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# *Commission Meeting*

of

## NEW JERSEY DEATH PENALTY STUDY COMMISSION

*"Commission will hear testimony from the following experts:  
R. Erik Lillquist, Honorable John J. Gibbons, and Joseph Krakora"*

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**LOCATION:** Committee Room 16  
State House Annex  
Trenton, New Jersey

**DATE:** August 16, 2006  
2:00 p.m.

**MEMBERS OF COMMISSION PRESENT:**

Reverend M. William Howard Jr., Chair  
James P. Abbott  
Edward J. DeFazio  
Kathleen Garcia  
Kevin Haverty  
Eddie Hicks  
Thomas F. Kelaher  
John F. Russo  
Rabbi Robert Scheinberg  
Yvonne Smith Segars  
Miles S. Winder III

**ALSO PRESENT:**

Boris Moczula  
(Representing Zulima Farber)

Gabriel R. Neville, *Commission Aide*  
Miriam Bavati, *Commission Counsel*  
*Office of Legislative Services*



*Meeting Recorded and Transcribed by*  
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REVEREND M. WILLIAM HOWARD (Chair): Good afternoon, friends.

I must say-- Bill Howard, Chair of the Commission. I must say that, up to now, I felt very positive about the atmosphere of our gathering and the people gathered around the table, and also about our meetings. And I thought that the Public Defender also enjoyed being with us, until I learned the extent to which she would go to avoid being in the session.  
(laughter)

I wonder if she can hear me. I don't think she can.

You may have heard that she had quite a serious biking accident.

MR. KELAHER: Oh, no.

REVEREND HOWARD: Yes, in Martha's Vineyard. She was riding the bike. She fell over the handlebars and broke several ribs.

MS. SMITH SEGARS: (on telephone) Can you hear me?

MR. NEVILLE (Commission Aide): Yes, I can hear you. But I don't think you're hearing us.

MS. SMITH SEGARS: Oh, I can hear faintly.

REVEREND HOWARD: Can you hear me?

MS. SMITH SEGARS: I can hear you. Can you--  
Hello.

REVEREND HOWARD: This is Bill Howard.

MS. SMITH SEGARS: Hello, everybody.

REVEREND HOWARD: Yes. I was just explaining the extent to which you went to avoid meeting with us.

MS. SMITH SEGARS: (laughter) Don't make me laugh. It hurts.

REVEREND HOWARD: But we welcome you. We're happy to have you here by the telephonic technology here.

MS. SMITH SEGARS: Thanks, Dr. Howard.

REVEREND HOWARD: Friends, first let me just say, formally, that we're calling the meeting to order. And there are a couple of housekeeping matters that deserve our attention. And if you have any concerns or questions at any point, I hope you'll just alert me.

But let me turn your attention first to this (indicating) sheet, which has the various persons, expert witnesses, that we have proposed. I think all of these persons have come from members of the Commission. There's a bit of biographical information. You will note here, to the right, the person who has referred them and the status of our contact.

Now, four of these distinguished individuals are either contacted or with us today. There are three here today. Professor Lillquist; and Judge Gibbons; and Mr. Krakora, Director of Capital Litigation-- These persons will be here with us today. And Judge Baime has been committed for a date certain.

So the point is, we have this list. And we have, among those who are not with us today, one person who has been firmly scheduled for our October meeting. But the rest of those persons, because of our limited time-- I'm going to invite the Commission to participate in some decision making, not at this meeting. But we will have to make some decision, based on the time we've allotted for our public sessions and deliberations, as to whether or not we will be able to receive each and every expert proposed.

Now, in order for us to make the very best informed decision, we're asking the staff to take a close look at the descriptions that have been given to us in the biographical column. And if you feel, for example, after going through this list, someone has been inadequately or incorrectly characterized, we want to improve on that. But based on that description, they're going to group each of the remaining speakers based on the affinity or similarity of the subjects they will discuss.

And then, immediately after this meeting, once they've completed that work, they're going to get those folks out to us and let us know, roughly, how many people in the block of time we will have established. And we will be able to hear a good many of them. But there's some question about whether we can actually hear them all.

And I'm going to ask you to engage in some prioritizing, and then send that back to us. We'll give you an instrument that you can use to determine your prioritizing of these persons. And some decision-- We will let you know the results of this and let you know what we intend. And if you have some strong objections, we will then have some negotiations.

However, we think that we can address this in this manner so that by the time we're together in September this will have been decided, and the staff will have had some direction from us. Because, obviously, we will need to move forward to secure these experts, given that they are people with many other commitments.

So hearing no objection to this process, I would like then to have us expect this from the staff shortly, by the usual means of communication. And we will impress upon you the importance of getting back to us promptly.

Having said that--

MS. GARCIA: Chairman.

REVEREND HOWARD: Yes, please.

MS. GARCIA: I think I'd really like to discuss this more after we hear from our witnesses today, if that's possible.

REVEREND HOWARD: Discuss the--

MS. GARCIA: The whole process of the witnesses and who will testify when.

REVEREND HOWARD: Okay. So then in our deliberations, we can come back to this. Fine.

MS. GARCIA: I would like to see that, yes.

REVEREND HOWARD: Okay.

Let me just alert you that the transcribed portion will end after the experts have concluded their testimony. And you should know that there will be a transcript available to all of us, going forward. So that ought to inform the nature of your note taking.

And I guess we have a couple of trees now in our possession.  
(laughter) Are these--

Would you describe, just for a moment, what this is, since I don't think every Commissioner has had a chance to read this?

MR. NEVILLE: The first folder is materials I thought we might need for the meeting today. It consists of the tentative schedule that we looked at, the notice, and the expert chart. The accordion folder is all the materials that have been submitted to the Commission since our last meeting. In addition, there is a memorandum from staff in there trying to give you some summary of what's in there.

REVEREND HOWARD: Okay. Thank you.

Are there any questions about that? (no response)

As you go through these documents, we want to, once again, underscore our willingness to have you submit additional items that you think might be of use to the work of the Commission. But this is what we've assembled up to this point.

Now, let us begin. We have the benefit of three outstanding persons who've come. I'd like to ask them to take their seats here.

There are two seats, so I'm going to ask the Professor and Judge Gibbons, if you would start. And then we'll hear Mr. Krakora.

First, let me, as you come, thank you on behalf of all of us gathered. What you have to share with us has been highly recommended. So we feel privileged to have you speak. And I invite you to begin.

**R. ERIK LILLQUIST:** Do you want me to go first, Judge?

**JUDGE JOHN J. GIBBONS:** Well, what does the Chairman want?

REVEREND HOWARD: I invite you to begin. I'm looking right in your eye. (laughter)

Now, let me say that because of your expertise, we felt it would be to our benefit to hear from you a bit more extensively than we might in a general public hearing. So we've allotted 20 minutes. You may give us back some of that time if it's your pleasure. But we're allotting 20 minutes for you to present--

JUDGE GIBBONS: I'll try to talk fast.

REVEREND HOWARD: Pardon me?

JUDGE GIBBONS: I'll try to talk fast.

REVEREND HOWARD: Okay. Thank you very much.

JUDGE GIBBONS: Mr. Chairman, the State of New Jersey has not executed anyone in the 43 years since the execution of Ralph Hudson in 1963.

In August of 1982, the New Jersey Legislature enacted a new death penalty statute, replacing a 19th century version that failed to pass 20th century constitutional scrutiny. The constitutionality of the 1982 New Jersey statute was upheld by the New Jersey Supreme Court in *State v. Ramseur* in 1987. And Chief Justice Wilentz's opinion in *Ramseur* held that the statute did not violate either the Federal or the New Jersey prohibitions against cruel and unusual punishments.

For the past 20 years, the New Jersey Supreme Court has deemed *Ramseur* to be controlling authority on the constitutionality of the death sentence in this state. And as recently as 2002, a divided court in the *Josephs* case, pointing to its 15-year history of relying on *Ramseur*, said it was controlling authority. The Court said, "We therefore reaffirm *Ramseur* and subsequent cases upholding the constitutionality of New Jersey's death penalty statute."

Now, the Commission must understand that the constitutional challenge of the death penalty statute, made both in *Ramseur* and in *Josephs*, is that it violated both the cruel and unusual punishment clause of the Eighth Amendment, and the equivalent clause in Article I, Paragraph 12 of the New Jersey Constitution. And for purposes of those clauses, Justice Wilentz noted three inquiries are required: first, does the punishment for the crime conform to contemporary standards of decency; second, is the punishment grossly disproportionate to the offense; and third, does the

punishment go beyond what is necessary to accomplish any legitimate penological objective?

This substantive constitutional test is conjunctive. Because death is different, in addition to those substantive constitutional prerequisites, a death penalty prosecution also requires a number of constitutionally mandated procedural safeguards, as well. Nothing that the New Jersey Legislature or the Congress of the United States can do is going to change these very complex rules respecting the instances in which capital charges may be made, how capital trials are conducted, or the availability of post-conviction remedies. The very complexity of these constitutionally required procedural safeguards affects the selection for capital prosecution, as well as the manner in which those selected for capital prosecution are treated in the judicial system.

The result is that 24 years after the enactment of the New Jersey death penalty statute, no one has been executed in the State of New Jersey, and there are only nine people on death row. The result in this state is that a sentence of death is, in reality, a sentence to incarceration on death row for decades, with the threat of execution overhanging the prisoner at all times, and the prolongation of painful uncertainty for the families of victims.

Nor is New Jersey unique. The national death row population has climbed steadily from under 300 in 1974, to over 4,000 today. Nationally, the number of executions has climbed from none in 1974 to, in some years, perhaps in the low hundreds -- mostly under a hundred. But the percentage of persons on death row actually executed has never, from 1974 through 1999 -- which was the last year I checked -- exceeded 3

percent in any year. Even those low percentages are somewhat distorted by the aberrational enthusiasm of Texas and Virginia for state-ordered killing. Nationally, there are almost as many deaths from natural causes among death row inmates as there are actual executions.

The point you, as Commissioners, must keep in mind is that nothing you can recommend to the New Jersey Legislature can improve the efficiency of New Jersey's capital murder scheme. The substantive rules as to what offenses or offenders are death-worthy, and the procedural safeguards for trials and for post-trial review are requirements of the Federal and New Jersey Constitutions. Twenty-four years hence, if New Jersey still has a death penalty, it will probably not have executed someone who was sentenced to death next year.

In *Ramseur*, Chief Justice Wilentz observed: "The legislative history of the Act provides no persuasive evidence of the legislative purpose. We will, therefore, assume that the Legislature intended one or more of the well-recognized penological purposes underlying all criminal sanctions: deterrence, both general and specific; retribution; and rehabilitation." He continued, "Quite clearly, rehabilitation is not intended, so we will only deal with deterrence and retribution."

Well, Chief Justice Wilentz certainly was correct in noting that a state doesn't kill people in order to rehabilitate them. In *Ramseur*, he went on to note that there is "sufficient respectable support for the proposition that retribution is a legitimate penological goal to allow a Legislature to fix punishment with that goal in mind."

As to any deterrent affect, he observed: "The answers, the reasons, and the statistics conflict and proliferate. The Legislature could

reasonably conclude that the death penalty deters murder, just as it could find that it does not.” He continued, “Given the conflicting and inconclusive evidence, we cannot say that a legislative conclusion that the death penalty acts as a deterrent is so clearly arbitrary and irrational as to constitute an illegitimate exercise of power.”

*Ramseur*, as required by binding authority in the United States Supreme Court, states that the existence of a legitimate penological objective is part of the constitutional norm for determining cruel and unusual punishments. In applying that norm, however, the *Ramseur* -- Court applied, as I just quoted, “a clearly arbitrary and irrational” standard of review, when no agency of the State government ever made a determination with respect to penological objectives.

