

PUBLIC HEARING

before

SENATE JUDICIARY COMMITTEE

on

SENATE BILLS NOS. S-46, S-639, S-1100, S-1119, S-1477
(Bills concerning reinstatement of the death penalty)

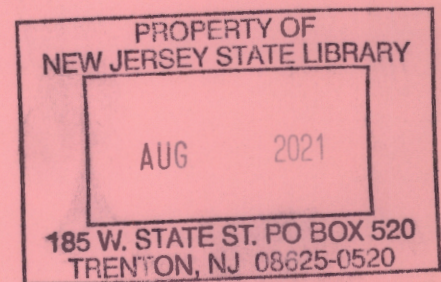
DIVISION OF CRIMINAL JUSTICE
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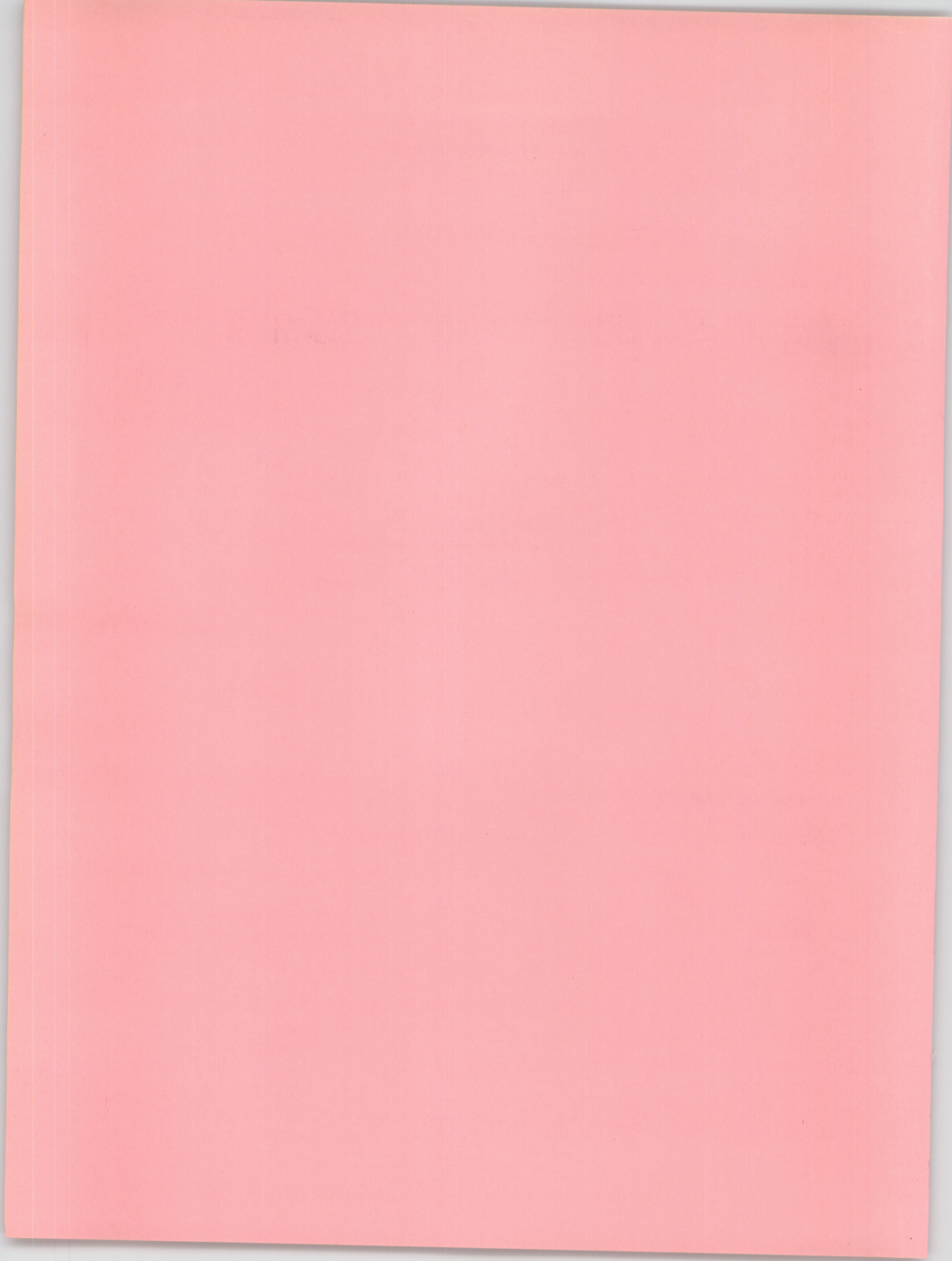
Held:
Assembly Chamber
State House
Trenton, New Jersey
July 29, 1976

MEMBER OF COMMITTEE PRESENT:

Senator John F. Russo (Acting Chairman)

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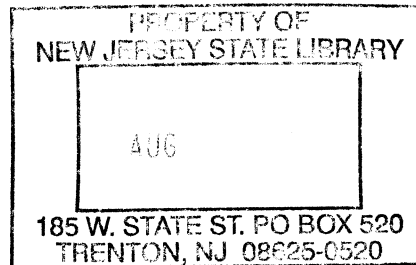




1-54:III
55-65:I
66-79:II
80-84:I
85-90:II
91-98:I

I N D E X

| | <u>Page</u> |
|---|-------------|
| Philip Yacovino President New Jersey State Patrolmen's Benevolent Association | 1 |
| Kenneth A. Gewertz, Assemblyman 4th District | 2 |
| Stanley Van Ness, Commissioner Department of the Public Advocate | 7 |
| David Baime and Marianne Espinoza Deputy Attorneys General New Jersey Department of Law and Public Safety | 13 & 1x |
| Stephen R. Champi, President County Prosecutor's Association | 19 |
| Burrell Humphreys, Prosecutor Passaic County | 21 |
| Irving Joiner Director of Criminal Justice Program United Church of Christ | 27 & 57 x |
| Reverend Paul Mayer Professor of Theology New York Theological Seminary | 35 |
| C. Judson Hamlin, Prosecutor Middlesex County | 40 |
| Philip John Association of Black and Latin American Law Students | 42 |
| Hugo Bedau, Professor of Philosophy Tufts University Speaking for New Jersey Civil Liberties Union | 46 |
| Joseph C. Woodcock, Jr., Prosecutor Bergen County | 55 |
| Neil Cohen New Democratic Coalition of Union County | 59 |
| Michael Meyers Assistant National Director National Association for the Advancement of Colored People | 60 |



| Index - continued | <u>Page</u> |
|---|-------------|
| Paul L. Stagg New Jersey Council of Churches | 62 & 58x |
| Theresa Mc Cormick | 66 |
| Donald Tucker National Black Caucus of Local Elected Officials and Councilman, City of Newark | 66 & 62x |
| Rita Cohen Vice President League of Women Voters of New Jersey | 69 |
| Gilbert Lugossy Board of Chosen Freeholders Mercer County | 71 |
| Reverend Jarrette C. Atkins, Jr. Episcopal Diocese of Newark | 72 & 100x |
| Eleanor Howell New Jersey Friends Council | 73 & 103x |
| Willis O. Thomas National Council on Crime and Delinquency | 74 & 105x |
| Ernest Lettieri Bayonne Taxpayers and Rentpayers Research Association | 75 |
| Laurie Anderson National Conference of Black Lawyers | 77 & 112x |
| Philip S. Showell, Jr. Executive Director New Jersey Association on Corrections | 80 |
| Richard Singer Professor Rutgers Law School Newark, New Jersey | 81 & 123x |
| Anthony Martone Essex County Prosecutor's Office | 85 & 129x |

Index - continued

| | <u>Page</u> |
|--|-------------|
| Larry Loigman Middletown Township Police Department | 89 & 133x |
| Winifred Canright | 91 & 138x |
| Richard J. Stuart | 93 |

ALSO SUBMITTED:

| | |
|--|-------|
| Statement from Senator Raymond J. Zane | 145 x |
| Statement from Assemblyman Kenneth A. Gewertz | 149 x |
| Statement from Kenneth A. Gibson Mayor, Newark, New Jersey | 151 x |
| Statement from Patrick V. Murphy Police Commissioner City of New York | 155 x |
| Statement from Nadine Taub United States Commission on Civil Rights Northeastern Regional Office | 158 x |
| Statement from Donald B. Clark Community Life Commission New Jersey Council of Churches; Outreach Commission New Jersey Association, United Church of Christ Co-chairperson, Operation Understanding, Essex County | 162 x |

SENATE, No. 46

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1976 SESSION

By Senators HAGEDORN and MUSTO

AN ACT concerning crimes, prescribing sentences for murder in the first and second degree, and amending sections 2A:113-1, 2A:113-2, 2A:113-3, 2A:113-4, 2A:118-1, 2A:148-1, 2A:148-6 and 2A:168-1, supplementing chapter 152 of Title 2A, of the New Jersey Statutes and repealing P. L. 1952, c. 212.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. N. J. S. 2A:113-1 is amended to read as follows:

2 2A:113-1. **[If any person, in committing or attempting to com-**
3 **mit arson, burglary, kidnaping, rape, robbery, sodomy or any**
4 **unlawful act against the peace of this State, of which the probable**
5 **consequences may be bloodshed, kills another, or if the death of**
6 **anyone ensues from the committing or attempting to commit any**
7 **such crime or act; or if any person kills a judge, magistrate, sheriff,**
8 **constable or other officer of justice, either civil or criminal, of this**
9 **State, or a marshal or other officer of justice, either civil or crimi-**
10 **nal, of the United States, in the execution of his office or duty, or**
11 **kills any of his assistants, whether specially called to his aid or**
12 **not, endeavoring to preserve the peace or apprehend a criminal,**
13 **knowing the authority of such assistant, or kills a private person**
14 **endeavoring to suppress an affray, or to apprehend a criminal,**
15 **knowing the intention with which such private person interposes,**
16 **then such person so killing is guilty of murder.]** *a. If any person*
17 *purposely, knowingly, or recklessly under circumstances manifest-*
18 *ing extreme indifference to the value of human life, causes the*
19 *death of another human being; or if any person, acting alone or*
20 *with one or more other persons, is engaged in committing or at-*
21 *tempting to commit or in flight after committing or attempting to*
22 *commit robbery, rape, sodomy, arson, burglary, or kidnaping,*

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

23 *and in the course of and in furtherance of such crime or of im-*
 24 *mediate flight therefrom, he, or another participant, if there be*
 25 *any, causes the death of another human being, then such person*
 26 *is guilty of murder.*

27 *b. For purposes of this section:*

28 *(1) A person acts purposely with respect to the nature of his*
 29 *conduct or a result thereof if it is his conscious object to engage*
 30 *in conduct of that nature or to cause such a result. A person acts*
 31 *purposely with respect to attendant circumstances if he is aware*
 32 *of the existence of such circumstances or he believes or hopes that*
 33 *they exist.*

34 *(2) A person acts knowingly with respect to the nature of his*
 35 *conduct or the attendant circumstances if he is aware that his*
 36 *conduct is of that nature, or that such circumstances exist, or he*
 37 *is aware of a high probability of their existence. A person acts*
 38 *knowingly with respect to a result of his conduct if he is aware*
 39 *that it is practically certain that his conduct will cause such a*
 40 *result.*

41 *(3) A person acts recklessly with respect to a material element*
 42 *of an offense when he consciously disregards a substantial and un-*
 43 *justifiable risk that the material element exists or will result from*
 44 *his conduct. The risk must be of such a nature and degree that, con-*
 45 *sidering the nature and purpose of the actor's conduct and the*
 46 *circumstances known to him, its disregard involves a gross devia-*
 47 *tion from the standard of conduct that a reasonable person would*
 48 *observe in the actor's situation.*

1 2. N. J. S. 2A:113-2 is amended to read as follows:

2 2A:113-2. Murder which is *committed purposely* [perpetrated
 3 by means of poison, or by lying in wait, or by any other kind of
 4 willful, deliberate and premeditated killing, or which is committed
 5 in perpetrating or attempting to perpetrate arson, burglary,
 6 kidnaping, rape, robbery or sodomy, or which is perpetrated in
 7 the course or for the purpose of resisting, avoiding or preventing
 8 a lawful arrest, or of effecting or assisting an escape or rescue from
 9 legal custody, or murder of a police or other law enforcement officer
 10 acting in the execution of his duty or of a person assisting any such
 11 officer so acting,] is murder in the first degree. Any other kind of
 12 murder is murder in the second degree. A jury finding a person
 13 guilty of murder shall designate by their verdict whether it be
 14 murder in the first degree or in the second degree.

1 3. N. J. S. 2A:113-3 is amended to read as follows:

2 2A:113-3. In no case shall the plea of guilty be received upon

3 any indictment for murder *in the first degree* and if, upon arraign-
 4 ment, such plea is offered, it shall be disregarded, and the plea of
 5 not guilty entered, and a jury, duly impaneled, shall try the case.

6 *Except in the case of an indictment for murder in the first degree,*
 7 **[Nothing]** *nothing* herein contained shall prevent the accused
 8 from pleading non vult or nolo contendere to the indictment; the
 9 sentence to be imposed, if such plea be accepted, shall be **[either**
 10 imprisonment for life or**]** the same as that imposed upon a con-
 11 viction of murder in the second degree.

1 4. N. J. S. 2A :113-4 is amended to read as follows :

2 2A :113-4. a. Every person convicted of murder in the first degree,
 3 his aiders, abettors, counselors and procurers, shall **[suffer death**
 4 unless the jury shall by its verdict, and as a part thereof, upon and
 5 after the consideration of all the evidence, recommend life imprison-
 6 ment, in which case this and no greater punishment shall be
 7 imposed.

8 Every person convicted of murder in the second degree shall
 9 suffer imprisonment for not more than 30 years.**]** *be sentenced*
 10 *pursuant to the procedures set forth herein to: death; imprison-*
 11 *ment for life, without eligibility for suspension, reduction or re-*
 12 *mission thereof, or for probation or parole until at least 30 years*
 13 *of said term shall have been served and in such case, until the*
 14 *expiration of said 30 years, said sentence shall not be suspended,*
 15 *or subject to reduction or remission and the person so sentenced*
 16 *shall not be eligible for probation or parole; or to imprisonment*
 17 *for life.*

18 (1) *Upon conviction of murder in the first degree, the court shall*
 19 *conduct a separate sentencing proceeding to determine whether the*
 20 *defendant should be sentenced to death; or life imprisonment with-*
 21 *out eligibility for suspension, reduction or remission thereof, or*
 22 *for probation or parole, until at least 30 years of said term shall*
 23 *have been served; or life imprisonment. The proceeding shall be*
 24 *conducted by the judge who presided at the trial and before the*
 25 *trial jury which determined the defendant's guilt or before a jury*
 26 *empaneled for the purpose of the hearing if the jury which deter-*
 27 *mined the defendant's guilt has been discharged by the court.*

28 *The court may conduct the hearing without a jury upon the*
 29 *motion of the defendant and with the approval of the court and of*
 30 *the State.*

31 (2) *In the sentencing hearing the court shall disclose to the de-*
 32 *fendant or his counsel all material contained in any presentence*
 33 *report, if one has been prepared, except such material as the court*

34 determines is required to be withheld for the protection of human
35 life. Presentence reports shall not be given to the jury. Any
36 evidence relevant to any of the mitigating factors set forth in sub-
37 section a. (5) may be presented by either the State or the defendant,
38 regardless of its admissibility under the rules governing
39 admission of evidence at criminal trials; but the admissibility of
40 evidence relevant to any of the aggravating factors set forth in sub-
41 section a. (6) shall be governed by the rules governing the admis-
42 sion of evidence at criminal trials; except that evidence determined
43 by the court to be relevant to both an aggravating and a mitigating
44 factor shall be admissible regardless of its admissibility under the
45 Rules of Evidence. The State and the defendant shall be permitted
46 to rebut any evidence received at the sentencing hearing, and shall
47 be given fair opportunity to present argument as to the adequacy
48 of the evidence to establish the existence of any of the factors set
49 forth in subsection a. (5) or a. (6). The burden of establishing
50 beyond a reasonable doubt the existence of any of the factors set
51 forth in subsection a. (6) is on the State. The burden of establish-
52 ing by a preponderance of the evidence the existence of any of the
53 factors set forth in subsection a. (5) is on the defendant.

54 (3) The jury or, if there is no jury, the court shall return a
55 special verdict specifically setting forth its findings as to the
56 existence or nonexistence of each of the factors set forth in subsec-
57 tion a. (5) and as to the existence or nonexistence of each of the
58 factors set forth in subsection a. (6), its reasons for so finding, and
59 its determination after weighing its findings whether the penalty
60 should be death or imprisonment.

61 (4) If the jury or, if there is no jury, the court finds that one or
62 more of the factors set forth in subsection a. (6) exists and that
63 any of the factors set forth in subsection a. (5) which it finds exists
64 do not sufficiently outweigh the factors of subsection a. (6) and,
65 therefore, recommends that the sentence should be death, the court
66 shall sentence the defendant to death. If the jury or, if there is no
67 jury, the court finds that none of the aggravating factors set forth
68 in subsection a. (6) exists, or finds that one or more of the mitigat-
69 ing factors set forth in subsection a. (5) exists sufficiently to out-
70 weigh any factors under subsection a. (6) which are found to exist,
71 and therefore recommends imprisonment, or if the jury is unable to
72 reach a unanimous verdict, the court shall not sentence the defend-
73 ant to death but shall impose any other sentence provided for the
74 offense for which the defendant was convicted.

75 (5) The mitigating factors which may be found by the court or
76 the jury if proven by a preponderance of the evidence are:

- 77 (a) *The defendant was under the influence of extreme*
78 *mental or emotional disturbance but not such disturbance as to*
79 *constitute a defense to prosecution;*
- 80 (b) *The victim was a participant in the defendant's conduct*
81 *or consented to the act;*
- 82 (c) *The defendant was an accomplice in the murder com-*
83 *mitted by another person and his participation was relatively*
84 *minor;*
- 85 (d) *The defendant was under the age of 18;*
- 86 (e) *The defendant's capacity to appreciate the wrongfulness*
87 *of his conduct or to conform his conduct to the requirements*
88 *of law was significantly impaired, but not so impaired as to*
89 *constitute a defense to prosecution; or*
- 90 (f) *The defendant was under unusual and substantial*
91 *duress, although not such duress as to constitute a defense to*
92 *prosecution.*
- 93 (6) *The aggravating factors which may be found by the court or*
94 *the jury if proven beyond a reasonable doubt are:*
- 95 (a) *The defendant has previously been convicted of first or*
96 *second degree murder, for which a sentence of life imprison-*
97 *ment or death was imposable;*
- 98 (b) *In the commission of the offense, the defendant pur-*
99 *posely or knowingly created a grave risk of death to another*
100 *person in addition to the victim of the offense;*
- 101 (c) *The murder was committed in an especially heinous,*
102 *cruel or depraved manner;*
- 103 (d) *The defendant committed the offense as consideration*
104 *for the receipt, or in expectation of the receipt of anything of*
105 *pecuniary value;*
- 106 (e) *The defendant procured the commission of the offense*
107 *by payment or promise of payment, of anything of pecuniary*
108 *value; or*
- 109 (f) *The defendant committed the offense against a police or*
110 *other law enforcement officer, corrections employee or fireman,*
111 *while performing his duties or because of his status as a public*
112 *servant; or*
- 113 (g) *The offense was committed while the defendant was en-*
114 *gaged in the commission of, or an attempt to commit, or flight*
115 *after committing, or attempting to commit robbery, rape,*
116 *sodomy, arson, burglary or kidnaping.*
- 117 (7) *If the jury, or if there is no jury, the court does not find by*
118 *a special verdict as provided in subsection a. (3) that any of the*

119 factors enumerated in subsection a. (6) is present or does not
 120 recommend death, or if the jury is unable to reach a unanimous
 121 verdict, the court in its discretion shall impose a sentence of life
 122 imprisonment, without eligibility for suspension, reduction or
 123 remission thereof, or for probation or parole, until at least 30 years
 124 of said term shall have been served, or a sentence of life imprison-
 125 ment.

126 (8) If a sentence of death has been imposed, the judgment of
 127 conviction and sentence of death shall be subject to automatic
 128 review by the Supreme Court of New Jersey within 60 days after
 129 certification by the sentencing court of the entire record unless time
 130 is extended an additional period not to exceed 30 days by the
 131 Supreme Court for good cause shown. Such review by the Supreme
 132 Court shall have priority over all other cases, and shall be heard in
 133 accordance with the Rules of Court.

134 b. Every person convicted of murder in the second degree, his
 135 aiders, abettors, counselors and procurers, shall be sentenced to
 136 imprisonment for life, without eligibility for suspension, reduction
 137 or remission thereof, or for probation or parole, until at least 30
 138 years of said term shall have been served and in such case, until the
 139 expiration of said 30 years, said sentence shall not be suspended, or
 140 subject to reduction or remission and the person so sentenced shall
 141 not be eligible for probation or parole; or imprisonment for life; or
 142 imprisonment for 30 years.

1 5. N. J. S. 2A:118-1 is amended to read as follows:

2 2A:118-1. Any person who kidnaps or steals or forcibly takes
 3 away a man, woman or child, and sends or carries, or with intent to
 4 send or carry, such man, woman or child to any other point within
 5 this State, or into another State, territory or country, or forces,
 6 persuades or entices a child within the age of 14 years to leave its
 7 father, mother or guardian, or other person intrusted with its care,
 8 and secretes or conceals the child, or who procures any such act to
 9 be done, or guilty of a high misdemeanor, and shall be punished
 10 by imprisonment for life, or for such other term of not less than 30
 11 years as the court deems proper.

12 Any person who kidnaps or steals or forcibly takes away a man,
 13 woman or child, as aforesaid, and demands for the return of such
 14 man, woman or child, money or anything of value, is likewise guilty
 15 of a high misdemeanor, and upon conviction shall **[suffer death]**
 16 *be sentenced, as the court deems proper, to imprisonment for life*
 17 *without eligibility for suspension, reduction or remission thereof*
 18 *or for probation or parole until at least 30 years of said term shall*

19 *have been served; [unless the jury by their verdict, and as a part*
 20 *thereof, upon and after consideration of all the evidence, recom-*
 21 *mends imprisonment for life, in which case this and no greater*
 22 *punishment shall be imposed] or to imprisonment for life.*

1 6. N. J. S. 2A:148-1 is amended to read as follows:

2 2A:148-1. Any person owing allegiance to this State who levies
 3 war against it, or adheres to its enemies or to the enemies of the
 4 United States by giving them or any of them any aid or comfort,
 5 and is convicted thereof on the testimony of two witnesses to the
 6 same overt act of the treason whereof he stands indicted, or on
 7 confession in open court, is guilty of treason and shall [suffer
 8 death] *be sentenced to imprisonment for life, without eligibility*
 9 *for suspension, reduction or remission thereof, or for probation or*
 10 *parole until at least 30 years of said term shall have been served*
 11 *and in such case, until the expiration of said 30 years, said sentence*
 12 *shall not be suspended, or be subject to reduction or remission, and*
 13 *the person so sentenced shall not be eligible for probation or parole.*
 14 Upon the trial of an indictment for treason, no evidence shall be
 15 received of any overt act of treason that is not expressly alleged
 16 in the indictment.

1 7. N. J. S. 2A:148-6 is amended to read as follows:

2 2A:148-6. Any person who assaults the President or Vice-
 3 President of the United States, or any official in the line of succes-
 4 sion to the presidency of the United States, or the Governor of this
 5 State, or the ruler, governor or other chief executive of any state,
 6 or heir apparent or heir presumptive to the throne of a foreign
 7 state, with intent to kill and with intent thereby to show his hostility
 8 or opposition to any and all government, or any person who incites,
 9 promotes, encourages or attempts any such assault, such assault not
 10 resulting in the death of such official, or any person who conspires
 11 to kill such official, is guilty of a high misdemeanor and shall [suffer
 12 death unless the jury trying the case recommends the defendant to
 13 the mercy of the court, in which case the punishment shall be im-
 14 prisonment for life] *be sentenced as the court deems proper, to*
 15 *imprisonment for life, without eligibility for suspension, reduction*
 16 *or remission thereof, or for probation or parole until at least 30*
 17 *years of said term shall have been served; or to imprisonment for*
 18 *life.*

1 8. N. J. S. 2A:168-1 is amended to read as follows:

2 2A:168-1. When it shall appear that the best interests of the
 3 public as well as of the defendant will be subserved thereby, the
 4 courts of this State having jurisdiction over criminal or quasi-

5 criminal actions shall have power, after conviction or after a plea
6 of guilty or non vult for any crime or offense, except those herein-
7 after described, to suspend the imposition or execution of sentence,
8 and also to place the defendant on probation under the supervision
9 of the chief probation officer of the county, for a period of not less
10 than 1 year nor more than 5 years.

11 The courts having jurisdiction over juvenile or domestic rela-
12 tions cases, when it shall appear that the best interests of the public
13 as well as of the person adjudged guilty of any offense, except
14 those hereinafter described, before such court will be subserved
15 thereby, shall have power to place the defendant on probation for
16 a period of not less than 1 year nor more than 5 years. Such courts
17 shall also have the power to place on probation under the same
18 conditions children who shall come within the jurisdiction of the
19 court. The provisions of this section shall not permit the suspen-
20 sion of the imposition or execution of any sentence and the placing
21 of the defendant on probation after conviction or after a plea of
22 guilty or non vult for violation of any provision of [chapter 18 of
23 Title 24 of the Revised Statutes] the "*New Jersey Controlled*
24 *Dangerous Substances Act*," P. L. 1970, c. 226 (C. 24:21-1 et seq.),
25 except in the case of a first offender.

26 If any person placed on probation shall abscond while under
27 supervision, the time during which he remains away or hidden shall
28 not be counted as part of his term of probation.

1 9. A defendant in any criminal case punishable by life imprison-
2 ment, without eligibility for suspension, reduction or remission
3 thereof or for probation or parole until at least 30 years of said
4 term shall have been served, shall be entitled as of right after
5 sentence has been imposed to appeal the final judgment of his con-
6 viction directly to the Supreme Court.

1 10. If any person charged with a capital offense or any offense
2 punishable by life imprisonment, without eligibility for suspension,
3 reduction or remission thereof or for probation or parole until at
4 least 30 years of said term shall have been served, shall make
5 application to the judge before whom he is to be tried, showing that
6 a copy of the transcript of the record, testimony and proceedings at
7 the trial is necessary for his defense, and that he is unable, by
8 reason of poverty, to defray the expense of procuring the same,
9 such judge shall, being satisfied of the facts stated and of the suffi-
10 ciency thereof, certify the expense thereof to the county treasurer,
11 who shall thereupon pay such necessary expense, the amount
12 thereof having been approved by the judge to whom such applica-

13 tion was made, and which shall not be in excess of the rates pro-
14 vided for by the Supreme Court.

1 11. If any person convicted of an offense and sentenced to death
2 therefor or to life imprisonment, without eligibility for suspension,
3 reduction or remission thereof or for probation or parole until at
4 least 30 years of said term shall have been served, shall make
5 application to the judge who presided at the trial showing that he is
6 about to appeal from such conviction, and is unable, by reason of
7 poverty, to defray the expenses of procuring a transcript of the
8 record, testimony and proceedings at the trial, and of the printing
9 of the same, including briefs on appeal, for presentation to the
10 court, such judge shall, being satisfied of the fact stated and of the
11 sufficiency thereof, certify the reasonable expense thereof to the
12 county treasurer, who shall thereupon pay such necessary expense,
13 the amount thereof having been approved by the judge to whom
14 such application was made.

1 12. "An act to provide for the payment for transcripts and
2 certain expenses of appeals for impecunious defendants in capital
3 cases, and supplementing Title 2A of the New Jersey Statutes,"
4 approved May 16, 1952 (P. L. 1952, c. 212), is repealed.

1 13. This act shall take effect immediately.

