STATE OF NEW JERSEY
NEW JERSEY DEATH PENALTY
STUDY COMMISSION

IN RE:

NEW JERSEY DEATH PENALTY
STUDY COMMISSION

Office of Legislative Services
225 West State Street, State House Annex
Trenton, New Jersey 08625
Wednesday, October 25, 2006
1:05 p.m. to 6:10 p.m.

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BEFORE:

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BORIS MOCZULA, Attorney General Representative
SENATOR JOHN F. RUSSO
RABBI ROBERT SCHEINBERG
YVONNE SMITH SEGARS
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REVEREND M. WILLIAM HOWARD JR. (CHAIR): Good afternoon, everyone. I’m Bill Howard, chair of the Committee, and we want to apologize that this room is so small and will not apparently accommodate all who are interested in our public session. But we have indeed arranged for an auxiliary room, and I’d like to ask those who are not speaking if you would consider taking advantage of the arrangements that have been made rather than to stand.

Now, if you’d like to stand, it’s quite okay, but there might be some limits if people continue to come. You appreciate that, but if you’re willing to stand, just be aware that there is an auxiliary room that is available where audio is available. We will hear from a gentleman, Mr. Scheidegger, who is not yet connected. We will hear by video conference, so we’re waiting that connection before our formal beginning, and those of you who are seated in the audience can view his testimony in that monitor.

Of course, we welcome you to this public hearing. This is the concluding public hearing of the Death Penalty Study Commission for the State of New Jersey. We will, in our future sessions as a Commission, deliberate and, hopefully, reach a consensus about recommendations that we will make to the legislature and to the governor. But we have received, as I’m sure many of you know, voluminous testimony and background support from a variety of persons who have important things to say to us on this subject, and we thank you today for your interest and for your presence.

It was our intent to have Mr. Kent Scheidegger testify first by video conference. We’re having some technical difficulties, so we’re going to go to the second scheduled witness, Mr. Sam Millsap, because he has some time constraints and he will have to make a plane at Newark Airport. So, Mr. Millsap, would you please come take your seat.
And let me just say that the ground rules here are that your presentation should not exceed 10 minutes. I know that's placing some restraints on you, but we hope you can, and of course we will engage you in some discussion.

MR. MILLSAP: That's fine.

REVEREND HOWARD: Oh, I see we seem to have Mr. Scheidegger. If you don't mind, just relax. But wouldn't you know that we would have to invite you to come to the table in order to make this work.

MR. MILLSAP: Whatever works.

REVEREND HOWARD: So let's honor his presence here by video conference because, Mr. Scheidegger, I understand you're covering the cost of this from your own pocket, so we want to really honor your willingness to be with us today. We thank you for your commitment, and we appreciate in advance what you will share with us. So on behalf of the Commission, I welcome you and I invite you to address us at this time.

KENT SCHEIDEGGER: Thank you very much. I thank the Commission for the opportunity to testify today. The correct identification and sufficient punishment of murderers is a matter of the greatest importance. Indeed, there is no more important function of the state government than the protection of their citizens from murder. Regrettably, that function is not being properly performed in New Jersey today.

In recent years, we have seen a sea change in the scholarship on deterrence and the death penalty. The availability of data for the 30 years since the restoration of the death penalty, as well as improved methods of econometrics, have produced a new generation of studies. While the studies are not unanimous and absolute proof is not possible, a preponderance of recent studies published in peer reviewed journals confirms what common sense has always told us.
The death penalty does have a deterrent effect and does save innocent lives if it is actually enforced. I will not attempt to explain the math behind these studies or pretend that I completely understand it myself. To illustrate deterrence in more understandable terms, I have computed the change in the murder rate for each state using as a base the moratorium period from 1968 to 1975, when there were no executions in the United States and it was doubtful there ever would be any again.

This gives us a basis to compare states at a time when none of them had an effective death penalty and see how they changed when the death penalty was restored. In 2004, the State of Delaware had the greatest drop since the moratorium period of any state in the nation, and Delaware has also had the most effective death penalty of any state by a wide margin. I do not believe this is a coincidence. Of the five states with the best improvements in their homicide rates, all five are states actively using the death penalty.

Over 11,000 people were murdered in New Jersey between 1977 and 2004, and I believe it is probable that some of them would be alive today if the state had an effective death penalty during this time. So why doesn't New Jersey have an effective death penalty? Thirty years of experience in 38 states has demonstrated one truth beyond question. You cannot have an effective death penalty in a state if your court of last resort is determined to block it and willing to twist the law to do so.

Regrettably, that appears to be the case in New Jersey. To see this, one need only look at the decision last July in the case of Anthony DiFrisco. DiFrisco was a hired killer, a hit man, who committed murder in 1986. In 1994 the New Jersey Supreme Court reviewed all his claims of procedural error and decided by a majority vote that no reversible error had occurred in his case. The next year, the court
reviewed his claim that his sentence was disproportionate and decided five to two that it was not.

Eleven years after that second decision and 20 years after the crime, the New Jersey Supreme Court went back, counted noses in its two previous decisions, decided it could put together a majority for reversal in those two old decisions, and on that basis alone overturned the death sentence. Not only was the decision on the merits an outrage, but to reopen this 11-year-old case, the court had to brush aside and effectively nullify a rule of court placing a five-year limit on collateral review of final judgments.

After 20 years of litigating these matters, I thought I had seen it all, but this is beyond belief. This is not law in any meaningful sense of the word. This is obstruction of the enforcement of the law because a majority of the judges disagree with it, and they are willing to make up new rules without limit to impose their preference on the state. Nor is the DiFrisco the only outrage by any means.

Earlier, you heard the poignant testimony of Sandra Place. Her elderly mother was strangled by a man who broke into her house, then cut off her clothing and sexually violated her. The New Jersey Supreme Court struck down the sentence in this case for this offense is disproportionate. To reach this result, the court decided that for any disputed fact not conclusively resolved by the jury's verdict, they would presume that the defendant's version was the truth.

This is not how findings of fact are reviewed by appellate courts in the United States. The standard, indeed nearly universal, rule is that all questions of fact are assumed in favor of the jury's verdict, when it is reviewed on appeals. I do not see anything but hostility to the death penalty and a determination to block it that could justify the opposite presumption.
The primary question before this Commission and the Legislature, and ultimately the people of New Jersey, is whether you are going to value the lives of the innocent above the lives of the guilty, and do what it actually takes to have an effective death penalty in this state.

Several measures suggest themselves. First, get rid of proportionality review. It is not constitutionally required, and it is not needed as a practical matter. The criteria to be eligible for the death penalty; the jury's decision, informed by every mitigating fact the defendant chooses to offer; and the final backstop of executive clemency make this additional level of review unnecessary.

The New Jersey Supreme Court wastes resources trying to quantify a fundamentally unquantifiable decision, and the case of the murder of Mildred Place demonstrates that the court cannot be trusted to do this correctly. Second, enact some strong limits on collateral review. Every capital defendant should be entitled to a direct appeal and one post conviction proceeding. There should be no further review except in cases where the issue relates to a substantial doubt of the identity of the perpetrator.

The execution of a person who is, in fact, guilty of murder and is, in fact, eligible for the death penalty is not an injustice warranting multiple reviews over a 20-year period. Finally, though nothing will achieve the goal unless you fix the New Jersey Supreme Court, we hear a lot about judicial independence, but the other, equally important side of that coin is judicial responsibility. Judges must use their power for the proper purpose in enforcing the Constitution and not for the improper purpose of imposing their policy preferences on the people of the state.
Unfortunately, life tenure tempts too many judges to do exactly that, so I suggest that New Jersey amend its Constitution so that Justices of the Supreme Court must go before the people for a yes or no confirmation at regular intervals, as is done in California. The experience in California demonstrates that this system comes as close as possible to the optimum, providing effective life tenure in most cases while still providing a safety valve to remove the most egregious abusers of judicial power.

Thank you again for inviting me to speak to you today, and I would be glad to answer any questions you may have today.

REVEREND HOWARD: Thank you very much. I invite any member of the Commission at this time to ask questions or make comments. Yes, Senator Russo.

SENATOR RUSSO: Thank you. Mr. Scheidegger, did I pronounce it correctly?

MR. SCHEIDEGER: That's correct.

SENATOR RUSSO: You refer to the five-year limit on collateral review of final judgments. Is that presently a rule of court in New Jersey?

MR. SCHEIDEGER: I believe it is. It was referred to in the opinion.

SENATOR RUSSO: I might add that I think your presentation is excellent, and I totally agree with you; but you should understand I come with a biased point of view, I guess, since I sponsor the death penalty. But I don't -- I do not agree with you that the way to solve this problem is to amend the Constitution so that you require Justices to go before the people. Because if there's one thing, I think, that undermines the legal system in the states that do, is judges that either are elected or go
before the people, because then you have only a judgment of -- I don't even know what the word is.

But I think what we need to do is make sure that governors select judges who will follow the law and not their own wishes and not change it to suit their own purposes. Because I think what you've outlined, as to what happened in the case that you referred to in your notes is probably, as I recall it, exactly correct; but I don't think we ought to throw out the baby with the bath water. New Jersey has always had one of the finest Supreme Courts in the country. We're always recognized as such.

Unfortunately, this issue, I think in my opinion, in my mind, has tarnished it. But I think we have to correct --, as we do with the death penalty -- we have to correct the problems, not simply throw the whole shooting match out because it doesn't work right. It isn't working right now, there's no question about it. We ought to correct it so that it does work right and not simply throw things out, same thing with the selection of Justice in the Supreme Court. But I thank you very much. Your presentation makes a lot of sense, at least to me.

MR. SCHEIDEgger: There is more than one way to fix the problem.

REVEREND HOWARD: Thank you, Senator Russo. Yes.

MR. MOCZULA: Mr. Scheidegger, have you had an opportunity to review the studies dealing with exonerated defendants? And if so, do you have an opinion on those studies, in the context, obviously, of capital cases?

MR. SCHEIDEgger: The list that is usually cited of exonerated defendants is often miscited as a list of people proven innocent, and it most is certainly not that. I'm referring to Justice Scalia's opinion in the Kansas v. Marsh case; as well as the amicus brief
signed by numerous states written by the California Attorney General in
the case of House v. Bell. And those have a thorough critique of those
studies. I personally have not critiqued the statements myself; other
people are doing that work.

REVEREND HOWARD: Mr. Moczula, do you care to ask?

MR. MOCZULA: No.

REVEREND HOWARD: Mr. Hicks.

MR. HICKS: Mr. Scheidegger, in the order here, it has you
listed as the organization -- as dedicated to the rights of crime victims.
But I'm just wondering if your strong support of the death penalty is
personal, or is it as a representative of that organization of crime
victims?

MR. SCHEIDEGGER: I am a believer in it. I believe for the
reasons both of deterrence and justice desserts. Professor Blecker
already talked about that part, so I didn't repeat what he said. But it
is also the position of my organization, yes.

MR. HICKS: The reason I ask is, because during the process of
this Commission, we had quite a few victims -- family members of victims
who have come to this Commission in opposition to the death penalty. So I
think it's important for people to realize that all victims' family
members aren't necessarily in favor.

MR. SCHEIDEGGER: I reviewed the testimony of the transcripts
that were available, and I note that it appeared to me that some of those
victims were traumatized by the system as it presently exists in New
Jersey. And I would certainly agree that the system you have is
unacceptable.

MR. HAVERTY: Mr. Scheidegger, I just want to ask one
question. Do I understand from your testimony here that you would like to
see some of the due process protections which have been put in place in this state, in capital cases, eliminated?

MR. SCHEIDEGGER: I think that you need to limit the extent to which old cases can be reviewed, and limit that to cases where there's a serious question of actual innocence. I would not regard that as a due process protection. It is certainly not required by the due process clause. It is not required by any other provision of the Constitution.

MR. HAVERTY: What about -- you did suggest that we do away with proportionality review because, in your mind, that's not constitutionally required under the U.S. Constitution. I think you cited to a U.S. Supreme Court case, correct?

MR. SCHEIDEGGER: That's correct.

MR. HAVERTY: But the New Jersey Supreme Court, under interpreting its Constitution, certainly has the ability to interpret it as requiring proportionality review for cases in our state rising out of our laws, does it not?

MR. SCHEIDEGGER: It certainly has that authority, subject to the ultimate authority of the people of the state to amend their Constitution in the event it is misinterpreted.

MR. HAVERTY: And you believe that the New Jersey Supreme Court has misinterpreted our Constitution to require proportionality review under our Constitution, and under our law?

MR. SCHEIDEGGER: I don't believe the proportionality review is required, no.

MR. HAVERTY: Under New Jersey constitutional law?

MR. SCHEIDEGGER: I'm not aware of anything in the New Jersey Constitution that would justify a different conclusion.

MR. HAVERTY: Thank you.

REVEREND HOWARD: Ms. Segars.
MR. SCHEIDEGER: I'm sorry. I can't hear anything.

MS. SMITH SEGARS: Can you hear me now?

MR. SCHEIDEGER: Yes, thank you.

MS. SMITH SEGARS: I'm looking at your statistics and your chart, and my question is, if the death penalty has a deterrent effect, which you state, what is the problem in Texas? And I notice that Texas is not on any of your attachments.

MR. SCHEIDEGER: On the attachments, I listed the five states with the best improvements with their homicide rates, and I listed the five that have had actual increase in their homicide rates, at the time when most of the country was going down. Texas is neither in the top five nor bottom five.

MS. SMITH SEGARS: I'm sorry?

MR. SCHEIDEGER: Nor is Texas Texas is not the state with the highest number of executions per murder. Texas has a lot of executions because it is a very large state.

MS. SMITH SEGARS: But those numbers in Texas have not gone down as Texas has continued to execute.

MR. SCHEIDEGER: You're saying the murder rate has not dropped in Texas?

MS. SMITH SEGARS: That's my question. Has it, or do you have something here that shows? I'm just curious if that factor is contained in your information.

MR. SCHEIDEGER: Yes, not on the table that I provided as attachments to testimony. But the rate of murder in Texas relative to the moratorium period has dropped by 50 percent, which is more than the national average.

MS. SMITH SEGARS: Thank you.
REVEREND HOWARD: Are there further questions?

RABBI SCHEINBERG: Thank you.

There are some reviews in the deterrent studies that you have cited that suggest that, because there's, overall, a decrease in the murder rate in the United States during the period that you described, that there is a very large number of factors that are likely to effect the murder rate, and that isolating the effect of capital punishment is a difficult conclusion to reach. Do you have a comment?

MR. SCHEIDEgger: Yes, sir, there are a number of factors. Yes, it is difficult. That doesn't mean though that it's impossible.

As I stated, they are not unanimous. There is some consent in the community, but I think that the preponderance of evidence, based on a new generation of sophisticated studies, is that there is indeed a deterrent effect, and that an effective enforcement of the death penalty will produce a reduction in murders over what would be the murder rate, everything else being equal.

REVEREND HOWARD: Mr. Scheidegger, this is Bill Howard, Chair of the Commission. You seem to hinge a great deal of your argument, today at least, on the effects of deterrence. But you alluded to your sympathy to the testimony of a previous witness in favor of the death penalty and his advocacy of something called, "just desserts." Am I correct?

MR. SCHEIDEgger: Yes.

REVEREND HOWARD: Would you, on your own, elaborate a bit on exactly what your view is on this?

MR. SCHEIDEgger: There are some crimes for which any lesser penalty is simply insufficient as a matter of basic justice. And this is an issue that's rather difficult to debate. I mean, most people either believe that or they don't, as a matter of morality and as a matter of
their sense of justice; and there is very little you can say to convince people one way or the other.

But when you hear of a case of torture-murder -- the man executed in Ohio yesterday who killed an entire family of five people, including the children -- to give that person life in prison under the conditions that Professor Blecker has already described to you, I think is a mockery of justice and I think it is inadequate punishment.

REVEREND HOWARD: Professor Blecker made a rather categorical statement in his testimony. He said that retribution is at--

MR. SCHEIDEgger: I'm sorry. I couldn't hear you because they interrupted to tell me the video is almost over--

REVEREND HOWARD: I'll repeat. He said that retribution is at the core of human dignity. Do you believe that?

MR. SCHEIDEgger: I don't go as far in that regard as Professor Blecker does. I do believe that inadequate punishment of a crime is indeed an affront to dignity. I wouldn't go quite that far.

REVEREND HOWARD: Thank you. Hearing no further comments or questions from the Commission, let me again thank you, sir, for taking the time to be with us today and for your presentation. And I'm to say here that you may now disconnect.

MR. SCHEIDEgger: All right. Thank you very much.

REVEREND HOWARD: That is apparently what you should say to shut down the technology, so I think we've successfully completed that test. Now we welcome, once again, Mr. Millsap, who will speak to us now. Thank you very much for your patience, sir.

SAM D. MILLSAP JR.: Let me say, first of all, my name is Sam Millsap, and I'm delighted not only to have the opportunity to be here, but I'm particularly delighted to testify right after Mr. Scheidegger, because I think -- well, because I come from a state that has been
remarkable in its efficiency in executing those who have been convicted of
capital crimes. I always love it when somebody asks the question, just
before I talk, what's wrong with Texas?

And while, at least at some level, I would say on behalf of
the people of Texas that we appreciate the fact that you gave us Woodrow
Wilson, and that you gave us Thomas Edison and light, and we apologize for
the fact that we gave you Tom DeLay -- and I want to try to address, to
some extent at least, what may be wrong with at least a part of Texas.

I'm a former elected district attorney. I was the district
attorney in San Antonio, Texas, in the mid-1980s. And during the period
when I was the district attorney, it was my -- not only my duty, but also
a privilege to oversee the prosecution of a number of capital murder
cases. In the four years that I was in office, we prosecuted and
convicted probably more people than are on Death Row in New Jersey today,
and that's just from one county of the 254 counties in Texas.

All of the people that were prosecuted by my office when I was
district attorney were convicted and they have all been executed. One of
the cases that my office prosecuted in the 1980s was the case of Ruben
Cantu. If you haven't heard about Mr. Cantu, you will. Mr. Cantu is at
least part of the response to Justice Scalia's suggestion that there had
been no innocent people that he knows of, at least, that have been
convicted and executed, in all probability. And I say that because we'll
never be certain. But when Mr. Cantu was executed in 1992, we were all
certain that justice had been served. Recent events, however, suggest
that Mr. Cantu may well have been innocent, and that's what I want to talk
with this Commission about. And let me say also that, although it's
unpleasant for me, as a former prosecutor who may at least in part be
responsible for the prosecution and ultimately the execution of someone
who may have been innocent, I believe that those whose best efforts may
have produced unfortunate results in capital murder cases have a moral and an ethical duty to admit their mistakes and to accept responsibility for those mistakes.

And it's for that reason that I welcome the opportunity to talk with you about my experiences with the death penalty in Texas. And at the risk of being accused of being a carpetbagger, at least a carpetbagger in reverse, to suggest that the State of New Jersey can learn from the Texas experience, and hopefully will, in order that it might avoid the tragic reality that I think the state of Texas faces today.

I should also add that I hope that there are only a few prosecutors or former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man. And although it's important that we be willing and able to look back and ask ourselves objectively what went wrong, how did this happen, it's absolutely crucial that all of the players in the system, whether we're in Texas or New Jersey or anywhere else, rather than hurl allegations and assign blame for the mistakes of the past, be positive, look to the future in the search for a system that guarantees the protection of the innocent; and ask the most important question of all: How do we make sure that innocent men and women are not executed in the future?

And that's why I'm here today. I want to discuss the death penalty with you from the perspective of a former prosecutor who has accepted personal responsibility for the execution of a man who may well have been innocent. And I acknowledge that there are certainly huge differences between the State of New Jersey and the state of Texas when it comes to the death penalty, but one of the things that I want to emphasize is that the two states are virtually identical in those respects that are most significant, in terms of the points that I want to make today.
Their courts and our courts function in the same way. You rely on juries to decide questions of fact. Those questions of fact are decided based on the testimony of witnesses who sometimes tell the truth, and who sometimes don't tell the truth; who sometimes, even when they believe that they're telling the truth, are simply wrong. And as is the case in Texas, the criminal justice system in New Jersey, on its very best day, is driven by imperfect human beings. And try as we do to get it right all the time, sometimes we don't.

Sometimes we get it wrong, and so it's against this backdrop of what our states have in common that I address the issue of innocence and share my perspective as a former death penalty player who got it wrong. Mr. Cantu is the center piece for any debate, whether it occurs in Texas or New Jersey or any other state, on the question of innocence in the context of the death penalty debate. And the reason for that is that, unlike so many of the other cases that you hear about from Texas where the defense lawyer went to sleep, or the defense lawyer was drunk, or some horrible miscarriage occurred in the trial itself, Ruben Cantu had not only what we promised to every defendant in Texas and in New Jersey, namely a fair trial, Ruben Cantu had a perfect trial.

He had a fine defense lawyer. He had a fair judge. He had one of the most ethical and honorable prosecutors that it was my privilege to work with, and he had a jury that decided the case on the basis -- in the only way that they could -- based on the evidence that was presented. And yet, 21 years later, the thing that we're confronted with is the reality that Mr. Cantu may have been innocent. And the point that I would emphasize is that, whether he was innocent or not, the criminal justice system in Texas failed Ruben Cantu.

And the reason that I say that is, that in Texas, like New Jersey and like most states, prosecutors are entrusted with vast
discretion as to how cases should be prosecuted and whether they should be prosecuted. I made an error in judgment when I decided to prosecute the Cantu case as a capital murder case because that decision was based on the evidence of a single eyewitness. We had one eyewitness. We had no physical evidence that connected Cantu to the crime.

And yet the thing that I know, from my discussions with prosecutors around the country, is that the decision I made is a decision that would have been made by almost any prosecutor in the same situation; and yet it was a flawed decision. It shouldn't have been made. And what I would say -- and I know I'm running out of time, and I want to make one final point that's important. I would call to your attention and urge -- and particularly in response to Justice Scalia's suggestion, in Kansas v. Marsh, that he knows no innocent man has been executed in the United States -- look at the record in the state of Texas; look beyond the Cantu case because in the Cantu case we don't have certainty.

But if you look at the case of Cameron Willingham -- and I don't know whether you all have talked about the Willingham case or not -- but the Cameron Willingham case is in response to Justice Scalia. Cameron Willingham was convicted of arson. His house was burned to the ground. His three children were killed in the fire. He was convicted on the basis of what was considered at the time to be expert testimony. After he was executed, in fact just in the last few months, a number of experts have come to the conclusion that the basis for his conviction was absolutely flawed; that, in fact, what we considered, and for many years considered generally to be good expert testimony in arson cases, was really just junk science.

And so in the state of Texas, we have one case in which not only an innocent man was convicted and executed, we have an execution in Texas in a case in which there was probably not even a crime committed.
And so I'll conclude, because I know I've run out of time. And I look forward to answering your questions, with a statement of appreciation for the fact that I've been invited to be here. And I look forward to your questions. And I urge, at the risk of being accused again of being a carpetbagger, that you head off the State of New Jersey from what I think lies ahead for the state of Texas.

REVEREND HOWARD: Thank you, Mr. Millsap, and now we invite the Commissioners to ask questions or make comments.

You go first, and then Justice Coleman.

MR. HAVERTY: I wanted you to elaborate a little bit more on the last point you just touched on, the fact that there was an expert that gave you opinion or gave an opinion in that case, and now you go back later and you realize that there probably wasn't even a crime committed. Can you elaborate a little bit more on how that happened?

MR. MILLSAP: Sure. I forget what the term is, I think it's called spalling, but for many years it was generally accepted that the only way that glass could feather or web in a fire was if the heat that was created was so great that the only possible explanation was the use of an accelerant. And so in all situations in which this condition was discovered, the conclusion, the natural conclusion, was that arson was the only explanation.

And what's been established recently is that there are any number of things besides the use of accelerants that can create exactly the same result. And the basis for the conviction -- the primary basis for the conviction in the Willingham case was the presence of this evidence; and it obviously, what we know today, undermines the validity of that conviction.
MR. HAVERTY: And not to be too hyper-technical about it, we discuss something that we as lawyers all know about, had that expert testimony been vetted through a Daubert-like process.

MR. MILLSAP: Well, you know, when Willingham was convicted, I'm not sure we had a Daubert-like process.

MR. HAVERTY: Even the Frye test, in general acceptance.

MR. MILLSAP: Sure. In the period when I was district attorney -- and Willingham was convicted after I left office, and he was not convicted in Bear County. We're not responsible for both of these cases, but, you know, what had to be established as a predicate for expert testimony was that the process was generally accepted, and certainly the testimony that was given in the Willingham case satisfied that test. Daubert is a much more exacting test and process, and I frankly can't tell you whether Daubert was even had even be decided when the Willingham case was presented.

MR. HAVERTY: The only reason I ask is that's a gatekeeper function there as well, that apparently failed.

MR. MILLSAP: That's true.

MR. HAVERTY: Thank you.

JUSTICE COLEMAN: The question is a personal one. If you prefer not to answer it, feel free not to answer it, but I too am part of a family of victims whose brother was murdered, and as a judge I've always been concerned about passing judgment, finalizing the conviction when there is some question about innocence. How do you live from day to day with the fact on your conscience that you may have sent to the execution chambers an innocent person?

MR. MILLSAP: Well, first of all, I do assume that responsibility. And when I say that, I know that there are prosecutors on
this panel and the sort of typical response of prosecutors is to take the position that the only thing they did was to present the evidence and it was the jury who made the decision. I believe that that's bunk. I believe that and I think this is true in New Jersey. It's certainly true in Texas. From the time that a case hits the district attorney's office, until someone is executed, literally, the person who makes all of the decisions that matter is the prosecutor.

The prosecutor decides whether the case is going to be accepted, how it's going to be presented to the grand jury, how it's going to be presented to the jury. In Texas, if the grand jury does something the prosecutor doesn't like, we can just dismiss and start all over again until we get it the way we want it. And so I assume responsibility for the result. It's not easy to live with the realization that an innocent man may have been executed because of a decision that I made, but it's something that you know, when I was 35 years old, I was certain about everything.

I'm 59 years old today, and I'm not certain of nearly as many things as I was then, and I made the best decisions that I could make at that point in my life. And I do the same thing today, and I recognize that some of the decisions that I make today may not be correct. But my shoulders are broad and I'm not uncomfortable living with the fact that I made a mistake. I simply welcome the opportunity to suggest to others that they seize the opportunity to make sure that prosecutors, or former prosecutors, are not placed in the position that I find myself in today. It's not an easy thing. And I welcome that question, by the way.

MS. SMITH SEGARS: Mr. Millsap, can you share with us what facts came to your attention later that makes you believe that Mr. Cantu was wrongfully executed?
MR. MILLSAP: Mr. Cantu was -- well, the victims of the crime were two people who were building a house and they were sleeping in the House, as they built it. And the crime was committed on an evening when the two of them were asleep. Two people broke in, one of the victims was killed. The other victim was shot nine times, and this victim who was shot nine times was the eyewitness that our case was based on, and he testified. He testified repeatedly that Mr. Cantu was the killer.

Twenty plus years later, in response to questions from a reporter with the Houston Chronicle, he recanted that trial testimony and revealed for the first time that he had been under what he considered at the time to be enormous pressure, enormous pressure from the police department. He was not in the country legally. He was fearful that he would be deported. The police made it very clear to him that they believed Cantu was responsible for the crime, and after he had been shown a third photo array with Mr. Cantu's photograph, he identified Mr. Cantu as the killer.

And the main thing, the main reason why I'm inclined to believe, although we'll never be certain that he's telling the truth today, is there is really nothing for him to gain by stepping forward at this point. He's not writing a book, he's not looking for attention. He's done nothing but create trouble for himself by recanting this trial testimony. In addition, there have been other things that had developed that had suggested that Mr. Cantu was innocent.

REVEREND HOWARD: Mr. Russo.

SENATOR RUSSO: Thank you. Mr. Millsap, first of all, I couldn't help but notice that after thanking us so sincerely for sending you Woodrow Wilson, and whatever, since Monday night you didn't thank us for sending you Bill Parcels.
MR. MILLSAP: Well, we're not. There are bad sides to
everything. You gave us light with Edison, and we gave you darkness with
Tom DeLay, so it sort of evens out, I suppose.

SENATOR RUSSO: Let me ask you just a couple of quick
questions. Have you read the New Jersey Death Penalty Statute?

MR. MILLSAP: No.

SENATOR RUSSO: I didn't think so. Are you-- I guess what I
would say, I hoped you had read it. Because the cases you referred to
here strike me -- I don't know whether Prosecutor DeFazio or Prosecutor
Kelaher, and I was once a prosecutor, would disagree -- would not have
been convictions under that statute in New Jersey, probably not. I
shouldn't say would not, but probably would not.

MR. MILLSAP: Well, let me say that what we've seen in the
state of Texas and the two cases that I've mentioned -- and there are
others that I could make reference to -- are things that could happen in
any state that has a jury system. Any state that relies on juries and
relies on fact witnesses to help juries make their decisions are subject
to the kinds of errors that I believe have occurred in Texas, and with
respect to the fact that there are differences between our Death Penalty
Statute and the Death Penalty Statute that we had in Texas in the 1980s,
and what New Jersey has, and the many safeguards that New Jersey has that
Texas does not have -- what I would suggest to you is that what happened
in the Cantu case could happen here.

SENATOR RUSSO: Well, I don't at all agree with you. I just
wanted to share with you that in defense of the Legislature and Governor
Kean, who signed the Death Penalty Law at the time that this was debated--
Actually, each time it was debated, it had been turned down by Governor
Byrne several times. The whole purpose of it was to look at what happened
in Texas in many other cases; Kansas, other places. How do we draw a
law that makes it, at least -- you can never say with absolute certainly -- but virtually certain it will not happen in New Jersey?

And the kind of things that you talk about in your statement were the kinds of things we debated; and we put together a law that, at least to this date -- at least to this date -- we have not had one determination of an innocent person being executed or convicted of the death penalty in New Jersey, under its current law, so far, because of, I think, the way the statute was drawn. Now, our problem, of course, some would say is with the courts. But nevertheless, the law itself was drawn in such a manner that if you were going to have a death penalty, it's as tight as can be.

Now, there may be people, and I respect that view as I always have, who don't feel we should execute anyone under any circumstances, and that's a view that I can't quarrel with if that's how they feel. But if you're going to have one, New Jersey has one that Texas should look into for its own use.

MR. MILLSAP: Well, let me just say in response to that, that while I have no reason to question or to doubt anything that you have said, the basic premises of my position is that essentially that it's impossible to create a statute that guarantees the protection of the innocent in all death penalty cases. And I would also suggest to you that anyone who believes, as many do, that it's enough if we get it right most of the time, would not require as much as I do, and as I think we should.

I think it's crucial in death penalty cases, because the sanction is so final, that we have a system, a statute that gets it right all the time. And what I suggest to you, and the only thing that I suggest to you, is that if you look at the Cantu case and if you look at the
Willingham case, that even though there are safeguards in New Jersey that
don't exist in Texas, that at least the Cantu case could have happened
right here, because you know you have witnesses as we do who don't tell
the truth. You have witnesses who try to and who get it wrong, and you
have juries that make decisions based on what those witnesses have
testified to.

SENATOR RUSSO: I'm not sure I agree with you. Perhaps the
prosecutors who are currently sitting might want to comment, but I would
suspect on the Cantu, where you had just the one witness, a junk science
case where you had just that expert testimony, that these prosecutors
certainly would probably never have thought of the death penalty in those
instances. And if they had, under this statute, the jury in New Jersey
probably would not have returned a death penalty verdict. But, at least,
that was the purpose of the statute -- to make sure that Cantu did not
happen here, and we think so far, at least, it's been successful.

MR. MILLSAP: Well, I think I was interested in what Mr.
Scheidegger had to say about the Supreme Court -- that it seems, at least
from his perspective, to do everything it can to make sure there will not
be an execution. The fact that you haven't had one in New Jersey in, what
is it, I think 40 plus years, whether you abolish the death penalty or
not, I hope that you go another 40 years without an execution.

SENATOR RUSSO: So do I. So do I, and hopefully it will never
be necessary. But if it is, then we ought to have the machinery to allow
it under those unusually, unusually severe murders. But otherwise I agree
with you. I hope we never have one.

MR. MILLSAP: The one thing that Mr. Scheidegger said that I
agree with fully, and it was the basis for my support of the death penalty
when I was DA, is there really are some crimes that are so horrible that
the only appropriate response from civilized people is execution. So I'm
not an opponent of the death penalty on moral grounds. I simply have seen
in the state of Texas a system that doesn't guarantee the protection of
the innocent in all cases. And that's the basis for my opposition.

REVEREND HOWARD: Ms. Garcia.

Just before you speak, let me just say, we'd like to have this
be the last question for Mr. Millsap, because we have a person waiting for
another video conference hookup, and we'll have to take some time to
connect him. Thank you.

MS. GARCIA: Mr. Millsap, I just wanted to assure you that we
will never execute an innocent person here in New Jersey. It's my
opinion we will never execute anyone. We haven't done it in 40 years. I
don't see us doing it ever in the state, and I disagree with Senator Russo
and yourself that -- in hoping that we never carry it out. In doing so,
in having it on the books and never using it, what it does to the
survivors -- this false hope that they have that something will be carried
out that never will.

I can understand where you're coming from, and I appreciate
your testimony and I don't think any of us could assume that we're
perfect. But the fact is, what this legislation that's never carried out
does to the survivors -- I think that's the real issue that we should all
be considering. We may never execute an innocent person, but we're
putting lots of innocent victims through sheer hell in this state.

Thank you.

REVEREND HOWARD: Thank you very ; and thank you, sir, for
coming. And we have met our obligation to get you out on time.

MR. MILLSAP: I appreciate it. Thank you so much.

REVEREND HOWARD: All the best.

Now, we're going to take a five minute break so we might
connect with our next witness. And we'd ask that you not go
too far away because we intend to begin immediately after the connection, and we also wanted to give the recorder a break at this time. Thank you very much.

(RECESS)

REVEREND HOWARD: We welcome all who would like to be present now for the resumption. The reporter is returning; and let's take this marvelous moment as an occasion to shut off our cell phones; if you have not done that, there's no better moment.

We welcome, as the next witness to give testimony to the Death Penalty Study Commission, Professor Charles Ogletree of the Harvard Law School. Professor Ogletree, are you able to hear?

CHARLES J. OGLETREE JR.: I can hear you very clearly, Reverend Howard. It's good to see you.

REVEREND HOWARD: Good to see you, and we want to thank you for taking time to share your views on this. You are speaking to us in the concluding public hearing of the Death Penalty Study Commission. And I note that a number of our Commissioners have not returned to the hearing room, so with your patience, we would like to await their return.

MR. OGLETREE: That's fine.

REVEREND HOWARD: Let me just say that the format of our hearing is that we would like to invite your testimony for 10 minutes, following which the members of this Commission would engage you in some question and answer, and comment.

MR. OGLETREE: Very well.

REVEREND HOWARD: I think we're here now. Again, Professor Ogletree, we thank you for your presence here today, and we invite you now to address us.
MR. OGLETREE: Thank you very much, Reverend Howard. Thank you to all the members of the Commission. I'm honored to have the opportunity to speak before you today. I regret that I can't be at this hearing, which I would prefer to do, in person, but could not get there in time for the hearing scheduled today. I'm Charles Ogletree, Jr. I'm the Jesse Climenko Professor of Law at Harvard Law School. I'm the executive and founding Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School.

It is an institute that focuses on the enormous and successful work of Charles Hamilton Houston, a Washington D.C. native, a Harvard Law School graduate, and the lawyer who trained many of the lawyers like Marshall and Oliver Hill, who led the important battle to establish race and justice and equality in the Brown case in 1954. I'm joined by David Harris, who is here with me. He's the new managing director of the Houston Institute. And you will receive, as I agreed with Mr. Neville, our testimony in writing as part of the record for this hearing.

Let me say a word, if I can, about my background, and then a few minutes about the testimony today. I'm a native of California, graduate of Stafford University and Harvard Law School, and I now teach at Harvard Law School. I have been involved in the criminal justice system for my professional life, for much of three decades. I've tried cases in state and Federal courts, working with juvenile and adults; and trials and appeals at every conceivable level from simple assault cases to capital punishment cases, including arguing capital punishment cases before the U.S. Supreme Court, other state courts and circuit courts in this nation.

I come at this as a lawyer, as a scholar and also as a victim of crime. My sister, I regret to say, was murdered in early 1980s, and it makes this even a more painful experience to think about, thinking about her life that was lost -- and no one was prosecuted for that offense --
and yet it has not changed my view at all about capital punishment and its role in our society. I am against capital punishment.

I hope New Jersey will follow the lead of states like Illinois and others to look at the way that justice is unevenly distributed based on race, race of the victim and race of the defendant; and will look at the other important factors to decide that the most important way to go forward is not to punish unfairly, but to think of other forms of punishment short of death that will achieve all the goals that this Commission might want to consider.

Let me spend just two minutes on history, and then a couple minutes on the demographics; and then I will be more than responsive to any questions you may ask. First of all, race has had a profound and disturbing history in the application of capital punishment in this country. Not only capital punishment by states that decide to impose it, but in other nonjudicial, extrajudicial settings. What we do now is, and what I have written about in my recent book with Professor Austin Sarat, is that thousands of African-Americans were victims of what we call legal lynchings.

That is, they were lynched in the 1900s, late 1800s without any judicial process, without any fairness. So race has been significant in the idea of who lives and who dies in our justice system, so much so that it took the Supreme Court, in 1972, to look at Georgia's application of capital punishment and decide that Georgia -- one of what we call the death (indiscernible) states in the South -- was very serious about the application of capital punishment and the execution particularly of African-Americans.

The Supreme Court in 1972 stopped executions because of the lack of any meaningful controls. They were reinstated in 1976 in a case
called Gregg v. Georgia. The Commission might remember it. And then more importantly for this Commission's role, is that there is a very important change in the course of thinking in 1977, when the Supreme Court decided as well that the felony of rape should not result in the execution of individuals, because the punishment for the crime was disproportionate.

And that case was important in that the underlying data that became essential in the findings in the 1977 Supreme Court case -- was that, if you look at the history, the people who were being executed for rape were largely African American, and largely male, and largely accused of crimes against white women.

That disproportionality was very profound. It became even more arresting in the 1980s study by Professor David Baldus, from the University of Iowa, who did a substantial study in the case of McCleskey v. Kemp, where he showed, in regression analysis, an enormous disparity between African-Americans and others in terms of who would die based on the race of their victim.

Let me turn to why that's relevant now, as we look at that history, and why it's something that should be considered by this great Commission in New Jersey. First, let me give you a little comparative data. And a part of the book, the book I mentioned before -- I think all the Commissioners have it. It's called From Lynch Mobs to Killing State: Race and the Death Penalty in America. It is our effort to bring to bear current data and research on the death penalty, and the application across states and across regions.

And there are a number of citations that will be in the testimony that you will receive, as well as passages from the book. But my basic point is this: In a study in the book, Professors Radelet and Pierce noted, looking at information on disparities in the death penalty, the following -- looking at Illinois, Cook County, and other urban
counties and rural counties. Their analysis said the following: that in Cook County, 1.5 percent of the first degree murders ended with the death sentence versus 3.3 percent of the cases in collar counties, versus 3.4 percent in the cases in the other urban counties, and 8.4 percent of the cases in the rural counties.

But they went on to say this: Comparison across all the variables in the logistic regression analysis shows that sentencing, county region, and the race of victims are among the 13 independent variables, not counting the dummy variables, that achieve a .05 level of significance. To put it another way, the authors ultimately stated that the odds for receiving a death sentence for killing a victim or victims in Cook County, on average, is 84.5 percent lower than a killing victims in the rural county region of Illinois, comparing for other variables in the analysis.

The odds of receiving a death sentence for killing a victim or victims in the collar or urban counties decreased by a factor of .484; and the odds of receiving a death sentence for killing a victim or victims in Cook County are on average 51.6 percent lower than for killing a victim or victims in the rural county region of Illinois, controlling for the other variables. These results in Cook County are similar to other results in other jurisdictions as well, and I think it's important in what you're attempting to do in New Jersey -- to think about the impact.

Here is why these issues are particularly significant. One of the things that we have learned from the studies in this book that we’ve compiled is the following. The problem arises because present criminal justice information systems were designed primarily to support administrative functions of the agencies they assist. The systems were not designed to support research activities, and equally important, judicial monitoring activities. That is one important point.
REVEREND HOWARD: Professor, that’s a two minutes alert.

MR. OGLETREE: Yes. I want the members to think about the idea of the role of -- the presumption that the problem is a death (indiscernible) problem. There are problems in places like Texas and Florida, Louisiana, other southern states where we see this disparity. But it is not a southern problem; it’s a national problem. It’s a problem in Illinois, it’s in New Jersey. And therefore, it’s important that, if you look at the external issues of what’s happening in other states, internally, even within the State of New Jersey, you will see the replicability of disparity based on race and based on region.

My hope is, as this Commission looks at these issues, they’ll examine them more carefully, and that we can offer you additional data and support that might influence the ultimate decision that will say that, as much as punishment is important and necessary and essential, the use of capital punishment is inappropriate and clearly unfair to the citizens of New Jersey; and it should not be continued, going forward.

Thank you.

REVEREND HOWARD: Thank you very much. We are going to invite members of the Commission to address questions or comments to Professor Ogletree at this time.

Mr. Hicks.

MR. HICKS: Good afternoon, Mr. Ogletree.

MR. OGLETREE: Good afternoon.

MR. HICKS: A year (sic) or two ago there was a young lady here. I believe she was from North Carolina - I’m not sure, but she was from another state -- and she testified that she was raped as a college student by a black man. and eventually she falsely identified a gentleman who spent many years in prison and eventually, at some time, DNA exonerated him. But I think that her point, that she made, was that there
is this thing -- I think you referred to as cross-cultural identification -- where people of different cultures have problems identifying people of different races.

And do you find this fairly common, where people have problems in correctly identifying people of other cultures and races?

MR. OGLETREE: Mr. Hicks, you're absolutely right. And one of the pervasive phenomena in thinking about that is the fact that we have eyewitness identification. People have honest but mistaken beliefs in identifying the accused, and they will take those sometimes to their grave, even though those beliefs are false. And we have seen case after case of the implication of that sort of prosecution.

It happened here in Massachusetts. A young man by the name of Bobby Joe Leaster came up from the South, came to Massachusetts in the early 1970s, was convicted of a homicide that he did not commit, was identified, went to trial, went to appeals, and it took 17 years before they realized that he was falsely accused. It happened in some of those cases in the state of Illinois. And the tragedy of this is not -- that they were caught by the judicial system. It's great when an Appellate Court, like in New Jersey, can find a substantial number of capital cases where there is error and reverse it. But in Illinois, what we saw was that some of these people who were innocent were deemed so based on investigation by journalists or journalism students -- not lawyers, not legal investigators, but parts of the common public. Which means that those accidents can happen.

