

NEW JERSEY STATE LEGISLATURE  
DEATH PENALTY STUDY COMMISSION

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I N D E X

<u>WITNESSES</u>	<u>PAGE</u>
JUDGE DAVID S. BAIME	3
ROBERT BLECKER	30
JEFFREY FAGAN	67
CLAUDIA VAN WYK	89
ROBIN GLENN	108

REVEREND HOWARD: Good afternoon everyone. Are you able to hear me in the back? Good afternoon.

EVERYONE: Good afternoon.

REVEREND HOWARD: Good afternoon. My name is Bill Howard, I'm Chair of the Death Penalty Study Commission, and we welcome those of you who have come to hear from our panel of experts. Initially we conceived of this meeting as an opportunity for Commission members to hear and have benefit of expertise of persons who will be speaking to us today. But as we went along, we thought it would be useful to persons from the public who might be interested in their sharing to also join us. And, of course, this session is different in that only the experts will be speaking today.

Our first speaker, we're honored to have him join us, is Superior Court Judge David Baime. And I'm going to ask him if he would be kind enough to come. Judge Baime is the Special Master for proportionality review with regard to capital cases. Judge Baime, we welcome you. You will have 20 minutes to address us, and when you have roughly two minutes remaining I will give a little tap just as a warning and you can begin to wind down. And then, of course, the Commission will engage you in some give and take. Thank you very much.

JUDGE BAIME: Thank you. I very much appreciate

the opportunity to appear before your Commission today. Some of the things that I will describe are somewhat esoteric and involves statistics. And to assist me I have provided you with reports that we have submitted to the Supreme Court, and the Attorney General, and the Public Defender. I hope to be able to answer your questions, but I don't want to get lost in a wealth of statistics. So if I cannot answer your questions, I'll be happy to supplement my presentation through letter or in any way you wish.

I was appointed Special Master by the Supreme Court in 1999. My objectives were twofold. First, to develop a system that would monitor the administration of our capital punishment laws, focusing upon the fairness of sentencing with respect to a particular defendant, that we have denominated to individual proportionality.

A second goal was to determine whether there were, at work in the system, influences that were not germane to the legislative design and intent. The primary factor we have considered is race or ethnicity of the defendant and the victim, in that respect. But as you will probably note from our rather recent reports we have also focused upon the extent to which the disparity in which counties have prosecuted cases capitally impacts upon the system.

Before going into these subjects, I have to acquaint you with the concept of the death-eligible

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universe. What we do in both individual and systemic proportionality is to compare cases. And therefore a major decision in our methodology concerned what sample of cases we should utilize. We could, of course, consider only those cases in which the death penalty has been invoked. We also could consider only those cases that went to penalty trial.

And third, we could consider all cases that are death-eligible. We have chosen the last alternative and I'll explain why.

Death eligibility focuses upon whether the evidence in a case supports the elements of a capital prosecution, whether or not the case was actually capitally prosecuted. The benefit of considering the death-eligible universe is that we are able to monitor the system at various critical points -- critical decision points. We are able to monitor the exercise of prosecutorial discretion, we are able to monitor the impact of the original jury in determining guilt or innocence, we are able to monitor the decisions of penalty-phase juries in determining whether a death sentence is actually invoked.

Let me give you an example why we feel it is important to examine the entire picture, i.e., the death-eligible universe. If we were only to consider cases in which the death penalty has been invoked we would have a

rather narrow view of the universe of cases in which capital prosecution could be brought. Now, many cases that could potentially be prosecuted in a capital way are not prosecuted capitally by virtue of the discretion of the prosecutor. We therefore seek to get a better picture of the entire system in the manner in which it works. Were we to only consider death penalty verdicts, we might get a case where there, let's say, were two death sentences in an armed robbery situation and compare only the case under review with those two cases, when in reality there may be 40 or 50 cases that were not capitally prosecuted by reason of prosecutorial discretion.

So again, we feel rather strongly that any system monitoring the administration of our capital punishment laws must begin with the concept of the death-eligible universe.

The Administrative Office of the Courts examines every homicide case in the state on a yearly basis and attempts to make a determination whether the evidence is sufficient to support the elements of a capital prosecution, whether a capital prosecution actually ensued or not.

Now, let me get to the idea of individual proportionality review. The goal of that review is to ensure that like cases are treated alike. We compare the case under review, the case at that point is under review by

the Supreme Court, with other cases that are similar in terms of factual circumstances. We utilize what we call salient factor test. That test focuses upon the aggravating factors that were enunciated by the legislator, the statutory aggravated factors.

For example, if the Court is reviewing a case in which the defendant killed a law enforcement officer in the performance of the law enforcement officer's duties, we cull all those cases from the death-eligible universe in which that essential fact is an issue. We determine from those cases the percentage of those cases which were capitally prosecuted, the percentage of those cases that ultimately reached the penalty trial, and the percentage of those cases in which a death verdict actually was reached. By doing so we're able to determine whether, at least to some extent, there is a societal consensus with regard to the death worthiness -- which is a terrible word, but it is descriptive with respect to a particular defendant.

Now, with the killing of a law enforcement officer, I believe there have been seven death-eligible cases. Six have gone to penalty trial. So right away when the Supreme Court gets that case they know that there's a large percentage of that category of cases that go to penalty trial and ultimately reach a death verdict.

We also consider an individual proportionality, what we call precedent seeking review. Again, we look at the category of cases, and we provide the Supreme Court with factual summaries of cases in that category. And the Court reviews those cases for factual similarities. Now, in that context, I might add that morality is a question for the philosophers. We're only concerned with a comparison of the cases. And I know it sounds rather curdling, but what we're seeking to find is whether the case under review falls within a category that is particularly blameworthy. By that I mean, in the continuum of terrible murder cases, which cases are the worst and which cases are deserving of the death penalty.

We also monitor the system for systemic proportionality purposes. As I mentioned before, our inquiry in that respect is to determine whether there are factors influencing capital punishment decisions that are non-germane to the system, such as race or ethnicity. We're dealing in New Jersey with a relatively small number of cases in a statistical sense, and so we have a multifaceted monitoring system. We consider bivariate analysis, which in essence consists of raw numbers to the cases and cross tabulations. We also consider regression analyses, which are more sophisticated because a greater number of variables



and circumstances come to bear. And thirdly, we consider case sorting. By that I mean we'll look at a given category of cases, either aggravating factors and/or mitigating factors, and we determine the ratio composition of the cases falling within that category.

The idea and our purpose is to determine race or ethnicity as a factor influencing either prosecutors or juries in rendering decisions with respect to the death penalty. Our findings over the years have been uniform. We have applied the same procedures, I believe, since 1999 and yet our findings in each case have been uniform and consistent. This provides us with a certain degree of confidence in the conclusions we have reached.

Let me briefly describe our findings. Although our bivariate studies disclose statistically significant evidence that White defendants advance to penalty trial and are sentenced to death at higher rates than African-American or Hispanic defendants, this race effect is not sustained when employing the multivariate regression approach. That sounds somewhat arcane, and it is somewhat counter intuitive. With respect to raw numbers, it means that a greater percentage of white defendants are capitally prosecuted, proceed to penalty trial, and result in the death penalty than the minority defendant cases. In terms

of the penalty trial universe -- that's those cases that actually have reached the penalty trial, and the broader death-eligible universe, i.e., all cases that could be capitally prosecuted whether or not they were -- there is no solid evidence that the race of a defendant affects the outcome of the case.

In a similar vein, there is no solid evidence that the race of the victim is an important factor in determining which defendants are sentenced to death. In terms of actual death verdicts we do not find a consistent statistically significant relationship between the race of the victim and death outcome, i.e., death verdicts.

In contrast, our bivariate studies, multivariate regression runs and case-sorting techniques indicate that white victim cases advance to penalty trial at a higher rate than cases involving African-American or Hispanic victims. We hasten to add that the white victim effect I just noted is not sustained when county variability or county disparity is taken into account. County variability refers to the difference in rates among the counties that death-eligible cases advance to penalty trial. Minority victim cases are concentrated in counties in which a smaller proportion of death-eligible cases are advanced to penalty trial. In contrast, white victim cases are concentrated in counties in

which a larger proportion of death-eligible cases advance to penalty trial.

Significantly, our studies disclose that there is no intra-county disparity in the rates that white victim cases and African-American cases are treated. I should add one other confounding factor. White defendant cases proceed to penalty trial at a higher rate than minority defendant cases. White defendants, historically, almost exclusively kill white victims. Since capital punishment was reinstated in New Jersey, there have been only three death-eligible cases in which white defendants have killed African-American victims. African-American defendants generally kill African-American victims. But they also kill white victims and Hispanic victims.

Since white defendant cases proceed to penalty trial at a far higher rate than minority defendant cases, and since white defendants almost exclusive kill white victims, it is not surprising that white victim cases advance to penalty trial at a higher rate than African-American victim cases. In short, we find no consistent, reliable evidence that the race of the victim affects whether a death-eligible case proceeds to the penalty stage when county variability is taken into account.

Now, let me add one further matter that isn't in my

statement. Later on today, you are going to hear about studies that in some way affirm the conclusions we have reached, but in other ways are much more equivocal. In our studies regarding intracounty differences in capital prosecutions, we have excluded cases involving the killing of a law enforcement officer in the performance of the law enforcement officer's duties. The reasons are obvious. These cases are considered particularly heinous by the public and by county prosecutors. And that's true not only with respect to New Jersey, it's true with respect to every state in the union. Every state that has a capital punishment law has an aggravating factor relating to the killing of a law enforcement officer.

Moreover, our studies indicate that these cases are treated in a much harsher fashion throughout the country with respect to whether a capital prosecution is commenced in the actual outcome of that capital prosecution. Common sense under those circumstances required us to exclude those cases because again, regardless of the race of the victim or the race of the defendant those cases are generally capitally prosecuted, they generally go to penalty trial, and they generally result in a death verdict. And so again, we have excluded those cases. And we feel that that's dictated not only by common sense, but also by our

experience in this area, and by the experience of others who have studied systems in other states.

You will hear from a group today that takes a different view of that decision. And after all, it is simply a question of judgment. Statistics are not an exact science and therefore judgments have to be made. You know, our government is one of laws, but it's run by men and women with all their human frailties, and we have to bring to bear on the subject our common experience in this area and, to be honest, our common sense. So we believe that our methodology is excellent and has provided extremely reliable results.

One further matter deserves, I think, great attention: that of county disparity, county variability. County variability continues to be a major concern in the administration of our death penalty laws. Since the death penalty was reestablished by the Legislature in New Jersey, the fact is that counties have had widely differing rates in the extent that they bring capital prosecutions and to the extent these cases advance to penalty trial. There are probably a host of reasons for that fact, but it is a fact.

We have presented the Attorney General's Office with several screening models designed to ameliorate the geographic disparity in the rates in which death-eligible

cases are prosecuted. We have done so for this reason: our research thus far discloses no state in which capital punishment has been abrogated either by a legislature or by the judiciary because of county disparity. But it is essentially a new and open question. After all, consider this fact, or this hypothesis. The exact same case of a killing occurs in neighboring counties. All of the circumstances are the same. In one county the defendant is capitally prosecuted, is subject to a penalty trial, and is subject to the ultimate outcome of death. In the other county the defendant is not so treated; either through a plea bargaining or other processes he receives a penalty that is much less harsh.

We are of the view that the approach we have suggested to the -- We have suggested that centralization of the decision of whether to capitally prosecute, in the Attorney General's Office with the input of county prosecutors, would not necessarily cure the problem of county disparity, but would certainly diminish that phenomenon. We are of the view that this would also thereby diminish the white victim effect with regard to cases that proceed to penalty trial. As in other states, geographic variability is currently under study. So with that, I'm open to any questions that I can answer.

REVEREND HOWARD: Thank you very much. Justice Coleman.

JUDGE COLEMAN: Judge Baime, I think you have indicated already, but perhaps you should repeat it, that the selection of the universe of cases, as well as the methodology used in conducting proportionality review, have been established by the New Jersey Supreme Court, rather than you as the Special Master.

JUDGE BAIME: Oh, yes.

JUDGE COLEMAN: In other words, that you are the messenger.

JUDGE BAIME: I am the messenger, and I should have made that apparent. What we're talking about with regard to individual proportionality is post-conviction review by the Supreme Court. So this methodology was recommended by the Administrative Office of the Courts and the Special Master.

But the Supreme Court considered it, modified it, and ultimately adopted the factors for the methodology that I've described. It rejected other procedures that were recommended. So I don't mean in any way to suggest that this is a system in which only the Administrative Office of the Courts is involved and only the Special Master is involved.

And I might add one further matter. I shouldn't, but I will. The Supreme Court has really taken the lead

throughout the country with regard to ensuring that our death penalty laws are administered in a fair manner. Most states do not have a system as sophisticated and as curious in their attempt to determine whether the laws are being faithfully executed and fairly executed. We have a Chief Justice in New Jersey, who's about to leave, who has done a marvelous job in that respect, with whom we all worked very closely.

REVEREND HOWARD: Thank you. Then let me invite members of the Commission. Yes.

MR. KELAHER: Judge, good afternoon. With respect to its county variability are you aware of any state jurisdictions where the centralized decision-making is in effect? And if so, could you tell us how it's working?

JUDGE BAIME: I am not certain with regard to the states. The United States Attorney General has a system in which these decisions are made by the Attorney General. In fact, counsel are permitted to provide comments to the Attorney General on whether cases should be capitally prosecuted. Now, obviously the Attorney General can't canvas every case in the country, even Federal cases in the country in which the death penalty has been invoked, could be invoked, but there are designees and there are committees within the Attorney General's Office that --



MR. KELAHER: That's with respect to the Federal jurisdiction?

JUDGE BAIME: Yes. Now, in the states I'm really not fully aware of whether that decision has been centralized.

MR. KELAHER: All right, thank you.

REVEREND HOWARD: Thank you, Mr. Kelaher. Now, perhaps there are other members of the Commission who'd like to ask questions of Mr. Baime? Judge Baime, this has been excellent. We have Ms. Segars, please.

MS. SEGARS: Yes, Judge. Has the socioeconomic background of the defendant ever been analyzed in this, and has it been a factor? Being poor.

JUDGE BAIME: It certainly has been a factor that falls within the analysis we've utilized -- particularly regression runs. What we do is, we -- whenever there is a death verdict, we prepare a data sheet which is basically 90 pages. And among the information in that, there are socioeconomic factors. But we have never considered the bivariate sense. By that I mean, solely the extent to which -- or the effect upon the system with respect to socioeconomic factors such as poverty.

MS. SEGARS: So the impact of poverty has not been analyzed.

JUDGE BAIME: That has not been part of our charge. No.

MS. SEGARS: So theoretically, being poor can have an impact on whether or not a case is a death penalty.

JUDGE BAIME: Theoretically, you are correct. But let me add this, the one thing New Jersey cannot be criticized for is conscience. New Jersey has a big conscience. We have ensured that the public defender provide -- I shouldn't say we have ensured -- the public defender has provided excellent representation in these cases. I'm not going to --

MS. SEGARS: Well, actually, Judge, that's not the direction I'm going, because in fact you're correct. Public defender does -- and I can attest, because I am a public defender -- we do provide excellent representation, and resources are adequate. That's not the issue. The issue for me is whether being poor puts you at greater risk of being charged. Not the level of representation you get afterwards, but the fact that you -- Would the same person who acted the same way if you're from a rich family or you're from a poor family, the fact is whether or not you are more than likely or not to be charged with a capital offense or not, and whether that's been analyzed.

JUDGE BAIME: I understand. I can't answer your

question. I really don't know. I did want merely to note though, that when a defendant is charged with a capital offense, he or she receives excellent representation. I currently -- I'm retired five years. I live in Virginia. And I know that New Jersey ranks, I think, top, with respect to the level of representation once someone is charged a capital offense. But no, I can't answer your question otherwise.

MS. SEGARS: And I have a second question. And that has to do with -- you touched on the county disparity.

And I can only look back at my notes which are back as far as February, where Cumberland County had a greater percentage of all the capital cases in the state at that time. I think it was, I don't know, let's see -- As of October of 2005, the public defender, we had 17 clients charged with murder in Cumberland County. And six of those were facing the death penalty. The disparity in the counties, and as you mentioned earlier the same offense in one county in a neighboring county you're not facing the death penalty. How is it that you dismiss that that can't be unfair?