SENATE, No. 639

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1976 SESSION

By Senator RUSSO

AN ACT concerning crimes, prescribing sentences for capital offenses, amending sections 2A:113-3, 2A:113-4, 2A:118-1, 2A:148-1 and 2A:148-6, and supplementing chapter 85 of Title 2A, of the New Jersey Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. N. J. S. 2A:113-3 is amended to read as follows:

2 2A:113-3. In **[no case shall the]** *all cases* a plea of *guilty, non*
3 *vult or nolo contendere may* be received upon any indictment for
4 murder**[,** and if, upon arraignment, such plea is offered, it shall
5 be disregarded, and the plea of not guilty entered, and a jury,
6 duly impaneled, shall try the case**].**

7 **[Nothing herein contained shall prevent the accused from plead-**
8 **ing non vult or nolo contendere to the indictment; the sentence to**
9 **be imposed, if such plea be accepted, shall be either imprisonment**
10 **for life or the same as that imposed upon a conviction of murder**
11 **in the second degree.]**

1 2. N. J. S. 2A:113-4 is amended to read as follows:

2 2A:113-4. Every person convicted of murder in the first degree,
3 his aiders, abettors, counselors and procurers, shall **[suffer death**
4 **unless the jury shall by its verdict, and as a part thereof, upon and**
5 **after the consideration of all the evidence, recommend imprison-**
6 **ment, in which case this and no greater punishment shall be**
7 **imposed]** *be sentenced to death or to imprisonment for life in*
8 *accordance with the provisions of section 6 of this amendatory and*
9 *supplementary act.*

10 Every person convicted of murder in the second degree shall
11 suffer imprisonment for not more than 30 years.

1 3. N. J. S. 2A:118-1 is amended to read as follows:

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

2 2A:118-1. Any person who kidnaps or steals or forcibly takes
 3 away a man, woman or child, and send or carries, or with intent to
 4 send or carry, such man, woman or child to any other point within
 5 this State, into another state, territory or country, or forces, per-
 6 suades or entices a child within the age of 14 years to leave its
 7 father, mother or guardian, or other person intrusted with its care,
 8 and secretes or conceals the child, or who procures any such act to
 9 be done, is guilty of a high misdemeanor, and shall be punished by
 10 imprisonment for life, or for such other term of not less than
 11 30 years as the court deems proper.

12 Any person who kidnaps or steals or forcibly takes away a man,
 13 woman or child, as aforesaid, and demands for the return of such
 14 man, woman or child, money or any thing of value, is likewise guilty
 15 of a high misdemeanor, and upon conviction shall [suffer death,
 16 unless the jury by their verdict, and as a part thereof, upon and
 17 after consideration of all the evidence, recommends imprisonment
 18 for life, in which case this and no greater punishment shall be
 19 imposed] *be sentenced to death or to imprisonment for life in*
 20 *accordance with the provisions of section 6 of this amendatory and*
 21 *supplementary act.*

1 4. N. J. S. 2A:148-1 is amended to read as follows:

2 2A:148-1. Any person owing allegiance to this state who levies
 3 war against it, or adheres to its enemies or to the enemies of the
 4 United States by giving them or any of them any aid or comfort,
 5 and is convicted thereof on the testimony of two witnesses to the
 6 same overt act of the treason whereof he stands indicted, or on
 7 confession in open court, is guilty of treason and shall [suffer
 8 death] *be sentenced to death or to imprisonment for life in accord-*
 9 *ance with the provisions of section 6 of this amendatory and supple-*
 10 *mentary act.* Upon the trial of an indictment for treason, no evi-
 11 dence shall be received of any overt act of treason that is not
 12 expressly alleged in the indictment.

1 5. N. J. S. 2A:148-6 is amended to read as follows:

2 2A:148-6. Any person who assaults the President or Vice Presi-
 3 dent of the United States, or any official in the line of succession to
 4 the presidency of the United States, or the Governor of this State,
 5 or the ruler, governor or other chief executive of any state, or heir
 6 apparent or heir presumptive to the throne of a foreign state, with
 7 intent to kill and with intent thereby to show his hostility or opposi-
 8 tion to any and all government, or any person who incites, promotes,
 9 encourages or attempts any such assault, such assault not resulting
 10 in the death of such official, or any person who conspires to kill

11 such official, is guilty of a high misdemeanor and shall [suffer death
12 unless the jury trying the case recommends the defendant to the
13 mercy of the court, in which case the punishment shall be imprison-
14 ment for life] *be sentenced to death or to imprisonment for life in*
15 *accordance with the provisions of section 6 of this amendatory*
16 *and supplementary act.*

1 6. (New section) The court upon the conviction of any defendant
2 of a capital offense, shall conduct a separate sentencing proceeding
3 to determine whether the defendant should be sentenced to death
4 or to life imprisonment. Where the defendant has been tried by
5 a jury the proceeding shall be conducted by the judge who presided
6 at the trial and before the trial jury which determined the
7 defendant's guilt or before a jury empaneled for the purpose of
8 the proceeding if the jury which determined the defendant's guilt
9 has been discharged by the court. Where there has been no jury
10 trial the proceeding shall be conducted by the judge who accepted
11 the defendant's plea and by a jury empaneled for the purpose of
12 the proceeding.

13 The court may conduct the proceeding without a jury upon the
14 motion of the defendant and with the approval of the court and
15 of the State.

16 a. In the sentencing proceeding the court shall disclose to the
17 defendant or his counsel all material contained in any presentence
18 report, if one has been prepared, except such material as the court
19 determines is required to be withheld for the protection of human
20 life. Presentence reports shall not be given to the jury. Any evi-
21 dence relevant to any of the mitigating factors set forth in sub-
22 section d. may be presented by either the State or the defendant,
23 regardless of its admissibility under the rules governing admission
24 of evidence at criminal trials; but the admissibility of evidence
25 relevant to any of the aggravating factors set forth in subsection e.
26 shall be governed by the rules governing the admission of evidence
27 at criminal trials; except that evidence determined by the court to
28 be relevant to both an aggravating and a mitigating factor shall
29 be admissible regardless of its admissibility under the Rules of
30 Evidence. The State and the defendant shall be permitted to rebut
31 any evidence received at the sentencing proceeding, and shall be
32 given fair opportunity to present argument as to the adequacy of
33 the evidence to establish the existence of any of the factors set forth
34 in subsection d. or e. The burden of establishing beyond a reason-
35 able doubt the existence of any of the factors set forth in sub-
36 section e. is on the State. The burden of establishing by a pre-

37 ponderance of the evidence the existence of any of the factors set
38 forth in subsection d. is on the defendant.

39 b. The jury or, if there is no jury, the court shall return a special
40 verdict specifically setting forth its findings as to the existence or
41 nonexistence of each of the factors set forth in subsection d. and as
42 to the existence or nonexistence of each of the factors set forth
43 in subsection e., its reasons for so finding, and its determination
44 after weighing its findings whether the penalty should be death or
45 imprisonment.

46 c. If the jury or, if there is no jury, the court finds that one or
47 more of the factors set forth in subsection e. exists and that
48 any of the factors set forth in subsection d. which it finds exists
49 do not sufficiently outweigh the factors of subsection e. and,
50 therefore, recommends that the sentence should be death, the court
51 shall sentence the defendant to death. If the jury or, if there is no
52 jury, the court finds that none of the aggravating factors set forth
53 in subsection e. exists, or finds that one or more of the mitigating
54 factors set forth in subsection d. exists sufficiently to outweigh
55 any factors under subsection e. which are found to exist, and
56 therefore recommends imprisonment, or if the jury is unable to
57 reach a unanimous verdict, the court shall not sentence the defend-
58 to death but shall impose a sentence of imprisonment.

59 d. The mitigating factors which may be found by the court or
60 the jury if proven by a preponderance of the evidence are:

61 (1) The defendant was under the influence of extreme mental or
62 emotional disturbance but not such disturbance as to constitute a
63 defense to prosecution;

64 (2) The victim was a participant in the defendant's conduct or
65 consented to the act;

66 (3) The defendant was an accomplice in the murder committed
67 by another person and his participation was relatively minor;

68 (4) The defendant was under the age of 18;

69 (5) The defendant's capacity to appreciate the wrongfulness of
70 his conduct or to conform his conduct to the requirements or law
71 was significantly impaired, but not so impaired as to constitute
72 a defense to prosecution; or

73 (6) The defendant was under unusual and substantial duress,
74 although not such duress as to constitute a defense to prosecution.

75 e. The aggravating factors which may be found by the court or
76 the jury if proven beyond a reasonable doubt are:

77 (1) The defendant has previously been convicted of first or
78 second degree murder, for which a sentence of life imprisonment
79 or death was imposable;

80 (2) In the commission of the offense, the defendant purposely
81 or knowingly created a grave risk of death to another person in
82 addition to the victim of the offense;

83 (3) The murder was committed in an especially heinous, cruel
84 or depraved manner;

85 (4) The defendant committed the offense as consideration for
86 the receipt, or in expectation of the receipt of anything of
87 pecuniary value;

88 (5) The defendant procured the commission of the offense by
89 payment or promise of payment, of anything of pecuniary value;

90 (6) The defendant committed the offense against a police or
91 other law enforcement officer, corrections employee or fireman,
92 while performing his duties or because of this status as a public
93 servant; or

94 (7) The offense was committed while the defendant was engaged
95 in the commission of, or an attempt to commit, or flight after
96 committing, or attempting to commit robbery, rape, sodomy, arson,
97 burglary or kidnaping.

98 f. If the jury, or if there is no jury, the court does not find by a
99 special verdict as provided in subsection b. that any of the factors
100 enumerated in subsection d. is present or does not recommend
101 death, or if the jury is unable to reach a unanimous verdict, the
102 court shall impose a sentence of life imprisonment.

103 g. Every judgment of conviction and sentence of death shall be
104 subject to automatic review by the Supreme Court.

1 7. This act shall take effect immediately.

SENATE, No. 938

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1976 SESSION

By Senator DUMONT

AN ACT concerning crimes, prescribing sentences for capital offenses, amending sections 2A:113-3, 2A:113-4, 2A:118-1, 2A:138-1, 2A:148-1 and 2A:148-6, and supplementing chapter 85 of Title 2A, of the New Jersey Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. N. J. S. 2A:113-3 is amended to read as follows:

2 2A:113-3. In no case shall the plea of guilty, *non vult or nolo*
3 *contendere* be received upon any indictment for murder, and if,
4 upon arraignment, such plea is offered, it shall be disregarded, and
5 the plea of not guilty entered, and a jury, duly impaneled, shall try
6 the case.

7 **Nothing herein contained shall prevent the accused from plead-**
8 **ing non vult or nolo contendere to the indictment; the sentence to**
9 **be imposed, if such plea be accepted, shall be either imprisonment**
10 **for life or the same as that imposed upon a conviction of murder**
11 **in the second degree.]**

1 2. N. J. S. 2A:113-4 is amended to read as follows:

2 2A:113-4. Every person convicted of murder in the first degree,
3 his aiders, abettors, counselors and procurers, shall **suffer death**
4 unless the jury shall by its verdict, and as a part thereof, upon and
5 after the consideration of all the evidence, recommend imprison-
6 ment, in which case this and no greater punishment shall be
7 imposed] *be sentenced to death or to imprisonment for life in*
8 *accordance with the provisions of section 7 of this amendatory and*
9 *supplementary act.*

10 Every person convicted of murder in the second degree shall
11 suffer imprisonment for not more than 30 years.

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.**

1 3. N. J. S. 2A:118-1 is amended to read as follows:

2 2A:118-1. Any person who kidnaps or steals or forcibly takes
3 away a man, woman or child, and sends or carries, or with intent to
4 send or carry, such man, woman or child to any other point within
5 this State, into another state, territory or country, or forces, per-
6 suades or entices a child within the age of 14 years to leave its
7 father, mother or guardian, or other person intrusted with its care,
8 and secretes or conceals the child, or who procures any such act to
9 be done, is guilty of a high misdemeanor, and shall be punished by
10 imprisonment for life, or for such other term of not less than
11 30 years as the court deems proper.

12 Any person who kidnaps or steals or forcibly takes away a man,
13 woman or child, as aforesaid, and demands for the return of such
14 man, woman or child, money or any thing of value, is likewise guilty
15 of a high misdemeanor, and upon conviction shall [suffer death,
16 unless the jury by their verdict, and as a part thereof, upon and
17 after consideration of all the evidence, recommends imprisonment
18 for life, in which case this and no greater punishment shall be
19 imposed] *be sentenced to death or to imprisonment for life in*
20 *accordance with the provisions of section 7 of this amendatory and*
21 *supplementary act.*

1 4. N. J. S. 2A:138-1 is amended to read as follows:

2 2A:138-1. Any person who has carnal knowledge of a woman
3 forcibly against her will, or while she is under the influence of any
4 narcotic drug, or who, being of the age of 16 or over, unlawfully
5 and carnally abuses a woman-child under the age of 12 years, with
6 or without her consent, is guilty of a high misdemeanor and shall
7 be [punished by a fine of not more than \$5,000.00, or by imprison-
8 ment for not more than 30 years, or both] *sentenced to death or*
9 *to imprisonment for life in accordance with the provisions of sec-*
10 *tion 7 of this amendatory and supplementary act; or who, being*
11 *of the age of 16 or over, unlawfully and carnally abuses a woman-*
12 *child of the age of 12 years or over, but under the age of 16 years,*
13 *with or without her consent, is guilty of a high misdemeanor and*
14 *shall be punished by a fine of not more than \$5,000.00, or by*
15 *imprisonment not more than 15 years, or both.*

1 5. N. J. S. 2A:148-1 is amended to read as follows:

2 2A:148-1. Any person owing allegiance to this State who levies
3 war against it, or adheres to its enemies or to the enemies of the
4 United States by giving them or any of them any aid or comfort,
5 and is convicted thereof on the testimony of two witnesses to the
6 same overt act of the treason whereof he stands indicted, or on

7 confession in open court, is guilty of treason and shall [suffer
8 death] *be sentenced to death or to imprisonment for life in accord-*
9 *ance with the provisions of section 7 of this amendatory and supple-*
10 *mentary act.* Upon the trial of an indictment for treason, no
11 evidence shall be received of any overt act of treason that is not
12 expressly alleged in the indictment.

1 6. N. J. S. 2A:148-6 is amended to read as follows:

2 2A:148-6. Any person who assaults the President or Vice Presi-
3 dent of the United States, or any official in the line of succession to
4 the presidency of the United States, or the Governor of this State,
5 or the ruler, governor or other chief executive of any state, or heir
6 apparent or heir presumptive to the throne of a foreign state, with
7 intent to kill and with intent thereby to show his hostility or opposi-
8 tion to any and all government, or any person who incites, promotes,
9 encourages or attempts any such assault, such assault not resulting
10 in the death of such official, or any person who conspires to kill
11 such official, is guilty of a high misdemeanor and shall [suffer death
12 unless the jury trying the case recommends the defendant to the
13 mercy of the court, in which case the punishment shall be imprison-
14 ment for life] *be sentenced to death or to imprisonment for life*
15 *in accordance with the provisions of section 7 of this amendatory*
16 *and supplementary act.*

1 7. (New section) The court upon the conviction of any defendant
2 of a capital offense, shall conduct a separate sentencing proceeding
3 to determine whether the defendant should be sentenced to death
4 or to life imprisonment. The proceeding shall be conducted by the
5 judge who presided at the trial and before the trial jury which
6 determined the defendant's guilt or before a jury empaneled for
7 the purpose of the proceeding if the jury which determined the
8 defendant's guilt has been discharged by the court.

9 The court may conduct the proceeding without a jury upon the
10 motion of the defendant and with the approval of the court and
11 of the State.

12 a. In the sentencing proceeding the court shall disclose to the
13 defendant or his counsel all material contained in any presentence
14 report, if one has been prepared, except such material as the court
15 determines is required to be withheld for the protection of human
16 life. Presentence reports shall not be given to the jury. Any evi-
17 dence relevant to any of the mitigating factors set forth in sub-
18 section d. may be presented by either the State or the defendant,
19 regardless of its admissibility under the rules governing admission

20 of evidence at criminal trials; but the admissibility of evidence
21 relevant to any of the aggravating factors set forth in subsection e.
22 shall be governed by the rules governing the admission of evidence
23 at criminal trials; except that evidence determined by the court
24 to be relevant to both an aggravating and a mitigating factor shall
25 be admissible regardless of its admissibility under the Rules of
26 Evidence. The State and the defendant shall be permitted to rebut
27 any evidence received at the sentencing proceeding, and shall be
28 given fair opportunity to present argument as to the adequacy of
29 the evidence to establish the existence of any of the factors set forth
30 in subsection d. or e. The burden of establishing beyond a reason-
31 able doubt the existence of any of the factors set forth in sub-
32 section e. is on the State. The burden of establishing by a pre-
33 ponderance of the evidence the existence of any of the factors set
34 forth in subsection d. is on the defendant.

35 b. The jury or, if there is no jury, the court shall return a special
36 verdict specifically setting forth its findings as to the existence or
37 nonexistence of each of the factors set forth in subsection d. and as
38 to the existence or nonexistence of each of the factors set forth
39 in subsection e., its reasons for so finding, and its determination
40 after weighing its findings whether the penalty should be death or
41 imprisonment.

42 c. If the jury or, if there is no jury, the court finds that one or
43 more of the factors set forth in subsection e. exists and that
44 any of the factors set forth in subsection d. which it finds exists
45 do not sufficiently outweigh the factors of subsection e. and,
46 therefore, recommends that the sentence should be death, the court
47 shall sentence the defendant to death. If the jury or, if there is no
48 jury, the court finds that none of the aggravating factors set forth
49 in subsection e. exists, or finds that one or more of the mitigating
50 factors set forth in subsection d. exists sufficiently to outweigh
51 any factors under subsection e. which are found to exist, and
52 therefore recommends imprisonment, or if the jury is unable to
53 reach a unanimous verdict, the court shall not sentence the defend-
54 ant to death but shall impose a sentence of imprisonment.

55 d. The mitigating factors which may be found by the court or
56 the jury if proven by a preponderance of the evidence are:

57 (1) The defendant was under the influence of extreme mental or
58 emotional disturbance but not such disturbance as to constitute a
59 defense to prosecution;

60 (2) The victim was a participant in the defendant's conduct or
61 consented to the act;

62 (3) The defendant was an accomplice in the murder committed
63 by another person and his participation was relatively minor;

64 (4) The defendant was under the age of 18;

65 (5) The defendant's capacity to appreciate the wrongfulness of
66 his conduct or to conform his conduct to the requirements of law
67 was significantly impaired, but not so impaired as to constitute a
68 defense to prosecution; or

69 (6) The defendant was under unusual and substantial duress,
70 although not such duress as to constitute a defense to prosecution.

71 e. The aggravating factors which may be found by the court or
72 the jury if proven beyond a reasonable doubt are:

73 (1) The defendant has previously been convicted of first or
74 second degree murder, for which a sentence of life imprisonment
75 or death was imposable;

76 (2) In the commission of the offense, the defendant purposely
77 or knowingly created a grave risk of death to another person in
78 addition to the victim of the offense;

79 (3) The murder was committed in an especially heinous, cruel
80 or depraved manner;

81 (4) The defendant committed the offense as consideration for
82 the receipt, or in expectation of the receipt of anything of pecuniary
83 value;

84 (5) The defendant procured the commission of the offense by
85 payment or promise of payment, of anything of pecuniary value;

86 (6) The defendant committed the offense against a police or
87 other law enforcement officer, corrections employee or fireman,
88 while performing his duties or because of this status as a public
89 servant; or

90 (7) The offense was committed while the defendant was engaged
91 in the commission of, or an attempt to commit, or flight after
92 committing, or attempting to commit robbery, rape, sodomy, arson,
93 burglary or kidnaping.

94 f. If the jury, or if there is no jury, the court does not find by a
95 special verdict as provided in subsection b. that any of the factors
96 enumerated in subsection d. is present or does not recommend
97 death, or if the jury is unable to reach a unanimous verdict, the
98 court shall impose a sentence of life imprisonment.

99 g. Every judgment of conviction and sentence of death shall be
100 subject to automatic review by the Supreme Court.

1 8. This act shall take effect immediately.

SENATE, No. 1100

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 9, 1976

By Senator IMPERIALE

Referred to Committee on Judiciary

AN ACT concerning crimes, prescribing sentences for murder in the first, second and third degree, and amending sections 2A:3-5, 2A:67-14, 2A:78-4, 2A:104-1, 2A:104-2, 2A:104-4, 2A:104-5, 2A:113-2, 2A:113-3, 2A:113-4, 2A:118-1, 2A:148-1, 2A:148-6, 2A:159-2, 2A:164-28 and 2A:168-1, supplementing chapter 152 of Title 2A, of the New Jersey Statutes and repealing P. L. 1952, c. 212.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. N. J. S. 2A:3-5 is amended to read as follows:

2 2A:3-5. The County Court shall have and may in its discretion
3 exercise jurisdiction to try and adjudge, without a jury, except
4 in capital cases or cases in which a sentence of life imprisonment,
5 without eligibility for suspension, reduction or remission thereof,
6 or for probation or parole, or cases in which a sentence of life
7 imprisonment, without eligibility for suspension, reduction or re-
8 mission thereof, or for probation or parole, until at least 30 years
9 of said term shall have been served, may be imposed upon the de-
10 fendant, the guilt or innocence of any person charged by indictment
11 with any offense, if and when the person so indicted shall waive
12 trial by jury and request to be tried without a jury.

1 2. N. J. S. 2A:67-14 is amended to read as follows:

2 2A:67-14. The persons hereinafter specified shall not be entitled
3 to prosecute writ of habeas corpus:

4 a. Any person committed or restrained of his liberty by virtue
5 of any process issued by any court of the United States, or any
6 judge thereof, in cases where such court or judge has or shall have
7 acquired exclusive jurisdiction.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

8 b. Any person committed or restrained of his liberty by virtue
9 of a final judgment of a competent tribunal of civil or criminal
10 jurisdiction or by virtue of any process issued pursuant thereto,
11 but no order of commitment for an alleged contempt, or upon con-
12 tempt proceedings, to enforce the rights or remedies of a party or
13 any process issued upon such order shall be deemed a final judg-
14 ment or a process issued pursuant to a final judgment within the
15 meaning of this section.

16 c. Any person in custody or restrained of his liberty for any
17 capital crime or any crime, upon conviction of which a sentence of
18 life imprisonment, without eligibility for suspension, reduction or
19 remission thereof for probation or parole, or any crime, upon con-
20 viction of which a sentence of life imprisonment, without eligibility
21 for suspension, reduction or remission thereof or for probation
22 or parole, until at least 30 years of said term shall have been
23 served, may be imposed upon the defendant, plainly and specially
24 expressed in the warrant or commitment, unless the judge to whom
25 the application is made, as an act of discretion, shall direct the
26 issuance of the writ.

27 d. Any person in custody or restrained of his liberty on any civil
28 process who does not show either that he has, prior to applying for
29 the writ, exhausted the other remedies available to him in the courts
30 of this State to secure his release or that such remedies are or will
31 be ineffective to protect his rights.

1 3. N. J. S. 2A:78-4 is amended to read as follows:

2 2A:78-4. Upon the trial of any cause, civil or criminal, all
3 parties may, within the discretion of the court, question any person
4 summoned as a juror, after his name is drawn from the box and
5 before he is sworn as a juror, and without the interposition of any
6 challenge, to elicit information for the purpose of determining
7 whether or not to interpose a peremptory challenge, and of dis-
8 closing whether or not there is cause for challenge. In all cases in
9 which a death penalty or a sentence of life imprisonment, without
10 eligibility for suspension, reduction or remission thereof, or for
11 probation or parole, or a sentence of life imprisonment, without
12 eligibility for suspension, reduction or remission thereof, or for
13 probation or parole, until at least 30 years of said term shall have
14 been served, may be imposed, the examination as to competency
15 shall be under oath, but in other cases it shall be made without
16 putting the juror under oath. Such questions shall be permitted
17 for the purpose of disclosing whether or not the juror is qualified,
18 impartial and without interest in the result of the action. The

19 questioning shall be concluded under the supervision and control
20 of the trial judge and in open court.

1 4. N. J. S. 2A:104-1 is amended to read as follows:

2 2A:104-1. Any person having in his lawful custody a prisoner
3 charged with or convicted of any crime punishable by death or
4 *life imprisonment, without eligibility for suspension, reduction or*
5 *remission thereof or for probation or parole, or life imprisonment,*
6 *without eligibility for suspension, reduction or remission thereof*
7 *or for probation or parole, until at least 30 years of said term shall*
8 *have been served,* or any deputy, subordinate, employee or agent
9 of any such person, who voluntarily permits or suffers such
10 prisoner to escape, or connives at or assists such escape, is guilty
11 of a high misdemeanor, and shall be punished by imprisonment
12 for not more than 30 years.

1 5. N. J. S. 2A:104-2 is amended to read as follows:

2 2A:104-2. Any person having in his lawful custody a prisoner
3 charged with or convicted of any crime other than a crime punish-
4 able by death or *life imprisonment, without eligibility for suspen-*
5 *sion, reduction or remission thereof or for probation or parole, or*
6 *life imprisonment, without eligibility for suspension, reduction or*
7 *remission thereof, or for probation or parole, until at least 30 years*
8 *of said term shall have been served,* or any deputy, subordinate, em-
9 ployee or agent of any such person, who voluntarily permits or
10 suffers such prisoner to escape, or connives at or assists such
11 escape, or negligently suffers such prisoner to escape, is guilty of a
12 misdemeanor.

1 6. N. J. S. 2A:104-4 is amended to read as follows:

2 2A:104-4. All rescues by force or fraud of a person charged
3 with or convicted of any crime punishable by death or *life im-*
4 *prisonment, without eligibility for suspension, reduction or re-*
5 *mission thereof or for probation or parole, or life imprisonment,*
6 *without eligibility for suspension, reduction or remission thereof*
7 *or for probation or parole, until at least 30 years of said term shall*
8 *have been served,* are high misdemeanors, and every person so
9 offending shall be punished by imprisonment for not more than 30
10 years.

1 7. N. J. S. 2A:104-5 is amended to read as follows:

2 2A:104-5. Any person who by force or fraud rescues, or at-
3 tempts to rescue, a prisoner charged with or convicted of a crime
4 other than a crime punishable by death or *life imprisonment, with-*
5 *out eligibility for suspension, reduction or remission thereof or for*
6 *probation or parole, or life imprisonment, without eligibility for*

7 *suspension, reduction or remission thereof, or for probation or*
 8 *parole, until at least 30 years of said term shall have been served,*
 9 *or a prisoner held in custody or confinement upon any writ or*
 10 *process in any civil case, from lawful custody, or from an officer or*
 11 *person having the prisoner in lawful custody, is guilty of a misde-*
 12 *meanor.*

1 8. N. J. S. 2A :113-2 is amended to read as follows :

2 2A :113-2. *Murder which is perpetrated in the course or for the*
 3 *purpose of resisting, avoiding or preventing a lawful arrest, or of*
 4 *effecting or assisting an escape or rescue from legal custody, or*
 5 *murder of a police or other law enforcement officer acting in the*
 6 *execution of his duty or of a person assisting any such officer so*
 7 *acting, or murder by a person who previously has been convicted of*
 8 *murder in the first or second degree, or murder which is perpetrated*
 9 *by means of poison, or by lying in wait, or by any other kind of*
 10 *willful, deliberate or premeditated killing, is murder in the first*
 11 *degree. Murder, other than murder in the first degree, [which is*
 12 *perpetrated by means of poison, or by lying in wait, or by any other*
 13 *kind of willful, deliberate and premeditated killing, or] which is*
 14 *committed in perpetrating or attempting to perpetrate arson,*
 15 *burglary, kidnaping, rape, robbery or sodomy, [or which is pepe-*
 16 *trated in the course or for the purpose of resisting, avoiding or*
 17 *preventing a lawful arrest, or of effecting or assisting an escape or*
 18 *rescue from legal custody, or murder of a police or other law*
 19 *enforcement officer acting in the execution of his duty or of a*
 20 *person assisting any such officer so acting,] is murder in the [first]*
 21 *second degree. Any other kind of murder is murder in the [second]*
 22 *third degree. A jury finding a person guilty of murder shall*
 23 *designate by their verdict whether it be murder in the first degree*
 24 *or in the second degree or in the third degree.*

1 9. N. J. S. 2A :113-3 is amended to read as follows :

2 2A :113-3. In no case shall the plea of guilty be received upon
 3 any indictment for murder, and if, upon arraignment, such plea is
 4 offered, it shall be disregarded, and the plea of not guilty entered,
 5 and a jury, duly impaneled, shall try the case.

6 *Except in the case of an indictment for murder in the first degree,*
 7 **[Nothing]** *nothing herein contained shall prevent the accused*
 8 *from pleading non vult or nolo contendere to the indictment; the*
 9 *sentence to be imposed, if such plea be accepted, shall be [either]*
 10 *(a) imprisonment for life without eligibility for suspension, reduc-*
 11 *tion or remission thereof or for probation or parole, or (b) im-*
 12 *prisonment for life without eligibility for suspension, reduction or*

13 *remission thereof or for probation or parole until at least 30 years*
 14 *of said term shall have been served, or (c) the same as that imposed*
 15 *upon a conviction of murder in the [second] third degree.*

1 10. N. J. S. 2A:113-4 is amended to read as follows:

2 2A:113-4. Every person convicted of murder in the first degree,
 3 his aiders, abettors, counselors and procurers, shall suffer death
 4 unless the jury shall by its verdict, and as a part thereof, upon and
 5 after the consideration of all the evidence.