It's even more important because our perceptions of race are shaped by what we see on television every day, what we read in the newspapers. Right now, here in our state of Massachusetts, there is an ad running by a candidate for governor, talking about another candidate, an African-American, who happened to represent someone in a death penalty
case. The case was reversed because it was an error. And the implication is, do you want this African-American man running for governor, to be your governor, when he represented someone who was a killer.

That implication of race is very dangerous and it's very tragic, and it has no place in a civilized, progressive society. I think that we have to be ever cautious. And we go back to the old adage: it's better that someone guilty go free than any innocent person ever be convicted. We have to have that as an adage. And I would think about a true justice system.

REVEREND HOWARD: Senator Russo.

SENATOR RUSSO: Thank you, Professor Ogletree. As I understand what you've said to us so far, your main objection to the death penalty is based on race.

MR. OGLETREE: You said it may?

SENATOR RUSSO: No, I said, as I understand your testimony, your main or primary objection to the death penalty is because it's unfair, for example, in this case -- in your case, in your testimony, to African-Americans.

MR. OGLETREE: It's unfair in a lot of ways, sir. If you think about what has happened with the Innocence Project, many of those victims of unlawful claims of crime were white. They were male and they were female. They were sentenced to death even though they had a trial with a lawyer and appeal. Race had nothing to do with those errors. There are errors in the application of capital punishment. That's one factor.

The second factor, race, is important because people should be selected, if at all, on the basis of the crime they commit, and not the color of their skin or the color of the skin of their victim. And I think that's important. It should be a fair system. And to the extent that
you can't set up a system that eliminates all the addition of unfairness, you have to find one that at least will discount, to the extent possible, all of the ways that people can be convicted of a crime that have nothing to do with fairness.

So it's just not based on race. That is a factor, but that's not the factor. If you look at the research in our book, we talk about other factors as well. Race just happens to be one that we see in Georgia and Mississippi and Texas and Alabama; and Illinois and New Jersey, in Massachusetts -- even if it's not capital but in another context. So it continues to come up, and the idea is that who has the power to decide? Is it applied fairly, or does it result in discrepancies, disparities in the criminal justice system -- where the public and the citizens can have no confidence in it, if your likelihood of being convicted is not because of your crime, but because of the color of your skin or the color of the skin of the victim. That should not be the basis upon which someone is punished.

SENATOR RUSSO: Let me say that, as sincerely as I can, I totally and completely agree with you that the color of the skin of the accused, the victim, or anyone else should not play a part whatsoever, totally. But let me ask you this then: You talked about the studies in Cook County, Illinois, and other places where race was shown to be a factor; and I assume you made a similar study of New Jersey?

MR. OGLETREE: Yes.

SENATOR RUSSO: And when did you make that study?

MR. OGLETREE: We didn’t actually do the study. We’ve looked at the studies that have been done by New Jersey.

SENATOR RUSSO: Did you make any study of the effect of race?

MR. OGLETREE: No, I did not.
SENATOR RUSSO: Do you have any basis for concluding that race has played a part in New Jersey's death penalty in the last 25 years, of those cases that have gone to that death penalty stage?

MR. OGLETREE: We have what we see in many states -- that if you look, county by county, you see disparities in New Jersey, as you do in Illinois and other places as well. And you also have, at least, the sense-- My concern about it is, if there is a circumstance where courts -- the highest court in the jurisdiction has to examine capital cases, and it's not 20 percent, or 30 percent, or 40 percent, or 50 percent of the cases result in some sort of reconsideration or reversal by the court -- but I think New Jersey it was 75, maybe 80 percent. That is an alarming statistic about -- there's something wrong with the system.

SENATOR RUSSO: Say that again. Eighty percent of what?

MR. OGLETREE: Of the cases that have been on review. In New Jersey, the reversal rate for death penalty cases was 87 percent of all the cases that reached final review in 1995, and three counties contributed nearly half of the 39 death sentences handed down to New Jersey courts. Four counties accounted for 24 of the death sentences. Another 39 have been reversed, 10 were vacated, and five were reduced in some capacity by the New Jersey Supreme Court, the highest authority in the state on that.

SENATOR RUSSO: Before we get to other members in the panel on that issue -- I suspect we will -- have you read any opinion in New Jersey which suggested that the death penalty was unfairly applied based on race, whether African-Americans or whomever -- in New Jersey?

MR. OGLETREE: Let me be clear about my concern. As I've said, my concern is about whether or not the death penalty is fair. Fair to everyone without regards to race.

SENATOR RUSSO: Right.
MR. OGLETREE: That's the central issue. Is it fair, and if it's not fair, if there is some errors that we see repeatedly, they should be addressed. And that's what I hope this Commission will do. The second concern is the pattern I've seen, that we have tried to relegate to a Southern pattern. And that is the problem with the death penalty, like the problem with lynching, is that Southern problem. It's a problem with Texas and Florida and Alabama and Mississippi. But what we are seeing, in disturbing data, is that when you take into account the race of the victim and you take into account the race of the accused, you see a disproportionate application of capital punishment, even in what we call progressive northern or mid-American states, in who lives and who dies. And it's the fact of that the data show these disparities that I believe requires close examination.

And it's not accusing a prosecutor of doing that in a particular case. It's not accusing a county of being biased based on some factors. But at least if I were an authority of any state -- the governor, a member of the court, a member of the legislature -- if someone tells me that people seem to be selected in a disproportionate number to their population of the state for the punishment of death, I want to know why. If there are some, is it the crime? Or if it's not that, is it the region? Well, that can't be an explanation. Does it have something to do with valuing some lives more than others, and valuing other lives less than others?

I'm simply saying, look at this with great seriousness and without any sense of saying, "We're not being tough on crime." But rather than run the risk of making mistakes that can't be corrected -- you can't correct an execution. A life sentence without the possibility of parole, surveys have said across the country, is something the public embraces as long as they know people will not be back on the street. Given the risk
we have seen, the inherent risk in wrongful executions, and what we have seen in the last 10 years -- the enormous growth in the number of people who have been wrongfully convicted and sentenced to death. And luckily DNA evidence or other circumstances have led to those individuals having their cases dismissed, and prevented that from going forward.

It's not just race, it's the idea of errors that occur. And I would think that no one wants to ever say is it acceptable to ever have a person who is innocent executed, or to have a process that is not completely effective in reducing the risk of unfair convictions.

SENATOR RUSSO: Let me conclude by saying that, first of all, as I understand it, most of those closest to Death Row -- who have been closest to Death Row in New Jersey were not African-Americans. But on the other hand, let me leave you with this thought. If you have any study, or if you make one yourself and you can get it to me or us before we vote on this, to show me that race is a factor in New Jersey and the death penalty, as a sponsor of that law I'll go before the legislature and ask that it be repealed. Fair enough?

MR. OGLETREE: That's fine. If race is a factor in who is charged for the death sentence.

SENATOR RUSSO: That's exactly right. I don't mean to say that if a black man committed a murder that he shouldn't be subjected to the death penalty any less so than a white man. I'm just saying if there is anything that shows that race is the motivating factor in the death penalty in New Jersey, we should throw it out -- we should throw it out, and I'll be the first one to say so. I'll have no part of that myself. So help me out by getting such a study.

MR. OGLETREE: Thank you.
REVEREND HOWARD: Professor, you're being asked now to provide us, if your testimony does not currently focus on that, you're being asked to provide us with some data along these lines. That's understood?

MR. OGLETREE: Yes.

REVEREND HOWARD: I'm going to ask Mr. DeFazio, if he would, to speak.

MR. DEFAZIO: Professor, I just want to make one thing perfectly clear. When you say 87 percent of the death penalty verdicts in New Jersey were overturned, you're talking that the penalty phase -- the death sentences were overturned, correct?

MR. OGLETREE: Yes.

MR. DEFAZIO: All right. Because I don't want there to be a misunderstanding --

MR. OGLETREE: Also. that’s not the only--

MR. DEFAZIO: Wait a minute, Professor. Let me finish now.

MR. OGLETREE: Okay.

MR. DEFAZIO: I don't want there to be a misunderstanding that in the State of New Jersey 87 percent of the guilty verdicts in death penalty cases have been overturned. You understand that we want to make that clear, correct?

MR. OGLETREE: I hope it was clear, sir. Of 39 death sentences, 19 were reversed, 10 vacated, five were reduced.

MR. DEFAZIO: Thank you.

MR. OGLETREE: Which means that other sentences, short death, other murder convictions-- We're not talking about where people were not subject to the death penalty. But the issue is, have the courts consistently seen some issue of constitutional magnitude in death sentences that make the court decide that those cases cannot be affirmed.

REVEREND HOWARD: Mr. DeFazio, do you want to speak to that?
MR. DEFAZIO: No.

REVEREND HOWARD: Ms. Garcia, Justice Coleman, and someone on this side -- and Ms. Segars.

MS. GARCIA: Professor Ogletree, if I were to tell you that here in New Jersey I've had prosecutors and criminal defense attorneys both tell me that a white perpetrator with white victims would be executed because he was the right race and from the right socioeconomic level, wouldn't that indicate to you that we have addressed the issue of racism here in New Jersey and possibly even overcompensated for that?

MR. OGLETREE: If you're saying that white defendants are prosecuted for crimes when their victims are white, and they're convicted -- does that solve the problem of disparity?

MS. GARCIA: No, I'm saying that -- and I'm not talking about any of the prosecutors here on this panel -- but when prosecutors, and both prosecutors and criminal defense attorneys are saying that someone on Death Row will be executed because they are white and from the right socioeconomic level, wouldn't that indicate that we have addressed the issues of racism as far as minorities here in New Jersey, and actually we're on the slippery slope of having reverse discrimination in regards to the death penalty here in New Jersey?

MR. OGLETREE: Yes, it's an interesting question; and the answer is, that doesn't solve the problem. Unfairness should not be tolerated at all, number one. And number two, you don't compensate for racism by saying, if we tack more hides of white defendants to our set of successful convictions to level the playing field we solve the problem. You've only exacerbated it. What we're looking for is fairness, and a system that is not fair is a system that can't withstand, I believe, true Constitutional scrutiny. And it's one that is going to require reversal.
And let me give you an example. There are a whole variety of ways where race can play a factor. Our United States Supreme Court has consistently affirmed the death sentence of individuals across the country. And yet, in one of the states most known for executions -- the state of Texas -- this Supreme Court, just in the last two years, has determined that in the case of Thomas Miller-El the conduct of the prosecutors -- in a death case where the government had substantial evidence, they assert, of guilt -- violated the constitution by striking black jurors.

That went to the heart of the fairness of it; and indeed, in an extraordinary opinion of the Supreme Court, it went on, as you may recall, in Justice Souter's opinion, to show extraordinary efforts of race playing a factor, while the prosecutors in Texas denied that happened, denied that was their motivation. But our Supreme Court clearly said, we're not looking at whether this man is guilty or innocent. We're looking at whether or not he's had a constitutionally fair trial. And they reversed more than once on a case that has been in the news for over a decade now.

So it tells you that the courts are looking for fairness, and I think that should be the motivation. Race is an important factor but it's not the only factor. And I think if we can get to fairness, then race will be less of a factor. But we can't get to fairness without looking at race and the impact it has had on criminal justice jurisprudence.

REVEREND HOWARD: We're going to hear now from Justice Coleman, Mr. Moczula, and Ms. Segars.

JUSTICE COLEMAN: Professor Ogletree, did your studies include any evaluation of the various proportionality review systems in the various states?
MR. OGLETREE: I interrupted the rest of the question. I’m sorry.

JUSTICE COLEMAN: That's the complete question. That's the question.

MR. OGLETREE: Yes, some of the-- We have been working with a number of social scientists around the country who have been looking at these issues -- Professor Radelet from Colorado; Professor Bowers, here, from Northeastern; Professor Baldus from Iowa, and this group of social scientists that looks at that data in a variety of places. In addition to Professor Baldus and-- I want to say Professor -- Professor Paternoster, from the University of Maryland, did a study looking at this disproportionately. And that study, in 2003, gave evidence, I think, that would be very helpful for New Jersey to think about how they might consider it.

The study found that the black on white killings in Maryland were much more likely to result in the death sentence than any other racial combination; and that murders in Baltimore County were much more likely to evoke the death penalty than any other jurisdiction, while only about seven percent of Maryland murders annually occurred in that particular county. So proportionality was one of the important factors in the study. We have that study available if it’s not already submitted to your Commission. We’d be happy to provide that as well.

JUSTICE COLEMAN: Thank you.

MR. MOCZULA: Professor, did you have an opportunity to review the reasons for the reversals of death sentences in New Jersey?

MR. OGLETREE: I’ve reviewed them before in studying capital punishment. There is a whole host of reasons. To me, they were all important for one reason. The Supreme Court affirms a substantial numbers of cases, but in these cases where they should use extra scrutiny if they
see some error of Constitutional magnitude, they will reverse and they have.

MR. MOCZULA: Based on trial errors in the case?

MR. OGLETREE: Some technical errors, applications of a whole host of different factors. It's not just trial errors, but there are a range of errors that make a difference. And in fact, when a court reverses on one grounds - if you read these decisions -- it doesn't mean that's the only ground on which reversal might be significant. And I think the Court only reaches issues that it must reach. It doesn't say, "Here are the 13 objections raised by the appellate, and here is our conclusion on each one of them."

If the court finds one issue that tips the scale, it need not review the others, as I'm sure you're aware, And the fact of the matter is that-- I wish I could say the courts are perfect. The one thing that our Supreme Court has said, "we may not be infallible, but we're final." And the Supreme Court, in terms of state jurisdiction, is final. But what we're seeing in jurisdictions around the country is that even after a final determination affirming that everything was constitutionally appropriate in a criminal prosecution, and a conviction, and a furthering sentence, then we'll find evidence that there was a misidentification, DNA says the wrong person was charged, or some other flaw that could not be found in a judicial process.

So I'm concerned about getting it right as much as we can get it right and not simply being satisfied that we had judicial review.

MR. MOCZULA: Well, the danger of citing numbers is that it rarely gives you a sense of what exactly is going on in terms of the reasoning of the Court. And let me suggest to you, as I have to other witnesses that have appeared here, that citing the overall percentage
of reversal rate doesn't take into account factors, such as if the Court makes a decision that profoundly affects how capital cases are to be tried. It necessarily affects not only that case, but the cases already in the system.

So the effect of one reversal may be 10 reversals. Simply citing the number -- 87 percent or whatever it may be -- doesn't give you a sense that on that day, because the Court has decided to change a rule in the prosecution of cases, that other cases that came before it, that obviously were not aware of the new rule, would necessarily fall. It doesn't go so much to trial error as in some cases the decisions of the Court would have an effect on how capital prosecutions are to be tried. So that's a deceiving number, to say 87 percent.

The other factor is -- you had mentioned some studies including David Baldus. Are you aware of the interpretation of Mr. Baldus' studies by the special master appointed by our Supreme Court, and by the Supreme Court itself? And specifically I'm talking about how the Court has rejected certain complex methodologies offered by Professor Baldus because of the uniqueness of the New Jersey system; and in particular a small amount of cases which would not allow for these type of statistical analyses to be done with any sense of reliability.

What I'm trying to point out is, there are certain factors that you miss by simply citing numbers and not probing as to the reasons why and how it's developed in the course of our 20-plus years of capital jurisprudence.

MR. OGLETREE: I'd be happy to respond to that. With all due respect, when I was told I had 10 minutes, as opposed to five hours, there was no opportunity to give you footnote, brief, and citation. And I'd be happy to do that. Let me respond to the first one. With all due respect, the idea of the New Jersey Supreme Court-- The New Jersey Supreme Court,
like every state's highest Court, looks at its role seriously, takes its responsibility seriously, and makes judgment about those cases.

It's interesting. If you had data saying that the New Jersey Supreme Court had reversed only three percent of death sentences, that would have been significant in saying that we don't have a problem. When a Supreme Court reverses a sentence that applies to multiple cases, it tells you that there is more than one person that has a problem. And so that statistic is not cited to say that there are 87 cases or 87 people. It's cited to say that when numbers are that high, it at least should urge you to say, "You know what, let's look at this and examine it more carefully to see if there's an underlying issue."

You can't dismiss the New Jersey Supreme Court, saying "this is a liberal Court, they are letting criminals go free." That's not fair to the New Jersey Supreme Court, and that wouldn't reflect reality. Because the Court is trying to do its job as it's constitutionally required. And remember, there are ways that those cases could go further -- to the Supreme Court, in some instances, not all.

The Supreme Court could return those cases back to New Jersey, and say the Supreme Court of New Jersey -- as it's done with other Supreme Courts -- goes beyond its Constitutional authority. So the numbers aren't cited to be misleading, or to understate or overstate. It is a fact that it is a major issue. Whether it involves 18 people, three people, the numbers are important because it tells you the Court is consistently seeing a problem -- consistently seeing a problem in capital cases.

As to David Baldus, Baldus' book is substantial, and it does looks at Georgia and other places. Those numbers are not at all replicable in a place like New Jersey. But the fact of the matter is that, you know, you're comparing apples and asparagus sometimes to try to figure out whether (indiscernible) protect the jurisdiction. And my point
is, what Baldus is saying is, pay attention to these factors: Does it matter where a person lives in terms of whether or not they will receive the death penalty? Does it matter the race of the victim? And is that justifiable or explainable in some conceivable way?

And it is interesting, isn't it, that we haven't found-- And New Jersey maybe is really unique. We haven't found, where there are prosecutions of whites for death sentences against blacks, a disproportionate number of cases where whites are actually sentenced to death. Maybe New Jersey might be unique in that result, but what we've seen is almost the opposite -- that the patterns keep replicating themselves in a variety of jurisdictions.

And again, I'm not coming here as an authority on New Jersey. I'm not here to tell you what you should do. I was asked if I would provide the national perspective, which I've tried to do. Your work is really concentrated on what you see within the four corners of that state, what you see within the context of cases that come before you, what you hear from communities about whether or not they think the system is fair in a way -- in applications.

What you see from reversals would tell you that there are some problems in legislation that is drafted by State legislators; there are problems in arguments, there are problems in timing that are made. And not every reversal, as you suggest, is retroactive. In some cases, the Court has said, and will say, in jurisdictions that this is an important point, but this is a prospective, it applies to the future cases -- which is also a consideration. So the New Jersey Supreme Court, by making those reversals retroactive, is telling us something more -- that this is a matter that we will look back on cases; and not just something, now, that we discovered in this case, and if any new cases come it will be part of it. I think the fact that many of those are retroactive and apply to
multiple cases is not overstating the data but saying, before the Court has to hear a case, they are of the opinion, by a majority of the Justices, that the only reasonable constitutional way to address this is to make sure that every case that has this error, whatever it might be, is resolved and addressed before the case comes back before us for further review and possible affirmation.

REVEREND HOWARD: Ms. Segars.


MR. OGLETREE: Yes, how are you.

MS. SEGARS: I always think that race is an uncomfortable topic for us to discuss, and in the context of the criminal justice system, I think that-- And my question to you is two part. One is that, even in the State of New Jersey, when we have the disparity in the number of African-Americans incarcerated across the board and of course in the nation-- And certainly New Jersey put the term racial profiling on the map in the United States.

And with respect to the Death Penalty Statute, where race of a victim or race of the accused -- or even poverty for that matter -- where disparity applies to a minority community, do you feel that there will ever be a time, particularly since death is final, that a system of -- a death penalty system can ever be fairly created or designed?

MR. OGLETREE: Well, it's a very important question. The optimist in me says that, yes, we have creative minds that could come up with a criminal justice system that can be fair. The realist in me says that, if we look at hundreds of years of history, it seems impossible. And it's important that you mentioned an issue of racial profiling. We talk about a whole series of racial disparities, not just capital punishment, and I know you say New Jersey put racial profiling on the map.
I think it's the other way. New Jersey just became a dot on the map of racial profiling because it was known in many other areas — much more pervasive in southern states. But it was Maryland, Connecticut, New Jersey, 95 -- the highway from Massachusetts all the way down to Florida. And you can see that continuum in New Jersey just, unfortunately, happened to be one of those spots where profiling was practiced. I don't see at this point any reasonable way that it can be addressed. Now, why do I say that?

Our United States Supreme Court, since 1976, has been clear that the death penalty, as a matter of Federal constitutional law, is constitutional. And yet, if you look at what some would describe as the most conservative Court in some time -- and I don't necessarily agree with that determination -- this Supreme Court decided in the last decade that we would no longer execute young people under the age of 18. That was not the case before in this society (indiscernible, but this Supreme Court is concerned about that. A majority of Justices said “no.”

This Supreme Court looked at our evolving standards and said we can no longer execute individuals who are mentally retarded, although we've done that for a long time. This Supreme Court took Thomas Miller-El's case -- that was notorious for its sensationalism in the state of Texas, in a place where the death penalty was affirmed by the Texas Court of Appeals with some regularity -- and not only reversed his death sentence, but wrote a substantial opinion that tells us the Court's uneasiness.

This Supreme Court, where Justice Anthony Kennedy complained before the American Bar Association, concerned about fairness in the criminal justice system. This Supreme Court, where Justice Ruth Bader Ginsburg had a talk before the University of District of Columbia two years ago expressing concerns about the application of capital punishment,
in theory. This Supreme Court, where Justice O'Connor was alarmed at the number of individuals who had their convictions reversed because of DNA evidence and other evidence, that they were clearly innocent.

So the idea that we have a perfect system or can have one is far from obvious. And my concern is that if we can't fix a system -- and I have seen no way or no state that's fixed it with any sense of confidence and predictability -- that we can't use it. And there are other forms of extensive, substantial punishment that achieve that same goal, different people with different minds. But my view, having looked at it from a thousand different ways as a victim with my family personally -- I don't see the solution of trying to decide who lives and who dies is the right way to run a democratic society of punishment, particularly when we compare that to what almost the entire world around us has decided to do.

One final point, just a point of reference. We're not at all bound by international law, but one of the places that is ridden with poverty, and crime, and despair is the Republic of South Africa. That hasn't abated since Nelson Mandela was released in 1990, nor since he was elected president in 1994, nor since they had a constitutional court. But that court had to say, as a matter of morality, what will we do, given crime and poverty and victimization, what will we do. And they, too, followed the lead of many other democratic societies by saying, "We will no longer" -- in a sense, as Justice Blackman said -- "We will no longer tinker with the machinery of death." And they no longer have a capital punishment system.

That at least tells me, if we can't hear it, the rest of the world is saying, "It may not be popular, it may not be the majority will, but there is a high moral authority that says we can accomplish what we
want to accomplish, and we don't need to take a person's life in order to take care of the interests of our victims and take care of the interests of a stable, anti-crime society.”

REVEREND HOWARD: The Chair will recognize Senator Russo with a concluding question.

SENATOR RUSSO: Thank you, Mr. Chairman. Professor, forgive me for coming back once more, but first of all, by the Court that reversed those 87 percent, there is some that would suggest that the Court didn't believe in the death penalty and that was the reason for many. I don't know that that's so, and I don't know if we can prove it, but I wanted to make that point but I'm puzzled by one thing.

The public defender raised a question about the majority of people in prisons are African-Americans, and the almost, I don't think she meant this, but almost with the suggestion that it was because they were African-American just as I recall and you know well, the Vanzetti case in your own state around 1900, most of the people in prison in those days were Italians. A similarity, they lived in tough neighborhoods, they lived in ghettos, they weren't educational at the time, they were educationally deprived at the time.

I don't think anyone suggests that anyone who is in prison, I shouldn't say that. That the majority of those folks in prison today, whatever color they are, are there because of their color and not because they committed a crime, whatever the reason may be, whatever the social reason would be. Do you agree with that or not?

MR. OGLETREE: I don't agree with that at all, and I’m surprised that you would say that. Let me tell you why.

First of all, New Jersey Supreme Court-- Whatever you might want to say about the New Jersey Supreme Court, each of those judges has a constitutional oath to keep to the law. And if you think judges are
unevenly applying the law, they should be removed. There are ways to remove judges. And I think that once we start doing that -- you talk about whether we have chaos in our constitutional system -- it will happen. But if there's a belief the judges are unfair -- which I'm not inferring or would say -- then there is a process to take care of that, number one.

Number two, the reality is that there is selective prosecution and selective law enforcement. And so when you say the majority of people are in prison because they've committed a crime, if you look at almost any urban area, and look at the suburban area -- whether it's New Jersey, or whether it's Massachusetts, or whether it's Illinois, or whether it's California -- there is a remarkable sense that even though-- In Massachusetts, for example, a lot of crime -- a lot of people are prosecuted in the Roxbury, (indiscernible), and Matapan communities that have a large number of Hispanic, Asian-American, Native American, and African-American families. And yet, if you go to places like Brookline, Newton, or other suburban areas and you talk to young people, the crime, drug use, selling of drugs is just as prevalent, but it's not policed.

So the system is flawed, in a sense that-- We did one in our state, and I think New Jersey did one as well -- we did a study of police arrests. And we showed the disproportion of arrests based on race, not based on crime; and disproportion of stops based on race, where it turned out that people stopped -- African-Americans and Hispanic -- were not involved with any drugs or crime, but they were stopped nonetheless. And the people who were white who were stopped -- a high proportion of those were involved in illegal activity.

So it does matter.

I think the public defender was talking about the issue of profiling, which gets people in the system.
It also (indiscernible) look at the jury system. I think, if you want to look at -- I think it may be beyond the scope of this Commission’s work, but I think it’s going to be very interesting to see to what extent are people able to be citizens -- who sit and serve as jurors, jurors who decide who lives and dies. That's another factor of disproportionate elimination of opportunity.

So I'm not saying anything remarkably different than you are about New Jersey. Because you are elected to serve that community, and I'm just looking at data that has come my way. But I am saying there are flaws in the system, and we should look at those flaws very seriously; and that a person is not a racist if they have these views about race -- but at least think about how it influences the way we think about how the justice system works.

And I hope that your Commission can do two things. That is, look at the evidence before you and don’t feel that you have to be a racist in order to recognize there is a problem in the system, and that it needs to be fixed in some material way. It’s being a citizen who recognizes that this is a problem. Whether Democrat or Republican, whether Liberal or Conservative, I don't know any person, ever, to come into the courtroom, and look at the jury and look at the judge, and say, "I can have a fair trial because of the color of my skin.”

If that can at least be addressed in a meaningful way, it means it will have some transparency, and that there will be a sense that justice is available -- and not just in the State of New Jersey, but hopefully it will go from up north to places like Maryland, Florida, Texas, Alabama, Arkansas, and beyond.

SENATOR RUSSO: That's not even an issue. I think we all agree with you that the color of the person's skin should have no effect
at all whether he's arrested, prosecuted, what have you; and most of us, all of us up here would defend that right and would agree with you on that. That's not the issue, but thank you.

MS. SMITH SEGARS: Mr. Chairman, for the record, I would like to clarify that my comment was that there is a disparate impact on people of color in this state. And by that I mean, in New Jersey, where roughly, I believe -- where African-Americans represent 13 percent or so of the population, they represent close to 70 percent in the prisons; and that is a disparate impact. For whatever the reasons, whether we're talking about the fact that certain, you know, certain laws have a different impact in urban America -- we call that the urban impact -- it has an impact on people of color, and it has an impact across the state in a variety of ways.

And so we can't sit here-- And if we don't believe for one moment that people aren't in jail that may be innocent, and if statistically there are greater numbers, then of course there's an impact on people of color -- not only African-Americans; Latinos -- in this state that is different, and we need to recognize that. And because it extends itself possibly to someone who is on Death Row -- you start with a larger pool, but at the end of the day, when it all trickles down, and that same disparate impact can happen in a capital case.

So I want to make sure that my comments were clear. Thank you.

REVEREND HOWARD: Thank you.

Let me say, Professor Ogletree, your entire testimony, including of course your prepared testimony, is a matter on the record, and will be distributed to all members of the Commission and will be available to the general public.
We deeply appreciate the time that you have taken, and I would be remiss if I didn't thank your colleague who has joined you. We are very pleased to have him and we thank you very much for your contribution to our deliberations.

MR. OGLETREE: Thank you very much. It is a pleasure to appear before the Commission, and I wish you well in the deliberations.

REVEREND HOWARD: And I'm told now it is my obligation to say, "You may now disconnect." (laughter)

Thank you so much. All the best.

We're going to take a brief intermission to allow the reporter to take a deep breath.

(RECESS)

REVEREND HOWARD: We're going to enter now another phase of our testimony. We will have witnesses present for this section; and I hope that Mr. Bardo (sic), Mr. Jim Bardo, are you here? I'd like to ask Mr. Garry Hilton, also, if he's present. These are persons who come with expertise regarding the Department of Corrections. I'd like to ask you both to take your seat here at the table. You each have 10 minutes, and perhaps it would be useful if I tapped the gavel just a little to alert you when you have -- your two minute warning. And if you're approaching the end of your testimony and I tell you that your time is up, don't stop in the middle of your thought. Feel free to complete your thought. And with that bit of information, let me invite Mr. Barbo, if you would present your testimony to us, Director of Operations for the New Jersey Department of Corrections.

JAMES BARBO: Thank you, Chairman, thank you to the Commission, pleased to be here today on behalf of Acting Director (sic) George Hayman. By way of background, my name is Jim Barbo. I'm the Director in the Division of
Operations. I've been in State government 33 years, 27 of which are with the Department of Corrections. I am currently responsible for five of our adult institutions, Southern State Correctional Facility, Mid-State Correction Facility, Riverfront, New Jersey State Prison -- where I worked for 11 years as an assistant superintendent -- and Northern State Prison, where I was an administrator or warden for seven years.

I do not have a prepared statement. I'm responding today to the questions posed by the Commission to the Acting Commissioner Hayman, and I'm at your disposal to respond to those -- which basically involve a number the inmates we have that have life without parole and some other classification issues.

REVEREND HOWARD: Now, let me understand. Did you say your name is--

MR. BARBO: Barbo, B-A-R-B-O.

REVEREND HOWARD: “B-O” And we have your name incorrect.

MR. BARBO: It is a common misspelling.

REVEREND HOWARD: Barbo. (indicating pronunciation) Thank you for that correction. And I understand that you are making yourself available to our queries, and, Justice Coleman, I'm going to ask you to lead us out.

JUSTICE COLEMAN: I have some familiarity with the process in terms of a sentence that is imposed, how it is computed when it gets to your offices, and so forth. But one of the interests that we have is, can you tell us what is the meaning of a sentence of life without parole? And I'm saying without parole, never being eligible for parole; and how many such people do you have currently housed and where do they serve the sentence.

MR. BARBO: Let me begin by telling you the second part of your question, first. We currently have 21 inmates in the State of New
Jersey who are sentenced to life without parole. And 18 of those inmates are at New Jersey State Prison, which is our maximum security facility. One of those inmates is at Northern State Prison, and he's in the Security Threat Group, Management Unit, administrative segregation unit, which means he's a core gang member who's committed an offense while he's been incarcerated. When he completes that, he will be returned to New Jersey State Prison. The other two are serving out-of-state sentences. One has a concurrent life sentence in New York, who will be returned to us upon completion of that, if that happens; and the other is out of state for murdering one of our correction officers.

I would defer to parole for the parole part of the question -- but to us, as the executive branch of government, life without parole means just that: incarceration until the end of the natural life of that individual.

JUSTICE COLEMAN: And can one therefore conclude from what you've told us, that those persons sentenced to life without parole will serve their time until death at the New Jersey State Prison, unless they have to be sent elsewhere for other reasons -- such as serve for a sentence out of state first -- but returning to New Jersey to complete the life without parole sentence in New Jersey?

MR. BARBO: Yes.

JUSTICE COLEMAN: Can you give us some idea of what the housing and opportunities are like for those serving life without parole at the New Jersey State Prison?

MR. BARBO: Well, New Jersey State Prison has a variety of custody classifications -- what we call special housing classifications. Of course we're here to discuss the capital sentence. We have the Capital Sentence Unit, which is in the north compound. We also have the management control unit, and that is for those inmates who have presented
themselves to be just that -- management problems within the department. It's a departmental placement. New Jersey State Prison is the only one of our 14 institutions that has a management control unit. We also have the department's protective custody unit. That is of course for inmates who need protection from other members of the population. And we also have an administrative segregation unit there. That is a unit for inmates who have committed institutional offenses either in our institution in the New Jersey State Prison, or other places around the state, and are brought there to serve up to a 365-day sanction for each infraction.

We have a school. There is our school programs. We also have special needs units at New Jersey State Prison, where we house inmates who have psychological problems. We have a stabilization unit for those who are exhibiting episodic psychiatric behavior. We then would have a residential treatment unit for those inmates who are coming out of that behavior; and then the therapeutic unit, for those who are about to go back into our general population. We share that function with the special needs housing units with South Woods State Prison in Bridgeton and Northern State Prison in Newark.

JUSTICE COLEMAN: One of the prior speakers indicated that in some jurisdiction -- and he even suggested that he would expect the same to be true in New Jersey -- that persons sentenced to life without parole virtually live under hotel conditions. Can you comment on that?

MR. BARBO: Well, as I said, I worked in New Jersey State Prison for 11 years, and I wouldn't describe it at all as a hotel. They do have their individual rooms in New Jersey State Prison.

REVEREND HOWARD: It depends on what hotel, right?

MR. BARBO: Correct. There are good four star hotels, and there are other hotels; but in our case, the inmates -- I'll give you an example. This past December our prison was locked down while we were
doing a search, and I happened to be the director of that institution. I was in on a Sunday afternoon just to see how things were going, and I was watching the mess move for dinner. And I was standing in the rotunda watching the units go by, and many of those inmates were inmates who were there when I was there, and I left there in 1993. And they were just taking that monotonous walk into the dining hall to get their meal and to come back. Their hair turned gray like mine did since I left.

But there is a very debilitating, monotonous lifestyle in a prison. Yes, inmates have television access, they have educational programs, we have social services programs. But life at New Jersey State Prison is very debilitating to inmates. That's why we have special needs units -- some of those inmates can't deal with the level of confinement in that institution. And that is our institution where inmates are there, I like to say, for your whole career. You can come in and, 25 years later, you're saying good-bye to the same inmates you saw when you came in.

JUSTICE COLEMAN: I don't know whether you're a lawyer or not, but can you tell me whether or not the so-called amenities are being provided primarily because of federal law, such as constitutional mandates -- a library for example?

MR. BARBO: Actually, my first job with the Department was Legal Services Coordinator, but I'm not a lawyer. But I did provide the institution with law libraries, and I also hired attorneys to teach the inmates how to do litigation, how to become inmate paralegals so they could then, in turn, assist other inmates. And that was as a result of Federal litigation. Our special needs units is a result of a consent order. A lot of the things that we do, we did in some measure, and they've been enhanced, by litigation.

JUSTICE COLEMAN: I have no further questions.

REVEREND HOWARD: Ms. Segars.
MS. SMITH SEGARS: You said they have individual rooms. What is the cell size? Does that vary from --

MR. BARBO: It varies. When you're talking about New Jersey State Prison, you're talking about a history of penological construction from 1835 to 1982. There are no the north and south compounds are pretty much the same. They were built in 1982 under Mr. Hilton's supervision. And the older institution, the older buildings in the west compound range from around 1835 to 1910 in construction. Those could be brick and mortar. There were metal cells. There is really no two buildings alike at New Jersey State Prison.

MS. SMITH SEGARS: So an inmate cell, we're not talking about a 10 by 12 bedroom.

MR. BARBO: Right.

MS. SMITH SEGARS: We're talking about a four by six space or a six by eight space.

MR. BARBO: I would say the size of a bathroom.

MS. SMITH SEGARS: Okay. The size of a bathroom. And in that space, is there also a toilet in their own space?

MR. BARBO: Yes, a toilet and a sink.

MS. SMITH SEGARS: So a toilet and a sink within a space of eight by what?

MR. BARBO: I would say eight by six.

MS. SMITH SEGARS: Eight by six. And how much time are they allowed out during the day?

MR. BARBO: That depends. It depends.

MS. SMITH SEGARS: On average, if you're able to say.

MR. BARBO: I would say on the average of five to six hours, if they are employed in a job that takes them out of the cell.
MS. SMITH SEGARS: But they could also be in solitary confinement, could they not?

MR. BARBO: Yes, but only up to periods of 30 days.

MS. SMITH SEGARS: And those periods of 30 days can run consecutive? Or does there have to be a break?

MR. BARBO: There is a break between it.

MS. SMITH SEGARS: Which would be what?

MR. BARBO: Just a day or two.

MS. SMITH SEGARS: So a day or two break, and they could go back to a 30 day confinement?

MR. BARBO: That's correct.

MS. SMITH SEGARS: And you mentioned televisions, but we're not talking premium channels, right?

MR. BARBO: No. Absolutely not. Just the regular channels.

MS. SMITH SEGARS: And all that information is controlled that they're able to receive -- controlled information. My understanding, that under Commissioner Brown, that some of the material that came across the television was limited. They get the History Channel, they get the Animal channel. They get all that good stuff.

MR. BARBO: Well, we have the regular channels -- 2, 4, 5 -- and then we have educational television, yes.

MS. SMITH SEGARS: One of the witnesses came in earlier in our testimony, and equated a life in prison as a day at the beach and volleyball camp. And what other kinds of things can you talk about in terms of their day-to-day existence?

MR. BARBO: Well, there is recreation, but there is no volleyball. I can tell you that. There is the usual weight lifting, basketball, that type of thing; but the weight lifting is confined at New Prison to the big yard.
MS. SMITH SEGARS: Also, are there issues facing inmates regarding questions of violence amongst one another?

MR. BARBO: Yes.

MS. SMITH SEGARS: And including rape and other kinds of inappropriate activity?

MR. BARBO: Well, there is always that possibility. We do a very good job in New Jersey of classification -- that is putting the right inmate at the right institution. And in so doing we limit that type of violence. More concerned than rape, one inmate on another, we are with violence, assaults. Especially, we have an emerging gang population in the institutions. I opened the Security Threat Management Unit in Northern State in 1998. However, that was before the emergence of the Bloods in the State of New Jersey, and that has filtered into the institutions and it has caused us to inflate our core gang member jail numbers.

MS. SMITH SEGARS: And are members of the capital population, are they allowed to have their family visit, and picnics, and things of that sort?

MR. BARBO: The capital sentence inmates? No. Families can visit. There are visiting booths there on the housing unit. Pretty much everything that they do is confined to the housing unit. But they're not picnicking. There is no family day, if that's what you’re referring to. There’s none of that. And New Jersey State Prison does not have family day for the general population either.

MS. SMITH SEGARS: And if a person were to communicate to a member of your staff that they were, in fact, innocent, what would happen?

MR. BARBO: If they told us they were innocent?

MS. SMITH SEGARS: Do you have anything in place for that?

MR. BARBO: You know, you wouldn't believe this, but I hear that every day.
MS. SMITH SEGARS: I would like a recommendation.

MR. BARBO: That is exactly why we have legal access. That is exactly why we have inmates trained as paralegals to assist those inmates who may not have the money to hire an attorney.

MS. SMITH SEGARS: But it is also true, sir, there are no attorneys on staff. You have to know your own in-house counsel inmates who have honed up on their skills, and called themselves in-house counsel.

MR. BARBO: Well, inmate paralegals. That is correct.

MS. SMITH SEGARS: But there are no attorneys.

MR. BARBO: That is correct also.

REVEREND HOWARD: Mr. Barbo, are you able to stay with us for a while?

MR. BARBO: Yes, absolutely.

REVEREND HOWARD: Let me suggest that we go now to Mr. Hilton's testimony, and that you would remain, in case there are some questions of you both. Because I think you both are going to you are touching upon some of the same kinds of issues as Mr. Hilton, I suspect -- having reviewed the testimony -- that you are going to touch upon some of the things we're asking questions about. So if you would, we invite you now to speak.

GARY J. HILTON SR.: Thank you. Good afternoon. My name is Gary Hilton Sr., and I retired from the New Jersey Department of Corrections in 1998, after 33 years of service. And during my career at the department, I was warden at the New Jersey State Prison and at the Correctional Institution for Women. For a period of approximately 17 years, I served as the Department's Assistant Commissioner for Operations, Deputy Commissioner Chief of Staff; and upon my retirement, I served as Acting Commissioner.

I have a long history and familiarity with New Jersey's death penalty. While serving as Assistant Commissioner, I was responsible for
overseeing the development of procedures for the Capital Sentence Unit, as well as developing procedures and protocol for the implementation of the legal injection penalty. I never have been, nor am I today, opposed to the death penalty on the basis of moral consideration.

During an earlier period of my professional life, I supported and believed that the death penalty had a proper and appropriate position in our criminal justice system. It has only been with the passing of time, firsthand observation, and careful deliberation that I have come to a clear and firm opinion that the death penalty is poor public policy and ill-advised correctional practice. You've already heard from my colleague, Dr. Robert Johnson, about life without parole, and for what he aptly describes as "death by incarceration."

I thoroughly endorse Dr. Johnson's testimony. When the death penalty was reinstated in New Jersey in 1983, it was a very different time in New Jersey sentencing history. We did not have the alternative of life without parole. Indeed, the standard punishment for murder at that time was a life sentence with a parole eligibility of 30 years. This is no longer the case today.

In addition to a sentence of life without parole, New Jersey now has an 85 percent parole ineligibility statute which essentially means anyone sentenced to a life sentence for murder must serve 63-and-one-half years before being parole eligible. This represents a significant change from the 1983 period. There are approximately a thousand or more persons serving some form of a life sentence or the practical equivalent in the New Jersey State Prison in Trenton, which is, as Mr. Barbo has described, the state's most secure prison. Most of these inmates, while technically eligible for parole, will, in a practical context, never be released because of age or consecutive sentence. The bottom line, however, is clear. No one sentenced to life without parole can be paroled. The New
Jersey experience, similar to the national experience in dealing with inmates serving actual or practical forms of natural life sentences, has been that these inmates show no significant additional challenges, nor require any special resources beyond that of any other inmate classified for maximum security confinement.

Let me pause here and make a note. Very horrible things can happen and will happen over the course of time in extremely well-managed maximum security prisons. That is an unfortunate reality of life. Within the maximum security environment, the majority of inmates accede the tight security controls, limited movement, long hours of self confinement and the uncompromising rules, regulations and repetitive schedule.