JUDGE BAIME: I don't dismiss it. I suggest that perhaps it could be and probably is. But whether it is recognized as a constitutional defect is a question that I

can't answer. It's open. All I meant to say is that we have researched the question nationally and we found no case in which county disparity, or I should say geographic disparity, has been found to be a reason for abrogating the death penalty by the judiciary, i.e., there is a constitutional problem. That doesn't mean it isn't a constitutional problem in New Jersey. It hasn't been addressed yet.

As I said before, it certainly is arguable that it is unfair. When I say that, I don't mean to sympathize with a defendant who's committed an awful crime. But I say that in the context of an overview of the system, which as a judge we are duty-bound to require fairness in a manner in which the death penalty statutes are enforced.

I was given a message, and I just want to supplement an answer I gave before. I think I made it clear that socioeconomic status is considered in the models and in the equations we used in regression runs. I know this sounds somewhat arcane, but it is taken into effect in determining questions of individual proportionality and systemic proportionality. What I intended to say is that we've never studied specifically the exact impact of socioeconomic factors on the administration of the death penalty laws.

MS. SEGARS: Thank you, Judge.

REVEREND HOWARD: So let me just be clear. What you've given us today with respect to the county disparities is simply that the data supports that reality. That's really what you intend to give us today, right?

JUDGE BAIME: Yes.

REVEREND HOWARD: Okay. And I guess, implied in your question, Ms. Segars, is perhaps a suggestion that class and economic status may, like race and ethnicity, become a factor to be studied, is that right?

MS. SEGARS: Yes.

MR. MOCZULA: Mr. Chairman.

REVEREND HOWARD: Yes, please.

MR. MOCZULA: Good afternoon, Judge. A couple of questions. You had mentioned -- I'll ask the other one first. Your predecessor as Special Master has or had recommended a far more comprehensive, involved and detailed system of review of death penalty cases, death-eligible cases. And over the years, with the Court's rulings, and I believe your recommendations and study, that system has been refined. In fact, one method of analysis has simply been abandoned. Would it be fair to say that the primary driving factor for that is the small amount of cases in New Jersey?

JUDGE BAIME: Yes. In statistical terms --

REVEREND HOWARD: Microphone, please.

JUDGE BAIME: I'm sorry. In statistical terms, when one is performing a regression study, the number of variables that can be considered depends on the number of cases. Because New Jersey has a relatively small number of death penalty cases, the number of variables that can be considered in that regression run is limited.

Professor Baldus was the initial Special Master appointed by the Supreme Court. He's a professor from Iowa, and he created models that ultimately failed because of what we call instability. By that I mean too many variables were considered in the context of the number of cases we had, and therefore the results reached could be the -- could simply be an artifact of the statistical strategy employed. The fewer cases you have and the more you cut the cases into pieces, in order to make determinations concerning fairness, the more unstable the result you're getting. And therefore, one of my principal efforts was to diminish the number of variables that could be considered. In the context of systemic proportionality review, i.e., determination whether race or ethnicity influences death penalty decisions, that was an easy thing -- I shouldn't say easy, but it was possible. And our regression models have been used by other states, most notably Maryland, in their studies. We're very

confident with regard to their reliability.

But -- individual proportionality we did away with regression runs, and as I mentioned before, we primarily consider frequency analysis, that is, the composition of cases, the ratio composition of cases within different categories.

MR. MOCZULA: And therefore any error within that study, because of the small sample size, would likely be magnified. Meaning if you're dealing with a small amount of cases and there's a mistake in the analysis, that mistake will likely be magnified, have a greater effect than if you had ten times the amount of those cases.

JUDGE BAIME: That's probably true, and that is why, as I noted, before we use a multi-faceted monitoring system. We don't just depend, for example, on regression runs. As you know, we conduct bivariate studies. We review raw numbers, and we also use case-sorting techniques. Let me just briefly describe what we do in that respect. We'll take a category of cases such as the killing of a law enforcement officer. And we'll determine ratio composition of those who have been prosecuted, those whose cases proceeded to a penalty trial, and those that ultimately reach a death outcome. We'll review those cases factually to determine whether there's any explanation for the sum of the

differences in the treatment of those cases. To some extent that inquiry is somewhat subjective. But that is what we do. And that is why we examine the cases utilizing three different modes of analysis, and we also examine the cases using alternative hypothesis.

For example, there are cases in which the defendant has been convicted, resulting in the death penalty, and those cases have been reversed. In that situation we utilized two different samples: the first case sample, which includes that case, and last case sample, which includes whatever history occurred thereafter. So our entire purpose in a statistical sense is to diminish the possibility that an error would significantly impact on one of the conclusions or findings we've reached.

MR. KELAHER: Just as a follow-up to one of your comments about being the exact same case, all the circumstances being the same in two cases. What you're really saying is, based on similar factors. You can't be sure that they're the exact same case and all the circumstances are the same. That's a judgment based on certain uniform factors that you're applying to reviewing the cases.

JUDGE BAIME: Not only that, as you yourself noted in various briefs submitted, a murder case is a terrible



dramatic event. And each case, I'm sure, has its own flavor, and each defendant has his or her own personal history. We do the best we can to ensure that the cases we are comparing are similar -- are alike. But after all, we all know that to some extent reality does not permit exactitude in that type of analysis.

MR. KELAHER: I just want to note my personal appreciation for your good faith and commitment to the process, Your Honor. Thank you.

JUDGE BAIME: Thank you.

JUDGE COLEMAN: Reverend Howard, I just have one --

REVEREND HOWARD: Let me ask that we neutralize some of the mikes here so that the volume -- good. Justice Coleman, let us have your -- are you going to speak now?

JUDGE COLEMAN: Judge Baime, I hope this question is not unfair, but if you think it is, please say so. The legislation creating this Commission assigned to us, as one of the missions to propose legislation and subsequent to the moratorium planned by the Legislature, pieces of legislation. One, of course, was proposed by Senator Lesniak, recommending that the death penalty itself be abolished and there be substituted for it life without any consideration of parole eligibility. If that were to become the law, do you have any idea or an opinion on whether or

not under that legislation proportionality review would serve any useful purpose?

JUDGE BAIME: I can see situations in which I do feel that proportionality review would be helpful. As you know from experience in other types of cases, not death penalty cases, the Court often has occasion to consider the fairness of a sentence and the Court has adopted, in several cases, a framework of analysis to accomplish that mission. It's a value judgment whether life without parole is so onerous a penalty as to impel an inquiry greater than that employed in other cases. So I can't really answer your question other than by making those observations.

REVEREND HOWARD: Is it not fair to say that scientific approach to proportionality is meant to minimize discretion or value judgments in these cases? Yes?

JUDGE BAIME: Yes, it is.

REVEREND HOWARD: Mr. Haverty.

MR. HAVERTY: Just one quick question.

JUDGE BAIME: May I just say one further thing in that respect? Yes, one of our purposes is to diminish the extent to which subjectivity is part of the analysis of cases, both in regard to the fairness of the penalty and in other areas of the law. But I don't want to leave the impression that the application of social science techniques

is a silver bullet or that there is any formula that would have universal verity in determining what is fair and what is not fair. In the end we have to expect that human judgment will come to bear.

MR. HAVERTY: Judge, I just have one quick question. I have not had the opportunity to read the statistical tomes, but I just wanted -- When I'm looking at it, just so I can have context for it, is one of the factors that was considered when you were doing the proportionality the ratio composition of the juries, both in and of themselves and relative to the race of the defendant?

JUDGE BAIME: No.

MR. HAVERTY: Was that ever considered as part of the model?

JUDGE BAIME: No, we've never considered it. Firstly, I don't think that could be retrieved from our database, and I don't think it's a fact that's commonly recorded in trials. Least not when I was --

MR. HAVERTY: Do you have any sense whether or not that information might be useful in an analysis, or it's just something that nobody ever considered?

JUDGE BAIME: My answer is not helpful. And it's, I hope not.

MR. HAVERTY: I didn't mean to throw you a curve

ball, Judge.

JUDGE BAIME: I can tell you this. As a trial judge, I've sat in Essex County and my experience is that juries acted in accordance with the instructions we gave them. I think conscientiously, they did the best they could. It was suggested at one point, well, why do you have a jury decide a case, why don't you have judges or experts, because they're experienced and seasoned in the criminal justice system? And I guess the answer is. when one is facing a criminal prosecution one prefers generally to submit the case to 12 fools rather than one. By that I mean all of us are subject to committing mistakes, but in the end we have faith that the jury will be right in its determination and will be aided by its common sense and experience.

MR. HAVERTY: Thank you, Judge.

REVEREND HOWARD: The Chair would like to express a bias here. I think we've stumbled upon yet another variable that deserves investigation. And I appreciate your judicious response to that question. But one of the most important things you've said, for me, is our government is one of laws, but administered by human beings. That being the case, it seems to me, on all sides of these cases those issues bound to be relevant need to be applied. I'm not

soliciting your response to this, but I'm speaking because I know this is on the record. I think that this is an issue that deserves attention by this Commission in its final report.

Again, I want to thank you for the way you have come and shared with us. And we have one final question from a member of our Commission, Ms. Garcia, and then we're going to invite our next witness.

MS. GARCIA: Judge Baime, I'm a Victim's Advocate and my concern is what our current practices actually do to the survivors. It's my belief that we will never, ever execute anyone in this state, and what we do is put these families through sheer hell.

My question to you is, you stated, I believe, that we should have a similar review process if we were to do away with the death penalty, and we would examine life without parole the same way. Is that correct?

JUDGE BAIME: Well, what I personally -- I really cannot provide helpful information in that respect. I can only say that the judiciary currently examines cases for fairness with regard to sentencing using a fairly elaborate framework of analysis. Now, whether that would be sufficient in cases in which the penalty is life without parole -- is the maximum penalty -- or whether a greater

degree of scrutiny would be required, is a matter of judgment which I can't provide. The Legislature has to provide.

REVEREND HOWARD: The Chair is going to violate his own rule. First, I'm going to ask, Ms. Garcia, if you have a follow-up, and then Mr. DeFazio will come.

MS. GARCIA: Not really a question. More of a concern that we were not looking at replacing one problem with another. That would be just as distressing to the survivors.

JUDGE BAIME: Well, certainly it would be a factor to be considered by the Legislature, whether it would elongate the proceedings. But again, as a Judge my responsibility was to apply the law, not to make judgments as to whether the laws were good or bad. And that sort of continues even now, even in my conversations with my wife.

REVEREND HOWARD: Mr. DeFazio.

MR. DeFAZIO: Judge Baime answered my question. I just want to make it clear. Proportionality review in New Jersey is called for by the statute and is not something that is required by the Constitution, correct?

JUDGE BAIME: Well, the Federal Constitution does not require it.

MR. DeFAZIO: Right.

JUDGE BAIME: As you know, at one point there was language in one of the United States Supreme Court decisions that seemed to indicate to the contrary. Our Supreme Court has decided, however, that some system or proportionality review is necessary and an essential ingredient in its obligation to judge the fairness of that sentence.

MR. DeFAZIO: And I just want to make this clear, because I share Ms. Garcia's concern. You could have a life without parole statute in New Jersey without the requirement of proportionality review, clearly, right?

JUDGE BAIME: Yes.

MR. DeFAZIO: Okay. Thank you.

REVEREND HOWARD: And just to finish that point. Indeed, we already have such a statute on the books, because the very statute that we have been asked to call upon to recommend some changes in contains at least two provisions.

One is the murder of a police officer, where the jury is not unanimous in its weighing of the aggravating and mitigating factors. The penalty there is death -- I'm sorry, life without parole. And another instance is murder of a person under the age of 14 that occurred during the commission of a sexual assault such as rape. Again, the statute does not require proportionality review. And to my

knowledge there has been no constitutional challenge saying there ought to be. Thank you.

JUDGE BAIME: Thank you very much. I very much appreciated being here, and good luck.

REVEREND HOWARD: Thank you. Now the Chair would like to invite Mr. Robert Blecker. Mr. Blecker is Professor at New York Law School and a leading advocate of the death penalty. Welcome, Mr. Blecker.

MR. BLECKER: Thank you.

REVEREND HOWARD: Again, you have 20 minutes to offer your testimony. I will give you a two minute alert, following which I hope you will entertain questions from members of the Commission.

MR. BLECKER: I appreciate it. Of course I'm honored to be here, but I must tell you I feel more burdened than honored. I've gone through every page of the transcript of every hearing of this Commission because I believe I'm the lone voice from the academy that will appear before you in favor of the death penalty. And in my statement -- which, of course, I don't have a prayer of getting through, but I've selected probably close to a hundred questions that Commission members asked or responses that were given. But I think either deserve emphasis, need to be supplanted, need to be supplemented, need to be emphasized, or need to be



rebutted.

As I read these Commission hearings so far, essentially your concerns have been divided principally into eight, and I hope to very quickly cover all eight, at least summarily, and then provoke questions. And I certainly do welcome them.

It seems to me you've emphasized retribution, you've emphasized deterrents, you've emphasized costs, you've emphasized innocence, you've emphasized life without parole, you've emphasized public opinion, you've emphasized race. And then of course is the question of what should you, as a Commission, recommend and do about all these things? Let me start with retribution.

Retribution by consensus is certainly not supported. It's in fact more disparaged than supported, but by consensus it provides the principal support for the death penalty if any is warranted. However, retribution has been distorted by witnesses here, distressingly. Retribution has consistently been equated by with revenge. It's been called atavistic. It's been called emotional. And it's been called fundamentally hypocritical. That is, we say we value human dignity. We say that killing is terrible. We say that murder is terrible, and then we respond in like kind. So aren't we disparaging the very value that we claim to

support?

The first and categorical mistake here is not to equate retribution with revenge. Retribution is not revenge, although they come from a common source which is the desire to answer pain with pain. But they are not the same thing. They are very different. Revenge is not proportional. Revenge need not be. Revenge need not be directed appropriately. Collective community punishment can be revenge. It's not retribution.

And revenge is not limited. Retribution is limited, proportional and correctly directed. Be very aware that retribution provides the basis for limiting punishment as well as for affirming it. We, as advocates of the death penalty, are just as concerned that those who do not deserve it do not get it, as we are that those who do, do. And the United States Supreme Court, while it has disparaged retribution fairly consistently has nevertheless used it without acknowledging it. When in Cocca v Georgia they struck down the death penalty as just proportionate to the rape of an adult woman; when in Atkins v Virginia they struck down the death penalty for the mentally retarded; when in Roper v Simmons they struck down the death penalty for those who killed one less than 18 -- in all these cases, they had an abiding conviction that justice was not served,

that it was a disproportionate response to execute. They were utilized in retribution.

Retribution is past-oriented. It is a direct conflict to the principal utilitarian justification for punishment, which is deterrence. But retribution is not hypocritical. For if it is to disparage the value of life to take life, then ask yourself, what is the appropriate response to those who kidnap? We imprison them. We deprive them of their liberty as a response to their deprivation of the victim's liberty. Does that disparage liberty itself by depriving liberty?

And what do we do sometimes to those who steal? We fine them. We deprive them of property. Does that thereby disparage the value of property? Of course not. What you're seeing, essentially, with retributivism is the essential human-like kind response. Fighting fire with fire; giving someone a taste of their own medicine. This is at the core of human dignity. It, of course, needs to be refined as retributivism has been refined. An eye for an eye has also been disparaged. Do recall culturally, that an eye for an eye was a cultural advance because it limited punishment. It was understood originally as only an eye for an eye, no more than eye for an eye.

So the point is that the past counts, that

retribution is not revenge; and for those who insist on equating retribution with revenge, then when you turn to deterrence, recognize that for what it is. Because if retribution is pure revenge, then deterrence is pure terrorism, as Hobbes -- the first and greatest modern utilitarian -- said in disparaging retribution and proposing deterrence. He said, "The aim of punishment is not revenge, it's terror."

Now, we've come to appreciate that deterrence is not pure terror. You should also appreciate that retribution is not pure revenge. I won't have time to go through retribution in any detail, the statement does some more. But let me just point out again, a disparaged feature of retribution, and that is emotion.