6 (a) recommend life imprisonment, *without eligibility for suspen-*
 7 *sion, reduction or remission thereof, or for probation or parole or*

8 (b) *recommends life imprisonment, without eligibility for sus-*
 9 *pension, reduction or remission thereof, or for probation or parole*
 10 *until at least 30 years of said term shall have been served in which*
 11 *case this and no greater punishment shall be imposed and in such*
 12 *case, until the expiration of said 30 years, said sentence shall not be*
 13 *suspended, or be subject to reduction or remission, and the person*
 14 *so sentenced shall not be eligible for probation or parole.*

15 *Every person convicted of murder in the second degree, his aid-*
 16 *ers, abettors, counselors and procurers, shall be sentenced to im-*
 17 *prisonment for life, without eligibility for suspension, reduction or*
 18 *remission thereof or for probation or parole and in such case, said*
 19 *sentence shall not be suspended, or be subject to reduction or remis-*
 20 *sion and the person so sentenced shall not be eligible for probation*
 21 *or parole, unless the jury, by its verdict, and as a part thereof, upon*
 22 *and after consideration of all the evidence, recommends mercy, in*
 23 *which case life imprisonment, without eligibility for suspension,*
 24 *reduction or remission thereof, or for probation or parole until at*
 25 *least 30 years of said term shall have been served and no greater*
 26 *punishment shall be imposed.*

27 Every person convicted of murder in the [second] third degree
 28 shall suffer imprisonment for not more than 30 years.

1 11. N. J. S. 2A:118-1 is amended to read as follows:

2 2A:118-1. Any person who kidnaps or steals or forcibly takes
 3 away a man, woman or child, and sends or carries, or with intent to
 4 send or carry, such man, woman or child to any other point within
 5 this State, or into another State, territory or country, or forces,
 6 persuades or entices a child within the age of 14 years to leave its
 7 father, mother or guardian, or other person intrusted with its care,
 8 and secretes or conceals the child, or who procures any such act to
 9 be done, is guilty of a high misdemeanor, and shall be punished
 10 by imprisonment for life, or for such other term of not less than 30
 11 years as the court deems proper.

12 Any person who kidnaps or steals or forcibly takes away a man,
 13 woman or child, as aforesaid, and demands for the return of such
 14 man, woman or child, money or any thing of value, is likewise guilty
 15 of a high misdemeanor, and upon conviction shall **【suffer death】**
 16 *be sentenced to imprisonment for life, without eligibility for sus-*
 17 *pension, reduction or remission thereof or for probation or parole*
 18 *and in such case, said sentence shall not be suspended, or be subject*
 19 *to reduction or remission, and the person so sentenced shall not*
 20 *be eligible for probation or parole, unless the jury by their verdict,*
 21 *and as a part thereof, upon and after consideration of all the*
 22 *evidence, recommends 【imprisonment for life】 mercy, in which*
 23 *case 【this】 life imprisonment for life, without eligibility for sus-*
 24 *pension, reduction or remission thereof or for probation or parole*
 25 *until at least 30 years of said term shall have been served, and no*
 26 *greater punishment shall be imposed.*

1 12. N. J. S. 2A :148-1 is amended to read as follows:

2 2A :148-1. Any person owing allegiance to this State who levies
 3 war against it, or adheres to its enemies or to the enemies of the
 4 United States by giving them or any of them any aid or comfort,
 5 and is convicted thereof on the testimony of two witnesses to the
 6 same overt act of the treason whereof he stands indicted, or on
 7 confession in open court, is guilty of treason and shall **【suffer**
 8 **death】** *be sentenced to imprisonment for life, without eligibility for*
 9 *suspension, reduction or remission thereof, or for probation or*
 10 *parole and in such case, said sentence shall not be suspended, or be*
 11 *subject to reduction or remission, and the person so sentenced shall*
 12 *not be eligible for probation or parole. Upon the trial of an in-*
 13 *dictment for treason, no evidence shall be received of any overt*
 14 *act of treason that is not expressly alleged in the indictment.*

1 13. N. J. S. 2A :148-6 is amended to read as follows:

2 2A :148-6. Any person who assaults the President or Vice-
 3 President of the United States, or any official in the line of succes-
 4 sion to the presidency of the United States, or the Governor of this
 5 State, or the ruler, governor or other chief executive of any state,
 6 or heir apparent or heir presumptive to the throne of a foreign
 7 state, with intent to kill and with intent thereby to show his hostility
 8 or opposition to any and all government, or any person who incites,
 9 promotes, encourages or attempts any such assault, such assault not
 10 resulting in the death of such official, or any person who conspires
 11 to kill such official, is guilty of a high misdemeanor and shall **【suffer**
 12 **death】** *be sentenced to imprisonment for life, without eligibility for*
 13 *suspension, reduction or remission thereof, or for probation or*

14 *parole and in such case, said sentence shall not be suspended, or*
15 *be subject to reduction or remission, and the person so sentenced*
16 *shall not be eligible for probation or parole, unless the jury trying*
17 *the case recommends the defendant to the mercy of the court,*
18 *in which case the punishment shall be imprisonment for life with-*
19 *out eligibility for suspension, reduction or remission thereof, or for*
20 *probation or parole until at least 30 years of said term shall have*
21 *been served and no greater punishment shall be imposed.*

1 14. N. J. S. 2A:159-2 is amended to read as follows:

2 2A:159-2. Except as otherwise expressly provided by law no
3 person shall be prosecuted, tried or punished for any offense not
4 punishable with death or by imprisonment, without eligibility for
5 suspension, reduction or remission thereof, or for probation or
6 parole, or by life imprisonment, without eligibility for suspension,
7 reduction or remission thereof, or for probation or parole until
8 at least 30 years of said term shall have been served and in such
9 case, until the expiration of said 30 years, said sentence shall not
10 be suspended, or be subject to reduction or remission, and the per-
11 son so sentenced shall not be eligible for probation or parole, unless
12 the indictment therefor shall be found within 5 years from the time
13 of committing the offense or incurring the fine or forfeiture. This
14 section shall not apply to any person fleeing from justice.

1 15. N. J. S. 2A:164-28 is amended to read as follows:

2 2A:164-28. In all cases wherein a criminal conviction has been
3 entered against any person whereon sentence was suspended, or
4 a fine imposed of not more than \$1,000.00, and no subsequent con-
5 viction has been entered against such person, it shall be lawful
6 after the lapse of 10 years from the date of such conviction for the
7 person so convicted to present a duly verified petition to the court
8 wherein such conviction was entered, setting forth all the facts
9 in the matter and praying for the relief provided for in this section.

10 Upon reading and filing such petition such court may by order
11 fix a time, not less than 10 nor more than 30 days thereafter, for
12 the hearing of the matter, a copy of which order shall be served
13 in the usual manner upon the prosecutor of the county wherein
14 such court is located, and upon the chief of police or other executive
15 head of the police department of the municipality wherein said
16 offense was committed, within 5 days from the date of such order,
17 and at the time so appointed the court shall hear the matter and
18 if no material objection is made and no reason appears to the
19 contrary, an order may be granted directing the clerk of such
20 court to expunge from the records all evidence of said conviction

21 and that the person against whom such conviction was entered
 22 shall be forthwith thereafter relieved from such disabilities as
 23 may have heretofore existed by reason thereof, excepting convic-
 24 tions involving the following crimes: treason, misprision of treason,
 25 anarchy, all capital cases *and cases in which a sentence of life*
 26 *imprisonment, without eligibility for suspension, reduction or re-*
 27 *mission thereof, or for probation or parole, or life imprisonment,*
 28 *without eligibility for suspension, reduction or remission thereof,*
 29 *or for probation or parole, until at least 30 years of said term shall*
 30 *have been served, has been imposed, kidnaping, perjury, carrying*
 31 *concealed weapons or weapons of any deadly nature or type, rape,*
 32 *seduction, aiding, assisting or concealing persons accused of high*
 33 *misdemeanors, or aiding the escape of inmates of prisons, em-*
 34 *bracery, arson, robbery or burglary.*

1 16. N. J. S. 2A:168-1 is amended to read as follows:

2 2A:168-1. When it shall appear that the best interests of the
 3 public as well as of the defendant will be subserved thereby, the
 4 courts of this State having jurisdiction over criminal or quasi-
 5 criminal actions shall have power, after conviction or after a plea
 6 of guilty or non vult for any crime or offense, except those
 7 hereinafter described, to suspend the imposition or execution of
 8 sentence, and also to place the defendant on probation under the
 9 supervision of the chief probation officer of the county, for a period
 10 of not less than 1 year nor more than 5 years.

11 The courts having jurisdiction over juvenile or domestic rela-
 12 tions cases, when it shall appear that the best interests of the public
 13 as well as of the person adjudged guilty of any offense, except
 14 those hereinafter described, before such court will be subserved
 15 thereby, shall have power to place the defendant on probation for
 16 a period of not less than 1 year nor more than 5 years. Such
 17 courts shall also have the power to place on probation under the
 18 same conditions children who shall come within the jurisdiction
 19 of the court. The provisions of this section shall not permit the
 20 suspension of the imposition or execution of any sentence and the
 21 placing of the defendant on probation after conviction or after a
 22 plea of guilty or non vult for violation of any provision of
 23 [chapter 18 of Title 24 of the Revised Statutes] *the "New*
 24 *Jersey Controlled Dangerous Substances Act," P. L. 1970, c. 226*
 25 *(C. 24:21-1 et seq.), except in the case of a first offender or in any*
 26 *case in which the sentence imposed upon the defendant was life*
 27 *imprisonment, without eligibility for suspension, reduction or re-*
 28 *mission thereof or for probation or parole or in any case in which*

29 *the sentence imposed upon the defendant was life imprisonment,*
30 *without eligibility for suspension, reduction or remission thereof*
31 *or for probation or parole until at least 30 years of said term shall*
32 *have been served.*

33 If any person placed on probation shall abscond while under
34 supervision, the time during which he remains away or hidden
35 shall not be counted as part of his term of probation.

1 17. (New section) Any person heretofore convicted of any offense
2 which immediately prior to the effective date of this act was
3 punishable by death but which, under the terms of this act, is not so
4 punishable, shall be sentenced, or, if he has been sentenced to death,
5 shall be resentenced, pursuant to the provisions of this act, it being
6 the intent of this act that the imposition and execution of the death
7 sentence for any offense, other than murder in the first degree
8 shall be abolished upon the effective date of this act.

1 18. (New section) A defendant in any criminal case punishable
2 by life imprisonment, without eligibility for suspension, reduction
3 or remission thereof or for probation or parole until at least 30
4 years of said term shall have been served, shall be entitled as of
5 right to appeal the final judgment of his conviction directly to the
6 Supreme Court.

1 19. (New section) If any person charged with a capital offense or
2 any offense punishable by life imprisonment, without eligibility for
3 suspension, reduction or remission thereof or for probation or
4 parole or any offense punishable by life imprisonment, without
5 eligibility for suspension, reduction or remission thereof or for
6 probation or parole until at least 30 years of said term shall have
7 been served, shall make application to the judge before whom he is
8 to be tried, showing that a copy of the transcript of the record,
9 testimony and proceedings at the trial is necessary for his defense,
10 and that he is unable, by reason of poverty, to defray the expense
11 of procuring the same, such judge shall, being satisfied of the facts
12 stated and of the sufficiency thereof, certify the expense thereof
13 to the county treasurer, who shall thereupon pay such necessary
14 expense, the amount thereof having been approved by the judge
15 to whom such application was made, and which shall not be in
16 excess of the rates provided for by the Supreme Court.

1 20. (New section) If any person convicted of an offense and
2 sentenced to death therefor or to life imprisonment, without eligi-
3 bility for suspension, reduction or remission thereof or for proba-
4 tion or parole or to life imprisonment, without eligibility for
5 suspension, reduction or remission thereof or for probation or

6 parole until at least 30 years of said term shall have been served,
 7 shall make application to the judge who presided at the trial
 8 showing that he is about to appeal from such conviction, and is
 9 unable, by reason of poverty, to defray the expenses of procuring
 10 a transcript of the record, testimony and proceedings at the trial,
 11 and of the printing of the same, including briefs on appeal, for
 12 presentation to the court, such judge shall, being satisfied of the
 13 fact stated and of the sufficiency thereof, certify the reasonable
 14 expense thereof to the county treasurer, who shall thereupon pay
 15 such necessary expense, the amount thereof having been approved
 16 by the judge to whom such application was made.

1 21. "An act to provide for the payment for transcripts and
 2 certain expenses of appeals for impecunious defendants in capital
 3 cases, and supplementing Title 2A of the New Jersey Statutes,"
 4 approved May 16, 1952 (P. L. 1952, c. 212, C. 2A:152-15 and
 5 2A:152-16), is repealed.

1 22. This act shall take effect immediately.

STATEMENT

On January 17, 1972 the New Jersey Supreme Court in *State vs. Funicello*, declared unconstitutional N. J. S. 2A:113-4 permitting the jury to impose capital punishment in first degree murder cases. As a result of this decision, any person hereafter convicted of first degree murder will be subject to a penalty of life imprisonment, making him eligible for parole after serving approximately 14 years and 10 months. On the average, parole has not been granted to persons convicted of first degree murder until they have been imprisoned 18 to 20 years.

The proposed bill will accomplish the following:

1. The jury will be empowered to impose the death penalty in the following situations, designated murder in the first degree:
 - a. Murder while resisting, avoiding or preventing a lawful arrest.
 - b. Murder while effecting or assisting in escape or rescue from legal custody.
 - c. Murder of a policeman or other law enforcement officer in the line of duty.
 - d. Murder of a person assisting a police or law enforcement officer acting in the line of duty.
 - e. Murder by a person previously convicted of first or second degree murder.

f. Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing.

2. In those first degree cases where the jury does not choose to impose the death penalty, but may do so, it may:

a. recommend life imprisonment without eligibility for probation or parole; or

b. recommend life imprisonment without eligibility for probation or parole for at least 30 years.

3. In second degree murder cases (all other murder cases now designated first degree) the jury may:

a. recommend life imprisonment without eligibility for probation or parole; or

b. recommend life imprisonment without eligibility for probation or parole for at least 30 years.

4. Correct the constitutional defect which was the basis of the court's ruling in State vs. Funicello by removing the non-vult plea in first degree murder cases.

Although the United States Supreme Court has under advisement the question of the constitutionality of capital punishment, and a Capital Punishment Study Commission appointed by the Governor is considering the question, neither is expected to act within the next several months. The proposed legislation, if enacted, would provide clearer and fairer penalties and guidelines than now exist, and would serve to protect law enforcement officers.

SENATE, No. 1098

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 9, 1976

By Senator IMPERIALE

Referred to Committee on Judiciary

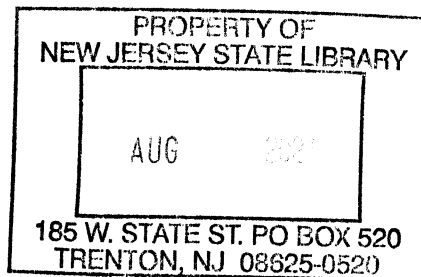
AN ACT mandating the death penalty for the sale, distribution or dispensing of certain controlled dangerous substances in certain cases by nonaddicts and a term of imprisonment without parole for addicts and supplementing the "New Jersey Controlled Dangerous Substances Act," approved October 19, 1970 (P. L. 1970, c. 226, C. 24:21-1 et seq.).

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

1 1. Except as authorized by the act to which this act is a supple-
2 ment, any person who, being over the age of 18 and not addicted
3 to the use of morphine, cocaine, heroin, opium or any derivative
4 thereof which is a substance classified in Schedules I and II who
5 knowingly and willfully sells, distributes or dispenses any of said
6 drugs, shall, upon conviction, be punished by death.

1 2. Any person who, being over the age of 18 and addicted to the
2 use of morphine, cocaine, heroin, opium or any derivative thereof,
3 which is a substance classified in Schedules I and II, who knowingly
4 and willfully sells, distributes or dispenses any of said drugs to
5 any child under the age of 18 shall be sentenced to a term of im-
6 prisonment not to exceed 10 years, without eligibility for suspen-
7 sion, reduction or remission thereof or for probation or parole.

1 3. This act shall take effect immediately.



SENATE, No. 1119

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 9, 1976

By Senators IMPERIALE, MUSTO and DAVENPORT

Referred to Committee on Judiciary

AN ACT concerning kidnaping and prescribing sentence therefor,
amending sections 2A:118-1 and 2A:118-2, and supplementing
chapter 118 of Title 2A, of the New Jersey Statutes.

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

3 1. N. J. S. 2A:118-1 is amended to read as follows:

4 2A:118-1. Any person who kidnapes or steals or forcibly takes
5 away a man, woman or child, and sends or carries, or with intent
6 to send or carry, such man, woman or child to any other point
7 within this State, or into another state, territory or country, or
8 forces, persuades or entices a child within the age of 14 years to
9 leave its father, mother or guardian, or other person intrusted with
10 its care, and secretes or conceals the child, or who procures any
11 such act to be done, is guilty of a high misdemeanor, and shall be
12 **[punished by imprisonment for life, or for such other term of not**

13 less than 30 years as the court deems proper.
14 Any person who kidnapes or steals or forcibly takes away a man,
15 woman or child, as aforesaid, and demands for the return of such
16 man, woman or child, money or any thing of value, is likewise guilty
17 of a high misdemeanor, and upon conviction shall suffer death,
18 unless the jury by their verdict, and as a part thereof, upon and
19 after consideration of all the evidence, recommends imprisonment
20 for life, in which case this and no greater punishment shall be
21 imposed] *sentenced pursuant to the procedure set forth in section*
22 *3 of this amendatory and supplementary act: death, imprisonment*
23 *for life, without eligibility for suspension, reduction or remission*
24 *thereof, or for probation or parole and in such case, said sentence*
25 *shall not be suspended, or subject to reduction or remission and*
the person so sentenced shall not be eligible for probation or
parole; or to imprisonment for life, without eligibility for suspen-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.

26 *sion, reduction or remission thereof, or for probation or parole,*
 27 *until at least 30 years of said term shall have been served.*

1 2. N. J. S. 2A:118-2 is amended to read as follows:

2 2A:118-2. Any person who threatens or attempts to kidnap or
 3 steal or forcibly take away any man, woman or child, or threatens
 4 or attempts to send or carry such man, woman or child to any other
 5 point within this State, or into another state, territory or country,
 6 or who threatens or attempts to force, persuade or entice a child
 7 within the age of 14 years to leave its father, mother or guardian,
 8 or other person intrusted with its care, or to secrete or conceal the
 9 child, or who procures any such act to be done, is guilty of a high
 10 misdemeanor and shall be [punished by imprisonment for a term
 11 of not more than 30 years, or by a fine of not more than \$5,000.00,
 12 or both] *sentenced pursuant to the procedure set forth in section 3*
 13 *of this amendatory and supplementary act: death, imprisonment*
 14 *for life, without eligibility for suspension, reduction or remission*
 15 *thereof, or for probation or parole and in such case, said sentence*
 16 *shall not be suspended, or subject to reduction or remission and the*
 17 *person so sentenced shall not be eligible for probation or parole; or*
 18 *to imprisonment for life, without eligibility for suspension, reduc-*
 19 *tion or remission thereof, or for probation or parole, until at least*
 20 *30 years of said term shall have been served.*

1 3. (New section) a. Upon conviction of kidnaping or threaten-
 2 ing or attempting to kidnap the court shall conduct a separate sen-
 3 tencing proceeding to determine whether the defendant should be
 4 sentenced to death; or life imprisonment without eligibility for
 5 suspension, reduction or remission thereof, or for probation or
 6 parole; or life imprisonment without eligibility for suspension, re-
 7 duction or remission thereof, or for probation or parole, until at
 8 least 30 years of said term shall have been served. The proceeding
 9 shall be conducted by the judge who presided at the trial and before
 10 the trial jury which determined the defendant's guilt or before a
 11 jury empaneled for the purpose of the hearing if the jury which
 12 determined the defendant's guilt has been discharged by the court
 13 for good cause.

14 The court may conduct the hearing without a jury upon the
 15 motion of the defendant and with the approval of the court and
 16 of the State.

17 b. In the sentencing hearing the court shall disclose to the de-
 18 fendant or his counsel all material contained in any presentence
 19 report, if one has been prepared, except such material as the court
 20 determines is required to be withheld for the protection of human
 21 life.

22 Any presentence information withheld from the defendant shall
23 not be considered in determining the existence or the nonexistence
24 of the factors set forth in subsections e. or f. Any information
25 relevant to any of the mitigating factors set forth in subsection c.
26 may be presented by either the State or the defendant, regardless
27 of its admissibility under the rules governing admission of evidence
28 at criminal trials; but the admissibility of information relevant to
29 any of the aggravating factors set forth in subsection f. shall be
30 governed by the rules governing the admission of evidence at
31 criminal trials. The State and the defendant shall be permitted
32 to rebut any information received at the hearing, and shall be
33 given fair opportunity to present argument as to the adequacy
34 of the information to establish the existence of any of the factors
35 set forth in subsections e. or f. The burden of establishing the
36 existence of any of the factors set forth in subsection f. is on the
37 State. The burden of establishing the existence of any of the
38 factors set forth in subsection e. is on the defendant.

39 c. The jury or, if there is no jury, the court shall return a special
40 verdict setting forth its findings as to the existence or nonexistence
41 of each of the factors set forth in subsection e. and as to the exist-
42 ence or nonexistence of each of the factors set forth in subsection f.

43 d. If the jury or, if there is no jury, the court finds by a pre-
44 ponderance of the information that one or more of the factors set
45 forth in subsection f. exists and that none of the factors set forth
46 in subsection e. exists, the court shall sentence the defendant
47 to death. If the jury or, if there is no jury, the court finds that
48 none of the aggravating factors set forth in subsection f. exists,
49 or finds that one or more of the mitigating factors set forth in
50 subsection e. exists, the court shall not sentence the defendant to
51 death but shall impose any other sentence provided for the offense
52 for which the defendant was convicted.

53 e. The court shall not impose the sentence of death on the de-
54 fendant if the jury or, if there is no jury, the court finds by a special
55 verdict as provided in subsection c. that at the time of the offense:

56 (1) The defendant had no significant history of prior criminal
57 activity;

58 (2) The defendant was under the influence of extreme mental
59 or emotional disturbance but not such disturbance as to constitute
60 a defense to prosecution;

61 (3) The victim was a participant in the defendant's conduct or
62 consented to the act;

63 (4) The defendant was an accomplice in the kidnaping com-
64 mitted by another person and his participation was relatively
65 minor;

66 (5) The defendant was under the age of 18;

67 (6) The defendant's capacity to appreciate the wrongfulness of
68 his conduct or to conform his conduct to the requirements of law
69 was significantly impaired, but not so impaired as to constitute a
70 defense to prosecution; or

71 (7) The defendant was under unusual and substantial duress,
72 although not such duress as to constitute a defense to prosecution.

73 f. If no factor set forth in subsection e. is present, the court
74 shall impose the sentence of death on the defendant if the jury or,
75 if there is no jury, the court finds by a special verdict as provided
76 in subsection c. that:

77 (1) The defendant has previously been convicted of kidnaping,
78 for which a sentence of life imprisonment or death was imposable;

79 (2) In the commission of the offense, the defendant purposely or
80 knowingly created a grave risk of death to another person in addi-
81 tion to the victim of the offense;

82 (3) The kidnaping was committed in an especially heinous,
83 cruel or depraved manner;

84 (4) The defendant committed the offense as consideration for
85 the receipt, or in expectation of the receipt, of anything of pecuniary
86 value; or

87 (5) The defendant procured the commission of the offense by
88 payment or promise of payment, of anything of pecuniary value.
89 g. If the jury, or if there is no jury, the court does not find by a
90 special verdict as provided in subsection c. that any of the factors
91 enumerated in subsection f. is present, the court in its discretion
92 shall impose sentence of life imprisonment, without eligibility for
93 suspension, reduction or remission thereof, or for probation or
94 parole; or sentence of life imprisonment, without eligibility for sus-
95 pension, reduction or remission thereof, or for probation or parole,
96 until at least 30 years of said term shall have been served.

97 h. The judgment of conviction and sentence of death shall be
98 subject to automatic review by the Supreme Court of New Jersey
99 within 60 days after certification by the sentencing court of the
100 entire record unless an additional period of time not to exceed
101 30 days is extended by the Supreme Court for good cause shown.
102 Such review by the Supreme Court shall have priority over all
103 other cases, and shall be heard in accordance with the Rules of
104 Court.

1 4. This act shall take effect immediately.

STATEMENT

Although the death penalty, as it has been generally imposed in the United States, was outlawed on June 29, 1972, many states, as well as Congress, are moving toward consideration—or have already considered—new death-penalty legislation designed to make capital punishment fit guidelines suggested by the United State Supreme Court in its landmark ruling. It is the intention of this bill to constitutionally restore the death penalty as a deterrent to kidnaping, a crime in which lives of innocent citizens and residents could be lost.

To avoid an “arbitrary” and “capricious” application of the death penalty, this bill would provide that when a defendant is found guilty of kidnaping under the provisions of N. J. S. 2A:118-1 or 2A:118-2—as amended by this act—the jury, or if there is no jury, the court, would be asked to determine whether there were any mitigating or aggravating circumstances. If a mitigating factor were found—as provided for in this bill—the defendant’s life would be spared. But if there were any aggravating circumstances—as provided for in this bill—the judge would be required to impose the death penalty. The uniformity of punishment would be guaranteed by requiring that the judgment of conviction and sentence of death shall be submitted to automatic review by the Supreme Court of New Jersey within 60 days after certification by the sentencing court of the entire record unless an additional period of time not to exceed 30 days is extended by the Supreme Court for good cause shown.

SENATE, No. 1477

STATE OF NEW JERSEY

INTRODUCED MAY 17, 1976

By Senators IMPERIALE, VREELAND and HIRKALA

Referred to Committee on Judiciary

AN ACT concerning crimes, prescribing sentences for murder in the first, second and third degree, and amending sections 2A:3-5, 2A:67-14, 2A:78-4, 2A:104-1, 2A:104-2, 2A:104-4, 2A:104-5, 2A:113-2, 2A:113-3, 2A:113-4, 2A:118-1, 2A:148-1, 2A:148-6, 2A:159-2, 2A:164-28 and 2A:168-1, supplementing chapter 152 of Title 2A, of the New Jersey Statutes, repealing P. L. 1952, c. 212 and providing for the submission of said act to the legal voters of the State for their adoption or rejection before said act shall become operative.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. N. J. S. 2A:3-5 is amended to read as follows:

2 2A:3-5. The County Court shall have and may in its discretion
3 exercise jurisdiction to try and adjudge, without a jury, except
4 in capital cases or cases in which a sentence of life imprisonment,
5 without eligibility for suspension, reduction or remission thereof,
6 or for probation or parole, or cases in which a sentence of life
7 imprisonment, without eligibility for suspension, reduction or re-
8 mission thereof, or for probation or parole, until at least 30 years
9 of said term shall have been served, may be imposed upon the de-
10 fendant, the guilt or innocence of any person charged by indictment
11 with any offense, if and when the person so indicted shall waive
12 trial by jury and request to be tried without a jury.

1 2. N. J. S. 2A:67-14 is amended to read as follows:

2 2A:67-14. The persons hereinafter specified shall not be entitled
3 to prosecute writ of habeas corpus.

4 a. Any person committed or restrained of his liberty by virtue
5 of any process issued by any court of the United States, or any
6 judge thereof, in cases where such court or judge has or shall have
7 acquired exclusive jurisdiction.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.

8 b. Any person committed or restrained of his liberty by virtue
9 of a final judgment of a competent tribunal of civil or criminal
10 jurisdiction or by virtue of any process issued pursuant thereto,
11 but no order of commitment for an alleged contempt, or upon con-
12 tempt proceedings, to enforce the rights or remedies of a party or
13 any process issued upon such order shall be deemed a final judg-
14 ment or a process issued pursuant to a final judgment within the
15 meaning of this section.

16 c. Any person in custody or restrained of his liberty for any
17 capital crime or any crime, upon conviction of which a sentence of
18 life imprisonment, without eligibility for suspension, reduction or
19 remission thereof for probation or parole, or any crime, upon con-
20 viction of which a sentence of life imprisonment, without eligibility
21 for suspension, reduction or remission thereof or for probation
22 or parole, until at least 30 years of said term shall have been
23 served, may be imposed upon the defendant, plainly and specially
24 expressed in the warrant or commitment, unless the judge to whom
25 the application is made, as an act of discretion, shall direct the
26 issuance of the writ.

27 d. Any person in custody or restrained of his liberty on any civil
28 process who does not show either that he has, prior to applying for
29 the writ, exhausted the other remedies available to him in the courts
30 of this State to secure his release or that such remedies are or will
31 be ineffective to protect his rights.

1 3. N. J. S. 2A:78-4 is amended to read as follows:

2 2A:78-4. Upon the trial of any cause, civil or criminal, all parties
3 may, within the discretion of the court, question any person sum-
4 moned as a juror, after his name is drawn from the box and
5 before he is sworn as a juror, and without the interposition of any
6 challenge, to elicit information for the purpose of determining
7 whether or not to interpose a peremptory challenge, and of dis-
8 closing whether or not there is cause for challenge. In all cases in
9 which a death penalty or a sentence of life imprisonment, without
10 eligibility for suspension, reduction or remission thereof, or for
11 probation or parole, or a sentence of life imprisonment, without
12 eligibility for suspension, reduction or remission thereof, or for
13 probation or parole, until at least 30 years of said term shall have
14 been served, may be imposed, the examination as to competency
15 shall be under oath, but in other cases it shall be made without
16 putting the juror under oath. Such questions shall be permitted
17 for the purpose of disclosing whether or not the juror is qualified,
18 impartial and without interest in the result of the action. The
19 questioning shall be concluded under the supervision and control
20 of the trial judge and in open court.

