the grounds that issues raised as to what happened at trial were not meritorious. Then it went up to the Supreme Court a second time, this time on proportionality grounds, and the Supreme Court found that Mr. Martini's sentence was not disproportionate to those similarly situated.[102] He had been to the Supreme Court twice, both times the conviction was affirmed.[103]

The public defenders wanted to do what they would usually do in the ordinary course, and what they would be expected to do in the ordinary course in order to defend a person against the death penalty, and that is to file a petition for post-conviction relief. Mr. Martini did not want that. Mr. Martini had sat in jail for about five years. He abhorred the conditions that he was living under. There were rats that he lived with, mice, he hated the food, the clothing didn't fit him. He wasn't given simple things like razors for shaving. He was stripped searched every time he had to leave the cell. He felt that he was treated completely inhumanly, and he was right. He was on death row and this is the way that he was being treated.

He said "I do not believe that this post-conviction relief petition is going to succeed. I have the right, I have a right of self-determination to decide for myself that I don't want any further appeals taken on my behalf, notwithstanding that the public defenders are acting in what they believe to be my needs. They are acting for me, I know that, but this is not what I want. I do not favor what the public defender is asking the Court to do."

Once the judge learned that Mr. Martini's wishes were contrary to those of the public defenders who were representing him, it put Mr. Martini in the position of conflict with those who were representing him. The judge then turned to Dale and asked him to supply a list of names of people who might be willing to represent Mr. Martini on his wish, in essence, to die.

When I got the call from Dale, I knew very, very little about the case. I do annually a summary of the Supreme Court term for the Law Journal and I think I had done a summary on the case maybe a year or two before, but I didn't even recall the name

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101 *See id.*

102 *See id.*

103 *See generally* State v. Martini, 144 N.J. 603, 677 A.2d 1106 (1996).

when Dale mentioned it to me. I said to Dale very reluctantly, because I am opposed to the death penalty personally, that I would do it. It was really out of deference to my respect for Dale.

I am opposed to the death penalty not on moral grounds, but because I believe that the death penalty is disproportionately applied to minorities. I also accept an argument that was raised long ago by Charles Black, and that is that there are inherent ambiguities in the English language that can lead to ambiguous and arbitrary results. For example, if a jury must find that the defendant had a reckless indifference to human life in order to impose the death penalty, what does that term mean? Is that term susceptible to different meanings by two different groups of jurors? I would suggest that it is because we have inadequacies in language and because juries are instructed with language that arbitrary results can result, can be obtained in any system that relies on language for the testing of the reliability of a judgment of conviction.

I also have problems because I do believe that different results are obtained depending upon who is representing the person. If there is an attorney who is especially skilled in capital cases, like Cathy, the chances are that she will far more likely obtain a successful result for a person than somebody who is not schooled in this area of the law. The system is not error free. It is my view that if the system is not error free, we as a society cannot afford to be putting to death people, particularly where we know that death is irrevocable, there's no taking it back.

There have been innocent people put to death. Boris talked about prosecutors having DNA analysis and other scientific means available to them to corroborate what the testimony might be, and that is very true. But at times, those analyses have not been used. There have been people who died, and later, after DNA testing was done on materials that were connected with the offense, it was found after the person was put under the ground, that the person could not have committed the crime. We do not have an error-free system.

That having been said, why in the world would I accept Dale's offer to represent Mr. Martini, since I do, and have for as long as I know, have very deep convictions against the death penalty? I think when I told Dale yes, it was very half-heartedly. I said, "I'd do it for you Dale, but I don't really feel strongly about doing it."

Then I thought about it probably fifteen minutes, a half hour, and I called Dale back and I said, "Dale, I know when I called you I sounded a little bit ambiguous about whether I was willing to take this case on, but I've thought about it now and I feel far more strongly that I am willing to represent Mr. Martini." Even though I, you know, very, very strongly disagreed with what it was that he wanted an attorney to do on his behalf.

The reason I rethought it was I am of the view that we as criminal defense lawyers have an obligation to advocate for our clients. It is not our right to impose our view of morality upon the Court or the system merely because we disagree with the views of our client. We take our clients as we find them. We are there to advocate our client's interests. The ethics rules that govern our profession require that we as attorneys do whatever we must zealously to advance the objectives of the litigation which are specified by the client.[104]

So it was with that in mind, and knowing that probably very few people would be willing from a defense side to represent Mr. Martini, and I thought that he was entitled to experienced counsel, that I agreed to do this. But even at the time I agreed to do it, I never, never in a million years realized what a hornet's nest I was walking into.

Cathy got up here and she spoke very emotionally. When she speaks, she speaks that way because it is coming from her heart. When Boris speaks emotionally, he speaks that way because it is coming from his heart. This subject raises the passions of attorneys and those involved in this system of capital punishment like no other issue.