Witnesses, several, and Commission members, some, have disparaged emotion. We should all be engaged in simply a rational inquiry, an abstract ideational inquiry. And you can be a retributivist and be that. Immanuel Kant was one of the great retributivists, and he believed in the death penalty as a matter of duty, of abstract duty. But there's another strain of retributivism to which I subscribe, and I suspect most of the American public subscribes, and that is a motive for retributivism. That is, that emotion is appropriate. That emotion rightfully -- emotion conformed,

emotion restricted, but nevertheless emotion in the appropriate sets of circumstances rightly move us. If a juror does not feel angry at the defendant, if a juror does not hate the defendant for the despicable, callous, cold, heartless murder that that defendant has done, for the damage that that defendant has caused, if the juror does not hate that defendant, the juror should not condemn that defendant to death.

And there was a whole tradition of this going back to James Fitzjames Stephen, for example, the great 19th century English judge and greatest historian of the Criminal Law, who says explicitly, and it's quoted in the statement, **A**That it is right sometimes to hate, and it is right to act on that hatred.**@** By the way, you need not be a proponent of the death penalty in order to acknowledge the legitimate role of emotion. Increasingly, abolitionists themselves, as humanists, are recognizing that emotion can rightly direct us when combined adequately with reason. But let me move on from retribution to deterrence.

The deterrence argument here and throughout your hearings has been overstated to the disadvantage, by the way, of the abolitionist. You've heard statements that there was absolutely no evidence that the death penalty deters. Of course that's ridiculous. The death penalty does deter.

But so can life without parole. The real question is does the death penalty deter anymore effectively than its principal alternative, live without parole? As the British Commission, a Commission in whose tradition you now sit and probably the greatest one ever to sit to date -- we await your report -- but as the British Commission said, we can number its failures, but we can never number its successes. We don't know how many people would have otherwise killed who didn't but for the death penalty.

But again, the question is, is it a more effective deterrent? Now, Jeffrey Fagan will be testifying, and he certainly is an expert on this, and he'll be giving you his take on it. But as you've had testimony already, the last several studies have shown with sophisticated analysis that the death penalty provides a more effective deterrent than its principal alternative: life without parole. Those studies themselves are, however, subject to criticism, and that criticism is now coming from the abolitionist community.

Let's assume that those who propose and purport to establish that the death penalty is a more effective deterrent admit that through the statistical analysis their case is not overwhelmingly proven. The point is, as was made in earlier testimony before you, that it has not only

statistics on its side, it has human nature on its side. It has logic on its side. As Fitzjames Stephen once said, "It is one of those arguments," and it is also quoted in the statement, "that is so obvious that it is more clearly established than any argument can be made about it."

Everything we would have, most of us, we would give for our lives. Life is the ultimate threat, death is the ultimate terror. And so it's quite clear. And if we're looking for supporting anecdote, having spent 2000 hours over 12 years interviewing convicted killers and probing their minds and psyche, I can give you more than one. And one particular comes to mind.

The guy, let's call him Joe, who described a situation in which he burst in to rob drug dealers in Virginia, discovered much more drugs than he expected, told his cohort to wait outside and was about to kill them when he changed his mind. And I asked him well, what made you change your mind? And he said well, what flashed in his mind was when he was in prison in Virginia and he used to mop the floors and pass the electric chair and look at it at the moment when he had the gun to their heads the image of himself strapped in the chair went through his mind and he let them live. And then I asked him whether he had any other similar situations and he told me one in Washington,

DC which has no death penalty and I asked him what did you do and he said well, I blew them away. And I asked him why, and he said because I could face what DC had. I'd been there before, I could go back to prison again. Now, that's only one anecdote, obviously, and there may be counter instances of brutalization, but it is clearly an overstatement to say that there is absolutely no evidence of a deterrent effect.

Both common sense, human nature, logic, anecdote, and the latest studies indicate, and it is almost certainly true that there is a marginal deterrent benefit for the death penalty over its principal alternative, life without parole. Now, for most of us who are retributivists that's ultimately irrelevant, because it's the past that counts. It's not a cost-benefit calculus in which we should be engaging.

But speaking of that very quickly in terms of costs, you heard the \$250 million figure banging about, you've also heard grounds to conclude that it's wildly inflated. One thing I would just point out about cost before moving on is that there is one feature of the death penalty that has never been calculated in the costs. The most recent studies seem to show that it costs 30 to 70 percent more to maintain death penalty than in an individual case in life without parole. Thirty to 70 percent more.



But in the every study that's cited, and more than once, in the testimony before you, the Kansas study for the first, and I think only time -- there may be another one that notes it -- they know that there are three benefits to the death penalty that they did not and that no one has yet considered. And that is that costs are reduced by the hundreds of thousands of dollars saved for everybody who pleads guilty and takes life without parole and thereby waives appeals who would as otherwise death-eligible in order to avoid the death penalty. That has never been subtracted by any study. And if you do that it may turn out that the cost figures come out differently, that it's in fact cheaper to execute than it is to maintain life without parole.

However, even if it isn't, even if it's more expensive, of course, the bottom line is this commission has observed -- or individuals have observed -- in some witnesses is that justice isn't cheap. And that if the death penalty is the only just alternative then we have to do it even though it may be expensive.

Innocence. Innocent people on death is a nightmare that haunts us and it haunts us retributivists because remember, we are just as committed to ensuring that those who do not deserve it don't get punishment as we are that

those who do, do. Do recall all the testimony before you and probing questions by you. There is no ascertaining, there is no evidence that anybody on New Jersey's death row is factually innocent. And that is also true in states that are relevantly similar in value and concerns and safeguards to New Jersey. There is no claim of innocence, there is no evidence of innocence of anybody on Oregon's death row. There is no claim of innocence, there was no concern of innocence of anybody on New York's death row.

Interestingly enough a few years ago when the Ohio Legislature offered all its death row inmates free DNA testing, of the 201 inmates on death row guess how many took them up on the offer? Zero. Now, that's not to say that there has not ever been an innocent person who has been executed in the United States. Proponents of the death penalty are fond of pointing out that we have never executed a demonstrably innocent person. I think that that's an unfair statement and I won't make it. My best guess is we have executed at least one innocent person in the United States. We're not going to do it in New Jersey with the safeguards you have, but we have done it.

How do I feel about it? I feel sick. But one more word about innocence, and I note it's a very politically incorrect thing to say, but innocence is of two varieties.

One Commissioner here said that the testimony of a witness was particularly compelling. That witness -- and you've had a parade of witnesses orchestrating their own innocence who have been released. Now, I'm willing to believe that most, perhaps all of them were factually innocent. But one of the witnesses named four others who are innocent on Florida's death row, one of whom was Benny Demps. I witnessed Benny Demps die. I know what the situation was, I know it because I studied the case to find out what it was that I was witnessing and make sense of what it was that I was witnessing.

There was a couple, the Puhlicks. She was named the flower lady because she had a green thumb. He was a construction person who moonlighted and worked for the defense department. Their lifelong dream was to retire in a house in Florida. She wanted to be in an orange grove. It looked like they could follow that dream when a cousin called them and said there was now a handyman special available. And so they went down to look at it.

As luck would have it Benny Demps had just robbed a house and taken the safe into the orange grove. As they drove down he pulled out his gun, announced that it was a stick-up, forced them out of the car, forced the husband into the car, take out the spare tire, back into the car.

As Mrs. Puhlick nervously fumbled for her wallet to comply with his demand from the robbery she dropped her lipstick, picked it up and he shot her in the stomach.

He forced the husband into the trunk and then he forced the cousin into the trunk and then he forced her into the trunk. Believing he slapped the trunk, and before he left, when they were desperately trying to get out of the trunk, he sprayed it with bullets killing two of them, but the wife absorbed the bullets meant for the husband. He lived. He had a sustained identification. The evidence was overwhelming. It matched that there was no doubt that it was he who did. And the jury sentenced him to death.

Then Furman was decided and he, like everybody else, was released from death row. Once in prison now among general population he killed again. He probably killed a snitch, and maybe he didn't do it. The proof was beyond a reasonable doubt. No, he shouldn't have been death-eligible, in my view, but he was, and he was condemned to death. Not for that particular crime, and he was eventually executed.

Now, imagine, although the evidence isn't there, imagine he didn't kill the snitch while in prison. Imagine he was executed. Was he an innocent person? Well, in one sense analytically factually for that crime. But having unquestionably, undoubtedly killed the two earlier and been

rightfully sentenced to death he was poetically -- it was poetic justice if it was not analytic justice.

So distinguish between innocence and innocence. I got to know David Aitchy@ Brooks quite well. I believe he serves a life sentence for a murder he never committed. But he has admitted to me that he shot 57 people when he was 19 years old. And so had he been executed, he was once on death row, he would have been technically an innocent for the crime he committed. But he would have been guilty and deserving of it for other things.

Life without parole. You do not make your decision in a vacuum. You're asked to determine whether death is the appropriate punishment ever or its alternative life without parole. Now, Ms. Garcia just raised the problem of replacing one problem with another on how distressing it was to the survivors. This is one of the few areas in which you haven't probed, and I urge you to do it. You have an obligation to understand what is the quality of life for those who serve life without parole. I've spent hundreds of hours in five states now with video cameras -- full access to document what is the daily life of people who serve life without parole. If you knew it, it would appall you. I haven't gone into New Jersey; I'm trying to.

But I called yesterday, for example, to try to find

out for purposes of this testimony -- and I asked the public information officer if a person is spared the death penalty and other wise death-eligible and sentenced to life without parole does he thereby serve the rest of his sentence in maximum security or what's the least restrictive setting he can get into? The answer was well, of course he's on maximum security. And I said are you sure, because that's not the way it is in Tennessee, which I visited and documented. That's not the way it is in Oklahoma, which I visited and documented. That's not the way it is in Illinois. Why should it be that way in New Jersey? He said well, come back and I'll check. He came back sheepishly and said, I'm wrong.

A person who could otherwise get the death penalty may -- and the statute is not clear, it is no more than five years and it may still be immediately, I haven't yet been able to determine it -- be sent to medium security prison. What's life like? There's every reason to believe that New Jersey is relevantly similar to Tennessee, to Oklahoma, to Illinois.

If that's true they're playing volleyball, they're playing softball with line based paths and umpires and uniforms. You know, the standard line is they never see the light of day. You throw them away and lock away the key.

Well, if they never see the light of day how come the commissary includes suntan lotion with an SPF factor of 30?

In fact, they more than see the light of day. They watch colored television, cable television, in many situations they are free to roam around.

What you've heard -- testimony, telling testimony, heart wrenching testimony from the victims families, saying leave us alone. If only you had life without parole, we wouldn't be here. We could move on with our lives. Could they move on with their lives if they really understood what the quality of life is for those who do actually serve life without parole day to day? You owe it to yourself to find that out.

I beg you, help me get in and if you don't trust me help somebody else get in with a video camera and then let me present or let someone present -- I'm prepared and will as part of my appendix later present you video testimony of what life without parole is like in Tennessee and Oklahoma so you can get a visual sense of it. There's every reason to believe it's the same in New Jersey. Look at the Department of Corrections mission statement. Nobody's job is to punish. They all disavow it.

Public opinion. It's been doubly distorted. You've heard presentations that life without parole is the

preferred alternative to the death penalty. But look at the question that's asked. For cases of murder, which do you prefer: the death penalty or life without parole -- life with no chance of parole for cases of murder? Well, what about someone like me, and I suspect most of you, if you support the death penalty, that recognize that it's only appropriate in five percent of murders? Which do I think is the better punishment? Life without parole or death? Well, almost always life without parole. But which way am I to answer that? With absolutely no possibility of parole. That's what the Gallup poll says. But of course there's the possibility of parole. If you want a reason for that possibility? It's very simple. Increasingly you hear voices that we should imitate Europe. You may not know this, Europe has abolished life without parole. The papers don't report it. They've abolished it a few years ago. It doesn't exist. Can you ensure a future Legislature following the leadership of Europe won't also abolish life without parole? And also of course the public mistakes, absolutely no chance of parole with absolutely no chance of commutation. So do read the statement.

Now, race and geographical disparity. I can skip most of it because Judge Baime reported it. The rates of defendant effect does not exist or if it does it



disadvantages Whites. The race of victim effect collapses into geography.

Now, there is a race effect that nobody has focused on, and it's real. In some ways the argument is dismissed. You hear the argument, and you've heard it already as a Commission. Twelve percent of the population, 44 percent on death row. Doesn't that show racial discrimination? And even some abolitionists reject that and say no, because analyze who's committing the death-eligible crimes. Twelve percent of the population is committing more than about 50 percent of the death-eligible murders and yet there are only 44 percent on death row. But that assumes that the definition, and this is an answer to Ms. Segars, that assumes that the definition of capital crimes is race neutral. It is not. The robbery aggravator is a race-biased aggravator that disadvantages class and disadvantages race. It must be, it should be eliminated. It is a single change you should make.

And finally, because I fear that I'm going to be called to stop, the other area in addition to life without parole, the quality of life for lifers without parole to make that moral decision that you have ignored, the only other area that you substantially ignored is, what should you really do other than one of two issues? And it was just

raised for one of the rare times. That is --

REVEREND HOWARD: Your time is up, but I want you to complete your point.

MR. BLECKER: Thank you. I appreciate it very much. So far the presentation~~s~~ been two options. Either abolish the death penalty and replace it with life without parole or stand pat. Both of those are deeply mistaken. You have a rare opportunity to debate and deliberate and instead of either doing the indiscriminate, morally indiscriminate act of abolishing it or in my view the morally indiscriminate act of keeping it, what you should be doing and focusing upon is refining it so that you limit it in definition to only the worst of the worst which will reduce the cost factors, which will reduce the racially disparate factors.

Now, concretely, is there a proposal on the table? Yes, there is, and I hope someone will ask me about it. It~~s~~ in the statement. I spent six pages with your death penalty statute proposing concrete reforms. Provision after provision after provision. No witness has yet done that, and you~~ve~~ not pushed anyone to do that. I urge you take a careful look at your present death penalty statute and ask yourself as Senator Russo even suggested -- and asked -- and principal author of it, ~~A~~Can't it be improved?@ It sure can,

and it should be.

REVEREND HOWARD: Thank you very much and I hope you are ready to hear from members of the Commission. The Chair would like to recognize Ms. Garcia.

MS. GARCIA: Professor Blecker, I just wanted to let you know that you are not alone. I agree with a lot of what you said. However, I'm a realist and my goal is to help the survivors. I have as much compassion for the perpetrators of these crimes as they had for their victim, which is none. But the bottom line is that we are in one of the most liberal states in the country. We will never execute anyone in this country. I don't care if it was the Devil himself. They will not be executed.

And these families go through hell having these cases being overturned and overturned. And they live on death row, and if someone sneezes somebody runs and brings them a tissue. There's no justice for victims as long as this exists. And I think seeing someone imprisoned for the rest of their life, and I know what it's like in the prison, but they're at least away from the public for the rest of their lives and these families aren't going through the nightmare of going through trial after trial. And the bottom line is, you can't get the same conviction 18 years later. So they're out walking the streets. That's the situation we have.

And as I said, I agree with a lot you say, but it's not working for the survivors here in New Jersey, and it never will. We wouldn't execute anybody before all these case -- the DNA, and the rest of the country is going in the direction it's going now. Why in the world would we start now?

MR. BLECKER: Two things in response to that. The first is I very much appreciate the concern of a more victim-centered system of justice. And in fact, some of the proposals made in the modification of your death penalty statute directly address that. For example, right now the statute says that when victim impact evidence is introduced in a capital trial a photograph may be introduced of the victim. That should be extended and expanded to audio and videotapes.

Secondly, if we ever do counter to your assurance and fear, if we ever in New Jersey do execute anybody, in my view the whole execution process ought to be more victim centered. So, for example, not only should the condemned make a last statement, but really the last statement the society should have made for them is a video or audio or visual collage of the victim in the last birthday party, loving life, living, et cetera.

Now, to directly address the concern of why is it

that we have no substantial prospect of having an execution in New Jersey, part of it is the fact that the bench is partly composed here and around the United States of abolitionist judges. There was one very brief mention in testimony before you that judges no less than juries should be death qualified. For example, in Pennsylvania, interestingly enough in the Federal bench, when I last lost count of the last 20 death penalties that came up before the judiciary, 20 out of 20 were reversed on appeal. The very famous Columbia study, one of whose principal co-authors is to succeed me in testimony today, showed that 68 percent of the death penalties were reversed on appeal. Now, some part of that is because of error, but we all know that there is no perfect trial. There is always error. The question is whether error arises to constitutional error or whether it's pre-textual error. So one way that you could begin to handle this is to actually have the judiciary be death qualified when they sit on capital punishment cases as well as the jury.