Generally, they accept the daily routine of imprisonment in order to make what they view as the best of a bad situation. For those inmates who choose to act in a violent or disruptive manner, or incite others to do so, the maximum security environment has specially structured living units to effectively control and manage these recalcitrant individuals. At the New Jersey State Prison, these specially structured units include the disciplinary administrative segregation units and the management control units. These are tested and proven classification options for disruptive offenders. These are highly disciplined, controlling environments, as they are meant and need to be. Within the last several months, I had the opportunity, along with Dr. Johnson, to tour the New Jersey State Prison in Trenton, including the closed custody units, and can report to this Commission that the Trenton State Prison is an extremely well-managed facility and an extremely secure operation.

The abolishment of the death penalty in New Jersey will have little qualitative impact on the number of inmates who will grow old behind bars and hence need geriatric medical and support services. It is
my recommendation, without reservation, that anyone sentenced to life without parole for murder must serve the full term of their sentence in a secure environment as determined by the Department of Corrections.

With all due respect, it is my opinion that life without parole means this -- that short of judicial reversal or executive clemency, the only way an individual leaves prison confinement is in a rubber bag and a tag on their toe.

I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum security prison. By its very nature, the maximum security prison is a cold, dangerous and frightening environment.

The reality is that as offenders age and become more infirm, they become more likely targets of abuse and intimidation by the younger population. The prison culture has no respect or deference to its senior counterparts. Older inmates are routinely strong armed for their meager personal assets -- tobacco, hard candy, and coffee. I know I'm running out of time and I'm going to pass over some of what I wanted to say, but I do want to share one reflection that an inmate shared with me.

He told me that shortly after arriving at Trenton prison, he saw a young rookie correction officer begin his career. Some 25 years later, he saw that officer retire. Within a day or two of that retirement, he saw another officer begin his career and realized that, if alive, he'd still be in prison when the second rookie retired. In my opinion, the irreversible reality of execution must be a major consideration.

The ever-advancing and rapidly improving capabilities of forensic science and its potential to provide heretofore nonexistent evidential resources must be given deliberation. I am of the firm belief that the decades-long appeal process is an unnecessary, cruel protraction
of grief and suffering for victims’ families and loved ones. From a standpoint of public safety, I believe execution is not a significant deterrent. To the contrary, based on my experience, life without parole possibly would be a more meaningful deterrent.

I ask that you carefully review -- one half minute, if I may. I ask that you carefully review and consider what Dr. Johnson and I have had to say about the realities of life in prison and dying in prison. I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution. I thank you.

REVEREND HOWARD: We thank you very much. And at this time, we invite the panel-- Let me say that we project that if we hear every witness and give them as much time as we have allotted, we will be here till well after pizza. So we must be economical if we can, and we want to extract the best information. But be aware that we are under significant time pressures to hear all the witnesses. With that proviso, I invite members of the Commission to raise questions or make comments.

MR. MOCZULA: Mr. Barbo, you had mentioned that you hear claims of innocence practically every day, or did hear that, and there's a legal services unit that you were the head of.

MR. BARBO: I was responsible for that from 1979 to 1982. I've been gone since then. But I'm still the recipient under the lawsuits, though, but I'm defending at this point.

MR. MOCZULA: And some of the inmates you had mentioned have developed a speciality -- inmate paralegals?

MR. BARBO: That's correct.

MR. MOCZULA: Who, in your experience, are the most prolific prisoner litigators?

MR. BARBO: I won't mention them by name, but naturally we have inmates who have been very good in court. They're pro se when they
go to Court against our deputy attorney generals in Federal Court. They usually acquit themselves very well. The Court does assist them, knowing that they're not attorneys. I used to attend trial regularly on behalf of the department and act as a liaison to the DAGs. But I would say the best, geographically, are New Jersey State Prison, since they've had the most time to study the law books and have an invested interest in trying to find a way out.

MR. MOCZULA: But in terms of the sentences that may be imposed, in terms of challenging their sentences or convictions, and engaging in protracted litigation, do you have a sense of what inmates or the type of sentences that those inmates usually have attached to them that would spur this type of litigation?

MR. BARBO: If you go through the hierarchy of our department, things like legal access are most important in New Jersey State Prison or East Jersey -- which was Rahway -- or Northern State Prison. As you work your way down, inmates with lower sentences, of course, can see the light at the end of the tunnel and know that they're going to be getting out, and they probably would not litigate to alter their sentences.

MR. MOCZULA: So the higher, the more severe the sentence -- unscientific--

MR. BARBO: Right.

MR. MOCZULA: --is much more likelihood that those inmates would engage in some sort of litigation, either challenging their sentence, or prison conditions, or something else.

MR. BARBO: That's correct.

MR. MOCZULA: Thank you.

MS. SMITH SEGARS: I'm just curious, do you keep statistics or any database on inmates who are claiming innocence?
MR. BARBO: Are you saying that if an inmate approached me on a tour and said --

MS. SMITH SEGARS: Yes, is there any --

MR. BARBO: I would not document that. If that occurred, I would, you know, advise that inmate to seek counsel or to go to the law library and to work on that. But, are you talking about innocent of a crime that they're in jail for?

MS. SMITH SEGARS: Oh, yes.

MR. BARBO: We don't really keep any statistics of that type of day-to-day conversation that we have. And we have plenty of contact with the inmates. It’s kind of -- direct supervision is something that is very important to us, but you get protracted conversations on interview lines. Most of the administrators have an interview line where they meet with inmates to discuss their problems regarding that. And there are referrals made for them to seek some assistance. But our role we used to have a phrase, deputy keeper. Our role is that. We have 27,000 inmates, most of whom don't think they should be there. So we're kind of used to that complaint from an inmate -- that either the trial was unfair, he wasn't there or she wasn't there -- because we do have a female unit at New Jersey State Prison also.

MR. HILTON: I think what is often not realized, a good deal of the inmate litigation focuses on conditions of confinement. It's not all just their conviction, but a whole plethora of conditions of confinement. And that makes a large portion of inmate litigation.

REVEREND HOWARD: The Chair would like to recognize Ms. Garcia; and following her, Justice Coleman.

MS. GARCIA: Gentlemen, I was wondering if you could describe the difference between the living conditions of someone on Death Row and the capital sentence unit, with the general population.
MR. HILTON: Yes, clearly the Death Row, as I know it -- and if I'm wrong, Jim, correct me -- basically runs pretty consistent with a closed custody unit, not run terribly different. Then, for example, the management control unit, where all movement outside of the cell is two-on-one escort; any movement off the cell block is manacled hands and legs. They eat their meals in the cell, which maybe is two feet away from the toilet. Any congregate activity would be extremely small, and I would say they average probably 22-plus hours a day in their cell.

MS. GARCIA: Is the cell size the same?

MR. HILTON: The same, yes, which is about eight by six, something like that. There is virtually no congregate. They do not get contact visits, so the management control and Capital Sentence Unit are run pretty much by the standard high security supermax model.

MS. GARCIA: Could you tell me, is Bayside -- and you referred to a prison up in North Jersey -- are they both maximum security prisons?

MR. BARBO: No, Bayside would be a light-medium security. Northern State, I referred to Northern State is a high-medium security institution.

MS. GARCIA: I'm pretty familiar with the prison setting. And you painted sort of a sparse existence, but I know there is a lot more that goes on there. I know that they have access to porno movies and violent movies. I know that they are transported for intramural basketball, and we are actually paying the officers overtime to transport those inmates. I would like to know what you gentlemen can say -- and I understand, Mr. Hilton, you're retired -- but what you can say to assure families in New Jersey that these inmates will do their time in maximum security, they won't be out on work release and they won't see the streets ever again.
MR. BARBO: To begin with, to be eligible for a halfway house or work release, they would have to be within 12 to 18 months of their PED or their max date. They just would not come up. If they're life without parole, that would not happen. It would not show as coming to be eligible, to be minimum, to be out of those programs. But insofar as when you talk about different levels of custody, as you go from Trenton, to East Jersey, to Northern, to Riverfront, there is more you can do with the inmates, more in a rehabilitative sense that you can do.

The type of inmate that is housed at Bayside is not the type of inmate you would house at New Jersey State Prison. Earlier I mentioned that we're pretty good at classification, and that's what we do. We do not want to have inmates who are housed at Bayside that, quite frankly, could tear their place up, because it's not made for inmates that would be housed in maximum security.

MS. GARCIA: I know for a fact there are inmates at Yardville that should be in Trenton State. But that's neither here nor there. Wouldn't you say, though, that the life that they would live in the general population would be less pleasant than what they're living now on Death Row?

MR. BARBO: I don't think so. The life that they would live in general population--

MS. GARCIA: They're in isolation up in Death Row.

MR. BARBO: Correct.

MS. GARCIA: But there is something to be said about living in the general population, as far as comfort.

MR. HILTON: Well, yes. As you get older, though, it gets tougher. Growing old in jail is hell. You're going to be victimized. You're going to be ripped off. I was going to tell a story -- I vividly recall general population, Trenton Prison, where the older inmates would
wait until the yard goes out -- when 95 percent of the inmates go out to yard -- and the older inmates would stay back on the cell block because that was the only time they felt safe enough to go to the gang showers. And I'm talking guys that 10, 15 years ago were studs; and as they got older, less able to protect themselves, they had to capture yard time to take a safe shower.

MS. GARCIA: Well, that's my point, right now they're protected living on Death Row, more so than living in the general population. But of course, if they're attacked in the general population, they sue the State. So they're better protected now on Death Row.

MR. HILTON: Anyone that represents to this Commission that life in a maximum security prison is some cultural lark is simply misinformed. Prisons are nasty, tough environments, and a TV and an occasional bag of candies is about all you've got to look up at.

MR. BARBO: I'd just like to add, to me, the punitive aspect is the confinement. There are different levels of confinement even within New Jersey State Prison, which is why I mentioned the different types of housing. But even in general population the movements are very restricted because of assaults that have occurred on staff. The officers wear riot gear during movements. No more than 25 inmates move through any common area at one time, which is a very small number, supervised by eight officers in any common area. So the level of structure and restriction at New Jersey State Prison is very high, even for the inmates housed in the general population.

REVEREND HOWARD: We're going to hear from Justice Coleman. The reason why we've invited you to speak about this is to characterize, as best you can, life in prison for the rest of your life. That's really why, right? Okay? Because it has been suggested by previous witnesses
that there is something of a less punitive environment, and you're here today to correct that impression.

    MR. HILTON: I can certainly speak for myself, that I feel that there is real and powerful retribution in having an individual spend the rest of their life and die in prison. I took a little liberty to talk about the rubber bag and tag on the toe because I wanted to drive that point home. That's what it means, no ifs, ands or buts.

    REVEREND HOWARD: Let's hear from Justice Coleman.

    JUSTICE COLEMAN: Would you assume for a moment that the legislature decides that it wants to abolish the death penalty, but substitute for it life in prison without parole -- but nonetheless, does something else that it has not done -- in the context of which the existing law allows people to serve life without parole? But as a substitute for the death penalty, the Legislature says the penalty shall be life without parole, and that sentence shall be served at the New Jersey State Prison. What problems, if any, do you see in implementing that legislation?

    MR. HILTON: Since I don't have any lawful authority, I might take a shot at that. I personally would support that language, okay. But I do think there may need to be some interpretation that if the individual were bedridden or restricted to a wheelchair and needed outside hospitalization, you know, that might be required.

    JUSTICE COLEMAN: I'm not talking about where the Constitution kicks in and provides those protections.

    MR. HILTON: Yeah, but as long as that was understood, I have no problem with it. It does take a little of the executive authority of the department away.

    JUSTICE COLEMAN: That's precisely what the intent would be.
MR. HILTON: And I would be comfortable, frankly, in having citizen, not as a DOC person, but as a citizen saying a penal environment as determined by the DOC -- because obviously, if someone is bedridden or restricted to a wheelchair, you know, they pose a different flight and problem, but as long as it's a legitimate penal environment, the Department of Corrections sanction, I would be, as a citizen, very comfortable.

JUSTICE COLEMAN: On a personal level, one of the problems that I foresee with that, if I were a legislator, I may want to circumscribe your power to allow the centers to be served anywhere except at the State Prison Complex and provide in the legislation, if necessary, and it really wouldn't be necessary because the legislation could not be inconsistent with constitutional mandates. We all know that the amendment would protect and you would have to provide the medical care necessary, but otherwise, I'm talking curtailing the Commission's authority to decide where the sentence will be served and I hear you saying that, essentially, it will pose no problems if that's the type of sentence.

MR. HILTON: I would not say so. Personally, I agree.

MR. BARBO: I would just like to add that when the inmate is committed, committed to the custody of the corrections commissioner or as designated for, whatever that sentence happens to be, and we exercise, in the case of the 21 inmates I just mentioned, that they are all in the maximum security sentence.

JUSTICE COLEMAN: I understand that, but under the proposed wanted to deliberately create a new paradigm to curtail the Commission's authority, and that will allow that such a sentence would not give you that authority.

MR. BARBO: Right, I understand.
JUSTICE COLEMAN: Is there any problem in the implementation of that type of sentence?

MR. BARBO: No, I don't believe so, but I just wanted to add that we currently have nine inmates on capital sentencing, that if you add that to the 21 we already have, it would be 30 inmates in a population of about 1800, so we can do it numerically, certainly housed at the New Jersey State Prison at this point.

REVEREND HOWARD: That line of exchange, I hope is clear to all. Thank you.

MR. HILTON: Just very, very quickly, New Jersey and the Department of Corrections specifically has a long history of dealing with long term offenders that are going to die in prison. Because of multiple consecutive sentences, people coming in at age 55 over a 40 year stint, so there's a great experience factor. There will not be a learning curve at the DOC.

MR. HILTON: I can certainly speak for myself, that I feel that there is real and powerful retribution in having an individual spend the rest of their life and die in prison. I took a little liberty to talk about the rubber bag and tag on the toe because I wanted to drive that point home. That's what it means, no ifs, ands, or buts.

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JUSTICE COLEMAN: I’m not talking about where the Constitution kicks in and provides those protections. Obviously, we’d have to follow it.

MR. HILTON: Yes. But as long as that was understood, I have no problem with it. It does take a little of the executive authority the intent would be.

JUSTICE COLEMAN: That’s precisely what the intent would be.

MR. HILTON: And I would be comfortable, frankly, in having language -- as a citizen, not as a DOC person, but as a citizen -- saying “a penal environment as determined by the DOC.” Because obviously, if someone is bedridden or restricted to a wheelchair, you know, they pose a different flight problem. But as long as it’s a legitimate penal environment that the Department of Corrections sanction, I would be, as a citizen, very comfortable.

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authority to decide where the sentence will be served. And I hear you saying that, essentially, it will pose no problems implementing that type of sentence.

MR. HILTON: I would not say so.

Personally, I agree.

MR. BARBO: I would just like to add that when the inmate is committed, the commitment order says, “committed to the custody of the Correction’s Commissioner or his designate for” -- whatever that sentence happens to be. And we exercise, in the case of the 21 inmates that I just mentioned -- they are all in maximum security settings.

JUSTICE COLEMAN: I understand that, but under the proposed legislation in my question, I wanted to deliberately create a new paradigm to curtail the Commission's authority, and that will undoubtedly mean that such a sentence would not give you that authority.

MR. BARBO: Correct, I understand.

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REVEREND HOWARD: And that line of exchange, I hope is clear to all. Thank you.

MR. HILTON: Just very, very quickly -- New Jersey, and the Department of Corrections specifically, has a long history of dealing with long-term offenders that are going to die in prison, because of multiple consecutive sentences -- people coming in at age 55 with a 40 year stint
-- so there's a great experience factor. There will not be a learning
curve at the DOC.

REVEREND HOWARD: Let me thank you, if there are no further
questions for your testimony.

And moving right along, the Chair would like to invite Bill
Piper and Molly Weigel. Am I saying that correctly? Weigel (indicating
pronunciation).

Please come forward. We have, on our documents here, that you
would share your time; and then I’ve heard to the contrary. I wish you
would be sympathetic to this tired old Commissioner and try to, you know,
help us out a little bit on the time, would you?

WILLIAM PIPER: I think we can. We're going to try that.

REVEREND HOWARD: And you’re free – whoever wants to go first.

MOLLY WEIGEL: I'm going to start. Am I on? Thank you for the
opportunity to speak to this Commission. My name is Molly Weigel. I'm a
resident of Pennington, New Jersey, where I live with my husband and 10-
year-old-son. I know you have heard from other victims family members who
opposed the death penalty, but I believe I have a perspective to share
that has not been presented to this Commission in past testimony. That
is, what happens to the family of a murder victim in a capital case when
individual family members do not hold the same views on the death penalty.

My mother-in-law, Arlene Piper was raped and murdered in
Altoona, Pennsylvania, on July 18, 1999. She was 74 years old. I wish
she were still here so that she could share the ups and downs of our life,
the milestones that my son is going through. And I loved her very much,
but putting her killer to death wouldn't bring her back or ease our grief.

It would have been, for us, the most destructive thing anyone
could have done to us, as we struggled to come to terms with her loss and
the incomprehensible fact that she was murdered. Even though the death
penalty was not ultimately used in the case of Arlene's killer, who is in prison in Pennsylvania for life without parole, it still wreaked havoc on our lives.

We became victims, not only by having a beloved family member murdered, but by having to go through the wrenching process of considering the use of the death penalty with the district attorney's office and other family members. One of the most painful aspects of this process was the terrible split within our family that it caused. My husband and I have a different world view, political affiliation, and set of religious beliefs from most of his family, though our relationship with his mother was close and loving and transcended many differences. But after Arlene's death, we became closer to my husband's sister, aunt and uncle and cousins.

We depended on each other and provided each other with real emotional support for perhaps the first time. And this gift, in the time of great sadness and need, felt very precious. Our shared grief and shared experience brought us together and opened us more to each other. The aunt, who had seemed distant, and I spontaneously hugged and talked about how we missed Arlene. We went to Ecuador where my sister-in-law lives to visit the chapel her Baptist mission had built in Arlene's honor, and shared my sister-in-law's life more than I would have thought possible.

But then our decision making about the use of the death penalty in the framework of the legal system polarized us in ways that were inexpressibly hurtful to all of us, putting a violent end to that fragile new closeness and driving a wedge between us that has yet to heal.

The painful and scary discussions we had with family members were difficult in themselves, but to make matters worse, we were scapegoated by the district attorney and the victim services professional from that office, who made untrue and misleading statements to other
family members about our intentions, causing further misunderstanding and generating deep hostility towards us on the part of other family members. We are not in touch with my husband's aunt and uncle, and my sister-in-law no longer answers our son's e-mails. Our son has lost not only his grandma, but also his aunt and other family. As murder victim’s family members, we have few people who can understand our experience. To lose the few people who could have gone through it with us was devastating to us, and I believe to them as well. The process was more painful than I can ever hope to convey.

I have chosen to speak about this painful experience because I believe that what we went through is unnecessary and preventable. Victims’ family members have enough to deal with without becoming victims a second time, by having to struggle with the issue of the death penalty and having to experience conflict with other family members over sentencing. Abolishing the death penalty in New Jersey and replacing it with life without parole would insure that no murder victims’ family members in New Jersey have to suffer this heartache. Thank you.

REVEREND HOWARD: Thank you, Mr. Piper.

MR. PIPER: Thank you. I'm going to address a different aspect of this. They'll be some repetition, but I don't think too much. So thank you for having us here and thank you for doing this work.

My name is Bill Piper, and I live in Pennington, New Jersey, as well. I'm here to address the issue of whether alternatives to the death penalty would sufficiently insure public safety and address other legitimate social and penological interests, including the interest of families of victims.

And specifically, I would like to address the question, from my perspective as a family member of a murder victim, in a case that resulted in a life without parole sentence. Many times, throughout
hearings similar to this, I've heard speakers asked by committees whether life without parole would have allowed them healthy grief and coming to terms with their loved one's death. Most of them said they imagined it would. I don't imagine it. It did. Unfortunately, I know this.

Life without parole does for victims exactly what it should. It removes the perpetrator of crime from the rest of society forever, and it permits victims to come to terms with the tragedy of murder and loss, however we are best psychologically able, without having politicized and moralizing questions thrown into the mix, at times on public levels. It's not the way for a person to grieve healthily, not in public.

In 1999 my mother was murdered in Pennsylvania, where life without parole is an option. Since then I've been left to live a pretty normal life. I let sorrow be sorrow, and I miss my mother, but not that differently from the way I miss my father who died of natural causes in 1986 -- and that's only because of life without parole. Before the near closure of life without parole, things were very different.

Because of the nature of the crime -- my mother was 74, and raped and murdered by a seemingly random nighttime intruder some time between 3 a.m. and dawn -- lovely thing to wake up to -- the prosecution strongly considered pursuing the death penalty. The next three years were spent traveling and communicating back and forth to and from Altoona, Pennsylvania, for pretrial hearings, advising, at the prosecution's request, on the desirability of the death penalty, etc., each time hearing more and more forensic facts about my mother's death or about the murderer and his limited affect and virtual mental retardation.

Ultimately, about a month before the killer's scheduled trial, the DA told my sister and me that he would pursue whatever course we wanted. Well, as both a long-time opponent of capital punishment and as a person traumatized by a loved one's murder, and being very aware of how
horrible it felt to be in the presence of death that way, I could not condone giving assent to another planned taking of life. I was being asked to take on the role of the violator in participating in killing him at a distance.

I spent three years in the emotionally untenable position of not only being both opposed to and traumatized by murder while being asked to participate in a state execution, but also of being morally obligated to speak out against the execution as a benefactor of the person who raped and murdered my 74-year-old mother. Not only did I feel violated by having been given both the responsibilities of executioner and rescuer, I can also say that giving victims the indirect power of revenge undermines the principle of government by law.

In response to something said earlier, I believe that retribution is not fundamental to human dignity. I believe that reconciliation is. I believe that understanding that death is death, and not lying to ourselves, is fundamental to human dignity. But that came to an end when my sister, against her wishes and those of most of my family, consented to accepting the sentence of life without parole.

The prosecution laid out quite clearly for the family what could be involved in taking the case to trial and pursuing the death penalty option. It was made clear that life without parole means what it says, and that the killer would never leave prison. But the sentence was reluctantly accepted. I think the reason, ultimately, that my sister, who rarely communicates with us, recommended accepting life was to save my son, then 6, the years and perhaps decades of his life being interrupted while his parents worked with the system on his grandmother's murderous case.

My son was 3 when the murder occurred, and would have faced growing up into his late adolescence and even early adulthood in the
shadow of appeals and concerns of the advisability of execution, and reminders of his grandmother's horrible death. Life without parole saved him from that.

As I said when giving my victim's impact statement, I am not a victim of it anymore. That's only because of life without parole. The murderer is not my friend. I harbor no warm feelings toward him at all. I don't know him. There is only a limitless sorrow left -- over the whole catastrophe and the cold beginnings of his life behind bars, as you heard described earlier; and the terrible end of a kind and nearly innocent woman's loving commitment to her family and to her friends.

And I ask that we honor my mother's kindness by sparing others this trauma. It's in our hands.

Thank you.

REVEREND HOWARD: Thank you very much.

Thank you for your presence and for what you've shared with us this afternoon. And I invite members of the panel to ask whatever questions or offer any comments.

MS. GARCIA: Mr. Weigel (sic), I'm very sorry about what happened to your mom -- I'm very sorry. I was wondering, if you could please try to articulate -- and I hate to put you on the spot here -- what you think, as survivors, what you think it must be like for others who are put in the position of having to deal with the death penalty case, and having those cases overturned and going through trial after trial.

MR. PIPER: I'm very grateful not to have been put in that position, let me start with that. I cannot imagine. You know, it was the one point I kept making over and over to my family – please, guys, spare us this. Most of my family, given the 15 to 20 years it sometimes take, they are fairly elderly people, my mother's siblings. So they weren't
doing to see this execution occur, and they were going to die not knowing. For the rest of us, I just think it's torture.

MS. WEIGEL: Three years was bad enough. I can't comprehend. It was our biggest fear -- having it go on and on and on, as they often do; and so quite apart from our moral objection to the death penalty, we were also, quite frankly, terrified of that possibility and its impact on the life of our entire family.

MS. GARCIA: Thank you so much.

REVEREND HOWARD: Again, let me thank you very much for coming and for sharing, and I personally appreciate your presence today. Thank you.

MR. PIPER: Thank you.

REVEREND HOWARD: The Chair would like to invite Ms. Celeste Fitzgerald, representing New Jerseyans for Alternatives to the Death Penalty; and may I ask Ms. Kathleen Hiltner, if she is present, to also come forward so that we might expedite the time. Again, let me say that in your prepared remarks, we hope you will limit yourself to 10 minutes. You will be notified with that sound that you're approaching the two minute mark.

But Ms. Fitzgerald, let me ask you to just start us now with your words.

CELESTE FITZGERALD: Thank you. Thank you, Chairman Howard and thank you very distinguished members of this Commission. My name is Celeste Fitzgerald, and I am the director and a founding member of New Jerseyans for Alternatives to the Death Penalty. Our 10,000 members and more than 200 supporting state organizations represent the views of hundreds of thousands of New Jerseyans. Over the last seven years, I have watched public opinion on the death penalty almost completely reverse itself.
One after another, I have watched death penalty supporters change their minds or join us to say it is simply not worth it. I have watched victims’ family members conclude that the system they believed in has instead irreparably harmed them; and members of law enforcement say it has made their jobs harder. I have seen more and more of our elected representatives from both parties acknowledge the failings of the death penalty, and fight to persuade the State to replace it with life without parole.

Perhaps most importantly, I have watched all of these people come together and speak up in greater numbers than ever before to say that they do not want this policy to continue. Our supporters have taken days off to attend these hearings, while others have followed them closely over the course of your study. Their devotion to consigning executions to our state's history books is a clear indication of a dramatic evolution. This Commission should take note of their numbers, their passion, their diversity of perspectives, and the unanimity of their conclusions.

There can no longer be any doubt that New Jersey’s death penalty is broken. For a quarter of a century, the people of our state have tried, many with the very best of intentions, to justify our attachment to capital punishment. Those efforts have failed.

Some have claimed that it was necessary to deter and look to flawed studies to prove it. Some have looked the other way when faced with overwhelming evidence that the death penalty is arbitrarily and unfairly applied. Others have convinced themselves that the criminal justice system always gets it right -- and yet innocent men and women have lost decades of their lives behind bars at the hands of our human frailties. Some have argued that we need the death penalty to keep us safe, yet the death penalty has clogged our courts and distracted our attention.
Others have stated that our citizens need the death penalty to restore their faith in the criminal justice system, yet the long capital process has shattered the people’s faith and hurt the families who were promised a myth of healing through executions. In the new era of DNA, life without parole, and the rising cries of victims’ families -- the people of New Jersey are done clinging to justifications, misperceptions and half-truths.

With this moratorium, our citizens have given you a mandate to confront once and for all what the death penalty actually does to us in real life. The evidence is overwhelming. The death penalty has failed the people of New Jersey on every count, and myth after myth of the death penalty has been shattered in this hearing room. The flaws that have been presented to you have covered everything from confused jurors to county variability, from high costs to high reversals, and more.

I urge you to consider the gravity of all of it, and especially the gravity of it all together, weighing down the death penalty until it is literally collapsing under the weight of its own problems.

But even if you accept merely an iota of the evidence that has come before you, you must recognize that something is terribly wrong. If you believe nothing else, you now know that the death penalty puts victims’ families through sheer hell, and after the testimony of many victims’ advocates and homicide survivors who came before you, you simply cannot believe that the death penalty takes care of victims’ families.

And if you believe nothing else, you cannot still believe that human beings are absolutely, perfectly right 100 percent of the time. Jennifer Thompson, a victim of rape, looked you in the eyes and told you that, even with her very best intentions and those of the police, the prosecutors, the juries, and the judges, one small mistake became a colossal nightmare for an innocent man.
Larry Peterson sat here and told you that he was sent to prison in a capital murder case, for a crime he did not commit, right here in New Jersey.

Still, New Jersey can be very proud. We have done our best to do it better. Our lawyers don't sleep through trials. We are not Texas, or Florida, or Alabama. We make mistakes, but we try. But for all the time and care we take, we are still human. We still risk error, arbitrariness and unevenness. The question before you then is what to do about it. On this critical point, let me say this. No matter how much you might try to repair it, our death penalty system will continue to fail.

We must also be clear about what the study is about. This is not about the death penalty versus letting killers go free. The question before you is whether there is an alternative to the death penalty that is stronger, fairer and more certain; an alternative that is more consistent with our evolving standards of decency, and more compassionate to those that have lost a loved one. The answer is yes. The death penalty must be ended and it must be replaced with the punishment of life without the possibility of parole.

In addition, nearly all of the homicide survivors have told you that New Jersey should be doing more for them. There is a gross lack of funding for organizations that care for homicide survivors in the State of New Jersey. The nonprofits that directly serve this community are having trouble keeping their doors open. Please take extra care to share this piece of the puzzle with the Legislature and with the Governor. They need to hear what you've learned and homicide survivors need you to tell them.

I urge you to write a detailed and comprehensive report on all that you've learned about the death penalty. I respectfully urge that you
recommend that the Legislature and the Governor replace the death penalty with life without parole, with restitution to the victims families. You should also recommend providing funds in the budget that go specifically to nonprofit organizations that are serving the needs of homicide survivors.

New Jersey has the opportunity to be the first state in the modern era to end the death penalty. We can do so in a way that provides both a stronger and more certain punishment for offenders, and addresses aggressively the needs of the families touched by murder. This is a unique and wonderful moment in our state's history. I urge you to seize it.

Thank you.

REVEREND HOWARD: Thank you very much.

Ms. Fitzgerald, I'm going to ask you to hear the questions of our panel.

But Ms. Hiltner, you're going to be joined by Ms. Poinsett later, and I'm going to ask you to let us conclude with this witness. Remain seated there, and we'll bring your colleague from your organization, and you will talk together. Is that fair?

MS. FITZGERALD: Sure, thank you.

REVEREND HOWARD: So we invite the panel.

There was a gentleman standing up. Is there some reason why you were standing?

UNKNOWN SPEAKER: I'm just showing support. Thank you.

REVEREND HOWARD: Oh, thank you.

MS. SMITH SEGARS: He was refraining from applauding.

REVEREND HOWARD: Yes. I see. Yes, indeed. Do you have off -- your cell phone? (laughter)

The panel is now invited to raise questions.
Mr. Moczula, would you like to speak now?

MR. MOCZULA: Ms. Fitzgerald, I commend you sincerely for the passion and dedication for which you advocate your cause. I have just one question. Does the New Jerseyans for Alternatives to the Death Penalty have an operating budget? And if so, what is it?

MS. FITZGERALD: Our budget right now is probably in the vicinity of about $700,000 a year.

MR. MOCZULA: Has any of that money -- has any consideration been given to giving even a portion of that money to the dire need for additional victim services that you mentioned in your statement?

MS. FITZGERALD: I'm glad you asked that, actually. The New Jerseyans for Alternatives to the Death Penalty is a program of the New Jersey Association on Correction -- very long-standing, wonderful organization in the State of New Jersey, whose mission encompasses both the needs of victims and offenders. We run shelters for battered woman. We run halfway houses for ex-offenders. We run homes for people with AIDS. We are one, single program of a much larger organization; and our staff, three of us, including myself, have lost family members to murder.

We were founded by a man who lost his daughter to murder, who reached out to me and asked me very early on to get involved. Commissioner Hicks, as you know, is on our staff. I believe, unfortunately, I'm sad to say, about eight of our 20 executive Committee members have lost family members to murder. We volunteer in prisons, yes. And we have helped with grant writing for organizations that have counseled homicide survivors; and we have reached out -- have gone to annual fundraisers, for years, of various organizations as well.

MR. MOCZULA: Of that specific 700,000 that has been distributed, beyond advocating the cause of abolition or alternatives to the death penalty -- or are you talking a larger budget in New Jersey?
MS. FITZGERALD: The larger budget of New Jersey Association on Corrections is in the millions.

REVEREND HOWARD: Yes, please, Mr. Haverty.

MR. HAVERTY: Ms. Fitzgerald, I assume that you've taken into consideration the fact that if we forward your recommendation to the Legislature, or recommend to the Legislature what you're advocating, and the Legislature passes that, that New Jerseyans Alternatives to the Death Penalty will cease to exist anymore - or not have reason to exist anymore, will they?

MS. FITZGERALD: We will be glad to shut down, and I would be glad to go back--

REVEREND HOWARD: Or just change your name, right?

MS. FITZGERALD: I'd be glad to go back to my higher paying job. Or frankly, I've learned so much along the course of this that I'm hoping to continue to contribute to New Jersey in a way that helps both survivors and people in prison.

REVEREND HOWARD: I responded-- I didn't mean to sound facetious or comical, but it seems to me that, based on your prior answer, you would still have a lot of work to do,, perhaps under a different name. But if you indeed have programs for survivors of murder, that need will still remain.

MS. FITZGERALD: The New Jersey Association does not have a specific program for survivors of homicide, but we have been very supportive of the programs in our state for homicide survivors. And what we're asking the Commission to do is to share with the Legislature what you've learned about the needs of homicide survivors, and to ask the Governor and the State Legislature to actually have a budget amount, in the budget, that actually would go to help survivors with their long-term
counseling needs. But I won't go into too much detail because I know Mrs. Hiltner will.

JUSTICE COLEMAN: Does the Violent Crimes Compensation Board provide any assistance?

MS. FITZGERALD: It does. You know, I'm not an expert on that. I understand, and Mrs. Hiltner can probably answer that better than me, but it's a limited amount of money. You know, I'm unfortunately very aware of the long term consequences, and I know you are, sir, too of homicide, and this is not something that goes away after three years or five years or even 15 years.

As Richard Pompelio -- and I urge you to pay close attention to what he told you earlier. He has taught me about, you know, so much about -- and unfortunately, again, my loss has been more recent -- about the long-term consequences. And a mother could wake 15 or 20 years after a loss of a daughter and have panic attacks. I mean, it doesn't go away overnight. And the Victims of Crime Compensation Board has limited services that covers funeral expenses and a certain amount of counseling services -- but it's very limited.

REVEREND HOWARD: Ms. Segars.

MS. SMITH SEGARS: Yes, first of all, I'd like to commend you for your long-standing commitment to this cause and the work that you've done over the years. I know it's been a marathon for you, and I just would like to thank you -- and also for the materials you provided this Commission, and the information, and the work that you've done. But could you explain I think there is a little confusion about your organization and how it sits within a bigger organization. Could you just expound on that? I'm just not clear on it.

REVEREND HOWARD: If that's something that you might share with us in writing?
MS. SMITH SEGARS: Okay. Thanks.

MS. FITZGERALD: Oh, sure.

REVEREND HOWARD: Please. That would be helpful.

I'm also concerned about the recorder. How are you doing? Do you need a little break? Soon? Just give me that signal.

Now, unless there are other questions of this current witness, I'm going to ask if Ms. Poinsett—First, let me thank you for being with us and for your testimony. We do have copies here for the record.

And the Chair would like to invite Ms. Janet Poinsett, representing the Center for Traumatic Grief and Victim Services; as well as Ms. Kathleen Hiltner, who is seated here—if you could, as best you can. Might I persuade the two of you—you’ll have to come to this mike. And you know the chair is trying to be transparently fair, right? But looking in your eyes, I think you can help me, if you could—because you represent the same cause, more or less—if you could try and share as much of that 10 minutes. If you find it impossible, I'll understand, but we'll try.

KATHLEEN M. HILTNER: I'll do the best I can.

REVEREND HOWARD: Very good. Ms. Hiltner, let me ask you to begin with your words to us.

MS. HILTNER: Thank you. Thank you, Chairman Howard and the members of the Commission. My name is Kathy Hiltner. I'm the Executive Director for the Center for Traumatic Grief and Victims Services, which has provided comprehensive services to individuals and families who have lost a loved one to homicide, since 1987. The center does not have a position on the issue of the death penalty.

Since the death penalty process represents a longer connection to the criminal justice system for survivors of homicide than other sentences, such as life without parole; and since the Legislature asked
you to consider the needs of victims when considering alternatives to the
death penalty, it is my hope that I can help you understand the long-term
effects that plague co-victims of homicide.

Both the loss of the loved one to homicide and the resulting
forced exposure to the criminal justice system is traumatic for survivors.
Many of us have experienced the loss of a loved one through life's natural
process. We accept their death, we bury our loved one, and we move on
with our everyday living. We have our loved one's memories that we hold
very dear in our hearts and our minds.

Let us take a journey with a family that has experienced the
death of a loved one by murder. The trauma that they experience begins
when the police officer arrives at their door to inform them that someone
has murdered their loved one. They immediately enter a state of total
disbelief. They cannot comprehend that this is truly happening to them.
Many describe feeling as though they are standing outside their body
watching everything happening around them, and then thinking that they
will wake up and it will be nothing more than a dream. They realize it is
actually the beginning of their worst nightmare.

They struggle notifying families and friends of the death.
They make the funeral arrangements and they bury their loved one. Besides
the loss of their loved one, co-victims are forced to immediately cope
with the restructuring of family roles. If the victim was the financial
provider, they must learn to cope with the loss of income and support.
They can experience a wide range of emotional responses that continually
resurface.

They also find themselves becoming part of the criminal
justice system. This was certainly not something that they chose to be a
part of. Many families find themselves reading about what happened to
their loved one in the local newspaper or watching the details unfold on
the television. The media becomes one of their many sources, along with the criminal justice system, and each causes secondary injuries to the many co-victims left behind.

The process is harmful and it's totally out of their control. Many become so focused on the criminal justice system in the trial that they do not even address their own or their families needs until the trial is over. It's not uncommon for co-victims to fall apart emotionally and physically after the trial is over and justice is served. While many believe that the end of the trial brings closure, in reality, there is no closure. There is only the end of the trial. The grief continues.

For many, the future brings appeals and retrials and retraumatization. For co-victims in capital trials, experience tells us this is guaranteed to them. When a sentence is reduced or reversed, the survivor is again retraumatized. The criminal justice system focuses on the rights of the accused, not the survivor. As a result, survivors feel left out of the process and revictimized by the focus on the accused. They feel helpless, as the entire experience is out of their control.

The system tries to assist survivors through those that work in the county prosecutor's victim witness offices. These victim witnesses provide support -- system support for survivors of homicide while they are going through the trial. They are there to inform them as to what will take place in the courtroom and try to prepare them for the explicit details of their loved one's death that will be exposed during the trial.

Families impacted by a death penalty case experience an even more complex system that traps them for even a longer period of time. As you have already heard from people directly impacted by a capital case, families are told that the death penalty will mean justice for the loved one, but it falls far short. In reality, even when a death sentence is imposed by the jury, it means years of appeals and reversals and continued
exposure to the way in which their loved one died. It means a continued forced connection to both the criminal justice system and to the offender.

This repetition, under the trauma, experienced through the criminal justice system, is harmful. The death penalty has not been carried out in New Jersey for over three decades. Some here have called it a cruel hoax, others a false promise. Call it what you’d like, but please know that survivors feel betrayed by the capital punishment system and the upheaval it brings into their lives.

Fortunately, throughout the 21 counties in New Jersey, there are state-mandated services available through agencies for all victims of sexual assault and domestic violence. Regrettably, similar services do not exist for survivors of homicide. Our nonprofit agency provides services specific to these survivors, such as specialized individual, family, and group counseling and other essential services, but because of financial constraints, we cannot meet the need. We have had survivors drive up two hours to be able to participate in a program. Recently, during a visit with a legislator that lost a loved one in a homicide, we were asked, where were you when I lost my loved one a few years ago?

Sadly, due to financial restraints, we are not reaching many who need us. We are simply unable to expand our services to reach the undeserved population throughout all of New Jersey. There are, approximately, 400 homicides every year in New Jersey, leaving an average of seven to 10 family members behind to endure its aftermath, yet our state lacks consistent long-term services for survivors. Indeed, currently, there is no mandated funding specific to survivors of homicide.

I hope my testimony has helped you to understand the real needs of homicide survivors. They do not need false promises. They need long-term counseling, and support, and healing. It is my hope that you will take what we have learned here about homicide survivors and the need
for long term services and share it with the Legislature. There seems to be a resounding consensus that we need to do more for the survivors of homicide. Help us to help them reach a new normal. Thank you. (applause)

REVEREND HOWARD: Thank you. Ms. Poinsett, would you just begin, and we'll ask questions of you both together, if that's okay.

JANET POINSETT: Thank you for having me here. My name is Janet Poinsett, and I have a master's degree in social work from Rutgers University. I'm a licensed clinical social worker and I'm a therapist at the Center for Traumatic Grief Services. I've been a therapist there for three years, and I had worked previously in the Division of Youth and Family Services for 27 years. I worked in both settings with groups and individuals.

And in the grief center, I have worked with those who have lost loved ones to homicide as well as the people exposed to trauma that I had worked with in the other system. For that reason, I've always sought training in grief, loss and trauma. I am trained in clinical hypnosis and in eye movement desensitization reprocessing, which is otherwise known as EMDR. These are techniques that can prove helpful by processing and or reducing trauma. However, trauma does not go away.

As a therapist, I'm speaking to you today regarding the abolishment of the death penalty, because it has not worked. And you know about this better than I do. My focus is on the families and loved ones of the victim. Although trauma can be processed to lessen the effects of PTS, or posttraumatic stress, or PTSD, posttraumatic stress disorder, it does not go away. We at the center do speak of the new normal.

Survivors are never the same but they can move on in their lives with the memories that they choose to hold near to them. It is an individual path and an individualized process. The judicial system is, in and of itself, by nature, a system of waiting and review. The system
often impedes healing and/or reinjures. A simple thing like picking up a newspaper can become a reinjury, possibly causing a panic attack or worse, because an article highlights an upcoming trial or some reminder of the original trauma.

The added layers of the legal process a in death penalty case provide little time for relief for loved ones. The following excerpts relate to memory in terms of trauma, and they are from Memory, Trauma Treatment and the Law by Brown, Scheflin and Hammond. They explore memory and trauma treatment based on clinical experiments and neurological evidence, and there is much combined evidence that leads many experts to believe that traumatic memory is stored differently in the brain than conscious, narrative memories.

Traumatic memories are described as more indelible, and burned in visually and behaviorally. Trauma memories are considered to be more likely to be associated with fear conditioning that produces flashbacks. And emotional as well as automatic responses triggered by stimuli are reminiscent of the original trauma. There are neurobiological finds far more complicated and far more detailed, but they do establish that emotional and traumatic memory is undoubtedly very different from unstressed memory for nontraumatic material.