1 4. N. J. S. 2A :104-1 is amended to read as follows:

2 2A :104-1. Any person having in his lawful custody a prisoner
3 charged with or convicted of any crime punishable by death or
4 life imprisonment, without eligibility for suspension, reduction or
5 remission thereof or for probation or parole, or life imprisonment,
6 without eligibility for suspension, reduction or remission thereof
7 or for probation or parole, until at least 30 years of said term shall
8 have been served, or any deputy, subordinate, employee or agent
9 of any such person, who voluntarily permits or suffers such
10 prisoner to escape, or connives at or assists such escape, is guilty
11 of a high misdemeanor, and shall be punished by imprisonment
12 for not more than 30 years.

1 5. N. J. S. 2A :104-2 is amended to read as follows:

2 2A :104-2. Any person having in his lawful custody a prisoner
3 charged with or convicted of any crime other than a crime punish-
4 able by death or life imprisonment, without eligibility for suspen-
5 sion, reduction or remission thereof or for probation or parole, or
6 life imprisonment, without eligibility for suspension, reduction or
7 remission thereof, or for probation or parole, until at least 30 years
8 of said term shall have been served, or any deputy, subordinate, em-
9 ployee or agent of any such person, who voluntarily permits or
10 suffers such prisoner to escape, or connives at or assists such
11 escape, or negligently suffers such prisoner to escape, is guilty of a
12 misdemeanor.

1 6. N. J. S. 2A :104-4 is amended to read as follows:

2 2A :104-4. All rescues by force or fraud of a person charged
3 with or convicted of any crime punishable by death or life im-
4 prisonment, without eligibility for suspension, reduction or re-
5 mission thereof or for probation or parole, or life imprisonment,
6 without eligibility for suspension, reduction or remission thereof
7 or for probation or parole, until at least 30 years of said term shall
8 have been served, are high misdemeanors, and every person so
9 offending shall be punished by imprisonment for not more than 30
10 years.

1 7. N. J. S. 2A :104-5 is amended to read as follows:

2 2A :104-5. Any person who by force or fraud rescues, or at-
3 tempts to rescue, a prisoner charged with or convicted of a crime
4 other than a crime punishable by death or life imprisonment, with-
5 out eligibility for suspension, reduction or remission thereof or for
6 probation or parole, or life imprisonment, without eligibility for
7 suspension, reduction or remission thereof, or for probation or
8 parole, until at least 30 years of said term shall have been served,
9 or a prisoner held in custody or confinement upon any writ or

10 process in any civil case, from lawful custody, or from an officer or
11 person having the prisoner in lawful custody, is guilty of a misde-
12 meanor.

1 8. N. J. S. 2A :113-2 is amended to read as follows :

2 2A :113-2. Murder which is perpetrated in the course or for the
3 purpose of resisting, avoiding or preventing a lawful arrest, or of
4 effecting or assisting an escape or rescue from legal custody, or
5 murder of a police or other law enforcement officer acting in the
6 execution of his duty or of a person assisting any such officer so
7 acting, or murder by a person who previously has been convicted of
8 murder in the first or second degree, or murder which is perpetrated
9 by means of poison, or by lying in wait, or by any other kind of
10 willful, deliberate or premeditated killing, is murder in the first
11 degree. Murder, other than murder in the first degree, [which is
12 perpetrated by means of poison, or by lying in wait, or by any other
13 kind of willful, deliberate and premeditated killing, or] which is
14 committed in perpetrating or attempting to perpetrate arson,
15 burglary, kidnaping, rape, robbery or sodomy, [or which is perpe-
16 trated in the course or for the purpose of resisting, avoiding or
17 preventing a lawful arrest, or of effecting or assisting an escape or
18 rescue from legal custody, or murder of a police or other law
19 enforcement officer acting in the execution of his duty or of a
20 person assisting any such officer so acting,] is murder in the [first]
21 second degree. Any other kind of murder is murder in the [second]
22 third degree. A jury finding a person guilty of murder shall
23 designate by their verdict whether it be murder in the first degree
24 or in the second degree or in the third degree.

1 9. N. J. S. 2A :113-3 is amended to read as follows :

2 2A :113-3. In no case shall the plea of guilty be received upon
3 any indictment for murder, and if, upon arraignment, such plea is
4 offered, it shall be disregarded, and the plea of not guilty entered,
5 and a jury, duly impaneled, shall try the case.

6 Except in the case of an indictment for murder in the first degree,
7 [Nothing] nothing herein contained shall prevent the accused
8 from pleading non vult or nolo contendere to the indictment; the
9 sentence to be imposed, if such plea be accepted, shall be [either]
10 (a) imprisonment for life without eligibility for suspension, reduc-
11 tion or remission thereof or for probation or parole, or (b) im-
12 prisonment for life without eligibility for suspension, reduction or
13 remission thereof or for probation or parole until at least 30 years
14 of said term shall have been served, or (c) the same as that imposed
15 upon a conviction of murder in the [second] third degree.

1 10. N. J. S. 2A :113-4 is amended to read as follows :

2 2A:113-4. Every person convicted of murder in the first degree,
3 his aiders, abettors, counselors and procurers, shall suffer death
4 unless the jury shall by its verdict, and as a part thereof, upon and
5 after the consideration of all the evidence.

6 (a) recommend life imprisonment, without eligibility for suspen-
7 sion, reduction or remission thereof, or for probation or parole or

8 (b) recommends life imprisonment, without eligibility for sus-
9 pension, reduction or remission thereof, or for probation or parole
10 until at least 30 years of said term shall have been served in which
11 case this and no greater punishment shall be imposed and in such
12 case, until the expiration of said 30 years, said sentence shall not be
13 suspended, or be subject to reduction or remission, and the person
14 so sentenced shall not be eligible for probation or parole.

15 Every person convicted of murder in the second degree, his aid-
16 ers, abettors, counselors and procurers, shall be sentenced to im-
17 prisonment for life, without eligibility for suspension, reduction or
18 remission thereof or for probation or parole and in such case, said
19 sentence shall not be suspended, or be subject to reduction or remis-
20 sion and the person so sentenced shall not be eligible for probation
21 or parole, unless the jury, by its verdict, and as a part thereof, upon
22 and after consideration of all the evidence, recommends mercy, in
23 which case life imprisonment, without eligibility for suspension,
24 reduction or remission thereof, or for probation or parole until at
25 least 30 years of said term shall have been served and no greater
26 punishment shall be imposed.

27 Every person convicted of murder in the [second] third degree
28 shall suffer imprisonment for not more than 30 years.

1 11. N. J. S. 2A:118-1 is amended to read as follows:

2 2A:118-1. Any person who kidnaps or steals or forcibly takes
3 away a man, woman or child, and sends or carries, or with intent to
4 send or carry, such man, woman or child to any other point within
5 this State, or into another State, territory or country, or forces,
6 persuades or entices a child within the age of 14 years to leave its
7 father, mother or guardian, or other person intrusted with its care,
8 and secretes or conceals the child, or who procures any such act to
9 be done, is guilty of a high misdemeanor, and shall be punished
10 by imprisonment for life, or for such other term of not less than 30
11 years as the court deems proper.

12 Any person who kidnaps or steals or forcibly takes away a man,
13 woman or child, as foresaid, and demands for the return of such
14 man, woman or child, money or any thing of value, is likewise guilty
15 of a high misdemeanor, and upon conviction shall [suffer death]
16 be sentenced to imprisonment for life, without eligibility for sus-
17 pension, reduction or remission thereof or for probation or parole

18 and in such case, said sentence shall not be suspended, or be subject
 19 to reduction or remission, and the person so sentenced shall not
 20 be eligible for probation or parole, unless the jury by their verdict,
 21 and as a part thereof, upon and after consideration of all the
 22 evidence, recommends [imprisonment for life] mercy, in which
 23 case [this] life imprisonment for life, without eligibility for sus-
 24 pension, reduction or remission thereof or for probation or parole
 25 until at least 30 years of said term shall have been served, and no
 26 greater punishment shall be imposed.

1 12. N. J. S. 2A :148-1 is amended to read as follows:

2 2A :148-1. Any person owing allegiance to this State who levies
 3 war against it, or adheres to its enemies or to the enemies of the
 4 United States by giving them or any of them any aid or comfort,
 5 and is convicted thereof on the testimony of two witnesses to the
 6 same overt act of the treason whereof he stands indicted, or on
 7 confession in open court, is guilty of treason and shall [suffer
 8 death] be sentenced to imprisonment for life, without eligibility for
 9 suspension, reduction or remission thereof, or for probation or
 10 parole and in such case, said sentence shall not be suspended, or be
 11 subject to reduction or remission, and the person so sentenced shall
 12 not be eligible for probation or parole. Upon the trial of an in-
 13 dictment for treason, no evidence shall be received of any overt
 14 act of treason that is not expressly alleged in the indictment.

1 13. N. J. S. 2A :148-6 is amended to read as follows:

2 2A :148-6. Any person who assaults the President or Vice-
 3 President of the United States, or any official in the line of succes-
 4 sion to the presidency of the United States, or the Governor of this
 5 State, or the ruler, governor or other chief executive of any state,
 6 or heir apparent or heir presumptive to the throne of a foreign
 7 state, with intent to kill and with intent thereby to show his hostility
 8 or opposition to any and all government, or any person who incites,
 9 promotes, encourages or attempts any such assault, such assault not
 10 resulting in the death of such official, or any person who conspires
 11 to kill such official, is guilty of a high misdemeanor and shall [suffer
 12 death] be sentenced to imprisonment for life, without eligibility for
 13 suspension, reduction or remission thereof, or for probation or
 14 parole and in such case, said sentence shall not be suspended, or
 15 be subject to reduction or remission, and the person so sentenced
 16 shall not be eligible for probation or parole, unless the jury trying
 17 the case recommends the defendant to the mercy of the court,
 18 in which case the punishment shall be imprisonment for life with-
 19 out eligibility for suspension, reduction or remission thereof, or for
 20 probation or parole until at least 30 years of said term shall have
 21 been served and no greater punishment shall be imposed.

1 14. N. J. S. 2A:159-2 is amended to read as follows:

2 2A:159-2. Except as otherwise expressly provided by law no
3 person shall be prosecuted, tried or punished for any offense not
4 punishable with death or by imprisonment, without eligibility for
5 suspension, reduction or remission thereof, or for probation or
6 parole, or by life imprisonment, without eligibility for suspension,
7 reduction or remission thereof, or for probation or parole until
8 at least 30 years of said term shall have been served and in such
9 case, until the expiration of said 30 years, said sentence shall not
10 be suspended, or be subject to reduction or remission, and the per-
11 son so sentenced shall not be eligible for probation or parole, unless
12 the indictment therefor shall be found within 5 years from the time
13 of committing the offense or incurring the fine or forfeiture. This
14 section shall not apply to any person fleeing from justice.

1 15. N. J. S. 2A:164-28 is amended to read as follows:

2 2A:164-28. In all cases wherein a criminal conviction has been
3 entered against any person, and no subsequent conviction has been
4 entered against such person, it shall be lawful after the lapse of
5 10 years from the date of such conviction or 10 years after the
6 date such person completed his term of imprisonment or was
7 released from parole, whichever is later, for the person so con-
8 victed to present a duly verified petition to the court wherein
9 such conviction was entered, setting forth all the facts in the matter
10 and praying for the relief provided for in this section.

11 Upon reading and filing such petition such court may by order
12 fix a time, not less than 10 nor more than 30 days thereafter, for the
13 hearing of the matter, a copy of which order shall be served in the
14 usual manner upon the prosecutor of the county wherein such court
15 is located, and upon the chief of police or other executive head of
16 the police department of the municipality wherein said offense was
17 committed, and upon the Diagnostic Center at Menlo Park if such
18 person was committed to that institution before sentencing, within
19 5 days from the date of such order, and at the time so appointed
20 the court shall hear the matter and if no material objection is made
21 and no reason appears to the contrary, an order may be granted
22 directing the clerk of such court to expunge from the records all
23 evidence of said conviction and that the person against whom such
24 conviction was entered shall be forthwith thereafter relieved from
25 such disabilities as may have heretofore existed by reason thereof,
26 excepting convictions involving the following crimes: treason, mis-
27 prison of treason, anarchy, all *cases in which a sentence of life*
28 *imprisonment, without eligibility for suspension, reduction or re-*
29 *mission thereof, or for probation or parole, or life imprisonment,*

30 *without eligibility for suspension, reduction or remission thereof,*
31 *or for probation or parole, until at least 30 years of said term shall*
32 *have been served, has been imposed, arson or robbery, and further*
33 *excepting that the court may continue the hearing for 30 days and*
34 *order an evaluation of such person by the Diagnostic Center if he*
35 *was committed to such center before sentencing.*

36 For services performed under this section same fees shall be
37 taxed as are usual for like services in other matters, which fees shall
38 be payable by the petitioner.

1 16. N. J. S. 2A:168-1 is amended to read as follows:

2 2A:168-1. When it shall appear that the best interests of the
3 public as well as of the defendant will be subserved thereby, the
4 courts of this State having jurisdiction over criminal or quasi-
5 criminal actions shall have power, after conviction or after a plea
6 of guilty or non vult for any crime or offense, except those
7 hereinafter described, to suspend the imposition or execution of
8 sentence, and also to place the defendant on probation under the
9 supervision of the chief probation officer of the county, for a period
10 of not less than 1 year nor more than 5 years.

11 The courts having jurisdiction over juvenile or domestic rela-
12 tions cases, when it shall appear that the best interests of the public
13 as well as of the person adjudged guilty of any offense, except
14 those hereinafter described, before such court will be subserved
15 thereby, shall have power to place the defendant on probation for
16 a period of not less than 1 year nor more than 5 years. Such
17 courts shall also have the power to place on probation under the
18 same conditions children who shall come within the jurisdiction
19 of the court. The provisions of this section shall not permit the
20 suspension of the imposition or execution of any sentence and the
21 placing of the defendant on probation after conviction or after a
22 plea of guilty or non vult for violation of any provision of
23 [chapter 18 of Title 24 of the Revised Statutes] the "New
24 Jersey Controlled Dangerous Substances Act," P. L. 1970, c. 226
25 C. 24:21-1 et seq.), except in the case of a first offender or in any
26 case in which the sentence imposed upon the defendant was life
27 imprisonment, without eligibility for suspension, reduction or re-
28 mission thereof or for probation or parole or in any case in which
29 the sentence imposed upon the defendant was life imprisonment,
30 without eligibility for suspension, reduction or remission thereof
31 or for probation or parole until at least 30 years of said term shall
32 have been served.

33 If any person placed on probation shall abscond while under
34 supervision, the time during which he remains away or hidden
35 shall not be counted as part of his term of probation.

1 17. (New section) Any person heretofore convicted of any offense
2 which immediately prior to the effective date of this act was
3 punishable by death but which, under the terms of this act, is not so
4 punishable, shall be sentenced, or, if he has been sentenced to death,
5 shall be resentenced, pursuant to the provisions of this act, it being
6 the intent of this act that the imposition and execution of the death
7 sentence for any offense, other than murder in the first degree
8 shall be abolished upon the effective date of this act.

1 18. (New section) A defendant in any criminal case punishable
2 by life imprisonment, without eligibility for suspension, reduction
3 or remission thereof or for probation or parole until at least 30
4 years of said term shall have been served, shall be entitled as of
5 right to appeal the final judgment of his conviction directly to the
6 Supreme Court.

1 19. (New section) If any person charged with a capital offense or
2 any offense punishable by life imprisonment, without eligibility for
3 suspension, reduction or remission thereof or for probation or
4 parole or any offense punishable by life imprisonment, without
5 eligibility for suspension, reduction or remission thereof or for
6 probation or parole until at least 30 years of said term shall have
7 been served, shall make application to the judge before whom he is
8 to be tried, showing that a copy of the transcript of the record,
9 testimony and proceedings at the trial is necessary for his defense,
10 and that he is unable, by reason of poverty, to defray the expense
11 of procuring the same, such judge shall, being satisfied of the facts
12 stated and of the sufficiency thereof, certify the expense thereof
13 to the county treasurer, who shall thereupon pay such necessary
14 expense, the amount thereof having been approved by the judge
15 to whom such application was made, and which shall not be in
16 excess of the rates provided for by the Supreme Court.

1 20. (New section) If any person convicted of an offense and
2 sentenced to death therefor or to life imprisonment, without eligi-
3 bility for suspension, reduction or remission thereof or for proba-
4 tion or parole or to life imprisonment, without eligibility for
5 suspension, reduction or remission thereof or for probation or
6 parole until at least 30 years of said term shall have been served,
7 shall make application to the judge who presided at the trial
8 showing that he is about to appeal from such conviction, and is
9 unable, by reason of poverty, to defray the expenses of procuring
10 a transcript of the record, testimony and proceedings at the trial,
11 and of the printing of the same, including briefs on appeal, for
12 presentation to the court, such judge shall, being satisfied of the
13 fact stated and of the sufficiency thereof, certify the reasonable

14 expense thereof to the county treasurer, who shall thereupon pay
 15 such necessary expense, the amount thereof having been approved
 16 by the judge to whom such application was made.

1 21. "An act to provide for the payment for transcripts and
 2 certain expenses of appeals for impecunious defendants in capital
 3 cases, and supplementing Title 2A of the New Jersey Statutes,"
 4 approved May 16, 1952 (P. L. 1952, c. 212, C. 2A:152-15 and
 5 2A:152-16), is repealed.

1 22. This act shall take effect immediately, but its provisions shall
 2 remain inoperative until the question of its adoption or rejection
 3 shall have been submitted to the legal voters of the State at the
 4 next general election succeeding the forty-fifth day following the
 5 date of enactment hereof.

1 23. There shall be printed on each official ballot to be used at such
 2 election the following:

3 If you favor the proposition printed below, make a cross (X),
 4 plus (+) or check (v) in the square opposite the word "Yes."

5 If you are opposed to the proposition printed below, make a cross
 6 (X), plus (+) or check (v) in the square opposite the word "No."

| | | |
|--|------|--|
| | Yes. | Do you favor making operative in this State the act entitled "An act concerning crimes, prescribing sentences for murder in the first, second and third degree, and amending sections 2A:3-5, 2A:67-14, 2A:78-4, 2A:104-1, 2A:104-2, 2A:104-4, 2A:104-5, 2A:113-2, 2A:113-3, 2A:113-4, 2A:118-1, 2A:148-1, 2A:148-6, 2A:159-2, 2A:164-28, and 2A:168-1, supplementing chapter 152 of Title 2A, of the New Jersey Statutes, repealing P. L. 1952, c. 212 and providing for the submission of said act to the legal voters of the State for their adoption or rejection before said act shall become operative?" |
| | No. | |

7 The date of the approval or passage of this act, as the case may
 8 be, shall be inserted in the appropriate place after the title.

9 In any election district in which voting machines are used the
 10 question shall be placed upon the official ballot to be used upon
 11 the voting machines without the foregoing instructions to the voters
 12 and shall be voted upon "Yes" or "No" by the use of such ma-
 13 chines without marking as aforesaid.

1 24. If at such election a majority of all the votes cast both for
 2 and against the becoming operative of such act in the State shall
 3 be cast in favor of said act becoming operative, the same shall
 4 immediately become operative throughout the State.

STATEMENT

On January 17, 1972 the New Jersey Supreme Court in *State vs. Funicello*, declared unconstitutional N. J. S. 2A:113-4 permitting the jury to impose capital punishment in first degree murder cases. As a result of this decision, any person hereafter convicted of first degree murder will be subject to a penalty of life imprisonment, making him eligible for parole after serving approximately 14 years and 10 months. On the average, parole has not been granted to persons convicted of first degree murder until they have been imprisoned 18 to 20 years.

The proposed bill will accomplish the following:

1. The jury will be empowered to impose the death penalty in the following situations, designated murder in the first degree:
 - a. Murder while resisting, avoiding or preventing a lawful arrest.
 - b. Murder while effecting or assisting in escape or rescue from legal custody.
 - c. Murder of a policeman or other law enforcement officer in the line of duty.
 - d. Murder of a person assisting a police or law enforcement officer acting in the line of duty.
 - e. Murder by a person previously convicted of first or second degree murder.
 - f. Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing.
2. In those first degree cases where the jury does not choose to impose the death penalty, but may do so, it may:
 - a. Recommend life imprisonment without eligibility for probation or parole; or
 - b. Recommend life imprisonment without eligibility for probation or parole for at least 30 years.
3. In second degree murder cases (all other murder cases now designated first degree) the jury may:
 - a. Recommend life imprisonment without eligibility for probation or parole; or
 - b. Recommend life imprisonment without eligibility for probation or parole for at least 30 years.
4. Correct the constitutional defect which was the basis of the court's ruling in *State vs. Funicello* by removing the non-vult plea in first degree murder cases.

Although the United States Supreme Court has under advisement the question of the constitutionality of capital punishment, and

a Capital Punishment Study Commission appointed by the Governor is considering the question, neither is expected to act within the next several months. The proposed legislation, if enacted, would provide clearer and fairer penalties and guidelines than now exist, and would serve to protect law enforcement officers.

SENATOR JOHN F. RUSSO (Acting Chairman): We will commence this hearing and begin with our witnesses without waiting for the other members of the Committee to arrive, because a record is being taken of the proceedings here today and a transcript will be made available to all members of the Senate Judiciary Committee.

The purpose of this hearing is to consider the bills relative to the reinstatement of the death penalty that are pending now before the Senate Judiciary Committee. Our goal is to take the testimony of all those who want to be heard on these bills.

Some members of the Committee are out of the State or country and will not be here for the hearing, but the transcript of the testimony of every witness will be furnished to each member of the Senate Judiciary Committee. At a later date, hopefully in the near future, after the transcript is prepared, the Committee will vote on these bills to either release or not release them for a floor vote in the Senate.

The Chairman of the Senate Judiciary Committee is Senator James Dugan. In his absence - he was unable to be here today - he has requested that I chair this Committee; and I am Senator John F. Russo of Ocean County.

The three bills that are being considered are: one sponsored by myself, one sponsored by Senator Dumont and one sponsored by Senator Hagedorn. Less anyone be concerned that the hearing is being chaired by one who has sponsored a bill to reinstate the death penalty, let me assure you I intend to conduct the hearing fairly and allow full opportunity to permit you to get everything you want into the record, within reason, obviously. But there will be no attempt to run this Committee hearing with an eye toward obtaining a particular result. We are going to hear all the testimony.

These are some members of the Judiciary Committee very much in favor of reinstatement of the death penalty; there are some very much opposed. So they are going to have before them in the transcript all of the testimony that is available.

I think that pretty well summarizes the purpose for being here.

The first witness we will hear is Philip Yacovino, President of the Patrolmen's Benevolent Association.

P H I L I P P. Y A C O V I N O: My name is Philip P. Yacovino. I am President of the New Jersey State Policemen's Benevolent Association. I am appearing here on behalf of my Association and we favor the return of the death penalty in New Jersey.

I didn't come with a prepared statement because I thought of all the times I did appear here at public hearings with a prepared statement containing statistics, which I spent many hours compiling, and it fell on deaf ears.

Now that the Supreme Court has seen fit to reinstate the death penalty and has said it isn't cruel and inhumane, I feel that the State PBA has accomplished something at least with the Supreme Court's decision. But I am here to support all the bills that are in our Legislature right now to restore the death penalty in New Jersey.

A lot of people will tell you that it is not a deterrent and there is no way to measure whether it is a deterrent or not. But I say that any man who takes a person's life, willfully, should die in the electric chair because I think this is the only way we are going to stop the wanton killings, not only of Police Officers, but of the civilian population throughout the State. Of course, you are going to say because I am a Police Officer, I say Police Officers first. Certainly, I think a Police Officer is first because I am a Police Officer and represent Police Officers. But we don't stop there. We want everyone executed for killing anybody in this State.

The thing is that we are going to listen to a lot of testimony from "bleeding hearts" here that never had occasion to see somebody face down in the gutter or face up,

his head half blown away or stabbed many times or axed to death or dismembered by a bunch of animals roaming the street. Yet we put them in jail, keep them there for a short while, rehabilitate them - they say they are rehabilitated - and then send them out on the streets to prey on the population again. Once they are put to death, they will never be able to go back in the community to commit the same crime. And many murderers have committed murder a second time once they were released.

In the rehabilitation program, we have a fine example. A man charged with first degree murder was placed in the work release program. I was opposed to this because this man interviewed me on the radio on the subject of capital punishment. Now he flew the coop - he escaped. This is what we have to put up with. Here was a murderer turned loose on a work release program and now he is running around free somewhere.

I can't put words in my mouth or put words in anybody's mouth to say how much the PBA has favored the death penalty. We have been doing it for years. My predecessor, John Heffernan, has screamed enough about it. I have been talking about it, there have been news releases, and I am hoping that it does pass. I will do everything in my power as the President of the PBA to try to get enough legislators to see that these bills are passed and signed into law by the Governor. Thank you.

SENATOR RUSSO: Mr. Yacovino, there is some sentiment, either in the Legislature or in general, to reinstate the death penalty, but only - and I think you touched upon this, but I would like to cover it further - for the murderers of police officers or correctional institution guards. Would you favor such a bill or would the PBA favor such a bill?

MR. YACOVINO: I would favor that bill, but I also want a bill to reinstate the death penalty for everyone. Of course, you know I am going to favor police officers. But, as I said in my statement, I want the death penalty restored for everyone concerned, not only the police officers, but also the civilian population.

SENATOR RUSSO: In the judgment of the PBA, do you see any sense at all to making a determination as to whether or not such an extreme penalty as execution should be imposed, by making it dependent on whether the victim wore a blue suit with a badge on it or a little pink dress?

MR. YACOVINO: No, it doesn't make any difference who it is, whether you have on a uniform or, as you say, a little pink dress or just a plain, ordinary suit.

SENATOR RUSSO: Thank you, Mr. Yacovino.

Assemblyman Gewertz.

K E N N E T H A. G E W E R T Z: Good morning, Mr. Chairman.

I am here to speak on behalf of the reinstatement of the death penalty, particularly on S 649. I realize there are a multiplicity of Senate bills dealing with various degrees of murder.

SENATOR RUSSO: You said S 649. Did you mean 649 or 639?

ASSEMBLYMAN GEWERTZ: S 639. Excuse me, Mr. Chairman. I somehow became confused.

But I think there is a need in the State of New Jersey and, for that matter, in the United States for the reinstatement of the death penalty. I think statistics will show that since the electric chair was installed in New Jersey approximately 160 convicted felons have been executed. But I think you would find over a period of time that that has, in fact, saved innumerable lives.

The question most commonly asked is: Does capital punishment prevent crime? The answer is, probably not. Though the presence of capital punishment obviously does not prevent a crime, it is my humble opinion that the absence of it certainly acts as

a positive incentive for criminals to murder their victims rather than leave a witness behind to identify them at some later date. And, of course, the proof is the steady increase in the amount of homicides, not only in the State of New Jersey but throughout the country since the courts ruled the death penalty to be unconstitutional.

I would like to direct, Mr. Chairman, the Committee's attention to the use of firearms. While the Legislature, and legislatures throughout the country, seems to be struggling with the problem of gun control, evidently that has not been the answer to controlling murders of individuals which have been committed with a firearm, because it obviously doesn't take the gun out of the hands of the criminal. So, obviously, the alternative is to create harsher penalties for those individuals who illegally use firearms.

I think that the harshness of the punishment obviously is not as bad, or is at least equal to, the harshness of the crime that was committed, for which the individual is being punished. Obviously, the easiest way to commit a murder is with a gun. It is the safest way for the criminal to do whatever he has to do and escape safely.

I think, Mr. Chairman, when you are dealing with the subject of first degree murder, first degree murder is not a crime of passion. It is not an accident. It is not a mistake. I don't believe the implementation of the death penalty for individuals who perpetrate those crimes can be adjudged by either this Committee, the Legislature, or the public, as being too harsh to fit the act. It is premeditated murder. It is murder that is committed during the commission of a felony. And, taking these facts into consideration, I certainly feel that even though people will argue and say, "Well, you can make a mistake; we really shouldn't take another's life", it is really not society that is doing that. Society is merely protecting the people who are the victims of those who continue to break the law.

I think it is interesting to note that, obviously, mistakes cannot be eliminated. Occasionally you may find that individuals may come into a court of law and give false testimony against someone and that person will be adjudged to be guilty, sentenced, and possibly electrocuted for a crime that he didn't commit. Of course, that seems to be the common cry for why the death penalty should not be reinstated. But, I think that the Committee has to take notice of the fact that it was not the State, nor the jury, nor the judge, that conspired to convict an innocent man. Those individuals who give false testimony in a court of law and who cause someone else to be condemned to death, obviously should, themselves, then be tried for first degree murder and suffer a similar penalty.