And finally, let me say to you, as painful as this is, that while the victims= families are the primary surviving victims, we are all to some degree, as community, victims. As the ancient great law giver Solomon said, in a well-governed state, citizens, like members of the same

body, shall feel and resent each other's injuries. And the primary victim is dead. And so another proposal made in modifying the statute would be to acknowledge something that abolitionists' organizations have proposed and proponents tend to disparage. And that is the living will.

If a victim says in advance, "I am committed to opposing the death penalty; should I ever be murdered, I do not want my killer killed," that living will should be able to be introduced at the penalty phase. Similarly, if a victim -- if the evidence is substantial and clear, judged in camera first, you can see the details in it. Similarly, if a victim says, "I am in favor of the death penalty, and should I ever be killed under circumstances that are death-eligible, I do want my killer to face the death penalty, that, too, shall be introduced. Because the past counts.

And now, finally, even if it's never effectuated, there remains a value, and I understand it's painful for the victim's family, but there remains a value in condemning someone to death who deserves to die. When Peterson was condemned to death recently in California and the point was made that only three percent of death row in California -- 11 percent -- three percent, I think, has been executed and he's unlikely, Scott Peterson, ever to be executed. One of the answers was, and I think rightfully given, this is a

solemn ritual of denunciation in which 12 people, and I can tell you from condemned killers whom I have interviewed on death row who say, what gnaws at me in part is that society said I'm not worthy to live. That's right. And where that's so, it should be said apart from whether we ever carry it out.

MS. GARCIA: Profession Blecker, if they're never executed there is no value in it, if it's never carried out. It's another injustice to the survivors.

MR. BLECKER: Yes, it is.

MS. GARCIA: Because not only did that perpetrator take their loved one's life, now he's getting away with not serving a sentence that he received. It's a bigger slap in the face.

MR. BLECKER: You're surer than I. As we know, there is-- The first significant death penalty case has made its way through the Appellate process and New Jersey will soon, unless this Commission in my view wrongly and tragically recommends -- and the Legislature follows that recommendation to abolish it, we're going to see whether New Jersey has the courage of its professed convictions to do justice as it has previously articulated.

MS. GARCIA: Professor, I'm make you a wager like I made a defense attorney and a prosecutor when I heard that

Marshall would be executed. It's never going to happen. And to give the families the impression that it's going to happen is cruel.

On your suggestion about videos, by the way, we do have videos in New Jersey. It's up to the individual judges, but Mr. Pompilio was here some weeks ago and he was responsible for that in the state. As I say I agree with you, but sadly the reality in New Jersey is very, very different. We're not Texas, and that's good in some ways. But as far as the survivors, you know, when is this cruel hoax over for them?

MR. BLECKER: But I beg you, look into the conditions with life without parole and you'll realize it's yet a crueler hoax, and it would be even more painful to the survivors if they realized that mass murderers of children are playing volleyball, ping-pong, watching cable TV, sitting --

REVEREND HOWARD: I'm afraid I'm going to interrupt this exchange. Perhaps there is some additional question from a member of the Commission? Rabbi, I'm going to recognize you first.

MR. SCHEINBERG: Thanks very much, Professor Blecker. Two questions related to the notion of worst of the worst. First is, are there people who are currently on



New Jersey's death row who, in your view, do not belong on death row? And then second, is worst of the worst, in your view, an objective or subjective determination, and do you feel that you speak for a consensus of who is worst of the worst?

MR. BLECKER: Sadly and unfortunately I'm going to have to duck your first question, because when I finished the roughest draft of the statement -- and I apologize for all the typos -- at 3:30 this morning, having spent 60 of my last 80 waking hours on this, I decided to try to get some sleep rather than review in detail the profiles of the nine. My sense is, but not my expert opinion, that they would and should qualify.

But let me focus on the second part of your question, which I think is the primary one. Is this subjective, objective, or is this just a matter of opinion?

In common, absolutists -- of which I am one, but so are many abolitionists -- believe that there is a moral fact to the matter, that this is not just a matter of opinion. Even if you abolish the death penalty, I take it there will probably be common ground among most of us that some crimes are objectively worse than other crimes. Even if they wouldn't respond with death. And furthermore, that some murders are objectively worse than other murders.

And so then, the adjunct question which you asked is, can we and how can we determine which they are, and have we adequately done it? My view is that New Jersey has not yet adequately done it. It's unlikely to adopt all the reforms I proposed, but more importantly it's a work in progress and you collectively deliberate and modify and act, you still wouldn't have gotten there. But there is a core. And just because I can't tell you the boundary of where the worst of the worst becomes merely the horrible, I can clearly indicate cases which clearly belong as the worst of the worst and others which clearly do not. The robbery-felony-murderer who sticks up a 7-11 Store and the clerk grabs a gun from under the counter and then the robber kills him is not the same person who maintains a torture chamber like Charles Ange in his basement, kidnaps women with their children knowing once he's got the kids he's got the women, videotapes torture over weeks, exposes them to unspeakable misery, rapes and then murders and then mutilates them, that's not the same person. They don't inhabit the same moral universe. Charles Ange unquestionably deserves to die. He is at the core. The robbery-felony-murderer, ordinarily absent more and other aggravating circumstances though presently death-eligible in New Jersey, does not deserve to die.

So the answer is yes, there is a core to objectivity about this. The boundaries are subtle and difficult, and New Jersey has gotten closer than it once was, can get a lot closer and hopefully will. But it's difficult ever, and perhaps impossible, to get it exactly right. But that you leave to the success of filtration systems of prosecutors deciding when to go for death and ultimately juries deciding whether to give it, and appellate proportionality analysis deciding whether this qualifies as the worst of the worst.

REVEREND HOWARD: Please, Mr. Moczula.

MR. MOCZULA: Professor, there are, as you had mentioned, discussions of the cost of the death penalty and the suggestion from some of the witnesses that have appeared before us that if the death penalty was abolished and replaced with some form of life without parole that you can pluck an identifiable number of cost savings and then perhaps supply it to victim services or law enforcement services. In your experience with review of other death penalty jurisdictions, what can you tell us about the ability to first, make that type of identification; and whether if there was some type of savings along those lines, it was ever used for the purposes that have been mentioned?

MR. BLECKER: I don't know whether they've ever used

it, but what I can tell you is that the studies haven't adequately revealed or been able to reveal whether in fact there is a cost saving. Number one, as I mentioned -- and Kansas, I believe, is the only one to ever acknowledge it. They do not include the thousands of dollars saved in investigative, trial and appellate costs for each guilty plea obtained of a death-eligible defendant who pleads guilty and accepts life without parole in lieu of the death penalty.

They do not include the costs -- the geriatric costs, the increasing costs per year to stay on life without parole as you get into your 70's and 80's. And finally, if you are utilitarian -- which I am not -- if you think that the moral way of doing this is doing the cost benefit analysis, then there is an analysis that's very troubling and that's been referred to in Commission testimony before you earlier. And that's an essay by Sunstein and Vermile, a recent essay which is controversial in which they point out what they call life- for-life tradeoffs. Because if the recent studies are correct, and if the logic of deterrence is correct and in fact it is a more marginally effective deterrent, then in terms of costs one of the cost benefits of the death penalty are the lives, the innocent lives that would otherwise be lost without it, which should be measured

against the remote possibility of the innocent lives that will be taken with it. And that's not been factored in. Again, for retributivists, costs aren't the ultimate issue. But unquestionably the studies have not focused adequately.

Is there the political will to allocate the money saved if there is money saved to other purposes? I doubt it. If you're really interested in innocent lives lived, I bet you an investigation will reveal a very dangerous traffic intersection where only \$10,000 spent will actually save an innocent life from a car crash. We are not a society committed on the margin to minimize innocent lives lost.

REVEREND HOWARD: Are there any further? Mr. Haverty.

MR. HAVERTY: Thank you. Professor Blecker, very early on in your presentation I think you were discussing philosophical underpinnings of retribution. And I detected from that, and correct me if I'm wrong, it's your position that retribution is a moral imperative.

MR. BLECKER: That's correct.

MR. HAVERTY: Is that a correct characterization?

MR. BLECKER: Yes, it is.

MR. HAVERTY: So would it be fair to say that a society which does not engage in retribution is morally

inferior to a society that does engage in retribution?

MR. BLECKER: Yes.

MR. HAVERTY: Okay. So therefore societies which have eliminated the death penalty, and you mentioned, for example, the European Union, Great Britain, French, Germany, Italy, these countries would then be deemed -- in your mind, because they are not retributivists, to be morally inferior to a society like the U.S. that does permit executions.

MR. BLECKER: No.

MR. HAVERTY: Why not?

MR. BLECKER: The therefore doesn't follow. There are retributivists opponents of the death penalty. I conceded to you that retribution in my view is a moral imperative and that a society that is devoid of any impulse to punish what is deserved -- just deserts -- has missed a moral fact of the matter. What I've not conceded to you is that retribution necessarily results in the support of the death penalty. There are retributivists who are opposed to it. They concede the moral fact of the matter that the past counts and that we ought to be keeping covenants and not only engaging in questions like what good will it do, but focus on the issue of what bad has been done. But they are disagreeing about whether engaging in that inquiry, giving the past its just due, searching for proportional punishment

that one necessarily concludes that the death penalty and only the death penalty is an adequate moral response.

I feel certain. I'm a retributivist. It's not just an idea. It's not just that I am certain. It's not that it's just right. I feel certain to the core of my being that in some cases the death penalty and only the death penalty is an adequate moral response. But other retributivists, a distinct minority -- but other retributivists disagree. And that's why the conclusion doesn't follow from the premise.

MR. HAVERTY: And let me just follow up on that a little bit. Are you aware of the Amnesty International Report? I think it's annually they publish a report of the executions that are conducted throughout the world and they list the top numbers of the countries and their executions? Are you familiar with that?

MR. BLECKER: Yes.

MR. HAVERTY: Did you see the one that came out, I guess it was in the spring, the late spring for last year?

MR. BLECKER: I'm not sure if I saw '06 or '05. I read them when I can.

MR. HAVERTY: The most recent one that came out, do you know what the top four countries were in executions?

MR. BLECKER: I would guess China would be number 1, probably the United States -- the United States would be

among the four. I forgot -- is this the argument about the company we keep? Am I anticipating where you're going?

MR. HAVERTY: I'm just asking a question. Are you aware of the fact that China was number one with about 1500? They were way out. They're just off the chart. But the next two were Saudi Arabia and Iran, very close in number to the number of executions in the United States - committed, which was number four. Were you aware of that fact?

MR. BLECKER: As you saw I didn't mention Saudi Arabia and Iran. I'm not surprised by that. So the implication of the question, of course, is, look at the company we keep. And I'd like to respond to that because the adjunct question although you've not raised it, but it's the correlative. Why are we the only western democracy with a death penalty? Or how come Canada and the rest of Europe has abolished it, and Australia?

And of course because that's the correlative to look at -- the company we keep - is, look at the company from which we depart. They are a group that shares our values, and the company we keep are a group largely that does not share our values. And the response is two-fold. First of all, in reporting the death penalties, of course they are the ones that go through the judicial process. There are countries in which -- whose values supposedly are



more similar to ours, in which there are police killings all the time with a wink and a nod, but they're not going through the judicial process. But that's not the adequate response.

Every country that abolished the death penalty in Europe and Canada did so in the teeth of overwhelming public support for it. In the latest public opinion polls in Europe -- with the probable exception of Italy which seems to be clearly against the death penalty in large part due to the influence of the Church -- there is a majority in favor of the death penalty in each of those countries. The fact that the governments of the countries that are most clearly associated with us have managed to abolish the death penalty does not show that the people whose values are most similar to us disagree with us on that. And that's true in states in the United States. Look at North Dakota, that's been abolitionist for the last 150 years. The first and most recent time when the Feds went for the death penalty, just recently in the last couple of weeks, 12 jurors selected in North Dakota found death. Right now, Wisconsin has a referendum on November 7th. They've been an abolitionist state. The latest public opinion poll shows 54 percent of Wisconsin residents in favor of the death penalty.

So the point is, when you judge the company we keep or you do it internally in terms of the company we keep, and

analyze the states with the death penalty versus the states without them, it is reflective of the elites that govern it.

It's not reflective of the people themselves and the values that they hold.

REVEREND HOWARD: I'm going to -- unfortunately we -- this is very exciting to me, it's dabbling in philosophy and so forth, but I'm also aware that we have three additional persons to hear. I guess the Chair would like to exercise a little prerogative to be sure that I heard you right. Did I understand you to say that retribution is at the very core of human dignity?

MR. BLECKER: Yes you did, you heard correctly and you do understand that. That is, the abolitionists have tended to --

REVEREND HOWARD: No, no, is that your opinion?

MR. BLECKER: Yes, sir, it is.

REVEREND HOWARD: Let the record show at least one person on the panel firmly disagrees.

MR. BLECKER: May I explain it and explore it?

MR. HOWARD: And if I look toward Lancaster, Pennsylvania and the example of the Amish that would be my evidence to support this claim. Now, philosophically you can follow the line of Hobbes and Kant and others and come to a view regarding the death penalty, and others may

disagree. And I think as a scholar you appreciate that. But what I would like to ask is, since New Jersey has such an exemplary record -- but as our previous speaker Mr. Baime indicated, its exercise in proportionality was meant to minimize mistakes but no claim of elimination of mistakes. What would you advise us here about how we might be sure to avoid, given the human administration of our system, the death of an innocent person or a person who is not guilty of the crime? And is your commitment to the death penalty superseding your concern about the likelihood of the death of an innocent person?

MR. BLECKER: Thank you for that question. I very much appreciate it. Concretely, as the statement shows first, I would alter the jury instruction. Right now in the New Jersey death penalty statute the jury is asked to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. My view is that that's not a heavy enough burden on the prosecution. The jury should be required first to find that the aggravating circumstances substantially outweigh the mitigating circumstances.

Secondly, the jury is asked to find beyond reasonable doubt that the person -- that the aggravating circumstances outweigh the mitigating circumstances. My

view is that while the standard of persuasion of beyond a reasonable doubt is appropriate for the guilt phase in determining whether the person did it, the penalty phase focuses on something else. The penalty phase does not focus on the question of did he or she do it, but does he or she deserve it?

Proof beyond a reasonable doubt is not a high enough standard in the penalty phase. My view is that New Jersey ought to amend its death penalty statute to acknowledge residual doubt or lingering doubt. That is, if it's doubt not sufficient to acquit, if you're still convinced beyond a reasonable doubt that he did it, but you have doubts for which you cannot give a reason as to his guilt that still linger in the penalty phase, the jury should be specifically instructed that that is ground to find life against death.

Next, the jury -- proof beyond a reasonable doubt even if you acknowledge lingering doubt is not sufficient because it goes to rationality and it avoids emotion, and these decisions will be made partly as they should be, but must be on an emotional basis. The jury should be further instructed that they must be convinced not only with no lingering doubt that he did it, but they must be convinced to a moral certainty that he deserves it, which is a

standard of persuasion even higher and appeals to another part of our faculty, or emotional faculty.

And finally, all of this is in the proposal. And finally, the last way in which the statute in my view can limit and virtually eliminate any possibility of mistake in this case is that the jury is instructed or that the judge is instructed that when the jury finds that the aggravators outweigh the mitigators beyond a reasonable doubt, the judge must sentence the defendant -- convicted murder to death. It's stated as mandatory right now. That, in my view, is a mistake. It should not be in terms of must, it should still be in terms of may. So that jurors who, even if they don't have a lingering doubt, even if they are emotionally certain, but for some reason that they can't articulate, are not willing to vote death, should never feel compelled on the basis of a mechanical process to say death. Only if you feel certain that he did it and deserves to die for it should be you be allowed to and never compelled to find death.

REVEREND HOWARD: I want you to just tolerate this from one humble parish priest. Most of my life I've been in search of a human being who has moral certainty, and I've failed so far. And we're talking about the life of a human being. Now, please, just let me get away with that

observation. I think you've agreed with what I've said, maybe. But I would like to say that it has been my pleasure to have you come, not only to offer your views, but to offer them with such an exciting and passionate style and disposition.

MR. BLECKER: Mr. Chair, I appreciate it. Could I possibly give one 30 second response to your last, because I don't agree?

REVEREND HOWARD: How about 15?