Note the internal inconsistency in the Chief Justice’s analysis. He starts by announcing the inquiries are constitutionally required. He acknowledges that there is no evidence that the Legislature made the required inquiries with respect to penological purposes. And he goes on to say that the Court won’t do so either.

When the Chief Justice punted on the Eighth Amendment in 1987, it might plausibly be said that the conflicting evidence about the general deterrent effect of the death penalty was inconclusive. Nineteen years later, that proposition that the death penalty has a general deterrent effect is, in the light of 40 or more empirical studies conducted in the meantime, totally implausible.

The appropriate references to those studies were furnished to the *Josephs* Court. And Justice Long, dissenting, observed: “Coupled with what we now know about the death penalty’s failure to deter criminals,

those changed circumstances underscore the need to reconsider *Ramseur*.” Her colleagues did not, in the *Josephs* majority opinion, take issue with Justice Long’s assessment of the absence of any empirical support for any deterrent effect. The majority simply ignored that issue.

There is, of course, specific deterrence. A dead person will not kill in the future. Even a dead innocent person will never kill. But general deterrence, as a valid penological objective, is simply a nonstarter.

Now, I thought about the deterrent justification while reading the Supreme Court’s opinion in *Atkins v. Virginia*, in 2002. That case, overruling *Perry (sic) v. Lynaugh* -- a 1989 case -- held that there was an emerging consensus against executing the mentally retarded, and thus such executions would be unconstitutional. It was then still -- that is in 2002 -- still considered constitutional to execute persons who, at the time of the homicide, were juveniles, though New Jersey has never done that. In *Roper v. Simmons*, in 2005, the Supreme Court overruled *Sanford v. Kentucky*. And thus, today, neither mentally retarded nor juvenile offenders may be executed.

Now, what juvenile offenders and mentally retarded offenders have in common is that neither group is at all likely to respond to any supposed deterrent effect that the availability of the death penalty might have.

Note, however, that general rather than specific deterrence, as a penological objective, would be as well-served by the execution of both mentally retarded and juvenile offenders. Indeed, the execution of persons actually innocent of the offenses with which they were charged would also serve any general penological objective.

It is supposedly the example of the execution that is supposed to deter at least the fully competent from committing homicides. Still, I think it would take a rather bold utilitarian to argue that we should not worry too much about executing mental retarded, or juveniles, or the actual innocent, because such executions serve a higher social purpose.

What most proponents of executions today focus on is not general deterrence, because that is not empirically supportable, but vengeance against criminals who they often described as “the worst of the worst,” so bad that they do not deserve to live.

Let me suggest that they are focusing on the wrong question. No one on death row, no one in prison, and no one in this room deserves the gift of life in the sense that we have it because of our own moral worth. Life is a priceless gift of God that none of us has earned. Some of us make better use of that gift than others do. But we do not thereby gain the right to life, nor does the State confer that right. The question is not, “Who deserves life?” but when can the State, acting on behalf of you and me, terminate God’s gift to another person? And the answer to that question cannot, I suggest, be that the State can do so in order to fulfill the atavistic desires of some among us for vengeance. It can only be that the State can take a life only when doing so is necessary to protect other lives from harm. With life without parole as the State’s alternative to execution, there is no such necessity.

But I return to the previous point. The social science evidence is that the death penalty really has no general deterrent effect. That leaves, as some supporters of execution urge, retribution, or its synonym, vengeance. I find loathsome the thought that my State would take a life on

my behalf for the sake of vengeance, rather than for the protection of other lives. And thus, I will, at least, never be persuaded that vengeance is a morally justifiable, penological purpose for executions. Assuming, however, that vengeance is a morally defensible penological purpose, can it legitimately be exercised by the State in an entirely arbitrary and standardless manner?

*Ramseur*, while acknowledging that there is a significant school of thought that retribution, without more, is not a justifiable penological goal, said, “We agree with the United States Supreme Court, that retribution constitutes a valid penological objective for the death penalty.”

Neither the *Josephs* majority opinion, nor Justice Long’s dissent, however, addressed the point made in an amicus curiae brief that was filed in *Josephs* -- that assuming that retribution is a valid penological purpose, can it be exercised by the State in an entirely arbitrary and standardless manner? The *Josephs* amici asked the Court to consider -- and this Commission certainly should consider -- that: one, between 1984 and 1998, nationally, there was an average of 287 admissions to death row each year, while the average number of homicides each year was 21,000. Thus, the retribution of a death penalty is imposed in only about .013 percent of homicides. There are no standards for the identification of the tiny percentage of murderers worthy of the retribution of execution.

The picture in New Jersey is similar. The Administrative Office of the Courts identifies, statutorily, death-eligible defendants. Since the restoration of the death penalty, there have been 455 such charges in New Jersey. Only 52 cases resulted in a death sentence. And there are only nine persons on Trenton State death row now -- less than 2 percent of the

statutorily eligible death penalty defendants. That's 2 percent of statutorily death eligibles, not 2 percent of the thousands of homicides that have occurred in this state since restoration.

Consider, both nationally and in New Jersey, that there is far more death penalty retribution for the murder of white people than for the murder of black people. Consider that the retribution of the death penalty is imposed far more frequently on poor defendants than on well-off defendants. Consider that the retribution of the death penalty is imposed far more frequently in some states than in others and, in New Jersey, far more frequently in some counties than in others.

Among persons-- Selection among persons who commit homicides for execution, in the interest of the penological purpose of retribution, by a lottery, or by designating every 10th or every 100th death-eligible defendant for execution, would be at least as legitimate as the present arbitrary system of exacting retribution.

Fifteen years ago, the *Ramsuer* Court cited the Supreme Court decision in *Gregg v. Georgia* for the legitimacy of retribution as a valid penological objective, with no further analysis, and simply stated the result. At that time, New Jersey had not executed anyone for nearly a quarter of a century. And the utter randomness of retribution by execution may not have been, then, so obvious.

It was obvious in the year 2003, yet the *Josephs* Court didn't even discuss random, standardless retribution as a matter of concern. Random, standardless exaction of retribution cannot be a valid penological purpose. Indeed, that very point was made by Justice White, in the 1972

case of *Furman v. Georgia*, which -- for a time, at least -- made all executions unconstitutional.

How can this Commission justify a system that affords the satisfaction of retribution for two out of 100 families of murder victims? What makes those families, or those victims, more worthy of retribution? Members of this Commission should recognize that the death penalty system in this state is badly broken, and should report to the Legislature that the anarchy of arbitrary and standardless selection of targets for execution for the sake of retribution simply may not continue.

REVEREND HOWARD: Judge Gibbons, are you nearing the conclusion? Otherwise, I'm going to ask you to give us a summary statement, because you will have an opportunity to respond to the queries of the panel.

JUDGE GIBBONS: If you will let me just look at my notes briefly.

I think the one additional point that I'd like to call to your attention is the rather unique New Jersey issue of proportionality, which requires the New Jersey Supreme Court to compare the relative heinousness of one killer's crime against the universe of other New Jersey homicides to decide whether the defendant before it is a worthy candidate for execution.

The Commission should read the Supreme Court's recent decision in *State v. Papasavvas*, in which the Court made a proportionality analysis. And you should ask whether mere mortals -- and Judges are, after all, only mortals -- are capable of making that kind of moral judgement.

REVEREND HOWARD: I would like to ask if you would be kind enough to supply us with the full text of your presentation--

JUDGE GIBBONS: I will, indeed.

REVEREND HOWARD: --so that we might review it carefully. But I think you've spoken clearly on a number of points that might stir the Commissioners to ask questions. And feel free to elaborate within the time that we have.

But I'm going to, as Chair, invite the Commissioners now to comment or ask questions of Judge Gibbons on what he has said, or perhaps items that he has not spoken about.

Senator.

SENATOR RUSSO: Is this on? (referring to PA microphone)

MR. NEVILLE: We're not using the mikes today.

SENATOR RUSSO: Pardon me? We're not using them?

First of all, Mr. Chairman and members of the Commission, I just want to say that it is somewhat of an honor to be able to question Judge Gibbons. We in the Legislature, and we in the law profession, have always considered him a giant among those in the judicial community, and have always had a tremendous respect for him. In fact, I probably can't think of another opinion of his I didn't agree with other than the one today. (laughter) But I mean that. He is an outstanding jurist.

A couple of questions. First of all, you emphasize quite a bit, Judge Gibbons, the deterrence question.

A preliminary -- if I may -- before asking the question, Mr. Chairman.

It comes as a shock to many people that at the time that I drafted this bill -- in 1982, I think it was, and on the floor of the Senate over the years -- when Governor Byrne vetoed it the first few times before

Governor Kean signed it -- I emphasized that deterrence was not a factor. In fact, I agree with you. I do not believe the death penalty is a deterrence. As a matter of fact, you probably recall -- not because you were there -- but in old England, when there was a pickpocket executed for pickpocketing, the greatest day for pickpockets was at the public hanging of the pickpocket.

Am I correct, Judge? Have we not heard that story in the legal--

JUDGE GIBBONS: That's in the legal literature. (laughter)

SENATOR RUSSO: You weren't there though, were you?

But, seriously, this is true. I found -- years -- I served 10 years as a prosecutor. And I always felt that the penalty was almost never a deterrent, because nobody who commits the crime thinks he's going to get caught. And he's not thinking of the penalty. That comes afterwards. He wished he had, perhaps, later. So I just want to put that part aside. I think there's a lot to what you say about deterrence. I have never placed a great weight on that.

However, I've always felt that -- and we passed out -- and you're familiar. You mentioned *Gregg v. Georgia*. The concurring opinion by Justice Stewart-- And there were-- People in the Legislature had a lot of different reasons why they were in favor of the death penalty. There was never a consistent one with the other. But I always felt what impressed me -- and you might recall in that opinion by Justice Stewart -- the concurring opinion, where he said, "I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man. In channeling that instinct in the administration of criminal justice, serves an

important purpose in promoting the stability of a society governed by law. When people begin --" this is the important part. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy, of self-help, vigilante justice, and lynch law." And he says, "As Mr. Justice White so tellingly puts it, the legislative will is not frustrated if the penalty is never imposed."

Judge Gibbons, it seemed to me as though much of your comment was based upon the fact that we haven't had executions or, as you said, two out of a hundred. Although, I made a note -- what about, we cut it down to zero out of a hundred.

But the purpose of that law in 1982 -- and that part of it I think has been, you might say, carried out -- was not that there be wholesale executions. And, in fact, we -- at least I wasn't concerned if there would never be an execution. But to have that threat of the penalty of death, and have society feel that there is such a penalty available in the most heinous cases -- and that law was drafted so tightly that only the most heinous would be convicted under it, given capital punishment -- was what society needed -- was something that society had a need for, in order to feel that the criminal law was carrying out what their feelings were, as Justice Stewart said.

So I'm not so sure-- I can hardly disagree with what you said. As I so many times said about Governor Byrne's opinions, I don't know whether we're right or wrong. But there is another view that doesn't rely on deterrence, and it doesn't rely on the fact that we should have many executions. There are some who feel that we haven't had executions

because of the judiciary. I don't say I necessarily subscribe to that view. But there are some who feel Justice Long would never vote for a confirmance of a death penalty case. That one, I think, I would agree with.

What do you think?

JUDGE GIBBONS: Well, there's no doubt that the case you referred to, *Gregg v. Georgia*, was the only justification relied upon by the New Jersey Supreme Court in recognizing retribution as a valid penological purpose. But the problem was that neither at the time *Gregg* was decided, nor at any time since, has anybody faced up to the fact that this retribution justification is applied in a totally arbitrary and standardless manner, and that if you seriously think about it, you can't constitutionally justify it. Sooner or later, the Court is going to say, "No, retribution for two out of 400 victims -- what social justification is there for that?"