Also, experimental data strongly suggests that traumatic experiences are processed differently from normal experience. There is evidence that the processing for traumatic memories are amygdala based rather than hippocampally based. Both are sites for the memory in the brain, but the amygdala is in the primitive part of the brain that signals danger. And if you are protecting yourself from an dinosaur or an attacker, the signals released are helpful - this is a very primitive part of our brain -- and they include the symptoms include the adrenaline rush,
the increased heart beat, increased rate of breathing, heightened sensory
sensitivity, etc.

But if you are thrown into these symptoms by the sound of a
siren or a picture in the newspapers, rather than an attacker or a
dinosaur, it is terrifying and frustrating in your daily life because it
happens over and over and over again.

Another difference is that trauma subjects, in one study
cited, were found to have significant left hemisphere dominant asymmetry
during neutral memory, which are markedly shifted to the right
hemisphere when recalling an unpleasant event. This seems to represent
memories that are processed and not charged versus memories that are free
floating, not processed and remain as vivid and acutely painful as when
they first occurred. Many trauma patients were reported as describing
that a traumatic memory is triggered by a stimulus that either directly or
indirectly reminds them of the trauma event.

Briefly, I will relate a case I worked with recently.
Although it did not entail the death penalty, it may provide some insight
into what such a trauma reinjury can entail.

A young woman in her early 20s had lost her father at age 11
as a result of a homicide. Suddenly at 22, she found herself barely able
to get out of bed on a daily basis; she couldn't work. Her fears began to
incapacitate her so that she could barely maintain her relationship with
her partner, despite his patience and support. She exhibited symptoms of
Obsessive Compulsive Disorder, and when she was awake and around the
house, she would check the locks every few minutes.

She found herself literally hiding under the covers much of
the time due to severe anxiety. Through therapy sessions, we connected
the onset of the symptoms with the notification of a parole review for the
person convicted for murdering her father. She had learned of this
through a family member, but had not been expected to participate. We connected her with a psychiatrist who concurred with the diagnosis and provided medication for the OCD and medication monitoring. Her situation stabilized and she was able to resume her new normal life.

Just as a note, she did provide a written statement regarding the loss of her father to the Board, which seemed therapeutic to her.

The last part of my statement is that even when individuals are traumatized and they are symptomatic, they quite often deny it. They wonder: "What is wrong with me? Why can't I get over this?" -- and other statements which minimize the impact of trauma. This is why I feel it is important to speak about trauma, even though some of the past may have been a bit boring. But there is a difference between having gone through something horrible and being traumatized. There is a tendency, even for the loved ones who come to our center or call, to expect themselves to be able to move on, or get back to normal, or get closure. Their trauma is often disguised as lack of focus, lack of energy -- "I just can't seem to get it together."

Reports range from full-blown panic attacks, startle response or what is termed hyper-vigilance, to anger on a scale from mild to rage. There are many faces to the trauma and all of them hurt. Reinjury is probably even less accepted, recognized, and/or understood.

And I would like to see the abolishment of the death penalty and the acceptance of a life sentence with no parole. I see it as a tool to accomplish legal means; and also to allow survivors of loved ones to move forward to their new normal, without the reinjury that is presently part of our system.

REVEREND HOWARD: Thank you very much. If you would be so kind as to receive our questions, comments -- if there are comments.

Yes, Mr. Kelaher.
MR. KELAHER: I just have a quick — maybe to enlighten us about this center that you belong to. Is that State subsidized or is volunteer? Because I’m not familiar with it.

MS. FITZGERALD: We do receive — we do have, currently in our budget, one grant from the State, and it is approximately 50-some thousand dollars. We have an annual budget of about $120,000.

MR. KELAHER: Donations and—

MS. FITZGERALD: The remainder comes from donations, fundraising; and the local Burlington County United Way gives us approximately $12,000 a year. And the rest is done with fund-raising, with volunteers. We do training of individuals that have gone through our program to support other victims. We use them as mentors and they work with other victims to help them through the process.

MR. KELAHER: Thank you.

REVEREND HOWARD: No other questions?

MS. GARCIA: No—

REVEREND HOWARD: Thank you very much.

MS. GARCIA: No. Mr. Chairman—

REVEREND HOWARD: Oh, you do have...

Ms. Garcia.

MS. GARCIA: Thank you. I think we, first of all, we have to answer Justice Coleman's question regarding the Violent Crimes Compensation Board; and then I did have a question.

MS. HILTNER: The VCCB, the Victims of Crime Compensation Board -- victims that we see would be -- some could be eligible for us to receive reimbursement from them. It all depends upon whether they have exhausted all of, I believe it's $25,000 that they're entitled to.

Many times the victim doesn't get the survivors do not get to us until maybe two years after the homicide, and they recognize that they
need help. And at that point, they may have already spent that $25,000 on other needs, other family needs, through funeral costs, loss of support, those types of things. So when they get to us, there would be no reimbursement to the agency for providing services through the VCCB.

MS. GARCIA: Ms. Hiltner, I believe you stated survivors have traveled up to two hours to come to the program.

MS. HILTNER: Correct.

MS. GARCIA: Could you explain, maybe, why that might be necessary for a family to travel that far?

MS. HILTNER: Because we're located in Burlington County and we serve—Because of the financial restraints, we're limited to how far we can serve. So families who have the need, and they need to be with others for support, as well as -- Janet said -- process what they've experienced. So they'll travel two hours because our program is one in the state that is unique, and it doesn't exist anywhere else in the state. Because it provides a group therapy as well as educational component and long-term. Because once they participate in the program, they can participate in the monthly support group. So it provides that long-term, but it's only in our area.

MS. GARCIA: And you said it's different for other victims -- victims of domestic violence and sexual assault. There is at least one program mandated to be in each one of those counties. Correct?

MS. HILTNER: Correct.

MS. GARCIA: Did I also hear you say that a legislator asked you, “Where have you been?”

MS. HILTNER: Correct. We recently met with a legislator who had lost a loved one to homicide, and he asked the question, “Where were you when I lost my loved one?” And because of the limited amount of money that's available, it's very difficult to get people to know that we exist,
and to get the resources to provide the services to those families. We wish we could be throughout the state.

REVEREND HOWARD: What would be your recommendation in this regard?

MS. HILTNER: Currently, it's my understanding that federal monies come to the state and there's mandated percentages for domestic violence, sexual assault, and children. But in that formula, there is no amount or percentage that's designated specifically to homicide survivors. And it would be behooving to the survivors. We never know whether we're going to get money every year to keep our doors open. We go on a year-to-year basis, because nothing says that we have to get money to provide services to homicide survivors. Domestic violence and sexual assault, they know that they're going to get some money. It may not be what they want, but they will be able to keep their doors open and provide services. We don't have that security and ability to say that we can do that for survivors of homicide.

REVEREND HOWARD: I think you're answering my question implicitly. Thank you.

MS. HILTNER: Thank you.

MS. POINSETT: Can I just say something? I am very humbled and honored to work with this program, and I come from Trenton to go to Moorestown. My private practice is in Skillman, so sometimes I'm really feeling back and forth, but I feel the program itself speaks for itself. And the people that I work with and work for are an inspiration to me.

REVEREND HOWARD: Thank you. Again, thank you for your being here and what you've shared with us.

We're going to take a break now to give this outstanding recorder a break. And you let me know how much of a break you need.

Just take a little stretch, there. Don't spare.
JUSTICE COLEMAN: Can we take our seats so we can begin?

Thank you.

Reverend Howard apologizes for having to leave before the end of the session. He’s asked me to take over. The list shows that we have seven more people who wish to testify, and it's already 5:05. I will have to reduce the amount of time from 10 minutes to about five, because the targeted hour will have to be about 6:00, to bring the session to a conclusion. You may or may not appreciate it, but I don't like having to sign overtime payroll slips for some of the people who have participated.

The next person scheduled is David Shepard. Mr. Shepard, would you have a seat, and press the button to turn the mike on to begin your testimony.

DAVID SHEPARD: I'd like to thank the members of the Commission for having me here. My name is David Shepard, and I live in Newark. And in 1984, I was wrongly convicted of rape, and served 11 years in prison before becoming the first person to be exonerated in New Jersey based on DNA evidence. That was in 1995. I'm happy to answer any questions that you have about my case, but the purpose of my testimony today is to address a subject that has been raised by others.

What is life in prison really like? Anyone that will say that life in prison is not hard, including people that testified -- the professor was talking about volleyball last week in the last hearing -- has never spent real time in prison. I will never understand the country club myth that got started. It's nothing like that at all. Visiting a prison is very different from living the experience. I know. I lived it. I lived it right in New Jersey.
I was in the Youth Correctional Facility. Then I was transferred to Rahway, which is New Jersey State Prison. Prison life is hell. The worst part is the isolation. No friends, no support, no family. Prisoners need to always watch their back. It's a dangerous place, you live in constant fear. Simply changing the channel on the TV set could put you at risk. You never know when someone will go after you.

In prison you do not have a name, just a number. Your identity is literally taken from you; so is your dignity. It is the loneliest place in the world. You're not respected. You must strip before visits and strip every time you go anywhere. There is no privacy in prison, absolutely none. The only recognizable food is lunch meat. The food is the same every day, and I bet they still serve corn beef on Mondays, no change, just the same bad, barely edible food. You get two hours out of your cell. Work detail may give you more time.

Weekends are toughest for those who work, as you cannot leave for your job which breaks up the boredom a little. The cell is a four by six, and you are in there most of your life.

I would laugh about people who say prison is a country club, except that it is such a dangerous lie. Our young people should fear prison, and we should not protect them from the truth, or lie to them out of anger that prisoners can get any rec time or watch television. Prison is hell. Believe me, we need to tell our kids that.

Those who are in long term generally consider it to be a lifetime. I have only imagined how much worse it would have been knowing you will never get out, as with life without parole.

Some suggested that we play volleyball and it isn't bad really. Think about it, really think about it. Think about what it must be like to know that you will never hold a baby again, or see the ocean again, or smell a flower again, or eat at a restaurant again. Think about
all the things we take for granted -- our freedoms -- and think about what it would be like to know you'll never enjoy those freedoms again, none of them.

I do not believe there could be a worse punishment, and I don't care what prison you're talking about. Even when inmates are seriously sick and hospitalized, they remain shackled. They remain in custody. They are not free. They do not have their dignity.

Dental care takes months, and you are expected to take Tylenol and tough it out. Medical care is spotty and the wait for a doctor can be up to two weeks. Many people in our prisons are seriously mentally ill. They have different sets of problems. Many of those in prison develop mental illness, such as anxiety attacks, as a result of incarceration.

We should try to improve services for the seriously mentally ill. Many of us who have been freed because of our innocence deal with our own anxieties.

We should take care of the exonerees too. But today I'm simply here to tell you the truth about prisoners, prison life in New Jersey. This is hard for me and very painful, but I felt I had to do it to help end the death penalty. This is the least I can do for the other innocent men and women out there. Thank you.

JUSTICE COLEMAN: Thank you for informing us and sharing with us your experience before you were exonerated. Is there any Commission member that would wish to ask questions? We have your report.

Mr. Hicks.

MR. HICKS: I'm really sorry that you had to spend all those years of your life incarcerated for a crime you didn't commit. And one of the reasons I have a problem with the death penalty is because I know people who have spent time on Death Row for murders they didn't commit.

But outside of the abuse by the other prisoners, and the
abuses of probably some of the prison staff, some of the correction
officers -- outside of the abuse, don't you think a prison should be a
hard place, should be a place that people don't want to go? It should be
a place that you would use as a deterrent?

MR. SHEPARD: I think prison is a place where most people
don't want to go. Anybody that's sane doesn't want to go to prison.
Prison is not an easy place. It's constant, 24 hours a day, seven days a
week, of watch and be watched. That's what prison is every day. It never
changes.

MR. HICKS: And I believe that's what society expects. They
want it to be a hard place, because they want it to be a deterrent to
crime. And unfortunately, some people end up there for crimes they didn't
commit. And I hope it happens as little as possible, or it never happens.
But I think our society needs a rough place for some people who commit
these horrible crimes. So I think you can agree with that. It should be
a tough place.

MR. SHEPARD: Yes, I do.

MS. SMITH SEGARS: Mr. Shepard, I am sorry about your reality,
but I'd like to know -- if the victim in your case had been killed, you
could have been facing a death sentence.

MR. SHEPARD: Correct.

MS. SMITH SEGARS: And but for DNA, is it possible that you
could still be sitting on Death Row?

MR. SHEPARD: Yes.

MS. SMITH SEGARS: But for DNA, do you think, if there had not
been DNA, do you think you would still be in jail today?

MR. SHEPARD: Yes.

MS. SMITH SEGARS: And if that were the case-- What was your
sentence imposed, by the way, at the time?
MR. SHEPARD: I had -- it would have been -- I would have done close to 30 years before I would have been eligible for parole, had it not been for DNA.

MS. SMITH SEGARS: And in your experience in prison, for those inmates who I’m sure-- Did you have contact with inmates who were in prison for homicide?

MR. SHEPARD: Yes.

MS. SMITH SEGARS: Have you ever heard of or been told that there were people who claim their innocence, but did not have DNA?

MR. SHEPARD: Yes.

MS. SMITH SEGARS: Thank you.

JUSTICE COLEMAN: Any other questions?

MS. GARCIA: Mr. Shepard, I'm sure that I don't know how much inmates talk amongst themselves, but I just had a thought, and I'll throw it out to you. I'm just wondering how many people in prison were victims themselves and never received treatment, and end up in prison -- maybe we start to address their problems, but they come into the juvenile justice system rather than when they were victimized. And I can't help but wonder how many people would not be incarcerated if we'd started serving the victims.

MR. SHEPARD: I think a large percentage of them were victims somehow, in some way, either by their parents or somebody they knew in some way, where there was--

JUSTICE COLEMAN: Would you raise your voice?

MR. SHEPARD: Okay, I’m sorry.

Yes, I think a lot of people that were in prison were victims in some kind of way, and their problems were never addressed. And that may be one of the reasons they landed where they are today.

MS. GARCIA: Right. Doesn't excuse it, but--

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MR. SHEPARD: No, I'm not excusing it. You know, I did time, and that's the worst place in the world, but I still believe that prisons have their place. If you do something wrong, that is where you end up. But there were people there that were there because of circumstances that were beyond their control, in some cases.

MS. GARCIA: Thank you.

JUSTICE COLEMAN: Thank you, Mr. Shepard.

MR. SHEPARD: Thank you.

JUSTICE COLEMAN: Bryan Miller; and Kathryn Schwartz will be next.

You may proceed, Mr. Miller.

BRYAN MILLER: Red means go? Okay.

Thank you, Mr. Chairman and distinguished members of the Commission. And I have to say, I admire you all for hanging in there on this long, long afternoon; and this, the fourth hearing. I really admire you a tremendous amount for your stoicism.

My name is Bryan Miller, and I'm a resident of Haddonfield, New Jersey. Some of you may know me from my tenure as Executive Director of Cease Fire New Jersey, our state's leading organization devoted to reducing gun violence.

Two days before Thanksgiving 1994, my only brother, Mike, an FBI special agent, and two of his colleagues were murdered in the line of duty. Since that time, and in Mike's honor, I've worked to expose the dangers of gun violence and to gain measures to take illegal guns out of the hands of people who shouldn't have them.

I believe that murderers should be punished swiftly and harshly. They should be held accountable for their actions. I believe our laws should protect our citizens, and that we honor victims with
strong and just public policies, just as I seek to honor Mike daily with my work. The death penalty is proven neither strong nor just.

It's appropriate that the State Legislature ask you to keep the needs of homicide survivors in mind as you consider potential alternatives to the death penalty. I believe that the death penalty has been a sore that doesn't heal for those that have been through the capital process. As you discuss alternatives, you should consider this reality which has been exposed through compelling and painful testimony from witnesses who know from direct experience, that the promised benefits of the death penalty in New Jersey are just illusions. And you've heard several of them today.

We need to stop making false promises that somehow the death penalty is going to make things better, because the reality is that the death penalty is making things worse. And we need to stop blithely accepting the illusion that execution will somehow provide closure to victims as a reason to maintain execution as a punishment. There is no closure to survivors of murder.

How can anyone expect the death of another to help them live with the death of their own loved one? We murder survivors will always live with the shock and grief that was bestowed upon us. It's unavoidable. Instead of focusing on illusions, let us focus on what is important. Homicide survivors need to know they matter and that we care, all of us.

This Commission should recommend that the death penalty be replaced with a strong measured and certain response, life without parole. You should also recommend additional funding for services for murder victims' families, and look to victims advocates who are doing that incredibly important work to guide you.
Philosophical positions on capital punishment differ among people of good will and good intentions, including all of us in this room, and they also evolve. In 1982 many more of us would have supported the death penalty under the mistaken belief that it deters crimes more than life sentences, or under the assumption that it is somehow needed to right a wrong.

It was, and to a degree still is, common to hear people say that we need the death penalty for victims’ families. We now realize that the extreme of death is unnecessary in light of strong alternatives, and that these alternatives are better in many ways for surviving families. We also know that many homicide survivors oppose the death penalty and for a variety of reasons.

In short, we have learned, and I hope we have grown in our understanding of how this complex and serious public policy really impacts us. But I wanted to be here today because I feel strongly that the death penalty is bad public policy, and because I know that, like many other issues, the death penalty can fall prey to politics. However, as someone who works in the public policy arena, I know a moment when I see one -- and this is a moment for New Jersey.

The Legislature has signaled its readiness to address this issue and take action. They're looking to this Commission for guidance. You should help them to understand the many ways that the death penalty fails us. You should help them to understand that we can do better for the families of the murder victims, and that we should not forget them after the headlines die down. No more illusions. Too many families need our help. And I thank you very much for your time.

JUSTICE COLEMAN: Thank you, Mr. Miller, for taking the time to come, and for making the presentation. Is there any Commissioner who wishes to ask a question?
MS. GARCIA: Mr. Miller, I'm sorry about your brother. We share a holiday that's not too pleasant, unfortunately. I'd like to ask you what your thoughts are as a survivor. And clearly you know the system that we have here. What would you say to families that still believe that the person that took their loved one's life will be executed in the State of New Jersey?

MR. MILLER: I'm sorry. Say that again -- I didn't quite understand. I apologize.

MS. GARCIA: For the surviving family members that believe in the death penalty and they trust that it will happen, what would you say to them?

MR. MILLER: Actually, what I would say to them is, I would point to people who would do the sort of things that I do -- not necessarily me, but people who take the experience and the horror that they faced -- and that I face and my family faces every day -- and try to turn it into something good. I get up-- I love my brother. He's no longer with me, but I still love him every day and I miss him every day. And every day I get up and I think, "What I can do with that hurt?" And what I do is something that I believe is really good. I try to get out there and save people from enduring what my family does every day.

And I think it's meant everything to me that I can do that, and that I can honor my brother; and that I can feel that my brother, somewhere, feels honored by this and has appreciates my work. And that's what gives me hope, and pleasure, and the ability to face every day. And I think, you know, I'm not a genius, but I think that's what I would say. This is what you need to do, not what I particularly do, but to provide hope to yourself and to everyone around you.

MS. GARCIA: I think you might have misunderstood where I was going, but I agree with that. In order to survive it, you have to do
something positive, I believe. But there are survivors that philosophically believe in the death penalty. And I think my point was for those who do, and are under the impression that it will be carried out here in New Jersey -- the facade that we have here, and what it does to the families, whether it will ever be carried out.

MR. MILLER: Well, I still think it's a matter of refocusing, really, on good things in life and hope; and not on the death of another person, with what I believe is the false hope that that's going to provide closure and help you get through life. I think it's by moving forward and being positive that one gets through life. I don't know if I answered your question. I apologize if I didn't.

JUSTICE COLEMAN: Any other questions?

Yes.

MR. HICKS: First of all, I'm sorry for your loss. But I really don't have a question, I just have a comment. I just want to commend you on your work in trying to remove illegal guns off the street. My daughter was murdered with an illegal handgun, and I think it's a very good cause, and I wish you luck. That is a very good way to honor your brother's death.

MR. MILLER: Thank you very much. I really appreciate that, sir.

JUSTICE COLEMAN: Any other questions or comments?

Mr. Miller, we thank you for coming and sharing with us your loss, and informing us on how you move forward.

MR. MILLER: Thank you very much.

JUSTICE COLEMAN: Ms. Kathryn Schwartz.

KATHRYN SCHWARTZ: Red means go?

JUSTICE COLEMAN: Red means go.
MS. SCHWARTZ: Good evening. You have the full testimony. I have done some quick editing to cut it down, to stay within the time limit.

My name is Kathryn Schwartz. I am a Diaconal Minister in the Lutheran Church, ELCA, and I'm also Chaplain of the Morris County Correctional Facility in Morristown, New Jersey. I'm here to represent myself, as well as Bishop Roy Riley, Bishop of the New Jersey Synod, Evangelical Lutheran Church in America.

I will first summarize the key points of his letter. He writes, "The reasons for our opposition to the death penalty are simple. One, the risk and fact that innocent persons may be executed has been demonstrated, and there is no way to correct such an error once an execution has taken place. Two, imposition of the death penalty falls disproportionately upon those who are least able financially to defend themselves. Three, the death penalty is significantly more expensive than a life sentence without parole. Four, the death penalty does not provide the closure victims families are hoping for, nor does it deter further acts of violence."

He continues, "In fact, I am convinced that the death penalty, because it is state-sanctioned violence, opens the door to permission for violence toward other human beings. Even where this penalty is reserved for the worst of the worst, it maintains the presumption that there are those who do not deserve to live, and that determination is a judgment call. I believe that the judgment is reserved for the Creator alone. I respectively ask you to do whatever is necessary to end the use of the death penalty. Very sincerely, E. Roy Riley, Bishop, New Jersey Synod, ELCA."

I concur with the Bishop's letter, and I now have my own observations and questions from my perspective, as both a Christian and
someone who ministers with incarcerated people. I've been a Chaplain for over three years and have worked with approximately a dozen men who were incarcerated for homicide. Two of them have been indicted with the death penalty and currently are waiting trial. My main question is this: Whom does the death penalty serve? Public policy should serve someone. At times there are policies that serve one group better than another, but if it is to be maintained, New Jersey's death penalty should serve some group’s interest. Does the death penalty serve the victims of crime? You have heard eloquent testimony from many families of victims of homicide who say “no.” You have heard consistent criticism of the system as it currently stands.

Some people have lifted up the death penalty, promising that it will bring about some degree of peace, settling the score somehow, but I wonder if that is the kind of peace that lasts. Does the death penalty serve notice to the offender? I have learned that one cannot generalize about people who commit homicide. They are diverse with regard to age, race, economic status, and motive for their crime; and therefore, like the victims of crime, they cannot be lumped into one basket. And while the circumstances of their homicides vary tremendously, my experience with men who have killed people has led me to completely discount the deterrence argument.

I cannot imagine that the death penalty has ever served or will serve as a deterrent to crime. One common thread that I have found in spending time with offenders, however, is a tremendous sense of remorse and repentance. They would almost, to a person, give anything to have that day to live over again so they could make different decisions.

Does the death penalty serve the offender's family? This is a group that gets few headlines. People who commit homicide are more than the one awful act that they have committed. They are also husbands,
fathers, sons and brothers. Their children, parents, spouses, brothers and sisters are further victims of their crime. I see them every week as they line up for visits, to be processed by the officer at the main entrance to the jail. They go up to visit their loved one, pressing their hands on the glass, and talking on the phone.

Children ask when dad is coming home, mothers and grandmothers sing songs, wives struggle emotionally and financially, sometimes moving to new neighborhoods where their loved one's crimes are not so well publicized.

JUSTICE COLEMAN: Ms. Schwartz, you've run out of time.

MS. SCHWARTZ: Oh dear. Okay.

How would the death penalty serve these people? They would be added to the rolls of families of victims of violence.

I would like to leave you with one quote from Bud Welsh, who lost his daughter in the Oklahoma City bombing. He says, "I knew that the death penalty wasn't going to bring her back, and I realized that it was about revenge and hate. And the reason that Julie and 167 others were dead was because of that very same thing, revenge and hate."

Thank you for your time and for allowing me to testify. I do want to add one thing in response to a question. Just in my little world, I would say a huge percentage of offenders have also been victims of crime -- those people who I work with in the jail.

JUSTICE COLEMAN: Thank you.

Does any Commissioner wish to ask questions?

Having heard none, we thank you again for coming in and participating.

David Ruhnke.

DAVID A. RUHNKE: Good evening members of the Commission. And I know the hour draws late, and I will try to speak shorter than I was planning on
speaking. I'm trying to bring a perspective to this Committee and
Commission that's different than from most of the people that you've
heard.

I'm an attorney. I've been an attorney for 30 years. For more
than two-thirds of that period of time, I have always had on my docket a
defendant accused of a crime of taking another person's life, for whom the
state wanted to exact their own life. And whatever the purpose was of
enacting the death penalty in New Jersey in 1982, I can tell you for sure
from the perspective of one who tries the cases, who stands in front of
the juries, who watches their verdicts returned, who interacts with the
families of survivors in the courtroom, and interacts with the families of
my own clients, it is not working.

It has not accomplished what the Legislature set out to do.
There is nothing that the death penalty can accomplish that can’t also be
accomplished with life in prison without the possibility of release. I
recall, at the time the death penalty was enacted in 1982, reading Senator
Russo's remarks that he designed, or the Legislature had designed, a
statute that was guaranteed to only target the worst of the worst, And I
will tell you, from personal experience, that not even that is so.

The death penalty is not only something-- I've listened to
this Commission and I've listened to the big bad wolf in the room being -
well, it's the New Jersey Supreme Court. That's the devil, that's the
problem. That's why we haven't had any sentences of death imposed in our
courts for a long period of time.

New Jersey Supreme Court is not a static institution of seven
people who have been on the Court for 30 some years. It changes and its
composition changes. And what the Court does is, it applies the
principles that the United States Supreme Court lays down, by and large,
and it takes them seriously.
When the Supreme Court of the United States tells state Supreme Courts that death is different, and that the cases are to be treated differently than ordinary murder cases, our Courts has taken that seriously. When the Supreme Court tells the state Courts that death verdicts must be marked by heightened standards of reliability, because that's what the Constitution demands, our Supreme Court has taken that command and those directions seriously.

But it is also juries who have difficulty with the idea of a death penalty in New Jersey. If the death penalty is reserved for the worst of the worst, surely it was reserved for the gentleman who walked up behind a police officer in the Essex County Courthouse and, using a smuggled gun, shot him through the back of the head; and then shot a sheriff's officer in the chest; and then shot at another sheriff's officer in the stairwell; and then shot at a security guard outside the Courthouse -- and was not sentenced to death, not by a New Jersey Supreme Court gone wild, but by 12 citizens who heard all the evidence.

When the New Jersey Supreme Court reversed the Koedatich decision, because of legal errors -- Koedatich had been sentenced to death -- but affirmed the underlying conviction, sure enough, a jury that heard the evidence, free of legal error that had been identified by the Supreme Court of our State, sentenced Koedatich to life.

When Anthony McDougald’s sentence of death was put aside by the New Jersey Supreme Court because of legal error -- in a horrible, horrible, unmanageable, indescribable, double homicide, the worst of the worst -- a jury spared his life, in a guilty phase free of constitutional error.

It is uncommon for regular, ordinary -- who could ever speak of murder being ordinary -- verdicts to be set aside on appeal. It is a rare occasion. And often my cases have ended, whether a State Court or
Federal Court -- with the families of victims unhappy, upset, crying, hugging one another because a convicted murderer has escaped the death penalty and will only be going to prison for the rest of his life. There are times when I look at these families, and I simply say to myself, "You don't know, in a very perverse sense of the way, how lucky you are, because for you, the case is over."

And so are my remarks for this afternoon. If I--

JUSTICE COLEMAN: I didn't mean to interrupt.

MR. RUHNKE: It's amazing that you hung in here as long as -- that you are willing to hang in here. So if there are questions, I'd be happy to reply.

MR. HAVERTY: Mr. Ruhnke, you provided us with your curriculum vitae. I'm just looking at it. Are all these death penalty cases, that are listed on here, cases that you worked on?

MR. RUHNKE: Yes.

MR. HAVERTY: And it goes on for many, many pages. Can you give us an estimate of how many of those were--

MR. RUHNKE: I'm not sure how many. Most of the cases, probably the majority of them, were cases that were not authorized for capital punishment in the Federal system. I tried six cases in New Jersey that went to a verdict. So my experience in the New Jersey system is six cases -- five lifers, one acquittal. So that's been my experience. And some of those cases-- Any murder case -- you take any murder case by its own terms, it sounds horrible by its own terms. You take any victim's family, every victims' family suffers. Everybody suffers differently. Everybody takes it a different way, but they all suffer. There is no capital to be made about comparing, case to case, suffering to suffering. They're all horrible. The system does a terrible job of prosecuting the worst of the worst, or selecting the worst of the worst. It's arbitrary.
It's like being struck by lightning. And in New Jersey it’s been juries -- are probably the primary group that's rejecting the death penalty.

MR. HAVERY: Is much of your criminal practice-- Do you have a criminal practice?

MR. RUHNKE: I'm in private criminal practice. At any given time-- Half to two-thirds of my practice, right now, is Federal capital work; because there's been a drastic fall off in death penalty prosecutions in New Jersey, because prosecutors realize it's a waste of time.

MR. HAVERY: Thank you.

JUSTICE COLEMAN: Ms. Segars. One more -- at least one more.

MS. SMITH SEGARS: Good afternoon, Mr. Ruhnke. Thank you for joining us. I guess for the record, a number of the cases that you have represented clients on Death Row were assigned through the Office of the Public Defender.

MR. RUHNKE: Well, all of the trial cases, none of which are on Death Row, have all been as appointed counsel through the State’s Public Defender’s Office, starting at 40 dollars an hour. I think it's up to 75 dollars an hour now.

MS. SMITH SEGARS: For many of the years it was nearly nothing.

MR. RUHNKE: Yes.

MS. SMITH SEGARS: But I would like to ask you the following question. In your experience, how do you see -- how do you view the issue of proportionality, race, and other factors that impact upon the death penalty?

MR. RUHNKE: I think the death penalty, from my experience, both in the State and Federal Courts, is arbitrary. I don't think there is any accurate way of predicting which defendant is going to receive a
sentence of death and which is not. As I said, all crimes can be made to sound horrible, because they are. Each crime is horrible.

In terms of race, the story of the death penalty is the story of race -- whether it starts in the south, continues to the completely consistent findings of every study -- with the exception of, apparently, Judge Baime -- that there is a white-victim effect that operates in all capital punishment systems, that race and the death penalty are inexplicably intertwined, always has been and, I'm afraid, it always will be.

MR. DEFAZIO: Justice, may I?

JUSTICE COLEMAN. Yes.

MR. DEFAZIO: How are you doing?

MR. RUHNKE: Good. How are you doing?

MR. DEFAZIO: All right, Counselor.

You know, proportionality -- let's assume, for the sake of argument, that the death penalty were to be replaced by life without parole for certain enumerated murders. What would you have to say about proportionality review then?

MR. RUHNKE: For life sentences?

MR. DEFAZIO: Yes, life without parole.

MR. RUHNKE: If, taking a hypothetical statute, specific criteria--

MR. DEFAZIO: Yes, this is hypothetical.

MR. RUHNKE: It would probably be no more. I wouldn't see it -- for proportionality review at all. I would see the same kind of role that operates in sensing factors, generally. But in terms of a proportionality review, I think proportionality review is a function of death being different.

MR. DEFAZIO: Okay. Thank you.
MS. SMITH SEGARS: I have a follow-up question.

JUSTICE COLEMAN: Yes, you may.

MS. SMITH SEGARS: In regard to—in addition to race as a factor, but with respect to the clients that you serve, how has poverty played a role? And two, with respect to the issue of geography—I mean, is there cases that happen—Are you more likely to be in one part of the state versus another and be charted with the death penalty?

MR. RUHNKE: I know what the overall figures are. I know that there is a countywide disparity. I can also tell you that, from my experience in the Federal system—which has a centralized decision-making process—the Attorney General of the United States makes the decision on every single case, whether it's going to be authorized for Federal capital prosecution. There is a very, very heavy southern regional effect, like a two to one, completely out of proportion—that the states from the South—Texas, Virginia, Missouri, Oklahoma, Georgia—are much more likely to receive authorization from the Attorney General than in states in the Northeast. There has only been a handful of death verdicts in the Federal system returned in the northeastern states. There have been 20 or 30 returned in the South. So regionalism is always a problem, whether it's within a state or within a nation.

MS. GARCIA: I'm sorry, Mr. Ruhnke, I was out of the room when you testified. But if my memory serves me correct, weren't you involved in the Koedatich case?

MR. RUHNKE: I was involved in the Koedatich case.

MS. GARCIA: Okay. And that was, for those who don't know, a serial murder. And his case was overturned, correct?

MR. RUHNKE: Yes.

MS. GARCIA: And he's serving a life sentence?
MR. RUHNKE: He's serving several consecutive life sentences, yes. And he's not been heard from since.

MS. GARCIA: But it was a death penalty case overturned -- another.

MR. RUHNKE: Yes.

MS. GARCIA: Thank you.

MR. RUHNKE: Thank you.

JUSTICE COLEMAN: Mr. Ruhnke, thank you.

CLARE LAURA HOGENAUER: That's okay. My name is Clare Laura Hogenauer. I'm a little stuffed up today. I don't usually sound this way; I have a cold.

Thank you for allowing me to speak with you.

The shirt I'm wearing, by the way -- which you probably can't all see -- says, “Why do we kill people who kill people to teach that killing is wrong?” I can sum up and leave, but I have a few more things to say. That pretty much says it.

I'm a lawyer from New York City, but I'm here in neither capacity. I'm here solely as a human being who has despised the death penalty since I understood the concept, probably before age 5. I'm also here despite seven years of pain, fever, exhaustion and sleep destruction from an incurable bone marrow cancer. That's how important this issue is, for me to be here. I'd describe myself as having a compassionate connection with those on Death Row, because I'm on Death Row.

They both take years until there's certain death. Average survival for my cancer is five years; I've had it eight. The average survival in Virginia on Death Row is a bit more than six years. The difference is that a higher being -- and I'm not religious -- not human
beings are going to determine when I die, and that's the way it should be for all of us.

I first spoke against the death penalty, I'm proud to tell you, when I was 15, in 1962; probably farther back than anyone else who has spoken to you.

It was in 1962, in high school in the Bronx, and I was preparing a paper against the death penalty in anticipation, I believe, of the execution of the last person to be executed in New York. In any event, that was the last execution in the Northeast before Michael Ross' execution in Connecticut, which I attended. I presented my paper to the class and I used a theatrical device to convey the message, mimicking the electric chair in some way.

I've updated that, and this was my mother's tube feeding bag. And fluid both takes life and gives life, and this is what my mother lived on for seven years. But if you just put a drug in it that can kill, that's what it will do.

And I cannot believe the timing of my speaking. At this very moment, in another place in our country, where I might have been tonight -- in Florida -- unless things have changed at the last minute, a man is having this done to him at the Starke prison in Florida. A man is being executed down there. And just within hours of now, in Ohio, a man was executed in this manner.

I have been to five executions this past year. Some people kid me and say, "What are you doing for fun these days, Clare?" Well, the reason I go is because I now speak from my soul, not just from my brain and my heart. To have been at an execution and to have stood yards away from where a human being is slaughtering another human being is a profound experience. And I would highly recommend if any of you can go to an
execution vigil, please do. You don't have to go very far -- Virginia, Tennessee, Ohio, all within a month probably.

Attempts are made throughout the country to make it more humane by changing the drug method or the method of lethal injection. Humane execution is an oxymoron. The state is taking the man's life. All they're focusing on is a couple of minutes of pain?

My earliest memory of the death penalty actually dates back to 1953. You can probably guess where this is going. My 7th birthday was going to be on June 15. My highly educated parents had several newspapers, and the black and white TV of course had something on it that you will, I'm sure, recognize. Another little 6 year old was having a very special day that week also. His parents, the Rosenbergs were to be executed and, in fact, it was to occur on my birthday; but it ended up happening on June 19.

JUSTICE COLEMAN: You have one minute.

MS. HOGENAUER: Sorry? One minute remaining? Okay, I've given you my testimony here.

I was held up and nearly murdered in 1975, and I'm still here to speak against the death penalty. I went to the play, Exonerated. That's what got me started on this. I highly recommend it. It is a very powerful play that has the real exonerees on stage. I went to death penalty trials, and I actually got involved in Michael Ross' execution. What he did to eight women, including a Vassar graduate, which is where I graduated from, was absolutely savage. And I'm going to put that on the floor, no doubt about it. There is no question that that's what it was. But if you sat in the courtroom with me, I doubt you would have been able to say, please kill that man in a month.

Many horrific murders are committed in a rage, or in a moment of hate, or revenge. Some are planned. However, none are committed with
the steady, incessant, calculated cold planning of the death penalty. That's barbaric. That's on the ground, also, with savage.

JUSTICE COLEMAN: Your time is up.

MS. HOGENAUER: Please keep New Jersey in the civilized world and eliminate the death penalty, and please grant my dying wish and get rid of it. Thank you.

JUSTICE COLEMAN: Thank you.

Any questions from the Commissioners?

We thank you for coming.

The next person is John Nickas. Is the red light on?

JOHN NICKAS: Yes.

I'm a Catholic priest who served in Newark, New Jersey, for 30 years; and in Montclair, New Jersey, for about 10 years. I say that because I've seen everything in Newark. I saw the riots in '67, and the tanks coming down the street, and the State Police shooting at the Newark police, and all the confusion above life; and especially with so many young people being killed in Newark in automobile accidents, in drug addiction, and all these terrible ways that young people die.

When I listen to everything today, it struck me a couple ways. It struck me first how simple it is to say you don't believe in killing, and you kill somebody. That's completely opposite of what you're saying, and that's what the death penalty does. And the other thing that struck me today is, you people work so hard, but your work is just beginning. It seems to me this death penalty study has shown -- for you today, and all your discussion -- all the things wrong with our system of corrections. When the officers testified before, my mind went, "I wonder if somebody, a prisoner, would testify, if he would say the same thing about the prisons," you know? And then the young man just got up before and told
you almost the exact opposite of how prison is. So that makes you think, doesn’t it?

The other thing -- when I was in Newark, if kids would steal a car, if they would sell marijuana on the street, they would be arrested if they were caught. And they would go to jail. And their parents or guardians had no money. They would stay in jail until they finally went to court,

And I have a good friend of mine whose niece's husband, who is a young lawyer, just murdered someone. A million dollars in bail, and in a week's time he was out on the street, because he was able to make his million dollar bail. And I was -- this is one of my best friends. I'm following this, in fact. I met with him and spoke with him for four hours straight about what actually happened, how this murder took place. And I said-- He got a good defense lawyer, and I'm listening to him -- $250,000 he had to give the lawyer before he even began his defense.

How could our legal system be fair in any way? I certainly couldn't put up $250,000 or get a million dollars bail. So it's so -- and what you heard today was how unfair the system is. It could never be fair. And when you're talking about someone's life, to make a mistake on something that is never fair, it's impossible. But you heard that today too, so what do you do?

And the other thing you heard today -- and when you think about the death penalty, you think about the person who is going to die, don’t you, because of what they did. And you don't always think about the people who experience the death -- the victims, the parents of the person, or whoever it might be, and what they suffered. We heard that so much today

So it's just-- One thing I thought about too, the last thing -- people who are old in prison. I had a stroke and I had five heart
attacks, so I know. In one day I went from a young man to an old man, so I know what that is. But I'm not the same person that I was; and when you think of people in prison, you think of them in their worst state, when -- whatever crime they committed that made them go to prison.

You don't think how they are at 50 years old, or 60 years old, or now, when people could be in prison forever, 70 and 80 years old. And they're talking about treating them in the same way as they would be treated if they just committed a crime. But they're not the same person. We forget that so much. We're not the same person, and especially other people are not the same person. And there is no way in the present setup to show a difference, you know?

What do you do with old people in their 60s and 70s still in prison? Do you keep them in one little room and don't let them move out 22 hours a day? Does that make any sense?

JUSTICE COLEMAN: Thank you, Father Nickas.

Is there any member of the Commission who has a question to ask?

You may step down, and we express our appreciation and gratitude for coming and giving testimony, under what is, obviously, very dire circumstances, given your condition.

Thomas Langan.

THOMAS F. LANGAN: The only reason I signed up to speak was because Father was before me. I said if he signed up, I'd sign up also. I'll try to be very brief.

I'm a member of Pax Christi USA, which is the Catholic Peace Movement, and our credo is "Violence ends where love begins." And I think that the death penalty is a violent crime. And as a former teacher, I'm not used to answering questions. I used to ask them. So I'd like to ask the Committee two questions.
One is, what is the purpose of the death penalty? And the second one is, have any of you ever been incarcerated in a Federal or a State prison? I assume the answer is no. But the reason I ask these two questions is that the death penalty seems to rid society of a person who has committed a heinous crime. Well, I think our penitentiaries are capable of doing this without taking another life. And this is what we should be doing with a penalty of incarceration without parole -- would be, do the same thing.

As far as the victims families, I don't know what they're looking for, but I know they don't get satisfaction from the death penalty being imposed. I think if any of you had ever been to a state prison -- I know, two years ago I was out in California and I visited Alcatraz. Well, I went in through the tour like everybody else, and I even saw the Birdman's cage way up in the top; and I just couldn't imagine being locked up in that cage for the rest of my life. I think I would have tried to commit suicide rather than spend the rest of my life in that cage.

So if it's satisfaction that victims’ families want, I think this would be much more satisfactory than just eliminating the person quickly. And that's really all I have to say.

Thank you very much for hearing me.

JUSTICE COLEMAN: Thank you, Mr. Lavigon.

Is there any member of the Commission who wishes to ask a question?

You may step down. Thank you.

Our final item today is a letter from Assemblyman Joseph Azzolina, who is unable to attend but wishes to have a brief letter read into the record.

MR. NEVILLE: “My position on the death penalty has been consistent during my quarter century in the State Senate and Assembly,
beginning in 1966. I was the prime sponsor of the Death Penalty Bill in the early 1970s, which was ultimately blocked by then-Governor William Cahill.

"My position is humanely reasonable and rational. If you can prove without a doubt that a person committed murder, if the facts are perfectly clear and all correct, and due process is fully completed in the judicial system, then the death penalty should be applied.

"The death penalty is a deterrent for such hideous crimes against innocent victims and society itself. There are way too many murderers and killings in New Jersey, especially those involving debts by the killer, his family or by a business partner.

"Too many hostile individuals are literally getting away with murder. It costs taxpayers multi-million dollars by allowing cold-blooded murderers to spend the rest of their lives in a State or Federal prison. This is irrational and a terrible insult to those who have been murdered and their families.