MR. BLECKER: Fifteen. Fine. I walk my grandchildren in a stroller in which a truck may jump the curb and kill them. I will for my own convenience, because the odds are so small, I will for my own convenience subject the lives of those I love to the possible, but remote mistake that they may be killed. Surely, if I will subject, on the basis of convenience, the lives of those I love, I must be willing to subject for the sake of justice the lives of those who have been convicted beyond a reasonable doubt as murderers.

MS. SEGARS: Excuse me, Reverend --

REVEREND HOWARD: Final comment for this witness.

MS. SEGARS: Sir, I just need to understand that what I hear you say is that the execution of an innocent person is the cost of doing business if you want to uphold

the death penalty? Yes, or no?

MR. BLECKER: No. The remote, remote possibility of the execution of an innocent person is the cost of doing justice. It's not the same thing.

MS. SEGARS: The point is innocent. That's the point.

MR. BLECKER: The point is, children are innocent and yet you will expose them to a risk of death for your own convenience because there are other values at play. And justice is a primary value even greater than convenience. If you will expose your own children to a minuscule risk of death, if you will expose yourself to the minuscule possibility this ceiling will crash in upon you or that a plane will crash, yet you board it, surely you will expose a convicted killer for the sake of justice. Not convenience, but justice to a minuscule possibility. New Jersey has approached absolute zero on that possibility. Nobody claims that there is the remotest possibility that any of the nine on death row are factually innocent.

MS. SEGARS: But we've heard from innocent men who walked in, sat at that table, and discussed that they were in fact innocent and freed from death row. Yes?

MR. BLECKER: Yes. Not in New Jersey.

REVEREND HOWARD: I would insist, and I dare say

you agree -- and we're going to take this up at some other time to talk. Please, the implication that somehow New Jersey is an island into itself is offensive to me, although I love this State. And your comparison of the child taking a walk is apples and oranges. As an ethicist, let me say it might be more interesting for you to use the example of going out to eat tonight in a public restaurant. We take a chance at eating poisonous food, don't we? But this is apples and oranges. And I beg you to consider that point, and I think this may be more of a personal interest of mine.

I'd be willing to share some dialogue with you. But New Jersey is not an island. We want to commend our state for being as thorough as it is, but there is no proof, there's no possibility in human experience that it will ever reach the point of certainty. And on the question of life, this is a matter of urgent concern. That's merely the opinion of the Chair, and I thank you once again.

MR. BLECKER: May I give you my e-mail address?

REVEREND HOWARD: And you've indicated to us that you have brought along materials that we should consider in our discussion, and I assure you that as we come to our conclusions, everything that you've shared with us including your oral testimony will be a part of our deliberation.

MR. BLECKER: Thank you very much.



REVEREND HOWARD: I don't want to penalize the persons coming forward, otherwise we might have continued that soliloquy. But let me just ask, Mr. Fagan, if you would. Mr. Fagan is professor at the law school at Columbia University and an expert on deterrence studies. He's been referred to by previous witnesses, as well as other issues related to the death penalty. We still have two other persons, Ms. Claudia Van Wyk and Ms. Roberta Glenn. I hope you are still with us, are you? Good. Very good. Mr. Fagan, you have 20 minutes. Any minutes you give back to us would be greatly appreciated. But you have 20 minutes and you will be alerted when you have two minutes left. Thank you.

MR. FAGAN: Thank you, and thank you to the Commission for inviting me to address you. I'm here not to talk about deterrence, although I've published two articles about deterrence and would be happy to entertain questions from the Commission about deterrence and about the scientific evidence that Professor Blecker referred to, which is actually part of a very contentious debate among law professors and social scientists around the country right now.

But I am here instead to talk about some research that I did with my colleagues at Columbia University in the

course of two studies, one published in 2000 and another published in 2002, examining the effectiveness and efficiency of the system of capital punishment around the country. I make reference to those publications in written testimony, and give you some websites where those can be obtained. Attached to the testimony is a summary publication from the first of those studies. There is also a second one which I would also be happy to make available to the Commission.

I want to say that I also have been working in the state of New Jersey. I was a professor at Rutgers in the School of Criminal Justice for several years. I served on the domestic violence working group for the State of New Jersey under the direction of Nancy Kessler and other staff people for three or four years. And my research on juvenile justice, which is another arm of what I do, also has been done three times now, in the state of -- four times in the state of New Jersey beginning in the mid-1980's and concluding just a couple of years ago. And in fact, we're still interviewing serious young juvenile offenders in the state of New Jersey.

In our study we traced the outcomes of more than 6000 death verdicts during a 23-year period beginning with the resumption of capital punishment following the Furman

decision in 1972, and concluding with all cases that have been finally concluded by 1995. We quit in '95 because we wanted to have -- pick a year when most of the cases that were active at that point had been completed.

We reviewed every death verdict, both the original verdicts and the appellate verdicts all the way up through direct appeal, state post-conviction review, and finally federal habeas review when it took place. To put it very simply we found that 68 percent -- just slightly more than two and three of all death verdicts reviewed were reversed.

About half of them were reversed because the finding that the defendant was guilty of capital murder was so seriously flawed, absence of evidence, absence of proof, et cetera, and so unreliable that the verdict simply could not be enforced.

In more than -- in 85 percent of the states, the reversal rate was over 50 percent, meaning that any death verdict was more likely to be reversed than it was to be upheld on appeal. Of those that were reversed, 82 percent of all of the death verdicts were sent back for new trials and resulted in sentences less than death. Nine percent of those cases were simply the finding was vacated, the person was released based on a finding that the defendant was not guilty. The remainder were subject to death.

The issue has come up, I know, in previous testimony, it's come up a little bit today about who's doing these reversals. Are they literal judges? We find in fact that 90 percent of all of the reversals that we studied were done by elected state judges, judges who certainly would be subject to recall by the overwhelming majority of voters, who Professor Blecker cited, who do support the death penalty and would probably be outraged to know that their judges were in fact overturning sentences. And we do know that the voters do throw those folks out.

Many of the other reversals were in fact done by the Federal courts, roughly about ten percent, and almost all of those were done by panels of judges composed or individual judges composed of majorities who were appointed by Republican law and order presidents dating back to President Nixon.

Ultimately, only six percent of the thousands of death verdicts in the U.S. were actually carried out. The average time, I think you all are aware of the extraordinary delay that's involved, anywhere from ten to 12 -- it was averaging about ten years, a little bit less for an affirmance, a little bit longer for a reversal. It has since risen to 12 years according to information from the death penalty information center and other places.

And in some of the states we've been studying, the high courts in places like Georgia and Arizona, Florida and others devote almost half of their time to deciding capital cases as opposed to other kinds of cases.

So this is a flawed system. And we talk about it as a broken system. And we try and use analogies to try and locate it in a broader sphere of public policy. So, for example, it's hard to imagine that the Food and Drug Administration would release a medication where 68 percent of the patients either died or became ill. It's hard to imagine that in an era when we're moving toward standardized testing in public education that we would allow a standardized test to be put into place where 68 percent of the students failed after three tries.

You all may remember the Ford Explorer episode when they began -- they kept rolling over. It's hard to imagine that we'd be putting Ford Explorers out to sale into the public when two-thirds of the time they would be prone to rolling over.

The flaws in the system are so severe that it led somebody like George Will who is a fairly -- very conservative commentator write to the *Washington Post* to recommend that this system actually be abolished in part because it was broken and he actually agreed with our

terminology that we had published.

There's been a lot of talk about costs. I don't want to get into the details of cost because cost is a contentious issue. I think Professor Blecker talked about it. I've read previous testimony of other witnesses. Let's assume a fairly conservative estimate on cost. I think that's one way to go. The best study to my knowledge was done in Florida and the Florida study asked a specific question about how much extra time do prosecutors, judges, police officers, investigators and so on stand on doing death penalty cases more than they would on other kinds of cases. The citation is actually at foot note number 5 on page 6 and the testimony was done by a reporter named Date at the *Palm Beach Post*. A very interesting detailed study.

So you can come up with sort of a boundary of estimates, very low ball estimate of maybe \$2 million per trial to a high ball estimate of maybe \$25 million per trial. The estimates are really pretty wildly all over the map. So what we do in social science is we tend to bound things. We call them confidence miracles. We come up with a range of plausible estimates. And so we can talk about a fairly low ball estimate. And at the end I want to try and tie the question of accuracy of the death penalty to efficiency of the death penalty.

But the key question for us is the marginal cost. Professor Blecker raised a very good point about the fact that many of the studies ignore the idea that the threat of the death penalty can force a plea bargain and would shorten cost and shorten delay. Lots of those plea bargains come at the end of the process, some of them come at the beginning of the process. We really don't know where that process begins, but certainly like any other sense these are the kinds of social science disputes that get mediated through a series of publications and peer review journals and people go to conferences and argue with one another and that's the process of what's happening now.

But we do come up with these low and high ball estimates and we're roughly at about maybe anywhere from two to -- somewhere between two and a half to \$25 million per trial. So how are these costs getting paid for? There was a wonderful study done by an economist at Dartmouth named Kathy Baicker. Kathy Baicker showed that for every death sentence -- this is not the cost of the death sentence, but it's the cost to the pool of resources available in that county. Roughly \$2 million per capital trial was diverted from local services, hospitals, health care, police and public safety, education, et cetera causing counties to either borrow money or raise taxes or diverting cost from

capital expenditures such as roads or other kinds of infrastructure.

So every time there's a death sentence, it's akin to having a natural disaster in your county. A flood, an earthquake, a tornado, perhaps a raging fire or a chemical spill even such as the one that happened in North Carolina the other day.

We undertook a second study, and the second study tried to identify the factors that predicted why some states and also why some counties had higher reversal rates than others. We found that high error rates were associated with very high frequent use of capital sentencing seeking the death penalty, poor law enforcement practices, low per capita spending on the courts and sub-par state review processes. None of those things were happening in New Jersey. New Jersey doesn't have any of those risks. It doesn't have an inefficient and poorly funded system of appellate review like places like Texas, Alabama, Georgia and so on.

Even without the risk factors New Jersey had an error rate of 87 percent in the period up through 1995. Even without those risk factors, meaning a really good state with a really thorough investigative process and a really good appellate review system still wound up overturning



those cases in 87 percent of the cases. Was it liberal judges? Well, it's hard to imagine why judges here would behave any differently with respect to the quality and accuracy of a death penalty than they would in Georgia, Alabama, Texas or Florida. The same judges produced the same reversal rates and I can't -- maybe the judges here are different. I would suspect that they are, having taught and worked in New Jersey. But still it's something about the capital process and the sentence itself. It's not about the judge.

When you compare reversal rates across states we found that the proportion of -- two factors that are really interesting and actually tell a story about race. Now this is a story about race that's different than the story about proportionality. Ours is a story about race as it pertains to reversal rates. We find that a proportionate of African-Americans in a state's population, and the ratio of homicides or the rates of homicides, cross racial, between whites and minorities -- these are the factors that are associated with a high capital error rates. Both of these, unfortunately, are salient risk factors in New Jersey. New Jersey ranks third in the ratio across the nation between 1976 and 2003 in all known homicides where we have clearance rates, third in the nation of the ratio of interracial homicides.

Sixteenth in the nation in the percentage of African-American populations -- among the state population which suggests that these risk factors are producing or do converge and operate here as they do in other states to produce a somewhat elevated -- a very elevated error rate, roughly 87 percent.

We looked specifically in New Jersey. I mentioned that the error rate here was 87 percent. Judge Baime mentioned the concentration in particular counties. We noted that also. Three counties contributed nearly half or 18 of the 39 death sentences handed down of those that were cleared through 1995. Four counties accounted for 24 percent of the death sentences, nearly two-thirds. Nearly half of the death sentences were reversed, 19. Ten were vacated, five others were simply reduced to something less than death. And that's where we get the 87 percent figure.

Then we went back and looked at cases after 1995 to update our records. We haven't updated the full study, but in preparation for coming here I did look at New Jersey cases. There have been 21 death sentences handed down or decided since 1995 when our study ended, our first study. Eleven of the 21 have already been reviewed and reversed by the Courts. Eleven of the 21 have been reversed, that's roughly 55 percent and counting, because we don't know what's

going to happen with the appellate process on the others. Three of them were affirmed early on in the review process only to be reversed again at later stages of the appellate review.

And what really jumped out at me from looking at the records in New Jersey was that of the last ten death sentences in the state that have been reviewed at least once, only two have been affirmed. Eight have been reversed which leads us to an 80 percent reversal rate. One inmate died after his sentence was affirmed on direct appeal. And as we all have spoken about no inmate was executed wither before or after 1995 in the state of New Jersey.

So that leads to some policy choices for the state. I'm trying really hard to give you back some minutes as our Chair has asked. There are three models around the country. The one that's in Texas and Alabama is not the one that's going to happen here. That's what we call death penalty on the cheap.

There's another model that happens in places like California and Pennsylvania. Very heavy use of the death penalty, very, very few executions. California has roughly 650 people on its death row. Since it reinstated capital, it's only executed 11 people. Two of them were people whose death verdicts were not fully approved. They had not gone

to the end of the appellate process and found reliable by the courts. But these folks nevertheless elected to be executed. These were people who just simply didn't want to face the prospect of life in prison.

In the same period, Pennsylvania grew its death row to roughly 250 persons and executed only three. And of those three all were voluntary executions. They elected to forego appeals. They did not want to spend the rest of their lives either in prison or for a very long period on death row. So there is a deterrent value of life without parole. It does seem to be operating; it's fairly salient.

We can come up with upper and lower boundaries on the cost. I do so in testimony and hopefully you'll have a chance to read it. Let's assume there's roughly 15 death sentences handed down in the next 20 years in the state of New Jersey under current conditions, or even under a tightened statute. It would cost somewhere -- let's assume an upper bound of \$25 million, a lower bound of maybe \$10 million. That's \$150 million to \$375 million. The question is not whether cost is a justifiable basis for making a determination about using the death penalty. The cost is, what else could you be doing with that money particularly if nobody is going to get executed? You could be buying state police officers, grief counseling sessions for victims,

expansion of violence prevention programs in parts of Newark and Camden and parts of Passaic County. Any one of a number of things that could be going on; things that would enhance prosecution of other crimes, the kinds of crimes that ultimately grow up to become homicides -- a robber who is caught who fails to be convicted this time and eventually does a felony murder by committing a murder in the course of the robbery. That guy might well have been in jail with an improved police force and better prosecution system at that point in time.

So if the state has that kind of money, the question is, do you want to spend \$375 million or \$150 million, \$300 million, whatever the figure you want to adopt. It's a hell of a lot of money to achieve to achieve two or three executions at most over 20 years if that many.

Or do you want to fund additional police detectives and prosecutors, victim services, et cetera?

There's also another problem. Let's assume we went to the kind of system that we have here, which has a very small number of affirmed death sentences. Or we went to Professor Blecker's system, where had one or two over the next 20 years but still kept the announcement effect of having the death penalty on the books. When only a tiny proportion of the individuals who commit murder are given

the death penalty for it, the penalty becomes unconstitutional. It runs into a giant, what we call in law school, a Furman problem. Justice White, and I quote Justice White in foot note 16 of the testimony, basically said if you have a death penalty and you don't use it it has no penological function. You run afoul of the Eighth Amendment. It has neither a deterrent effect, and it doesn't have any kind of retributive effect either.

So the question then is whether the kinds of efforts that I think are going on here that are wonderful efforts, necessary, admirable efforts to avoid error, to avoid executing innocent people, to avoid putting victims through a very prolonged process, won't wind up landing New Jersey in the end after spending hundreds of millions of dollars with a death penalty that will be overturned again and again, and death sentences overturned again and again and ultimately running into the constitution. I thank you.

REVEREND HOWARD: Than you. Let the record show you are the first speaker who has not had to be warned about the limitation of time.

MR. FAGAN: I can talk about deterrence, if you want.

REVEREND HOWARD: Let's invite members of the Commission now to speak with our witness. Yes.

MR. MOCZULA: Professor, when you speak about the error rate in cases, do you make any distinction as to the reason for what you call error?

MR. FAGAN: Yes.

MR. MOCZULA: And what is that?

MR. FAGAN: There are numerous reasons that went into error. There was no single reason. The most frequent reason was incompetent counsel. This was something that was widespread across virtually every death penalty state from the states like Pennsylvania, California as well as Connecticut and other places to what I call death penalty on the cheap. Incompetent counsel was the most common. Unfortunately --

MR. MOCZULA: What about New Jersey?

MR. FAGAN: I'm sorry?

MR. MOCZULA: What about New Jersey?