I think what we have to face in this particular situation is, where first degree murder is committed, our society has a habit of condoning the commission of that act by permitting that individual to not suffer the death penalty. It is a little bit ironic that society is really the victim when one of its members is killed. How we can be called upon to harbor and protect a convicted murderer through the process of keeping him incarcerated for a period of time and then, after approximately 13 years, seeking his release and his return to society on the basis that, statistically, people who murder only murder once -- I am afraid I cannot personally buy that concept. The problem that I think we are having - particularly in cases where you have hired killers - is, they laugh at the law. They can honestly go out, for pay, and kill another individual, as a business venture, and be assured that they are not going to suffer death in return. I think that is something that has to be seriously considered.

I am also extremely concerned that some of the pending legislation seeks to, really, in essence, reduce the existing penalties by making all murder crimes first degree murder and creating new punishments. I understand that one of the punishments

that is to be considered for murder will be the indeterminate sentence, which would be new to the State of New Jersey.

SENATOR RUSSO: Excuse me, may I interrupt you, Assemblyman Gewertz?

ASSEMBLYMAN GEWERTZ: Yes.

SENATOR RUSSO: I just want to make this clear. You are referring, when you say "pending legislation", not to the death penalty bills before this committee but other legislation pending in the legislature elsewhere?

ASSEMBLYMAN GEWERTZ: Yes. Basically, the Model Penal Code, Mr. Chairman.

SENATOR RUSSO: Right.

ASSEMBLYMAN GEWERTZ: It has been proven that that particular type of sentence, which was initiated in California some 30 years ago, has proven not to be very effective and the present Attorney General of the State of California has requested the legislature to pass a law eliminating that particular concept.

I think that the situation we have is that law abiding citizens are afraid to walk the streets. I think that people who are going to break the law have the upper hand in today's society because everybody looks upon a situation of rehabilitation -- and I am not opposed to rehabilitating anybody but it shouldn't be done at the expense of the rest of society that is not breaking any laws. There is no incentive to abide by the law.

The theory that through some psychiatric treatment -- Psychiatrists, playing with the minds of murderers to see what makes them tick or what makes them kill someone, to me is like a game of Russian Roulette. While they are experimenting, people are dying every day in a continual upswing of crime and the criminal really doesn't fear the law enforcement agencies anymore because the law specifically states that you are allowed to employ a force equal or greater than that which is employed against you. Certainly, a police officer, though armed and trained, is no match for a criminal armed with the element of surprise. The police officer will be dead before he knows what is really going on. I think that becomes more and more prevalent every day. And if, in fact, criminals are not afraid of the police who are schooled, who are armed, then how are they going to fear taking the life of an average citizen after breaking into someone's home and committing a multiplicity of crimes against those people?

Though, in fact, the death penalty may not deter an individual from the commission of a murder, you can rest assured that the implementation of it will assure that he doesn't do it again. Thank you, Mr. Chairman.

SENATOR RUSSO: Thank you, Mr. Gewertz. I just want to ask you two brief questions, if I may. You have indicated that you support S-639 - the bill that I have sponsored, reinstating the death penalty for all first degree murder cases, with a separate sentencing procedure and another jury to determine whether the death penalty should be imposed.

ASSEMBLYMAN GEWERTZ: Yes.

SENATOR RUSSO: There has been talk about reinstating the death penalty only for the murder of police officers and correctional institution guards, though, and not for first degree murder in general. Do you favor that concept?

ASSEMBLYMAN GEWERTZ: No, I don't. I think that to do that might very well stop the murdering of police officers and correctional institution officers but I don't think it will have any effect at all on the average citizen who happens to comprise the bulk of the population on which the crime is being perpetrated.

SENATOR RUSSO: My second question, Assemblyman Gewertz, is, in the opinion in Gregg versus Georgia - the United States Supreme Court opinion, recently, upholding the death penalty - Mr. Justice Stewart basically made the point that there was a demand

and a need for the death penalty in our society today and he pointed to the fact that 35 states, since the original Supreme Court opinion rendering the death penalty unconstitutional, have reinstated it in conformance with the Supreme Court's opinion. Now, as an Assemblyman, representing a constituency, do you find in talking to the people in your district that there is a feeling amongst the people that there ought to be a death penalty in some form or another in New Jersey?

ASSEMBLYMAN GEWERTZ: Absolutely, Mr. Chairman. I think that the average citizen, in viewing the original Supreme Court decision - though I am only a lay person - found that it addressed itself to the fact that it was a cruel and unusual punishment to have someone sitting on death row for a period of years with the thought that they were going to go to the electric chair or the gas chamber or be hanged, and that this was not proper to have someone go through that lengthy procedure of appeals that could last for innumerable numbers of years. The average person has said to himself and to me, "Well, if that is the case then the courts, instead of ruling it to be unconstitutional, should speed up the judicial process so that it doesn't take as long to hear appeals in the case of a convicted murderer who is facing the death penalty and, possibly, instead of ruling that the State of New Jersey should have a thorough and efficient system of education, they would better address themselves to having a thorough and efficient system of courts."

SENATOR RUSSO: Thank you, Mr. Gewertz.

ASSEMBLYMAN GEWERTZ: Thank you, Mr. Chairman.

SENATOR RUSSO: Before calling the next witness, we are concerned at this hearing, as I have indicated, about, basically, four approaches to the death penalty. The sponsors of the legislation in question were all invited to testify.

Senate Bill #938 was sponsored by Senator Dumont. Senator Dumont, as I understand it, is hospitalized and is unable to be here.

Senate Bill #48, sponsored by Senators Hagedorn and Musto -- Senator Hagedorn was notified of the hearing and does not appear on the list. He has not indicated that he wishes to testify. I understand that Senator Musto, who is a member of this committee, does plan to be here.

Senate Bills #1119, 1477, and 1098 are sponsored in various forms by Senator Imperiale, dealing with the death penalty. We do not have a request for Senator Imperiale to appear.

The other bill is Senate Bill #639, which is sponsored by me. At this time I will briefly explain that in the form of testimony. If any of the other sponsors do arrive, they will immediately be put on so that the testimony of other witnesses will either support or oppose the concept that they advocate.

Senate Bill #639 would reinstate capital punishment for basically all cases of first degree murder, as well as attempts upon the life of a President or a head of state. It neither makes the death penalty mandatory nor does it prohibit the acceptance of a plea of guilty of murder.

It meets the Supreme Court's decision in setting a separate procedure for sentencing in the case of the death penalty, a proceeding that has guidelines which are set forth in the Bill, in conformance with the Supreme Court's ruling.

In order for a defendant to receive the death penalty under this bill, he must first be found guilty of murder in the first degree beyond a reasonable doubt and unanimously by a jury, or by a judge if the jury is waived by both the defendant and the State.

In the event he is so found to be guilty of murder in the first degree, or one

of the other offenses outlined in the statute, he would then have a separate sentencing procedure, probably before another jury - although it conceivably could be before the same jury. At that sentencing procedure, evidence is presented in accordance with guidelines contained in the legislation and, basically, the bill would provide that evidence in mitigation in favor of the defendant could be presented without regard to the rules of evidence, but evidence in aggravation or by the State in support of the death penalty would be limited to the rules of evidence. There, again, the defendant could only be sentenced to death by a finding of the jury, unanimously, that such a penalty should be imposed.

The Bill would basically reinstate the death penalty in the manner that it existed prior to the Supreme Court's opinion rendering it unconstitutional but, yet, within the guidelines of the Supreme Court's opinion.

I should first emphasize that as sponsor of this legislation I in no way support nor advocate the indiscriminate use of the death penalty in New Jersey. As I see the law, under this legislation, if it is adopted - although basically reinstating the death penalty in the manner it existed before it was declared unconstitutional - the guidelines are rather strict and severe. I would anticipate less use of the penalty than existed before, although it would be available to a jury where they felt it would be appropriate.

I note, for example, in my own county of Ocean, where I served as a Prosecutor for some years, when we had the death penalty we had one death penalty conviction between 1909 and 1967. Juries just do not indiscriminately apply the death penalty.

There has been talk about reinstating the death penalty for limited crimes, that is crimes limited to certain victims - limiting the death penalty to the murders of police officers and correctional institution guards. I not only do not support that, but I would vigorously oppose it. The concept of whether one supports a death penalty or not is a very deep, philosophical, moral, and emotional question that each man has to resolve in his own mind. I would find it difficult to believe that anyone can resolve this question easily; I can't. I sponsored this bill. I believe it is the right thing to do. But, to suggest to you that I can do so without any concern - or that any man can - and perhaps, when an execution takes place - if it does under this bill - without any feelings of uneasiness, is really to stretch credibility. I think every man is going to have a difficult decision - certainly every legislator and the Governor is, if this bill passes - in determining where to take a stand on it.

To me it seems as though the death penalty is a necessary part of our society for unusually severe, brutal, premeditated murders, where a jury unanimously feels that the death penalty should be imposed.

I would not - I could not - support its use only in the case of police officers and jail guards. If the death penalty is rational, civilized, and makes sense, it should not depend on who happened to be the victim of the murder.

Insofar as the reasons for the death penalty, the problem becomes, in my judgment, very difficult. I no more feel that I can demonstrate a need for the death penalty to one who opposes it than I feel the one who opposes it can demonstrate his position to me. There is no simple answer to this question.

The easy answer for those who support the death penalty is that it is a deterrent and that would be the easy answer for me to give to justify my support of this bill. I can't give that easy an answer. I think the death penalty has some deterrent effect in cases of crimes for hire, terrorism, and the like. I cannot rationally and honestly justify the death penalty in the, you might say - if there is

such a thing - run-of-the-mill case of premeditated, first degree murder, other than those that I have mentioned.

I think it has some deterrent effect. I don't think its deterrence alone is worth taking the lives of people who have committed murder.

I really don't know how to better describe it than to use the words of Mr. Justice Stewart in upholding the death penalty recently. Very briefly, he stated - and I quote - "Capital punishment, in part, is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

There is a demand, in my judgment, for capital punishment in our society today, as witness the 35 states who have reinstated it through their Legislatures, as witness the attitudes expressed by the people in general through the various polls that have been taken. There is a demand for it. This is a democracy and we are representatives. Certainly, no man should give weight to that demand if he believes it is immoral or unconstitutional. I don't believe -- Well, the unconstitutional question has been resolved; it is not that. I personally don't believe it is immoral. Most of the religious thinking is not that it is immoral. It is just simply a question of, does each citizen believe that it is right for the State to take the life of a man in the manner described in this bill, for willful, premeditated murder? I believe it is and I have great sympathy for one who disagrees with that and I cannot say he is wrong - except I do not agree with him.

That is the concept behind S-639. If any of the other sponsors of the other bills arrive, they will be immediately called to testify as to their bills.

We will now go back to the witness list and call Stanley VanNess, Commissioner of the Department of the Public Advocate. Mr. VanNess.

S T A N L E Y V A N N E S S: Good morning, Senator. My name is Stanley VanNess. I am the Commissioner of the Department of Public Advocate and I am still the Public Defender in the office that is included in that Department. I wish to thank the Committee for the opportunity to come here this morning to express my views on capital punishment. I don't have a prepared statement but I did testify some three years ago, rather completely on this question. If it would be useful to the committee, I am sure that the transcript of that hearing could be made available.

At that time, two years ago, I expressed my personal, my professional, and my institutional opposition to the death penalty. My mind has not changed in those three years, although candor requires that I admit circumstances have changed within those three years.

When I was last here, the most recent pronouncement from the United States Supreme Court on this very serious subject was the Furman Case, wherein a majority of the Court found that our then existing capital punishment statutes were unconstitutional. The swing votes in that majority relied on the absence of standards in those statutes and concluded that the execution of someone under those statutes would be arbitrary and capricious.

As you pointed out, in your most eloquent statement on the bill, Senator, in that intervening period some 35 states have reinstated the death penalty. Some opted for mandatory death penalties, thinking that is what the United States Supreme Court wanted. We now know that that is not what it wanted, at least that is not what a majority of the present Court thought that the Court wanted when Furman was decided.

Other states opted for a statutory scheme which provided standards for the

guidance of the jury or judge, whatever the case might be. Now, I must concede that as a result of the Gregg decision a majority of the present United States Supreme Court is of the opinion that such a standard type statutory scheme is not unconstitutional on its face. I disagree with the result. I disagree with the rationale of the Court but I must accept its judgment, as we all must do.

I think it important to realize what the court did not say in Gregg. The Court did not express a preference for capital punishment. The Court did not say that capital punishment was wise, desirable, or necessary. Rather, it left that decision to legislative bodies, like this one, and that is the question that confronts this committee and, ultimately, the entire legislature and, perhaps, the Governor of the State itself.

Is capital punishment necessary? Is it wise? Is it desirable in New Jersey in this year of 1976? I submit to you that the answer to that question is no and it is no for a number of reasons. First, while I have moral scruples against the taking of life under any circumstances - or almost under any circumstances - I would be willing to concede that if it could be shown that capital punishment would save one life, if it would deter one person from committing a murder, then I might be willing to concede the efficacy of capital punishment in this State. But, I respectfully submit to you that the proofs are that it does not. Or, stated more specifically, there are no proofs that it does.

If we look at the State of Michigan, which was the first state in this country to abolish capital punishment and has never seen fit to reinstate it, notwithstanding that the City of Detroit had one of the highest murder rates in recent years -- when we look at that entire state and compare its homicide rate with neighboring states, like Ohio and Indiana, there is no showing that the absence of capital punishment in the State of Michigan has contributed to an increase in the number of homicides.

If we look at the State of Delaware, there was a period of time when that State had abolished capital punishment and then reinstated it, after a particularly heinous crime had been committed. Statistics will show that the murder rate was lower during the period of time when there was no capital punishment than it was before or after.

When you talk about the need to protect police officers and corrections officers -- I recognize the hazards both of those groups face from day to day, and if I thought there was some basis for capital punishment to protect those groups, I might be persuaded that there is some efficacy in the reinstatement of that punishment in the State. But, again, I submit that there is no objective evidence to support that conclusion.

The State of New York abolished capital punishment for all but murderers of police officers and corrections officers. They did that in the mid '60's. The incidence of homicide committed upon police officers went up and has continued to go up, so that it suggests to me that there is no relationship between the protection of the police officer and the existence of capital punishment in that jurisdiction.

It has also been observed here this morning and elsewhere that maybe it doesn't deter other people from committing a crime, but certainly it deterred the person who was executed. I can't dispute that. Certainly, anybody who was killed in our electric chair, or by any other form of capital punishment, is not going to commit any other act, whether it be good or evil. But, is there justification? Is it necessary to use the death penalty to prevent that person from committing further criminal acts?

I understand that Director Farver will be here some time today and he is certainly more able to speak to this point than I am, but it is my understanding from observation and from reading that convicted murderers are least likely to commit another crime, in prison or out, than any other classification of criminal. No one has yet

suggested that we should murder, legally, any person convicted of any offense. But the people who commit burglary and go to jail and come out are more likely to commit a homicide than a person who was sent to prison in the first place for homicide. I think statistics will show that. I think they will show that people who are sent to jail for narcotics offenses are more likely to come out and get into further difficulty that might even result in homicide than in the case of murderers.

So, I submit to you that there is no deterrent effect to be associated with a death penalty and absent such an efficacious outcome, then we are only demeaning ourselves and society by legally sanctioning the taking of another human life.

But, there are other reasons why I think the death penalty should not be reinstated in this State. Assemblyman Gewertz made allusion to the possibility of a mistake. I was lost somewhere along the way when he suggested that no one would be responsible if an innocent person should be put to death, and then maybe if that event occurred because of perjured testimony, we could then prosecute the perjurers. But, you know, Senator, as well as, or perhaps better than, I that that is not the only kind of mistake that can occur in a court of law. Every year our Appellate Courts are reversing convictions, either on findings that the law was improperly applied or that the verdict was against the weight of the evidence.

We have now, in the State of New Jersey, a case that has gained national - even international - attention, dealing with a person who was convicted of three murders. It was not a capital sentence at that time but he was, in fact, convicted and could have been given the death penalty upon that finding. Now, some nine years later, the State Supreme Court suggests that his conviction was improperly obtained. I don't know whether we are talking about an innocent man or not but I do know that had capital punishment been applied in that case, we would not be worrying now whether his conviction was improperly obtained or not. It is so obvious that it goes without saying - once we pull that switch, we are not going to be able to correct the mistakes that you and I know happen in this judicial system, and in any judicial system.

The question of who will get the electric chair if we are to have capital punishment returned to this State -- I submit that experience will show that it will be, again, the poor, the members of minority groups, the despised of society, that will pay that price if it is to be exacted from anyone.

Now, I won't go through the statistics of telling you how many black people were on death row when the death penalty was overturned here, but I will say that across the country when Furman was decided, 53% of the occupants of the respective death rows were non-white and perhaps that is what persuaded the swing-voters in Furman that there was something wrong with a standardless statutory scheme. Now they say that with standards it will be all right. But, I am informed that in those states where there have been standards introduced by legislation and where they have been applied in those states, again, 51% of the occupants of those death rows are non-white. If you look at the standards - and you can draw them as stringently and as rigidly as human ingenuity permits - I do not think you will ever be able to squeeze out of those standards the opportunity for discretion to be exercised. I think human nature has demonstrated that where that opportunity exists, discretion will be in favor of those who are favored by society and against those who are viewed with suspicion, distrust, and hatred by that society.

There is another reason why I think it would be foolish for us to reinstate capital punishment in this State. Assemblyman Gewertz called for a thorough and efficient court system. I would second that motion. I think we need a thorough and efficient court system. I think everybody in that system now is laboring under caseload

backlog, insufficient resources, and doing as good a job as can be done, but it is not a thorough and efficient court system at present.

To reintroduce capital punishment is to make it even less thorough and less efficient. You know what it takes in a capital trial, Senator Russo. You know how, under Witherspoon, you have to select a death qualified jury. You know how long that takes. Each juror is interviewed individually, not in the presence of the panel. It takes not only days but weeks and sometimes months to obtain just the jury before you start trying the case. Then the case is tried and if it results in a conviction, under the bifurcated system that the bill you describe would require and under the system that the court suggested would be preferable, another hearing takes place. Now we have people who have served on a jury perhaps for two or three months before there is a pronouncement of sentence and then that is just the beginning. Then the appeals start. They will go through the State courts, they will go through the Federal courts, they will start on a collateral basis. No lawyer who is charged with the responsibility of representing a person whose life is hanging in the balance, who is worth his salt - or maybe even if he isn't worth his salt - is going to allow that person to go to the electric chair without exhausting every possible avenue of appeal imaginable. And Gregg doesn't answer the questions for us that will be raised. There is no final pronouncement from the United States Supreme Court that this is constitutional and "don't come back to us."

They talked about it being not unconstitutional on its face, but if the experience that I think will be shown is, in fact, shown, if it is discriminatory in its application, there will be another series of cases brought to the United States Supreme Court.

We are not even sure what our State Supreme Court will say about a statutory scheme. They will certainly be asked before the first person is executed. So, again, we are talking about a long, protracted, and expensive proposition before anyone is going to have their life snuffed out in our electric chair and, as I said at the outset, I don't think that game is even worth lighting the candle for.

I am troubled by one thing and that is the expression of popular opinion, which I think has been accurately stated here. There are a majority of citizens in this State, and perhaps across the country, who are now expressing, in abstract terms, a preference for capital punishment. But, to say in the abstract that you favor capital punishment is a far cry from saying, in a particular situation, that you think a human's life ought to be taken.

Now, I don't know how accurate the polls were. I don't know how scientifically they were run. But, there is an expression of opinion and I know, as elected representatives of the people, you must be, should be, and will be concerned with the expression of that opinion. But, I respectfully submit to you, Senator, that an elected representative's role goes beyond merely counting the votes, counting the mail, and making a decision, based on what the greatest number of people want at a given time.

No more than four or five years ago, the majority of people when polled, perhaps under just as unscientific a circumstance, were expressing opposition to capital punishment. So, these things come and they go. It is subject to the vicissitudes of time. It is subject to the pronouncements from on high that -- well, I will say it: We have lived through a period of some six or eight years in this country where, from the highest offices in the country, we were hearing this whole resort to fear and concern about law and order. That has to effect people.

I respectfully submit that the responsibility of this Legislature goes beyond just counting the mail and making a determination.

I would conclude with an observation, although you may question its relevance. I am certainly not a biblical scholar but I do recall one situation where the general public was asked whether one of two men should live or die and it is my recollection, from that study, that they said, "Give us Barabbas." Thank you for the opportunity to be here and I hope it has been useful.

SENATOR RUSSO: Thank you, Mr. VanNess. I would like to pursue a few points with you, primarily because, since I favor the death penalty and you oppose it, I think, in fairness, the arguments I would make in opposition to you should be presented to someone as learned as yourself. I would rather present them to someone less learned for strategical purposes, but I don't think it would be quite fair. So, I would like to talk with you about them.

MR. VAN NESS: May I smoke, sir?

SENATOR RUSSO: Certainly, you may.

I don't think the anti-death penalty viewpoint could have a better spokesman than yourself. I have said that before. It is not just an accolade.

I agree with you, incidentally, that just counting the votes is no way to legislate and I don't suggest that at all. I, for one, believed in the death penalty long before I ever thought of seeking public office. As you know, as a prosecutor I prosecuted such cases and I believe in it and I did long before this.

But I do think, and no less an authority than the United States Supreme Court thinks, that the will of the people is certainly something that should be given significant weight in an issue such as this.

Counting the votes, though, is not enough because several years ago the people, as I recall in a C.B.S. poll, would have abolished the Bill of Rights. So, simply because that is what the majority feels, it is not enough. Here, though, what they seek involves a deep fundamental question and one can agree with them or not agree with them without necessarily being immoral, dishonest, or what have you.

But, I would like to talk to you about what I feel is a very important point. I can't think of a better way to bring it out than by dialogue between you and I, and that is the racial question regarding the death penalty. This is a question that obviously concerns me very much because I looked at the list of people who were executed since 1907 that Institutions and Agencies provided for me yesterday. Some years ago there were an awful lot of names that were Italian on the list. As you point out today, when the death penalty was abolished, most of the people pending execution were black - although I think we should point out, and this is not at all contrary to anything that you have suggested because you didn't go into this, that over the years in New Jersey, 111 out of the 160 people executed were white. So, I do think that should be made clear.

But, there is a reason for that. In 1910, 1920 and 1930, we did not have the black urban problem. It was then a white urban problem - perhaps an Italian urban problem, or what have you. But, I think it should be made awfully clear though and I would like your reaction to this because if the death penalty is reinstated, I think it is quite obvious that the majority of those executed, let's say, in the next 10 or 20 years - if there are any - would be black. This does not make, in my judgment, a racial problem.

Crime today is primarily a black problem, isn't it? It used to be, primarily, an ethnic problem in the sense of the immigration groups. It is an environmental problem, I think. Today, the lower income people in the cities are primarily black. They used to be of different races. Can we possibly say -- or, wouldn't the logical

extension of the racial argument be, "we shouldn't convict them of crimes either" because they are, in fact, environmentally, you might say, caused?

MR. VAN NESS: Is it my turn to react now? I think you have pointed out with more eloquence than I could have what the problem has been. When you take a group that is economically disadvantaged, they are economically disadvantaged because they represent a sub-group in that society at any given time. Now, there was a time when it was the Irish. There was a time when it was the Italian. There is a time now when it is black, and Puerto Rican, and Chicano in other parts of the country.

When you take that situation and give discretion -- and, as I say, with all the standards that you can devise, you can't squeeze all the discretion out of the jury's determination. Now, there is one provision, I believe, in the Georgia statute, that was not involved in the Gregg case but you may find as an aggravating circumstance -- when a particular crime shows a depraved mind, or is heinous. Now, those are very subjective determinations and a jury is going to make that judgment subjectively, charged by the judge with their obligation to define that standard.

But, if indeed -- as was the case in the South and it still continues to be the case in the South -- that offender was white and the victim was black, that discretion seems to have gone in favor of leniency or mercy for the offender. Reverse the role, and it seems to go the other way. That is what I am suggesting. I am not suggesting that because someone is disadvantaged, they are immune from prosecution. Obviously that is not the case or we wouldn't have 80% of our prison population non-white at this moment.

Whether that has been proportional or not, though, I think is another question. I suggest statistics would demonstrate that the incidence of execution does not bear a relationship to the incidence of the commission of a first degree offense. You know, we could certainly quarrel about what those statistics mean. But, I am suggesting that there is still discretion left even within the statutes that the United States Supreme Court found not unconstitutional and that discretion, in all probability, will be exercised as discretion has been exercised in the past, and that will be in favor of the advantaged group and against the disadvantaged.

SENATOR RUSSO: Mr. VanNess, isn't that really a problem with crime in general? For example, a black man on trial for a burglary in a suburban county has, you might say, a strike or two against him. It doesn't matter whether it is murder or burglary, that is just a problem we live with in our society as long as we are dealing with human beings on juries, is it not?

MR. VAN NESS: We are talking about the ultimate level of that problem now. Now, if we were to discuss the application of the criminal justice system as it affects minority groups, generally, we could spend a great deal of time here today, even though I did not come prepared to do that. But we are talking about exacting the ultimate penalty that society can exact and I respectfully submit that it is different, not only in degree but it is different in kind when we are talking about putting someone to death. If we have those kinds of problems in our criminal justice system -- and I agree with you that they are there -- then we ought to, certainly, be hesitant to continue along the progression towards the most ultimate penalty when we know that is a problem that runs across our system.

SENATOR RUSSO: Just one last thing. You raised the argument -- or suggest as an argument against the reimposition of the death penalty -- the tremendous amount of time and expense that would be involved. I was sort of, very frankly, surprised at that argument. I hadn't heard it before. Do you really believe that ought to be a consideration at all when it concerns something as deeply emotional and, perhaps, as

moral an issue as this? What difference does it make how many appeals there are or how much time is involved?

MR. VAN NESS: Oh, I think if we have the penalty, then certainly we ought to take as much time as we can take, to squeeze out as much possibility of mistake as possible.

The point I was trying to make, and probably did not say it too intelligently, was, that while we are devoting this time to determining whether someone is going to be put to death - and you have to factor into that equation my belief that no useful purpose will be served by having five or six people executed at the end of the line - to get to that point, we will have utilized the time, the energy of the prosecutor, of the public defender, of the court system, at the same time when other crimes - muggings and rapes and robberies - are not being prosecuted as diligently and as timely as they possibly could.

So, if there were some useful purpose to be served by it, then of course I wouldn't raise that argument. But, if I believe - as I do - that there is no useful purpose to be served, then I have to look at what it does to the rest of the system and I think it inevitably backs that system up and it means that some people will be on the streets, who shouldn't be, committing other crimes; it will mean some people will be awaiting trial whose innocence will ultimately be determined, and they will be under that cloud for a period of time.

SENATOR RUSSO: Well, I think, if I understand you correctly, the bottom line of what you are saying is, if one believes that there is no useful purpose to the death penalty, then nothing else really matters; you ought to oppose it. But if one believes there is a useful purpose to it, it ought not matter that it is going to be expensive and time consuming, and one ought to favor it. Wouldn't you say that is really what it comes down to?

MR. VAN NESS: Well, I think one certainly can-- If one believes there is no purpose at all to it, then of course it follows that you shouldn't waste any time on it. If one believes there is a purpose, I think he should factor into that belief the side effects of it.

SENATOR RUSSO: Yes.

MR. VAN NESS: And if we are looking at it strictly in utilitarian terms - which I would assume someone who is favoring the death penalty would have to do, they would have to say, "Well, it serves a useful purpose - then you would have to say, "What are the competing purposes that will be disserved?" My side is much easier than yours.

SENATOR RUSSO: Yes, I know. I would heartily agree with you that one who believes in something as fundamentally important - or serious - as the death penalty, and who believes it is right, ought not to even think about his cost, or what not. But, that, again, is only one opinion.

Is there anything else you would like to add?

MR. VAN NESS: No. Just my thanks for the opportunity to come down, Senator. I am sure this bill will get the most careful consideration by the entire Committee and by the Legislature.

SENATOR RUSSO: We thank you for your usual fine presentation. Thank you again for coming.

From the Attorney General's office, our next witnesses will be David Baime and Marianne Espinoza. Mr. Baime, are you and Marianne - if I may ask - presenting your individual viewpoints, or the position of the Attorney General?

D A V I D B A I M E: We are representing the position of the Attorney General.

At the outset I would like to express my appreciation for the opportunity to appear and speak today. We have prepared a lengthy and comprehensive statement which fully sets forth our views with regard to the issue at hand.

In addition, we have provided an analysis of legislation in every state in the Union, regarding capital punishment and we hope this information will be beneficial to the committee.

Of course it would be superfluous for me to merely repeat, at length, what is set forth in my statement - or in the Attorney General's statement I should say - rather, I would merely discuss certain portions of that statement for emphasis.