I did not realize what I was walking into because I had not had experience in the capital area until I became involved with the Martini case. Lo and behold, the attorneys who I had been friendly with for a long time either would not speak with me or were bad-mouthing me behind my back and I learned about that. It made my life as an attorney terribly, terribly uncomfortable.

But notwithstanding what it did to me emotionally, I still felt obligated to continue down the path that I agreed to undertake on behalf of Mr. Martini and I felt more strongly about it, frankly,

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[104] N.J. MODEL RULES OF PROFESSIONAL RESPONSIBILITY, DR 7-101.

as I went along. Why is that? That is because once I got involved with the case I saw that what the public defenders wanted to do was to take confidential information that they had been given by Mr. Martini and use that, in essence, against his wishes to die.[105] The public defenders were of the view that this confidential material that they had obtained from Mr. Martini would be mitigating, and if it had been presented at trial, the jury might well have found, when it had to weigh aggravating and mitigating factors, that the mitigating factors outweighed the aggravating factors.[106]

Therefore, they felt compelled under *State v. Koedatich*, which obligates you to present all mitigating factors, irrespective of what the client's wishes are, to present information reposed in them in confidence to the Court and later to a jury.[107] My feeling was that this is wrong; that when a client comes to us for advice, we have an absolute obligation, as that person's attorney, to maintain whatever their confidences are. If any client comes to us fearing that their confidences are going to be disclosed, that will chill what they tell us and it will, in turn, impair our ability as attorneys to give appropriate advice.

My feelings were and are that if what the Court in *Martini* is going to do is to compel attorneys who are in possession of confidential information to disclose that information and to use it as something mitigating, then the next person who comes in who wants to be defended against the death penalty, but who fears that the attorney might disclose confidential information, might be unwilling to give up that information out of fear of its disclosure. Then the lawyer who is there to defend the person in a capital case will be less willing or less able to provide the kind of advice necessary in order to properly defend his or her client. To my mind, the principle of confidentiality outweighs any interest that the public defender or any other person that would be in the public defender's position representing Mr. Martini against his wishes might have, either on moral grounds or might have under their view of the law insofar as it affects their obligations to present mitigating evidence to a jury.

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[105] N.J. MODEL RULES OF PROFESSIONAL RESPONSIBILITY, EC 1.6.

[106] *See* N.J. STAT. ANN. § 2C:11-4 to -5.

[107] *See* State v. Koedatich, 118 N.J. 513, 572 A.2d 622 (1990).

This issue went up to the Supreme Court. The Supreme Court, when we first went up, said that we've got to go back to the trial judge where it must hold a hearing.[108] At that hearing, the trial judge has to weigh the value of what the public defender said was mitigating, and the public interest in having that advanced in a post-conviction relief petition, against Mr. Martini's interest in maintaining the confidentiality of the information.

That was done, and the judge ruled in Mr. Martini's favor.[109] Now the issue is back before the Supreme Court. Because the information is so highly sensitive, the Supreme Court has taken the unusual step, the unprecedented step, in fact, of not having oral argument on the case and putting all the briefs under seal. It is the first time in the history of the Supreme Court where a criminal matter has not openly been argued before the Court, nor has it even been argued behind closed doors. The Supreme Court is considering an extremely important criminal case on the papers because of the sensitivity of the issues involved.

I am presently the president of the Association of Criminal Defense Lawyers. Cathy was a prior president of that organization. At some point along the line, and this is where I talk about the hornet's nest, some people within the organization wanted the organization to file an amicus brief on behalf of the Public Defender's Office and that opened up the criminal bar to wide debate.

There were two very deeply felt sides of the issue. The side that wanted to file the amicus brief in support of the public defender won resoundingly because the defense bar feels very strongly that we must always take the position that favors life. Our group, though, declined to take any position on the issue of confidentiality and how that bore upon what the Supreme Court had to consider, because that issue is far more sensitive. It is one that I still think, no matter how the Supreme Court decides the issue ultimately, has to be carefully thought about by any attorney undertaking to represent a person accused of crime. In my view, this is because one of the highest obligations we owe to our client is to protect their confidences. Many of us, the bravest of us, the best in our profession, have risked contempt citations. Some have

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108 *See id.*

109 *See id.*

been put in jail in order to protect a client's confidences. To my mind, you know, there is no higher calling than a lawyer doing what his professional ethics require him to do, even if it means injury to himself or to herself.

Thank you.

F. *Remarks of Thomas J. Critchley, Jr., Esq.*

I have been a prosecutor since 1982, and I have had a chance to participate in about seven, that I prosecuted myself, death penalty cases, and a handful more that came through the office and I assisted in one way or another.

I have to tell you right off that I cannot generate the level of passion in favor of the death penalty that you saw my colleague, Ms. Waldor, demonstrate against it. There is a reason for that and the reason is that I consider myself to be a moderate regarding the death penalty. I will explain to you what I mean as I go on. I am not particularly bloodthirsty. I do not consider myself to be so.