MR. FAGAN: We did not look into specific reasons for New Jersey. I can do that and would be happy to submit a supplemental statement if the Commission would like.

MR. MOCZULA: If there was --

MR. FAGAN: There were other reasons though, but can I --

MR. MOCZULA: If there was a situation where, let's assume ten death penalty cases went through the prosecutor

and the death sentence was obtained, and then on the appeal on case ten the Supreme Court makes a decision which markedly reflects or changes the propriety of the procedure of implementation of the death penalty which results in not only the reversal of that death sentence, but the nine others. Any attempt in the study to make a distinction between that type of effect and let's say prosecutorial misconduct or incompetence of defense attorneys?

MR. FAGAN: Are you referring to LaValle?

MR. MOCZULA: I'm referring simply to the facts I stated, where a decision impacts more than one case simultaneously. You, I assume, would lump that in the error rate. My suggestion is that you're taking a bunch of cases and putting them in for the same reason and counting them as nine or ten separate cases when in fact the basic reason remains the same. They're not case-specific reversals, they're systemic reversals.

MR. FAGAN: Right. The scenario is certainly characterized as the events in New York when the LaValle decision was handed in. It invalidated the death penalty in all but one of the death sentences, I believe, were vacated and there's one that's being appealed now as to whether it's vacated or not.

I can't say for certain, but I do not believe that



in our database there were such systemic events that swept people off their throw. (sic)

MR. MOCZULA: I would suggest about the need for elaboration here that those events happened in New Jersey, and there are in fact three critical events that resulted in reversals of a number of death sentences as opposed to one.

Now, this study that you mentioned has been subject to its fair share of criticism, I suppose you know that. There are web pages full of quote, Liebman responses, including studies like Liebman death penalty study called "Biased and Dishonest," -- study fails to prove death penalty as unfair. There have been also references to the fact that rather than go for instance in the state of Nevada to the source, the attorney general and the courts and other repositories of information you chose to go in fact to death penalty abolition organizations and in fact your numbers when compared to the real numbers came up much higher than the accuracy of -- than the actual numbers in that state.

Is it also true that your study lumped together cases going back to 1973 through >95 without accounting for the major systemic changes as imposed by the United States Supreme Court?

MR. FAGAN: Well, let me answer one at a time. First of all let me go back to the original question. There

are other reasons for reversals. Prosecutorial misconduct, police withholding evidence, jury instructions as well.

MR. MOCZULA: How many in New Jersey, sir? I'm just limiting it to New Jersey.

MR. FAGAN: We did not look at the -- I did not examine the reasons for New Jersey.

MR. FAGAN: Then I would suggest that the rest of the information is informative, but not quite relevant to what this Commission is trying to make a decision about.

MR. FAGAN: It could well be, but the error rates are very comparable here as they are in other states. So perhaps the information we obtained in other states was generalized. Let me speak about Nevada though. We actually had very interesting correspondence with Nevada, in particular with Clark County. They refused to turn over data to us. We asked them many times and we had a series of exchanges with them. Ultimately we relied on the sources that we could get at that were best. And when we did obtain the information we published it. We were unhappy that we did not get cooperation from Clark County.

And there are a lot of criticisms, just as we're critical of the deterrence literature, for example, perhaps on different terms, and we don't call them unbiased. There also are a number of reputable criticisms of our work. I

think the one that is probably the best was done by Professor Joseph Hoffman. Joe Hoffman is an Indiana law school professor. He wrote the death penalty statute that was introduced by Governor Romney in Massachusetts. And he has argued for something that is very narrow in terms of what the death-eligible aggravators are, extensive procedural review.

Anyway, Joe took a very hard look at our study. We actually had a number of exchanges with him in print. And Joe says well, I would not -- I believe his statement was he believes that a floor for the reversal rate is 40 percent. He said even if Fagan and West may be -- it may be closer to their estimate. It is somewhere between their estimate which is an upper bound and my estimate which is a lower bound to 40 percent.

So let's split the difference with Professor Hoffman. Let's assume that -- that's a 28 percent difference. So let's assume that we take half of that. That's a 54 percent. Let's go to 50 percent. Do we want to have a death penalty system or do we want to rely on a death penalty system as currently -- which is wrong as often as it's right? That seems to be a question that I think is a public policy choice.

MR. MOCZULA: I think that begs a question of what

you're defining as wrong. Again, if there's a system of review -- of judicial review and the decision is made that a procedure needs to be changed, I don't know if that's telling you something about whether an individual case is wrong versus right in the same sense as the hiding of exculpatory material, prosecutorial misconduct, or some other type of case specific reason that goes to the heart of the case itself.

Have you done any work with regard to analyzing mandatory sentencing?

MR. FAGAN: Only in drug offenses.

MR. MOCZULA: My question goes to whether there would be the same amount of litigation and post-conviction relief proceedings, habeas corpus actions, if we didn't have a death penalty. There's been a lot of discussion of the initial trial, the investigation. And again, I still -- at least this person is not convinced that anybody has been able to quantify what the difference is. Well, what about the --

MR. FAGAN: Difference in what, sir?

MR. MOCZULA: In cost. But what about the end of the process? Isn't it true that the upswing in litigation at the end of the process in challenging sentences is more directly related to the increase and mandatory sentencing

than it is the death penalty in a relative sense?

MR. FAGAN: Well, there are numerous challenges regarding -- you mean for example something like Blakely?

MR. MOCZULA: No, simply the fact that someone=s faced with mandatory sentencing will be more likely to challenge and keep challenging and that the notion that as long as we have no death penalty in New Jersey that any given inmate will take one shot at perhaps reversing his sentence or her sentence and therefore be content if he fails. That the prolonged litigation is as directly attributable to mandatory sentencing as a suggestion that it is somehow involving the death penalty.

MR. FAGAN: Well, I guess I=d answer it in two ways. One, the jurisprudence of the death penalty is very different than the jurisprudence of other claims. There is a case involving a juvenile, an adolescent who was sentenced to life without parole in the State of California and he got his claim up to the Ninth Circuit, at which point Judge Kazinsky writes an opinion that basically says, to paraphrase -- and Judge Kazinsky is a colorful character, but to paraphrase he says, AI don=t want to hear this. We=re not talking about death, we=re talking about prison, regardless of how long it is.@

My point in raising that is that I don=t think that

those claims get nearly -- get one-tenth of attraction that death claims get. And so although there may be a lot of filing I can't imagine that we're going to wind up running into trial courts -- hearings, new evidentiary proceedings, people introducing exculpatory evidence. The kinds of cases that are subject to mandatory sentencing are cases that involve drugs, that involve second violent offenses, predicate felony laws, three strikes laws, if you will.

Three strikes law is a good example. I'm unaware of the courts in California, which has the broadest three strikes in the country, being papered with claims by inmates that they were wrongly incarcerated and looks for strikes to be reversed. It's just not happening.

MR. MOCZULA: Do they require that counsel for the defendant raise every issue that the defendant wants to raise irrespective of counsel's own view of the legitimacy of that claim?

MR. FAGAN: Varies by state.

MR. MOCZULA: Varies by state. That is the rule in New Jersey. Thank you.

REVEREND HOWARD: Further questions, comments? If not, thank you, Professor , for being with us today.

MR. FAGAN: Do I get a minute on deterrence?

REVEREND HOWARD: Say that once again.

MR. FAGAN: Do I get a minute on deterrence?

REVEREND HOWARD: A minute on deterrence.

MR. FAGAN: Yes.

REVEREND HOWARD: Hearing no objection.

MR. HAVERTY: One minute.

REVEREND HOWARD: One minute.

MR. FAGAN: One minute. It's very simple.

Professor Blecker raised the issue, and I've written about it and I've submitted testimony to the Commission earlier that was given to Senator Brownback in the Committee for Constitution in the U.S. Senate. And it's very simple. There are a series of studies that were put out over the last ten years or so by a group of economists. They were all economists to economics journals. they all claims anywhere from three to 32 lives saved, murders prevented by the fact of execution that people were deterred.

In a process that I think is one that is used routinely in science, that of getting hold of somebody's original data, reanalyzing it, subjecting it to a variety of different tests and claims to see if it really holds up -- this is what we call replication. And it's a cornerstone of the scientific process. Three reasonable investigators now have reanalyzed all those data. One was Dick Burke who is a distinguished professor at the University of Pennsylvania in

statistics. John Donahue, who's an economist at Yale, and myself who is a law professor and also Professor of Public Health at Columbia. None of us are able to stably replicate or even unstably replicate the findings of the deterrent studies.

My point is that there may or may not be deterrence. I know more believe in counter deterrence or brutalization than I do in deterrence itself. Some people are deterred, murderers I doubt are for reasons that I go into in a testimony. And these just simply are not the kinds of rational actors that deterrence assumes that they are. And that perhaps explains why in fact the studies are very unstable statistically.

REVEREND HOWARD: Thank you.

MR. FAGAN: Thank you all very much.

REVEREND HOWARD: The Chair would like to invite Ms. Claudia Van Wyk to the table. Ms. Van Wyk I think you've been with us most of the proceedings. You know you have 20 minutes to offer and the Commission will look upon you with favor if you take less time. Nonetheless, you do have 20 minutes. And we will give you an alert with a light tap of the gavel when you're approaching two minutes of your time. Thank you.

MS. VAN WYK: Thank you. Can I be heard?



REVEREND HOWARD: Yes.

MS. VAN WYK: Good afternoon. I'm a local lawyer who worked for the New Jersey Public Defender for 18 years and now work in private practice at the Gibbons Law Firm in Newark. New Jerseyans for Alternatives to the Death Penalty have asked me to testify because I'm familiar with data on New Jersey's capital sentencing system going back to 1982. And the focus of my testimony is question 4 on the Commission's agenda from the Legislature which in a nutshell is whether the selection of defendants in New Jersey for capital trials or death sentences is arbitrary, unfair, or discriminatory in any way.

I work with statistical experts to analyze the data and this is the same data that Judge Baime discussed earlier today. And my experts reached the conclusion that probably no one who knows New Jersey's system would really need a statistician to tell them different counties treat similar death penalty cases differently, a lot differently. Whether a defendant faces capital prosecution depends in large part on where the homicide occurs.

Now, I've presented two charts to the committee which are attached to the testimony which I sent to the staff a couple of days ago, and I'll explain them in a moment, but I want to make some preliminary points. First

of all, the data looked at prosecutorial decisions to seek the death penalty, but the purpose in presenting them is absolutely not to lay blame. I believe the wide variations in capital prosecution rates are largely the result of factors that can't be changed.

First, the constitutional ground rules laid down by the United States Supreme Court, I believe, make consistent application of the death penalty virtually impossible. The Constitution requires, first of all, a limiting of the class of death-eligible offenders. This state and every other state is not permitted under the Federal Constitution to make all murderers uniformly eligible for the death penalty. It has to identify one or more subgroups.

At the same time the federal constitution requires unlimited discretion for defendants to present and juries to find the existence of mitigating factors that the defendant might offer as the basis for a sentence of less than death.

And I think uneven application is just an inevitable result of a combination of drastic narrowing of the pool with wide open discretion on the mitigating side. It makes application difficult, and prediction of what jurors are going to do difficult. That's number one.

Secondly, no matter what is done to the system and who is making the decision no one can change the fact that

any law enforcement official deciding whether to seek the death penalty must take into account whether a local jury will impose the death penalty. That's a necessary part of the process and it's going to vary from one county to another.

Judge Baime mentioned earlier, and he has mentioned in writing in other places, that as a remedy he suggests we centralize the charging decision by requiring the Attorney General of the state to assume responsibility for the capital charging process. I don't think that's a solution to the problem of this wide geographic disparity in capital sentencing -- capital charging decisions -- both because it would require a structural revolution in this state's criminal practice and because I'm pessimistic. I don't think it would work anyway.

As to the structure in our system, the local prosecutor has primary responsibility for criminal charging decisions including capital decisions. And further, over the last few years because of a court decision, the aggravating factors have to be included in the indictment when the state decides to proceed capitally. Centralizing would add an entire layer of review to this process which would presumably require defense input in order to be fair, and it would have to be front loaded. Investigation would

have to be front loaded within the time allowed for the supersede indictment that would include the aggravating factors. Right now that's 90 days after the initial indictment plus good cause -- the prosecutors on the Commission would probably imagine better than I could how many things would have to change.

And the second thing is, we have experienced in at least one jurisdiction in this country, the Federal jurisdiction with centralized charging, and the U.S. Attorney has a whole chapter in the U.S. Attorney's manual devoted exactly to centralized review of the nationwide charging decisions of all of the U.S. Attorney's Offices in all the states. It's very detailed, very bureaucratized, and they still have a lot of geographic variation. People who have reviewed the reports say capital prosecution in the Federal system is still largely a southern phenomenon.

And if you use your common sense about how the process would work, it stands to reason -- and the Federal statistics that I saw bear this out, even though there's all this review. But the Attorney General in the end usually defers to the judgment of a local person who knows the case.

It's just common sense. So it's really not surprising that it's not that easy to weed out local variation. I would imagine in order to really have a hope of ending the local

variation through centralization that the Attorney General would have to virtually take over the prosecution.

Otherwise he's naturally going to defer to the people who know best what's going on in their own district with their own case, their own witnesses, and their own evidence.

And I should also point out there have been a number of empirical studies in other states. Judge Baime collects quite a few of them in the report he filed with the Supreme Court in December, which I think the Commission has.

And geographic variability is not limited to New Jersey, it's endemic around the country. So for that reason as well I'm just pessimistic that centralization would cure the problem of geographic variability.

Now, my last point relates to race because you'll see that one of the charts that I present has separate columns for White victim cases and non-white victim cases. As Judge Baime mentioned earlier the data show that murderers of white victims are more likely since 1982 to face capital prosecution -- almost twice as likely. Again, I want to stress, the purpose of presenting this information is not to lay blame on individual prosecutors. The data say nothing about the motives of individual prosecutors. In fact, Judge Baime's analysis suggests that county variation is a major culprit for the race differences that we see in

the prosecution patterns in this state. But I think it's important for the Commission to look at this information because the race difference is one of the end results that the public sees when it looks at the process. And I think public confidence in the process should be important to this Commission.

Now, as the Committee may know the Attorney General has submitted a response to the Supreme Court's call for comments on the problem of these large and significant geographic differences in capital charging patterns. There's quite a lot of common ground between the Attorney General's view and the view of New Jersey and to alternatives to the death penalty. But we do reach different conclusions.

The Attorney General believes that this geographic variability is inevitable and acceptable. NJADP thinks it's unnecessary and unacceptable when lives are at stake. There's no reason to put up with a system as arbitrary as this one is after so many years of effort by so many dedicated individuals when there's an alternative. And that's one of the many reasons NJADP is urging the Commission to recommend abolition of the death penalty in favor of a statute including a maximum sentence of life without parole.

Now, what I'd like to do for the balance of my time is explain the two charts that are attached to my testimony

to the Commission members, but with the Chair's permission I'd like to invite you to interrupt me as I go along. And if anyone doesn't have a copy I have extras here.

Table 1 is similar to something that Judge Baime has presented to the Supreme Court. It simply shows --

MS. SEGARS: At what page, please?

MS. VAN WYK: I'm sorry. My testimony -- there's a short version of my testimony that begins, **A presentation.** It should be the very back. It's the back. Seven. This just shows year by year the percentages of what we call case progression. I can just start you with columns at the top of the page. Column 1 gives you the year, column 2 just tells you the raw number of death-eligible cases included in the database that the AOC maintains. Column 3 tells you the percentage of those death-eligible cases that reach a penalty trial. So that's the column that gives you a handle on prosecutorial charging decision. Column 4 tells you -- focuses more on jury discretion. It tells you the percentage of penalty trial cases that result in death. And then the last column is like the very big picture column. It shows you out of all of the death-eligible cases over in column 2 what percent end up with the death sentence.

So the first point that I think we can draw from this chart, if you run your eye down column 2 you'll see we

haven't really had a dramatic decrease in the number of death-eligible homicides that happened in this state since 1982 -- I should say '83. It looks like '83, the Ransor death sentence, I know, was imposed, I think, May '83. So they didn't have as many death-eligible cases that year, but all the years since up to 2004 when it dropped off again it's been pretty steady between 20 and 30 most years.