Senator, there is no psychological evidence, that I know of, that the public at large feels better in those states that occasionally do execute people. And even if some part of the population does feel better seeing somebody executed, what's moral about that?

REVEREND HOWARD: We want to get as many of the Commissioners in on the discussion as possible.

I'm going to turn to Mr. DeFazio.

MR. DeFAZIO: Mr. Chairman, thank you.

Judge, I'm not asking you to speak for the New Jersey Supreme Court. But in your opinion, why, in all of these years, haven't they directly addressed the issue of what you, I believe, called *random retribution*? Why? Can you tell me? Because, honestly, I've been practicing criminal law as a

prosecutor for now almost 25 years. And I'd love an opinion on that subject from a man as learned as you.

JUDGE GIBBONS: I can give you my opinion.

MR. DeFAZIO: Yes, your opinion.

JUDGE GIBBONS: But I don't mean that facing -- that the task facing the New Jersey Supreme Court, in any of these cases, is an easy one.

But my own opinion as to why the United States Supreme Court has not faced up to this arbitrariness of retribution issue, and why the Supreme Court of New Jersey has not faced up to it, is that you can't write a plausible justification for it. And there are a lot of pressures on the Court not to go back to *Furman v. Georgia*, which turned out to be an issue in some national elections.

Now, that's putting it bluntly. But that, I think, is the reality.

MR. DeFAZIO: So just to get -- make sure I--

JUDGE GIBBONS: I don't think that anybody can write a respectable justification for the arbitrary imposition of retribution.

REVEREND HOWARD: Does that speak to your question?

MR. DeFAZIO: But that's why I'm a little concerned. Why hasn't New Jersey's Supreme Court -- and now, based on the latest decision -- the Martini decision -- it's now six to one that they affirmed the death penalty with, once again, Justice Long being the only dissenter -- the lone dissenter. Justice Douglas, of the New Jersey Supreme Court -- was it Justice Douglas?

But what I-- Are you saying it's strictly a political decision, on the part of the New Jersey Supreme Court, that they won't come to grips

with this issue of the randomness of retribution? Is that what you're saying, Judge?

JUDGE GIBBONS: I'm saying that it would be a very difficult opinion to write and publish. And they haven't done it yet.

MR. DeFAZIO: No, they haven't.

MR. HAVERTY: Is that, Judge, because they haven't squarely faced that issue? They've been able to avoid it?

JUDGE GIBBONS: Well, or ignore it. It's there. We know we're down to nine-- There are only nine New Jersey murderers whose victims are worthy of retribution.

MR. HAVERTY: I guess what I'm asking, Judge, is, just procedurally, we all know that a case that goes up to the Supreme Court, or goes up to an Appellate Court, goes up based upon its record and the assignments of error that the parties raise. Have the parties ever raised that precise issue for the Court and placed it squarely in the Court's lap?

JUDGE GIBBONS: Without going back and looking at the opinions, I would not want to -- or the briefs -- I would not want to comment on that.

MR. HAVERTY: But the Court has clearly said, "The parties have forced us to address this issue. So, therefore, we're going to have to do that." They've been able to side-step that?

JUDGE GIBBONS: Well, all I can say is, they've stated the conclusion, whether you want to call that side-stepping it or what. But the justification of a standardless, arbitrary imposition of retribution is an opinion that I don't know how anybody could write. So they don't write it.

REVEREND HOWARD: So let me be clear, if I'm hearing you correctly, as one of the few non-lawyers here. You're saying that it would be difficult to write an opinion affirming a standardless, arbitrary imposition of retribution.

JUDGE GIBBONS: Yes.

REVEREND HOWARD: Does that get at what you're asking?

MR. DeFAZIO: It gets at it from the opposite direction from whence I was coming.

REVEREND HOWARD: I understand exactly what you've said. But I'm not sure that's the question you were asking.

Did you finish?

MR. HAVERTY: I'm finished.

REVEREND HOWARD: Please.

RABBI SCHEINBERG: Thank you.

Can you-- I'd like to invite you to speak further about why the proportionality analysis process, you feel, is inadequate at the -- at preventing arbitrary imposition.

JUDGE GIBBONS: Yes. Under New Jersey proportionality review, the Supreme Court is required to compare the relative heinousness of one killer's crime against the universe of other New Jersey homicides, to decide whether or not the defendant before it is a worthy candidate for execution. And the Court did that in the *Papasavvas* case in '02.

Now, that reflects a rather clear New Jersey consensus that not all killers should be executed and, indeed, now a constitutional rule to that effect. But the issue in New Jersey proportionality review -- which assumes that the offense is one for which death is an appropriate sentence -- is

different. Rather, the issue is whether, when compared with other killers, the defendant is less worthy of death than they are.

But despite the Court's effort to objectify -- objectively quantify the process by what it calls *frequency analysis* and *precedent-seeking review*, they make an effort to -- comparative selection on the death-worthiness of this defendant against a universe of others. And I just ask you to read *Papasavvas*. And ask yourself, can mere mortals do that? Can they say, "Even among the nine on death row, that one is more worthy of death than that one"? Can that be anything but arbitrary?

REVEREND HOWARD: I'm going to entertain one additional question, because we've exceeded our time.

However, Judge Gibbons, would you be willing, in the course of our deliberations, if we had additional questions -- we might e-mail, or call, or fax -- would you be willing to respond?

JUDGE GIBBONS: Absolutely.

REVEREND HOWARD: Great.

Please.

MR. MOCZULA: Thank you.

Boris Moczula, representing Attorney General Farber.

Juries make those decisions every day, Your Honor. The real key, in my opinion, is whether there is a set of standards to guide those types of discretionary decisions. That's an element of our criminal justice system, not only in the initial part of the decision making, but the appellate decision making.

And you started your presentation by mentioning that there is this complex procedural system that we undergo in the capital punishment

process. And as Senator Russo mentioned, we can quibble about whether that is State constitutionally required, or judicial ideologically required. But my point is, it exists.

And at some point, though, you concluded your remarks by talking about the random and arbitrary nature of the selection process. And it strikes me that there is -- those two concepts are not consistent. There is a very structured process in the selection, at every step of the way, of capital punishment, all the way to what -- you have suggested -- the Supreme Court actually invoked in the *Papasavvas* case, where they reversed an otherwise appropriate death sentence, because they felt it was disproportionate in other cases.

That sounds to me like the system is working exactly like it's supposed to, in that it's winnowing the class of defendants selected for capital punishment at the initial stage, the guilt phase, the penalty phase, the appellate phase. And what we have is, in fact, exactly what the State Constitution and the Federal Constitution require, as opposed to a small handful that, somehow, don't serve any retributive purpose. I would suggest that permanent incapacitation is one of those purposes, as well, and that (indiscernible).

So I'm suggesting that that is exactly how it was intended that the statute work, that we narrow the class of defendants. And there is nothing wrong with that type of approach.

JUDGE GIBBONS: And so over a 15-year period, with thousands of homicides -- 455 death-eligible homicides -- the system has worked so perfectly that we have selected the nine in this state most worthy

of the retribution of execution. If you believe that, you believe in Santa Claus.

MR. MOCZULA: Well, it's actually been 55, Your Honor. But the Appellate Courts have reversed most of those sentences. So the selection process is greater. And that's really the key.

JUDGE GIBBONS: But the Appellate Courts have applied constitutional norms in reversing them.

MR. MOCZULA: And actually, the Supreme Court -- I don't remember the case, and you all don't have that. But the New Jersey Supreme Court had dealt with the argument, in one of its cases, that the death penalty is being applied, for that period of time, so infrequently that it's withered down to just a few death sentences. There are some years where none were applied. That, in and of itself, falls into question the legitimacy of the system. And at least the majority -- I can't speak of all the Justices -- rejected that argument.

JUDGE GIBBONS: But you don't have to. The majority maybe doesn't want to lay down that as a constitutional norm. But this Commission is not operating under that constraint. It can look at whether or not the system -- which produces this result of 455 or some odd death-eligible defendants, and nine on death row -- is at all defensible. Forget about constitutional.

REVEREND HOWARD: We are going to conclude with Senator Russo.

SENATOR RUSSO: Judge Gibbons, one more question. Shouldn't the focus-- You seem to place the focus on whether or not we can pick nine out of 455. Isn't the question: do those -- should it not be --

do those nine deserve the death penalty? Maybe the others all did, too. But that doesn't make ineffective the nine that do. Because that whole bill -- as I think the Attorney General pointed out -- was stated as being one to be applied in the most heinous and restricted case, not with frequent executions. So do those nine deserve it, or do they deserve to go free also -- or using your other analogy, two out of 100--

JUDGE GIBBONS: Not go free.

SENATOR RUSSO: Shall we make it zero out of 100?

JUDGE GIBBONS: Not go free.

SENATOR RUSSO: I'm sorry?

JUDGE GIBBONS: They'll not go free.

SENATOR RUSSO: Of course not. They'll go free of death.

JUDGE GIBBONS: Free of death, yes.

SENATOR RUSSO: They'll have their life. The other nine won't. The question should be, should it not, do those nine deserve to die for what they did? And if the answer is no, or we can't say, that's one thing. But it shouldn't be because someone else didn't get it that they shouldn't either.

JUDGE GIBBONS: Who is capable, other than on an arbitrary basis, of answering your question?

SENATOR RUSSO: Who's capable of saying anyone is guilty or innocent of any crime?

JUDGE GIBBONS: Oh, but death is different.

REVEREND HOWARD: I think on that note, Judge Gibbons, we owe you a great debt of gratitude for coming and making such a clear

presentation of your views. And if you would be kind enough to share the full text -- because I know there are other points you wanted to make.

And I also, as a Pastor of a church, want to thank you for the few theological comments you made. (laughter)

JUDGE GIBBONS: It's my Jesuit training. I couldn't resist.  
(laughter)

REVEREND HOWARD: There you have it.

MR. DeFAZIO: I figured that, Judge. It had that ring to it.

REVEREND HOWARD: Yes, we deeply appreciate that.

MR. HAVERTY: Nothing scarier than a Jesuit lawyer?

REVEREND HOWARD: I'm sorry?

MR. HAVERTY: Nothing scarier than a Jesuit lawyer.

REVEREND HOWARD: Nothing scarier than a Jesuit lawyer.  
(laughter)

JUDGE GIBBONS: I'll be happy to send you the full text. And if you have any other questions, or any way that you think we can be of assistance, don't hesitate to call on me.

REVEREND HOWARD: And, really, I think -- if I've listened well -- the way we concluded between Senator Russo and you was exactly the right point of where we should have concluded. Because we have-- The word *deserve* is actually the key word in your whole argument on retribution. The nonscientific way of arriving at the answer to that question-- Whether that's accurate or not, depending on one's view, I think this is the clear point that I heard you making. And I thank you for your coming.

JUDGE GIBBONS: Thank you for your time and attention.

REVEREND HOWARD: Professor.

MR. LILLQUIST: I'd like to thank you all for inviting me here, today.

In speaking with the staff before being called here, it was suggested that it might be most useful if I give an overview, both of criminal law theory relating to the death penalty and my more specific area of expertise, which is procedural reform associated with the death penalty, in particular dealing with accuracy.

So I'm going to take-- And I believe Mr. Neville provided you with some materials about recent scholarship on the death penalty in advance. So let me just try and take you all through a brief introduction.

As Judge Gibbons was suggesting, when it comes to the death penalty-- For those of you who are not lawyers, the notion of punishment, in general, as a societal goal is something that lawyers and legal philosophers believe needs to be justified in some way. How is it we can punish anyone -- not just the death penalty -- but how can we impose imprisonment or any other form of punishment on someone?