The seven or eight cases that I have had, I believe that if I were a juror on at least several of them, I would have voted against the death penalty. I view it as my job to present the evidence and to present the arguments that put a jury in a position to make an informed and intelligent judgment. That is what I think the commission is about; restoring the integrity of our judgment process.

I want to give you an example from my professional experience that I think illustrates the problems we can run into, leaving aside the question of whether we should have a death penalty or not for a second and just talking about the way in which we reach judgments as a society. The case that I was involved in and that I want to tell you about involves James Koedatich, and many of you here one way or another know all about that.

Mr. Koedatich, when I got him, had been through several murder trials. My trial was on the penalty phase only. After he had been convicted of the particular murder we were considering the death penalty for, he had been sentenced to death. It was one of the early cases reversed by the New Jersey Supreme Court and

this is what happened.

We sat up in Sussex County, the venue had been changed, and we began selecting a jury to determine what was going to happen with Mr. Koedatich. The aggravating factors, or the things which might get you sentenced to death in New Jersey, were that he had kidnapped Amie Hoffman where she worked, in the parking lot at the Morris County Mall, taken her to a remote location, sexually assaulted her, tortured her, eliminated her so that she could not in the future testify against him, and left her behind there by the reservoir to die. Those were the aggravating factors about the crime he had committed. In addition, Mr. Koedatich had previously been convicted for two other murders, so that was why the State of New Jersey was seeking the death penalty.

We went through the jury selection process, and I was leaving the courtroom at the end of a morning session with Bill Reilly to eat lunch. On the way out he mentioned something that James Koedatich had been doing, and that is he was reading a paperback novel while we were bringing jurors into the room and saying what do you think about maybe killing this guy. James would just continue to read, occasionally look up, maybe wave, and then continue to be more or less disinterested in the process.

Bill Reilly said, "How can that guy sit there and be so indifferent when these people are talking about killing him?" What I said came out of my mouth without much thought, but it represented what I felt and thought about the process. I said, "Bill, we are in more danger crossing the street to go to lunch than he is in this death penalty case." I think I turned out to be prophetically accurate because as you will hear at the end of the story, he did not receive the death penalty. I mention that because even by that point practitioners really understood that the death penalty was not something that could strike much fear in the heart of anyone, even someone sitting there listening to jurors debate whether or not they could impose the death penalty. This was in 1990, eight years after the law had been passed.

Anyway, we went through the trial and the jury found each of the alleged aggravating factors. They were pretty bad, as I mentioned, and I do not want to go through a graphic illustration, but here is a man who had two prior murders. He had tortured this particular victim. The way he tortured her was

with a knife. He sliced under her nose repeatedly to inflict pain before he killed her. He cut a flap of skin off her shoulder and toyed with that. He toyed with her with a knife. I'll end it right there.

So he went through the process and we had our arguments before the jury and what happened is as follows. The jury found each of the aggravating factors. They found each of the aggravating factors beyond a reasonable doubt. They found them unanimously. They did not find, as I recall, any mitigating factors unanimously, although that is not necessary. An individual juror can consider a factor regardless of whether all the other jurors agree that it exists.

What then happened is, and it is the worst thing that ever happened to me in my legal career, one of the jurors, as we found out from other jurors in the case, decided that he was in fact against the death penalty. Now we have a death qualification process as most practitioners know. You ask people the question, "Can you impose a death penalty if you find the aggravating factors outweigh the mitigating factors beyond a reasonable doubt," et cetera, et cetera. Everybody said yes. This particular juror decided he really wasn't in favor of the death penalty and I get the sense that he might have—I am not going to get into my view of his psychology, but that was his prerogative in our system. As Cathy Waldor indicates, he is a juror, he has a voice, he's been impaneled. I had a chance to question him and he has an opportunity to make his vote, which he did.

Although he found all the aggravating factors, even himself, beyond a reasonable doubt, this is what happened. The jury essentially was eleven to one for death. This meant that the principled judgment of the community, at least as our system was designed at that point, was that eleven to one for death, finding all of the aggravating factors, and few, if any, of the mitigating factors unanimously, that this verdict should be a life verdict for Mr. Koedatich.[110]

Most of us who are practitioners know and understand that there are few contexts in the criminal law in New Jersey where a nonunanimous verdict becomes a judgment. There's only one I

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[110] *See* N.J. STAT. ANN. § 2C:11-4 to -5.

can think of off the top of my head. So that meant that this particular view of one juror became the judgment of our community. I am going to suggest to you that it really wasn't a principled judgment in the sense that we want it to be.