"I am unable to attend the public hearing because of an appointment with my foot doctor in Baltimore, Maryland, Joseph Azzolina." (applause)

MS. SMITH SEGARS: I'm sorry. Did you say what district? I didn't hear the name of the--

MR. NEVILLE: A retired Senator and Assemblyman. I'm not sure of the district, though.

MS. SMITH SEGARS: All right. Thank you.

JUSTICE COLEMAN: This concludes our public hearing for the Commission, and on behalf of each Commission member and Chairman Howard we wish to express our deep gratitude to you for the dedication that you have shown and the seriousness of purpose which each one of you has recognized.

We will now begin our deliberative process, and I can assure
you that we will take into serious consideration all that the witnesses
gave us today, as well as those in the three prior hearings -- both the
written and the oral testimony that has been presented, as well as any
other research documents that have been submitted to us.

Our job is a very serious one – to try to resolve what to
recommend to the Legislature in response to the question the Legislature
set forth in the legislation creating this Commission. It is indeed a
daunting task, but a task that each one of us welcomes and recognizes the
grave importance of our deliberations to both the families of victims of
crime, particularly capital murder crimes in the state, as well as all of
the other citizens in our state.

As New Jersey has been on the cutting edge in so many other
respects, this is a Commission that will be consistent with that
tradition, so I want to again thank you for your participation; and when
the report is made public, consider yourselves as having been an intimate
part of the process. To me, process is always extremely important, and
the process is working today.

Thank you.

(Hearing Concluded)
CERTIFICATE

I, LAUREN BUTTERFIELD, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my original stenographic notes taken at the time and place hereinbefore set forth.

________________________________________

LAUREN BUTTERFIELD, CSR

Dated: October 31, 2006
Statement of Kent Scheidegger  
Legal Director, Criminal Justice Legal Foundation  

Before the New Jersey Death Penalty Study Commission  
October 24, 2006  

I thank the commission for the opportunity to testify today. The correct identification and sufficient punishment of murderers is a matter of the greatest importance. Indeed, there is no more important function of the state government than the protection of their citizens from murder. Regrettably, that function is not being properly performed in New Jersey today.  

In recent years, we have seen a sea change in the scholarship on deterrence and the death penalty. The availability of data for the 30 years since the restoration of capital punishment as well as improved methods of econometrics have produced a new generation of studies. While the studies are not unanimous and absolute proof is not possible, a preponderance of studies published in peer-reviewed journals confirms what common sense has always told us. The death penalty does have a deterrent effect and does save innocent lives if it is actually enforced.¹  

I will not attempt to explain the math behind these studies or pretend that I completely understand it myself. To illustrate deterrence in more understandable terms, I have computed the change in the murder rate for each state using as a base the moratorium period from 1968 to 1975 when there were no executions in the United States and it was doubtful there ever would be any again. This gives us a basis to compare states at a time when none of them had an effective death penalty and see how they changed when the death penalty was restored. In 2004, the State of Delaware had the greatest drop since the moratorium period of any state in the nation, and Delaware has also had the most effective death penalty of any state by a wide margin. I do not believe this is a coincidence. Of the five states with the best improvements in their homicide rates, all five are states actively using the death penalty. Over 11,000 people were murdered in New Jersey between 1977 and 2004, and I believe it is probable that some of them would be alive today if the state had an effective death penalty during this time.  

So why doesn’t New Jersey have an effective death penalty? Thirty years of experience in 38 states has demonstrated one truth beyond question. You cannot have an effective death penalty in a state if your court of last resort is determined to block it and willing to twist the law to do so. Regrettably, that appears to be the case in New Jersey.  

To see this, one need only look at the decision last July in the case of Anthony DiFrisco.² DiFrisco was a hired killer, a hit man, who committed murder in 1986. In 1994, the New Jersey Supreme Court reviewed all his claims of procedural error and decided by a majority vote that no reversible error had occurred in his case. The next year, the court reviewed his claim that his sentence was disproportionate and decided 5-2 that it was not. Eleven years after that second decision and 20 years after the crime, the New Jersey Supreme Court went back, counted noses
in its two previous decisions, decided it could put together a majority for reversal in those two
decisions, and on that basis alone overturned the death sentence. Not only was the decision on
the merits an outrage, but to reopen this eleven-year-old case, the court had to brush aside and
effectively nullify a rule of court placing a five-year limit on collateral review of final judgments.
After 20 years litigating of these matters, I thought I had seen it all. But this is beyond belief.
This is not law in any meaningful sense of the word. This is pure obstruction of the enforcement
of the law simply because a majority of the judges disagree with it, and they are willing to make
up new rules without limit to impose their preference on the state.

Nor is the DiFrisco case the only outrage by any means. Earlier, you heard the poignant
testimony of Sandra Place. Her elderly mother was strangled by a man who broke into her house
and who then cut off her clothing and sexually violated her. The New Jersey Supreme Court held
that the death penalty for this offense was disproportionate and struck it down.\textsuperscript{3} To reach this
bizarre result, the court decided that for any disputed fact not conclusively resolved by the jury’s
verdict, it would presume that the defendant’s version was the truth. This is diametrically
opposed to the long-standing and universal rule of appellate practice throughout the United
States. In reviewing jury verdicts, American courts have uniformly assumed the version of the
facts most favorable to the verdict. Nothing but pure hostility to the death penalty and a desire to
block its enforcement can explain the gratuitous and unprecedented adoption of the opposite
presumption.

The primary question before this commission and the Legislature and people of New
Jersey is whether you are going to value the lives of the innocent above the lives of the guilty and
do what it takes to actually have an effective death penalty in this state. Several measures
suggest themselves.

First, get rid of proportionality review. It is not constitutionally required,\textsuperscript{4} and it is not
needed as a practical matter. The criteria to be eligible for the death penalty, the jury’s decision
informed by every mitigating fact the defendant chooses to offer, and the final backstop of
executive clemency make this additional level of review unnecessary. The New Jersey Supreme
Court wastes resources trying to quantify a fundamentally unquantifiable decision, and the case
of the murder of Mildred Place demonstrates that the court cannot be trusted to do this correctly.

Second, enact some strong limits on collateral review. Every capital defendant should be
entitled to a direct appeal and one post-conviction proceeding, and there should be no further
reviews of any issue that does not raise a substantial doubt of the identity of the perpetrator. The
execution of a person who is in fact guilty of murder and is in fact eligible for the death penalty is
not an injustice warranting multiple reviews over a period of 20 years.

Finally, though, nothing will achieve the goal unless you fix the New Jersey Supreme
Court. We hear a lot about judicial independence. But the other, equally important side of that
coin is judicial responsibility. Judges must use their power for its proper purpose of enforcing
the Constitution and not for the improper purpose of imposing their policy preferences on the

\textsuperscript{2}
people of the state. Unfortunately, life tenure attempts too many judges to do exactly that. I suggest that New Jersey amend its Constitution so that Justices of the Supreme Court must go before the people for a yes or no confirmation at regular intervals, as is done in California. The experience in California demonstrates that this system comes as close as possible to the optimum, providing effective life tenure in most cases while still providing a safety valve to remove the most egregious abusers of judicial power.

Thank you again for inviting me to speak to you today, and I would be glad to answer any questions you may have.

Notes:


Percent change in per capita murder rate for 2004 relative to 1997-2004 per 1000 murders in the same period

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<th>State</th>
<th>% Change</th>
<th>EX/KM*</th>
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<tr>
<td>US Ave</td>
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For comparison:

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Five States with Best Improvement: 2004 Relative to 1997-1998 Average Changes in Murder Rate
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<th>%EX/KM</th>
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<th>Executions in the Period 1977-2004 per 1000 murders in the same period</th>
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Testimony of Sam Millsap before the New Jersey Death Penalty Study Commission

October 25, 2006

I'm Sam Millsap, a former elected prosecutor from San Antonio, Texas. I was, until a few years ago, a strong supporter of the death penalty. As Bexar County District Attorney, I oversaw the prosecution of several capital murder cases in my four years as District Attorney. All of the men in the cases my office prosecuted were executed.

One of the cases my office prosecuted was that of Ruben Cantu in 1985. When Mr. Cantu was executed in 1992, we were all certain that justice had been served. Recent events strongly suggest that Ruben Cantu may very well have been innocent.

I would like to be able to say to you, as I often do when I speak, that it's an honor to be with you. But as I talk about the death penalty in the specific context of the Cantu case, I think you'll understand that I would rather be back in San Antonio having a root canal.

Let me begin my remarks with a word of thanks to the people of New Jersey and to the members of this Commission for having the courage to examine seriously this very difficult issue. I am deeply appreciative for the invitation by the Commission to testify today.

Although it is unpleasant for me personally to be with you under these circumstances, I believe those whose best efforts may have produced unfortunate results in capital murder cases have a moral and ethical duty to admit their mistakes and to accept responsibility for them. It is for this reason that I welcome the opportunity to tell you about my experiences with the death penalty in Texas and, at the risk of being accused of being a carpetbagger, to suggest that the State of New Jersey learn from the Texas experience in order to avoid the tragic reality that Texas faces today.

I fervently hope that there are only a few prosecutors and former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man. Although it is important that we be willing and able to look back and ask ourselves objectively "What went wrong? How did this happen," it is absolutely crucial, that all of the players in the system—rather than hurl allegations and assign blame for the mistakes of the past-- be positive, look to the future in the search for a system that guarantees the protection of the innocent, and ask the
most important question of all: “How do we make sure that innocent men and women are not executed in the future?”

And, that’s why I’m here today—to discuss the death penalty from the perspective of a former prosecutor who has accepted personal responsibility for the execution of a man who may well have been innocent.

I should acknowledge at the outset that New Jersey and Texas are very different places when it comes to the death penalty.

However, the two states are identical in those respects that are most significant in terms of the points that I want to make today. For starters, the people and courts of New Jersey—like those in Texas—are not infallible. Your courts essentially function as ours do in that, for example, your juries, like those in Texas, determine guilt or innocence based on testimony from witnesses who may or may not be telling the truth and who, even when they tell the truth as they know it, are sometimes wrong.

As is the case in Texas, the criminal justice system in New Jersey, on its best day, is driven by imperfect human beings. Try as we do to always get it right, we sometimes get it wrong.

It is against this backdrop—what our states have in common—that I address the issue of innocence and share my perspective as a death penalty player who got it wrong.

As I mentioned, Ruben Cantu was capitally prosecuted by my office in 1985. His case should be the centerpiece in the innocence discussion—not just in Texas—but also in New Jersey. Why? Both because it offers unique lessons and because it could also happen in New Jersey, despite your many admirable systemic measures that are in place to reduce error.

Ruben Cantu had a fine defense lawyer, a fair judge, and a jury that returned the only possible verdict, based on the evidence that was presented. The trial prosecutor I assigned to the case was one of the most honorable and ethical people that I have ever known. He investigated the case carefully and was confident when he stood before the jury that Ruben Cantu had committed the crime.

What does that mean? Ruben Cantu didn’t just receive the fair trial our system promises—he received a perfect trial. And yet, we have determined 21 years later that he may well have been innocent. Whether he was innocent or not, the system failed him.
What went wrong? How can I argue that the system failed in a case in which it is unclear whether the defendant was, in fact, innocent? The answer is simple: in Texas, like New Jersey, prosecutors are entrusted with vast discretion in deciding whether and how to prosecute capital murder cases. I made an error in judgment by permitting Cantu to be prosecuted for capital murder based on the testimony of a single eyewitness. Many prosecutors, confronted with the same circumstance at that time, would have made the same decision I made.

That witness, who had absolutely nothing to gain but trouble for doing so, has now recanted his sworn trial testimony.

Now, one might argue that my mistake can be easily remedied – don’t permit the death penalty in single eyewitness cases. That would be a good decision, but one that ignores the fact that prosecutors acting entirely in good faith must make all sorts of judgments in murder cases and, because we are human, we make mistakes, even on our best days. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you have is a system that, by definition, cannot be relied on to protect the innocent in all cases.

In the Cantu case, the system broke down because of a mistake I made. But, in 2000, years before I was a confronted with questions about that case, I came to realize that innocents are vulnerable throughout the process.

In 2000, I came to the personal realization that the criminal justice system we rely on to decide who may live and who must die is simply broken and, because it is driven by human beings and decisions that are made by human beings, can’t be fixed.

That is when I became an opponent of the death penalty - not for moral reasons, but on instrumentalist grounds. As much as I wish it could be, I am satisfied that the system cannot be reformed. What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. We have seen junk science debunked, and the exposure of terrible mistakes by forensic laboratories. And finally, we have seen misconduct and errors by many players within the system. In short, the undeniable fact is that the system we rely on in this country to prosecute capital crimes simply cannot be trusted to protect the innocent.

I am sure you have heard the argument from death penalty supporters that there is no proof that an innocent person has ever been executed in the United States.
Justice Scalia recently said in his concurring opinion in *Kansas v. Marsh* that he knew of no innocent man who had been executed.

I would challenge Justice Scalia and the other folks who argue that there is no proof that an innocent person has ever been executed in the United States to make that argument after they have examined the record from Texas.

Consider first the clearest of the recent Texas cases and tell me that the criminal justice system protects the innocent. Cameron Willingham was convicted of arson and executed; his three children were killed in the fire that burned his house to the ground. His conviction was based on expert testimony that was generally considered at the time to be reliable. What we now know with certainty—too late for Willingham—is that what we accepted as expert testimony was nothing more than junk science; it is now clear that the expert testimony upon which his conviction was based was simply wrong and that, in fact, the State of Texas convicted and executed not only an innocent man; we executed a man for a crime that never occurred.

So, I hope my testimony will set the record straight about whether an innocent person has ever been executed in the United States. The answer is, tragically, yes.

Some suggest that it's good enough if we get it right most of the time. That good intentions and strong procedural safeguards like you have here in New Jersey are sufficient. If you believe, as I do, that we MUST ALWAYS GET IT RIGHT in capital murder cases, that the system MUST do what is intended—guarantee the protection of the innocent, accepting a system that tries hard and gets it right most of the time is simply not good enough when the sanction is so final. Even in New Jersey.

I urge you to recommend that the death penalty be abolished in the State of New Jersey.

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Written Testimony of
Charles J. Ogletree, Jr.

Submitted to the
New Jersey Death Penalty Commission
Reverend M. William Howard, Jr., Chairman

November 14, 2006

Charles J. Ogletree, Jr.
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*For identification purposes only
Dear Chairman Howard and Commissioners of the New Jersey Death Penalty Commission:

My name is Charles J. Ogletree, Jr. I am honored to appear before the New Jersey Death Penalty Commission. I am the Jesse Climenko Professor of Law at Harvard Law School, and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, which opened in September 2005, also at Harvard Law School. I am a graduate of Stanford University and Harvard Law School. I spent the first eight years of my career in Washington, D.C., first as a trial attorney, later as Director of Training, then as Chief of the Trial Division and finally as Deputy Director of the District of Columbia’s Public Defender Service. In this capacity, I represented hundreds of clients in juvenile and adult matters, in trials and at the appellate level. Moreover, I was able to train and supervise hundreds of lawyers, investigators and others involved in the criminal justice system in the District of Columbia and other jurisdictions. In addition to my work in Washington, DC, I argued criminal justice cases in state and federal courts, including death penalty cases before the United States Supreme Court and state supreme courts. For example, I was counsel of record in *James Ford v. Georgia*, 498 U.S. 411 (1991). I have also argued cases before courts in Georgia, South Carolina and other states.

I am Chairman of the Board of the Southern Center for Human Rights, based in Atlanta, which handles death penalty and prison condition cases in Georgia and other southern states. I have served on several committees of the American Bar Association and other professional organizations dealing with criminal justice matters.

As a legal scholar, I have written extensively about criminal justice, race, and the death penalty. I have sought in my legal research and writings to unravel and clarify the long and deep historical connection between the nation’s racial politics and the killing of African Americans by lynching and state-sanctioned execution. The pattern began when the first slaves arrived from
Africa. It continued with the widespread practice of lynchings in the South. And the patterns now manifest themselves in the large racial disparities among those condemned by the state to die. From the racial profiling that occurs before arrest, to prosecutorial decisions about whether or not to seek the death penalty to the racially-tinged exclusion of jurors to the final decision about whether or not to impose the death penalty, my research shows that opportunities abound for prejudice to infect the system.

Several chapters in a book I co-edited, From Lynch Mobs to the Killing State: Race & the Death Penalty in America, published this year by New York University Press, address these historical patterns and their ongoing legacy in the contemporary application of the death penalty in the United States. Another relevant piece of scholarship is, “Beyond Justifications: Seeking Motivations to Sustain Public Defenders.”

I engage these important questions not merely with professional interest, but with personal emotion as well. I am a family member of a homicide victim. In 1983, my beloved sister, Barbara Jean Ogletree Scoggins, was stabbed to death, following an unforced entry into her living room in our hometown of Merced, California. Barbara served as a police officer with the Merced County Sheriff’s Office. She was highly regarded by colleagues and by the prisoners she escorted to court proceedings. She was also a young mother at the time of her murder. The police in Merced had many suspects. But no one has ever been prosecuted for her murder.

Barbara’s death ripped our family apart. It caused all of us incredible anxiety and pain. It ignited some soul-searching on my part, since at the time of Barbara’s murder, I was representing clients in criminal cases as a public defender in Washington, DC. It took a great deal of reflection and prayer to accept that my younger sister had been murdered. This brutal fact haunts and pains me to this day. My commitment to finding the person responsible for her death has not diminished.

I have offered a reward for information leading to an arrest. Despite my long-felt desire to bring closure to Barbara’s death, my views about the death penalty have not changed. I am opposed to the death penalty. I would not even seek to have my own sister’s murderer sentenced to death. While Barbara’s killer should be punished, taking that person’s life would not be a solution that Barbara, my family nor I could endorse.

As I have written in a variety of contexts, race is a divisive issue in our society. It has remarkable and enduring repercussions in the criminal justice system. As research has long shown, African Americans, in particular, are frequently the subject of disparate treatment at every stage of the criminal justice process. This disparate treatment often begins with police profiling, either of individuals of color or communities of color, thereby leading to excessive arrests. Racial disparities are reflected in decisions about which defendants will be granted bail pending trial, decisions about the severity of charges brought and punishments imposed, and in decisions that affect the likelihood juries will treat individuals fairly and without regard to race.

Finally, the death penalty, representing a component of this process, surely is not immune from this phenomenon. In the following testimony, I argue that the possibility for racial bias to infect and distort capital punishment in New Jersey is absolutely present. Further, the only way to remove this risk is to repeal capital punishment in favor of alternative sentences that will ensure public safety by removing dangerous offenders from the community.

Thank you for this opportunity to submit the following testimony for your consideration.

Sincerely,

[Signature]

Charles J. Ogletree, Jr.
In this written testimony, I put forth three arguments for why the racial dimensions of the application of the death penalty in New Jersey continue to be problematic. Taken together, these conditions make a strong case for repeal of capital punishment in the state. In making this case, I also address questions raised by commissioners during my oral testimony before the Commission on October 25, 2006.

I summarize the three arguments here. Later, I explore each one in depth.

1. *The link between race and geography has a strong and complex impact on capital sentencing in New Jersey.* Evidence shows that the county in which the crime took place is an overwhelming factor in influencing who is subject to the death penalty in New Jersey and that this pattern has a racially disparate impact. Similarly troubling patterns are displayed across the country. This strongly suggests that the trend manifest in New Jersey is not a ‘fluke’ or coincidence but an inherent flaw not at all easy to remedy or remove.

2. *Relatively large racial disparities are manifest in numerous components of New Jersey’s criminal justice system.* New Jersey, in fact, has some of the largest disparities in the country between black and white incarceration rates. The death penalty, being one component of this larger system, is thus equally deserving of scrutiny with regard to potential racial bias.

3. *Scholarly research clearly demonstrates that racial bias and stereotypes, albeit unintentional and unconscious, are likely factors in creating and perpetuating racial disparities within the criminal justice system.* Key players, including
police, prosecutors, and probation officers, make decisions based upon racial stereotypes or preconceptions that they themselves may be unaware they hold. Such prejudices have the potential to infect and corrupt the capital punishment system with permanent consequences.

Before we consider each argument in depth, I urge you to consider again the written testimony that former elected prosecutor from San Antonio, Sam Millsap, delivered to your commission. Mr. Millsap, speaking poignantly of an unfair execution in Texas, illustrates a basic point that underlies my written testimony. That is, that the possibility for human error is always present in any human-made system. But when human error leads to execution that is an error for which we cannot correct. Millsap writes: “If you believe, as I do, that we must always get it right in capital murder cases, that the system must do what is intended -- guarantee the protection of the innocent -- accepting a system that tries hard and gets it right most of the time is simply not good enough when the sanction is so final.”

The following arguments, well supported by research and data, make the case that there is no way to create a failsafe, capital punishment system immune to racial bias or arbitrariness that will always “get it right.” In the interest of public safety and fairness, the only option is to eliminate the death penalty altogether. I turn now to a discussion of each argument.

1. The link between race and geography has a strong and complex impact on capital sentencing in New Jersey. Evidence shows that the county in which the crime took place is an overwhelming factor in influencing who is subject to the death penalty in New Jersey and that this pattern has a racially disparate impact. Similarly troubling patterns are displayed across the country. This strongly suggests that the trend manifest in New Jersey is not a ‘fluke’ or coincidence but an inherent flaw not at all easy to remedy or remove.
I wish first to recognize the diligence and determination the Commission members and others have demonstrated over the years in confronting the question of racial disparities in the implementation of the death penalty in New Jersey. However, my careful review of the data concludes that this diligence and determination have not eliminated these disparities. In fact, after many years of careful and detailed analysis, strong evidence remains that the race of the victim and geography continue to distort the death penalty system in New Jersey. These two matters plague the administration of the death penalty in states throughout the country. They have been the focus of considerable study and reform efforts. It is my contention that the very existence of these lingering questions alone should render the death penalty impermissible both under the proportionality review statute (NJSA 2C:11-3e) and the state Constitution, which guarantees equal protection of the laws. Indeed, I would remind the Commission of the challenge set by the New Jersey Supreme Court in *State v. Marshall*.

New Jersey's history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination. All of our institutions reflect that commitment. We were among the first of the states that enacted civil rights law... As a Court, we have repeatedly emphasized our special commitment to equality in the administration of justice... Hence, were we to believe that the race of the victim and race of the defendant played a significant part in capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.

The Court is to be commended for its ongoing efforts to seek corrective efforts, but I believe those efforts have failed to date. They've slight chance of succeeding in the future.

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The New Jersey Context:

As you know, some of the country’s foremost criminal justice experts have conducted studies of the death penalty in New Jersey. The list includes David Baldus\textsuperscript{4}, Professors David Weisburd\textsuperscript{5} and Joseph Naus\textsuperscript{6}, as well as Professors Paul Allison\textsuperscript{7} and Neil Weiner\textsuperscript{8}. Much of the work conducted by these researchers has already been entered into the record. But I would like to review some of it briefly, as it provides important context for my testimony.

New Jersey has been at the forefront of efforts to conduct proportionality reviews of its death penalty system. That effort began with the appointment of a succession of special masters and a public record of study, debate, criticism and revision. Through it all, the state has employed a basic analytic framework, developed by Professor David Baldus, that combines bivariate comparison, multiple regression analysis and case sorting. And though there are ongoing methodological disputes surrounding the reviews, the framework used in New Jersey remains the standard for such studies. Indeed, proportionality studies of New Jersey are some of the most frequently cited in national research on the death penalty, a fact largely attributable to the state’s determination to apply rigorous statistical analysis to the problem and provide an objective means of assessment.

With the appointment of a new Special Master in 2000, the New Jersey Supreme Court adopted the three-pronged framework as the basis for proportionality reviews designed to assess the capital punishment system for evidence of racial discrimination or bias. In its initial report, the panel found “unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a [death] penalty trial than cases involving killers of

\textsuperscript{4} David Baldus is Professor of Law at the University of Iowa College of Law.
\textsuperscript{5} David Weisburd Professor of Sociology, University of Maryland, College Park.
\textsuperscript{6} Joseph Naus. Professor of Statistics, Rutgers University.
\textsuperscript{7} Paul Allison. Professor of Sociology, University of Pennsylvania.
\textsuperscript{8} Neil Weiner, School of Social Policy and Practice, University of Pennsylvania
African-American victims.\textsuperscript{9} Subsequent analyses sought to determine the extent to which this finding reflected geographic differences related to prosecutorial discretion. By the time of its most recent report, the panel “found no consistent significant statistical evidence of unlawful discrimination” adding that “The evidence abounds the other way.”

However, I find this latter statement surprising and dubious in light of succeeding findings:

Death-eligible defendants who kill White victims are sentenced to death at a higher rate than death-eligible defendants who kill minority victims, but this inference disappears when other salient factors are taken into account.\textsuperscript{....}

Some statistical evidence indicates that cases involving White victims advance to a penalty trial at a higher rate than cases involving African-American victims. This inference is not sustained, however, when other factors are taken into account. Specifically, White victim cases are concentrated in counties having high rates of capital prosecutions. Minority victim cases are concentrated in counties having low rates of capital prosecutions. There is no statistically significant evidence of intra-county disparity in the rates in which White victim cases and minority victim cases are treated. There is thus strong evidence that the higher rate in which White victim cases proceed to a penalty trial is the function of inter-county disparity in capital prosecutions.\textsuperscript{10}

The report goes on to suggest that this correlation can effectively be explained away by the fact that more whites \emph{kill} whites. However, the report still acknowledges:

Although some of the statistical evidence suggests that defendants who kill White victims are more likely to advance to a penalty trial than defendants who kill African-American victims...The counties in which a large number of African-American victim cases are concentrated have low rates of cases advancing to a penalty trial. Less urban counties with a high concentration of White victim cases have higher rates of capital prosecutions.

Notwithstanding earlier and repeated assurances that the system was without bias, the 2005 report concludes that “County variability continues to be a vexing (emphasis added) problem in the administration of New Jersey’s capital punishment laws.”\textsuperscript{11}


Indeed, wide disparities in the application of the death penalty across jurisdictions are problems that “vex” many other states throughout the country. The patterns are troubling and at the least, certainly suggestive of bias for the reasons clearly articulated by Attorney Claudia Van Wyk in her recent testimony before the Commission:

Some commission members may question why county variability is a problem. Why does it matter if geography is a factor? First, it matters because this is a single state and it is arbitrary and, we contend, unconstitutional for county line boundaries to affect whether or not a defendant faces the death penalty. Second, the result has been a statistically significant race of victim disparity in capital prosecution rates. The public sees the resulting disparity and that has consequences. The perception is that the system does not treat black and white victims equally.\(^\text{12}\)

I commend Judge Baime for his caution and concern to ensure a fair and equitable system for New Jersey. His oral testimony to the Commission provided an apt and compelling example of why such questions require answers. Consider again the scenario he presented to you:

The exact same case of a killing occurs in neighboring counties. All 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.\(^\text{13}\)

While this is merely hypothetical, the potential for such a situation nags the death penalty system both nationally and even within states such as New Jersey where officials work to ensure fairness. This raises another question: What if counties varied in readily and consistently identifiable ways? More specifically, what if these different outcomes tended to vary time and again based on the racial composition of the jurisdictions? This happens to be the very pattern

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\(^\text{11}\) Id. Page 58.


we see across the country. And this is what makes resulting disparities impermissible and unacceptable, rather than merely “vexing.” The record speaks clearly: The location of a crime plays a critical, often determinant role in whether or not a person is subject to the death penalty. This is true in New Jersey, in other states and in the nation as a whole.

Before turning our attention to the similarities between New Jersey and other jurisdictions, an alternative analysis of the data included in the official proportionality review provides an important contribution. This analysis, conducted by Allison, Weiner and Huang\(^{14}\) noted errors in an earlier analysis that had excluded 13 capital cases from consideration. That exclusion, Allison, Weiner and Huang conclude, effectively obscured the significance that the race of the victim played in capital cases. Allison, Weiner and Huang show that the original report excluded six cases from Warren County in the mistaken belief that they all involved white victims and therefore could not be subjected to comparative analysis. A second decision in the original analysis, Allison, Weiner and Huang show, excluded seven cases that involved the homicide of law enforcement officials for the sole reason that six of the law enforcement officials were white. This presented what the original analysts considered multicollinearity. In other words, the original analysts believed that the issuance of a death penalty was just as likely the result of the victim being a law enforcement officer as it was the result of the victim being white and that there was no way to distinguish between those two factors.

However, Allison, Weiner and Huang argue that the exclusion of these cases was premature, unnecessary and unjustified. They write: “simply excluding [these] cases arbitrarily prejudges the effect to lie with” the status as law enforcement “rather than the race of the

victim.” Once we include these 13 cases the analysis, the race effect within the counties, Allison Weiner and Huang show, reaches statistical significance. This is a separate result from that of Baime’s experts who find that differences between counties explained statewide race of victim differences.

In the words of Claudia Van Wyk’s June 14 submission to the Supreme Court of New Jersey, these results “show that white-victim and nonwhite-victim cases differ significantly in capital prosecution rates, even controlling for county.”15 My review of the record of specific data on capital punishment in New Jersey leads me to agree further with Van Wyk that “New Jersey’s capital sentencing system...disproportionately selects offenders in smaller non-urban counties who have killed white victims” and that it is “hopelessly arbitrary and irrational...”16

The National Context

We often think of the death penalty as a problem that haunts other parts of the country, notably the south. It is often said that the southern United States forms a “death belt” responsible for the vast majority of executions.17 We know, for example, that between 1976 and 2006, there have been 1,013 executions in the United States. Of these executions, 709, or 72 percent, have taken place in just 11 states, all of them Southern. (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia).18

16 Id. Page 11.
17 Steiker, Carol. Capital Punishment and American Exceptionalism, 81 Oregon Law Review 97 (2002). In this provocative analysis, Steiker challenges the notion that the higher rate of executions in these states is linked to homicide rates.
18 Fins, Deborah, Esq. (Director of Research and Student Services, Criminal Justice Project. NAACP Legal Defense and Educational Fund, Inc. Death Row USA (July 1, 2006) A quarterly report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc. These prisoners were almost equally divided by race, with 735 white and 725 Black.
Currently, 3373 inmates sit on death row in 37 of the 38 states with capital punishment statutes. Of these, 1674 – 49.6 percent – were concentrated in those 11 states.¹⁹

While this is a disturbing pattern, it cannot be tested against Judge Baine’s hypothetical scenario in which all other factors are the same. This is because we of course lack sufficient detail about the cases. The pattern does support the contention, however, that the death penalty is far more common in some areas of the country than in others.

We also know that such geographic disparity infects the federal death penalty system, overseen by the U.S. Justice Department. A review of the federal death penalty conducted for the Death Penalty Information Center found “large disparities in the geographical distribution of federal death penalty recommendations. Specifically, from 1995-2000, 42% (287 out of 682) of the federal cases submitted to the Attorney General for review came from just 5 of the 94 federal districts.” On the other hand, between 1995 and 2000, 21 districts had “never submitted a case for review.” And “40 of 94 federal districts never recommended seeking the death penalty for any defendant.”²⁰

We must recognize that this phenomenon of geographical disproportion mirrors the situation in New Jersey. This suggests that the appropriateness of the death penalty must be weighed in part by considering arbitrary geographic differences. In a chapter of my book, Lynch Mobs to the Killing State, called, “The Role of Victim’s Race and Geography on Death Sentencing: Some Recent Data from Illinois,” authors Michael Radelet and Glenn Pierce note that in Illinois, “Information on county of sentence allows us to investigate the possibility of

¹⁹ Fins, Deborah, Esq. (Director of Research and Student Services, Criminal Justice Project. NAACP Legal Defense and Educational Fund, Inc. Death Row USA (July 1, 2006) A quarterly report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc.

geographic disparities in death penalty sentencing decisions.”21 The researchers code “offender’s county of trial” by employing the four standard Illinois sub-regions used by the Illinois Criminal Justice Information Authority: Cook County, Collar counties, other urban counties, and rural counties.” Radelet and Pierce’s analysis shows that “In Cook County, 1.5 percent the first-degree murders ended with a death sentence, versus 3.3 percent of the cases in the Collar counties, 3.4 percent of the cases in other urban counties, and 8.4 percent of the cases in rural counties.” A logistic regression analysis similar to that conducted in New Jersey, found “sentencing county/region… and race of victim… are among the thirteen independent variables that achieved a .05 level of statistical significance.” The authors conclude:

[T]he odds of receiving a death sentence for killing a victim or victims in Cook County are on average 84.5 percent lower than for killing a victim(s) in the rural county region of Illinois controlling for the other variables in the analysis...the odds of receiving a death sentence for killing a victim or victims in the Collar or other urban counties decrease by a factor of .484... [and] the odds of receiving a death sentence in for killing a victim or victims in Cook County are on average 51.6 percent lower than for killing a victim or victims in the rural county region of Illinois, controlling for the other variables in the analysis.22

In Maryland, Professors Raymond Paternoster and Robert Brame conducted an analysis of that state’s death penalty. In some important ways, this study mirrors those conducted in New Jersey. The Paternoster and Brame study23, investigated various points within the death penalty system there.24 The researchers confronted several of the same challenges that faced researchers

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22 Radelet and Pierce, p. 141.
24 These points, include: “1. the decision of the state’s attorney to file a formal notification to seek a death sentence. 2. the decision of the state’s attorney to not withdraw a death notification once filed, in other words, the decision to make the death notification “stick”. 3. the decision of the state’s attorney to advance a death-eligible offense to a
in New Jersey. This includes smaller than ideal sample sizes. However, the results of the Maryland study are informative. Among the most noteworthy findings is:

… a significant effect for the race of the victim in the way the prosecutor initially handles death eligible homicides. State’s attorneys in Maryland are more likely to file a notification to seek a death sentence and more likely to retain that notification when the race of the victim is white rather than black. Furthermore, this race of victim effect is not explained by case characteristics of white and non-white victims or by the jurisdiction where the homicide occurred. This initial disparity is not corrected at later stages of the capital sentencing process.25

Interestingly, Paternoster and Brame found that two counties – Baltimore and Hartford – with the “highest death notice and death sentencing rates” also had the “highest rates of white victim and black defendant white victim death eligible homicides.” They conclude: “Maryland cannot ignore the substantial variability that exists in different state’s attorneys’ offices in the processing of death cases.” (page 41) These authors take care to limit their conclusions, particularly in light of the small sample sizes available.26 Even with their reservations, however, they report they have been able to:

…identify several clear statewide patterns among the cases that are fully observed. These patterns include statistically significant effects for geographic, race of victim, and joint offender-victim race groups on the imposition of death sentences in Maryland. The data suggest that most of these patterns become apparent at the earliest stages of processing within the state’s death penalty system. (p. 43; emphasis added)27

It is noteworthy that Professor Paternoster publicly objected to some uses of this study in an op-ed entitled, “Misunderstandings Cloud Death Penalty Findings.”28 But despite his opinion that one may be able to create a “racially neutral” system, Paternoster also stressed how far Maryland was from that ideal.

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26 The authors note with some anticipation, “Some specialized statistical methods for addressing small sample problems are becoming more feasible to implement with current statistical computing technology and this is another issue that will be explored with the Maryland death penalty data.”
He writes: “Defendants who killed their victims in Baltimore County were about 23 times more likely to be sentenced to death than those whose victims lived in Baltimore City, nearly 14 times more likely than if they lived in Montgomery County and eight times more likely than if they lived in Prince George’s County.” He goes on to note that “Hartford County’s state attorney’s office has a rate of seeking the death penalty that is nearly 11 times higher than Baltimore City and four times higher than Montgomery County.”

The Maryland pattern mirrors what we find in Illinois and New Jersey. Specifically, the probability of being sentenced to death increases as the population in which the victim lived becomes whiter. The patterns do not suggest a ‘neutral’ or ‘coincidental’ finding. Certainly, these are patterns that a socially concerned, fair-minded public official would consider worthy of scrutiny. To the statistician, a race effect may be “confounded” with a geography effect, but the numbers very clearly suggest an inextricable link between geography and race.

Here we must underscore just how vexatious these disparities are. The evidence of the geography/race of victim relationship is too overwhelming to ignore as statistical anomaly or view it as something that can be ameliorated with minor tinkering in the system. A look at national data further underscores the ubiquity of racial disparity within the death penalty.

For example, a 2003 comprehensive review of the death penalty published by Amnesty International reports the following:

The population of the USA is approximately 75 per cent white and 12 percent black. Since 1976, blacks have been six to seven times more likely to be murdered than whites, with the result that blacks and whites are victims of murder in about equal numbers. Yet, 80 percent of the more than 840 people put to death in the USA since 1976 were convicted of crimes involving white victims, compared to the 13 percent who were convicted of killing blacks. Less than four per cent of the executions carried out since 1977 were for crimes involving Hispanic victims. Hispanics represent about 12 percent

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29 Interestingly, one such neutral “fix” Paternoster identifies echoes the widely rejected proposal in New Jersey to “centralize the procedures used in death-penalty prosecutions.”
of the US population. Between 1993 and 1999, the recorded murder rate for Hispanics was more than 40 percent higher than the national rate.  

Amnesty went on to cite data from studies of several individual states where victim disparity repeats itself:

In 2001, the most comprehensive study on capital sentencing ever conducted in North Carolina found that “racial factors—specifically the race of the homicide victim – played a real, substantial, and statistically significant role in determining who received death sentences in North Carolina during the 1993-1997 period. The odds of receiving a death sentence rose by 3.5 times among those defendants (of whatever race) who murdered white persons.” About 40 per cent of murder victims in North Carolina are white, yet since resuming executions in 1984, the state has executed 23 inmates, 21 (91 per cent) of them for the murder of white victims.

Amnesty reported that “while 0.8 per cent of murder victims in Texas were white women, 19.3 per cent of the prisoners arriving on death row between 1 January 1995 and 31 December 1999 had been convicted of killing white women.” Moreover, according to Amnesty, “The arrest rate varied according to the race of the victim. In white victim cases, the arrest rate was 92 per cent, in non-white victim cases, the rate was 58 per cent. The rate at which cases went to trial also varied. Ninety per cent of the cases involving white victims went to trial, whereas only two cases involving non-white victims were tried.” Most telling of all, “Of the 301 prisoners put to death in Texas between December 1982 and 10 April 2003, 235 (78 per cent) were executed for crimes involving white victims.”

A similar pattern holds in Virginia. Amnesty, citing an ACLU report that finds: “blacks who rape and murder white victims in Virginia are four times more likely to be sentenced to

death than blacks who rape and murder black victims. Also in Virginia, in robbery murders…a death sentence becomes over three times greater if the victim is white than if the victim is black.”

And in Ohio, the Commission on Racial Fairness convened by that state’s Supreme Court concluded:

The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause of these widely divergent numbers.\(^{33}\)

In Oklahoma, the nation’s 27th largest state, is “third in the number of executions carried out. Of the 61 executions between 1990 and 9 April 2003, 47 -- 77 per cent -- were for crimes involving white victims.”\(^{34}\) Amnesty reports that “Between 1977 and 11 April 2003, Alabama executed 26 prisoners. Twenty of them (77 per cent) were put to death for the murder of white victims.”\(^{35}\) In Florida, Amnesty reported:

Eighty per cent of the executions carried out since 1977 were for crimes involving white victims. As in other states, studies have concluded that race [plays] a role in capital sentencing. One study, for example, found that after taking all variables into account a death sentence was over three times more likely in a case with a white victim than one with a black victim.\(^{36}\)

The cumulative effect of these state-by-state examples is sobering. But the national data complete the picture of an arbitrary system riddled with racial disparities. From 1976 to 2006, according to the Death Penalty Information Center, of the 1581 victims for whom an execution occurred, 1,256, or 79.3 percent, were white.


\(^{35}\) Amnesty International. Page 11. Amnesty also notes that in Virginia, “At least two of the eight African Americans executed for killing white victims were tried by all white juries” and likewise in Alabama, at least seven of the 11 African Americans executed for killing whites “were tried in front of all-white juries.” http://web.amnesty.org/library/Index/ENGAMR510462003

Finally, the disparities show up in implementation of the federal death penalty as well. According to an analysis by the Death Penalty Information Center, "U.S. Attorneys were almost twice as likely to recommend seeking the death penalty for a Black defendant when the victim was non-black as when the victim was Black. But U.S. Attorneys were slightly less likely to recommend seeking the death penalty for a White defendant when the victim was non-white rather than White." \(^{37}\)

By now it should be clear that the all-too-common problems with the death penalty across the country threaten to infect New Jersey's system as well. The link between race and geography is constant and ubiquitous. Indeed, this is clear from Judge Baime's testimony. And despite his recommendation for a more centralized process -- one not dissimilar to the federal death penalty system -- \(^{38}\) Baime acknowledges that centralization "would not necessarily cure the problem of county disparity, but would certainly diminish the phenomenon." Even more telling, however, is Judge Baime's next comment: "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." \(^{39}\) I would note with the emphasis added here, that the view expressed shows just how inextricably linked geography and race-of-victim effects are -- so much so that a change in one would thereby diminish the other.

In fact, the numbers out of New Jersey are some of the most frequently used to establish the presence of geographic/race of victim disparities. The reason for this might be merely that data and research actually exist in New Jersey precisely because of the state's long record of

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\(^{38}\) It is noteworthy that New Jersey's current Attorney General, the state's chief law enforcement official, the Public Defenders, and New Jerseyans for Alternatives to the Death Penalty all oppose Judge Baime's proposal of centralized review, albeit perhaps for different reasons.

\(^{39}\) Transcript of testimony of The Hon. David Baime to the New Jersey Commission on the Death Penalty. 11 October 2006, p. 14; emphasis added.
studying the problem. The Commission faces a series of choices about how to best respond to this persistent problem of race of victim/geographic disparity. Will New Jersey continue to study the clear pattern and tinker around its edges in hope of diminishing it? Or will Commission members recognize the need to adopt a more effective, efficient, and, ultimately, just form of punishment?

In a provocative and thorough look at America’s continued acceptance of racial disparities in the use of the death penalty, Professors David Baldus and George Woodworth locate the debate over race-of-victim disparities across the country in its starkest but most appropriate context.