And in modern criminal law theory, there are two primary justifications: retribution -- an argument from deontology -- and then deterrence. There's also other theories out there. Rehabilitation was one that played a large role in American criminal theory in the 20th century, although by the 1970s it had, for the most part, dropped out. And obviously, as Judge Gibbons suggested, plays no role in justifying the death penalty, because you can't rehabilitate somebody you are sentencing to death.

So in talking about the death penalty, people primarily look at these two justifications. And the retribution justification goes back to the

individual who might be seen as the sort of grandfather of retributive theory in criminal law in general, and that's the German philosopher Immanuel Kant.

Kant, himself, actually supported the use of the death penalty, from retribution, saying that even if-- He has this famous example in *Metaphysics of Morals*, saying that even if "civil society were to be dissolved, the last murderer remaining would still have to be executed so that each has -- " I'm sorry, there's a misprint here -- "so that each had done to him what his deeds deserve." The idea is that if you actually deserve -- that the notion of retribution requires, in some cases, the imposition of the death penalty, in Kant's view.

I should also be clear -- and I'm going to disagree here a bit with Judge Gibbons. At times, Judge Gibbons spoke as if retribution was about doing to the victim of the crime -- or about getting retribution for the victim of the crime. But modern retributive theories, I think, are not victim-centered. In particular, they tend to be defendant- or society-centered, in the sense that they are either -- actually giving to the defendant what the defendant's acts have created for him. They give moral weight to the defendant's actions. And the retribution from society is meant to send a message or to correct the defendant. And so it's done for -- in a sense, if you want to put it in very sort of colloquial terms -- when you punish your child, you're not punishing your child to carry out the interest of somebody else, but in order to correct that child, to improve that child's moral well-being. And some people view retribution in that way. Some people create retributive theories from the notion of creating a just and civil society.

In the materials I gave you, Professor Steiker of Harvard actually justifies her vision of retribution on a similar notion of -- hers is, admittedly, an anti-death penalty one. But, nonetheless, her idea of retribution is one coming out of what society ought to do, or what is good for society.

Okay.

I'm also going to talk a little bit about the consequential--

REVEREND HOWARD: Would it be disturbing your rhythm?  
I didn't quite--

MR. LILLQUIST: Oh, sure.

REVEREND HOWARD: --get that point that you made there toward the end.

The point of retribution is to act on behalf of society?

MR. LILLQUIST: Yes.

REVEREND HOWARD: Is that what you're saying?

MR. LILLQUIST: The idea would be-- I mean, there are many-- I don't want to-- If any of you have ever delved into criminal law theory, there are multiple, and -- volumes written on what retribution means. In fact, I think it's safe to say at this point that retributive theory is the dominant theory in a modern American or Anglo-American criminal law, used to justify the practice of punishment.

People do it in a variety of ways, some saying something along the lines of it's something society needs to do for its own good in order to, perhaps, stop people from being retributive on their own. So it upholds the dignity of a civil society. That would be the argument of retribution. It's

not about -- strictly about doing something on behalf of the victim. It's about doing something on behalf of the collective.

Does that answer your question?

REVEREND HOWARD: Yes.

MR. LILLQUIST: All right.

The other argument for criminal law in general, and the death penalty in particular, is consequentialist. As Judge Gibbons noted, specific deterrence is the idea that we execute the offender to stop that offender from killing again.

I think it is safe to say that that is not the primary justification given even by deterrence theorists. Instead, the primary justification is one out of general deterrence: the idea that the execution of murderers may have the effect of deterring others from murdering in the future. The idea is, if I see that other people are being executed for murders, I will not murder myself.

And contrary to what Judge Gibbons was suggesting, I think the literature here is more -- far more ambivalent than he suggests. There have been a bunch of recent studies -- econometric studies -- suggesting that, in fact, the death penalty does have a deterrent impact, at least if carried out in sufficiently large numbers. In particular, there's the Joanna Shepherd study, that was in the *Michigan Law Review*, that's cited in the Donohue and Wolfers article, and also in the Sunstein and Vermeule article.

MR. KELAHER: Can I interrupt you?

MR. LILLQUIST: Yes.

REVEREND HOWARD: Please.

MR. KELAHER: I ask you how they make that determination that it is a deterrent to society in general? I've read this literature about, maybe every person you execute -- maybe 18 other people won't be murdered.

MR. LILLQUIST: That's the one -- that's the statistic that Sunstein and Vermeule argued about. What they do is, they use sophisticated -- modern, sophisticated regression -- statistical regression techniques in order to take county-by-county or state-by-state data panels and then compare the effect of an execution versus the murder rate in those places. And they do various things in order to try to control for time lags and other confounding variables.

What they are doing is trying to use very sophisticated statistical models, that have emerged out of modern economic and psychological theory over the last 20 years, and applying to this. It goes back-- I mean, the sort of grandfather of this was Ehrlich, back in the '70s, right after Furman, who published a study suggesting that the death penalty did, in fact, have a deterrent value. That was subject to criticism. And there's been this proliferation of studies since then, going back and forth on this issue.

What the Sunstein and Vermeule article that you were provided with points out is that there is this small tick up in studies suggesting a deterrent value from the death penalty. As I'm going to suggest, I don't know that we can actually draw anything from them. But I think it's fair to note that there are-- Contrary to what I think Judge Gibbons was suggesting, I think there are -- there has been academic work out there -- respected academic work out there, that is -- that shows a

deterrent value. I don't -- not saying that you should agree that a deterrent value -- deterrence actually exists here, just that you have to recognize that there actually are studies showing that. They may turn out to be wrong, for other reasons, but you should know they exist.

MR. KELAHER: Mr. Chairman, just one more question on that point.

I'm not sure then how that would apply in New Jersey, where there haven't been any executions.

MR. LILLQUIST: Well, you know, particularly if we take some of the studies seriously-- At least one of the studies suggest this difference between something that I'm sort of ignoring -- what I've sort of ignored so far, which is the difference between deterrence on the one hand, and brutalization on the other.

The idea of deterrence is, obviously, based on this model of human behavior that suggests that, "Well, if I see somebody else being punished for doing X, I won't do it, because I don't want to receive that punishment, as well." That's the basic human behavioral instinct we have in using deterrence.

The other side to it is brutalization. If we see the State executing people, it may actually lead to a society in which people are more cavalier with life. And there are those-- And there are some-- One of the studies suggests that if a jurisdiction does not engage in enough executions -- that a small number of executions can actually have a brutalization effect, such that it actually increases the death -- the murder rate in the state, rather than decreases. And there's a tipping point at which we switch.

Now, as I'm going to-- And maybe I'll just point out the arguments against deterrence. There are a bunch of other articles that take issue with the notion that a deterrent value exists. But more importantly, I think the article to review in thinking about this is the Donohue and Wolfers articles, and their bottom-line conclusion that, you know, we have a lot of studies, but it just may be impossible to know what the deterrent or brutalization effect is here, ever -- at least as an empirical matter -- simply because we're never going to have a large enough database that can be removed of the confounding variables, such that we can come to a conclusion.

When scientists run studies in general, we try to do it in a controlled environment. You can't do that with murders and the death penalty. We're not going to put people in a lab, then ask them to murder each other -- or potentially murder each other -- and then execute some of them. That's never going to happen. That would be morally repugnant.

So we have to do these econometric studies. But they have confounding variables we can't control, because we can't control them well enough given the limited data sizes. We may never be able to get a firm conclusion as to whether or not a deterrent value exists.

REVEREND HOWARD: So may I ask-- Would it be fair to ask, at this stage in your presentation, that as a scholar reviewing all of these studies, it is not possible that a person can stand firmly and declare that deterrence is one of the benefits of capital punishment?

MR. LILLQUIST: I don't think-- Well, my opinion would be that a person cannot stand and say they have proven that deterrence exists.

But, equally, they cannot stand and say deterrence has been proven not to exist.

REVEREND HOWARD: No, no.

MR. LILLQUIST: We stand in a state of empirical equipoise, where we simply have to revert to, perhaps, our instincts about how humans behave. We don't--

REVEREND HOWARD: But the weight of this claim is on the affirmer.

MR. LILLQUIST: Science is not going to have-- From an epistemological point of view, I'm not sure that's true. I'll leave it to others as to whether or not we -- the theory of deterrence, in and of itself, is sufficient to justify this. I can speak only to what the science itself shows. And I think that the science -- to the extent science is useful here, I think science is indeterminate as to what the effect is.

REVEREND HOWARD: Excuse me for interrupting.

MR. LILLQUIST: I'm sorry.

REVEREND HOWARD: I'm very intrigued by your line of reasoning. But I'm trying to make sure we get the full benefit of your presentation, and also with the interest of time.

In other words, if I want to end the life of a person, and the motive that I put forward is deterrence-- I think you're saying the weight of the literature is that I cannot make that bold claim, never mind whether some could argue the opposite. The affirmer has the responsibility, here, of support of the evidence. Am I right or wrong?

MR. LILLQUIST: I would say that the supporter of capital punishment cannot use empirical -- cannot use econometric studies of the

type that are typically done in this area to strongly suggest that a deterrent -- that there is a deterrent aspect to the death penalty. They could still argue that the scientific literature is indeterminate. And based on their theories of human behavior, they can assert that deterrence does exist, although they won't be able to empirically prove that.

So I can't-- I don't want to be heard as saying that deterrence can't be used as a rationale. It just has to be acknowledged that these econometric studies are not going to support that rationale in a strong sense. But we have lots of areas in life in which we act without strong scientific evidence, but based on our hunches about how humans behave. This, unfortunately, at least for now, remains one of those where we're going to have to act on our instincts, rather than on what the empirical evidence says. And someone might come back and say that, given that we don't know enough here, we actually shouldn't move -- make any move for the death penalty until we do have scientific evidence that it exists. And then if that's the standard of proof, then yes it fails. But you don't necessarily have to frame the debate that way. And I'm not here to tell you how to frame the debate. I'm here to try to tell you what the scientific literature says. The scientific literature I don't think strongly supports or undermines the death penalty in this case. But underlying theories of human behavior, I think, remain, for now, untouched.

REVEREND HOWARD: I understand.

Now, I suppose-- I'm not going to interrupt you anymore.

MR. LILLQUIST: No, I don't-- Please.

REVEREND HOWARD: I just want to be clear.

MR. LILLQUIST: No, I actually welcome interruptions, because I view this as an opportunity to educate.

I'll just go back one moment here. Having said that Kant supports retribution, I do want to be clear that, of course, there are many deontological thinkers who oppose the death penalty -- Carol Steiker among them -- who view retribution as actually limiting our ability to engage in the death penalty.

Importantly, a lot of times what we end up with in criminal law are mixed theories of criminal -- of the justification for criminal punishment, such that retribution is seen as a limit rather than-- It might be seen as a ceiling, rather than a floor, for criminal punishment. You can punish no more than somebody is deserved to get. But you don't have to punish to that level. And so on those accounts, that leaves open other arguments against the death penalty, saying, "Well, retribution might say an eye for an eye, or a life for a life here is okay," but as Judge Gibbons eloquently argued, there may be lots of other reasons not to have the death penalty, beyond the pure retributive value.

And as he suggested, we have problems with equal protection and arbitrariness in the -- that have been demonstrated empirically in the application of the death penalty. The most famous one is the Baldus study, showing that the race of the victim influences who's going to and who's not going to get sentenced to death. In addition, we know from particular cases that sometimes it seems that less culpable defendants get convicted, even in the same case, and sentenced to death than the more culpable victims (*sic*), perhaps because of procedural niceties or because of plea bargaining.

We also have errors in the application of the death penalty itself. Innocent defendants have been sentenced to-- People we subsequently know to be innocent have been sentenced to death. And in addition, again going back to the general retributive notion, there's this idea of harm to the dignity of the defendant, the victim, and/or society by engaging in the death penalty -- that, in some way, the death penalty itself is a harm to our human dignitary values.