Ironically, what then happened in Mr. Koedatich's case was that he got put into the proportionality review pool. His case was held up as a possible element in the universe of comparing other defendants to whether people should be put to death, whether their punishment is proportionate to other people. So, lo and behold, not because of a judgment by a jury, which I certainly would have been thrilled to live with, and am every day that I practice as a prosecutor, but rather a hung jury decisively in favor of the death penalty that became a life judgment, and that in turn he became a member of the proportionality pool.

It bothered me. It seemed like an aberrational judgment in a system that was set up, because of this very unique quirky circumstance, a hung jury, eleven to one, a system set up to produce judgments that were really not in keeping with the thoughtful judgment of a jury drawn from the community.

The argument was raised that a jury's judgment has to be sacred. I agree with some limitations. For example, in the State of Florida, you do not need a unanimous jury to vote for the death penalty. I believe that if seven out of twelve vote for the death penalty in Florida, a defendant can be put to death.[111] So it does remain a question of how we want to design our system. When you look at cases like Koedatich and in cases like Biegenwald in which that process was repeated, only in a more aggravated way, in the sense that three consecutive juries, save one juror, thought that a principled judgment was for the death penalty, that was aborted by this rather quirky design of our criminal justice system. I think that is one of the things that has happened or is happening now through the legislative process in New Jersey. What we are trying to remove is the quirkiness out of this judgment process.

I think it is wrong to have a situation where James—let's use Biegenwald as an example—where three consecutive juries but for one juror thinks yes, death is an appropriate penalty, and then

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[111] *See* FLA. STAT. § 782.04.

have a situation where some other defendant goes through one jury, they vote twelve nothing for death and he gets the death penalty, and just because there is no reversal of those earlier judgments, he doesn't get to run through this exact same gauntlet, or the state doesn't have to. I realize that's not particularly clear. The point I'm trying to make is when you have a quirky judgment, it has an impact not only in that case, but in similar cases and how people feel about the criminal justice system. So what I'm suggesting is that some redesign of the death penalty statute is appropriate.

The question of how long it takes to reach a judgment I think is relevant. This is because, not to rely on the cliché that justice delayed is justice denied, I want to be a little more sophisticated, although I believe that and say that our society needs reasonably prompt and effective judgments about things that affect us like murder and other topics. If you have to wait fourteen years to figure out if this judgment is appropriate, or any other judgment that our society is making, well, then you are waiting too long.

Thomas Jefferson suggested that we should rewrite the Constitution every twenty years.[112] He considered that to be the length of a generation. We can't wait nearly, in my view at least, a generation, and shouldn't wait nearly a generation for a judgment about a particular case.

I want to go back to what I said in the beginning, and that is that I consider myself a moderate. I am sure that I could be up here telling you if, for example, James Koedatich had been sentenced to death and executed, that I have ambivalent feelings about that because, perhaps because of my Catholic upbringing, I will never be able to rid myself of at least one element of my temperament and personality that cannot be enthusiastic about the death penalty. But I can generate a reasonable amount of enthusiasm for having our legal system make principled, intelligent, cognizable judgments that our society can rely on and feel comfortable in because if we don't do that, again to throw out another cliche, we undermine, quote, "the fabric of society."

I believe that happens. I believe that when we have jurors

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[112] *See, e.g.*, Ryan P. Farley, *Ireland and Divorce: Is a Little Rebellion Now and Then a Good Thing?*, 11 EMORY L. REV. 515, 581 (1997). Jefferson argued for periodic amendment of our Federal Constitution by subsequent generations. *See id.*

coming in and saying, "Oh, we know you guys aren't really serious about this," that statement reflects an unhealthy view of our society and how it makes its judgments, so I do not think that is a good thing. I will be happy to live in a culture or place that does not have the death penalty. I will leave that to the legislators and those who make that decision, but as a practicing prosecutor, it bothers me to be involved in a system that produces what I consider to be almost bizarre lightning striking type judgments.

My point is that it's important to talk about how do we make these judgments. I think that the commission, without going through all of the particulars, is moving in a direction to make our process more intelligent and do the things that it is supposed to do, and that is give our community the sense that we live in a society of order and law. I submit that judgments like the Koedatich case and Biegenwald case do not really do that.

I can't resist rising to the bait of whether we should have a death penalty or not and I will never, I don't think in my whole life, be able to say definitively I think we should. Probably not until I get to the pearly gates will I be willing to commit myself 100 percent on that. But I have seen enough of the terrible trauma that people, sometimes sick people, as was pointed out, but sometimes very mean-spirited people can inflict on our community, on our children, and it's just terrible. My sense as I stand here right now is that it is okay to let our community consider whether there are some crimes that are so abhorrent that they should be met with the extreme penalty.

I am happy as a prosecutor to say, as I said earlier, that sometimes when I'm the prosecutor, even when the headline is "State Doesn't Get Death Penalty," that I agreed with the judgment in those particular cases. I am happy because I felt that it was a principled judgment of the jury drawn from the community. I have had occasion in cases to offer arguments, just one, actually, where I thought the defense did not make an argument that they should have, and I did not want my jury to make a death judgment without hearing at least that thing to consider about the defendant.