Clearly, death is a unique penalty in its finality, its enormity and its rejection of the convicted offender's reformation as a basic object of our criminal justice system. Despite its severity, however, capital punishment is a traditional societal sanction in the sense that it has been employed throughout our history. Although its precise origins are difficult to trace, it would appear that the ultimate penalty was recognized in Israel's ancient laws. Capital punishment in this country had its roots in the common law of England where its application was widespread.

Our research discloses that by shortly after 1800, capital offenses numbered more than two hundred in England and included crimes against the person, property and the public peace. Suffice it to say that the death penalty was not as common a punishment in the American Colonies. Even in the seventeenth century, there existed strong opposition to capital punishment. At different times in our history, strong abolitionist movements have developed. Although never completely successful, they nevertheless have had a major impact upon our law, especially in reducing the number of capital crimes and replacing mandatory death sentences with jury or judicial discretion and, finally, in developing more humane methods of conducting executions.

At present, many states, including New Jersey, are in the process of considering the reinstatement of the death penalty. In a society that so strongly affirms the sanctity of human life and the value of the individual, it is natural that the controversy has evoked extremely strong emotions on the part of those who favor capital punishment and those who oppose it.

Opponents of the death penalty argue that its very existence constitutes a morally repugnant renunciation of all that is embodied in society's concept of humanity. They contend that taking a life is so brutalizing to the public spirit as to be fundamentally unjust and thus beyond the scope of governmental authority. On a practical level - of course, this has been discussed today - they point to what they perceive to be a paucity of scientific evidence which would disclose that the death penalty deters criminal activity in any significant degree. Although several very recent studies suggest that capital punishment has a deterrent effect with respect to criminal conduct, there is little, if any, empirical data which definitely and conclusively supports such a view. The absence of such proof, they contend, compels the conclusion that capital punishment can only be grounded upon societal retribution - another factor that has been discussed here today.

Those who support reinstatement of capital punishment base their argument upon the spiraling rate of violent crime which, they claim, has resulted from its judicial abolition. Citing the primary obligation of government, which of course is to protect the innocent from criminal attack, proponents of the death penalty argue that the punishment acts as an effective deterrent.

In response to the claim that there exists no scientific evidence of deterrence, they answer that prevention is not susceptible to objective measurement. Further, many contend that societal retribution constitutes a legitimate and recognized penological

goal at least when applied to the most heinous and savage criminal offenses. The United States Supreme Court has recently recognized that retribution is a legal "expression of society's moral outrage at particularly offensive conduct." I might add that our own Supreme Court has stated that retribution is a proper philosophical justification for punishment. Nevertheless, one caveat appears in order and that is that our Court has also noted that "present day thinking emphasizes deterrence and rehabilitation."

Against this background of continuing moral controversy, it now becomes incumbent upon the Legislature to translate the public will. Needless to say, reintroduction of the death penalty is a subject upon which fair minded men can reasonably disagree. Significantly, our research has not revealed a formulation of public policy considerations or a compilation of objective scientific evidence, or data, so singularly persuasive as to compel a conclusion that capital punishment is or is not a proper and legitimate criminal penalty. Perhaps because the issue is clouded by one's personal view of public and individual morality, each citizen has his own perception of the need for capital punishment, or the lack of such a need. It can reasonably be anticipated that no judgment, no matter how carefully considered or well informed, can in all respects be wholly satisfying. Resolution of the issue must therefore be predicated upon a legislative reconciliation of competing social values.

We have noted that no single aim or thesis regarding capital punishment can claim scientific verity or universal support and that agreement can hardly be expected until much more is known about human behavior. It is evident that reinstatement of the death penalty is fraught with legal and practical difficulties. The number of bills concerning capital punishment, which have been introduced to date and are presently under consideration by the Legislature, starkly reveal the diverse questions, both constitutional, legal, and practical, that are presented. That is not to say, however, that these problems are insurmountable. Rather, we perceive it to be our role to analyze the legal issues presented by the various bills which have been introduced and to offer alternative solutions with respect to the constitutional difficulties which appear.

We have also, as I have noted, traced the history of capital punishment in New Jersey and have provided the legislature with a synopsis of the salient features of our present statutory scheme.

Finally, we have surveyed the efforts of other jurisdictions and, as I have noted, have included a rather exhaustive analysis of recent legislation in an appendix to this statement.

As you know, the Supreme Court of the United States has recently held that the death penalty is not per se a violation of the cruel and unusual punishment proscription of the Eighth Amendment. The issue, according to the Court, depended upon evolving standards of decency. Of course, these standards are continuing to evolve and change.

However, one caveat is plainly in order. It should be noted that the five capital punishment cases which were recently decided by the Supreme Court all involved convictions for murder. The Court's holding in each case was that the infliction of death as a punishment for murder is not invariably disproportionate to the crime and, hence, is not unconstitutionally severe if properly applied. Although the Court specifically noted that it did not address the question of whether capital punishment is a proportionate sanction where no victim has been deprived of life, there are certain indications in the Court's opinion which suggest that the death penalty may not be appropriate with regard to crimes in which death has not resulted.

The Court noted, for example, that death is "an extreme sanction, suitable to

the most heinous offenses and extreme crimes." Throughout the Court's opinions, it emphasized the unique severity of the sentence of death. For example - and I am quoting the Court - the Court stated that, "Death is a punishment different from all other sanctions in kind rather than degree and that it was appropriate only in extreme cases as an expression of the community's belief that certain crimes themselves are so grievous an affront to humanity that the only adequate response is the penalty of death." There is a corresponding need, therefore, for reliability in the determination that death is the appropriate punishment for a category of offenses and the inference, I think - or I should say, the Attorney General thinks - is strong that death may not be an appropriate punishment for offenses which do not entail the loss of life.

I would like, at this point, merely to briefly emphasize the elements set forth by the Supreme Court in its recent decision concerning the constitutional application of the death penalty.

The first point, which has been noted today, regards a bifurcated proceeding. It should be observed that the United States Supreme Court did not actually require all capital punishment statutes to provide for a bifurcated proceeding. However, three statutes which were upheld by the Court did provide for a bifurcated proceeding.

Further, although in State against Forcella our Supreme Court ruled that a bifurcated trial was not constitutionally compelled in capital cases, I think that conclusion is now rather questionable. If capital punishment is to be sanctioned in New Jersey, therefore, we recommend that a bifurcated proceeding would necessarily provide the best answer to the problems arising from the sentencing question in capital cases.

Secondly, we point to the necessity of providing to the court, or the sentencing authority - perhaps the jury - adequate sentencing information. The United States Supreme Court stated that the sentencing authority should be furnished with a wide range of information relevant to the question of the disposition of the offender. Of course, this would include information relative to the offense committed and the offender's background as well. To this end, the Court encouraged the avoidance of unnecessary restrictions with regard to the admission of evidence. I point out that most of the bills that have been introduced provide that the rules of evidence may be relaxed with regard to proof concerning mitigating factors but not aggravating factors and that would seem to conform completely with the Court's opinion.

We would also point to that part of the Court's opinions regarding the necessity of having adequate standards. The Public Advocate has noted that in the past there has been some evidence - at least nationally - that the death penalty was imposed in an arbitrary and capricious manner. By that I mean it was imposed based upon non-germane criteria. I emphasize that national statistics, which were presented in Furman against Georgia seem to support that view, although state statistics certainly do not.

Nevertheless, the Supreme Court did specify that unbridled discretion on the part of the sentencing authority, whether it be the jury or the judge, is most unwarranted and results in constitutional problems. The Court indicated that the procedure must permit a meaningful opportunity for consideration of both aggravating and mitigating factors.

The procedures adopted by Georgia and Florida appear to have been favored by the Supreme Court. Certain aggravating and mitigating circumstances were enumerated in each of those statutes and those factors are set forth in our appendix.

Although it is only clear that a death sentence should be based upon the finding

of at least one aggravating circumstance, it would seem preferable to provide for the weighing of the mitigating circumstances against the aggravating circumstances in this procedure. Again, I would note that most, but not all, of the bills that have been introduced in the Legislature clearly conform with that admonition by the Supreme Court of the United States.

The final prerequisite to a constitutional application of the death penalty, according to the Supreme Court, relates to appellate review. To make review meaningful, the sentencing authority should be required to make specific findings which document the basis of its decision. In this way, appellate review provides an additional safeguard, other than standards against the wanton and freakish imposition of the death penalty.

As I have already noted, we have presented ample material regarding the constitutional prerequisites to the Legislature. We have also provided the Legislature with various technical assistance regarding the specific bills. Of course, we pledge our efforts to assist the Legislature in alleviating any problems, legal problems or constitutional problems that may occur with regard to the application of the death penalty. And, again, I wish to express my thanks and that of the Attorney General with regard to the opportunity to appear here today. Thank you.

SENATOR RUSSO: Thank you, Mr. Baime. Was this written presentation compiled by you and Marianne Espinoza?

MR. BAIME: Among others, yes.

SENATOR RUSSO: I don't think there is any question but that the Committee owes a debt of gratitude to both of you and you ought to both be complimented for what appears to be a really outstanding compilation of the problem. You haven't taken an advocate's position. You have merely furnished us with the help that we need, with regard to research. I think it is an outstanding job and the Attorney General ought to be complimented. I hope this record will reflect the feelings of the Committee. I am sure the Committee, as a whole, will agree with me on this. You have done an outstanding job.

I would like to ask a few questions now. First, beginning with S-639, the Bill that I sponsored, you have analyzed that Bill, have you not?

MR. BAIME: Yes, we have.

SENATOR RUSSO: Based upon your testimony, other than a few details we will talk about, am I correct that, in your judgment, the Bill meets the constitutional requirements of the Supreme Court's opinion - the United States Supreme Court's opinion?

MR. BAIME: Yes, with one cautionary remark and that concerns the crimes that are encompassed in that Bill. By that I mean there are crimes other than those in which the victim's death was caused.

SENATOR RUSSO: Yes. That is my next question. So, other than that, for the moment, without expressing an opinion as to whether you agree with the legislation or not, constitutionally you see no infirmities in the Bill as presented?

MR. BAIME: That is correct.

SENATOR RUSSO: Now, on the question of the crimes, as you know, the Bill would include the death penalty for an assault with intent to kill, as I recall, on a President of the United States, a Governor, or heads of State. Is it your feeling that the United States Supreme Court would have difficulty with the death penalty for one who attempts to kill the President, for example, of the United States? Is that the result of your--?

MR. BAIME: It is very difficult to respond to that question. I might say that we are predicting future judicial decisions with regard to the Supreme Court. Of course, that is very difficult to do, particularly with regard to this area of the

law. I would note that only four years ago we all believed that the death penalty was unconstitutional, per se - or at least many of us did - by virtue of the Supreme Court's decision in Furman against Georgia. Of course, reevaluation of that decision by the Supreme Court has resulted in a contrary holding.

The only thing that we would say is that there seems to be very strong language in the opinion - in fact, in all five of them - regarding a limitation on the Court's holding, making the holding definitely applicable with respect to crimes in which life has been deliberately taken by the offender, and even in those crimes, of course, the jury or the judge - the sentencing authority - is given discretionary authority to impose that penalty or to impose a lesser penalty.

That being the case, surely, if this Body wishes to enact a statute which will definitely pass constitutional muster, it seems clear that it could do so by limiting the penalty to cases in which death occurs.

SENATOR RUSSO: Let me ask you this, Mr. Baime. My memory escapes me for the moment. At the time of the assassination of President Kennedy, as I recall, the prosecution had to proceed under the Texas statute because there was no Federal statute dealing with an assassination, or an attempted assassination of a President. Has there been one passed since - a Federal statute - or would an assassination, for example, of a President proceed in accordance with the state law where he was at the time of the assassination?

MS. ESPINOZA: I believe that the Federal statute which would impose the death penalty had to do with highjacking and not assault on the President.

SENATOR RUSSO: Not assault on the President? So, if, for example, there were a murder - for the moment, forgetting assault - of a President in New Jersey, the handling of that matter would have to be under New Jersey law? There is no Federal statute that would take over that prosecution?

MS. ESPINOZA: There would be a Federal statute, however, it wouldn't impose the death penalty.

SENATOR RUSSO: Okay. It would not impose the death penalty. Well, is it your feeling that a statute -- I think we agree that if a President were to be killed, under this S-639 certainly the death penalty is constitutional. But, it is your feeling that the United States Supreme Court would strike down a statute that would make an attempt to murder the President subject to the death penalty - or are you not sure?

MR. BAIME: Well, I would have to say that we are not certain at all. We do know, again, that the language in the opinion is limited expressly by the Court to cases in which the crime has resulted in the death of the victim. It is difficult, as I have noted - it is very hazardous - to make a prediction in this regard.

So, again, I can't say, by any means, that such a bill, or statute, if enacted, would be declared unconstitutional by the Supreme Court of the United States. I can only say that a bill which encompasses the death penalty only with respect to cases in which death occurs would definitely pass the constitutional muster, assuming that it meets the other prerequisites we have noted.

SENATOR RUSSO: Right. Now, you mentioned the standards of admissibility, and S-639, as you know, has two different standards for admissibility of evidence, depending upon whether the evidence is sought to mitigate or, in effect, benefit the defendant and whether or not, on the other hand, it sought to aggravate or lean toward the death penalty. The bill would provide that evidence beneficial to the defendant may be introduced without regard to the rules of evidence but evidence that would aggravate, or tend toward the death penalty, would be limited to the rules of evidence. You have

no difficulty with that concept, do you?

MR. BAIME: No. I would note that evidence contained in a pre-sentence report, of course, would not be admissible in a court of law.

SENATOR RUSSO: Yes.

MR. BAIME: From a constitutional sense and from a practical sense it seems clear that at least with regard to mitigating factors concerning a heinous offense, the sentencing authority, whether it be a judge or jury, ought to have the greatest amount of relevant evidence possible, and as we all know, rules of evidence, quite properly under certain circumstances, restrict the admissibility of highly relevant evidence when other important values outweigh it. It seems when we are considering the imposition of the death penalty, the inquiry by the court or jury should be far-ranging and the nature of the information presented to the sentencing authority ought to be relevant but great.

SENATOR RUSSO: I guess then, really, what I should ask you, in conclusion, is, if one were to support the concept of the death penalty and wanted to draw up a statute that was constitutional within the Supreme Court guidelines, S-639 would meet that test, would it not?

MR. BAIME: S-639 would, again with the reservation we have with regard to the types of crimes involved. I might add that several of the other bills would also appear to conform to the Court's decision.

SENATOR RUSSO: Right. Okay, I think that is all I have, unless you have anything further to add?

MR. BAIME: Again, we appreciate the opportunity to be here today.

SENATOR RUSSO: Well, we are very grateful, again, to both of you for the thorough job you have done. Again, our compliments and our thanks.

MR. BAIME: Thank you, Senator.

SENATOR RUSSO: Prosecutor Champi, please, of Somerset County. Prosecutor Champi is speaking as President of the County Prosecutor's Association, is that correct, sir?

S T E P H E N R. C H A M P I: That is correct, Mr. Chairman.

SENATOR RUSSO: Thank you.

MR. CHAMPI: On behalf of the Association I should like to take this opportunity to extend our sincerest thanks to you, Mr. Chairman, and the Committee, for the opportunity to appear here today on very short notice and taking us out of turn. We acknowledge it and we appreciate it.

My purpose of appearing in my capacity as President of the New Jersey County Prosecutor's Association is to bring to your attention, Mr. Chairman, and to the members of your Committee, the fact that approximately two years ago the New Jersey County Prosecutor's Association passed a resolution in favor of capital punishment. However, since that time, many things have happened with respect to this very important issue and subject matter - the latest Supreme Court opinion and its impacts with respect to this subject matter and also the fact that the Association's membership has changed somewhat drastically over the past two years. So, I am not sure whether or not, if we had an in-depth meeting amongst our members with respect to this subject matter today, this resolution of two years ago would still be valid.

Unfortunately, I received your kind letter the other day and time did not permit me to call a special meeting of our Association for the purpose of discussing what our present stand would be with respect to our past resolution.

Accordingly, I undertook to contact every one of the other 20 County Prosecutors and indicated to them that I would appear today on behalf of the Association for the

purpose of bringing our resolution of two years ago to your attention and also asking each member to appear, if he so desired, and give the maximum input from our Association to the Committee. I think that some of my colleagues will probably send in a written report to you. I think they -- I know Prosecutor Humphreys is here and perhaps several other Prosecutors are also here.

I would also like to take the opportunity and privilege of giving you my own personal concepts in this regard, as an individual Prosecutor. I am not now speaking for the Association. I, personally, have agonized over this very important question for some time and I have come to the conclusion, after weighing and balancing all of the equities, that I am in favor of capital punishment. I am especially in favor of capital punishment in those cases where the unfortunate death victim had been kidnapped either for purposes of money ransom or held as a hostage; in those instances where a law enforcement official was killed in the performance of his assigned duties; in those situations where a public or governmental official, regardless of whether he is the President of the United States or the mayor of a community, was assassinated; and where the death victim was murdered as a result of a professional killer for hire.

It seems to me that society must necessarily demand the removal of those persons who willfully, maliciously, and premeditatedly conduct themselves in such a fashion as to forfeit the right to live.

In my view, the very basic and fundamental issue goes far beyond considerations, although they are important, of deterrence, rehabilitation, moral and religious concepts, statistics, etc. I think in its strictest sense, the Legislature of this State is compelled to determine whether or not there are certain persons who are incapable of living in our society in accordance with the rules of law and order. If the Legislature, in its infinite wisdom, answers this question affirmatively, then I respectfully submit that capital punishment must follow.

I know that the opponents of capital punishment thrust a great deal of their opposition to the passage of any death penalty legislation predicated upon the position that another life should not be taken. I wonder, however, as to where the consideration for the death victim is, whose life has been taken through no fault of that person.

So, I think that under the circumstances, difficult, emotional as this problem may be, in the final analysis the ultimate determination to be made is whether or not there are people who just cannot live in our society.

One last comment, if I may. As a Prosecutor, having to deal with the trial of these types of cases in my assigned statutory duties, I think that we have to look at a practical consideration. We all know that the conduct of murder cases is long, difficult, time-consuming, causing the taxpayers considerable sums of money. The problem is getting more difficult than it is improving. With the advent and impact of new constitutional safeguards for defendants, as handed down by our judiciary, the procedure is getting further and further extensive and further and further costly. The appeals that are involved, the transcripts, are just overwhelming.

While I am in favor of the extension of due process to its ultimate degree and perhaps having bifurcated proceedings to determine whether or not there should be a death penalty imposed by a jury, following either the same jury or a prior jury returning a verdict of murder in the first degree, I would hope that, from the practical aspect, whatever legislation is passed the procedure is not extended to the point where it renders, from a practical point of view, an almost impossible situation. We have had some murder trials that last three and four months. Some of them, as we know, have lasted a lot longer than that. So, I hope that somewhere some recognition, acknowledgment and consideration is given to trying to keep the procedure to its absolute bare

minimum, consistent with due process.

Thank you, again, for the opportunity and allowing me to appear in both of my joint capacities.

SENATOR RUSSO: Thank you very much, Prosecutor, we very much appreciate your coming and giving us your testimony.

Prosecutor Humphreys from Passaic County,

Incidentally, William Fauver, Director of the Division of Correction and Parole, who was a scheduled witness, will not be able to appear.

B U R R E L L H U M P H R E Y S: Is this the hot seat?

SENATOR RUSSO: That is the hot seat. Go ahead, Prosecutor.

MR. HUMPHREYS: Thank you, Senator, very much for inviting me to appear. I have been in office only thirteen months and perhaps I should defer to my senior prosecutor but if my own family is any criteria, I find that the young people don't defer anymore. They don't like to be seen and not heard, so I have accepted your invitation.

I am not a stranger to law enforcement and criminal law. I spent some three years as a Deputy Attorney General in Governor Mynor's administration back in the late '50's and '60's, in charge of major criminal prosecutions. I have had the privilege of being appointed Special Prosecutor by the Supreme Court to investigate municipal corruption and I have had my fair share of cases in which I appeared as attorney for the defendant.

These encounters with law enforcement and criminal law have left me with a few thoughts and one suggestion, which I would like to share with you. First, I share the philosophical reservations that many people have about capital punishment. I ask myself is it fair. I remember the words of Warden Laws of Sing Sing, who said that capital punishment is inherently unequal because it falls on the poor, the deprived, the ignorant, the retarded, the sick, and that rarely do you find a wealthy person, or a person of prestige in the community, going to the gallows or the gas chamber.

Now, the Supreme Court has validated, constitutionally, capital punishment and has said that it can be applied equally and fairly, but I wonder. I can remember for many years the Supreme Court decisions saying that separate but equal facilities for blacks and whites were constitutional and fair. And I can remember in Brown v. Board of Education, Chief Justice Warren saying that there is no such thing as separate but equal; it is inherently unequal. And I ask myself, isn't capital punishment, essentially, unequal and unfair? And I ask myself, isn't it a step backwards? I see civilization as a long series of small advances, advances from the time in England when we used to draw and quarter people, put their heads on staves and march them around the square. This is a long march from barbarism. Our own colonial days -- ears were cropped and nailed; thumbs were branded; women were dunked; men were pilloried and flogged. I ask myself, is this a step back along that long road from barbarism?

Yet, I could overcome those philosophical reservations. If I were a legislator I could vote yes for capital punishment if I could be convinced that it is a significant deterrent to crime. And the reason is because I think that the crime problem in America today is like a cancer; it is eating away at the very vitals of our society. I wonder if people in government have gotten the message yet about how serious the crime problem is?

In Passaic County, in 1970, we had four judges sitting on criminal matters. We have nine judges sitting on criminal matters now, exclusively, and the assignment judge chips in and the juvenile judge handles 4,000 criminal complaints, and we haven't

had much of an increase in population in the last five years.

I saw a survey recently from businessmen from a major city in our county which said that crime and vandalism were the major deterrence, as they saw it, for the rebuilding of the cities, the major problem that they had to confront, and the major reason why they weren't going to stay in the city any longer, if they could help it. And, anyone who thinks that crime is confined to the cities is also mistaken; it spreading to the suburbs. The statistics show it. The studies show it. I had a meeting with the Chief of Police of Passaic County a few days ago at which every Chief from the suburban communities told me he was understaffed and they are getting quickly overwhelmed.

But, I don't see the crime problem as just another problem in our society. I see it as something basic and fundamental. People have come to America for hundreds of years because it is a refuge, a haven, a place where they can escape danger and persecution from abroad. And, what do they find when they get here today? They find unsafe streets and unsafe neighborhoods and unsafe homes. And I must seriously question how long the American people will cherish our free institutions if those free institutions don't preserve their first civil right - the right to be free from crime.

So, if I thought that capital punishment, as obnoxious as it is to me personally, would be a significant deterrent to the cancer of crime, I would be for it. But I don't. I think that capital punishment as a cure for crime is akin to castor oil for cancer; it is very, very disagreeable. It is very disagreeable medicine, having very doubtful efficacy.

Now, I know you will be bombarded by studies, pro and con. Some people say that it is a deterrent and some people say it is not a deterrent. I would like to make just a few observations on those points. The majority of the United States Supreme Court, in upholding capital punishment, reviewed those studies and reached this conclusion: That they were inconclusive. They didn't prove anything, one way or the other. Some of the minority judges thought that they proved that capital punishment was not a deterrent. Take your choice.

Now, I consider myself a political liberal, but I consider myself a pragmatic liberal. I am interested in results, not rhetoric. I am interested in accomplishments, not actions. So, I look at the problem of capital punishment as it affects my own county and my own problems. We have a lot of crime. If we had this bill passed, or another bill passed, would there be a significant deterrent to crime in Passaic County?

Let's take a few facts and look at a few simple arithmetic problems. We have about 40 murder indictments a year. In the last year we have had an excellent conviction record. We lost, I think, only one murder case in the last year. Out of those 40 murder indictments, we have had two first degree murder convictions. The year before it was one. The year before that I think it was one. In other words, first degree murder convictions, high crime county, plenty of murder, one or two a year.

Before I came down here I asked some of my senior assistant prosecutors - career law enforcement officials - in how many cases a year, total, in Passaic County would they ask for the death penalty. These people have been around for a long time. Most of them are for the death penalty. They are not soft-hearted people. The answer I got was, "Maybe one, possibly two." So, what does that leave us with? It means that if you pass this bill, or some other bill, I, as a Prosecutor for a five year period in a high-crime-rate county, may ask for the death penalty in three, four, five cases. Now, will I get it?

Now, I come to what I like to call the "cop out." I like some of the language the kids use and I think "cop out" is a very good phrase. Let's take a look at all the "cop outs." The first cop out is the prosecutor. It is very easy for me to say now I am going to ask for the death penalty in one case a year - and also for my senior assistant prosecutors - because we don't have the death penalty. But, what if we have it? Would I cop out? Would I want to pull the switch? I think there are a significant number of cases where I will be constrained not to ask for the death penalty.

Cop out candidate number two, the jury. Members of the public. Members of the public who tell the pollsters that, "We are in favor of capital punishment." Then they sit on the jury. They are impaneled and they say, "Oh, I am conscientiously opposed to capital punishment."

Cop out candidate number three, the courts. If you have a murder conviction with the death penalty, you had better have a very good case because every appellate court in this country - and the defense counsel will find courts that you haven't even heard of before - will be looking for a way to overturn that conviction.

Justice Brennan, in his dissent in the Gregg case, said that the unfortunate effects of the death penalty upon the administration of justice are most apparent when you take a look at convictions which probably should be upheld, but because the judge doesn't want to pull the switch, he overturns the conviction and sends the prosecutor back.

Let's assume that all those obstacles are surmounted, who is the next cop out candidate? The Governor. I understand the last execution we had was in 1963. Moratorium on executions, pursuant to the Supreme Court decision, didn't go into effect until 1967. What happened in those four years? How many people were executed in New Jersey during the '50's and '60's? I don't have the figures at hand but I bet if you - I would wager - examined the commutations by the Governors during the '50's and during the '60's, you would find that it is the rule, not the exception.

So, what do we come up with? We come up with a handful of people being executed by government, after much time, much cost, much expense. One of the minority opinions in the Gregg case cited statistics to show how, in their opinion, it costs substantially more to execute one man than it does to keep one man in jail for life.

Now, is that a deterrent to crime? A murderer is going to commit a cold-blooded murder or he is going to take hostages, or something like that, and he says to himself, "There is a one in two hundred or a one in five hundred - maybe one in a thousand - chance I might be executed." That's a deterrent? I don't think so. Now, I could be wrong. There are some very distinguished senior prosecutors who are going to come here and say that I am and they think it would be a significant deterrent. Perhaps they are right. But, what bothers me is, I think the whole issue of capital punishment - and I am not casting any reflections on your bill - is a red herring. I think it detracts from some of the real things that we ought to be doing to combat crime. I think it gives the public the idea that if we kill a handful of criminals, we are going to solve our crime problem, or do something about it.

We have so many things we ought to be doing - effective things with respect to our crime problem. I have proposed a number of them and I am not going to take the time to go into all of them now but let me hit on two of them, for example. We prosecutors know that serious crime is basically committed by "repeaters." I think the figures in Passaic County are something like 60% of major crimes are committed by people who fit into the category of chronic repeaters. And we know what happens to these people when

they go to jail. It is like the lady in the magic show. She is here; she is gone; and then she is back again on the scene.

We had an incident in Passaic County where a man beat a 15-year-old, pregnant girl to death on a city street and was sentenced to over 30 years in jail. He was back on those streets in five years. We have a sentencing program now in our County and we review all of the people who go on parole in our County. The other day I saw somebody who received a sentence of over 30 years for a heinous crime eligible for parole in four years.

Professor Wilson of Harvard has pointed out - he cited a study which indicates that if people in Manhattan who commit serious crime receive a sentence of three years and serve that sentence of three years, crime in Manhattan - serious crime - would be reduced by two-thirds. That means that one murder out of three would occur, or only one mugging out of three. Even if those figures are way off, there is a significant attack on crime.

I think we have to have effective sentencing. I think the State ought to be able to appeal from the sentence on the ground it is manifestly too lenient. And I don't think there is any constitutional objection to that.

I think we ought to end fast furloughs and easy paroles and, "anyone for work release programs"? I think the whole juvenile justice system ought to be overhauled. More juveniles in Passaic County commit offenses than criminals do. When I took office, it was a common sight to see juveniles in Passaic County - serious, chronic, repetitive juveniles - laughing at the juvenile judge because they knew nothing was going to happen to them.

I have a suggestion. This is an issue which creates a great deal of emotion on every side. You are going to get people here who will say it is morally wrong to have capital punishment. And you are going to have people here who will say it is morally wrong to let people who deliberately commit murder get away with it and not extinguish their lives. I am going to suggest to you, do you have the facts? Do you really have many New Jersey studies? Do we know why? Is there any correlation between the increase in the crime rate and the fact that, since 1963, there have been no executions?

This issue reminds me, very much, of the issue that arose over the divorce laws. Should we have easy divorce laws? Some people said that was immoral. Some people said the harsh divorce laws were immoral. I was a member of the editorial board of the New Jersey Law Journal at the time - I still am - and I wrote an editorial recommending that the Legislature and the Governor appoint a joint legislative and gubernatorial commission - broad representatives - and make a study. Out of that study came the divorce law and it was passed. I think we all agree that it is far better than the old law.