And then, of course, there are rebuttals to this. One major problem that is often overlooked here, I think, is that many of these problems of equal protection and arbitrariness, of course, are problems of the criminal justice system in general. They're not specific to the death penalty. People do get different sentences in burglary cases or rape cases based on where they live.

My best example of this is rather anecdotal, so I'll apologize for that. But my sister-in-law used to be a public defender in Louisiana. She lived in Jefferson Parish, which is a suburban parish next to New Orleans. And she would say how defendants who -- her clients who were arrested and tried in Jefferson would get much longer sentences than if they had committed the crime a mile away, in Orleans Parish, where the sentence would be almost certainly lower than what she was forced to deal with in Jefferson Parish. So geography does matter in the criminal -- throughout the criminal justice system, not just with the death penalty. And race matters, obviously, throughout the criminal justice system.

So while these are problems with the death penalty, you should be aware of the problems, to the extent that you buy those arguments, you're buying arguments about the criminal justice system in general. The

criminal justice system itself remains, despite our best efforts, unequal and arbitrary to a certain extent.

And, of course, there are-- I don't want to deny that death is different. But it's-- There are those who take the position-- I have at least one very liberal colleague who constantly hammers me over the head with the notion that death really isn't that different. To put it in-- I like to quote, here, Professor Douglas Husak, actually of Rutgers. He's a philosopher. But in discussing punishment, he talks about people being in prison and points out all the harms that come from imprisonment itself. Prisoners lose their liberty and most of their rights. They're deprived of their families, friends, jobs, and communities. Their days are passed in unproductive idleness. Prison life is degrading, demoralizing, and dangerous. Once released, defendants are less employable, often forfeit their rights to vote, to receive public benefits and services. Punishment has a negative impact on the lives of their spouses and children.

So while it's true that death is different, I think it's important to keep in mind that death is not radically different than imprisonment. Imprisonment is an awful, awful thing. That's why we need justifications for why we engage in it.

REVEREND HOWARD: But now-- I mean, now, as a Christian minister, I hesitate to say this, especially on the record. But death is irreversible, right?

MR. LILLQUIST: Well, yes, death is irreversible. But--

REVEREND HOWARD: That's the distinguishing factor about death, right?

MR. LILLQUIST: We have-- That's absolutely true. But practically speaking, I think it's also true that -- and I've written this -- that what prison -- that sentences of life imprisonment are often functionally irreversible. The reason they're functionally irreversible is because people who are sentenced to life in prison do not get anywhere near the resources committed to their cases after conviction that people who are sentenced to death--

If you're sentenced to life, nobody is-- You're not getting an automatic appeal to the New Jersey Supreme Court.

MR. KELAHER: That's life without parole?

MR. LILLQUIST: What?

MR. KELAHER: Life without parole?

MR. LILLQUIST: Life without parole, in many states.

You're not getting an automatic appeal to the state supreme court, which occurs in many states for death penalty people. You're not getting anywhere near the engagement of people interested in proving your innocence.

REVEREND HOWARD: I'm chiming in as you invited me.

MR. LILLQUIST: Please.

REVEREND HOWARD: You're speaking of probability. I'm speaking of possibility.

At our public hearing, we had a fellow here who had been sentenced to some rather lengthy period. I don't know how long -- life without parole, or something like that. And because of DNA evidence, he was released.

Now, had he been executed--

MR. LILLQUIST: I certainly don't deny-- I wanted to be clear at the beginning. I did not-- I said I do not deny that death is different. I'm simply trying to dispel the notion -- that it's not as different as-- It's not as radically different as some people want you to believe -- want to suggest it is, at least in my view -- that there is--

SENATOR RUSSO: I suggest we're using a bad example though, Mr. Chairman. For example--

REVEREND HOWARD: If I used it, I know it's a bad example. (laughter)

SENATOR RUSSO: And you referred on your chart there.

No one in New Jersey, I think we can agree, under this law, has ever been found to have been sentenced to death and found not to have been guilty. We can agree on that. It doesn't mean it can't conceivably happen, but it has not happened. Because the bill was drawn so tightly by many people -- I don't even mean just myself as sponsor -- to make -- to try to make sure that doesn't happen in New Jersey. And it has not. It has not, to this day. God willing, it never will.

MR. HAVERTY: I think that Mr. Scheck made it pretty clear, though, that it came perilously close with the Peterson case.

SENATOR RUSSO: Well, I don't know, because I--

MR. LILLQUIST: And while it may be true that no one in New Jersey has been yet-- I mean, the criminal justice system is a human system. It primarily involves decisions made by human beings, not by computers. And, inevitably, we make mistakes.

Those who argue that we will never make a mistake in the criminal justice system in general -- and the death penalty process in general

-- I think, are being -- are fooling themselves. Any criminal justice system, including the death penalty system, no matter how carefully we draw it, is going to make a mistake at some point. And if you find that to be-- If you personally-- If someone personally finds that as something that can never happen, then you ought not to have a death penalty. Because if you don't think you could ever execute someone who is innocent-- Given a long enough period of time, any death penalty system is going to do it, because it's -- unless we find some way of being omniscient, but that human beings are not.

SENATOR RUSSO: Not with our courts.

MR. LILLQUIST: Well, you know--

SENATOR RUSSO: It will never happen, because nobody will get executed.

MR. LILLQUIST: Well, that's beyond my expertise.

But on the other hand, we do punish people in general. And it's not just cases-- As the example shows, it's not just in death penalty cases we make mistakes. We make cases -- we make mistakes in all sorts of cases. And we punish people.

REVEREND HOWARD: Well, we presume, I think-- I think, now, as an ethicist-- I think it is fair to assume that well-crafted systems, administered by human beings, will make errors. I accept that. So the question is, I think-- I'm more interested in your views on the retribution rather than deterrence. Because I think it's, on its face, evident that death has a very searing distinction in that it is irreversible.

Now, the probability of an indigent person sentenced to life in prison, having the resources to have their case reversed, is also self-evident.

But there is the possibility. And I think this is within the realm of this Commission's thinking, or should be.

Now, we're running out of time. And I would like to ask you, if I'm not imposing, if you would say something, in summary, about the theory of retribution and whatever you would like.

MR. LILLQUIST: Well, it might be easier-- If you don't mind, I'll just quickly talk about-- I'll just say that I find, as an expert -- as somebody who is an observer of this debate, I find the debate in the area to be somewhat indeterminate. I mean, I don't have-- I, frankly, do not have a fixed view on what the right thing, here, to do is.

And so it might be useful just to take a minute -- because Mr. Neville had suggested that there was some interest in procedural reforms -- to just talk about what the two main efforts that capital justice reform in recent years has been: the Illinois Report, of which you all may be aware; and then there's a separate Massachusetts Governors Council proposal to reinstate the death penalty in Massachusetts, subject to very strict procedural changes.

And so it-- To the extent this Commission ends up being interested in that -- and I don't know to what extent is within its mandate -- there are things you can think about in reforming New Jersey death penalty law. The existing law in New Jersey requires the purposeful or knowing causing death of another; and then you have to meet a capital trigger -- one of these capital triggers; and then you have to show an aggravating factor at the punishment phase.

One way to change New Jersey law would be to narrow the capital trigger category so that there are less cases eligible for the death

penalty in the first instance. That's certainly things that Illinois and Massachusetts have thought about in dealing with the death penalty. In addition, you can think about procedural reforms. Justice Coleman, who fortunately for me is not here today, because I've criticized him in print for suggesting that one way to go is to go to absolute certainty or beyond all doubt -- I actually find that suggestion to be illogical because, again, we're human beings, and we cannot actually deal in absolute certainties, epistemologically.

But on the other hand, there is this process called *death qualification of juries* in criminal -- in death penalty cases, in which jurors are only allowed to serve if they are willing to sentence the defendant to death. Empirically, that's been shown to bias the decision of the guilt phase. In other words, one source of error in death penalty cases may just be that the initial panel deciding guilt has been slanted by the death penalty qualification process. So one possible reform is to only use death qualified jurors at the guilt -- at the punishment phase, rather than at the guilt phase; impaneling a new jury, or changing the panel when you get -- if you get to a punishment phase.

In other states, they have talked about rules and eyewitness testimony. We already have an instruction in New Jersey on cross-racial identification problems, which I think is a very good reform that the court engaged in. We also recently have changed our rules on custodial interviews to require audiotaping. That's been suggested in other states, but it already applies to a wide range of crimes in New Jersey, which has been good. In addition, the New Jersey Attorney General's office requires,

now, sequential photo arrays and lineups. That's a positive development for accuracy.

And the Supreme Court, in just the last few weeks, handed out a case called *State v. Delgado*, in which they required more in photo array lineup cases. I think there are a couple of other things that New Jersey hasn't done but could think about doing -- and it's the last one actually I want to focus on, which is reform in the crime lab. And in particular, making forensic testing in New Jersey blind. In other words, in taking it outside of the control of prosecutors, making it a completely neutral and independent organization that's subject to accreditation by outsiders, to ensure that there is no bias going into the generation of forensic evidence, which has been a significant problem, not so much in New Jersey, but in some other states -- have obviously uncovered very big problems here. And making a stronger crime lab would certainly help not just the death penalty system, but the criminal justice system in general.

I'm sorry, Reverend Howard, for taking up -- I didn't want to take up too much time.

REVEREND HOWARD: No, no. Thank you.

Maybe the Commissioners have some comments or questions they'd like to have before we conclude.

SENATOR RUSSO: Just so we don't go by default--

Could we go back to the one where you suggest how the New Jersey law could be improved?

MR. LILLQUIST: Oh, sure, yes. The substantive law.

SENATOR RUSSO: Yes.

MR. LILLQUIST: So these are all -- I'm just throwing these out there as ones that are used in other states in order to narrow-- If you go back one--

SENATOR RUSSO: Go back one more.

MR. LILLQUIST: Right.

SENATOR RUSSO: Yes.

MR. LILLQUIST: The existing capital triggers are: when done by own conduct of the defendant, or accomplice--

SENATOR RUSSO: Let's go one at a time, one at a time. That is the present New Jersey law?

MR. LILLQUIST: Yes. This is present New Jersey law. This is the present--

SENATOR RUSSO: You say possible reforms.

MR. LILLQUIST: Oh, I'm sorry. I was using this as a-- My mistake in setting up the slide.

SENATOR RUSSO: Well, that's not--

MR. LILLQUIST: This was meant as to explain to everyone how existing New Jersey capital law works. Right? So if I want to prosecute somebody in the death sentence in New Jersey, the first thing he's got to do is be purposeful or knowing, causing the death of another.

SENATOR RUSSO: Right.

MR. LILLQUIST: Right. Then you need a capital trigger, which has to be one of the next three things.

SENATOR RUSSO: What do you mean by accomplices? Define what you mean there.

MR. LILLQUIST: As somebody-- Oh, the best example is murder for hire -- this is a murder-for-hire situation.

SENATOR RUSSO: Okay.

MR. LILLQUIST: I can't get out of the death penalty in New Jersey by saying, "Oh, I didn't actually cause your death. I hired Joe to do it." Right? In New Jersey, if I hired Joe to do it, then the capital--

SENATOR RUSSO: The Marshall case.

MR. LILLQUIST: Right.

SENATOR RUSSO: Judge Gibbons, that's one of those poor people you referred to (laughter) -- (indiscernible) and I knew them well, or they fit that category.

MR. LILLQUIST: And then there's a final category for leaders of narcotic conspiracies to solicit the commission of the offense.

SENATOR RUSSO: Yes.