My last thought about whether or not we should have a death penalty. I saw a documentary about the Golden Gate Bridge. Wondering where this is going? Well, they had calculated before they put that rascal up, and it is a couple miles long, I guess, that

they would lose a certain amount of human lives in making it easier to get from one side of the bay to the other. They had factored that into the cost of construction. I guess it's not dissimilar to the kind of calculations we made when we landed an invasion on D-Day or something like that. It is going to cost human lives.

I think the nature of our world is such that unfortunately, we live in a dangerous, violent world. I wish it weren't so, but human lives are going to be sacrificed for the community. The people who died building the Golden Gate Bridge died for a good reason in a sense. Certainly the people who died on D-Day were heroes and died for a good reason. I have no problem, not having gotten to the pearly gates yet, in saying that it's okay to kill James Koedatich for the damn good reason that he took one of our sisters and tortured her and eliminated her, so that she couldn't bear witness against him, after he had killed two other people.

Maybe I am wrong. I can get passionate to some degree about the death penalty. Anyway, those are my points from working in the trenches. I appreciate your time.

Thank you.

G. *Remarks of Dale Jones, Esq.*

I would be remiss if I did not thank Alan Zegas for his work in the *Martini* case.[113] To those of you who are law students, you may find at some juncture in your career that you are called upon to do something you find particularly difficult to do. The more so if it conflicts with your own personal views. Alan agreed to take this case under extraordinary circumstances because the views involved here were matters of life and death and for an attorney played off against that highest stake of all, confidentiality and the attorney/client privilege. My thanks to him for taking on that task. I hope you can emulate that example. It's no easy thing to do. It cost Alan a great deal, if you have a price for it, but nonetheless, I hope he considers my respect and thanks as some small compensation for that.

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[113] *See* State v. Martini, 144 N.J. 603, 677 A.2d 1106 (1996).

Some sixteen years later I find it comfortable being able to agree with Tom Critchley to a great extent about capital punishment. It's certainly true that it cost human lives. Probably where I differ on that part is it should not cost innocent human lives.

Boris Moczula mentioned to you that he was not educated enough with respect to the systems in other states to know how they dealt with that problem. I can tell you one example that I am familiar with and that is in the state of Illinois. In the last seven years in the state of Illinois, eleven people have been taken off of their death row because it was determined that they were innocent of the crimes for which they received the death penalty.[114]

To me, perhaps the most interesting thing of that, and it sets up an interesting counterpoint, I think, to the work of Congressman Zimmer's commission, is that their innocence never could have been proven had they been executed in, if I can use Tom's word, a reasonably prompt fashion. The only reason these innocent lives were spared is because the system itself took so long.

I was also struck when Tom said to you it bothered him that he was in a system that produces bizarre, and I cannot remember the other word that he used, but I did write down the word bizarre, bizarre results, and indeed it does. I guess I again part from the conclusion he draws, and that is that I think we ought not to be in a system that produces a bizarre result. The late Justice Blackmun had the opportunity to sit for several years on the Supreme Court of the United States, at which time many of the fundamental principles of capital litigation were debated before him, during which many decisions were ultimately rendered, and finally in reflecting on that experience he said he no longer wished to tinker with the machinery of death. He had reached a point where I think he, too, like Tom and myself, saw a system that tended to produce some rather bizarre results and did not function in a meaningful principled way.

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[114] *See, e.g.*, Bill Granger, *Decide death penalty in Illinois with a coin toss*, CHICAGO DAILY HERALD, Mar. 15, 1999, at 7 (stating that "[s]ince the death penalty was restored in Illinois, [of approximately 180 people on death row] 11 have been executed and 11 found innocent and freed").

It disturbs Tom. It disturbs me. It ought to disturb anyone who is interested in criminal justice. It ought to produce rational results. My view of the governor's study commission is that it was a commission put into place to tinker with the machinery of death in New Jersey. I am never sure whether the word "tinker" is pejorative or not and I don't necessarily take it that way. I see it in the sense of exercising what I consider to be a futile attempt to alter some very fundamental principles.

The commission did ultimately recommend things that have been trumpeted by that commission and those who applaud what it has found as being able to save time in the process. As others have said, the process will be saved maybe three years, and they have asked you to consider whether or not that is appropriate. I am wondering what sort of mind-set raises these sorts of issues and what is it that prompts the question. Especially true when one looks around the United States and sees that the average time between reenactment of capital punishment law versus execution is about fourteen years.

Now Boris argued to you that New Jersey ought to be able to do it a little bit better. First of all, New Jersey cannot tinker with the federal process at all. That is beyond the grasp of even the New Jersey legislature. Secondly, I think it is rather presumptuous for New Jersey, who came late to the capital punishment game, if you will, to think that it can devise ways that other states could not to make that process happen more quickly.