I would suggest to you that that is the solution here - make a study of local conditions, a study of whether or not it is a deterrent; whether or not it would work. I think out of that commission we would find whether capital punishment is just a castor oil for cancer or whether it is a significant deterrent; whether it will just make us a little sicker or whether it will work. Thank you.

SENATOR RUSSO: Thank you, Prosecutor. I have a few questions. I must first preface them by saying that although I am chairing this hearing, I speak now, at this point, as an advocate for a position, rather than an impartial chairman. So, bearing that in mind, Prosecutor, I have always taken the position that one who disagrees with me on the death penalty, as you do for example -- I fully understand that position. I can hardly criticize it. It is one of those deep, emotional issues that

people are going to disagree on and I accept the opposing point of view. It seems to me, though, with all due respect, that you have difficulty accepting the fact that I, who have probably had maybe as much experience in law enforcement as you have, believe that this is right. It is not a red herring. It is not an attempt to sidetrack the problem of crime. I believe this is right. You seem to have difficulty accepting that. In your comments - and maybe I misunderstood you - you sort of subscribed a motivation - "Hey, let's get this death penalty thing going and maybe we can push under the rug the problem of crime." I think I am as concerned about this problem as you are. Perhaps you would like to respond to that.

MR. HUMPHREYS: If that was your interpretation, I apologize. I had no intention of creating such an impression. I don't challenge anybody's motivation in this matter. As I say, my emotional, philosophical, or call it what you will, reservations about capital punishment I could overcome and I could vote for the death penalty. I could ask for it as a prosecutor if I was satisfied it would work. My comments about a red herring had nothing to do with motivation. I am sure it is not the motivation of anybody who is in favor of capital punishment that it be a red herring. My point is I think it is a red herring. I think that the passage of such a bill may well lead the public to think we have solved, or done something significant, with respect to our crime problem and "now we don't have to have any more prisons which will cost a lot of money" - but we ought to have them - and "we don't have to reform our juvenile justice system" - which I think we should.

SENATOR RUSSO: Well, have you heard - because it would shock me as much as it apparently does you, or maybe I have just missed it - anyone who advocates the death penalty in New Jersey, or elsewhere, that has suggested it is going to solve our crime problems and perhaps do away with, or alleviate the need for, our prisons? Have you heard that even suggested, Prosecutor?

MR. HUMPHREYS: No, I haven't.

SENATOR RUSSO: I haven't either.

MR. HUMPHREYS: But I think--

SENATOR RUSSO: Well, why would the public get the impression, then, that if we passed this bill, we have solved our crime problem?

MR. HUMPHREYS: Well, I assume that the bill is being pushed and it will be passed because it is hoped it will have a significant effect on our crime problem.

SENATOR RUSSO: Not at all. Not at all, Prosecutor. You misunderstood, I think, the meaning behind the legislation and the intent of all of the sponsors, not only myself - however, I can only speak for myself.

Some feel it will deter murder. Earlier I expressed some concern about that concept. I am not prepared to defend that to any great extent. Others feel, as did the majority of the United States Supreme Court, that capital punishment - and I am quoting, again, from Justice Stewart's opinion, which does not mean that he is right but it is what the majority felt - is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrong. It is the feeling of some that in a democracy, legislators and perhaps prosecutors have an obligation to consider heavily and perhaps reflect the feelings of the people that make up that democracy.

No one suggests that if we impose capital punishment in New Jersey it is going to eliminate crime in general. I personally do not believe it will have any effect at all upon any other crime other than murder, even if on that. So, I think that should be made clear. It is a philosophical question that you and I, in good conscience, may

disagree on - and we both come from similar backgrounds with regard to law enforcement. One feels there is a need for it and one feels there isn't. That's all there is to this question. That's all there is to the question; the answer is far more difficult.

But, let me, if I may, go on to another part of your presentation that keeps coming up through many witnesses. We have talked about it here today and I would like to pursue it a little further with you because I think, based upon your many years of experience in law enforcement, you may be able to add something more to it, and that is the question of the death penalty being basically a poor man's sentence. As you said, I think, it affects the poor far more than the wealthy. You, of course, don't mean to suggest by that - or do you - as many wealthy people commit murders as do the poor? I think we know that the poor commit them in far greater numbers. Is that correct? I don't mean to sound like a cross-examiner, Prosecutor.

MR. HUMPHREYS: Yes, although I think the odds go down a little bit when you talk about first degree murder.

SENATOR RUSSO: Yes. But, still, it does seem to occur in greater numbers amongst the poor than amongst the wealthy.

MR. HUMPHREYS: To some extent in first degree murder and to a larger extent in other murders, which would not be affected by this bill.

SENATOR RUSSO: Other than first degree murder?

MR. HUMPHREYS: Yes.

SENATOR RUSSO: And of course that is pretty well caused - and it may be a good argument against capital punishment - by the environmental factors involved. Crime is indigenous more to the poor in the ghetto areas, whether they be black, Irish, Italian, or what, than it is to the wealthy. There is no question about that and it is still true today in your own County of Passaic.

MR. HUMPHREYS: Our last three murders were gang murders.

SENATOR RUSSO: Okay.

MR. HUMPHREYS: I am not sure that is the result of the poor in a ghetto neighborhood.

SENATOR RUSSO: I don't think it would be.

MR. HUMPHREYS: The persons who committed those murders committed them for hire - for money.

SENATOR RUSSO: What do you think about the deterrent effect of capital punishment on those kinds of murders?

MR. HUMPHREYS: As I said before, very slight, if any.

SENATOR RUSSO: Very slight, if any, even in murders for hire?

MR. HUMPHREYS: Right. I don't think if you take a mob executioner that he is going to say to himself, "Now, let's see, if I commit a murder in New Jersey for money they still have the gas chamber or the electric chair there and there is maybe a one in five hundred chance I am going to end up in it. I don't think I am going to commit that murder there, instead, I am going to commit it in New York City." I don't think that will happen.

SENATOR RUSSO: No, he might say, "I won't commit it at all."

MR. HUMPHREYS: I don't think that happens either.

SENATOR RUSSO: You don't? You have no basis for your position either, as I do not for mine, is that correct?

MR. HUMPHREYS: Correct. And, as I pointed out before, despite my philosophical reservations, if it can be shown by a study, by a commission, that that it was a significant factor with respect to crime - eliminating, reducing, call it what you will - having some beneficial effect on the crime problem we have today, I would go for

it.

SENATOR RUSSO: Well, isn't it true, Prosecutor, that there is no study in the world that is ever going to be able to tell us the answer, one way or the other, to a question like that?

MR. HUMPHREYS: Conclusively, I agree.

SENATOR RUSSO: Yes. In fact, over all of these years of debate over capital punishment - as I think you pointed out, and I agree with you - none has yet. I think it is sort of something like -- I had an experience yesterday that I think really focuses on the problem. We went to the State Prison and outside of the prison - I won't go into the whole story about it - I, rather coincidentally and strangely, ran into an inmate who I had prosecuted and received the death penalty on in 1966 and who was one of those spared by the Court ruling and was out and cleaning up the street. And I asked him - I'm sorry, I didn't ask him, one of the reporters asked him, "Do you think the death penalty is a deterrent?" Well, of course not. He committed the crime. The fact is, nobody commits murder thinking about what the penalty is because they don't plan on getting caught, with the possible exception, I would suggest, of murder for hire. Wouldn't that, basically, be true?

MR. HUMPHREYS: I agree.

SENATOR RUSSO: The difficulty I have, Prosecutor, when you talk about the inhumanity - or whatever word would be appropriate to describe it - of the death penalty - at the risk of throwing out an emotional argument, because when it is thrown out against my position, I resent it - I keep thinking of something like the California case, recently, with all the children in the bus. If we were to have a situation like this in New Jersey where a plan to kidnap many, many children took place, involving ransome that wasn't paid, and then a murder followed, wouldn't you say that, under that type of a situation, the death penalty would be more than justified, morally and philosophically, or would your position still be that it would not be appropriate?

MR. HUMPHREYS: I would have difficulty in philosophically accepting the proposition that, aside from any effect on crime, it is a good idea for a government to intentionally, deliberately, ritualistically, extinguish a human life for any reason. But, I would accept it and I would vote for it, and I would support it if I felt that there would be some effect on crime today.

SENATOR RUSSO: Thank you very much, Prosecutor. You sort of sparked an interesting discussion on it. I think it really drew out what the problem is. I thank you for coming down here.

MR. HUMPHREYS: I appreciate your comments. They have been very well taken. Thank you.

SENATOR RUSSO: I understand, Mr. Joiner, that you have a problem with an illness. You are next on the list and want to be heard before the break. You are Mr. Joiner?

(affirmative answer)

Mr. Joiner, you are with the Commission for Racial Justice, United Church of Christ, is that right, sir?

(affirmative answer)

Where are you located? What City?

I R V I N G J O I N E R: It is headquartered in Newark.

SENATOR RUSSO: All right, Mr. Joiner, would you proceed, please?

MR. JOINER: I believe you have a copy of my prepared statement before you, as well as a publication that we have put out on capital punishment.

For the record, I would like to introduce myself. I am Irving Joiner and I

am Director of the Criminal Justice Program of the United Church of Christ. I am a resident of East Orange, New Jersey. As the Director of the United Church of Christ Criminal Justice Program, I have led the church's national effort in its fight against the death penalty. That campaign began in 1965 and has been an active one since that time.

First of all, let me take this opportunity to commend this committee for conducting these public hearings to sample citizens' opinions relative to pending capital punishment legislation. I regret that more members of the committee are not here, nor more legislators, to get the input that you are receiving and the kind of cross-fertilization of dialogue that you are having with so many of the witnesses here.

SENATOR RUSSO: Mr. Joiner, I should point out again that the transcript will be put in the hands of each member of the committee. That is the primary purpose of the hearing. They will all have it and I assume they will all read it and have the benefit of all that is discussed, including your testimony. So, they will all have it.

MR. JOINER: Right, but my point is--

SENATOR RUSSO: They should be here.

MR. JOINER: We will get to it later on in the testimony anyway.

The Commission for Racial Justice is an agency of the United Church of Christ which has a membership, nationally, of approximately 1.8 million members. So, in a sense, then, this church has repeatedly enacted resolutions in opposition to capital punishment. So, in that sense, our view is inconsistent with the reported views of many of your colleagues and of yourself.

The arguments for and against capital punishment are well known, so there is no point in us rehashing those arguments here. I think the Supreme Court has disposed of, to some degree, the constitutionality of capital punishment by ruling that it was not cruel and inhumane, as many of us have contended for some time. I would just like to say that I don't think that decision disposes of the issue, however, because it left more questions unanswered than it answered. Also, I think we ought to note the fact that this Supreme Court is one that was packed as a result of Richard Nixon, who has since been run out of office -- I guess he vacated himself from office. I think we will find that in the future another Supreme Court, with different plans, will probably reverse the mistake that this Supreme Court has made.

So, our concern today is not really the legality of the death penalty. We are not of the opinion that it is impossible to draft legislation to meet the guidelines, as articulated by the Supreme Court. There is some question in our minds as to the ability of a jury to apply the statute in a non-discriminatory manner. Our concern today is whether the drafting of such legislation is morally and ethically appropriate for this day and time.

I think there are no studies that prove - as you have just said - that capital punishment, or the death penalty, has a deterrent effect. Even in cases of terrorism there is no deterrent effect, since terrorism is basically a political act as we have come to know it in the modern day. The United States has proved that the greatest deterrent to terrorism is a simple little screening process that they make people go through before they board a plane. That has cut out highjacking in this country, rather than the imposition of the death penalty for that.

There is certainly no proof that the death penalty serves a rehabilitative role. The only thing that the death penalty does is kill. The state is given the right and the duty to kill people. This killing can be rationalized in many ways and by many people, but that will not alter the fact that the state will be killing people. Some people will argue that to kill is good for the protection of humanity. Two hundred

years ago this response may have been civilized, but that certainly ought not be the case in 1976. We think that humanity has surpassed that barbaric response. Canada's abolition of the death penalty is ample evidence that an enlightened nation can and has passed the "killing phase" of its existence.

Other people will undoubtedly argue that the death penalty is preferable to life incarceration at Trenton State Prison. There may be many inmates at Trenton State Prison who may agree with that also. This may be true, but no one will be able to swear to that. No one will be able to return from the electric chair with a comparative analysis. And, even if someone did, such an analysis would not be believed by anyone.

The enactment of death penalty legislation is not timely nor is it necessary. There are many studies that document the racist implementation of the death penalty. In too many cases, death has been meted out regardless of the guilt or the innocence of the executee. I just want to note also here that there is no way to guard against indiscriminate application of the death penalty. Statistics from other states support this contention and we do not view New Jersey as being vastly different from any other state.

We are particularly concerned about the racial factors where the death penalty is in effect. An examination of the death penalty and execution statistics for New Jersey reveals evidence of racism in the implementation of the death penalty in this State. The population of New Jersey is only eleven percent black, yet thirty percent of those persons executed in this State during the last seventy years were black. If we look only at the period from 1930 to 1967, we find that thirty-seven percent of the persons executed were black. The racial character of the death penalty in New Jersey become more pointed when we examine the statistics of persons on death row on December 31, 1967. Of twenty-three persons on death row, fifteen were black, or approximately sixty-five percent, which represents a complete reversal of the earlier figures. This suggests, at least to us, that as we grow older and the black population increases, the percentage of blacks on death row escalates at an alarming rate.

In other states, blacks are sentenced to be executed at a rate far exceeding their percentage in the population. New Jersey is but one example. Mississippi, with ninety-five percent blacks on death row, North Carolina with seventy percent blacks on death row, Louisiana with eighty-five percent blacks on death row, Florida with seventy percent blacks on death row represent the elite company with which New Jersey compares. This is enough in and of itself to warrant the defeat of capital punishment legislation in the State.

In addition to the cases of Rubin Carter and John Artis, as has been referred to by the office of the Public Advocate, let me draw your attention to the case of Freddie Pitts and Wilbur Lee. These are two black men who spent twelve years on death row in Florida for a crime that they did not commit. In fact, they lived on death row for four years after persons confessed to the murders for which they were convicted. Had it not been for the moratorium on executions, due to challenges before the Supreme Court, these men would probably be dead today.

In North Carolina, one hundred and twenty-one persons occupied death row prior to the recent Supreme Court decision that outlawed the death penalty in that State. During the last two years, fifteen persons in that State who were sentenced to death had their convictions overturned and were acquitted in subsequent proceedings. Only one person in North Carolina, who had their conviction reversed by the higher court, was subsequently convicted of the crime of murder. We have a list of those persons in the prepared statement that I have given to you.

There is no doubt in my mind - and I am sure in the minds of most people -

that the death penalty is cruel and unusual, inhumane and barbaric for persons sentenced to it for a crime that they did not commit. There is no doubt that the mere sentence to the death penalty was a cruel hoax played on these people who were sentenced to jail for life and then had their convictions subsequently reversed and who were acquitted, or for persons who were convicted for a crime that they did not commit. We could go on, for instance, in terms of New York, where we had a number of people who were convicted for first degree murder, received the death penalty, had their convictions reversed, and then their indictments were subsequently dismissed by other trial proceedings.

We had the case of John Valituti in Brooklyn, New York in 1947. We had the case of James Foster in Jefferson, Georgia in August 1956 who had his motion for a new trial denied, got out on a writ of habeas corpus, and then had a new trial and was acquitted of the crime that he was accused of.

Given the apparent determination of many people to reenact the death penalty in this State, we would join with the National Council on Crime and Delinquency and Mr. Humphrey in urging at least a two to three year moratorium on the consideration of death penalty legislation in this State. We would recommend that a citizen's commission, reflecting the racial, political, and geographic diversity of New Jersey be created to study the death penalty and to obtain the broadest possible input from New Jersey citizens on this matter.

We are aware that there have been many polls conducted around the country that would suggest that citizens are now in favor of the death penalty in this State and in other states. We feel that because of the finality of the death penalty, this legislative body owes it to themselves and to the citizens of New Jersey and to those persons who will ultimately be convicted of crimes that carry with them the death penalty, the opportunity for the fullest possible input by citizens on the local level. That could possibly be done by a convening of town meetings in the various cities, the various legislative districts, Assembly districts, or judicial districts, or whatever the case might be. We feel that there is no crisis at this moment in New Jersey. There is no loud outcry for people's heads in New Jersey at this particular point. Therefore, such a study can proceed unhurried and in an emotionally-free atmosphere conducive to sober thoughts and reflections.

We feel that before any consideration takes place on any further capital punishment legislation, this should be done. With that, I want to thank you for this opportunity to offer our point of view and I hope that our suggestions will be seriously studied, if not adopted.

SENATOR RUSSO: Thank you, Mr. Joiner. Certainly, with regard to your opposition to the death penalty, philosophically, there can be no argument. That, as we said before, depends upon one's point of view and one's own personal philosophical position.

As to the question of deterrence, you have heard here today that there is no answer to that either. Studies since time immemorial haven't resolved that.

But, I am concerned, as I have been with several previous speakers, about the argument concerning the racist effect of the death penalty. Is it your contention that the fact that, in 1972 - or 1971 - when the death penalty was abolished, the greater number of people awaiting execution were black -- is it your contention that the convictions of the death penalty are as a result of racial prejudice?

MR. JOINER: I contend that.

SENATOR RUSSO: You do?

MR. JOINER: I think that when we start talking about discretion in the deliberation of the jury, where the jury sits down and makes a determination of the mitigating and

aggravating circumstances, that racial factors do play a part in those determinations.

The Office of the Public Advocate referred to the case of Rubin Carter who was convicted in the middle of considerable racial tension in Paterson, New Jersey, only nine years later to have that conviction reversed and a new trial ordered in that case. Now, the prosecutor - from newspaper reports - is seriously torn with the idea that they cannot even get a conviction in that case.

We know of many other cases of blacks in North Carolina and Georgia and Mississippi who have been convicted during the height of racial tension and racial antagonism in the community, who later had their convictions reversed in subsequent trials acquitting them of the crime for which they were sentenced to the death penalty.

So, we certainly believe that given the racist nature of many people in this society, that race does carry a heavy weight when people make a determination of who will and who will not, ultimately, end up in death row.

SENATOR RUSSO: Some years ago - and, obviously, you are well informed on this subject and I am sure you are familiar with these facts and I think I am correct - in New Jersey, for example, the overwhelming number of people convicted of crime and given the death sentence were Italian. Is it your contention that that was because there was an ethnic prejudice against Italians at the time? Or, isn't it a fact that, whether environmentally or economically, or what have you, the Italians were in the position at that time of committing more crime, the same as the blacks are today, perhaps, with or without justification - I won't get into that. But, isn't that the simple fact, that your ghettos do breed crime and today your ghettos are predominantly black, where some decades ago they were Italian and so on?

MR. JOINER: Well, I think that to the extent that in the earlier days that you refer to, there was ethnic prejudice against the Italians, which still exists today, the Italians received the death penalty in a disproportionate amount to their presence in the population. So, I think that discrimination certainly was a factor there, just as the racial antagonism against black, Puerto Ricans, and Chicanos - and others - is a factor now.

SENATOR RUSSO: Yes, but you seem to, in my opinion - and you can correct me if I am wrong - avoid the fact, I think, that back in those days the simple fact was that Italians committed more murder at that time, whether it was because they were deprived or disadvantaged and so resorted to more robbery and murder - whatever the case may be - the fact is the larger number of these crimes were committed by people of that ethnic group at that time. And, perhaps today the larger number of these crimes are committed by blacks in disproportion to the population.

MR. JOINER: Well, Senator, I have seen no statistics that would suggest that Italians committed more crime - or murder - in the period that you refer to, than any other people in the population did. I have seen no statistics that suggest, even, that blacks commit more murder in this society, in this day and time, irregardless of the poverty situation or the ghetto living, than any other people in the society commit.

I have seen figures that would suggest that persons of means - white people and people of the majority - who are convicted of murder, or other kinds of capital crime, are able, because of their financial position and their status in life, to escape the death penalty, whereas the minority persons who are convicted - and I am not saying that minority persons are convicted because they didn't, in fact, do that crime or do that particular wrong - are invariably sentenced to death. We can take statistics from Florida, Alabama, Mississippi, Georgia, Texas, North Carolina, South Carolina, Virginia - you know, right across the board - that would support that

contention. I do not believe that the mere fact that a person is poor will mean that he is going to go out and commit murder against people. I am poor, I haven't killed anybody. And, I know a lot of -- you know, I can cite the case of a rich daughter of a furniture magent in Florida who was caught for the first degree murder of her boyfriend and got off very, very cheaply. You know, it goes right on down the line.

So, I think that racial factors, ethnic antagonisms, and ethnic discrimination do play a part, as you have suggested, relative to Italians and relative to blacks here in New Jersey.

SENATOR RUSSO: I don't mean to discount the possibility of its being present at all because, frankly, I can recall, Mr. Joiner, when I first became a prosecutor in my County - and it has a very low black population, low number of blacks in the population - the talk used to be that if a black man assaulted a white man, you could get a conviction, but if he assaulted another black man, the people wouldn't convict -- sort of, "Well, it is in the family, leave them alone." This is something that used to upset us very much. So, it has to be recognized as a factor.

But, the thing too that was of great concern to the black people in our area, and what they demanded, was punishment of those who committed crimes against them - other blacks who committed crimes against them as blacks. Do you follow me? It seems to me that most the people, I would think - and I am not sure - who were in death row and who were black - or many of them - were charged with and found guilty of murdering other blacks, do you see?

MR. JOINER: Well, you see, the problem with that is that there are many people on death row now - and people who were on death row before - who are not on death row for murdering someone. In North Carolina, for instance, out of 120 some odd people, there are over 90 people who are there for crimes of burglary, entering a home in the night with a pen knife in their pocket, or things of that nature. I do not believe that blacks kill blacks more so than anyone else.

SENATOR RUSSO: Let me say this and save you some time. I can't, and won't, make any attempt to defend the practices that have taken place in our Southern States over the years. Hopefully, that is changing, or has changed, as the case may be. I don't defend this at all. I am talking here about the penalty of death for first degree murder. I don't care whether the murderer is black or white and I don't care whether his victim is black or white, or, as you heard me say earlier, whether he is a policeman or a little girl. The jury should at least have available to them the penalty of death for first degree, willful, premeditated murder, committed by any man, in my judgment.

Your concern, as I see it, is, "Yes, that's fine but if the defendant is black, that jury may exercise its discretion in favor of the death penalty more so than if he is white." That seems to be--

MR. JOINER: Well, you know, it can operate another way too, Senator Russo, in terms of the determination of the degree of the homicide - whether it is first degree or second degree. If it is first degree, I would contend that blacks would be more prone to get convicted of first degree murder, while many of the whites who come before the jury will get second degree murder. Therefore, whether to have a capital sentence or not will not even enter into the deliberations at that particular point. I am saying that as long as that discretion is there on the part of the jury, as long as the jury -- And, another factor, also, is that in many places - New Jersey included - while it might not be official, unofficially, people who have scruples against capital punishment are invariably dismissed from jury duty. They are not sitting on the jury

to make a determination of whether the person does, in fact, get sentenced to the gas chamber or whether they are guilty of first degree murder or second degree murder. So, I think in that sense, there is a lot of unevenness and a kind of discrimination in the jury process.

SENATOR RUSSO: We may have solved that in this bill that I sponsored, in that you have two separate trials - two separate procedures. I would suspect that in view of that, the question of whether or not a person is morally opposed to capital punishment may not be a proper question in the first trial that would deal with guilt or innocence. It, of course, would in the second one, and should.

MR. JOINER: But why?

SENATOR RUSSO: Well, you can't have someone sitting on a jury who says, "Even though the law of this State says capital punishment is proper" - depending on the case - "I will not vote for it, no matter what the facts are." He has closed his mind, just as if someone got on a jury and said "Hey, I am prejudiced against black people, I am going to find him guilty, no matter what the evidence is." That would be wrong and unfair too. It works both ways.

MR. JOINER: To the extent that the jury's determination is supposed to - at least theoretically - reflect the enlightened view of the people within their community, to bar people who are opposed to capital punishment from the citizen process is certainly discrimination against them. I think that, again, will raise the whole procedure to constitutional challenge which I think the Supreme Court will sustain in that instance.

SENATOR RUSSO: I wouldn't agree with you on that point, Mr. Joiner. If this Legislature in its judgment - I don't know what they are going to do - decides to reinstate capital punishment and if the Governor signs it and if it is upheld in court and capital punishment is part of our law, all you need is one person, since a unanimous verdict is required, to sit on that jury and says, "I am opposed to capital punishment; no way will I vote for guilt", then why go on with the trial? It is all over. That person has, in effect, negated the law. It is just as wrong to have one with a closed mind against a defendant as it is to have one with a closed mind against the State.

MR. JOINER: Yes, but the purpose of a trial is not to determine if a person is to go to the gas chamber, or the electric chair, or not, but to determine if a person is, in fact, innocent or guilty of the crime he is charged with. To that extent, the person who is on the jury's view of whether capital punishment is morally correct or incorrect has no bearing on that determination. In terms of dealing with the citizen process, if that person represents a view of that community, then that view ought to be present in that sentencing process because we all know - or we have all heard - that the criminal justice system is supposed to be able to show compassion for those persons who come before the bar of justice.

SENATOR RUSSO: Well, suppose there was an element in the community - and there is, you and I both know it, certainly you do - that, as we have talked about, is prejudiced racially, should that view be reflected on the jury also if the defendant is a black man?

MR. JOINER: Well, that is one of the arguments; that view in too many cases has been present on the jury and those views should be eliminated. But, that is different than bias against a particular mode of sentencing, rather than a class or race of people. There is a big difference between the two and I am sure you recognize the difference between those two.

SENATOR RUSSO: I really have difficulty recognizing the difference. I don't

mean to suggest you are wrong and I am right. I don't know. It just seems to me that anybody who is prejudiced, whether it be towards a man's color, his ethnic origin, or an issue, philosophically, should not be on a jury. A jury ought to be 12 people with an open, fair mind, in light of the law as it exists. Whether they like the law or not shouldn't matter. That is the law, good or bad. And that is what a fair jury is all about in my judgment. But, I guess we could go on all day without resolving that.

MR. JOINER: I just want to close again with reiterating our point of view. I think before the Assembly and the Senate acts on legislation, which is presently before it, that they avail themselves of the opportunity to solicit more views from the average citizen by going into local communities - I mean taking an aggressive posture by going into the various communities and begin to sit down and talk with those people - and talk with the Italian community, talk with the black community, concerning their views on capital punishment and have an exchange of dialogue. All of the people who are representing us here and in the Assembly should do this so that when the vote is finally taken, it can be taken with the knowledge that all of the views within a given community have been tested and they have come up with a more informed vote when the time comes. I don't think we need to rush on this thing and I think that is what we are doing now. It looks like we are trying to rush Oklahoma to the seat of judgment and we lost that.

So, why don't we just wait? You know, we have time. You know, nobody is going to get killed tonight. You know, we still have a few minutes left so that we can sit down and talk with people - people in the bars, people on the street, people in the social clubs - about what their views are towards this matter.

SENATOR RUSSO: Well, I think what you say makes a lot of sense and we intend to do that but I don't want you or anyone to get the impression of any rush to judgment here.

This bill-- I should say, I have sponsored this concept since I have been here three years now, almost. So, it isn't something that came up last week. There are other bills that we are considering here and there are others in the Assembly that have been around as long. There may have been some in the preceeding Legislature as well. So, there is no rush here to do something this vitally important.

I can only tell you - speaking for myself - that I don't approach this as child's play. I have been involved with this sort of thing, professionally and otherwise. It is very, very serious. Its finality is momentous. I don't intend to rush into anything. I put no personal stake on this bill passing. If it is the judgment of my colleagues that it shouldn't, after I have made my pitch - fine. We are dealing with human lives and I don't think anybody is going to rush into this. You can be well assured of that.

MR. JOINER: Well, I hope so because I would despair at the thought that a Wilbur Lee or a Freddie Pitts, who are in Florida, might end up here in New Jersey in death row for a crime that they did not commit. I think that no matter where the error is made, whether on the part of the prosecutor, whether on the part of the jury, or whether on the part of the court, the error is fatal; it can mean your life or your death. It is not punishment, it is destruction. I think we owe it to those persons to have the fullest possible input on the part of citizens of this State, rather than just deliberation by members of this Body. We should have the opinion of the citizens who are out there, who elect people, and who can be approached and spoken to in a kind of sober reflection on the moral and ethical considerations of this bill, and other similar types of legislation.

SENATOR RUSSO: I think most of the Legislators involved share your concern and I am confident they are all going to follow that approach and then reach their

decision.

I thank you for coming and adding what you have to the problem that we do have facing us. Thank you, Mr. Joiner.

We will have a break now for lunch and we will resume at two o'clock and proceed with the witness list.