Some people...believe that, when established, its persistence significantly impairs the legitimacy of a system. Others believe that such discrimination cannot be reliably established, or that it is not a matter of moral or serious constitutional concern. Yet others believe that tolerance of race discrimination, particularly race-of-victim discrimination, is a necessary evil required to preserve the benefits of capital punishment (the "necessity hypothesis"). Two beliefs underlie this hypothesis. The first is that race discrimination is inevitable and widespread in the system. The second is that all efforts to prevent or remedy the effects of race discrimination will eviscerate the use of capital punishment. 40

Similarly, in New Jersey, some officials and citizens question the extent to which racial disparities exist. Others, meanwhile, sublimate that central question so as to preserve capital punishment. Again, we commend Judge Baime for his frankness in this matter. But I must underscore that one of the major reasons for centralizing the death penalty system is to remedy the obvious racial element in its administration in New Jersey. Other states may be trying to remedy the problem of geographic variability. None has succeeded. There is little reason to believe that it is possible to eliminate the problem. This leads me to conclude that the only

alternative left for New Jersey’s citizens is to tacitly accept a degree of bias, however unintended, all in order to preserve the option of the death penalty. Given the myriad reasons presented to the Commission for abolishing capital punishment, I ask why and for whom are you preserving the death penalty?

It seems to me that the evident role of race and geography in the death penalty should be enough to justify an appeal. But if questions and doubts remain about the role of race, a look at other components of the state’s criminal justice system warrants even more concern. This leads to our second argument.

2. Relatively large racial disparities are manifest in numerous components of New Jersey’s criminal justice system. New Jersey, in fact, has some of the largest disparities in the country between black and white incarceration rates. The death penalty is one component – the final component, if you will – of this larger, disparate, system. Disparities in some components suggest the potential for arbitrary disparities to affect other components of the system as well.

Common sense and experience remind us that the death penalty is the ultimate punishment. But the literature on the death penalty underscores that it is merely the end point of a very long process, one that includes many other points along the way in which racial differences in treatment can arise. Recall the Paternoster study in Maryland that found race-of-victim disparities apparent at the “earliest stages of processing within the state’s death penalty system.” It is crucial that we consider New Jersey’s record of wide racial disparities at the arrest, incarceration, enforcement and sentencing stages. The death penalty, as part of this system, is not somehow exempt or immune from structural flaws and problems that may permeate other areas of the system and be part of what’s leading to racially disparate effects.
The racial disparities within the criminal justice system in New Jersey are among the largest in the nation. Given such disparities, it would be irresponsible simply to assume that bias or racism — even if it is of a wholly unconscious form — doesn’t play some role in the outcomes present here.

In order to appreciate the magnitude of the disparities in New Jersey, we must start with the overall state population. According to the 2000 U.S. Census, whites account for about 73 percent of the state population. Blacks account for about 13.6 percent of the population in the state and Hispanics (an overlapping ethnic category) account for 14.9 percent of the population.

Meanwhile, in New Jersey, African American youth are vastly overrepresented in juvenile detention facilities. In January, 2006, African American youth represented 18 percent of the overall population, but 64 percent of youth in detention.\(^{41}\)

Indeed, according to a 2001 study, New Jersey had one of the largest Black/White racial disparities for adult confinement of any state that year. Nationwide, blacks are incarcerated at 8.2 times the rate of whites. In 2000, in seven states — Connecticut, Illinois, Iowa, Minnesota, New Jersey, Pennsylvania and Wisconsin — blacks were incarcerated at more than 13 times the rate of whites.\(^{42}\)

The disparities in New Jersey have not diminished since that time, despite public awareness of, and attention to, the problem. In fact, as of January, 2006 — the most recent date for which data is available — 62 percent of all offenders in correctional institutions were African American. About 18 percent were Hispanic and 20 percent were white.\(^{43}\)

drug arrests in New Jersey\textsuperscript{44} suggests that some of the wide racial disparities may be due to the state's enforcement of drug laws and, more specifically, to the structure of that enforcement, which has a disparate impact upon communities of color.

Meanwhile, it is important to note that national research strongly suggests that Whites and African Americans use drugs at similar rates. The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) reported in 2005 that 8.1 percent of Whites, and 9.7 percent of African Americans surveyed said they used illicit drugs in the preceding month.\textsuperscript{45}

The SAMHSA survey also showed Whites and African Americans reporting dependence on an illegal substance at virtually the same rate. Specifically, 8.5 percent of African Americans, and 9.4 percent of Whites reported dependency.\textsuperscript{46}

However, New Jersey inmates doing time for drug crimes are overwhelmingly minorities. As of December, 2004, they were 73 percent black, 17.2 percent Latino and 9 percent white.\textsuperscript{47}

As Vincent Schiraldi and Jason Ziedenberg of Justice Policy Institute, the organization that conducted this study, conclude: “increasing imprisonment of drug offenders in New Jersey has a more concentrated affect on communities of color, particularly the African American community.” And, “New Jersey’s sentencing structure, including laws that mandate imprisonment for drug offenses, have contributed significantly to New Jersey’s . . . racially disparate use of incarceration.”\textsuperscript{48}

\textsuperscript{45} Department of Health and Human Services. Substance Abuse and Mental Health Services Administration. Office of Applied Studies. Results from the 2005 NSDUH.
\textsuperscript{46} Id.
\textsuperscript{48} Shrialdi and Ziedenberg. Page 2.
Similarly, the summary table below shows that in virtually every county, whether rural, urban or urban/suburban in composition, whether large or small, the number of black adults and juveniles arrested far surpassed the proportion of African Americans in the population.\textsuperscript{49}

<table>
<thead>
<tr>
<th></th>
<th>Total Population</th>
<th>White Population</th>
<th>Black Population</th>
<th>Black Adult</th>
<th>Black Juvenile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlantic</td>
<td>271,000</td>
<td>63%</td>
<td>18%</td>
<td>37%</td>
<td>40%</td>
</tr>
<tr>
<td>Bergen</td>
<td>902,500</td>
<td>68</td>
<td>5.8</td>
<td>22</td>
<td>20</td>
</tr>
<tr>
<td>Burlington</td>
<td>450,743</td>
<td>74</td>
<td>16</td>
<td>44</td>
<td>39</td>
</tr>
<tr>
<td>Camden</td>
<td>518,249</td>
<td>65</td>
<td>20</td>
<td>39</td>
<td>56</td>
</tr>
<tr>
<td>Cape May</td>
<td>99,286</td>
<td>90</td>
<td>5</td>
<td>13</td>
<td>1.5</td>
</tr>
<tr>
<td>Cumberland</td>
<td>152,252</td>
<td>56.1</td>
<td>21</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>Essex</td>
<td>791,057</td>
<td>40</td>
<td>43</td>
<td>76</td>
<td>77</td>
</tr>
<tr>
<td>Gloucester</td>
<td>276,910</td>
<td>84.6</td>
<td>9.8</td>
<td>29</td>
<td>25</td>
</tr>
<tr>
<td>Hudson</td>
<td>603,521</td>
<td>34</td>
<td>15</td>
<td>40</td>
<td>30</td>
</tr>
<tr>
<td>Hunterdon</td>
<td>130,404</td>
<td>90</td>
<td>2.8</td>
<td>10</td>
<td>12</td>
</tr>
<tr>
<td>Mercer</td>
<td>366,256</td>
<td>60</td>
<td>20.6</td>
<td>60</td>
<td>68</td>
</tr>
<tr>
<td>Middlesex</td>
<td>789,516</td>
<td>56.5</td>
<td>10.3</td>
<td>33</td>
<td>32</td>
</tr>
<tr>
<td>Monmouth</td>
<td>635,592</td>
<td>79.2</td>
<td>8</td>
<td>32</td>
<td>34</td>
</tr>
<tr>
<td>Morris</td>
<td>490,593</td>
<td>80</td>
<td>3</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>Ocean</td>
<td>558,341</td>
<td>88.5</td>
<td>3</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>Passaic</td>
<td>499,060</td>
<td>49.5</td>
<td>15</td>
<td>35</td>
<td>43</td>
</tr>
<tr>
<td>Salem</td>
<td>66,346</td>
<td>79</td>
<td>15</td>
<td>47</td>
<td>54</td>
</tr>
<tr>
<td>Somerset</td>
<td>319,900</td>
<td>69.3</td>
<td>8.7</td>
<td>32</td>
<td>29</td>
</tr>
<tr>
<td>Sussex</td>
<td>153,130</td>
<td>91.5</td>
<td>1.5</td>
<td>4.5</td>
<td>6</td>
</tr>
<tr>
<td>Union</td>
<td>531,457</td>
<td>50.6</td>
<td>22.5</td>
<td>54</td>
<td>62</td>
</tr>
<tr>
<td>Warren</td>
<td>110,376</td>
<td>89</td>
<td>2.7</td>
<td>2.7</td>
<td>10</td>
</tr>
</tbody>
</table>

Troubling as the raw data may be, what is more alarming is what happens when cases reach trial, namely that blacks and other people of color are more likely to go to trial in the first place. And when they get there, they are likely to confront juries that are predominantly, if not all white. A recent survey of public defenders in New Jersey confirms this.\textsuperscript{50}

In suburban Bergen County, for instance, with population that is 5.8 per cent black but where blacks constitute 22 percent of adult and 20 percent of juvenile arrests, we learn that “It is

\textsuperscript{49} Data culled from New Jersey State Police Crime Reports.
rare to have more than 2 African-American jurors in the jury pool” and “One African-American may make it to the jury.”51 Even more telling here is the analysis of why so few African Americans wind up on juries: “African-American jurors are frequently disqualified because of their self-reporting of negative experiences with the criminal justice system and/or police.”52 A similar report comes from urban/suburban Camden County, which has a higher percentage black population (20 percent), but still convenes jury panels containing relatively few people of color. Of those who are included many “tend to be past victims or know victims of crime...who have law enforcement family members or give other indications that result in being excused.”

In Passaic County, with a black population of 15 percent, but with African Americans constituting 35 per cent of adult and 43 percent of juveniles arrested, the Public Defender estimated that “the average jury will have between 1-2 African American and 1-2 Hispanics.” Even more telling is the following statement from the public defender’s office there.

In a recent case which was tried by a staff attorney, the judge sent for a panel. In the entire panel only three were African-American. The first African-American to be summoned to the jury box was excused for hardship. The next one that was seated was found acceptable by the court after questioning. The prosecutor used her first challenge on that juror. The staff attorney raised the Gilmore issue since the prosecutor had excused 50% of the African-American jurors. The judge made the prosecutor put her reasons on the record why she challenged the juror. Although the reasons were weak the judge excused the juror. The final jury was all white. The trial resulted in hung jury. The client then pled to a flat 3 when the offer had been 10/5 without parole.53

These reports add an important dimension to consideration of the state’s assessment of disparities in the death penalty. Although the data and examples presented above focus on African Americans, the Public Defender report provides another perspective on the intersection between race and place and the double harm the system imposes on people of color.

51 New Jersey Public Defender’s Office. Jury Composition Survey. eed citation here. Id from previous with page number.
52 Id.
53 Id.
Communities of color, the survey of public defenders suggests, are not equally protected by law enforcement, whether in seeking the death penalty or prosecuting crime. And it is this inequality and the feelings it likely engenders that might very well lead to members of those communities being excluded from juries. In other words, surveys demonstrate that African Americans who live in segregated communities have less faith in the fairness of the criminal justice system. They may be less likely, thus, to take part in juries. This means that the disproportionate numbers of blacks arrested across the state are highly unlikely to be judged by people who come from their own communities and who comprise a true jury of ones peers.

Obviously, the numbers, while troubling, do not, on their face, permit the conclusion that the racial disparities in the criminal justice system stem from discrimination or bias. However, in the interest of being thorough, responsible officials must consider all plausible causes for the disparities. Indeed, the Commission’s official mandate states:

In light of this, this compels us to carefully consider the research base that illuminates the role that discrimination – conscious or not – can play in bringing about racially disparate outcomes within a criminal justice system, of which capital punishment is one component.

3. Scholarly research clearly demonstrates that racial bias and stereotypes, albeit unintentional and unconscious, are likely factors in creating and perpetuating racial disparities within the criminal justice system. Key players, including police, prosecutors, and probation officers, make decisions based upon racial stereotypes or preconceptions that they themselves may be unaware they hold. Such prejudices have the potential to infect and corrupt the capital punishment system with permanent consequences.
Again, Sam Millsap’s powerful testimony before your Commission provides helpful context here. Speaking of his experiences as a prosecutor, Millsap testified: “Prosecutors acting entirely in good faith must make all sorts of judgments in murder cases and, because we are human, we make mistakes, even on our best days. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you have is a system that, by definition, cannot be relied on to protect the innocent in all cases.”

His testimony becomes particularly damning to the capital punishment system when one considers how racial bias—even unconscious and unintentional—can play a role in the decision-making process of not only prosecutors, but so many other actors in the criminal justice system. Studies overwhelmingly demonstrate that the race of a defendant and/or detainee plays a role in subjective decision-making among powerful actors in the criminal justice system. Prosecutors, as well as probation officers, potential jurors, police, prosecutors, judges and all actors in the criminal justice system, are merely human and therefore subject to error. Their decisions, especially when granted wide discretion, are inherently subjective and therefore not immune to racial bias. 54

For example, in a study published in American Sociological Review, researchers Sara Steen, Professor at Washington State University and George Bridges, President of Whitman College, found that probation officers consistently portray “black youths differently than white youths in their written court reports.”55 More specifically, Bridges and Steen found that

probation officers frequently attributed blacks’ delinquency to negative attitudes and personality traits. But depictions of whites more frequently stressed the influence of the individual’s social environment. This has several implications. First, such assessments shape subsequent assessments of the threat that the defendant may commit crimes in the future and, therefore, the sentence recommendations. Steen and Bridges find that officials’ perceptions and decisions are critical to legal decision making and may emanate from the officials’ misguided notions about the causes of criminal behavior. These ideas, the researchers demonstrate, are highly subjective and yes, directly related to the race of the youth. Attributions about youths and their crimes are, thus, “a mechanism” by which racial attitudes, conscious or not, influence judgments of dangerousness and sentencing recommendations, Steen and Bridges conclude.

A 2004 study by Ted Chiricos, Kelly Welch and Marc Gertz, published in the journal Criminology, considered whether support for punitive policies toward crime was related to a persons’ tendency to equate race with the tendency to commit crimes. The data showed clear evidence of what the researchers call “modern racism,” within a potential jury pool. In “modern racism,” overtly expressed racism, expressions of racial superiority and hostility are rejected, but the subject still equate African Americans with several negative traits, including the tendency to commit crime. The researchers conclude: “The equation of race and crime is a significant sponsor of punitive attitudes. . .”

In a February, 2006 study published in the journal, Criminology, Katherine Beckett, Kris Nyrop and Lori Pfingst, drew on several data sources to explain racial disparities in Seattle’s


There is, of course, some irony to this finding, since environmental factors are far more often associated with understanding why people of color have more encounters with law enforcement and such explanations are often dismissed as mere “excuses.”

drug dealing arrests. As in New Jersey, blacks were significantly overrepresented among the
city’s drug arrests. The researchers conclude that “several organizational practices explain racial
disparity in these arrests.” This includes law enforcement focus on crack offenders, priority
placed upon outdoor drug venues and finally, the geographic concentration of police resources in
segregated neighborhoods. The researchers conclude that these practices are not “race-neutral”,
nor are they related to actual crime rates or community complaints.”58 Their findings thus
indicate that race shapes perceptions of who and which communities constitute Seattle’s drug
problem as well as the organizational response to that problem.

A 2005 study of a Florida law alerts us to the possible role of unconscious bias in
sentencing. Writing in the journal Criminology, Stephanie Bontrager, William Bales and Ted
Chiricos explored the plausible causes for the racial disparities resulting from a Florida law that
allows judges to withhold the adjudication of guilt for people who have either pled guilty or been
found guilty of a felony. (This applies to people who would only be sentenced to probation and
allows the offender to say truthfully in the future that he or she has never been convicted of a
felony.) The researchers consider the relationship between race, Hispanic ethnicity and the
withholding of adjudication for 91,500 people sentenced to probation in Florida between 1999
and 2002. This methodologically sophisticated study considers the direct relationships between
various attributes of the defendant, community level “indicators of threat,” and the likelihood
that the adjudication of guilt would be withheld. The researchers found that Hispanics and blacks
are “significantly less likely” to benefit from withheld adjudication when other variables are

58 Beckett, Katherine, Kris Nyrop and Lori Pfingst. Race Drugs, and Policing: Understanding Disparities in Drug
controlled. Thus, they conclude, there is indeed a relationship between the race of the defendant and the receipt of withheld adjudication.\textsuperscript{59}

Legal scholarship increasingly recognizes that actors in the criminal justice system may not be conscious of their own bias and tendency to stereotype. For example, in a 2002 article in the UCLA Law Review, Professor of Law Gary Blasi reviewed research in cognitive social psychology and concluded “all of us behave in ways that demonstrate that we are subject to the effects of stereotypes, including those we expressly disavow.”\textsuperscript{60}

Similarly, in an article in the Yale Law Journal, Ian F. Haney Lopez, Professor of Law at Boalt Hall, University of California at Berkeley, reviews findings from organizational sociology and considers the implications for lawyers and actors in the criminal justice system. He concludes that discrimination is usually “not consciously motivated,” but instead “stems from the unconsidered repetition of cognitively familiar routines.” In other words, well-intentioned people may rely on racially related notions, such as a tendency toward criminality, yet fail to recognize their reliance on these notions. And indeed, Lopez adds, such people “may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy,” and “to a significant degree, discriminatory human behavior within organized settings often does not occur at a high level of consciousness.” Lopez concludes that “judicial conduct pursuant to such unexamined decision making often produces discrimination.”\textsuperscript{61}

Considered together, the implications of these findings for the death penalty in New Jersey seem obvious. The racial disparities that exist in New Jersey, added to what we know


about the role of discrimination, unconscious as it may be, among key decision-makers within the criminal justice system, demonstrate that one cannot guarantee that the death penalty in New Jersey will ever be implemented on a race-neutral basis. Prosecutors, jurors, and judges who decide whether to seek or impose a death sentence are only human, after all, and thus potentially subject to the same unconscious racial bias as others in the system. Even if it could be somehow proven that racial bias has never influenced criminal justice decisions in the past in New Jersey, the knowledge we have to date demonstrates that there’s no guarantee that such bias won’t come to infect the system in the future. Though I believe that you sincerely wish to safeguard your system from bias and discrimination, it simply is not feasible to create such a system at this time.
Summation

At the very least, our review of the record clearly establishes the immediate need for additional study and ongoing monitoring of the entire criminal justice process, from arrest to sentence and all the stages in between. This presents the prospect for continued and lengthy delay in final determination. Such delays, which, aside from their financial burden, promise to prolong the anguish and uncertainty facing relatives and survivors of the crimes in question.

Further, the mere perception of a biased system, supported by large racial disparities that permeate other stages of the criminal justice system in New Jersey, undermines public confidence in government fairness. Despite earnest efforts in New Jersey to address factors that may give rise to disparities, the disparities do persist. Research suggests that unconscious bias, which is difficult to identify, let alone control, may play some role in racially disparate effects.

However, let’s say, for the purpose of argument that public officials in New Jersey, determined to preserve the death penalty, were to embark on a mission to make the system free of bias: What would such a system require? In considering the question, let us return to Radelet and Pierce’s study of the Illinois system.

Radelet and Pierce acknowledge that some of their critics would complain that their Illinois study did not include enough variables and that inclusion of more variables may have very well explained away the racial disparities. For example, such critics might suggest that, say, place or residence or other variables might be really what accounts for what only appear to be racial disparities. However, Radelet and Pierce note that, actually, in studies that controlled for more variables, “The racial disparities were stronger…than in less complex work”62. Of even

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greater and more direct concern to this Commission is the fact that studies of disparities require extremely robust data in order to draw even tentative conclusions about either the fairness or efficacy of capital punishment. Radelet and Pierce note, for instance, that they devoted a great deal of time and energy to acquiring data for their limited study in Illinois, with state and local agencies providing "extensive support and consultation (at no cost) to the project." However, they write:

The problem arises because present criminal justice information systems were designed primarily to support administrative functions of the agencies they assist. The systems were not designed to support research activities and, equally important, judicial monitoring activities. Thus the limitations of data and information encountered by this study directly mirror the limitations that any death sentencing monitoring system would encounter in Illinois. Indeed, properly conducted assessments of death sentences in Illinois would resemble smaller scale projects of the type conducted for this project. Critically, today's criminal justice information systems are entirely inadequate to collect, manage, and integrate the range and quality of information on criminal cases necessary to support a reliable criminal justice monitoring system. As a result, the quality of available criminal data will greatly limit the integrity of any death sentencing monitoring system for the foreseeable future... A monitoring system built on a foundation of comprehensive high quality data can be used both to help ensure that race and other inappropriate factors are not involved in death sentencing decisions, and that pure arbitrariness (inequities not attributable to either legal or not-legal factors) does not permeate sentencing.

Meeting the mandate of Section 3 of the Commission's enabling statute -- whether there is "discriminatory variability in the sentencing phase or at any stage of the process" -- would require considerable expenditures of taxpayer dollars but, even more costly, of human resources. This informs the answer to Section 2 about the cost of administration of an equitable death penalty in New Jersey. Again, the experience of Illinois is informative:

...it is clear that there must be an intensive effort by all parties involved in capital cases in Illinois to gather detailed data on all aspects of homicide cases. Here we are not suggesting data collection on decisions made from charging through sentencing but, rather, going back to the day of the homicide and beginning with measures of the quality of the investigation by the police. If the police devote more resources to the investigation of the murders of prominent white victims than to other cases, even if all other decision makers (e.g., prosecutors, judges, jurors, and governors) are fair, racial bias will still
permeate the system. In addition, a database needs to be constructed to follow all cases from the time a death sentence is imposed to the time the person exits death row (via court or gubernatorial action, natural death, suicide, or execution). All links in the “continuous chain” of decision makers need to be involved in gathering data, which they can use to monitor their own performance.

People of good intention can and will often disagree on how to interpret data and events. This is certainly the case in the debate over the disparities that arise in the New Jersey capital punishment system. But I would stress the debate is not over whether there are disparities but over what they mean and, related to this, how serious they are. I would argue that, in matters related to death, any disparity is meaningful and serious. As a matter of law and as a matter of morality, a just society cannot turn a blind eye to the challenges the disparities raise. Nowhere is this truer than in the United States, where our history has been so horribly soiled by racial injustice. Despite the ongoing efforts by many people in New Jersey, the stain remains. We see continued disparities throughout the administration of justice, including indications that the system values whites – both as individuals and communities – more than it does people of color. Many years ago Dr. King spoke of the nation’s need to live up to the promise of its principles. It seems that after so many years and so much effort have failed to remove the taint of race from New Jersey’s death penalty system, it is time for the state to live up to the principle set forth by its own Supreme Court and “not, consistent with out State's policy, tolerate discrimination that threatened the foundation of our system of law.”

I repeat, the costs of the intense data collection and monitoring necessary to live up to this principle are not only or even mostly monetary. The costs extend to the frustration of law enforcement officials and criminal justice officials who would rather be spending their work hours fighting and preventing crime and ensuring the safety of New Jersey’s citizens. Indeed,
perhaps the greatest cost is to people like myself -- the friends, relatives and colleagues of victims.

In closing, I believe my testimony demonstrates that race still matters in our society, even if we aspire, as I believe this Commission does, to create a state and a country in which race does not play a role in the administration of justice. Sadly, the evidence demonstrates that we have not constructed such a society yet, either in New Jersey or in the nation as a whole. Opportunities abound for bias and discrimination to creep into the capital punishment system. The risk will remain even if the state were to invest years and millions more dollars into research and studies. Continuing this Sisyphean effort would most certainly prolong the agony of victims of family members in need of closure and cost millions of dollars, while never guaranteeing fairness.

Thus, return to a central question posed by Baldus and Woodworth: Is New Jersey willing to tolerate some racial bias in order to preserve the capital punishment system, and, if so, just who is being served by its preservation? The answer is that no one is well served by the retention of the death penalty in New Jersey.

Thank you again for the opportunity to testify before the Commission.
testimony to

New Jersey Death Penalty Commission

by Gary J. Hilton, Sr.

October 25, 2006
Good afternoon Chairman, Reverend Howard, and members of the Commission. My name is Gary Hilton, Sr. I retired from the New Jersey Department of Corrections in 1998 after 33 years of service. During my career I held positions of warden at the New Jersey State Prison at Trenton, the Correctional Institution for Women, and on an interim basis at the Youth Correctional and Reception Center at Yardville and the East Jersey State Prison at Rahway. For a period of approximately 17 years, I served as the Department’s Assistant Commissioner for Operations, Deputy Commissioner, Chief of Staff, and at the time of my retirement I had the privilege to serve as Acting Commissioner. After leaving State service I served as Director of Corrections and Youth Services for Monmouth County. Upon my retirement from public service in 2002 I formed a correctional consulting firm, Paige Plus, LLC. I am presently president of Paige Plus, and we have provided comprehensive correctional consulting and expert witness services to a variety of public and private
agencies in New Jersey and throughout the United States. Over the years I have lectured at various colleges and universities, and in 1995 I had the privilege to deliver a major address before a gathering of correctional executives representing former eastern block countries meeting in Budapest, Hungary.

I have a long history and familiarity with New Jersey’s death penalty. While serving as Assistant Commissioner I was responsible for overseeing the development of procedures for the Capital Sentence Unit at the New Jersey State Prison at Trenton, as well as developing procedures and protocols for the implementation of the lethal injection penalty. During my tenure at the Department’s Central Office I was responsible for overseeing approximately 27,000 sentenced offenders, 40,000 parolees and a staff of approximately 9,000. I believe my direct experience within the New Jersey Department of Corrections makes me uniquely qualified to comment on life without parole as an alternative to the death penalty.
I will attempt to keep my oral presentation well within the allotted time frame in order to allow for any questions the Commission members may wish to pose. I do, however, wish to make one preliminary comment: I never have been, nor am I today, opposed to the death penalty on the basis of a moral consideration. During an earlier period of my professional life I supported and believed that the death penalty had a proper and appropriate position in our criminal justice system. It has only been with the passing of time, first-hand observation, and careful deliberation that I have come to a clear and firm opinion that the death penalty is poor public policy and ill-advised correctional practice.

You have already heard from my colleague Dr. Robert Johnson about life without parole or for what he aptly called "death by incarceration". I thoroughly endorse his testimony. Because this Commission has been specifically tasked with considering alternatives to the death penalty, I welcome this opportunity to expand
on Dr. Johnson’s earlier testimony. Both Dr. Johnson and I have submitted written reports.

When the death penalty was reinstated in New Jersey in 1983 it was a very different time in New Jersey’s sentencing history. We did not have the alternative of life without parole. Indeed, the standard punishment for murder at that time was a life sentence with a parole eligibility of 30 years.

This is no longer the case today. In addition to a sentence of life without parole, New Jersey now has an 85% parole ineligibility statute, which essentially means anyone sentenced to a life sentence for murder must serve 63 1/2 years before parole eligibility. This represents a significant change in the sentencing laws in comparison to the 1983 period.

As dramatic as these sentencing changes have been in New Jersey, the State’s experience with long-term incarceration or natural life incarceration is not new. That is because some inmates were older when sentenced to a maximum 30 year sentence before parole eligibility
or others were sentenced to multiple consecutive sentences. Inmates in these cases were effectively incarcerated for the rest of their natural lives. They will not leave confinement until the occasion of their death.

Today there are approximately a thousand or more persons serving some form of life sentence, or the practical equivalent, in the New Jersey State Prison at Trenton, which is the State's most secure maximum security institution. Some have been sentenced to a term of life without parole, meaning they must and will serve the remainder of their natural lives in prison while others will have to serve 63 ½ years before parole eligibility. Some offenders, however, who were sentenced prior to these more extended terms having become law, may reach parole eligibility. Most of these inmates, while technically eligible for parole, will in a practical context never be released because of age or consecutive sentences. The bottom line is clear; no one sentenced to life without parole can be paroled!
The New Jersey experience, similar to the national experience in dealing with inmates serving actual or practical forms of natural life sentences, has been that these inmates pose no significant additional challenges nor require any special resources beyond that of any other inmate classified for maximum security level confinement. Maximum security prisons must always be viewed as potentially dangerous and violent environments. An unfortunate reality is that very bad things will over the course of time take place in very well-managed maximum security prisons. Confinement in a maximum security prison fundamentally differs from confinement in medium or minimum security facilities in that the maximum security prison’s perimeter is always fortified with deadly force. Inmates know with certainty that if they attempt to escape correction officers are lawfully authorized to “shoot to stop”. Correction officers in a maximum security facility live with a similar reality; if they are ever positioned between an inmate bent on escape
and a path to freedom, it is both likely and reasonable to assume that the inmate will do whatever is needed to effect the escape.

Within the maximum security environment the majority of inmates accede to the tight security controls, limited movement, long hours of cell confinement, and the uncompromising rules, regulations and repetitive schedule. Generally, they accept the daily routine of imprisonment in order to make what they view as the best of a bad situation. For those inmates who choose to act in a violent or disruptive manner or incite others to do so, the maximum security environment has specially structured living units to effectively control and manage these recalcitrant individuals.

At the New Jersey State Prison at Trenton, these specially structured living units include the Disciplinary and Administrative Segregation Units and the Management Control Unit. These are tested and proven classification options for disruptive offenders.
The Segregation and Management Control Units are generally referred to as close custody units. While in close custody confinement inmates spend approximately 22.5 hours a day in their cell, movement outside the cell is subject to a 2-on-1 officer escort, and the inmate is always manacled at the hands and legs when being escorted off the unit. Any out of cell activity with other inmates, i.e. recreation, is restricted to extremely small groups. Inmates confined to these close custody units normally do not receive contact visits; all meals are eaten in the cell, usually not more than a few feet from the toilet. These are highly disciplined, controlling environments, as they are meant and need to be.

The Management Control Unit and the other close custody units at the New Jersey State Prison at Trenton have been over the years thoroughly vetted by the appropriate State and Federal courts. Within the last several months I had the opportunity along with Dr. Johnson to tour the New Jersey State Prison at Trenton,
including the close custody units, and can report to you that the facility is an extremely well-managed and a very secure operation. Through a combination of physical plant improvements and technology, I believe that the New Jersey State Prison at Trenton is more controlled and secure than at any point in its long and distinguished history.

Anyone who might suggest to this Commission that life in a maximum security prison is a lark and that inmates pass the time of day in sun-drenched yard areas and immerse themselves in creative art or literary interests is simply misinformed.

The abolition of the death penalty in New Jersey will have little quantitative impact on the number of inmates who will grow old behind bars and hence will need geriatric medical and support services. The fact is that the New Jersey Department of Corrections has been providing such services for a significant period of years and there will be no need for a learning curve or expansion of services.
It is my recommendation, without any reservation, that anyone sentenced to life without parole for murder must serve the full term of their sentence in a secure penal environment as determined by the New Jersey Department of Corrections. With all due respect, it is my opinion that life without parole means this: the only way an individual leaves prison confinement is in a rubber bag and with a tag on their toe.

The only way an individual sentenced to life without parole could be released would be upon a judicial reversal of conviction or executive clemency granted by the Governor. Judicial reversals are, of course, a matter for the courts and are beyond the political process. I believe that in earlier testimony before this Commission former Attorney General Robert Del Tufo noted that the likelihood of executive clemency by a governor is extremely unlikely and politically unrealistic. I have observed the political culture in Trenton for many years and agree with General Del Tufo.
As difficult and overbearing as life in a maximum security prison is for the younger and middle-aged inmate, I can personally think of nothing more horrific than contemplating and enduring the process of growing old in a maximum security prison. From my own experience I know that inmates facing life without parole or the practical equivalent generally lose meaningful visiting and other contact with family and friends within the first 5 to 10 years of confinement. My personal observations have been that mothers are the most lasting source of visits and correspondence.

By its very nature the maximum security prison environment is a cold, dangerous and frightening place. The reality is that as offender’s age and becomes more infirm they become more likely targets of abuse and intimidation by the younger population. The prison culture has no respect or deference to its senior counterparts. Older inmates are routinely strong-armed for their meager personal assets, i.e. tobacco, hard candy, coffee, et cetera. Older inmates are often
required to hoard or courier contraband, i.e. weapons, drugs, fermented spirits, on behalf of younger thugs. Older inmates in fact often voluntarily agree to hoard or courier such contraband in return for protection from various prison groups or gangs. I can vividly recall observing older inmates remaining on the cell block during periods when the vast majority of other inmates had gone to recreation activities off the tier inasmuch as this was the only time the older inmates felt safe enough to utilize the gang showers. I specifically recall an older inmate once sharing a perspective of his long period of confinement at the New Jersey State Prison at Trenton. The inmate in question told me that not long after first arriving at the prison he observed a rookie correction officer begin his career, and then some 25-plus years later observed this same correction officer retire. Within a day or two of the latter officer’s retirement the inmate in question observed another rookie officer begin his career, and the inmate realized that he will
still be confined, if alive, when this second rookie officer exercises his retirement benefit.

In conclusion, I genuinely believe that execution is not sound or proper public policy. In my opinion the irreversible reality of execution must be a major consideration. The ever-advancing and rapidly improving capabilities of forensic science and its potential to provide heretofore nonexistent evidential resources must be given deliberation. I am of the firm belief that the decades-long appeal process is an unnecessary and cruel protraction of grief and suffering for victims' families and loved ones. I am also of the opinion that, if use of the death penalty is ended in New Jersey, the replacement punishment should be life without parole. This would in my judgment better serve the interests of society, including the victims' families.

From the standpoint of public safety, I believe that execution is not a significant deterrent. To the contrary, my experience suggests that life without
parole is possibly a more meaningful deterrent. Unfortunately, many of today's very hostile and angry youth do not expect to live long, and execution is merely one of any number of violent options associated with their perceived demise. I genuinely believe that if life without parole means life without parole, no ifs, ands or buts, and that every day of the sentence will be served in a secure penal environment, some deterrent benefit may be reasonably anticipated because this grim reality of a long and lonely life behind bars may frighten these young thugs more than an early death.

I ask that you carefully review and consider what Dr. Johnson and I have had to say about both the general realities of life in a maximum security prison and the specific realities of growing old and eventually dying in secure confinement. Upon such reflection, I am confident that you will share my conviction that true life without parole provides a real and powerful measure of retribution.
The New Jersey Department of Corrections has a solid history of confining individuals for the rest of their natural lives, and there is no reason to believe that ending the death penalty will pose any operational or other impediment to the management of New Jersey's prisons. I trust my observations have been of value to this distinguished Commission, and I welcome an opportunity to respond to your specific questions.
Life Without Parole, Our Other Death Penalty

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22 October 2006

Life without parole is sometimes called a “true life sentence” because offenders are sentenced to spend the remainder of their natural lives in prison. A better term for this sentence might be “death by incarceration” since these persons are, in effect, sentenced to die in prison. Life without the possibility of parole can thus be thought of as our “other death penalty.” For the purposes of this report, we will refer to these prisoners as life sentence prisoners, LWOP prisoners, or simply lifers.

Offenders sentenced to death by incarceration suffer a “civil death,” the death of freedom. Their freedom—the essential feature of our civil society—has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they “exist” in prison, since prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, the cell their tomb. In effect, they give their civil lives in return for the natural lives they have taken.

Possible objections to replacing death by execution with death by incarceration relate to public safety (are lifers a danger to others in prison?), punishment (is a life sentence sufficient punishment for premeditated murder?), cost (will it cost more to keep lifers alive than to execute them?), and what is termed correctional integrity (is it appropriate for prisons as public institutions to be used as settings of death by incarceration for a growing body of male and female offenders?). As we shall see, life without parole, our other death penalty, does not pose a special risk to public safety; it is a sanction of great severity, it is less expensive to implement than death by execution, and it does not undermine the integrity of prisons as public institutions. Each of these issues (with the exception of cost, which has been examined in earlier testimony before the Commission) will be discussed in turn. It is worth noting that one of the unique features of death by incarceration is that it allows a large window of time—much larger than that afforded by the death penalty—for evidence of innocence to emerge and thus permits the release and perhaps compensation of persons wrongly sentenced to prison for life.
Public Safety

Are prisoners sentenced to life without the possibility of parole a danger to others in prison, the setting in which they are slated to die? This is a reasonable question. After all, executed prisoners are dead; dead prisoners pose no threats, whereas lifers are at least potential dangers to others in the prison. Some proponents of the death penalty warn us that lifers will feel that they have nothing to lose and will be uncontrollably violent, injuring or killing officers and inmates at will. In the absence of the death penalty, the speculation goes, what more can we do to deter them from violence?

As appealing as this scenario may seem, it is dead wrong. In fact, the opposite is true. A substantial body of empirical research supports the claim that lifers are less likely, often much less likely, than the average inmate to break prison rules, including prison rules prohibiting violence (see Johnson and Dobrzanska, 2005 for a thorough review of the research on this question).

Experience in New Jersey and elsewhere in the Nation—including both State and Federal prisons—reveals that the vast majority of lifers are manageable prisoners, even model prisoners. The reason is simple: prison is their home for life. Accordingly, they strive to make the most of the life that is available to them behind bars. Self-interest guides them to avoid trouble because trouble jeopardizes the few privileges they can secure in the prison world.

In the U.S., capital murderers can be sentenced to death or to life, including life without parole. Some death sentences are overturned on appeal, with the offender released into the prison population with a life term (with or without parole eligibility). Significantly, research reveals that “former death row and life-sentenced capital inmates were disproportionately less likely to commit acts of serious violence in prison than non-capital offenders.” (Cunningham, et. al, 2005). Studies supporting these observations have been conducted in Texas, Missouri, Indiana, and Arizona. (see Cunningham, et. al, 2005; Sorensen and Marquart, 2003; Reidy et. al. 2001).

The premier study on this subject was conducted in Missouri and covered an 11 year period. (Cunningham, et. al, 2005). For our purposes, the populations under study included inmates serving sentences of life without parole for first degree murder (N=1,054) and inmates serving parole-eligible sentences (N=2,199). All inmates were housed in maximum security, the level just below “super max” prisons. Lifers were significantly less likely than parole eligible inmates to be involved in violent misconduct. (Cunningham, et. al.2005). Only one of the 1,054 life-without-parole prisoners killed someone in prison. Moreover, prisoners eligible for parole were almost twice as likely to commit acts of violence as were life-without-parole prisoners, and were almost four times as likely to commit major assaults.
There is every reason to believe that the findings from this extensive body of research on prison violence apply to New Jersey prisons. New Jersey prisons, like those in other states, have many lifers (about 1000 of them) but little or no lethal violence. (Mumola, 2005). I have visited Trenton State Prison and spoken extensively with Gary Hilton, who formerly ran that prison and was a longtime official in the New Jersey Department of Corrections. Mr. Hilton and the officials at Trenton State Prison assure me that they can safely contain and constrain any prisoner serving a sentence of life without parole.

For those few lifers who prove violent or disruptive, secure systems of custodial segregation can be deployed to control them. In New Jersey, the high security unit is called the Management Control Unit and is located in the New Jersey State Prison in Trenton. The regimen there, as I have seen first-hand, is strict and controlling. This unit is sufficient to control any life-sentence prisoner sent there for special confinement.

Does New Jersey need the death penalty to ensure that its prisons are safe? The simple answer is no. There are better ways to keep prisons safe without the threat of the death penalty.

Life in Prison as Punishment

Life sentence inmates are manageable prisoners, even model prisoners, but their satisfactory adjustment to prison life does not change the fact that their lives are marked by suffering and privation. Some of us fail to appreciate this because we don’t believe prison is punishment. Prisoners are given a roof over their heads, three meals a day, and basic amenities like showers, recreation periods, and even ready access to television. Since prisoners don’t have to work (though many do work), it may appear, from the outside, that they are being coddled. Some of us even go so far as to refer to prisons as country clubs for convicts.

Nothing could be further from the truth. Lifers can be expected to serve their sentences in maximum-security prisons. No prison, and certainly no maximum-security prison, even remotely resembles a country club. A prison joke has it that the country club prison is much like the Loch Ness monster—there have been sporadic citizen sightings but no scientific confirmations. On closer examination, one cannot fail to note that our “country club” prisons permit no heterosexual contact, issue nondescript clothing or sharply limit prisoners’ choice of civilian attire, and serve meager portions of poor food in noisy mess halls (well named) filled with dangerous guests who occasionally resort to violence when they are unhappy with the cuisine. The accommodations in a maximum security prison feature iron bars or steel doors, bare furniture, dim lighting, and poor ventilation. Uniformed officers control the inmates’ daily movements outside the cell, keeping the prisoners’ lives harnessed to a tight schedule. Like country
clubs, prisons are costly to operate, but unlike country clubs, little of the money is spent on convict sustenance, let alone amenities. It is not uncommon for a prisoner to be fed on two or three dollars a day. Unsurprisingly, the menu is limited; a lifer can tell you what he had for dinner this Thursday and what he can expect next Thursday, and the Thursday after that. Variety is the spice of free life; it is a casualty of prison life. Prison, then, is no country club. In point of fact, prisons are impoverished environments. A lifetime in prison is a lifetime of suffering and privation.

Life sentence prisoners live in maximum-security prisons. Nothing in a maximum-security prison is arranged for the comfort of prisoners. The lifers' home is a cage with running water and a toilet. Lifers spend long hours in the cell—they say the cell time feels like a lifetime in itself—and can tell you how many steps it takes them to get from their bunks to the toilet and from the toilet to the cell door. These prisoners live each day of their lives under lock and key, as well as under the watchful eye of correctional officers. Like children, they are told what to do and when to do it. Unlike children, few people in the prison care for them or respect them as individuals of intrinsic human worth.

Daily life for the maximum security prisoner is cold and rejecting, even demeaning. Days unfold with an oppressive redundancy; the schedule is fixed, the routine, like the prison wall, set in stone. Aging means enhanced vulnerability and escalating loss. As lifers age, their sense of vulnerability to prison violence grows. Loneliness grows over time as loved ones—wives, children, parents—grow apart from lifers or die during their confinement. (see Johnson & Toch, 1988 & 2000; Liebling & Maruna, 2005).

All prisoners are held in a kind of suspended animation while the rest of the world changes and evolves. The free world is dynamic, the prison world static. By its very nature, the free world offers hope for change. Prison, by its very nature, isolates the offender and holds hope hostage until the offender is released. (McGunigall-Smith, 2004). Lifers, unlike regular prisoners, will never be released, so life as they know it ends at the prison gate. For them, a life sentence is a death sentence. “Being given a life sentence,” observed one prisoner, “is like being told by a doctor that you’re going to die, you know, like you’ve got a terminal illness. You feel as if your life’s effectively over.” (Jewkes, 2005).

The pains of imprisonment are not obvious to us because they are not visible. As one life sentence prisoner insightfully observed, “Prison can be compared with the microwave oven in my kitchen at home—it destroys you on the inside long before it effects are evident on the outside.” (Johnson & Toch, 2000). Outsiders find it hard to put themselves in the shoes of prisoners; the prison world is alien to most citizens, so removed from our daily life that prisons might as well exist on another planet. To fully appreciate the pains of
imprisonment, one has to look at the prison as it is experienced by the inmates who must live each and every day of their lives in confinement.