So when we look at our states bordering us and we see that Pennsylvania took 21.4 years, Maryland 19.2 years, Delaware 18.2 years before they could bring about an execution, I don't think we ought to be troubled by the New Jersey process at all.[115] Connecticut, if you want to look at that example, is now in its twenty-fifth year without an execution.[116] So I don't think New Jersey stands on any different footing than any of its sister states. More importantly, to me it is very presumptuous to think that we can come up with some twist of the law, that we can continue to tinker with the machinery to make it work that much better.

It has been recommended that proportionality review be

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[115] *See* Evelyn Apgar, *States Take Time of First Execution: Jersey No Exception*, NEW JERSEY LAWYER, Vol. 6, No. 33 (Aug. 18, 1997), at 1.

[116] *See id.*

eliminated in New Jersey, and again, to me, I'm wondering why the question is even asked. Each time the New Jersey Supreme Court has exercised that function, it has affirmed all five cases which it's looked at, so I am wondering whether or not there is some other agenda afoot when the result that you get is five wins and no losses.

My suspicion is that the purpose is simply to increase the number of people who are sentenced to death and I am not sure precisely what that value is. Certainly eliminating proportionality review may bring about that process. It may not. Again, it is always striking to me when one is looking at a process designed to put fairness in the system, seeing it trying to be eliminated and again posing the question, well, why? Why are we troubled, in fact, as was said, by the majority in *McCleskey v. Kemp* by fairness?[117] I guess we can't stand too much fairness. Is that really what's going on here? We can't stand too much fairness in the system and therefore we are going to eliminate this further opportunity to review whether or not it was appropriate to sentence this particular individual to death?

Another one of the recommendations that the congressman mentioned today had to do with the retrial of cases where there are hung juries.[118] All of the speakers here have cited examples, some anecdotal, some statistical, and I often, and will again today, engage in the "lies, damn lies, and statistics" game. In a state which has voted to sentence someone to death on average every four months, I am compelled to ask the question, well, why isn't that enough? How many is enough? These are the sorts of questions that this commission, and in fact anyone who enacts the death penalty, apparently never really asked and never really wants to address. What is the number that makes this cry for execution stop? Is one every two months enough? Will that do it? I mean to me, it seems to me that the existence of that question suggests that there is some element of irrationality in this entire process.

My experience has been that this tinkering, and it happens not only with a commission like this or when the State of New Jersey amends legislation, is really a very futile attempt to place some sort of matrix of rationality on the very irrational process of

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[117] *See McCleskey v. Kemp*, 481 U.S. 279 (1987).

[118] *See* A. 2350, 208th Leg., 1st Sess. (N.J. 1998).

homicide.

I spent a significant amount of time in Essex County in our homicide unit. A large portion of my professional life was devoted to talking to murderers. That is probably not true for most prosecutors. I know it was certainly true for Cathy and myself. That is what we did.

I think the system itself does not understand that people that commit murders are not like you and me. The system assumes that they are rational, that they make intelligent decisions, that they will respond to the deterrent process, and that they will behave as they ought to behave, and if they do not, we'll execute them. I can tell you from my experience that no defendant ever said to me that he had the least bit of fear about the death penalty. In fact, I can tell you that most did not know there was a death penalty in New Jersey either. It is not just jurors that do not know, it is the folks that are out there doing the killing that do not know. They do not know that there is a death penalty in New Jersey. It is a mistake to think that they do.

There are prosecutors out there who have tried cases, and there are defense attorneys out there who have tried cases. It is no small thing that virtually every capital prosecution you see will involve some sort of mental health defense, whether it is insanity, diminished capacity, what have you, or that those sorts of things can be imposed as mitigation evidence in every case. The folks that commit murder, particularly capital murder, are not like you and me, and to my mind, it has never made sense to try and place this matrix of rationality over a very irrational process.

I was struck last week by the release of data about homicides in New Jersey during the past calendar year of 1998. When Cathy and I were assigned here in Newark, there were virtually almost a hundred murders in Newark alone; not just in Essex County, but in Newark alone. Last year there were only sixty here in Newark.[119] This has pretty much followed an enormous downtrend in the number of homicides. I was delighted to see that none of the proponents of the death penalty claimed that the fact there was a death penalty is what drove the homicide rate down, because I

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[119] *See* Kinga Borondy, *'98 statistics show 18% drop in Newark's violent crime rate-Murders rise, but robberies and assaults fall*, THE STAR-LEDGER (Newark, N.J.), Jan. 24, 1999, at 36.

would hope you would not be receptive to that and I don't think it's the least bit true.