MR. LILLQUIST: And then after you -- you have to show them one of those three things. And then finally there's a sentencing procedure which the government has to show at least one of -- a list of aggravating factors. And then the thing that I didn't include here is, then the jury has to decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. And so what I'm suggesting here is that one way of further limiting the substantive applicability of the death penalty is to narrow that category of triggers. Right now, it's the main one. Not the only one, but obviously the one that's used perhaps most often is when done by own conduct of defendant. That turns out to be a pretty broad category, in reality.

In practice, you could say, "Get rid of that one." Instead, require it to be done as a terrorist act; the killing of law enforcement, perhaps including correctional officers; a situation involving more than one defendant or previous first-degree murder conviction; or interference in criminal, other governmental investigations. These are just examples of more limited categories used by other states, as a way of limiting those who are going to be death penalty eligible. Something that you could consider doing. Again, I'm not here to advocate any-- I want to be very clear. I'm not here to advocate anything. I'm here simply to educate you and give you an idea of what the possibilities are, and these are among the possibilities. And I do note, some of these are presently used as aggravating factors, but the list of aggravating factors, actually, is pretty large.

MR. HICKS: If the defendant does fall into all these categories that you suggest, which require to be executed, how will society be better served by them being executed, opposed to just being sentenced to life without parole?

MR. LILLQUIST: In my view?

MR. HICKS: Yes.

MR. LILLQUIST: Why don't-- I want to be clear. I don't have a fixed view on that. That's a decision for the Commission and for the people of the State of New Jersey and the Legislature. Right? I mean, either -- again, this goes back to the general justifications for punishment in general -- either you do it because you think there's deterrence; or you do it because you think that it's a necessity of justice, of retribution to execute somebody rather than to sentence them to life in prison. I agree. That's a difficult, difficult decision. It's one that has divided academics now for

decades. And I don't see it as an easy decision. I can just lay out for you what the existing arguments for-- Because again, I personally am not here to advocate one way or the other on that issue.

REVEREND HOWARD: Right, right, understood.

MR. HAVERTY: Professor, I just had a question and these -- you really didn't touch on it, but it was in the materials. It was sort of raised from the materials that I read. This issue about adding or comparing the aggravating factors against the mitigating factors. And one of the things that was discussed in there -- and that's a formulation that the Supreme Court has sent down -- is that you have to permit that, correct?

MR. LILLQUIST: Well, it's one way of doing it, yes. And it's the one most frequently used, yes.

MR. HAVERTY: Right. But one of the things that I saw in there, where they talked about the requirement for balancing aggravating factors versus mitigating factors, is the idea that putting in the mitigating factors will allow you to resolve any residual doubt, as they described that, about guilt. And what troubled me about that was -- and maybe I don't understand it, because I'm not a scholar of criminal law -- but the question is, if there's any residual doubt about guilt, and you're somehow manifesting that in the mitigating factors, then has the jury met its burden, or dealt with the burden of *beyond reasonable doubt* in the guilt phase?

MR. LILLQUIST: Okay. This actually is right up my--

MR. HAVERTY: I see that's a very frustrating question to you.

MR. LILLQUIST: This is actually right up my line. There's this issue about lingering doubt, which most recently came up in *Oregon v. Guzek*, which was decided this past term, and what to do about those cases.

And by lingering doubt, it's situations where somebody is saying, "Well, there's some doubt, although it's not a reasonable doubt." In other words, the defense convicted beyond a reasonable doubt, but for some reason we're not absolutely certain. Well, the first problem with any sort of notion with lingering doubt is--

MR. HAVERTY: How do you distinguish it between -- is it reasonable or just--

MR. LILLQUIST: --supposed to be the highest level of certainty, human beings, as opposed to God, can accomplish.

MR. HAVERTY: Moral certainty is really what it is.

MR. LILLQUIST: Moral certainty, exactly. In fact, the idea of reasonable doubt goes back to enlightenment philosophers talking about moral certainty and how that's the highest level of certainty humans can accomplish. And it's directly derived from that idea. So it's hard to talk about lingering doubt as really existing. But if it does exist, the question is then, where do we impose it in our system? Should it be used? Should we allow it to be considered? And the Supreme Court sort of waffled on this question a bit. I think, given both *Guzek* and a much earlier case, *Franklin v. Lynaugh* -- if I'm pronouncing the last name right -- it's L-Y-N-A-U-G-H. In both cases, the court has been a little bit obscure about whether or not juries have to be allowed to consider lingering doubts at the punishment phase. It's not completely clear, I think even now, whether they constitutionally have to be required to do so. There are various ways of reading both *Franklin* and *Oregon* that would suggest that that possibility is still open.

MR. HAVERTY: But there's an acknowledgement that this might be there. There might be the -- some of the doubt.

MR. LILLQUIST: Empirically, people believe this does go on. The people who study how capital juries make their decisions about whether or not to impose death, suggest, I think probably rightly, that capital juries do at times decide not to impose the death penalty because they have some lingering doubt about the individual's guilt. And that plays a role.

MR. HAVERTY: Is that constitutionally permissible? In other words, if it's beyond reasonable--

MR. LILLQUIST: It seems to be. Well, constitutionally permissible, it seems to be, yes. Is it constitutionally mandated, I'm not sure.

MR. HAVERTY: I guess what I'm asking is, is if the standard is -- the constitutional standard is beyond reasonable doubt, as we've discussed moral certainty, and if jurors at the sentencing phase are still expressing some lingering doubt, then it couldn't have been to a moral certainty. I don't know how anybody could really distinguish a lingering doubt from a reasonable doubt.

MR. LILLQUIST: Well, you're making the argument I've made in print. If you'd like a--

REVEREND HOWARD: And professor? Professor?

I'm going to excuse you from having to answer that--

MR. LILLQUIST: Thank you very much.

REVEREND HOWARD: --because I don't know that you can.

MR. LILLQUIST: I've tried--

REVEREND HOWARD: Yes. You know what I'm saying. I mean, you can offer your opinion.

MR. LILLQUIST: --in many pages.

REVEREND HOWARD: But we are deeply appreciative of your coming and presenting such a helpful proposal.

And Senator Russo, were you impressed with this set of possible reforms?

SENATOR RUSSO: Absolutely.

REVEREND HOWARD: Yes, indeed.

I'm going to -- if you don't mind -- I'd love to have you remain with us.

MR. LILLQUIST: Sure.

REVEREND HOWARD: I'm going to ask our next colleague, Mr. Krakora, to come forward. He's been very patient with us. And I'm going to say, because one of our colleagues has to depart at 4:00 p.m., I'm going to propose that we establish, no later than 4:30, an adjournment, but try to conclude this portion of our program in the next 25 minutes, thus allowing the Commissioners to speak in private about a couple of items that require our attention.

**J O S E P H   F .   K R A K O R A ,   E S Q . :** I just have a handout.

REVEREND HOWARD: Sure, please.

MR. KRAKORA: Thank you, Reverend Howard.

My name is Joe Krakora. I know I introduced myself in one of the prior meetings. I'm the Director of Capital Litigation at the Public Defender's Office. I have been admitted to practice in New Jersey since 1984. And of those 22 years, 17 of which I have served in the Public

Defender's Office. And my main responsibility over the years has been the defense of homicide cases, both capital and noncapital. I have represented over 100 defendants in murder cases. I have represented 40 people in State and Federal Court facing the death penalty. I've tried 10 capital cases in State Court in New Jersey. I have worked as an adjunct professor at Seton Hall, teaching a class on the death penalty. I've lectured at numerous CLE events and other Bar functions, related to the defense of capital cases. And my current job is really -- has two parts to it: One, I continue to represent clients individually in capital cases; I think I have four clients right now facing the death penalty in New Jersey. And probably to some extent, more germane to what I would like to talk about this afternoon, is an administrative role I have as the Director of Capital Litigation that, among other things, requires me to make decisions concerning the assignment of counsel to our clients facing the death penalty; and also, short of the Public Defender herself, the final say in the authorization of the expenditure of Public Defender funds towards attorney fees and the other costs associated with defending capital cases. In other words, when our lawyers representing our clients in capital cases seek to hire experts, seek to do investigation, ultimately I'm the one who has to approve whatever expenditure of our budgetary funds is involved in doing that.

And in that context, what I would like to use my 20 minutes for is a discussion of one of the main issues that the Commission is confronting here, and that's the cost of the death penalty. I have a bias about the death penalty, given what I've done for the bulk of my career; but I want to try to make this presentation objective and factual, in the sense that I think that, as Commissioners, in order to understand what is the cost

of the death penalty in New Jersey, and is that cost justified going forward, you need to have a fundamental understanding of the process of capital litigation in this State -- what is involved in a capital case from beginning to end, what are the costs, what costs might be eliminated if the death penalty were to be abolished. And ultimately, there is a policy-type judgment that legislators certainly would make, and you as Commissioners might make, which is, whatever that cost is, is it worthwhile, justified, and appropriate, going forward?

One of the things that I think I've really, kind of, struggled with, in thinking about today was: there's a number of ways that you can look at the issue of cost of the system of capital punishment. At the basic level, when as a trial attorney you interview perspective jurors, you get that very basic notion that it is cheaper to execute this defendant, if convicted of murder, than it is to put him in prison and pay for him to live in prison for the rest of his life. All right? And many jurors will say, "I support the death penalty because, as a taxpayer, I don't want to pay to put this convicted murderer -- three squares, a TV, a rec room, weight lifting, etc."

That model of looking at cost is flawed for a number of reasons. Because if you think about it, what it assumes is that in a particular case, the person on trial is convicted, sentenced to death, has his appeals over a reasonable period of time -- let's say six to eight years -- and is then actually executed. Because obviously, at the point of the execution, the taxpayers no longer pay for the incarceration of this defendant. So if we used a case of someone who is 27 at time of conviction, for sake of example, executed at the age of 35 -- with a life expectancy these days of 75 to 80, you can see there would be savings. So if you put the issue in that context, you could

make the case that it's cheaper to execute the convicted murderer than to put him in prison for the rest of his life.

The problem is, that's not what happens in reality. A relatively small number of people who are prosecuted for the death penalty are, in fact, sentenced to death. A much smaller group of those are executed. And all you have to do is compare. Let's assume you tried 100 people for capital murder and 90 of them were convicted, sentenced to death, and executed in eight years; versus a system where you took the same 100, and one or two -- or, in the case of New Jersey, zero of those defendants -- even if having been sentenced to death by a jury, not executed, end up essentially with life sentences.

There have been -- and these numbers are a little different than Judge Gibbons, but I'm not sure the date at which he last had access to the data. We believe that there have been approximately 600 cases since 1982 in which a Notice of Aggravating Factors was filed by the Prosecutor in a particular county. That's historically -- until recently, that was the document that was filed that announced the State's intention to seek the death penalty at trial. It was called the Notice of Aggravating Factors -- a piece of paper which listed the legal basis upon which the State was seeking the death penalty. That's those aggravating factors we talked about before.

Of those 600, 60 resulted in a death sentence. There have been 60 death sentences, as of today, imposed by juries -- and in one case, a judge -- that I can think of, since 1982. There are nine on death row now, and there have been zero executed.

So one way to look at the issue of cost here is to say, let's assume those 600 cases had been prosecuted as noncapital cases with the

defendant facing a maximum of life in prison, and compare what it would have cost the State of New Jersey to prosecute those cases, to what it has cost the State of New Jersey to prosecute those 600 cases, the result being nine on death row after 24 years and none executed. And then you advance to the stage of which you make an assessment of whether that cost is a worthwhile, justifiable, or appropriate one, going forward.

I think, to analyze cost, you have to do it in two parts: What is the absolute cost of the death penalty system in place in this State? And the second part, which I'll address briefly, is how does that cost -- and this is what I alluded to a moment ago -- compare to what the system would cost without the death penalty, with life in prison, instead, being the maximum penalty?