A central fact of life imprisonment from the inmate’s point of view is a life of unremitting loneliness. The prisoner is permanently separated from his family and other loved ones, and with this separation comes a profound and growing sense of loss. Loss of family shows itself in ways big and small. Some inmates, for example, talk about the little things they miss greatly because they are separated from family. Not being around for the daily events that make up family life hits many prisoners hard. One man missed “the opportunity to go to a park with my nephews and nieces and spend time with them.” Said another, “My children will grow up and I won’t get to enjoy them—high school, getting married, starting families.” Lifers know that they can’t be parents in the sense most of us understand the term, which is to say, they can’t guide and support their children. “I’m not there to say ‘Honey, he wouldn’t be good for you...’ I’m not there to pat them on the back and I’m not there to pick them up when they fall. And that’s the hardest part.” (See Johnson & McGunigall-Smith 2006).

Lifers know that family ties are apt to wither over time and that family members, notably parents, are apt to die while the lifers are still alive in prison. Loss of a parent can be a blow. “My father passed away last month,” observed one lifer, “and I wasn’t able to attend his funeral. That’s probably the hardest thing I’ve had to deal with.” Said another prisoner, when asked to describe the greatest hardship he faced as he served his life sentence: “knowing my family is dying out there and moving away and I can’t keep in touch with them.” The life sentence inmate must face the painful fact that one day he may be entirely alone, bereft of outside support or concern. “I don’t have any contact with anybody on the streets,” said one prisoner, “I don’t know anybody... I don’t have anybody to talk to, to connect with. This is my world now. This is all I know – the inside of these walls.” (See Johnson & McGunigall-Smith 2006).

The world that unfolds behind the prison walls is a difficult and often debilitating place in which to live. A key feature of prison life as experienced by inmates is repetition. Each day in prison is essentially the same as the next. The result is a lifetime of endless boredom, which prisoners tell us—and which we can readily imagine—is a terrible thing to endure. As one inmate observed, “I awaken with a feeling of dread. A day in prison offers nothing to look forward to. It is an existence of endless repetition, restriction, and regimentation... Prison is sameness, day after day, week after week, year after year. It is total confinement of body and spirit and total separation from everything real and important.” (Johnson & Toch, 2000). “The thing I miss most,” said one lifer, “is the right to choose. I no longer have any choice—when I shower, where I go, what I do.” (Johnson & McGunigall-Smith 2006). Each day brings mortifications that remind you of your helplessness. A mundane but telling example offered by one inmate: “having to ask a guard for toilet paper. You could ask ten times in a
period of three to four hours for such an item. Things like this amount to cruel punishment.” (Johnson & McGunigall-Smith 2006).

Another core feature of prison life as experienced by prisoners is impersonality. Prisoners are given numbers to replace their names and are treated as commodities. In many prisons systems, prisoners are also given uniforms that further limit expression of their individual identities. (This is the case at Trenton State Prison, where the inmates wear khaki uniforms.) Life in an impersonal setting that is hostile to one’s individuality is understandably cold and lonely. As one inmate put it, “Prison is coldness... no one in prison really cares about you, not like those at home do. It’s a chilling feeling to realize that no one’s life here would be significantly changed if I were to die tomorrow. Loneliness breeds and thrives in the belly of the monster known as prison. It strikes constantly and insidiously and it never goes away.” (Johnson & Toch, 2000). When asked what was the most difficult thing about serving a life sentence, one inmate said this: “No love. Nobody to grab hold of me and hug me. I mean real love. I’ll never feel that emotion again.” (Johnson & McGunigall-Smith 2006).

Prisons are also experienced by inmates as settings of deprivation. Locking people up means locking them away from the free world with its variety and opportunity that is now replaced with deadening routine; it means locking people away from loved ones who are now replaced by strangers and keepers, few of whom even know their names let alone care about them; it means locking prisoners away from the many simple things we all enjoy, like good food eaten in good company and moments of treasured privacy. Lifers can look forward to an endless stream of irritating neighbors (inmates have low opinions of one another; the term ‘moron’ crops up regularly in interviews) and bad meals (“assorted lumps of greasy, starchy slop [bolted down] within a twenty-minute time limit.” (Johnson & Toch, 2000). There are also recurring intrusions into their privacy, day and night, with or without cause. As one inmate put it,

“At any time a staff member may enter a prisoner’s cell and deface or confiscate personal property. This is done often, and it leaves the prisoner feeling helpless and enraged. One of the pleasures of home is receiving mail that has been unopened, unread by others, and with the contents intact. Prisoners have no such pleasure.” (Johnson & Toch, 2000).

If life is made up of many small pleasures, the life of the lifer is made up of many small losses, which cumulate and leave the prisoner with a sense that he (or she) has no dignity or worth as an individual.

At the core of the prison experience, of course, is the loss of freedom. In a sense, loss of freedom is experienced as the sum of the various deprivations and hurts inherent in confinement. As one inmate observed, prisoners ultimately have no choice other than to submit to the prison:
"For the prisoners, the loss of freedom is devastating. Everything they have taken for granted is gone. They have no control over their lives, no choices. Others decide when and where they eat, work, and sleep... Their lives are fastened to rules and regulations that discourage and disregard normal impulses. They accept the rules and adjust to them, just as they do to the overcrowded conditions, body odors, lack of privacy, standing in lines, and the like. They have no choice." (Johnson & Toch, 2000).

Prisoners conform to the prison routines, which is why riots and other forms of disorder are rare in prison, even though prisons are filled with people who broke the law with regularity in the free world. This is another way of saying that prisons fulfill their basic mandate to contain and constrain prisoners. Lifers conform better than most prisoners since they come to see prison as their involuntary home for life. Nevertheless all prisoners, including lifers, must remain vigilant, on guard. Prisoners must always be alert to danger because other prisoners can be unpredictable and dangerous. Prisoners often say that the worst thing about prisons is the other prisoners. In one inmate's words,

"Prisoners are emotional zoos filled with paranoids, manic-depressives, aggressive homosexuals, schizophrenics, and assorted fruits and vegetables without labels that explode at various times. Living in a prison is not only a matter of physical survival; emotional survival is at issue, too." (Johnson & Toch, 2000).

These emotions include fear, self-pity and chronic anxiety. Life under the stress of these emotions is understandably difficult and even debilitating, and grows more stressful as lifers age.

The better adjusted prisoners, and especially the lifers, move in lockstep with the prison's routine. For them, the routine is like an anesthetic; it dulls the pains of loss and regret. This routine makes for an empty existence, as we have noted, but it is a bearable one. Prisoners, and especially lifers, have made a tragic mess of their lives; if they dwelled on this sad fact, they'd drive themselves to distraction. At times, however, the routine is broken—loved ones come to you with a problem and you can't help; a visit is missed and you wonder why; you don't get mail and you wonder why. In situations such as these, prisoners are shaken from their routines and painfully reminded that they are prisoners, that they got themselves into this mess, and that the future is bleak. As one prisoner insightfully observed,

"You're coping pretty well when you get one of those painful reminders of your situation. One of three events occurs or recurs. You learn of a family problem that demands your presence to handle, and you understand the meaning of being helpless. The problem would be nothing if you were not
in prison, but now it seems enormous because you can’t deal with it. It makes you brood, feel the shame of what you are doing to your loved ones and appreciate the fact that you are a pretty disgusting person. The other two events are visiting hours without a visitor and mail being delivered without a letter for you, which is the definition of loneliness. It makes you think a lot about home, loved ones, friends, the world outside. You remember little things you did before this; they were unimportant then, but now you realize they were very important…” (Johnson & Toch, 2000).

It is at these junctures—small but potent departures from the prison routine—that the most fundamental pain of imprisonment is revealed, for it is at these times that prisoners look at themselves and at their lives. Almost invariably, they are deeply distressed by what they see:

“Like it or not, you are being exposed to who you really are way down deep inside. It becomes increasingly difficult to hide from yourself. Often you find yourself lost in the darkest crevices of your being and not too happy with what you are finding. You are hesitant to continue but you do, hoping for the best, finding the worst. Constantly you are thinking, thinking, and thinking. It happens while you are working, pacing your cell floor, waiting for a letter or a visit, while [you] are mopping floors or performing some other robot work you’ve been assigned, or as you lie awake at night wishing for the escape of sleep. The layers of your character are getting peeled away like the skin of an onion, and don’t expect flower buds to be hidden at the core.” (Johnson & Toch, 2000).

This inmate’s reference to the pains of reflection when he paces his cell or lies awake at night is quite significant. Anytime an inmate’s mind breaks from the prison routine and drifts to the past, there is the palpable risk that “the demons of the past will chase you and you re-run the scenarios of the past, you think of what you could have done, what you could have been.” (McGungall-Smith, 2004). The catalog of regrets ranges from people one has let down and hurt to opportunities missed to live decently or indeed to have a life at all.

“Not being there for my daughter. I once vowed that I would be there for her always. I kick myself that I can’t.”

“Seeing my mom get all upset… Not being able to hold her or touch her. Not being able to live my life … Not being able to have a life.”

“Just thinking about your time, what you did, remembering how stupid you were when you were out [in the free world].”
"Out there I just lived for drugs and the rush, and all that—it was stupid. The worst part is that I won’t have a chance to get it right." (See Johnson & McGunigall-Smith, 2006).

The most basic hurt inflicted by life without parole is this: a lifetime of boredom, doubt, and anxiety punctuated by piercing moments of insight into one’s failings as a human being. This miserable existence only ends when the prisoner dies—alone, unmourned, a disgrace in the person’s own eyes as well as in the eyes of society. (Aday, 2003). If our goal is to make prisoners suffer greatly as human beings for the remaining days of their lives, life imprisonment without the possibility of parole offers itself as the ultimate punishment we can inflict.

**Life Means Life: Statistics on LWOP**

As of 2003, the latest year for which national survey statistics are available, roughly ten percent of all prisoners in America (roughly 94,000) are serving life sentences. This is a remarkable 83% increase since 1992, when the lifer population was at 69,845. Most of these prisoners are eligible for parole. The average term for these prisoners is somewhere in the neighborhood of 29 years. Today, roughly 33,000 prisoners are serving life without the possibility of parole, up from 12,453 in 1992. (Mauer, King & Young, 2004).

The only means of egress from prison for these offenders, other than by death, is by commutation or pardon. As a practical reality, life without parole prisoners would only be pardoned if they were found to be innocent; in that case, their release would be entirely appropriate. Commutations are rare events for persons sentenced to prison, let alone a prison term of life without parole, as commutations are generally met with considerable political resistance. In the state of California alone, over 2500 offenders have been sentenced to life without parole since 1978; not a single one of these offenders has had his sentence commuted. (Sundby, 2005).

It is fair to say that sentences of life without parole should be viewed as sentences of death by incarceration. These prisoners are slated to die in prison and it is a virtual certainty that none of these offenders will have their sentences commuted. It is interesting to note that death sentences are fairly regularly overturned, sometimes resulting in the offender being sentenced to life with the possibility of parole. Life without parole sentences, on the other hand, have been deemed permissible with a wide range of offenses, including three-strikes laws in which the final offense is minor. Sentences of life without parole are overturned less frequently than death sentences. In short, life without parole sentences are not subject to the detailed (and expensive) scrutiny normally afforded death sentences.

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As noted in an editorial in the Asbury Park Press (May 16, 2006), it is life without parole that is the sure and swift sentence, not the death penalty. Moreover, life without parole is increasingly popular with the public—more popular than the death penalty. (Gallup News Service, June 1, 2006). Support for the death penalty drops dramatically when the sanction of life without parole is an option. The popularity of life without parole appears to reflect the belief that this sanction is a better deterrent than the death penalty and, moreover, a penalty that spares us the risk of executing an innocent man or women.

Robert Johnson, Ph.D.

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Dr. Johnson has received a number of awards for his teaching and scholarship. He is the recipient of The American University Award for Outstanding Scholarship, as well as The American University Award for Scholarship and Teaching. His book, Death Work, received the Academy of Criminal Justice Science’s Outstanding Book Award. Poetic Justice, a collection of original poems by Johnson, received the L.I.F.E award, honoring Literary Involvements for Equality. Dr. Johnson is a faculty member (Honora Causa) of Phi Kappa Phi, and has been formally honored as a Distinguished Alumnus of the Nelson A. Rockefeller College of Public Affairs and Policy, University at Albany, State University of New York.
Sources


Testimony to the Death Penalty Study Commission, October 25th, 2006—Molly Weigel

My name is Molly Weigel. I am a resident of Pennington, New Jersey, where I live with my husband and son. I know you have heard from other victims’ family members who oppose the death penalty, but I believe I have a perspective to share that has not been presented to this Commission in past testimony—that is, what happens to the family of a murder victim in a capital case when individual family members do not hold the same views on the death penalty.

My mother-in-law, Arlene Piper, was raped and murdered in Altoona, Pennsylvania on July 18th, 1999. She was 74 years old. I wish she were still here so I could call her up and tell her how well our 10-year-old son is doing in school. I want her to still be sewing him cute clothes with a label saying “Made Especially By Grandma.” I wish we could’ve celebrated her 80th birthday with her and heard her wonderful girlish laugh. I loved her very much.

But putting her killer to death wouldn’t bring her back or ease our grief. It would’ve been the most destructive thing anyone could have done to us as we struggled to come to terms with her loss and the incomprehensible fact that she was murdered.

Even though the death penalty was not ultimately used in the case of Arlene’s killer, who is in prison in Pennsylvania for life without parole, it still wreaked havoc on our lives. We became victims not only by having a beloved family member murdered, but by having to go through the wrenching process of considering the use of the death penalty with the district attorney’s office and other family members. One of the most painful aspects of this process was the terrible split within our family that it caused.

My husband and I have a different world view, political affiliation, and set of religious beliefs from most of his family, though our relationship with his mother was close and loving and transcended many differences. But after Arlene’s death, we became closer to my husband’s sister, aunt and uncle, and cousins. We depended on each other and provided each other with real emotional support for perhaps the first time, and this gift in a time of great sadness and need felt very precious. Our shared grief and shared experience brought us together and opened us more to each other. The aunt who had seemed distant and I spontaneously hugged and talked about how we missed Arlene. We went to Ecuador where my sister-in-law lives to visit the chapel her Baptist mission had built in Arlene’s honor, and shared my sister-in-law’s life more than I would have thought possible.

But then our decision-making about the use of the death penalty in the framework of the legal system polarized us in ways that were inexpressibly hurtful to all of us, putting a violent end to that fragile new closeness and driving a wedge between us that has yet to heal. The painful and scary discussions we had with family members were difficult in themselves, but to make matters worse, we were scapegoated by the district attorney and the victims’ services professional, who made untrue and misleading statements to other family members about our intentions, causing further misunderstanding and generating deep hostility toward us on the part of other family members. We are not in touch with my husband’s aunt and uncle, and my sister-in-law no longer answers our son’s e-mails. Our son has lost not only his grandma but also his aunt and other family. As murder victims’ family members we have few people who can understand our experience. To lose the few people who could have gone through it with us was devastating to us, and I believe to them as well. The process was more painful than I can ever hope to convey.
I have chosen to speak publicly about this painful experience because I believe that what we went through is unnecessary and preventable. Victims' family members have enough to deal with without becoming victims a second time by having to struggle with the issue of the death penalty and having to experience conflict with other family members over sentencing. Abolishing the death penalty in New Jersey and replacing it with life without parole would ensure that no murder victims' family members in New Jersey have to suffer this heartache.
Others have convinced themselves that the criminal justice system always gets it right – and yet innocent men and women have lost decades of their lives behind bars at the hands of our human frailties.

Some have argued that we need the death penalty to keep us safe, yet offered no credible proof that it is actually necessary. Meanwhile, the death penalty has clogged our courts and distracted our attention.

Others have stated that our citizens need the death penalty to restore their faith in the criminal justice system, yet the long capital process has shattered the people’s faith and hurt the families who were promised a myth of healing through executions.

In the new era of DNA, life without parole, and the rising cries of victims’ families, the people of New Jersey are done clinging to justifications, misperceptions, and half-truths.

With this moratorium, our citizens have given you a mandate to confront, once and for all, what the death penalty actually does to us in real life.

The evidence is overwhelming. The death penalty has failed the people of New Jersey on every count – and myth after myth about the death penalty has been shattered in this hearing room.

The flaws that have been presented to you have covered everything from confused jurors to county variability, from high costs to high reversals, and more. I urge you to consider the gravity of all of it – and especially the gravity of it all together - weighing down the death penalty until it is literally collapsing under the weight of its own problems.

BUT – even if you accept merely an iota of the evidence that has come before you, you must recognize that something is terribly wrong.

If you believe nothing else, you now know that the death penalty puts victims’ families through sheer hell. After the testimony of the many victims’ advocates and homicide survivors who came before you, you simply cannot still believe that the death penalty takes care of victims’ families.

And if you believe nothing else, you cannot still believe that human beings are absolutely perfectly right 100% of the time.

Jennifer Thompson, a victim of rape, looked you in the eyes and told you that even with her very best intentions and those of the police, the prosecutors, the juries, and the judges, one small mistake became a colossal nightmare for an innocent man.

Larry Peterson sat here and told you that he was sent to prison – in a capital murder case – for a crime he did not commit – right here in this State.

Still, New Jersey can be very proud – we have done our best to do it better. Our lawyers don’t sleep through trials. We are not Texas, or Florida, or Alabama. We make mistakes, but we try.
But, for all the time and care we take, we are still human; we still risk error, arbitrariness, and unevenness.

The question before you, collectively, is what to do about it.

On this critical point, let me say this. No matter how much you might try to repair it, our death penalty system will continue to fail.

We must also be clear about what this study is about. This is not about the death penalty vs. letting killers go free.

The question before you is whether there is an alternative to the death penalty that is stronger, fairer, and more certain – an alternative that is more consistent with our evolving standards of decency and more compassionate to those who have lost a loved one.

The answer is yes.

The death penalty must be ended and it must be replaced by the punishment of life without the possibility of parole.

In addition, nearly all of the homicide survivors have told you that New Jersey should be doing more for them.

There is a gross lack of funding for organizations that care for homicide survivors. The non-profits that directly serve this community are having trouble keeping their doors open. Please take extra care to share this piece of the puzzle with the Legislature and the Governor. They need to hear what you’ve learned, and homicide survivors need you to tell them.

I urge you to write a detailed and comprehensive report on all that you’ve learned about the death penalty. I respectfully urge that you recommend that the Legislature and the Governor replace the death penalty with life without parole, with restitution to victims’ families.

You should also recommend providing funds in the budget that would go specifically to non-profit organizations that are serving the needs of homicide survivors.

New Jersey has the opportunity to be the first state in the modern era to end the death penalty. We can do so in a way that provides both a stronger and more certain punishment for offenders and addresses aggressively the needs of families touched by murder.

This is a unique and wonderful moment in our state’s history. I urge you to seize it.

Thank you.
Thank you Chairman Howard and the members of the Commission.

My name is Kathy Hiltner. I am the Executive Director for the Center for Traumatic Grief and Victim Services, which has provided comprehensive services to individuals and families that have lost a loved one to homicide since 1987. The Center does not have a position on the issue of the death penalty.

Since the death penalty process represents a longer connection to the criminal justice system for survivors of homicide than other sentences, such as life without parole, and since the Legislature asked you to consider the needs of victims when considering alternatives to the death penalty, it is my hope that I can help you understand the long-term effects that plague co-victims of homicide. Both the loss of their loved one to homicide and the resulting forced exposure to the criminal justice system is traumatic for survivors.
Many of us have experienced the loss of a loved one through life’s natural process. We accept their death, we bury our loved one and we move on with every day living. We have our loved one’s memories that we hold very dear in our hearts and minds. Let us take a journey with a family that has experienced the death of a loved one by murder.

The trauma that they experience begins when the police officer arrives at their door to inform them that someone has murdered their loved one. They immediately enter a state of total disbelief. They cannot comprehend that this is truly happening to them. Many describe feeling as though they are standing outside of their body watching everything happening around them and thinking that they will wake up and it will be nothing more than a dream. They realize that it is actually the beginning of their worst nightmare.

They struggle notifying family and friends of the death. They make the funeral arrangements and bury their loved one. Besides the loss of their loved one, co-victims are forced to immediately cope with the restructuring of family roles. If the victim was the financial provider, they must learn to cope with the loss of income and support. They can experience a wide range of emotional responses that continually resurface.
They also find themselves becoming part of the criminal justice system. This was certainly not something that they chose to be a part of. Many families find themselves reading about what happened to their loved one in the local newspaper or watching the details unfold on the television. The media becomes one of their many sources along with the criminal justice system, and each causes secondary injuries to the many co-victims left behind. The process is harmful and it is totally out of their control.

Many become so focused on the criminal justice system and the trial that they do not even address their own or their family’s needs until the trial is over. It is not uncommon for co-victims to fall apart emotionally and physically after the trial is over and “justice” is served. While many believe that the end of the trial brings “closure,” in reality there is no closure. There is only the end of the trial. Their grief continues. For many, the future brings appeals and retrials and re-traumatization. For co-victims in capital trials, experience tells us this is guaranteed for them. When a sentence is reduced or reversed, the survivor is again re-traumatized.

The criminal justice system focuses on the rights of the accused, not the survivor. As a result, survivors feel left out of the process and re-victimized.
by the focus on the accused. They feel helpless as the entire experience is out of their control. The system tries to assist survivors through those who work in the county prosecutor’s victim witness offices. These victim witnesses provide system support for survivors of homicide while they are going through the trial. They are there to inform them of what will take place in the courtroom and to try to prepare them for the explicit details of their loved one’s death that will be exposed during the trial.

Families impacted by a death penalty case experience an even more complex system that traps them for a longer period of time. As you have already heard from people directly impacted by a capital case, families are told that the death penalty will mean justice for their loved one but it falls far short. In reality, even when a death sentence is imposed by the jury, it means years of appeals and reversals and continued exposure to the way in which their loved one died. It means a continued forced connection to both the criminal justice system and the offender. This repetition of the trauma experienced through the criminal justice system is harmful. The death penalty has not been carried out in New Jersey in over three decades. Some here have called it a cruel hoax; others a false promise. Call it what you like but please know that survivors feel betrayed by the capital punishment system and the upheaval it brings to their lives.
Fortunately throughout the 21 counties in New Jersey, there are state-mandated services available through agencies for all victims of sexual assault and domestic violence. Regrettably, similar services do not exist for survivors of homicide. Our non-profit agency provides services specific to these survivors, such as specialized individual, family and group counseling and other essential services. But, because of financial constraints, we cannot meet the need. We have had survivors drive up to two hours to be able to participate in our program. Recently during a visit with a legislator that lost a loved one to homicide, we were asked, “Where were you when I lost a loved one a few years ago?” Sadly, due to financial restraints, we are not reaching many who need us. We are simply unable to expand our services to reach this underserved population throughout all of New Jersey.

There are approximately 400 homicides every year in New Jersey, leaving an average of 7-10 family members behind to endure its aftermath, yet our state lacks consistent long-term services for survivors. Indeed, currently, there is no mandated funding specific to survivors of homicide.

I hope my testimony has helped you to understand the real needs of homicide survivors. They do not need false promises. They need long-term
counseling and support and healing. It is my hope that you will take what you have learned here about homicide survivors and the need for long-term services and share it with the Legislature. There seems to be a resounding consensus that we need to do more for the survivors of homicide. Help us to help them reach a “new normal.” Thank you.
My name is Janet Poinsett. I have a masters degree in social work from Rutgers University, School of Social Work. I am a Licensed Clinical Social Worker. I am a therapist at the Center for Traumatic Grief Services.

I have been a therapist there for three years. I had worked in the Division of Youth and Family Services for 27 years prior to my involvement with the Grief Center. I have worked in groups and with individuals in both settings. In the Grief Center I have worked with those who have lost loved ones to homicide as well as people exposed to trauma. For that reason I have always sought training in grief, loss and trauma. I am trained in Clinical Hypnosis and in Eye Movement Desensitization Reprocessing/EMDR. These techniques can often prove helpful by processing and/or reducing trauma. Trauma does not go away.

As a therapist I am speaking today regarding the abolishment of the death penalty because it has not worked. You know the statistics.
My focus is on the families and loved ones of the victim. Although trauma can be processed to lessen the effects of PTS (Post Traumatic Stress) or PTSD (Post Traumatic Stress Disorder) it does not go away. We at the Center speak of the “new normal”. Survivors are never the same but they can move on in their lives with the memories that they choose to hold near to them. It is an individual path and an individualized process.

The judicial system is in and of itself by nature a system of waiting and review. The system often impedes healing and/or re-injures. A simple thing like picking up a newspaper can become a re-injury possibly causing a panic attack or worse because an article highlights an upcoming trial or some reminder of the original trauma. The added layers of legal process in a death penalty case provide little time for relief for loved ones.

The following excerpts relate to memory. They are from “Memory, Trauma Treatment and the Law” by Brown, Schefflin and
Hammond. They explore memory and trauma treatment based on clinical experiments and neurological evidence. There is much combined evidence that leads many experts to believe that traumatic memory is stored differently in the brain than conscious narrative memories. Traumatic memories are described as more “indelible” and “burned in” visually and behaviorally. Trauma memories are considered to be more likely to be associated with fear conditioning that produces “flashbacks” and emotional, as well as automatic responses triggered by stimuli reminiscent of the original trauma. There are neurobiological finds far more complicated and far more detailed but they do establish that emotional and traumatic memory is undoubtedly very different from unstressed memory for non-traumatic material.

Also, experimental data strongly suggest that traumatic experiences are processed differently from normal experience. There is evidence that the processing for traumatic memories are amygdala-based rather than hippocampally-based. Both are memory
sites in the brain but amygdala is the primitive part of our brain that signals danger. If you are protecting yourself from a dinosaur or an attacker the signals released are helpful. They include the adrenaline rush, the increased heartbeat, increased rate of breathing, heightened sensory sensitivity, etc. But if you are thrown into these symptoms by the sound of a siren or a picture in the newspaper, it is terrifying and frustrating in your daily life.

Another difference is that trauma subjects, in one study cited, were found to have significant left hemisphere dominant asymmetry during neutral memories, which markedly shifted to the right hemisphere when recalling an unpleasant event. This seems to represent memories that are processed and not “charged” versus memories that are free-floating, not processed and remain as vivid and as acutely painful as when they first occurred.

Many trauma patients were reported as describing that a traumatic memory is triggered by a stimulus that either directly or indirectly reminds them of the trauma event.
Briefly, I will relate a case I worked with. Although it did not entail the death penalty it may provide some insight into what such a trauma re-injury can entail. A young woman in her early twenties had lost her father at age eleven as a result of a homicide. Suddenly at twenty-two she found herself barely able to get out of bed, on a daily basis. She could not work. Her fears began to incapacitate her so that she could barely maintain her relationship with her partner despite his patience and support. She exhibited symptoms of obsessive compulsive disorder. When she was awake and around the house she would check the locks every few minutes. She found herself literally hiding under the covers much of the time due to severe anxiety. Through therapy we connected the onset of the symptom with the notification of a parole review for the person convicted of murdering her father. She had learned of this through a family member but was not expected to participate in the hearing. We connected her with a psychiatrist who concurred with the diagnosis and provided medication for the OCD and medication
monitoring. Her situation stabilized and she was able to resume her
“new normal” life. Just as a note, she did provide a written
statement regarding the loss of her father to the board which
seemed therapeutic to her.

The last part of my statement is that even when individuals are
traumatized and they are symptomatic they quite often deny it.
They wonder, “what is wrong with me, “why can’t I get over this”
and other statements which minimize the impact of the trauma.
This is why I feel that it is important to speak out regarding
trauma. There is a tendency for the loved ones and even clinicians,
who not trained in trauma, to expect survivors to” move
on” and/or “get back to normal”, to “get closure”. The trauma is

go
often disguised as :

“lack of focus”, “lack of energy,” and/or “just not being able to get
it together”. Reports range are from full blown panic attacks,
startle response, or what is termed hyper-vigilance; to anger on a
scale from mild to rage. There are many faces to the trauma and all
of them hurt. Re-injury is probably even less accepted, recognized
and/or understood. I would like to see the abolishment of the
death penalty and the acceptance of a life sentence with no parole.
I see it as a tool to accomplish legal means and also to allow
survivors of loved ones to move forward to their "new normal"
without the re-injury that is presently part of the system.
Thank you Chairman Howard and the Members of the Commission,

My name is David Shepard and I live in Newark. In 1984 I was wrongfully convicted of rape and served 11 years in prison before becoming the first person exonerated in New Jersey based on DNA evidence. That was in 1995.

I am happy to answer any questions you may have about my case but the purpose of my testimony today is to address a subject that has been raised by others. What is life in prison really like?

Anyone who would say that life in prison is not hard, including the professor who testified at the last hearing, has never spent real time in prison. I’ll never understand how the country club myth got started. My God, it is nothing like that – nothing at all. Visiting a prison is very different from living the experience. I know. I lived it right here in New Jersey. In New Jersey State Prison and in the Youth Correctional Center in Yardville.

Prison life is hell. The worst part is the isolation – no friends, no support, no family.

Prisoners need to always watch their back. It is a dangerous place. You live in constant fear. Simply changing the channel on a TV set could put you at risk. You never know when someone will go after you.

In prison, you do not have a name; just a number. Your identity is literally taken from you.

So is your dignity.
It is the loneliest place in the world.

You are not respected. You must strip before visits and strip every time you go anywhere.

There is no privacy in prison. None. Absolutely none.

The only recognizable food is lunch meat. The food is the same everyday. I would bet they still serve corned beef on Mondays. No change, just the same bad and barely edible food.

You get two hours a day out of your cell. Work detail may give you more time. Weekends are toughest for those who work as you cannot leave for your job, which breaks up the boredom a little. The cells are 4x6 and you are in them for most of your life.

I would laugh about the people who say prison is a country club except that it is such a dangerous lie. Our young people should fear prison and we should not protect them from the truth or lie to them out of anger that prisoners get any rec time or can watch television. Prison is hell. Believe me. We need to tell the kids that.

Those who are in for long terms generally consider it a lifetime. I have only imagined how much worse it would be knowing you will NEVER get out, as with life without parole.

That Professor said inmates get to play volleyball and he suggested it isn’t that bad. Think about it, really think about it. Think about what it must be like to know that you will NEVER hold a baby again or see the ocean again or smell a flower again or eat at a restaurant again. Think about all things we take for granted – our freedom – and think about
what it would be like to know you will NEVER enjoy those freedoms again. None of them.

I do not believe there could be a worse punishment and I don’t care what prison you are talking about. Even when inmates are seriously sick and hospitalized, they remain shackled. They remain in custody. They are not free. They do not have their dignity.

Dental care takes months and you are expected to take Tylenol and tough it out. Medical care is spotty and the wait for a doctor can be 2 weeks. Many people in our prisons are seriously mentally ill. They have a different set of problems. Many of those imprisoned develop mental illness, such as anxiety attacks, as a result of incarceration. We should try to improve services for the seriously mentally ill. Many of us who have been freed because of our innocence deal with our own anxieties. We should take care of the exonerees too.

But, today, I am simply here to tell you the truth about prison life in New Jersey. This is hard for me and very painful but I felt I had to do it to help end the death penalty. That is the least I can do for the other innocent men and women out there. Thank you.
Statement of Bryan Miller  
NJ Commission on the Death Penalty Hearing  
Trenton; October 25, 2006

Thank you Chairman Howard and the distinguished members of the Commission.

My name is Bryan Miller. I am a resident of Haddonfield, New Jersey. You may know me from my tenure as Executive Director of Ceasefire NJ, our state’s leading organization devoted to reducing gun violence.

Two days before Thanksgiving 1994, my only brother, Mike, an FBI Special Agent, and two of his colleagues were murdered in the line of duty. Since that time and in Mike’s honor, I have worked to expose the dangers of gun violence and to gain measures to take illegal guns out of the hands of people who shouldn’t have them.

I believe that murderers should be punished swiftly and harshly. They should be held accountable for their actions. I believe our laws should protect our citizens and that we honor the victims with strong and just public policies, just as I seek to honor Mike daily with my work. The death penalty has proven neither strong nor just.

It is appropriate that the State Legislature asked you to keep the needs of homicide survivors in mind as you consider potential alternatives to the death penalty. I believe that the death penalty has been a sore that doesn’t heal for those who have been through the capital process. As you discuss alternatives you should consider this reality, which has been exposed through compelling and painful testimony by witnesses who know from direct experience that the promised benefits of the death penalty in New Jersey are just illusions. We need to stop making false promises that somehow the death penalty is going to make things better because the reality is that the death penalty is making things worse.

And, we need to stop blithely accepting the illusion that execution will somehow provide ‘closure’ to victims as a reason to maintain execution as punishment. There is no closure to survivors of murder. How can anyone expect the death of another to help them live with the death of their own loved one? We murder survivors will always live with the shock and grief bestowed on us. It’s unavoidable.

Instead of focusing on illusions, let us focus on what is important. Homicide survivors need to know they matter and that we care. This Commission should recommend that the death penalty be replaced with a strong, measured, and certain response – life without parole. You should also recommend additional funding for services for murder victims’ families and look to victims’ advocates who are doing that incredibly important work to guide you.

Philosophical positions on capital punishment differ among people of good will and good intentions. They also evolve. In 1982 many more of us would have supported the death penalty under the mistaken belief that it deters crime more than life sentences or under the assumption that it is somehow needed to right a wrong. It was, and to a degree still is, common to hear people say that we need the death penalty for victims’ families. We now realize that the extreme of death is unnecessary in light of strong alternatives and that these alternatives are better in many ways for surviving families. We also know that many homicide survivors oppose the death penalty, and for a variety of reasons. In short, we have learned and, I hope, we have grown, in our understanding of how this complex and serious public policy really impacts us.

I wanted to be here today because I feel strongly that the death penalty is a bad public policy and because I know that, like many other issues, the death penalty can fall prey to politics.
However, as someone who works in the public policy arena, I know a moment when I see one. This is a moment for New Jersey. The Legislature has signaled its readiness to address this issue and take action. They are looking to this Commission for guidance. You should help them to understand the many ways that the death penalty fails us. You should help them to understand that we can do better for the families of murder victims and that we should not forget them after the headlines die down.

No more illusions. Too many families need our help.

Thank you.
To: Members of the New Jersey Death Penalty Study Commission  
Date: October 25, 2006

Good afternoon. My name is Kathryn Schwartz; I am a Diaconal Minister in the Lutheran Church, ELCA, and I am the Chaplain of the Morris County Correctional Facility in Morristown, NJ. I am here representing myself as well as Bishop Roy Riley, Bishop of the New Jersey Synod, Evangelical Lutheran Church in America. I will first read his letter:

[Bishop Roy Riley’s letter]

I concur with the bishop’s letter and I now add my own observations and questions from my perspective as both a Christian and someone who ministers with incarcerated people. I have been a Chaplain for over three years and have worked with approximately a dozen men who were incarcerated for homicide. Two of them have been indicted with the death penalty and are awaiting trial.

My main question is this: Whom does the death penalty serve? Public policy should serve someone. At times there are policies that serve one group better than another, but if it is to be maintained, New Jersey’s death penalty should serve some group’s interests.

Does the death penalty serve the victims of crime? You have heard eloquent testimony from many families of victims of homicide who say “no.” “Closure” is, indeed, the “C” word because how can there be real closure when there is such pain? You have heard consistent criticism of the system as it currently stands. Some people lift up the death penalty, promising that it will bring about some degree of peace, settling the score somehow, but I wonder if that is the kind of peace that lasts. Some victims’ families say that years later they want or need to talk with the person who killed their loved one. If their offenders are executed, the answers to their questions and potential apologies are also dead.

Does the death penalty serve notice to the offender? I have learned that one cannot generalize about people who commit homicide; they are diverse with regard to age, race, economic status and motive for their crime and therefore, like the victims of crime, they cannot be lumped into one basket. And while the circumstances of their homicides vary tremendously, my experience with men who have killed people has led me to completely discount the
their generous response after tremendous tragedy. I believe that they understand the source of true healing.

My faith tradition and scripture teach me to be cautious in my judgment of others. I am not capable of judging whether or not another human being should live or die. I cannot, therefore, ever support asking someone else to make that decision. As Bishop Riley says, such judgments are reserved for the Creator alone.

I leave you with two quotes from the photographic essays of Howard Zehr: Robert Hagood who is serving a life sentence in Pennsylvania says, “If God gave me one wish, it would be that I would be accepted on the basis of my sincerity of repentance. And that I would have the wisdom to live my life every day without ever doing anything harmful to another living thing.” And Bud Welch, who lost his daughter in the Oklahoma City bombing in 1995 asserts, “I knew that the death penalty wasn’t going to bring her back, and I realized that it was about revenge and hate. And the reason Julie and 167 others were dead was because of the very same thing: revenge and hate.”

Thank you for your time and for allowing me to testify today.

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1 Barbara Brown Taylor, Bread of Angels
2 Howard Zehr, Transcending: Reflections of Crime Victims and Doing Life: Reflections of Men and Women Serving Life Sentences
October 25, 2006

TO: Members of the New Jersey Death Penalty Study Commission

I am writing this letter in continued support of a moratorium on the use of the death penalty in New Jersey, in the hope that the day will come when this State and the United States will end this practice all together. I speak in behalf of the New Jersey Synod of the Evangelical Lutheran Church in America (ELCA), which has adopted a resolution calling for abolition of the death penalty, a resolution in accord with the position of the ELCA and, indeed, with the position of the Roman Catholic Church, virtually every mainline Protestant denomination, as well as leaders of the Jewish faith and the Islamic faith.

The reasons for our opposition are simple:

1. The risk (and fact) that innocent persons may be executed has been demonstrated, and there is no way to correct such an error once an execution has taken place.

2. Imposition of the death penalty falls disproportionately upon those who are least able to financially to defend themselves.

3. The death penalty is significantly more expensive than a life sentence without parole.

4. The death penalty does not provide the closure victims’ families are hoping for, nor does it deter future acts of violence.

In fact, I am convinced that the death penalty, because it is state-sanctioned violence, opens the door to permission for violence toward other human beings. Even where this penalty is reserved for the worst of the worst, it maintains the presumption that there are those who do not deserve to live, and that determination is a judgment call. I believe such a judgment is reserved for the Creator alone. I respectfully ask that you do whatever is necessary to end the use of the death penalty.

Very Sincerely,

E. Roy Riley, Bishop
New Jersey Synod, Evangelical Lutheran Church in America
To: Honorable Members of the New Jersey Death Penalty Study Commission

I submit these written materials in support and amplification of my personal presentation before the Commission today. I am attaching a resume of my capital-case experience as a lawyer who has been defending death-penalty cases for the past 23 years in the courts of this state and in the federal courts. As that resume reflects, I have tried 14 capital cases to a verdict, including six in the New Jersey Superior Court. I am also attaching a listing of federal capital crimes in support of the proposition that there is hardly a murder – whether it’s terrorism, gang-related, carjacking, murder of a law enforcement officer, murder of a witness or informant, murder with a firearm, drug-related murder – that cannot be addressed in the federal courts.

My core point, based on significant personal experience with the death penalty in New Jersey and elsewhere, is that it is not working and is not workable. While it is relatively rare for a murder prosecution to be overturned – either on direct state review or in the federal courts on habeas corpus review – it is not at all uncommon for a sentence of death to be overturned. The state and federal courts have developed – appropriately in my view – stringent standards for the performance of counsel and the overall trial of such cases.

My own experience, coupled with that of colleagues around the nation, also teaches me that the death penalty is unworkable on the level of achieving its stated aim of securing death verdicts and then executing only the “worst of the worst.”

Finally, I have also come to know, like, and respect many victims of capital crimes over the years. I do not speak for victims. For their own reasons, victims I have met, more often than not, want the clients I represent executed. To the extent, however, that our system of criminal justice holds out to victims a promise that capital punishment will address their concerns and needs, that does not, from my perspective, seem at all to have been the case.

Thank you for the opportunity to be heard on this important issue.

Respectfully yours,

David A. Ruhnke
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<td>resulting in death.</td>
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<td>of a member of Congress, an important executive official, or a</td>
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<td>Supreme Court Justice.</td>
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<td>already sentenced to life imprisonment.</td>
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<td>official or other person aiding in a Federal investigation;</td>
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<td>murder of a State correctional officer.</td>
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<td>18 U.S.C. 1503 — Murder of a court officer or juror.</td>
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<td>testimony by a witness, victim, or informant.</td>
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<td>18 U.S.C. 1513 — Retaliatory murder of a witness, victim, or</td>
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<td>informant.</td>
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<td>18 U.S.C. 1716 — Mailing of injurious articles with intent to</td>
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<td>kill or resulting in death.</td>
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<td>Assassination or kidnapping resulting in the death of the</td>
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<td>18 U.S.C. 1992 — Willful wrecking of a train resulting in</td>
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<td>death.</td>
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<td>18 U.S.C. 2332a — Murder by the use of a weapon of mass</td>
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<td>destruction.</td>
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<td>21 U.S.C. 848(e) — Murder related to a continuing criminal</td>
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<tr>
<td>enterprise or related murder of a Federal, State, or local</td>
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<td>law enforcement officer.</td>
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</table>
Resume of Death Penalty Experience – David A. Ruhnke
(Revised October 2006)

Education: 
B.A., English Literature, Dartmouth College, 1965
J.D. cum laude, Seton Hall University, 1975
Class rank -1/250

Work History: 
1965-1967: Management trainee
Prudential Ins. Co. of America
Newark, New Jersey

1967-1969: Peace Corps Volunteer
Republic of the Philippines

East-West Cultural Institute
Chiba City, Japan

Part-time construction worker

1972-1975: Summer employment in law school: project to revise
New Jersey child-abuse legislation (summer, 1973);
law clerk Office of the Federal Public Defender for
the District of New Jersey (summer, 1974)

1975-1976: Law clerk to Hon. Lawrence A. Carton, Jr., Presiding
Judge, Appellate Division New Jersey Superior Court

1976-1983: Assistant Federal Public Defender for the
District of New Jersey

1983-present: Partner, Ruhnke & Barrett, Montclair, New Jersey
Teaching: Formerly adjunct faculty member, Seton Hall University Law School, teaching primarily Criminal Law and Criminal Procedure (inactive at present).