I will share with you what I think is going on and why I think we have perhaps been asking the wrong questions in terms of the death penalty, its deterrent effect, and what we ought to do about homicide. I think, I would hope that the question of the death penalty is always about, well, isn't this the way we bring about a lowering of the homicide rate. If we appropriately punish these people, this will drive the homicide rate down, hopefully to zero. I think that's the premise that really underlies the death penalty. I would hope it's not the eye for the eye approach, but perhaps it is. Maybe that is an element of it. But it seems to me if there is a valid penalogical goal for the death penalty, it would be to drive the homicide rate down.

Some two years ago the Cleveland Police Department instituted a rapid response team to domestic violence reports. As a result of that, the murder rate in Cleveland was cut by one-third. That was an enormous difference.

I was struck this morning, Tom and I were talking about the decrease of murders in New Jersey, and Tom was speculating as to whether or not the ability of local police to respond to domestic violence complaints is contributing to driving the murder rate down. I think that is true. I think it was demonstrated in Cleveland. It may well be what is going on here in Newark. But it sure isn't the death penalty. If it's something else that can so dramatically affect the rate of homicide, ought we not to be looking at that rather than tinkering with the machinery of death? If we can save a third more lives by creating rapid response teams to domestic violence incidents, doesn't it make more sense to spend all our resources there rather than tinkering with the machinery of death?

Both Cathy and Tom, it was interesting because they both mentioned that the worst thing that ever happened to them during the course of their careers as lawyers happened during the course of litigating capital cases. I think this, too, is a product of placing, or trying to place I should say, a rational matrix on a very irrational event, the event of homicide.

I will tell you a story about my worst day in court and why I think we ought to be doing something else rather than tinkering with the machinery of death when it comes to addressing the issue

of homicide. In 1984, Cathy and I were called upon to represent an individual who had killed three persons. I tried the guilt phase of the case and Cathy tried the penalty phase. We lost in the guilt phase, so obviously we went to the penalty phase, and we were charged with the responsibility of saving the life of someone who had killed three people.

I know those of us, Tom, myself, Cathy, who would have been in these things at a trial level can tell you that there is no emotion, no setting like a penalty phase of a capital trial. It's a lightning rod for tension. It is an extremely difficult process for all concerned. Whether one is the family of the victim, the family of the defendant, the defense attorney or the prosecutor, it offends me the way that defense attorneys have to defend the criminals who are charged with capital murder who reach the penalty phase, because more often than not, we are compelled to look for the best mitigating evidence, and very often the best mitigating evidence for a defendant are his or her children.

In this particular case, this defendant had two children, one of whom was at Bloomfield High School. At that time I happened to be living across the street from Bloomfield High School. We felt obligated to put on the witness stand the two children, and the entire theme in mitigation was spare this man's life so that at least his children will be able to visit their father in prison. Don't go so far as to deprive them of that. We do not particularly care how you feel about this defendant, but this is too much to do.

Fortunately for me, Cathy had to do the penalty phase of this case, and I'll tell you why in just a second. Cathy called to the stand the fourteen-year-old. The fourteen-year-old had within the past few weeks attempted to commit suicide because his classmates at Bloomfield High were tormenting him. I say this not as an ill reflection against Bloomfield High, but only to show you that there are local ties and that this is a very real thing for you.

They were tormenting him because his father was being prosecuted for capital murder. Cathy put this person on the stand and took him through a direct examination of how he had been tormented and how he had attempted to commit suicide. It was at that point that I started to say to myself as I am sitting at counsel table and the burden is on Cathy's shoulders, what have I become involved in? I'm putting these two children—I should say it was really Cathy who was putting them, I am asking this child to

beg for the life of their father before sixteen strangers. This is a child who has never seen a courtroom before, who did nothing to bring this upon himself, but yet who is now the crux of our case in mitigation.

As these thoughts are going through my head, his younger brother, a twelve-year- old, was in the audience waiting to testify. We were going to put a twelve-year-old on the witness stand to do the same thing that a fourteen-year-old just did. While the fourteen-year-old was testifying, the twelve-year-old had an epileptic seizure in the courtroom prompted by the stress of watching his brother testify, the stress of the entire process.

I can tell you very cold-heartedly now that you probably couldn't come up with a better penalty phase from the defense point of view than making that happen all over again. I can also tell you that I would never ever do that again, which is why I don't try capital cases anymore. But what saved Monturis' life was putting those children in front of those sixteen strangers and having them beg for their father's life.

I am offended by that. I won't do it again. I'll do just about everything else that I can ethically and legally to save a defendant's life, but I'll be damned if I'll do that again. It's wrong. It's wrong. I don't think we ought to be in the business of compelling people to do that. I don't think we ought to be in the business of having victims come into court doing the same thing. Families of victims, I should say. It's an extraordinary burden that they ought not to face.