But if you run your eye down column number 3 you can see that penalty trials as percent of all the cases that could have gone to penalty trial have just been dropping. And I did a little math yesterday. I did the percent for the 1980's, the percent for the '90's and the percent since 2000. In the '80's about 57 percent of the death-eligible cases reached a penalty trial. In the '90's it was 18 percent, and beginning in 2000 it's down to 11 percent. So one thing we've seen is prosecutorial charging decisions have dropped off dramatically over time.

Then if you look at the other columns which show death sentences imposed, the pattern is not as even, but if you look since 1997 we've had no more than one death sentence a year since 1997. So the jurors were never very enthusiastic to begin with about imposing the death penalty.

Really, it sort of hovered around 30 percent. The jurors in this state, no matter how they might fill out public



opinion polls they don't seem -- when they get in a jury box and they hear all the evidence, they hear both the aggravating side and the mitigating side, they're not eager to impose the death penalty. And in recent years it's been happening almost never.

And that is really the sum of the points that I want to want to make about this chart, unless anyone has any questions about this chart.

So if you turn to Table 2, this is a table that shows some differences in the way victims are treated by way and by county. And let me just explain what the columns are. Column 1 lists the county by name. Column 2 shows cases with non-White victims and what percent of those cases reached the penalty trial. Column 3 shows the White victim cases, same thing. And then column 4 just adds the other two together because I wanted to be able to show you the wide differences in capital prosecution rates among the counties in this state. If you look down about two-thirds of the way you'll see Somerset County has never had a penalty trial since the death penalty was instituted in 1982. They've had four death-eligible cases in that time. It's a relatively small and quiet county, but they've never used the death penalty at all.

Cumberland is interesting. Well, let me backtrack

a bit. If you look down to the very bottom of the chart, one row up from the bottom you'll see a separate row for post-2003 cases. This is following the practice of Judge Baime's experts who found that capital prosecutions had dropped off so drastically after 2003 that it really wasn't fair -- it wasn't mathematically correct to include those cases in the chart in among all the others so they made a separate row for the 2003 cases.

MR. HAVERTY: Can I interrupt you for just one second?

MS. VAN WYK: Yes. Sure.

MR. HAVERTY: I'm looking at your chart and there's one column that I would be interested to see. When you do it by county, you talk about the percent of cases involving non-white victims or white victims that actually went to the penalty phase, but you don't then further correlate that with those cases that went to the penalty phase -- how many times the jury actually opposed of that sentence.

MS. VAN WYK: That would be very easy to provide to the Commission. I don't have those numbers with me.

MR. HAVERTY: Okay.

MS. VAN WYK: If you look at the very bottom of column 4, overall 28.3 percent of all of the death-eligible cases have gone to a penalty trial. And then we know that

about a third of the -- throughout the history of the death penalty about a third of the penalty trials have resulted in a death sentence. So you could divide 28 by three. So we're talking maybe nine percent, but the numbers are readily obtained and I'd be glad to provide that.

MR. HAVERTY: I guess that would implicate Judge Baime's analysis.

MS. VAN WYK: Yes. Well, I was about to call your attention to Cumberland County. Up until 2003 Cumberland County was one of the counties that used the death penalty the least, nine point one percent. We know from the public defender's submissions and statistics that have been discussed in text, after 2003 a new prosecutor came into Cumberland County who had a different philosophy and that county became one of the most enthusiastic in the state about the death penalty.

So let me just now call your attention to the bottom of column 2 and the bottom of column 3 and you'll see -- I've said before and I don't know if I've said it yet today, **A**The capital prosecution rate for white victim cases is nearly double that of non-white victim cases.**@** You'll see if you roundup 38.8 it's 39 and you round down 20.3 it's 20. That's where I get that number. It's nearly doubled.

Of course what all sides who have worked on the

proportionality studies agree raw numbers don't tell us the whole picture. They're only the raw numbers. And when Judge Baime, in extensive and courteous consultation with public defender experts, analyzed the system, they found by doing more complex analyses that a major culprit for the race disparity is county variation. But I do think it's important for the Commission to understand that an end result of the county variation is a very wide difference in the rates in which white victim cases proceed to penalty trial.

That's my two minute warning. I'll confine myself to saying both Judge Baime's experts and mine did a statistical test on the differences between the white victim and non-white victim cases in this chart. My experts thought it was appropriate to include cases in which law enforcement officers were killed, not because we want to ignore common sense, but because our experts thought it was mathematically inappropriate to add to the complication of this chart by pulling out one category cases on the basis of experience that those factors, those common sense notions were better dealt with in the more complicated analysis. And when the law enforcement cases were included our experts found that the differences between the White victim and non-White victim cases did achieve statistical significance. It was below the statistical cutoff that you may hear about,

point oh five.

That really concludes my planned remarks, and I'm certainly happy to try to answer any questions that the Commission might have.

REVEREND HOWARD: Comments or questions from the Commission? Yes.

MR. MOCZULA: One question, Claudia. There have been a lot of discussions about county variability. Can you define what county consistency would be in your view? Would it be that every county proceed for its capital prosecution or select capital prosecution with the same percentage? Would it be that no county can have their first before someone else has a first? There has been a dearth of information about what exactly consistency would be as opposed to variability. And we can discuss the wider range of when does variability become a constitutional issue if at all. But what's the consistent system? What would 21 county prosecutors be expected to do from a statistical standpoint or otherwise to make this variability non existent for you?

MS. VAN WYK: Well, I guess the range we're talking about is zero percent to 100 percent. One county prosecutor has a choice between never seeking death, always seeking death, or something in between. And I would hope that a consistent system would show that the counties are somewhere

within shouting distance of each other. Here we have the lowest one is zero and the highest one is Monmouth which is 63 percent. And I think in common sense terms that's too wide to be just.

MR. MOCZULA: What's that shouting distance? Let's examine that.

MS. VAN WYK: Okay.

MR. MOCZULA: If County A has two cases that it's examining for capital prosecution and the prosecutor in that county chooses one of those cases for capital prosecution, and County B has ten cases eligible for capital prosecution and that prosecutor chooses three cases for capital prosecution, is that a problem?

MS. VAN WYK: So that's 30 percent versus 50 percent.

MR. MOCZULA: Right. Let's overlook the small numbers, but 30 versus 50.

MS. VAN WYK: Right. We can multiply them both by ten. Well, the way you --

MR. MOCZULA: Or would that second prosecutor be required to choose five out of ten to make sure that the statistics are uniform?

MS. VAN WYK: I don't think that should be required. We're saying, to borrow a phrase from Professor

Fagan, "This system is broken because we're asking too much of it." We have so much discretion and so much of a burden on law enforcement agencies that we just don't think it's possible to be consistent. But if you were to ask me how would we know if we had achieved consistency, my answer would be have reasonable regression models where county was not a significant predictor of who gets prosecuted. That's the fair and nuance way to take into account whether there are huge and significant differences in the way counties are treating these cases. And both my experts and Judge Baime's experts feel quite confident having worked with the data that where the homicide is committed is in fact a significant predictor -- makes a significance difference of whether or not capital prosecution occurs.

MR. MOCZULA: I'm just concerned that what's being advocated is more a system where we're concerned with the percentages and the numbers as opposed to looking at individual cases. But more basically what I'm hearing is that your arguments on county disparity and variability are premised on the foundation that there is no acceptable statistical percentage or other system whereby prosecutors could avoid this variability.

So it doesn't really matter whether it's a minute difference or a wide range difference, if your basic premise

is no system would work.

MS. VAN WYK: Well, my premise is that we couldn't make it uniform enough to be just because of all the factors I mentioned earlier. And I don't think prosecutors should sit and look over their shoulder of the prosecutor in the next county. I think they should do what they always do which is consider their own constraints in the facts of the crime and what their people tell them when they go out and investigate, and I just think it's inevitable that we're going to have these wide variations because of all the different opposing forces that are causing them, which I've mentioned and other witnesses have mentioned in other testimony.

REVEREND HOWARD: But the defendants are citizens of the same country, right?

MS. VAN WYK: I think so, and I think they're citizens of the same state, and if we were going to have a death penalty I think it would be imperative that it have more rationality and consistency than it does have. And I should point out the falling capital prosecution rates, I think, play an important role here. Some prosecutors have turned their attention to other things more than others and everywhere it's being used so infrequently that I think the infrequency and the geographic variation are working



together and we really are approaching that Eighth Amendment point where it's getting to be like struck by lightning again, and lightning might strike in one county and not in another. So NJADP's position is that that's simply unjust, and the Commission should not allow it to continue.

REVEREND HOWARD: Mr. DeFazio has been trying to get in here.

MR. DeFAZIO: Thank you, Jim. Just as a hypothetical, counselor, let's say that we limited the death penalty to the two classes of cases that currently call for life without parole if the person does not get death: killing a police officer on duty or killing a child who's the victim of a sexual assault. That would clearly limit the universe of cases, correct?

MS. VAN WYK: Yes. That's right.

MR. DeFAZIO: And you would agree with me that it would probably nearly eliminate the countywide variability.

MS. VAN WYK: I wouldn't be surprised if that were so because of the high prosecution rates of cases in both those counties.

MR. DeFAZIO: Well, now, I'm going to ask you. What's your opinion on that? Your organization's position or your position. I'm just curious, really.

MS. VAN WYK: I think then this is consistent with

what I've been seeing. If you make the death penalty even more infrequent than it already is, I mean, as it is now we have no more than one per. So then we'll have even less.

MR. DeFAZIO: No, no, no, now wait a minute. I have to take issue with you on this. It would not be maybe infrequent within that smaller universe of death-eligible cases.

MS. VAN WYK: That's true. Nevertheless it would certainly -- we've had seven law enforcement killings in 20 years and I don't know the number for the child victims of sexual assault.

MR. DeFAZIO: It would clearly be a much, much smaller universe.

MR. VAN WYK: No question about that. But I think then we would have Eighth Amendment problems with respect to the frequency.

MR. DeFAZIO: Well, I'm --

MS. VAN WYK: But I understand your point that --

MR. DeFAZIO: I'm going to ask you to explain that to me because I don't follow you on that, that we'd have Eighth amendment problems if we were to limit the death-eligible universe to say what I just said. Those two classes of -- we agree and I know you'll agree with me.

MS. VAN WYK: Yes.

MR. DeFAZIO: Those are despicable events. I don't follow you on how that would be an Eighth Amendment issue.

MS. VAN WYK: I'm just saying I don't think any state has ever come close to -- the Federal Constitution requires that the set of death-eligible cases be narrowed. It is one of the Federal constitutional requirements for death penalty that is consistent with the cruel and unusual punishment clause. I don't think any state has ever come close to narrowing it that drastically and that's where I'm wondering, you know, it's such a tiny subset of all of the murders. We've had thousands of homicides since 1982. I'm not sure how many child sexual assault killings there are. We know there have been seven law enforcement killings. So there might well be Eighth Amendment problems in that respect.

REVEREND HOWARD: And terrorism is not in that subset.

MS. VAN WYK: Terrorism, I think, is also --

MR., HOWARD: But it would not be in that one. Obviously.

MS. VAN WYK: Yes.

REVEREND HOWARD: By the way, just as Justice Coleman is about to speak we have some indication here that we've had a plane hit a building in New York City.

MS. SEGARS: A small plane.

REVEREND HOWARD: Since we've been sitting here. A small plane.

MS. SEGARS: 72nd Street.

REVEREND HOWARD: No further words on the details. Justice Coleman.

JUDGE COLEMAN: I'm not sure I now understand your reason for urging the Commission to recommend abolition of the death penalty. Is it based on Eighth Amendment grounds alone? Because if it is our function was not to sit as constitutional officers.

MS. VAN WYK: Right. No, I'm sorry. I'm urging the Commission to do it because I think it's good policy for -- Prosecutor DeFazio was asking me to predict what might happen if the Commission instead chose only a couple of aggravators and I would anticipate such a statute might encounter problems in the courts. But I'm not asking this Commission to rule on such an issue. I hope that answers your question.

JUDGE COLEMAN: Well, I raised the question not so much in the context of the question, but your opening remarks that when the U.S. Supreme Court made its decision it narrowed the window of opportunity for states to enact death penalty statutes. And I thought you were concluding

that given the narrowness under which they had to operate, we now know they cannot comply and therefore we now have an Eighth Amendment violation.

MS. VAN WYK: Well, I wasn't urging this Commission to decide whether we do or we don't. I'm saying that the efforts to comply on the one hand with the constitutional requirement of narrowing and on the other hand with the constitutional requirement of discretion with respect to litigation has made it really, really hard for all the actors to engage in rational and predictable decision making.

JUDGE COLEMAN: If it's broken we simply ought to recommend that it be fixed.

MS. VAN WYK: Yes.

JUDGE COLEMAN: Thank you.

REVEREND HOWARD: Hearing no further comments we want to thank you for coming and the testimony that you have provided.

MS. VAN WYK: Thank you very much.

MS. SEGARS: And just for the record, Reverend Howard, I would just like to compliment Claudia Van Wyk on the work that she's done and the effort that she's put forth in this work for many, many years.

REVEREND HOWARD: Thank you. And I had reference

to your written testimony which we do have in our possession. Thank you.

MS. VAN WYK: Thank you very much.

REVEREND HOWARD: Then the Chair would like to invite Ms. Roberta Glenn. She has performed a comprehensive study of AOC narrative summaries of death-eligible homicide cases in New Jersey.

MS. GLENN: Good afternoon. Thank you very much for allowing me to make a presentation today. I have to commend you for the work you're doing. It's emotionally taxing. But for the past six years I've been consulting for a variety of large scale empirical capital homicide studies and I've been helping them design the methodology and the research protocols, and I've been researching the cases for them to extract reliable data.

In the course of this work I've analyzed hundreds of death-eligible homicides. Last spring the New Jerseyans for Alternatives to the Death Penalty asked me to help present something for you on question number 5 which is whether or not there's a significant difference in the crimes of those selected for the punishment of death and those who receive life in prison.

One, the data that I used is the same one that Judge Baime described to you today. It's prepared by the

Administrative Office of the Courts for the Supreme Court's proportionality reviews and it basically contains detailed information about the crime, about the defendant, about the procedure of the case and a resolve. I used the standards that Claudia described set forth by your death penalty statute and the constitution which limits what aggravators juries can look at, but broadens the discretion that they can use in looking at mitigating factors.

So it's very, very difficult, and it can be like comparing apples and oranges, yet some of the cases are almost identical. Some of the mitigating evidence while differing in detail is very similar in the amount of mitigation there is and it's the -- The difference is in the treatment of the cases are striking. You may have read recently in the newspaper about Donald Lofton. He's on death row for robbing a gas station and shooting an attendant. Carl Culley shot a gas station attendant in the course of a robbery and he was tried and sentenced to life.

Don DiLiretto shot a gas station attendant multiple times in the course of a robbery. He returned when he saw the attendant wasn't quite dead and shot him again. He was tried and sentenced to life.

John Downy shot a gas station attendant in the course of a robbery and then shot at a cop who chased him.

He was tried and sentenced to life.

Richard Feaster shot a gas station attendant in the mouth with a sawed-off shotgun in the course of a robbery. He was tried, he was sentenced to death and his death sentence was overturned. He was tried for a crime he committed a month after the first gas station robbery. In that gas station robbery he stabbed and slashed a gas station attendant over 40 times. He was tried and sentenced to life.

Dwight Hixon shot a gas station attendant in the course of a robbery. He pled to aggravated manslaughter and received a term of 30 years.

Caloff James shot a gas station attendant in the course of a robbery. He was tried and sentenced to life.

Robert Morton shot a gas station attendant 24 times in the course of a robbery. He was tried and sentenced to death and his death penalty was overturned.

Kevin Richard shot a gas station attendant in the course of a robbery. The victim lingered despite having been shot in the chest three times and once in the neck. He died five weeks later. Richard was tried and sentenced to life.

It just goes on and on. I've used another set of examples in my paper that I submitted, and I hope you get a



chance to read it. It's a pretty fast read. But what I tried to do is concentrate on cases that present very similar circumstances to try to show the differences in the treatment. I took one death penalty case -- and by the way, you heard testimony recently that speculated that there are no robbers on New Jersey's death row. Five of the nine people on New Jersey's death row were charged with robbery.

There was nobody like William Eng on New Jersey's death row. There are some people who approach the tragedy of the William Eng case who were tried in New Jersey and are not on death row and some of those cases are included in my paper.