There have been studies in a number of states. I made a conscious decision not to come in here with a lot of numbers. We can provide some of that information to the Commission at any point. You can go on the Internet. You can see some states -- Florida, Maryland, California, Texas, Kansas -- there have been studies that have purported to show what the difference is between a system of capital punishment and its cost, and a system where the death penalty does not exist and the maximum penalty is life without parole.

So I proposed a little outline here. And in the first part of my outline, which I entitled "Capital vs. Non-capital murder cases: A comparison," is based on the notion that you need to understand the difference in the procedures employed in the cases when the death penalty is sought as opposed to when it's not, in order to understand the second part of this: Where are the costs that are unique to capital cases? What

costs, be it monetary, be it emotional, psychological -- there's a number of costs -- but what costs exist because we have the death penalty that wouldn't exist if we didn't? The key thing that I think -- and I know people have varied levels of experiences as lawyers on the Commission, and non-lawyers and different walks of life -- but the key aspect that everyone needs to understand is that the United States Supreme Court, in the '70s, started what has become known as the death-is-different jurisprudence. And people have talked about that a little bit already at different Commission events.

And what that means is basically this: The United States Supreme Court struck down the death penalty in 1972 because it felt, in essence, that the juries deciding who got the death penalty and who didn't had no guidelines within which to make that decision. They were told, "Go into the jury room and deliberate. Determine if the defendant is guilty or not guilty of first-degree murder. And if he's guilty, come back and tell us whether he should get the death penalty or life in prison" -- no further guidance as to how that decision should be made on punishment. So the United States Supreme Court said, "That's unconstitutional. The sentencer must have a framework within which to decide whether someone lives or dies." And in a series of cases in the '70s, this concept of mitigating factors and bifurcated trials became the law in every state that sought to reenact the death penalty after *Furman v. Georgia*.

In other words, capital cases are unique because they have two parts to them. They are the only cases in which the jury, not the judge, imposes sentence. Capital cases have two part trials, known as the guilt phase and the penalty phase. And most of the cost that has been built into

this system now is a function of the constitutional requirement that a defendant facing the death penalty be permitted to offer to the jury any and all information about his life, his background, his history -- any and all information -- that might be the basis for a life sentence as opposed to a death sentence. This is the concept of mitigation. This is what defense lawyers are schooled in. This is what our Supreme Court in this state and the United States Supreme Court has been talking about since 1978, in the case of *Lockett v. Ohio*, in which the United States Supreme Court said, “The defendant in a capital case is entitled to present evidence in mitigation which amounts to almost anything that he or she believes might persuade a juror to vote for a life sentence rather than a death sentence.”

Because of that constitutional requirement and because of the two-phased trial, the mechanism by which a capital case is prosecuted is more complicated. It takes longer. It’s more complex, and it is much more expensive to the system as a whole. That will never change. Judge Gibbons made that point a little earlier today. You have to understand that it is beyond the point at which the system could be changed to become a more efficient “machine of death” -- the expression has been used. It’s passed the point where that could happen.

As recently as three years ago, in 2003, the United States Supreme Court decided an extraordinarily important case called *Wiggins v. Smith*, about the future of the death penalty in this country as a whole, in my opinion. Because in that case, a death sentence was overturned on Federal habeas review on the theory that the defense attorney in that case had failed to adequately investigate potential evidence in mitigation to be presented to the jury during the penalty phase of the trial.

In other words, it wasn't necessarily that this defendant had a case that wasn't presented or that the lawyers had not presented any case at all, it was ineffective assistance of counsel. Because before deciding whether to put on mom to beg for the client's life, or to call Aunt Judy to say that he had a troubled childhood -- before any of that, the lawyers had not adequately investigated his entire life history. The ramifications of that are enormous. Lawyers in this state defending capital cases have been diligent since day one in investigating the social history of the clients in building a case to present to the jury arguing for a life sentence. But it became a much broader constitutional requirement.

I wish Senator Russo were here--

MR. KELAHER: He's in the back. He's having lunch.

MR. KRAKORA: --because he mentioned the Marshall case. That case -- *Wiggins v. Smith* -- is the single, biggest reason that the United States Circuit Court, for the Third Circuit Court of Appeals in Philadelphia, reversed his death sentence. Because his lawyer had failed to investigate any possible testimony to present at Mr. Marshall's sentencing phase in 1986. Which was true, he had not.

So the point I'm making here is, the system in place now imposes many of these requirements. A capital case, capital versus noncapital -- a capital case is the pretrial preparation, and the investigation is more complicated because it's a two-part trial. Pretrial motions have always been more extensive in capital cases, although the issues still remaining unresolved have diminished over years. Jury selection in a capital case, because of Supreme Court precedent, takes four to six weeks in every single capital case in this state, as opposed to one or two days in a

noncapital case, because every juror has to be individually interviewed to determine his or her views on the death penalty and ensure what's called *death qualification* -- someone who is willing and able to vote for the death penalty if the evidence warrants it, and who is willing or able to consider life sentences at the same time.

The trial, instead of taking the normal time of whatever guilt phase -- it's now obviously elongated. Because if the defendant is convicted of murder, there is a second trial, a mini-trial, a penalty-phase trial with a jury. Sentencing in a capital case is done by a jury, not a judge. The Appellate process -- one of the things I've attached here is a chart that shows the stages of post-conviction relief in this state right now. But what's important -- I'm going to use a case example at the very end of my presentation to make this point, so I'm not going to harp on it now -- is that the Appellate process in a capital case is longer. It's more complicated. There is far greater consideration given to the defendant's claims because he's on death row. It lasts for years for a number of factors, that include judges not hearing cases, and ruling on post-conviction relief, or issuing opinions on cases -- any number of factors. But there is a stark difference, and all of this builds cost into the system.

The second part of my outline, I talk about the cost of the death penalty. Well, this is a combination of identifying for you what are the specific areas of cost that are built into the current system -- some of which could be abolished in their entirety if the death penalty were abolished tomorrow; some of which would be reduced, though not necessarily abolished. There's no magic to this other than, I guess because I'm a defense attorney, I put, first, cost related to the defense of a capital

case. The mitigation investigation which, as I said, is a constitutional requirement -- that is the critical element.

In that context, defense attorneys in capital cases are required to hire forensic social workers to engage in social history investigations of their client's background. There are various types of expert witnesses ranging from psychologists to psychiatrists, to experts on fetal alcohol syndrome, to battered woman syndrome. I mean, the list could go on in a given case. A creative lawyer who examines his client's life history and is seeking to give information to a jury to save his client's life -- this is the obligation: record collection, document collection of every piece of paper related to your client's life history which may reveal information that you could use. This is part of the constitutional requirement of mitigating evidence. Travel and witness location -- those kinds of costs, built into the fact that, if the client's family lives in California -- or in some cases we've had in the past, in Jamaica or in Europe -- and you've got to go there. You've got to find them; you've got to bring them to court to testify. There's enormous costs associated with that. And again, these are costs related to the fact that it is a capital case. These are specific.

Jury selection experts: Because of the complexity of the process, it's been the practice in this state and in many states, and in Federal Court, to employ jury consultants to assist the lawyers in the *voir dire* process that's unique to capital cases.

Enhanced attorney fees and enhanced transfer fees: We obviously would have to pay a certain number of pool attorneys to represent our clients whether they were facing the death penalty or not. Right now, in the death penalty realm, we pay our lawyers, pool attorneys.

And pool attorneys -- I'm assuming most people know what they are, but just in case -- these are outside, private counsel retained by the Public Defender's Office, normally because there's a conflict of interest that would preclude a staff-salaried Public Defender from handling the case. Also because in capital cases the number of lawyers out there who have the experience and the expertise to do the cases is limited. That's another reason why we may, in certain cases, *pool the case*, we call it. We pay \$75 an hour to the lawyers in those cases. We pay \$50 an hour for out-of-court time and \$60 an hour in-court time for pool attorneys in all other types of cases, including murder cases.

And significantly, because of this two-part process -- this bifurcated trial -- and this mitigation aspect, we have, since the reinstatement of the death penalty, we have -- and it is common around the country -- to put two lawyers on the case: one, in theory, to focus on the guilt phase, one to focus on the penalty phase. That has even been adopted by statute in Federal Court, where under the Federal Death Penalty Act a capital defendant is entitled by statute to a "learned counsel," meaning a lawyer with a certain amount of experience in capital cases.

Enhanced transcript fees go to things like jury selection process, where the transcripts of the interviews of the jurors become essential in order to ascertain whether they should be excused for cause or whether we could use our preemptory challenges against them. Those are costs that would be reduced. If it was a noncapital case, we might still hire a lawyer, a pool attorney, but it would only be one lawyer at a lower rate, spending less time.

MR. DeFAZIO: Mr. Chairman, I have to apologize to all the Commissioners, and to you, and to the witness. I am going to have to leave. But I would just like to make -- if I might?

REVEREND HOWARD: Please.

MR. DeFAZIO: The reason why we have had no one in this state exonerated who has been on death row is because of the quality of representation they get by Mr. Krakora's office. That's the real reason why. Because they get the highest quality representation that money can buy. All right?

But I just want to make a comment before I leave. I don't think that this issue comes down to dollars and cents. All right? And I know that that's part of our mandate, but I want to just make my position clear here. That is not the (indiscernible), because many of these costs, as Mr. Krakora has said, are going to come into play if this state goes to another system where it's life without parole or whatever. Still going to get the quality representation. I admit, they'll be reduced costs, and I'm not going to get into it. But I just wanted to make that comment before I leave.

And I really do apologize, but I have to go. But I just wonder out loud, in the case of Timothy McVey, all right? Should anybody really have been thinking dollars and cents in that case, where he did what he did? He took down that building and he killed those little children that were in there. I don't think it's a dollars-and-cents issue.

But I compliment you. And by the way, he's representing, right now, a murder defendant in my county. So don't come and see me, because I don't want-- (laughter)

MR. KRAKORA: I understood -- I heard you were going to handle the case personally.

MR. DeFAZIO: No. I'm not in practice. (laughter)

REVEREND HOWARD: What I do want to say, though, is that this is an ingredient. It's not our place, I think, to make that judgment, but some comment on the costs for those who will make the decision, in case they would consider it an item, makes this relevant.

MR. DeFAZIO: No, I agree with you, Mr. Chairman.

MR. KRAKORA: I think that's absolutely right. And that's why I premised my remarks by saying, down the road it's for others, I suppose, to make the judgment as to whether the cost is warranted, etc.

But let me just move through, because I know you're on a tight time schedule.

REVEREND HOWARD: But we are very close to being out of time.

MR. KRAKORA: I know.

REVEREND HOWARD: And before Mr. DeFazio walks out the door, as a novice in this field with respect to how the court actually works, one of the observations that our prosecutors seemed to have voiced in the early part of our discussion was that because we have a death penalty law, but no executions, prosecutors expend a great deal of resources aimed at bringing justice under the law, but find themselves frustrated at the end. And that somehow was raised as some kind of issue. And that's also relevant to the area that you are discussing.

MR. DeFAZIO: That's a very good point, Mr. Chairman, Reverend Chairman. However, I have to say, I think -- and I'll leave it to

Prosecutor Kelaher and-- I think the increased cost in these cases is disproportionately laid at the steps of the Public Advocate's office. Because many of the things that would be done to prosecute any murder case would be done despite whether it's a capital case or not. So I think that, really, the cost analysis is more directed to the defense side of the equation.

MR. KRAKORA: In fact, that kind of segues into my last two to three minutes, and then I'll wrap it up, because I know you asked to--

REVEREND HOWARD: All right. You're taking away three minutes from the group, but we're going to grant you that.

Go ahead.

MR. KRAKORA: Okay, thank you.

No. I think the difference is with respect to prosecution costs -- and I detail some of those in my little outline, and court system costs -- is that they are more difficult to quantify and put a number on them. I think that's a point that needs to be made; and that, to a larger extent, we're talking about resource allocation issues, as opposed to outlay of money issues.