How much is gained by executing someone rather than simply putting them in prison for the rest of their lives? Does it make that much more of a difference? I would suggest to you that it does not. It does not because it harms all of us in a very real and direct way. There is a scar here that won't go away. It harmed me. It harmed me, I will tell you, in an irreparable way, and in a way that brought home to me very directly what the death process is all about. We ought not to be doing that sort of thing. We can do better.

I don't know that there is anything more that I want to say about what's been said before. I did very much want to share that story with you because I think it is an indication that there is a problem in the process separate and apart from the cold analytical approach that many lawyers often take. I hope that when you

become voters, for those of you who are students now and may not have yet reached that point in your lives, and for those of you who have already been there, for those of you who will probably affect the legislative process either directly or indirectly, either by voting or by becoming legislators yourselves, I ask you to think whether or not we ought to continue to tinker with the machinery of death.

Thank you very much.

H. *Remarks of Mr. James O'Brien:*

Good afternoon. I feel quite at home this morning, considering that many of the scenarios that have been presented here I can relate to because it happened in our case. I have also had the pleasure of having some of the people that are on the dais come into and out of my life at various times throughout the past sixteen years, which just happens to be the length of time the death penalty has been in effect.

To briefly recap for you, my daughter was one of the women murdered by James Koedatich. She was the second one that Koedatich killed twelve days after Amie Hoffman.

When he was retried in the penalty phase in 1990, there wasn't anyone in that courtroom (and I can guarantee you this, that after the evidence was presented by Tom Critchley, who did a marvelous job) who would have given you or taken a bet from you that Koedatich was not going to get the death penalty.

The striking part was that Judge Collester would ask, "He has already been convicted and found guilty of Ms. Hoffman's death. Can you be impartial in your judgment?" and they would say yes. "If I told you that he committed murder in Florida and had been found guilty, could you still be impartial?" and they would say yes. "If I told you that twelve days after Amie Hoffman's death, he murdered another girl and was found guilty, could you still be impartial?" and they said yes. So you can see why no one in that courtroom thought Koedatich was going to walk out of there with a life sentence, but it did happen.

But let me tell you an interesting point. The shock of that from the survivor's standpoint, from Mrs. Hoffman's standpoint and my standpoint, was probably the greatest shock outside of the

death of my daughter that I have ever had. We were ushered in an anteroom where the two of us hugged each other and cried in absolute disbelief that this man did not get the death penalty.

I will tell you now, as I stand here sixteen years after the death of my daughter, the best thing that ever happened to me in my life was the fact that James Koedatich did not get the death penalty. The reason being because we would have gone through another eight to ten years of appeals which tears a family apart.

I appeared on 20/20 just prior to that trial, and the theme of 20/20 with Barbara Walters and John Stossel was "Trapped in the Criminal Justice System." And it's true. The survivor of a murder victim going through a capital case is trapped in the criminal justice system. As I said to John Stossel, if you have someone in your family that is dying of cancer, you can prepare yourself for that death. It is still a shock when that person dies, obviously, but you can mourn and you can get on with your life.

To the survivor of a murder victim in a capital murder case where the defendant is given the death penalty, you do not have time to mourn and you do not get on with your life. You are trapped there for years and years. It takes a toll on the family. Of the O'Brien and Hoffman families, several required psychological care as they could not handle it. Of the two families, the two mothers and fathers live in their own houses today, but the children live in other states. It is a proven fact by the National Victims Center that the children, siblings of a murdered child, will eventually move away from that area to distance themselves from the ongoing appeal process.

It is my feeling today that there should not be a death penalty in the State of New Jersey. I am against the death penalty, but I come from another direction than some on the panel. I come from the fact that it is so convoluted, it is so mixed up, it is so dragged out, that by the time anybody is going to be put to death, we are going to lose a sense of why we did it in the first place.

They should be given a true life sentence where there is no parole and sent to prison for life. It's clean. If you have made a mistake, you can bring him back out. On the other hand, it allows the victims to get on with their lives because they are punished just as much by what's happening as the man that goes to jail.

To give you just what I think in the future is going to happen,

I do believe that the New Jersey Coalition of Crime Victims, probably after the year 2000, will push very hard for similar legislation that Florida, Delaware and other states have adopted. We feel very strongly at this point, that when you have a hung jury, we are not in favor of a retrial. What we are in favor of is setting a minimum of a ten to two verdict by the jury. It then becomes a recommendation to the judge who will decide whether or not to give the death penalty to the defendant.

Two, I believe that the number of capital murder cases will continue to decrease because of the high cost and the uncertainty at the end of the line, which can be ten, twelve, or fifteen years away of the outcome. Three, I think the New Jersey Supreme Court has finally refined the process, and I do not believe that you will see many cases overturned. I think that anybody who is thinking about the death penalty, and whether or not you are in favor of it, think of all the people involved and the human toll it has taken on them. Think of how much time, effort and money we spent, and we have not put anyone to death yet. It appears to me that the only ones who have been punished so far are the survivors.

Thank you.