Bar Admissions: State of New Jersey, 1975  
State of New York, 1984  
District of New Jersey, 1975  
Eastern District of New York, 1983  
Southern District of New York, 1983  
First Circuit, 2004  
Second Circuit, 1993  
Third Circuit, 1977  
Tenth Circuit, 1997  
United States Supreme Court, 1983

Memberships: New Jersey Bar Association; National Association of Criminal Defense Lawyers; Association of Criminal Defense Lawyers of New Jersey (Past President and chair of death-penalty committee); New Jersey State Bar Association, Criminal Law Section (former trustee); former member, Death Penalty Subcommittee, Federal Defender Advisory Committee, Administrative Office of the United States Courts (Defender Services Division).

FEDERAL DEATH-PENALTY CASES (trial level):¹


- *United States v. Kenneth McGriff* (E.D.N.Y. 2005). Court-appointed by Hon. Edward R. Korman, Chief Judge, E.D.N.Y. Defendant alleged to be a major drug-dealer and to have killed two individuals, including rap artist “E Money Bags.” Case is set in the context of the rap music industry and it is alleged that the defendant’s

¹The date shown is the year of entry into the case as retained or appointed counsel.
drug profits were laundered through a major rap label, “Murder, Inc.” Case authorized by Attorney General and is on interlocutory appeal to the Second Circuit.


- **United States v. Mario Hernandez** (D.P.R. 2004). Court-appointed by Hon. Juan M. Perez-Gimenez. Carjacking murder of young woman victim whose body has never been recovered. Allegations are that victim was sexually assaulted and tortured prior to death. Attorney General did not authorize for capital prosecution. Charges ultimately dismissed because of concerns defendant was innocent.


- *United States v. Freddy Abad* (S.D.N.Y. 2002). Court-appointed by Hon. George P. Daniels. Indictment alleges single murder, accompanied by torture and home invasion, of reputed drug dealer in unsuccessful effort to steal drugs and money. Death penalty was not sought after it was demonstrated the defendant was mentally retarded.


1994. Prison killing at U.S.P./Allenwood. Defendant charged with strangling cellmate. Defendant confessed in grisly detail, said he did not fear the death-penalty and that, given the opportunity, he would kill again. Was serving equivalent of life sentences from Oklahoma. In federal custody as "transfer" since Oklahoma could not keep him from running economic and other scams from Oklahoma State Prison. IQ of 138. Death-penalty authorized and death verdict returned 7/98. Client withdrew appeal in order to speed his execution. United States v. Hammer, 226 F.3d 229 (3d Cir. 2000). Client changed mind again and execution date of 11/15/00 was vacated. Petition for post-conviction relief was filed, which client then attempted to withdraw several times. A June 2004 execution date was also vacated by the Third Circuit. In December 2005, after extensive hearings, the district court vacated the sentence of death on the basis of a Brady violation.


- United States v. Christopher Green (D.N.J. 1995). Court-appointed by the Hon. Joseph H. Rodriguez, U.S.D.J., as co-counsel to Federal Public Defender. Case brought pursuant to Federal Death Penalty Act of 1994. On March 21, 1995, Christopher Green, a 29 year-old man with no criminal record, entered a small postal sub-station in Montclair, New Jersey and announced a robbery. After receiving approximately $5,000, he ordered the five people in the post office — two postal employees and three customers — to the ground and methodically shot each in the head with a 9mm pistol loaded with "Black Talon" bullets. Four of the individuals died instantly; the fifth survived made a full recovery. After several negotiating sessions, the United States Attorney dropped her request for the death penalty and, on June 8, 1995, Green entered a guilty plea to the indictment and was sentenced to a life sentence without parole on September 22, 1995.


• United States v. Dandeny Munoz-Mosquera (E.D.N.Y. 1993). Court-appointed by the Hon. Sterling Johnson. Drug “kingpin” case. Defendant alleged “assassin” for the Medillin Cocaine Cartel; co-defendant was the late Pablo Escobar, alleged head of the cartel and then a fugitive in the Republic of Colombia. The capital count charged mid-air bombing of a domestic Colombia airliner (Avianca Airlines) in which 110 people — including two American citizens — were killed. The United States Attorney in Brooklyn eventually declined to seek Justice Department authorization and the case went to trial as non-capital prosecution.


STATE DEATH-PENALTY CASES (trial level):


- **State v. Eddie Lee Oliver a/k/a Al Damany Kamau** (New Jersey Superior Court 1993). Designated counsel by Public Defender (with law partner, Jean D. Barrett). Defendant charged with June 3, 1993 murder of a Newark Police Officer as he waited to testify in the hallway outside a courtroom on the 11th floor of the Essex County Courthouse in Newark, New Jersey. In the ensuing escape attempt, a sheriff's officer was shot in the chest. Defense was insanity. Jury convicted after five days of deliberations but, after two days of penalty deliberations, returned a non-unanimous verdict rejecting death penalty.

- **State v. Anthony McDougald** (New Jersey Superior Court 1990). Designated counsel by Public Defender (with law partner, Jean D. Barrett). This was a double-murder by stabbing of the parents of the 13-year old girlfriend of 27-year old defendant. After the murder, he inserted baseball bat into the vagina of the mother with the comment that this was in retaliation for her having given birth to the 13-year-old. Aggravating factors were that the murders were outrageously and wantonly vile and that they were committed to avoid prosecution for another offense. (The statutory rape of the 13-year-old.) This case was a penalty-only re-trial after the New Jersey Supreme Court affirmed the murder convictions but vacated the death verdict. See **State v. McDougald**, 120 N.J. 523, 577 A.2d 419 (1990). On November 18, 1995, following six weeks of jury selection and a two-week trial, the jury returned a verdict for life.

- **State v. Bryan Coyle** (New Jersey Superior Court, 1991). Designated counsel by the Office of the Public Defender (with law partner, Jean D. Barrett). This was a shooting death of the husband of a woman with whom defendant was romantically involved. Aggravating factors were that defendant has a prior murder conviction and that the killing was outrageous and wantonly vile in that it was a killing committed purely for the pleasure of killing. First jury convicted and imposed death sentence. This was a re-trial following the New Jersey Supreme Court’s reversal of both the guilt- and penalty-phase verdicts. See **State v. Coyle**, 119 N.J. 194, 574 A.2d 951 (1990). After plea negotiations, prosecution withdrew aggravating factors and defendant plead guilty to murder and was sentenced to 30 years.

- **State v. Julius Boeglin** (New Jersey Superior Court 1990). Retained as counsel to handle pre-trial motions and jury-selection only (with law partner, Jean D. Barrett). Aggravating factors were murder-by-hire and avoiding detection for another offense. Allegations were defendant — the son of a millionaire industrialist — paid another
to kill victim for informing on defendant’s drug activities. Case went to trial with substituted counsel and jury returned verdict of non-capital murder.

- **State v. James Jerald Koedatich** (New Jersey Superior Court, 1990). Designated counsel by the Office of the Public Defender (with law partner, Jean D. Barrett). Case involved the kidnaping, sexual assault and stabbing murder of an 18-year old adopted Korean girl. Aggravating factors were the defendant’s two prior murder convictions; that murder was committed in a manner that was outrageous and wantonly vile; that murder was committed for the purpose of escaping detection for the other felonies; and that murder was committed in the course of certain other felonies. This was a penalty-phase only re-trial. Because of the massive publicity, venue was moved out of the county where the crime occurred to a rural adjacent county. Trial took place in the summer of 1990. Jury selection took approximately five weeks. There was one week of penalty-phase evidence. Jury was unable to agree unanimously on whether the death penalty should be imposed and, therefore, as required by New Jersey law, defendant was sentenced to life imprisonment.

- **State v. Eneida Berrios** (New Jersey Superior Court, 1983). Designated counsel by the Office of the Public Defender (with law partner, Jean D. Barrett). Case involved the arson-murder of a six-year old child motivated by an argument between two families in the City of Newark. Building was set on fire in the middle of the night. Child was trapped. Aggravating factors were that defendant hired the arsonist and that the murder was outrageously and wantonly vile. Case tried in 1986. Defendant found not guilty at conclusion of guilt phase.

**APPELLATE DEATH-PENALTY EXPERIENCE**

- **State of Delaware v. Thomas Capano**, 781 A.2d 556 (Del.Supreme Ct. 2001). Retained as appellate co-counsel to politically prominent attorney found guilty of murdering his girlfriend (appointments secretary to the Governor of Delaware) and disposing of her body at sea. Sentenced to death. Conviction and sentence of death affirmed by Delaware Supreme Court. *Certiorari* petition pending in United States Supreme Court raising *Apprendi* challenge to Delaware capital punishment scheme. Outcome of case will be controlled by analysis of the United States Supreme Court’s decision in *Ring v. Arizona*. In state post-conviction at the trial level, relief granted on *Ring* error.

- **State v. John Martini, Sr.**, 144 N.J. 603, 678 A.2d 164 (1996). Martini was New Jersey’s first potential “volunteer” for execution. Served as counsel to *amicus curiae*, the Association of Criminal Defense Lawyers of New Jersey, taking the position that an otherwise competent defendant may not waive a state court post-conviction challenge to a death sentence where the attorneys handling the case are of
the view that there are meritorious issues to be presented. Court accepted that argument. Societal interest in reliability of death sentences outweighs individual defendant’s wish to forgo post-conviction review. *State v. Martini*, 144 N.J. 603, 678 A.2d 164 (1996).

- *State v. Marshall*, 130 N.J. 109, 613 A.2d 1059 (1992). *Marshall* was the first death sentence affirmed by the New Jersey Supreme Court. See, 123 N.J. 1, 586 A.2d 85 (1991). (Defendant was convicted of hiring others to murder his wife for insurance proceeds and was subject of book and made-for-TV movie entitled “Blind Faith.”) In this aspect of *Marshall*, served as counsel to amicus curiae, the American Civil Liberties Union of New Jersey, concerning the methodology to be employed by the New Jersey Supreme Court in carrying out statutorily-mandated proportionality review.

- *State v. Koedatch*, 112 N.J. 225, 548 A.2d 939 (1988). Defendant originally tried and sentenced to death in 1984. Firm became involved in the case on direct appeal to the New Jersey Supreme Court. Above-cited opinion affirmed defendant’s underlying convictions by 4-3 vote but unanimously vacated the death penalty. See also, *State v. Koedatch*, 118 N.J. 513, 572 A.2d 622 (1990). State appealed trial court’s decision to grant motion striking two of four aggravating factors on ground that previous penalty-phase jury had not been able to reach a unanimous finding that those aggravating factors existed. The New Jersey Supreme Court, in another 4-3 opinion, reversed the trial court and re-instated the dismissed aggravating factors which were then presented to the jury when the penalty-phase was re-tried in the summer of 1990. Jury returned life verdict.

**OTHER RELEVANT EXPERIENCE**


- May 2006. Faculty member, presenter and small group leader at the Capital Training Program of the Center for American and International Law in Plano, Texas.

- November 2005. Faculty member and presenter at annual federal death penalty strategy session, Pittsburgh, Pennsylvania.

- July 2005. Faculty Member, Death Penalty College, Santa Clara University School
of Law, July 2005.


- April, 2004. Faculty Member, Capital Trial Advocacy Program, Plano, Texas. Small group leader and plenary presentations on mitigating evidence and future danger.


- February 2004. Presentation at the mid-winter meeting of the Association of Criminal Defense Lawyers at San Antonio., Texas, “Putting a Human Face on the Despised.”


- March 2003. Faculty member at Federal Strategy Session and Life in the Balance programs, Austin, Texas.

- February 2003. Faculty Member, Virginia Death Penalty College, Richmond, Virginia.


- August 2002. Faculty member, National Death Penalty College, Santa Clara University Law School, Santa Clara, CA


2002 Federal Capital Defense Strategy Session, Kansas City, MO, March 8, 9, 2002. Presentations: Discussion Leader, Caucus of First, Second and Third Circuits; “Political and Terrorist Prosecutions,” (with Jerry Zerkin and David Bruck); “Mitigation: Federal Jury Findings” (with Margaret O’Donnell and William Brennan); “Ethical Considerations in Federal Capital Cases” (with Carol Kolinchak and David Lewis); “Litigating Racial, Ethnic and Geographic Diversity” (with Sam Gross and Tim Sullivan); “Mitigation that Opens the Door” (with Jerry Zerkin, David Bruck and Mark Cunningham).

Faculty Member, South Carolina Bar Association’s 17th Annual Update on the Criminal Law, Charleston, South Carolina January 2002, Panel, “The Criminal Law in the Aftermath of September 11.”

Faculty Member, Capital Trial Advocacy Program, Austin Texas, January 2002. Small group leader and plenary presentation, “Thinking About, Discovering and Presenting Mitigating Evidence”

Faculty member, National Death Penalty College, Santa Clara University Law School, Santa Clara, CA, August 2001.


Faculty Member, Clarence Darrow Darrow Death Penalty College, University of Michigan Law School, Ann Arbor, MI, May 2000


Faculty member, National Death Penalty College, Santa Clara University Law School, Santa Clara, CA, August 1999.

• Life in the Balance, Atlanta, GA, May 1999 (National Legal Aid and Defenders Association), faculty member. Presentation at special federal death-penalty seminar and in general sessions on "What to do When a Client Volunteers for Execution?" and "Opening Address to the Jury at a Penalty Phase."

• American Academy of Forensic Psychology, Philadelphia, PA, April 1998, co-presenter, with Alan Goldstein, Ph.D., of day-long presentation: "The role of the Forensic Psychologists in a Death-Penalty Case."

• American Academy of Forensic Psychology, Palm Springs, CA, January 1998, co-presenter, with Alan Goldstein, Ph.D., of day-long presentation: "The role of the Forensic Psychologists in a Death-Penalty Case."

• American Academy of Forensic Psychology, New Orleans, LA, January 1997, co-presenter, with Alan Goldstein, Ph.D. and Jean D. Barrett, Esquire, of day-long presentation: "The role of the Forensic Psychologists in a Death-Penalty Case."

• Life in the Balance, Dallas, TX, March 1997 (National Legal Aid and Defender Association), faculty member. Presentations on "Cross-examining the Government’s Expert;" "Working with Expert Witnesses;" "Brainstorming the Case;" and "Direct Examination of Penalty-Phase Witnesses."


• Presentation, “Opening Arguments in a Death Penalty Case,” Life in the Balance (National Legal Aid and Defender Association), Austin, TX, March 1994.


• Keynote speaker and panel member, “Saving Client’s Lives in the 90’s.” Day-long seminar presented by the Association of Criminal Defense Attorneys of New Jersey.
My name is Clare Laura Hogenauer.

Thank you for allowing me to speak with you.

I am a lawyer from New York City, but I am here in neither capacity. I am here solely as a human being who has despised the death penalty ever since I understood the concept.

I am also here despite years of pain, fever, exhaustion, sleep disruption from an incurable bone marrow cancer.

I have described myself as having a compassionate connection with those on death row. I am on "death row". They both take years until near certain death; average survival for my cancer is five years: I have had it eight. The average survival in Virginia on death row is a bit more than 6 years.

The difference is that it is a higher being not human beings who are going to determine when I die, and that is the way it should be for all of us.

I first spoke against the death penalty, probably earlier than any of those who have spoken before you. In 1962, in high school in the Bronx, I prepared a paper against the death penalty, in anticipation of the execution about to occur in New York. It was probably the last one in the northeast in 43 years until Michael Ross' in Connecticut last year in May, which I attended.

I presented my paper to the class and I used a theatrical device to convey the message, mimicking the electric chair. I have updated that. This is intended to represent lethal injection which takes about ten minutes, the time I have to speak.

Please envision while I speak that someone is being executed in that time. Having attended five executions this past year (in Connecticut, California, Texas and North Carolina), I can tell you the emotion is among the most intense possible in life. To know that behind those walls, yards away, a human being is being slaughtered by another human being, with the permission and request of the state, is simply overwhelming.

In fact, hours ago in Ohio, a man was executed in this manner. And in Florida at 6PM, a man is being executed by lethal injection, so please think of him as I speak.

Attempts are being made throughout the country to make it more humane by changing the drugs or the method of lethal injection. HUMANE EXECUTION IS AN OXYMORON! The state is taking the man's life!

My earliest memory of the death penalty dates back to 1953. My seventh birthday was going to be June 15. My highly educated parents had several newspapers every day; we also watched our black and white television. Another six year old was going to have an extraordinary day that week that he would remember far longer than I would remember my seventh birthday. Robert was going to have his parents, Ethel and Julius Rosenberg, executed in the electric chair in Sing Sing, just a few miles north of our home in the west Bronx.

A half century later, in 2005, I was testifying in the Massachusetts death penalty hearings. When I finished my testimony in tears, having just attended Michael Ross' execution in Connecticut, I leaned forward and gave a kiss and a hug to Robert now Meeropole, not Rosenberg, the son of the Rosenbergs, also active in anti-death penalty work.

I had graduated Vassar in 1967 and became a lawyer, practicing criminal defense law for most of my 25 year career. I co-counseled homicides, but we did not have the death penalty. It would have been irrelevant in 7 of the 9 since we got acquittals. One case in particular causes me to say that the difference between self-defense and murder is the thickness of a human hair in some cases.
In 1975, I was held up at knifepoint and nearly murdered in my apartment building entrance on 74th St. and Central Park West, where I still live. I went to the precinct and went through a few hundred photos of black males who had been convicted of robbery. Was the photo array prejudiced? I did not see any Union Theological Seminary students, social workers, elementary school teachers, doctors, just black males previously convicted of robbery. So, of course, he might be one of them. I picked one out, saying I was 95% sure he was the man who had committed the crime. Since I was only 95%, not certain, they would not arrest him. I told them I would never be 100% certain from a photo unless it was of my mother and I had taken the photo! Some of my Fordham Law classmates, coincidentally around this time, had just "seen me" in a photo on the front page of a New York newspaper, a rather large photo. The problem was: it was a man, not I!

The detective told me they would bring me in on a lineup if he was ever arrested again. I never heard from them. I was so sure that I wrote down his name and address from the back of the photo. I memorized the name, Ronald Timmons, but never went to his address, of course. But 15 years later, in the Law Journal, People v. Ronald Timmons, a triple murder in the Bronx. I went up to the courtroom and watched him and his co-defendant enter the courtroom. I knew who was who, although this had happened 15 years ago. He was sentenced to life in prison. My life was full with law practice and caring for my mother 24/7 until her death in 2002.

I finally had the time after I retired from law because of my health to go up to Dannemora to forgive him. We had an extraordinary visit for two hours. To make a longer story short, which could probably make a movie, he convinced me he could not have committed the crime; he was in Coxsackie youth facility at the time. I confirmed this later with the institution; they had his records.

My recent death penalty work recommenced with passion when I attended the play Exonerated in Greenwich Village. I highly recommend it. The real exonerates were on stage the night I went. Sunny Jacobs spoke about her husband's execution in Florida in a botched execution where flames shot out of his head.

I began to attend death penalty trials, including the LaValle appeal in Albany; a mafia case in Brooklyn; a federal death penalty case in Brooklyn. I knew it would be years before we came close to an actual execution in New York so I began to get involved in Michael Ross' case in Connecticut. I corresponded with him, lobbied the governor, spoke with his lawyers, testified at the Connecticut hearings as I had in New York and would in MA. What Michael Ross did to eight young women was, without question, savage, and I put my hand on the floor to demonstrate what savage is. Many horrific murders are committed in a rage or in a moment of hate or revenge. Some are planned. However, none are committed with the steady, incessant, calculated, cold planning of the death penalty. That's barbaric, on the ground with savage. Please keep New Jersey in the civilized world up there and eliminate the death penalty.

I have spoken against the death penalty to thousands of schoolchildren throughout the country.

I attended a horrific murder trial in Goshen, New York recently involving the murder of the chief law clerk to the chief judge of the appellate division in Albany. He was convicted and is about to be sentenced. I am going to recommend that the jail open an animal shelter so that he can put his six years of commendable veterinary work to good use. A speaker in Connecticut who had worked in corrections said that we should treat prisoners with love and compassion and bring out the best from them. That is my recommendation as an alternative to the death penalty. Everybody wins.

Please grant my dying wish and end the death penalty in New Jersey.

Clare Laura Hogenauer. 16 West 74th St., PH: NY. NY 10023: (917)595-9357
October 16, 2006

Testimony by Joseph Azzolina (Senator/Assemblyman, Ret.) on the New Jersey Death Penalty Study Commission, 1 p.m. Wednesday, October 25, 2006, Public Hearing, Committee Room 4 First Floor, State House Annex, Trenton, NJ.

My position on the Death Penalty has been consistent during my quarter-century in the State Senate and Assembly, beginning in 1966.

I was the prime sponsor of the Death Penalty bill in the early 1970s, which was ultimately blocked by then Governor William Cahill.

My position is humanly reasonable and rational:

If you can prove without a doubt that a person committed murder, if the facts are perfectly clear and all correct, and due process is fully completed in the judicial system, then the Death Penalty should be applied.

The Death Penalty is a deterrent for such hideous crimes against innocent victims and society itself.

There are way too many murders and killings in New Jersey, especially those involving debts by the killer, his family or by a business partner.

Too many hostile individuals are literally getting away with murder. It costs taxpayers multi-million-dollars by allowing cold-blooded murderers to spend the rest of their lives in a state or federal prison. That is irrational and a terrible insult to those who have been murdered and their families.

I am unable to attend the Public Hearing because of an appointment with my foot doctor in Baltimore, Maryland.

[Signature]

116a
THE NINE ON DEATH ROW

MARKO BEY

Cheryl Alston’s battered body was found by a jogger on April 2, 1983, in Ocean Grove, a section of Neptune Township, New Jersey. The nineteen-year-old's naked body had been found in a vacant lot across from the beach, along with a "two-by-four," containing blood and hair later determined to match those of the victim. Alston had been strangled with her own bra, and suffered extensive trauma to her face. Her skull was fractured in several places causing cerebral hemorrhages. There were lacerations of her liver, and bleeding in her abdominal cavity.

Marko Bey was charged with, and convicted of her murder. He had previously been incarcerated, and was paroled only two weeks before Alston’s murder. Bey received the death sentence, but that sentence was reversed, because it was discovered he had been a juvenile at the time of the murder, and under New Jersey law, was not eligible for the death penalty.

Marko Bey wasn’t so lucky with his second murder.

Three weeks after Cheryl Alston’s murder, Carol Peniston was accosted by Marko Bey in a robbery attempt. Interrupted by a passer-by, Bey took Ms. Peniston to an abandoned shack, where he ordered her to remove her clothes. He took her money, jewelry, and car keys. Bey then sexually assaulted her, and, when he thought she was looking at him, Bey decided to eliminate her as a witness. He beat her about the face, fracturing the dental plate in her lower gum. He broke four of her ribs, caused internal bleeding, and then, using her own scarf, strangled her to death. He left the shack, took Ms. Peniston’s car and abandoned it in Newark.

Marko Bey was convicted of her murder, given the death penalty by a jury, and remains on death row to this day.
AMBROSE HARRIS

On December 17, 1992, Kristin Huggins, a twenty-two year old graphic artist, left her parents' home in Bucks County, Pennsylvania, to paint a mural at the Trenton Club in downtown Trenton. That same morning, Ambrose Harris determined that he would commit a holdup, and enlisted one Gloria Dunn to assist him. Just out of prison after serving 13 years, Harris spotted Kristin Huggins drive her red Toyota into the parking lot of the Trenton Club, and announced "I'm going to get that bitch." He accosted Ms. Huggins, commandeered her car, and drove off after his accomplice Gloria Dunn, joined them in the car.

Harris drove to a deserted area under a bridge near Route One and Perry Street, where he forced Kristin Huggins into the trunk. He then drove the car around, eventually returning to the area under the bridge. There, he took Kristin out of the trunk and raped her. He then put her back in the trunk, and shot her in the back of the head. He hid the body under a mattress in the deserted area. Harris then left to get a shovel to bury her body. When he returned, he shot her again, this time in the face, to be sure she was dead. He then dug a shallow grave in which he and his accomplice buried Kristin Huggins.

The killing took place Dec. 17, 1992, and the victim's body wasn't found until Feb. 18, 1993. Gloria Dunn -- apparently hoping to collect the posted $25,000 reward -- contacted the police months after the murder, claiming to be a psychic who could lead them to the missing young woman. Her dubious story quickly unravelled, and she confessed to her role in the kidnapping and slaying of Huggins, after leading police to her badly decomposed body.

By the time he was tried, convicted and given the death sentence for her murder, Harris was already serving a life term in prison, required to spend 30 years in jail without parole as a persistent offender for an unrelated 1993 armed robbery conviction.

According to news accounts, when Harris was sentenced in 1996, he was asked if he had anything to say to his victim's parents, who were in the courtroom. Harris turned and suggested that Huggins' parents apologize to him. His outburst caused the judge to remove him from the courtroom.

Ambrose Harris remains on death row, having added another murder to his resume. While on Death Row, Harris attacked and killed another Death Row inmate, Robert "Mudman" Simon, a beefy, scrappily long-haired and long-bearded 48-year-old outlaw biker, with several previous murder convictions. Simon was convicted in 1974 for killing his girlfriend after she refused to cooperate in her gang rape by Simon's friends and fellow Warlocks. While serving time for that heinous murder at Graterford Prison in Philadelphia, he knifed and killed another inmate in 1984. Like his future killer, Simon pleaded self-defense and was acquitted. Despite his two killings, Simon was paroled.

Only 11 weeks later, Simon murdered police Sgt. Ippolito (Lee) Gonzalez in Gloucester County, New Jersey. This third murder earned him the death penalty.
SEAN PADRAIC KENNEY A.K.A. RICHARD FEASTER

On the night of October 6, 1993, Keith Donaghy was the only attendant working at the Family Texaco in Deptford Township. His body was found by patrons of the station that evening, lying on the floor of the little office in the station. A single gunshot wound to his head caused his death. The barrel of the gun had been placed up against his face, and the bullet entered the side of his mouth, blowing out his teeth, and destroying his brain before exiting through the back of his head.

Just before the murder, Richard Feaster had left a bar in a nearby town, armed with a sawed-off twenty-gauge shotgun. He and a companion had spoken about going to collect a debt, borrowed a car and eventually returned to the bar that night. Tragically, the investigation of Keith Donaghy’s murder did not immediately lead to Feaster.

On October 31, 1993, Ronald Pine, age 55, was working alone at an Amoco gas station also in Deptford. He was brutally stabbed more than forty times, and his throat slashed, resulting in his death. Eventually, Richard Feaster’s companions from the bar came forward with information about the killings, the shotgun used to execute Keith Donaghy was located, and Feaster was charged with both murders.

He was tried and sentenced to death for the murder of Keith Donaghy, and after the conviction, pled guilty to the murder of Richard Pine, for which he was sentenced to life in prison with a minimum thirty year term. Testimony at trial revealed that Feaster told a cellmate in jail that he “wanted to feel what it was like to kill.” He remains on death row, but has now changed his name to Sean Padraic Kenney.

NATHANIEL HARVEY

On June 17, 1985, the lifeless body of Irene Schnaps, a 37-year-old widow, was found in the blood-splashed bedroom of her garden apartment in Plainsboro, New Jersey. She had sustained severe head and facial wounds. There was evidence that someone had attempted to wipe the body clean. A pillowcase on the floor bore part of a bloody footprint. The autopsy revealed that Irene Schnaps had sustained fifteen blows to the head, the largest of which was six inches in length, likely made by a hammer or a tire iron. Some of the blows fractured her skull, causing direct injury to the brain. Her teeth were knocked out, her jaw was broken, and there were deep pressure marks on both sides of the neck.

At the time, Nathaniel Harvey was on parole after serving time for raping and violently beating a woman in Monroe Township, in Middlesex County in 1979. After the murder of Irene Schnaps, the police searched for her killer, while also investigating a series of burglaries and sexual assaults occurring in Middlesex County. In October, 1985, Harvey was arrested after he tried to kidnap a 13 year old girl from her West Windsor home. Evidence found in his car, DNA and statements made by Harvey led to his arrest for Irene Schnaps’ murder.

Nathaniel Harvey was convicted of her murder and was sentenced to death by a jury. He is presently on death row, while also serving time for another kidnapping, rape and robbery which occurred in Mercer County.
DAVID COOPER

On July 18, 1993, after church, Latasha Goodman and her family had Sunday dinner at the parish hall in Asbury Park, because they were too poor to have a good dinner. It was a warm summer afternoon. After dinner, the family visited with relatives. While the adults sat on the front porch, the children played in the fenced-in back yard. A man, stood in the shrubs and watched the children at play for a while. He then approached the children asking would one of them like a quarter? Six year old Latasha said she would go with the defendant. He lifted her over the fence and led her away by the hand. Her seven year old cousin was yelling "Don't go Tasha, you are going to get kidnapped". The cousin immediately ran around to the front porch and a search was instigated. The family called the police, and neighbors were asked to help find the child.

Several hours later the police found the body of the child under a porch of an abandoned building. The defendant had left her body naked from the chest down, one shoe off, in the rubble of the porch. Her vaginal area was exposed and covered in blood. There were no signs of life. Her killer had walked off after boarding up the entrance to the underside of the porch.

The defendant, David Cooper, was later identified after the police found a wallet in a gym bag at the scene. Physical evidence, as well as Cooper's confession, revealed that he raped the little girl both vaginally and anally, using a condom so that he would not leave any evidence in or on the body. Her autopsy indicated that she was manually strangled. DNA analysis further tied Cooper to the murder.

David Cooper was found guilty, and given the death penalty, by a jury in 1995. He remains on death row.

DONALD LOFTIN

Sofia Fetter was a 69-year-old chambermaid, working at Harrah's Casino Hotel in Atlantic City. On the evening of March 28, 1992, she was sent to dean Room 1134 in Harrah's Harbor Tower - - where she was murdered, execution-style, shot in the head at close range. Investigation was able to establish the presence of an unauthorized man in the Harbor Tower area, and video surveillance tracked his movements before and after the time of Sofia's murder. Ballistics testing of the bullets obtained from the hotel room identified the type of weapon used . . . a .380 caliber semi-automatic pistol. But there the trail ended.

During the pre-dawn hours of May 5, 1992, Gary Marsh was working alone at a Lawrence Township Exxon station. Gary was an honors graduate at Rider University. Looking forward to completing his aviation training, he took a part-time job at the Lawrence gas station. This was his fifth day on the job.

A co-worker arrived at six a.m. to start his shift, but saw no sign of Gary. He approached the office and saw Marsh's body, sprawled on the floor with his head in a large pool of blood. He was barely alive when the co-worker called for the police, and paramedics who arrived struggled to get him breathing. Although taken by Medivac
helicopter to a Camden hospital, he never regained consciousness and died that afternoon.

The autopsy determined that the cause of death was a gunshot to the head. The bullet entered over the left ear, penetrated his skull, passed directly through both hemispheres of his brain, and exited on the opposite side above the right temple. Both the bullet and its shell casing were recovered at the scene.

Four days later, Donald Loftin was arrested using Gary Marsh's credit card to buy a computer. Subsequent searches of his home and car revealed the murder weapon, a .380 semi-automatic weapon, concealed under the dashboard. Both the bullet that killed Gary Marsh, and the bullet that killed Sofia Fetter, were identified as coming from the gun belonging to Loftin.

Donald Loftin was tried for the murder of Sofia Fetter in 1993, was convicted and given a life sentence with thirty years before parole. He was tried for the murder of Gary Marsh in 1994, convicted and received the death penalty. He is on death row today.

JESSE TIMMENDEQUAS

Jesse Timmendequas was given the death penalty by a jury for the July 1994 kidnapping, rape and murder of 7-year-old Megan Kanka.

On the evening of July 29, 1994, Megan Kanka disappeared from her neighborhood in Hamilton Township, New Jersey. When her mother realized Megan was not in the house, she went to the homes of several neighbors where Megan often played. During her search, Maureen Kanka encountered Timmendequas, then 33, who lived diagonally across the street from the Kankas. Timmendequas told her that he had seen Megan earlier that evening while he was working on his car.

The Kankas called police hours later when Megan had not been found. Police conducted a door-to-door search of the neighborhood. They began to focus their attention on Timmendequas's house because they learned that another resident, Joseph Cifelli, was a convicted sex offender. Another resident of the house, Brian Jenin, was also a paroled sex offender. The three men had met at New Jersey's Avenel Adult Diagnostic and Treatment Center for sexual offenders.

After 24 hours of continued searches had failed to locate Megan, Timmendequas confessed and led police to Megan's body. Megan was found dumped in some weeds at a nearby county park.

The evidence demonstrated that Timmendequas lured Megan into his home by telling her she could see his puppy dog. Timmendequas raped Megan and strangled her after placing two plastic bags over her head. Timmendequas gratuitously killed Megan, according to the state, to prevent her from being a witness to the assault.

Timmendequas carried Megan's body out of the house in a toy box and dumped it in the county park. He then allegedly tried to cover up the crime by using ammonia to wash down his steps, the toy box and his truck. Timmendequas has two prior sex convictions. In 1979, Timmendequas pled guilty to attempted aggravated sexual assault in connection
with the attack of a 5-year-old girl in Piscataway, New Jersey. He was given a suspended sentence on the condition that he go obtain counseling. Court records showed that Timmendequas did not live up to those terms, and he served nine months in Middlesex Adult Correctional Center.

In 1981, Timmendequas was arrested in another incident involving the assault of a 7-year-old girl. He eventually pled guilty to attempted sexual contact and to attempting to cause serious bodily injury in connection with the assault. Timmendequas spent six years at Avenel. When released, he moved into the Hamilton Township house, owned by roommate Joseph Cifelli's mother, where he raped and murdered Megan.

Jesse Timmendequas is on New Jersey's death row today.

**BRIAN WAKEFIELD**

Brian Wakefield was sentenced to death for killing an elderly couple, by stabbing, beating and setting them afire during a robbery in their home. The Hazards, described by acquaintances as doting grandparents and helpful neighbors, were complete strangers to Wakefield when he forced his way into their two-story suburban home near Atlantic City in a midday burglary and robbery.

On Jan. 18, 2001, Richard Hazard, a retired military man who worked for years at the former Atlantic City Electric Co., heard a knock at the door. He let in his killer. Wakefield later detailed to police how it was much easier to kill Richard Hazard, who was slain first, than his wife. He savagely beat the elderly man. Wakefield stabbed Richard Hazard in his side, his face and head. Hazard suffered brain contusions and a fractured skull.

Shirley Hazard, a retired postal employee who worked part time at Boscov’s, left work after 3 p.m. She headed to Pathmark for groceries and went home. Wakefield ambushed the woman when she arrived. He stabbed her in the neck. He hit her in the head. He threw her down the basement steps. He kicked her in the ribs. He told police he kicked her "like a 250-pound place-kicker for the Raiders."

But the 65-year-old woman did not die quickly. She lived long enough, the killer told police, for her to turn and look into the face of her killer. With one eye swollen shut she also looked at her 70-year-old husband's lifeless body in a pile of debris.

Then Wakefield set five fires throughout the house. Both bodies were set afire - as was the house - before Wakefield stole Mrs. Hazard's car in his getaway.

Sometime during the course of the murders and the fire-setting, Wakefield went to the kitchen, took a wooden spoon and beat the couple's collie because the dog yelped and got on the killer's nerves.

After the murders, Wakefield took off in the couple's Lincoln Continental. The car broke down near the Hamilton Mall. The killer took the Hazards' money and credit cards and went on a spending spree at the mall. He bought $1,300 in jewelry from Zales and more than $130 in compact discs from Sam Goody. He also bought new clothes and $200 in top shelf liquor.
He called for a cab. The driver, Olin Caldwell, knew Wakefield as "B-Love," a regular customer. He picked up Wakefield, whom he described to authorities days later as animated. Caldwell took Wakefield to the Tropicana Casino and Resort, where the killer rented 3 rooms, to throw a party for a friend.

The cab driver called police and brought them the bloody clothes that Wakefield changed out of in the casino parking garage. The Hazards' DNA was all over his sneakers and pants. The killer also left behind some coins from Richard Hazard's valuable coin collection and Shirley Hazard's charm that said "No. 1 Grandma."

By 6 a.m. Jan. 19, 2001, police banged on the door to Wakefield's room at the Tropicana. He was asleep in the Jacuzzi. After his arrest, Wakefield admitted to the murders. Now convicted by a jury, Wakefield is on New Jersey's death row.

JOHN MARTINI

On Monday morning, January 23, 1989, Marilyn Flax kissed her husband Irving goodbye as he left for his job as supervisor in a warehouse in Secaucus. She never saw him again. Instead, she received a telephone call from a man who called himself "Tony," who told her that he had kidnapped her husband and was holding him for ransom. Despite threats to her life and her family's lives by the man on the phone if she called the police, Mrs. Flax contacted authorities. The FBI advised her to comply with the ransom demand, and formulated a plan to follow the kidnapper after he picked up the money.

That evening, Mrs. Flax delivered the ransom at the Forum Diner in Paramus, but the kidnapper managed to elude the pursuit by the FBI. Although "Tony" had promised to release her husband if she complied with his demands, Mrs. Flax waited in vain all that night.

The next morning, Irving Flax was found, sitting in his car, at the Garden State Plaza in Paramus. He had been slain, execution style, with three bullets to the back of his head. Law enforcement authorities manage to link the actions of the kidnapper to a wanted fugitive from Arizona named John Martini. Martini and his girlfriend, Theresa Afdahl, were on the run from two murders they committed three months earlier in Arizona, and had been living in New Jersey under assumed identities.

On Wednesday night, January 25, 1989, Martini and Afdahl were arrested when they attempted to leave a motel in Fort Lee, in possession of the ransom money and a gun. Martini was charged with capital murder here in New Jersey and in Arizona.

While awaiting trial, Martini threatened his lawyer and Afdahl's lawyer, causing the appointment of new counsel by the court. He also planned two separate escape attempts from the Bergen County jail, and nearly succeeded in the second attempt when he bribed a guard to smuggle in diamond wire so that he could cut the bars in the jail's law library. Martini was subsequently moved to state prison pending his capital trial.

Eventually, Martini was tried in Bergen County, convicted and given the death penalty by a jury. While on death row, he was flown to Arizona where he pled guilty to the shooting deaths of Theresa Dempster and David Uhl. He was later brought to Philadelphia where he was tried and found guilty of the murder of Anna "Polly" Duval, a killing he
committed back in 1978.

John Martini remains on New Jersey's death row, having exhausted his appeals.

These are the nine. And these are their victims:

Cheryl Alson
Carol Peniston
Irving Flax
Theresa Dempster
David Yul
Anna Duval
Gary Marsh
Sofia Fetter
Irene Schnaps
Latasha Goodman
Kristin Huggins
Keith Donaghy
Richard Pine
Megan Kanka
Richard Hazzard
Shirley Hazzard

These nine capital murderers stand convicted of killing these sixteen people. All nine murderers were found to be deserving of the death penalty by juries composed of twelve citizens of this state.
October 25, 2006
Death Penalty Commission Hearing
Trenton, NJ

We all know that the death penalty is a very sensitive topic. One that is not easy to address. Even considering the fact that it's intended for the most vile and inhumane, willful and intentional murders against innocent victims, innocent children and vulnerable seniors. Since we cannot protect them 100% against these predators, we have to ensure that justice will be served.

For murderers in NJ, regardless of what they did:
Today, a life sentence means a maximum 30 years in prison;
A death sentence means some years on death row until the State rescinds the sentence; then some years in State prison until release through a lengthy, repetitive parole process.
Today, there is no life without parole in NJ.

It is expected that this Commission will recommend life without parole as a possible sentence in NJ. This is the right thing to do. But severe restrictions on the murderer must be included. Otherwise, we're simply taking these cruel and unusual murderers off the streets and placing the burdens of their livelihood on us, the tax payers.

There are murders for which jurors will find that life without parole is an appropriate sentence. They will find that some cases deserve some leniency even though the ultimate crime has been committed.

There are murders for which jurors will find that death is commanded. For some, there is no alternative to the ultimate penalty for the ultimate crime because of the manner in which a murder is committed, or the number of murders committed. Life without parole must not be used as an alternative to the death penalty.

If for personal reasons you are not willing or able to recommend that the option of life without parole be implemented as a sentencing option; We urge you to recommend it be put to the vote of the people. Let the majority rule.

We urge you not to recommend life without parole as an alternative to the death penalty.

It doesn't take a death penalty expert to see these take home messages from these hearings:

1) The fact that NJ has not executed anyone since the DP's inception should not be viewed as a flaw. Rather, The fact that NJ's process is so meticulous because our statutes have been evolving to ensure as close to 100% accuracy as possible must be viewed as a strength.

Developing our process and giving it time to evolve was the right thing to do.

2) Many of those who testified before this Committee are from other States which have their own laws and statutes.
The messages they brought are serious and should not be taken lightly. They must be weighed against NJ’s process, not used as the basis for NJ’s determinations.

3) New Jerseyan’s (including our legislators) do not know the reality or truth about the death penalty in NJ. People are simply spreading the comments of others without knowing the facts. Comments like:

It’s not working in NJ so get rid of it. Instead of, it’s the LAW!... Who or what is hindering the process of known guilty murderers who now care more about where they are than they ever did before? And what more can be done to improve and perfect the process?

It’s too painful for survivors to relive their loved ones demise through continuous retrials. Instead of, it’s the LAW!... If it’s not retrials, it’s going to be parole hearings. If there is no proof, or even claim of innocence; who, what, when, where, why and how is the process being hindered?

We can’t use the death penalty because an innocent person might be executed. Instead of, it’s the LAW!... NJ has acknowledged the fact that no one wants to see an innocent person executed. This is evidenced by the fact that NJ’s entire process has been designed to weigh totally in the defendant’s favor to ensure that the process is as close to 100% accurate as possible.

Only blacks and minorities will be executed. Instead of, it’s the LAW!... The race of an absolutely guilty person or the victim should be obsolete.

NJ has aggravating factors, mitigating factors, aggravating vs. mitigating factors, experienced capital defense attorneys with access to the best jury consultants and psychological, sociological and clinical experts in the country; an in-depth jury selection process with unanimous jury voting requirements; mandatory appeals; post-conviction reviews; and DNA.

Victims who have been willfully and intentionally murdered in cruel and unusual ways and whose murderers receive a unanimous vote from jurors who have listened to the facts and seen the evidence must not continue to be forgotten by you and every other level of our judiciary system.

Survivors, whose hearts and lives are heavy with burdens they, and their children, must bear, brought on solely due to the willful acts of cold-blooded, selfish, selfless people, must not continue to be ignored due to their chosen silence or their inability or willingness or desire to come out and tell you, or to face any other level of our judiciary system or the media must not continue to be ignored.

NJ has invested tremendous time, money and resources in its DP statutes and allowed it to evolve. We didn’t simply execute. Its time has come.

I urge you not to recommend life without parole as an alternative to the death penalty.

Submitted by: Sharon Haggard Johnson