For example, if a court is tied up with a three-month capital trial, it impacts on the system as a whole, because this judge is now not available to resolve other cases, but we need more jurors brought in. That's a court efficiency resource allocation decision that someone has to make. It's not easy to put a cost number on that. And I try to outline some of those in the outline, and they're pretty much self-evident. The same thing in a prosecutor's office, if the lawyers are tied up on a three-month capital trial, which would have been a two-week trial had it been a regular murder case, and there hadn't been any preparation or investigation towards the

penalty phase aspect. We're talking resource allocation. I don't think you can say, if the death penalty were abolished tomorrow the prosecutor would lose four lawyers because they're designated to do only capital work; any more than you could say that for our office, where it's not true either. So I make that point.

I also make reference to some of the costs related to the criminal justice system. I include costs to the victim's survivors -- a topic that I don't feel particularly well-qualified to speak to, other than from my experience in courtrooms over the years watching the impact of these trials, not only on the families of the victims, which is just awful and never ends; but to be honest, on other innocent people, including families of clients, who are often innocent people caught in the middle of horrible circumstances as well -- though I didn't include that.

REVEREND HOWARD: And not just financial costs?

MR. KRAKORA: No. And I think we're talking here psychological, emotional costs that are worth talking about at some point in this process of evaluating the death penalty.

I had this one case that was -- I was going to use an example -- it takes two seconds. It's a real case. It was tried in Morris County several years ago. It was a gas station robbery by a 19-year-old kid who went in, robbed the gas station attendant, and then killed him as he went behind his desk to get change. The crime was caught on video. The client was arrested the next day with the murder weapon under his front seat. He was taken into custody and he confessed. That's the case in a nutshell. A 19-year-old kid with an extraordinarily troubled background of drug and alcohol abuse. He had been sexually abused by a high school teacher. A terrible case, an

indefensible case. That case was tried as a capital case. It lasted for three months, to get a verdict of life for this young man after the jury deliberated for 30 minutes. This case involved an enormous expenditure of resources, both prosecution and defense, only related to the death penalty, because there was no issue. This young man was on film committing the crime; a crime to which he confessed and from which he had the murder weapon in his possession a day later. The State's case took a day to present, because it was such an obvious case. The mitigation case: we presented expert witnesses -- psychologists. We documented the client's background. All we did was argue for a life sentence -- we didn't contest guilt. In fact, in my recollections, we may have even had the client plead guilty to the indictment before the trial ever started.

And my point is, it's a stark example of the costs to the system of the death penalty. That case resulted in the same outcome had it been tried as a noncapital case, in which the jury would have been picked in a day or two. The case would have taken two days to be tried. The defendant would have gotten a life sentence. He would have had one appeal to the Appellate Division. He probably would have had no issues to get the Supreme Court to hear his case. He would have had a pro forma, post-conviction relief, where he'd claim that I was ineffective as his attorney -- and in a case where he was on film committing the crime, with a confession, and the gun. Instead, it was the same outcome after a three-month trial, four to six weeks.

If those examples get to a point where they dominate the landscape of our death penalty in this state, then I submit at some point you've got to step back and say, "Is it worth it? Is this system working? Is

it accomplishing what we're supposed to do?" There's two ways of looking at the idea that there's only nine people on death row and no one executed after 24 years. It certainly has -- the system has sort of narrowed the field of eligible candidates. But if you weigh everything that goes into that process, and this is where we get -- at some point you have to question whether that's a system that's worth a continuing investment of time, energy, money, and emotion.

MS. GARCIA: I don't know if you mentioned it when I was out of the room, but you're talking-- This is one go-around. And since these cases are usually overturned, we're not talking about these resources being used once. It could be several times.

MR. KRAKORA: Yes. I wouldn't know the number. But you and I both know there's been a lot of capital cases in this state where death sentences were overturned and there were retrials in these cases.

I have a case right now that's been nine years since the murder happened, and it's up for trial for the third time, sometime next year. So that's part of the process.

MR. HICKS: Couldn't this money be better spent for some type of victim services or maybe in law enforcement? I'm assuming, I'm--

MR. KRAKORA: Listen, I--

MR. HICKS: Just how much would be saved -- but obviously there would be some type of savings. Is there a better way to spend those resources than hoping to execute?

MR. KRAKORA: I think that whole idea of resource allocation operates in many levels and in many aspects, and I think you make a valid point.

REVEREND HOWARD: But that's just your-- That's not an area of your expertise.

MR. KRAKORA: No, no. I wouldn't pretend to--

REVEREND HOWARD: Let's try and stick to--

MR. KRAKORA: Okay.

REVEREND HOWARD: --what this witness can tell us based on his expertise.

We're going to listen to a representative of the Attorney General's Office.

MR. MOCZULA: I just first wanted to second what Prosecutor DeFazio said -- and I think it's important, in the Commission's deliberations, particularly when there are witnesses that come in front of us and discuss the level of our presentation in other jurisdictions -- New Jersey's level of capital representation, defense representation, is second to none. I think you can just hear from Mr. Krakora's presentation that, in this state, it's a thorough, it's an effective, it's a tenacious defense. And claims that somehow capital defendants are being shortchanged in any way and that results in a deficiency in the process -- they're simply unfounded in this state.

Joe, do you know how many capital trials actually have been -- you mentioned the 600 where a notice has been filed, and 60 death sentences; I have no reason to doubt those numbers -- but actual capital trials, in the almost 25 years that we've had capital punishment.

MR. KRAKORA: I want to say that I recently saw a figure that amounted to 250 to 300 trials, but I wouldn't want to be held to that, because I don't know if that's accurate. The 600 also, to be fair -- those are

cases where Notices of Aggravating Factors were filed. Now, that could mean that, down the road before trial, that notice was withdrawn for some reason or a judge ruled that the factors didn't apply. So that's the number of cases that have been brought initially as capital prosecutions. Those cases could have ended up in noncapital trials, plea bargains, and other-- That's not meant -- and I think that's your point -- is that that's not meant to be the number of cases that have been tried to a jury as death penalty cases.

MR. MOCZULA: And that's really the issue in that -- let's say it's 300. So in almost 25 years, we're talking what? -- 10 to 12 cases a year, statewide on the average. Acknowledging then some circumstances--

MR. KRAKORA: It's probably less than that when you put it in those terms.

MR. MOCZULA: Or even less.

MR. KRAKORA: From my experience, there's very few years where there's more than four or five in the whole state.

MR. MOCZULA: So then, if we can remove certain aspects of the process -- and I agree, it's really tough to quantify the cost -- but there are certain stages that wouldn't be there. Assuming that's correct, how much, really, of an impact does it have if we remove capital punishment? Meaning, if the number was triple that or 10 times that I think I'd be at least personally more convinced that, removing death penalty from the process, you would have a market effect on the ability of the rest of the criminal justice to go forward. But the numbers are so small, comparatively speaking, that if you remove the process, particularly in terms of capital trials -- I'm talking about the full-fledged, as you very nicely laid out -- what

really is the savings? I mean, is it that dramatic if we take capital punishment out of the mix?

MR. KRAKORA: There have been a number of studies -- I mentioned before -- in various states that try to put numbers. And you can go in -- I might even come up with a printout of some and circulate them to the Commission. And the numbers seem very large. In other words, the numbers in these studies would show that there's a tremendous savings to a state that abolishes the death penalty in terms of cost. But I agree with you, that some of the costs are very difficult to identify, particularly on the court side and the prosecution side. It's difficult to know exactly what the number is. I know how much money the Public Defender's Office--

Going back to 1982, there was an appropriation to our budget of \$2.5 million. I think that's public record. That was an amount that was estimated to represent the increased cost to the Public Defender's Office of having to defend against death penalty cases. Over the years, the amount we've actually spent has varied because of the number of cases pending at any given time. It's lower now because there's only, I think -- we only have 17 clients statewide right now that are awaiting trial on capital cases. Interestingly, most of them are either in Morris County or Cumberland County, but that's a whole other issue of county disparity that we don't need to talk about right now. But the point is, the cost varies in that sense. So if you were going to ask me, in 1992, when there were 14 capital cases in Essex County alone, and then the death penalty -- how much we were spending there, and you abolish it, we'd save more in theory than now, because the number of cases is much lower than it has been.

But I agree with you. It's to me, conceptually -- quantifying some of these costs is difficult, especially as I keep repeating myself when you're talking about prosecution costs and court costs, which really go more to efficiency and resource allocation.

REVEREND HOWARD: If you think it would be helpful to direct our attention to those Web sites or--

MR. KRAKORA: Yes. I actually kind of did some stuff, and then I just decided that this wasn't really the forum for that, because it's something I could--

REVEREND HOWARD: Just pass it to the staff and it will be circulated, right.

MR. KRAKORA: I can put some documents.

SENATOR RUSSO: Mr. Chairman, can I have one comment?

REVEREND HOWARD: We're going to conclude with Senator Russo asking the closing question, and then we're going to have some opportunity to talk among ourselves.

And we thank our witness, of course.

SENATOR RUSSO: Thank you, Mr. Chairman.

I would only-- I don't know whether-- There were arguments in the Legislature that having a death penalty would cost more. There were some who said it would cost less, because you didn't have to support them all their lives. I found those arguments so painful -- and I do today, too. I would only say to this Commission, when the day comes to vote, if you don't agree with my position, I respect you for it. Believe me. But don't do it on how much it costs. You're dealing with life and death. And to equate life and death -- and I understand you're doing your job -- but to equate life

and death, and how much it's going to cost the taxpayer -- and some people will say the Legislature will find a way to waste it anyway. But that's totally irrelevant.

MR. KRAKORA: Well, I--

SENATOR RUSSO: If it's the right thing to have a death penalty-- I mean, Senator Cardinale argued for years, "Let's abolish the appeals." Well, I think that's terrible. It would save us a lot of money and one would perhaps think that I should support that. No, I don't. We've got to protect the rights of these people who might lose their life someday if the courts ever get around to affirming it. But, please, not on the basis of dollars and cents. At least to me, that's such a terrible way to come to a decision on the important issue that's before us, whichever way the final result goes.

REVEREND HOWARD: Point well taken.

MR. KRAKORA: Well, let me just respond to that real quickly.

REVEREND HOWARD: May I ask you not to?

MR. KRAKORA: Okay.

REVEREND HOWARD: Yes. We really are desperate for time.

MR. KRAKORA: Okay.

REVEREND HOWARD: And your presentation has been very concise and direct to an important matter of consideration.

And my colleague has been waiting to speak. Maybe he has a question for you to which I invite your response.

MR. WINDER: Thank you, Mr. Chairman.

Joe, you mentioned in your testimony there are 60 death sentences imposed and nine sitting on death row. I didn't understand how that got winnowed down. I presume it's deaths from natural causes, appeals, and other things but--

MR. KRAKORA: The difference is cases-- In fact, we could probably -- and if you'd be interested, I could probably get you them. We have a chart, I believe, that shows what happened to every defendant--

MR. WINDER: That'd be great.

MR. KRAKORA: --that was sentenced to death, in terms of was it overturned by the Supreme Court and then sentenced to life; was it reversed on post-conviction relief. There's a couple of defendants that died on death row -- one from natural causes, one from being murdered on death row, right. But the difference is that.

MR. WINDER: I'd like to see it.

MR. KRAKORA: All of these cases are ones that were reversed at some point, for some reason.

MR. WINDER: Thank you.

MR. KRAKORA: And then there was a subsequent disposition short of the death penalty.

MR. WINDER: Thank you.

REVEREND HOWARD: Deeply appreciate this.

And friends, let me just reiterate now that our experts have offered their testimony.

The transcription portion of this proceeding will end.

**(MEETING CONCLUDED)**