But I tried to be systematic about it. I took a death penalty case and compared it to another very similar case where the defendant got life after a penalty trial, and then I looked at another series of very similar circumstances and looked at those cases and some of those cases didn't even approach capital -- they weren't even charged as capital cases.

I can go through some of those with you. In the case of Nathaniel Harvey, he's on your death row. In the course of a burglary a female victim awoke and hit him in the nose, giving him a nosebleed. He struck her with a hammer, knocking her to the ground and killing her. She was

struck 15 times and suffered skull fractures and a fractured jaw. Contusions on her neck indicated that pressure had been applied and she may have been strangled.

Harvey was sentenced to death despite extensive mitigating evidence including abject poverty, abandonment by his parents, domestic violence in his childhood home, and significant childhood trauma stemming from his accidental involvement in the early death of his sister. When he was four and the children were left alone in their unheated home, his five year old sister tried to light a kerosene heater. She spilled some of the fuel on her nightgown, and when he went to start the heater her nightgown caught on fire and she burned to death right in front of him, no parents in the home.

I looked at his case and I compared it with a different capital prosecution from the very same county. Alphonso Brunson had repeatedly burglarized a residence of an 82 year-old woman during November 1987. During his third break-in, the frail homeowner surprised him and tried to defend her home. The police later found her body. It was a month later; she had died as a result of several severe bloody blows to the head and Brunson used a table leg to beat her.

As in the Harvey case, the defense presented

extensive mitigating evidence of mental disorders, his lack of impulse control, the fact that he was removed from his home when he was seven years old, his mother was a drug addict. When the child protective services first got him they found evidence of abuse, scars, bruises, injuries around his genital area. And in spite of the mitigating evidence the prosecution sought the death penalty, but unlike the Harvey case, Brunson was sentenced to life.

So coming from the outside, I'm an attorney, I'm a member of the bar in New York and in California. I look at this and I just wonder are there substantial differences between these two cases, between these two defendants? I have to conclude that there really aren't. And so I wonder well, why does a jury give one person life and another person death? Is it just how they feel on the day? Can the system really support that?

I looked again at other home invasion robberies, trying to find other similar cases to Harvey, and I found quite a number of cases that present worse facts than Harvey. I hesitate to contribute these because I find that it's emotionally scarring to have to hear horrible thing after horrible thing. It was very difficult to read these cases even though there are 600 of them, death-eligible cases in New Jersey.

Some of the other capital prosecutions with facts far more aggravated than the Harvey case include John Dow, who hit his victim during the course of the robbery. He hit the guy in the face, knocked him down, and set him on fire.

The elderly man was burned over 40 percent of his body and he died after suffering 16 days of excruciating pain. After his penalty trial Dow was sentenced to 75 years.

Roy Watson broke into a Mercer County home of a retired doctor and his wife and used a pipe -- as he later bragged to a friend, beat their brains out. After the killing, he sat down and enjoyed a whiskey while he reviewed his handiwork, and after his penalty trial he received life in prison.

Ronald Mazique beat a woman he knew and her six year old grandson with a hammer. Both the woman and the little boy were found lying face down on the floor covered with blood and surrounded with bits of human tissue. After his penalty trial Mazique was sentenced to life.

And as I mentioned before there were other cases that weren't even pursued as capital cases. Other home robberies. Louis O'Neal illegally entered the home of a very elderly, very petite woman. The defendant was 5'11", he weighed 225. She confronted him anyway, he beat her savagely with his fist. When she'd been subdued he dragged

her down to the basement stairs and put her partway into her own furnace. The medical examiner later testified that she was still alive when he did this. She died slowly while O'Neal remained in her house for a few more days and then moved on. O'Neal was convicted of all charges in a non-capital trial and sentenced to life.

Gerald Williams picked up a TV set during the home invasion robbery and hit his victim over the head with it. William then put the TV down and threw the victim out the window in front of the defendant's five year old daughter, who was along during the crime.

So the conclusion may be just as Claudia and Jeffrey and some of the other witnesses have suggested and that is when you limit the aggravators and you give full reign to the mitigator it may be just too difficult to make a consistent reliable decision. What people are looking for when they want a death penalty in their state is they want finality, they want confidence that the right thing was done. And it's difficult to be confident when you can read in the paper that this horrible crime was not pursued as a capital case, yet a relatively mundane crime like a gas station shooting was.

It's not just limited to subjective decisions about risk factors. You heard a lot about the police cases.

That's a very objective factor. If you're a public servant engaged in the course of your duties and you are killed, then that is automatically an aggravator that exposes the defendant to the death penalty. Yet sometimes for circumstances having nothing to do with the death penalty, not all the cases are pursued.

The police officer was shot while trying to approach a defendant after he had committed five robberies.

She touched his shoulder to turn him toward her and he shot her in the stomach. And as soon as he shot her in the stomach he shot her in the head. He was allowed to plead guilty and he's serving life in prison.

So I hesitate to read anymore and maybe I could just take questions. You may want to know what other procedures I used, what other cases. I can answer questions about any of the cases.

REVEREND HOWARD: Thank you. I invite members of the Commission to ask questions.

JUDGE COLEMAN: Do you know whether it is possible in the current proportionality review concept of collecting the data and analyzing it and so forth to factor in the makeup of the jury? And I raise the question in this context because our death penalty statute became effective, I believe, in 1982 which was only two years before State v.

Gilmore was decided precluding the prosecutor from emptorily excusing jurors based on race or ethnicity. And given the history of how Gilmore has been applied I just find it so almost impossible to believe that in a case that is being tried as a death penalty case the makeup of the jury at every stage is not very obvious to everyone in that courtroom, and record is being kept of it for the purpose of none other than to be able to address the Gilmore issue.

MS. GLENN: I know as Judge Baime said earlier that the data is not available in New Jersey. In other states where I've looked at proportionality, it's very difficult to get. I noticed something that everyone involved in proportionality would like to study and I think it's important. And I know that it exists. But without the support of the court system to basically order it to be given I don't know that it's possible to study. It's not part of the -- well, I've just never seen it and we've always wanted it.

JUDGE COLEMAN: To give you an illustration, if there were to be any going forward, is there a reason why the judgment which in these cases will essentially be the death warrant cannot contain a certification as to the makeup of the jury?

MS. GLENN: I think that would be an excellent

idea. I mean, you'd have to ask -- I don't know.

JUDGE COLEMAN: I'm asking the wrong person the question.

MS. GLENN: Yes, you are.

REVEREND HOWARD: Yes.

MS. GARCIA: You did a very good job of outlining the disparity between sentences of perpetrators and going over the cases a little bit. But I have a concern about the disparity as far as the victims. For an example, you know, one of the factors is the sexual assault of a child. I question, how is -- we had a case in Mercer County, I believe where a gentleman beat a little four year old and left him outside to freeze to death. How is that any less heinous than the sex -- I understand the rationale behind it that, you know, you're talking about sexual perpetrators on children, but, you know, how can you compare one and say it's more or less heinous than another?

MS. GLENN: Well, I think that's the exact point. I mean, it's impossible to make these comparisons. And I think there is no way for a system to be written that would be able to make those judgments. Fairness is an unmoving target. You know, if you try to be fair in one way you're being unfair in another way. I think that that's the whole point, the whole reason why the Commission should reconsider



having a death penalty at all. Because it's just not possible to make a decision on every case that's going to satisfy every citizen. And just unfairness is inherent in this system. There are way too many child abuse, child rape cases and sometimes the perpetrator gets the death penalty and sometimes he doesn't.

MS. GARCIA: From the victim's perspective it's, you know, the end result is the same and every child is, you know, it doesn't even matter the age of the child. It's someone's baby.

MS. GLENN: Oh, absolutely. And there must be some way to adequately punish without -- I don't know. I just don't think that when you're talking about the death of any person that we should be in a position of saying this crime is worse than that crime. Everybody has a different opinion. Women will tell you that rape is the worst of the worst. People who serve the public are going to tell you that police officer killings are the worst of the worst. Terrorism is the worst of the worst. How do you choose? Why should you have to choose?

MR. MOCZULA: But those kinds of judgments have been made, in some cases by the Legislature, in some cases by the Supreme Court. I agree with you. I think a very compelling argument can be made that a woman who is brutally

raped, and just for the grace of God survives a severe beating, is not -- her attacker is not eligible for the death penalty. But if a person is murdered then obviously that person, the perpetrator is eligible for the death penalty.

But those are the type of judgments that are being made all the time. And I think it goes to the Supreme Court's basic concern about death penalty process in this country. From what I'm hearing you say, the only way we avoid this type of disparity or choosing which may impact on why some cases are chosen, why some are not, is to have every case to be considered a death penalty case or no case be considered death penalty case. Anything in between, and Jeff, is your concern about how do you choose one case over the other. But in fact those types of automatic systems are exactly the systems that U.S. Supreme Court condemned back in '76 when it mentioned that individualize review, multi-stage review consideration of all aspects of the case is really the key to preserving the constitutionality of the death penalty. So it appears to me that your argument that let's eliminate inconsistency would necessarily go to the automatic type of system at either extreme that our courts have routinely condemned as unconstitutional.

MS. GLENN: Well, I agree with you. And the

Supreme Court standard is you have to be fairly and reasonably consistent or not at all.

MR. MOCZULA: Do you foresee anything within those two ranges that would survive your view of consistency?

MS. GLENN: Well, certainly giving the death penalty to every death-eligible case would not be fair. Obviously there are horrific cases and there are run of the mill cases that for technical reasons qualify as death-eligible.

MR. MOCZULA: So if there were seven police officer killings in the next year across the state, would all seven have to be prosecuted as capital cases?

MS. GLENN: I am happy to not be in a position to make that judgment. Very happy not to be. And I'm not advocating for one way or the other. I'm telling you what the evidence shows. And at the moment the death penalty is applied in a very arbitrary manner.

MR. MOCZULA: But in what -- define that arbitrariness for me. That's what I'm struggling with.

MS. GLENN: Well, that arbitrariness is that one guy can shoot a gas station attendant in the head while robbing his gas station. And another defendant can shoot a gas station attendant in the head while robbing his gas station. And one guy gets death and one guy doesn't.

MR. MOCZULA: So I go back to the question I just asked you. If there were seven cases involving the murder of a police officer, your rationale would require that all seven be prosecuted as capital cases to eliminate that, looks like two similar cases, let's treat them the same. Or none of them.

MS. GLENN: Or none of them.

MR. MOCZULA: Nothing in between. Six out of seven wouldn't work. Five out of seven wouldn't work.

MS. GLENN: Well, if it's unfair, it's unfair.

MR. MOCZULA: Sounds like --

MS. GLENN: If it's arbitrary, it's arbitrary. If one guy gets it and one guy doesn't it's arbitrary. The better option would be that none of them.

MR. MOCZULA: But all of them or none of them would satisfy the elimination of arbitrariness as you've defined it. I think it's common sense, no? I mean, if you treat them all the same way, whether no death penalty or death penalty, you've eliminated arbitrariness.

MS. GLENN: Unreasonably logical argument.

MR. MOCZULA: But the Supreme Court has said that we don't do that to maintain a constitutional system.

MS. GLENN: I think you sense a struggle between being uniform and consistent without being automatic. That's

a problem. That's why it may be a reasonable conclusion for the Commission to make that the death penalty is not a tenable institution.

MR. MOCZULA: But I think it goes to the individualized consideration of each case, all aspects which, by the way, you obviously have the luxury of being a single decision maker reviewing cases outside of the atmosphere of a trial as opposed to juries who consider all the evidence of the case and make that individualized determination. Not that we want that that way, that's what the Supreme Court is requiring.

MS. GLENN: I urge you to read a report that I presented. I had narratives. I didn't have every detail. I had basically the kind of information that the public would hear about the case. These are the conclusions I came to as a member of the public. I don't think that you would disagree if you read the narratives. They are available.

MR. MOCZULA: I understand. Again, it goes --

MS. GLENN: You can see what people from the outside can see. It's easy, you know, because we know the technical ins and outs of the statute, we understand the difficulties of the judgments that are made by the prosecutors, by the judges, by the juries. We understand how it could happen, but from the public policy standpoint I

don't know that the public understands. I don't know how you make the public understand why one guy can rape a two year old and not get the death penalty and another guy can shoot a gas station attendant in the head and get the death penalty. I don't --

MR. MOCZULA: But again, your solution to that is to treat all cases --

MS. GLENN: I don't have a solution to that, but I hope you do.

MR. MOCZULA: Your solution to that is, your definition of arbitrariness requires as a remedy that every case be treated alike in terms of its ultimate result in a capital punishment realm. Anything short of that becomes arbitrary.

REVEREND HOWARD: I think, if I may, as Chair, in defense of the witness my colleague is hearing something a little different from what I'm hearing.

MS. GLENN: Thank you. I know it's a struggle.

REVEREND HOWARD: I think what I hear you saying is arbitrariness, which is what you've really come to demonstrate in your testimony, doesn't feel like justice to the public.

MS. GLENN: That's right.

REVEREND HOWARD: That's your point, right?

MS. GLENN: Yes.

REVEREND HOWARD: Are there any further questions?

JUDGE COLEMAN: Just one point. You've been focusing on one of the issues that the Court found so troublesome when it was trying to decide on what the universal cases should be. And ultimately the decision included the broad universe because of the requirement of the U.S. Supreme Court in its decision on what will constitute a stature that would pass muster under the Eighth Amendment when it required both uniformity and consistency. An almost impossibility when you recognize that the overwhelming majority of death penalty cases would be tried before a jury. And although unlike what happened in California in the O. J. Simpson case, in which the lawyer argued jury nullification to the jury, which is not permitted in New Jersey, that is a concept that people when called upon to serve on juries understand. They know about it somehow. And so when the U.S. Supreme Court required uniformity plus consistency, it was creating a virtual impossibility for a state like New Jersey in which the judges feel they have this great latitude of judicial independence. And so in an attempt to continue with where you are with respect to your personal feeling, it is a very complex issue --

MS. GLENN: It is and --

JUDGE COLEMAN: -- and very difficult to try to resolve. Because in the final analysis in proportionality review we were not looking so much to see whether or not one crime was that much more heinous than another, but looking to see how the concept of uniformity and consistency can be applied. And when you begin to look at crime A and crime B, and I might say we never analyzed the rape cases in conjunction with the robbery cases as the aggravated factors because historically they involve very different fact patterns and so forth. So we were looking at cases that fall into the same fact pattern. And even eliminating so many of those variables, it still became a virtual impossible task to try to arrive at the uniformity plus consistency.

MS. GLENN: Right. And if you charge every eligible crime with the death penalty you have no places for the judges to exercise mercy. If you charge none of them there is no justice. There are alternatives to the death penalty.

JUDGE COLEMAN: My final comment in that area was that I know how difficult it sounds to suggest that one person who should have gotten the death penalty, but did not get it, that should somehow have an impact on whether the



person who did receive the death penalty should be executed.

Because we start with a simple proposition that because there are five people speeding down the roadway simultaneously, and you receive a ticket for speeding and the other four do not, that argument never holds up in court. Unless you can argue racial discrimination and so forth. That's not in the forms that I can give you now. But the Supreme Court has said very simply that because death penalties are different, they ought to be recognized all down the line.

MS. GLENN: Well, you know, I have such sympathies for juries who have to make that decision. And I just -- I disagree with Professor Blecker. I don't think it should be an emotional decision. I think it should be a decision about justice. I don't -- well, anyway --

JUDGE COLEMAN: I suppose you really mean as emotionless as is humanly possible.

MS. GLENN: That's right.

REVEREND HOWARD: Please. I'm very suspicious of the morally certain as I am the person who has no emotion. So here we live in this place of gray even though we yearn for black and white.

MS. GLENN: Yes.

REVEREND HOWARD: Thank you very much for your

presence here today, and you have supplied us with your testimony?

MS. GLENN: Yes.

REVEREND HOWARD: Thank you. And it's a great pleasure for me to be in the midst of people who think so carefully about these issues. And I want to say that this Commission has determined that on the 25th of October we shall have our final public hearing. And beginning as early as tomorrow morning the public will be placed on notice that October 25th is the date when they shall have their concluding opportunity to speak before this group. And we will welcome those who seek to address us at that time. I want to thank those of you who have come to be a part of this session to hear what the experts have had to say, and I want to thank the Commissioners for their patience and their participation. Thank you very much.

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**C E R T I F I C A T I O N**

I, Kimberly Upshur, court approved transcribers, certify that the foregoing is a correct transcript to the best of my ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

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DATE: October 18, 2006

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