(LUNCH RECESS)

AFTERNOON SESSION

SENATOR RUSSO: We will resume the hearing. The first witness to be called will be the Reverend Paul Mayer, Professor of Theology, New York Theological Seminary. Reverend Mayer.

I would like to make a request. We have a large number of witnesses and if you could try to keep your testimony as brief as possible, consistent with what you have to say - perhaps if there are things that are repetitive of prior witnesses, you could point it out in summary - hopefully, we can accommodate everyone today. Otherwise we are going to have to come back another day. So, with that in mind, any help you can give us would be appreciated. We have a lot of witnesses yet to be called.

Proceed Reverend Mayer.

REVEREND PAUL MAYER: Thank you. It seems no small irony that on the very eve of July 4, 1976, the 200th birthday of our independence, the United States Supreme Court should have reinstated the death penalty. It was, at best, a dubious way of celebrating the ideals of life, along with liberty and the pursuit of happiness, which were exalted by the founding fathers.

This afternoon I would like to share with you, in a capsule form, some aspects of the Judeo-Christian tradition on the death penalty, this agonizing question which challenges our consciences.

In the Old Testament book of Deuteronomy, God speaks to the people as follows: He says, "Today I place before you death and life, blessing and curse, therefore choose life so that your children will live." I think that we can say that all of biblical morality can be captured in this one saying - "Therefore choose life" - and that the religious community at its best and most faithful must always be on the side of life and must defend everything that advances and protects life.

Now, why is this? In the very opening chapter of the Bible, in the Book of Genesis, we read that God said, "Let us make man in our own image and likeness." This simple saying has become the very cornerstone of the Judeo-Christian ethic. The claim that man and woman are made in God's own image, attributes a unique dignity to the human person. It maintains that among all the riches of a animal life, human beings, above all others, enjoy the intellectual and spiritual powers and, above all, the gift of freedom, which is to say the ability to shape ones own destiny.

And, in the next Chapter of Genesis we read here further that God fashioned man from the earth and breathed into his nostrils a breath of life and so he became a living being. We see here that for the ancients the fact of life was so awesome, so mysterious, and so fragile, that human life could only be described symbolically as the Divine Breath itself, as that which God alone could give.

In this life one can understand why a recent statement by a group of religious leaders from Rhode Island, which I will refer to again later on, commenting on this biblical text, could condemn the death penalty as "An affront to God, Himself."

In short, the central biblical teaching is reverence for life and on it all morality and the entire social order are based, and without it a people stand spiritually impoverished and endangered. So, we can say reverence for life is the very cornerstone of social life, as seen from the biblical point of view.

I think it is this fact that has led most of the major religious groups in this country to oppose capital punishment in their various statements. Among these there are the statements of the General Synod of the United Churches of Christ in 1973, the General Conference of the United Methodist Church in 1972, the statement of the National Council of Churches in 1968, and, most recently, in April of this year, the statement of the New Jersey Council of Churches, among many others.

On February 19th of this year, a group of Rhode Island religious leaders, representing most major denominations, and led by a Roman Catholic Bishop, issued a statement in which they attempted to deal with the age old tension - as they put it - between the sacredness of life and society's right to protect itself from the criminal. It said - and I quote - "The death penalty is no longer an adequate and justifiable way of dealing with the problem of serious crime in our midst. The belief that the person has an inalienable dignity demands our affirmation that the imposition of the death penalty is unwarranted within our present capabilities and in our present circumstances."

Earlier this year, the Catholic Bishop, Bernard Flannigan of Worcester, Massachusetts, addressed himself to a bill that was, at that time, before the Massachusetts Legislature on the question of a death penalty. He stated - and I quote - "The death penalty is a brutal form of punishment which would be counterproductive to the Church's crusade for the sanctity of life." These, and similar statements, express the moral consensus which has developed among the major portion of this country's religious leadership, which I believe has to be taken seriously in these considerations.

Even that school of moral theology which justifies capital punishment under certain circumstances lays down three stringent conditions: One, that the death penalty be administered by duly constituted authority; two, that a proportionate reason exists for the death penalty; and, three, that no other avenue is open to society whereby it can protect itself.

In commenting on these three requirements, I think I speak for a large body of Christian moral theologians when they raise these kinds of questions. Are there, in fact, no other ways for our society to protect itself against the destruction of human life than by destroying human life? Does capital punishment, in fact, serve as a deterrent? And does it promote a societal value of reverence for life? Finally, cannot a reform of our system of jurisprudence, the improvement of our correctional facilities - insofar as they are, indeed, improvable - and more intense rehabilitation efforts serve the same results?

To begin with, one cannot consider this painful question without taking into account the inequitable manner in which the death penalty has been applied. The poor, the uneducated, members of minority groups, and men have been the main recipients of this questionable form of justice.

The Warden of Oregon State Prison commented - quote - "Only the poor get executed, the wealthy never do."

A study on death sentences in New Jersey covering the years 1937 to 1961, by Professor Bedol was reported in the Rutgers Law review and concludes - quote - "While the probability that a white man convicted of capital murder will be sentenced to death is three out of ten, the probability of a negro man is almost five out of ten." And, Tom Wicker, in the New York Times of the 25th of this month, notes that - quote -

"On July 2nd, of the 610 persons on death row, 310 were black and 56.35% were non-white." Is this liberty and justice for all, or for some?

Nor is there meaningful evidence to show that murderers are deterred by the death penalty. The Uniform Crime Report issued annually by the United States Department of Justice shows that 5 of the 7 states with the lowest homicide rates do not have a death penalty and that 12 of the 13 highest do have a death penalty. This has generally been the conclusion of other nations which have abolished the death penalty and few criminologists maintain otherwise.

This leaves us with the question of retribution, or punishment. Both the Old and the New Testaments can command that "Vengeance is mine, says the Lord, I will repay." The Bible seems to have little confidence in the human ability to punish justly and dispassionately. But, it is, above all, in the Sermon on the Mount, in the Fifth Chapter of the Gospel according to Matthew, that we find the most enlightened and most sublime teaching of Jesus concerning human conduct. He said, "You have had it said, an eye for eye and tooth for tooth. But I say this to you, offer no resistance. If anyone strikes you on the right cheek, offer him the other as well. You have heard it said, you must love your neighbor and hate your enemy. But I say this to you, love your enemies and pray for those who persecute you. In this way you will be children of your Father in Heaven."

This view is not based on some kind of pious naivete, some kind of ignorance of human nature, or some kind of devout sentimentalism, none of which Jesus appeared to be subject to as a eminent realist. But, it is based, rather, on a profound faith in even the most corrupt and evil person's potential for repentance, for renewal, and for rehabilitation; a faith which, in fact, has created all that has been most lasting and most noteworthy in the history of western civilization and culture.

It is also important to note that Jesus Himself, along with people such as Socrates and along with the Legions throughout history, was an example of those who have been the innocent victims of a death penalty, legalized and protected by contemporary laws and governments.

Finally, I think that the most striking argument against the death penalty is the fact that in reality it may have the opposite effect, the less desirable effect, not the effect of increasing a reverence for life but, on the contrary, the effect of decreasing the reverence for life.

We are presently living in a society which, I think, can be characterized by this quality of a gradual, frightening erosion of this respect for life. We see these symptoms everywhere, whether it is the glorification of violence on television or in motion pictures, the increase of terrorism of all kinds, the growing dependence on military solutions for social problems as reflected in the highest military budget in this country's history, the way in which the Viet Nam war was virtually serialized on television so that each child could, after supper, watch Southeast Asian peasants being incinerated in their homes, and so on.

I can hardly think of any other factor which would so incline people, and young people in particular, to accept killing as a solution to human problems as to reinstitute the death penalty, as to tell our young people that the way in which we will solve the human problems that exist in our society is by suffocating, or by incinerating, or by shooting, or hanging people.

Bishop Flannigan, whom I quoted earlier, said that the death penalty is completely out of accord with modern development of the penal system, with its emphasis on the reform and rehabilitation of the criminal. The whole thrust of everything that has been hopeful in penology - and I dare say, there is not as much as one might look

for - has been in the direction of increasing the reverence for life, increasing the respect for the individual, and emphasizing his or her potential for growth, reform, renewal, and rehabilitation.

I suggest that if we return to barbarism, that most European countries and many other countries in Latin America and some other countries have now given up, it will only lead to the lessening of respect for our society in the international community and the lessening of respect for our people.

I think it is ironic that in a state with a high urban concentration, living in the hellhole of the ghettos of Newark and Camden, that we should, at this moment in our country's history and economy, at this moment when public services are eroding, at this moment when we are shutting down hospitals, libraries, drug addiction centers, schools, and you name it - almost every service that people can rely on - at this moment when mothers in Newark have to feed their children cat food or put them to bed hungry at night, that at this moment we should look toward one of the most unenlightened, one of the most barbaric, and one of the most uncivilized solutions for what we consider to be criminal behavior.

Finally, I would leave you with the comment of the great Russian novelist, a man of great spiritual quality, Dostoyevski. He once said that if you want to find out what a society is all about, go and look at its prisons. I would say, if you want to find out what a society is all about, look at the way in which it deals with those whom it considers criminals or deviants. If the only way that our imagination makes available to us is to kill them, then, indeed, we are at a sorry state in our nation's history in the year 1976. Thank you.

SENATOR RUSSO: Thank you, Reverend Mayer. I have just two questions. Basically you have offered an argument that the death penalty is contra-indicated by theology and by the scriptures. Would it not be true that there are many in your field, many leading theologians, based upon the same scriptures, who would disagree with you?

REVEREND MAYER: Well, to begin with, I would say that their numbers are few and getting fewer. I think that is a safe generalization. But, in any case, I think you know that while there is a validity to arguing with numbers, I don't think that is the ultimate argument. I think the ultimate argument is to consider the intrinsic merits. I think to capsulize, rather superficially, the arguments that those opposing my point of view would follow -- I think they would point to the fact that there are passages in the Old Testament which warranted the use of the death penalty under certain extreme circumstances.

But, I think enlightened theology recognizes the development, the evolution, and the growth of Christian morality and that whereas in certain Biblical passages slavery was also supported, I think there are very few people in this room that would presently support that kind of practice.

SENATOR RUSSO: I think, though, the bottom line of it is, for example, as I understand it - the official theological teaching of the Catholic Church, for example, is, it is not in opposition to the death penalty. You mentioned Bishop Flannigan and I know there are exceptions. But, basically, the Catholic Church teaching is not in opposition to the death penalty, isn't that correct?

REVEREND MAYER: No. There have been several statements of the Bishops in which they question the death penalty. But, I think - as you may recall in my statement - I gave the general, moral, theological principles which would be used by those who would consider the death penalty justifiable under certain circumstances. One of them

was, of course, whether it is a genuine deterrent. The other one was whether there are not other alternatives available. There has not been an official statement since the most recent decision of the Supreme Court. But, I would say that the majority of Catholic theologians, moral theologians, would, based on those principles, oppose the death penalty.

SENATOR RUSSO: All right. My other question is, if you would refer back to your statement to the passage that you quote, following an eye for an eye and a tooth for a tooth, could you read that brief statement just once more - the statement you refer to as an indication of the Biblical expression that you feel would oppose the death penalty?

REVEREND MAYER: Well, I took some excerpts from it - "You have heard it said an eye for an eye a tooth for a tooth. But I say to you offer no resistance. If anyone strike you on the right cheek, offer no resistance. If anyone strikes you on the right cheek, offer him the other as well. You have heard it said, you must love your neighbor and hate your enemy. But I say this to you, love your enemies and pray for those who persecute you. In this way you will be children of your Father in Heaven."

Now, may I just make one other comment, just to elaborate on that?

SENATOR RUSSO: What I wanted to ask you, before you do, and then certainly you may - but, before you go on, the logical extension of your interpretation of that argument would be that we should not only not have a death penalty but we shouldn't punish anyone for crimes at all. We should simply turn the other cheek, forgive them and go about our business. This would be the logical extension of your interpretation of that passage, would it not?

REVEREND MAYER: No. There are passages in the New Testament which make it very clear that under certain circumstances Jesus supported certain forms of punishment - the exclusion of people from the community, and so on.

But, this text, which is usually dismissed as being rather unrealistic and naive is generally interpreted in a very literal and simplistic way. I don't think Jesus was so concerned with turning the other cheek in some literal way - if a man take your cloak, give him your coat too; if he forces you to walk one mile, walk two - He wanted to create a certain point of view that opposed the mores of the dominant culture, which was a culture that had the death penalty and many other forms of cruelty, torture and violence. He was saying, in fact, that it was a basic affirmation in the reformability and the potential for rehabilitation of every human being. In other words, we should approach people on a different level than retaliating in kind. Rather than killing those who kill; hanging those who hang; beating those who beat; we should approach them in a way that I think can, indeed, be called a revolutionary point of view, we should approach them as human beings and speak to something that exists within each human being, no matter how evil, and that is the potential to change, the potential to respond, the potential to be renewed.

I think it was on this premise that Jesus, Himself, underwent the death penalty. Not that He could not have retaliated - when his associates offered to do so, you will recall He said, "He who lives by the sword will die by the sword." He had learned that basic lesson of history, that individuals or societies that depend upon violence as a means of solution - as basic solutions - to social problems, will themselves ultimately be the victims of violence and destruction.

So, I think He introduced a new point of view into human history and into morality. I think history has proven since that time that this is eminently more realistic and eminently more practical than all of the armies and the death chambers

that have been erected by various governments since then.

SENATOR RUSSO: Thank you very much, Reverend Mayer. We appreciate your coming here.

We have a less than five minute witness, the Prosecutor of Middlesex County, C. Judson Hamlin.

C. J U D S O N H A M L I N: Thank you, Senator. I think, in talking about cruel and inhuman punishment, I suspect committee hearings may well qualify in that category on occasion.

SENATOR RUSSO: Thank you.

MR. HAMLIN: I don't intend to review world history, philosophy, etc. I intend to speak about pragmatics and about crime here and now, in my experience.

I might say, by way of introduction, I was the Chief Public Defender of Middlesex County for four years, prior to becoming the First Assistant Prosecutor. I was a First Assistant Prosecutor for four years, during which I actively tried, investigated, and handled cases. And I am now the County Prosecutor. I don't come, I think, with a particular venom, as a radical right wing rabble rouser, but rather with experience - long experience - of representing defendants, talking to them, living with them, trying murder cases, both as a defense counsel and as a prosecutor. I know what it feels like because I practiced defense law before the capital punishment law was held unconstitutional, as applied.

I know how defendants feel. I have spoken with them. I have lived with them. I have prosecuted, as a prosecutor, contract killers for the mob, as well as revolutionaries who believe it is a perfectly moral, right tool to kill public figures and policemen as a legitimate political tool. I have seen the lack of remorse they have and the lack of any real ability to reform.

I am prosecuting, today, people I defended ten years ago. I do not share the good Reverend's feeling about the reformability of man. I have seen too many whom it has not happened to.

I suggest that the death penalty consideration comes, really, on two levels. We tend to go off on all the basic considerations of inequity. Really, there are two stages of questions. One, is the death penalty a legitimate functioning tool of a civilized, organized society? And, if so, how should it be applied?

As to the first question, I think there is absolutely little disagreement amongst the people of this State, indeed of the world, that some form of death penalty by an organized society is not only right and proper, but is necessary. I doubt that there are very few people on the face of the earth who would have believed there would have been any proper penalty for Adolph Hitler, had he been apprehended at the end of World War II, but a death penalty. How do you deal with an inhuman, monstrous machine that kills without remorse and without reform?

Indeed, I would indicate that most have applauded, for instance, the Israeli action of a couple of weeks ago, and that in essence, if you will, was the acceptance of the right of an organized society to inflict, under certain limited circumstances, the death penalty. Because, indeed, that is what they did in order to save the lives of those people on that plane. That society agreed, and was willing to accept the infliction of death upon others as a way of producing the saving of lives.

So, I think, stated in the generic sense, a society, whether it be through military or legal action, not only has the right but has the duty to its citizens to be ready to inflict death on others if, in fact, they present so monstrous a danger or a threat to that organized society as to be dangerous. Every society throughout history has always exacted the death penalty as a method of expressing their most

extreme displeasure at the dangerous act - that they think was most dangerous at the time.

I cannot help but think, when I listen to theologians talk about the barbarity of the death penalty, that, in fact, any student of history will tell you that the greatest acts of genocide - hanging, burning and torture - have been done in the name of God.

In regard to the death penalty in New Jersey, I can say this, sir: I have watched the enforcement of the criminal laws of the State of New Jersey become less and less effective over the years, from both sides of the fence. The criminal justice establishment in this State has become an impotent and fat giant. We can do nothing in reality to fight the growing crime problem. We have tried increased leniency for the last 20 years; we have tried increased understanding and rehabilitation; and the truth of the matter is, we are drowning in crime.

What do you do, as I have had recently, with a criminal who commits an armed robbery and cuts the person's eye out and says, "If you identify me, I will cut the other eye out"? And, do you know the criminal justice establishment really can't do anything to protect that other man and that other eye? People have stopped coming forward because they don't believe the establishment can, or will, protect them. The criminal element, who I can still talk to and understand and live with, don't have the fine hopes and the willingness to do what is right. They are not going to do it. They laugh at you.

If a defendant is charged with a serious crime today and doesn't wish to go to trial, it is going to be at least a year before the system can finally force him to trial. And, if a year later the witness is still around and not afraid of, and willing to testify against the defendant, we may get to a jury trial, which may get us to sentencing, which may permit us to do something - and Lord only knows what at this stage of the game.

I suggest to you that without at least the possibility of the imposition of the death penalty in the State of New Jersey, all we will continue to do is to evidence, very clearly, to the criminal element that we are an impotent giant, of which not to be fearful and not to be respectful. Certainly, there is no reason for them to follow our laws. Why? What are we doing? Between ROR, PTI, and any number of alphabetical programs which essentially provide nice "outs", and don't reduce the crime rate because "we will put numbers in another category for a while", we have effectively demonstrated that we cannot combat the criminal element in this State.

And, it is no longer a matter of choice. Either we are going to do it or we are going to have people resort to direct action, which is happening already. Vigilantism has always been the response of people to a society that has been incompetent and unable to protect itself. What I suggest is, unless we, as an organized society and as a Legislative Body, take steps to restore the clarity and vigorousness of action, we are going to be faced with precisely that problem.

Obviously, by reason of what I have just said, I endorse the bill and I would hope that, perhaps -- I don't have the great learning and theological and philosophical background of others who have spoken to you but I know one thing, we need this.

SENATOR RUSSO: Thank you, Prosecutor. May I ask you, in your judgment, is the death penalty a deterrent to murder?

MR. HAMLIN: I must tell you, very frankly, I don't think, on an individual basis, you can demonstrate this. I don't think it is a demonstrable factor one way or the other. You can pull statistics from anywhere and do it and make an argument for

whatever position you want. I think, given an individual case, you can analyze it and say, "Well, no, obviously, when that angry husband or wife got drunk and mad and killed her husband or his wife, it was not a deterrent." And, obviously, the mob guy who kills by contract always thinks he is going to get away with it. So, to that extent it is not a deterrence. In that way, it would appear not to be. But, you don't know the numbers of people on the street who have refrained only for that reason.

I can tell you. I have dealt with defendants and talked to them. They are afraid of the death penalty. The chair scares them. How many refrain? I don't know. In a society where there is virtually little or no respect for the law, at this stage of the game, I must say, in all honesty, that unless we do something to speak vigorously, loudly-- And, concededly, I must say I don't think that everyone who gets convicted of murder deserves the death penalty. I think that jury consideration by 12 laymen is going to sift out the real hard cases. Frankly, I anticipate very few people actually being put to death under this bill, should it be adopted. The child killer? Yes. The mass murderer? The mob guy who does it by contract and has killed 10 people before? Yes. What right does he have to live, having done what he has done?

But, it will deter at least, I believe, the method and way criminals act. It won't be demonstrable in six months or a year, but I think in the long run it will be.

SENATOR RUSSO: Thank you very much, Prosecutor Hamlin for coming down.

Philip John. Mr. John is with the Association of Black Law Students and the Association of Latin-American Law Students.

PHILIP JOHN: First of all, let me thank you, Mr. Chairman, for honoring my request to appear earlier than scheduled.

As far as I am concerned, we are here today on a very sombrous occasion. The grave historical anomaly is that were we meeting on this date, at this very hour, 200 years ago, chances are we would have been speaking of the pursuit of happiness, liberty, and life. But American history has taken unpredictable and erratic courses during my lifetime. In its frenzy, it has left a path strewn with demolished hopes, charred dreams, and broken promises.

The legend in the black, spanish-speaking, and poor communities - in America's ghettos - is wrought with wrongful arrests, police brutality, stomachs mercilessly cut open by automatic weapons, children cheated of their lives as they lay on the blood-soaked earth, their innocent bodies mangled by racist shells, and their survivors filled with justifiable hatred and dread. America has never punished those who have been guilty of this orgy of contempt. In the contrary, through perfidious political and judicial orchestrations, those truly guilty have unanimously gone free and unblemished.

Mr. Chairman, it is the sad truth borne out by bitter reality, that to us death has been the most consequential aspect of the legal system in America. If we are not killed on the streets of our community, we are mistreated until dead, or actually murdered, as we decayed in dehumanizing prisons, or, were executed pursuant to capital punishment laws.

The issue of capital punishment - to be or not to be - is a question which penetrates to the very core of American society. To believe that the question will be settled once we have resolved the narrowly defined abolitionist and retentionist positions is entirely erroneous. This belief is founded upon an utterly false premise, and, at best, can only yield an equally false conclusion. It is my contention that the only appropriate starting point is the realization, first, that we have adequately examined the merits and flaws of both positions, and, second, that this has not led to a just determination of the controversy. In reality, the debate has intensified

with each faction questioning each other's variables and research methodology. To put it more concisely, we have been blinded by our preoccupation with fallacious assumptions, treating these as if they constituted a pernicious cause and effect or a vicious cyclical syndrome. In the process, we have confined ourselves to a narrow conceptual prison.

To illustrate my contention, let us briefly reexamine some of the major arguments on both sides of the issue.

The abolitionist position is essentially that there is no conclusive evidence to support the deterrence argument, while there is a plethora of available data to support the existence of arbitrariness and discrimination in the application of the death penalty. One of the most ardent spokesmen for the abolitionist cause, Professor Sellin, puts the position as follows: "The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crime." Professor Sellin is supported by the report of the Washington Research Project, which states further: "(That) the administration of the death penalty is characterized by arbitrariness, sporadic application, socio-economic and racial discrimination... The few who die are selected not by rational standards or legal principles, but by the unguided discretion of prosecutors, juries, judges and governors."

The other major contention of abolitionists is that capital punishment is indefensible on the grounds of retribution or vengeance, since the desire for vengeance is akin to a psychological prehistoric relic worthy only of society's unreserved moral condemnation. As Koestler states it: "...the desire for vengeance has deep unconscious roots and is roused when we feel strong indignation or revulsion... Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But, we would rather not have that little fur-clad figure dictate the law of the land."

On the other hand, the retentionists have maintained that there is a definite deterrence value attached to capital punishment or the threat of such punishment. They advocate the reasonableness of the proposition that humans are essentially rational and will avoid the commission of certain wrongful acts if committing such acts will cost them their lives. They do not contend the evidence to be overwhelming, but are satisfied beyond reasonable doubt that this position is legitimate.

Retentionists also categorically reject the proposition that capital punishment is a violation of the sanctity of human life, maintaining, rather, that this form of punishment reinforces this belief in life's sanctity, since the State, through this penalty, is demonstrating a willingness to impose the ultimate sanction at its disposal to guarantee this sanctity.

In sum, both camps have adequately put forth their convictions, but at no time have they come to grips with the underlying and only issue, namely, the reasons for crime and how do we eradicate the causes of so-called criminal behavior. To understand this, we must take an inferential leap and begin to give serious consideration to the nature of American society.

Professor Richard Quinney of the City University of New York, contends that the social reality of crime is clearly illustrative of the fact that behaviors are neither criminal nor non-criminal, since all behaviors are social and only become criminal when officially defined as such by authorized agents of the state.

Because American society is class-divided, and because criminal laws represent the values of the dominant class, the people in the lower strata are naturally subject to a higher probability of being defined as criminal. The class not represented in the

formulating and applying of criminal laws, is therefore more likely to act in ways which will be defined as criminal by the class which formulates and applies criminal definitions. Information gathered so far substantiates the fact of disproportionate numbers of lower-class people in United States penal institutions.

In a survey conducted by the National Crime Panel in mid-1972 and 1973, it was revealed that the demographic characteristics of the inmate population for the United States were practically uniform. Young, unmarried, of limited education, and a tendency to be low wage earners or unemployed prior to the criminal episode, were recurrent factors.

Further investigation of employment and earnings histories of inmates confirms the observation. A 1972 LEAA study shows that of 141,600 inmates in custodial institutions, the pretrial status of 40% was unemployed, with 30% of this group being outside of the labor force for more than one year. Of those employed prior to trial, 44% had annual incomes of less than \$2,000, 55% less than \$3,000, and only 10% had incomes in excess of \$9,255, the 1972 median income for the United States.

A study on North Carolina conducted by Bowers, illustrates that from 1940 to 1954, while 20% of the gainfully employed were occupied as farm laborers, foremen, and other laborers, 50% of those on that state's death row were in this category. At the opposite pole, professional, technical, and kindred workers, who comprised 3.6% of the United States population were not represented on condemned row.

In what is perhaps the most thorough contemporary study, Professor Reidel found the United States death row in 1976, to consist of: Unskilled, service, and domestic workers - 62%; craftsmen, foremen, and kindred workers - 19%; while professional, technical, and kindred workers comprised only 3%. Of this entire population, 60% were unemployed at the time of the offense.

It will appear, therefore, that overwhelmingly the evidence supports the theory that class location and unemployment are highly correlated to so-called criminal behavior. Of course, we recognize that color of skin or race and ethnic origin are also highly related to class location in American society.

My firm belief is that it is time to be realistic and truly seek solutions to eradicate the causes of crimes of violence, thereby making the issue of the efficacy or lack of efficacy of the death penalty moot. Perhaps the greatest deterrent to so-called capital crimes is to be found when conditions are created to permit equal opportunity structures. We must formulate such programs recognizing that crime is symptomatic of the ills of society. In each crime of violence we are, whether we acknowledge it or not, indicted along with the perpetrator, and stand doubly culpable for the death of the victim. We should no longer persist in efforts to treat a festering social wound with the barbaric and expensive cosmetic gloss, which is capital punishment.

All pieces of empirical and theoretical information which are responsible for suggesting ways to make capital punishment "comport with human dignity" should be discarded in favor of those which search for means whereby the productive apparatus of the state can be made responsive to the social condition. It is only through demonstrating that the social, political and economic machinery are responsive to human needs can the belief in sanctity of human life and the dignity of the individual take on true meaning.

Reform and repression should not be permitted to complement each other. When reform measures are found to be incapable of solving social problems, the answer is not to be found by shifting to repression, coercion, police power or law and order.

Repression, cautions Professor Miliband, "is cumulative." Further repression can only arouse protest, and further protest necessitates greater repressive measures by the state. Today, these are manifested by a willingness to execute our poor, unemployed, and minorities, in the name of the state. Tomorrow, it may be manifested by the total dismantling of all democratic institutions, the total subversion of all or most liberties, and a new type of control which ultimately transforms crime control into a larger system of state authoritarianism.

For all of the foregoing reasons, I am hoping that the state of New Jersey will rise to the level of its noblest traditions and assist us in amputating this cancer from our midst. Let us become the beacon of hope for the cause of the dignity of the individual, and acknowledge the historical axiom that the right to life is the firm pillar of all civilized societies. Thank you.

SENATOR RUSSO: Thank you, Mr. John. I would only raise one question. It seems as though the thrust of your argument, and the part that I completely agree with, is that crime is basically an ill of our society and perhaps we are all to be blamed for that ill that allows an environment that breeds crime. But, in making your argument against the death penalty, it would seem as though you might be suggesting that because we, as a society, ought to be blamed for the conditions that promote crime, that perhaps it would be equally improper to punish anyone for any crime that comes from that type of environment.

MR. JOHN: I am not saying this. I am saying that we must address those conditions that more or less support a willingness to commit crime.

SENATOR RUSSO: With which I agree with you. We certainly have to attack that problem and we have failed in that, thus far, as a nation. But, nevertheless, shall we in any way ignore or diminish our prosecution and punishment of crime because we have not done enough to eliminate it? Do you follow me?

MR. JOHN: I am not sure I do.

SENATOR RUSSO: If, in fact, it is an argument against the death penalty that it is imposed primarily upon those who come from the environmental conditions - and I think that is probably the best classification - that breed crime, why should we punish the burglar who comes from those conditions? He is unemployed. He needs money. He commits a burglary, or a robbery to get money because we have put him in a ghetto. We haven't properly educated him or taken care of him or employed him. Why should he be punished for that robbery or burglary any more than the murderer should be executed?

MR. JOHN: You see, we differ on this point because I would address the question of why would someone steal. Why would there be a need to steal? This would tell me that there are certain economic and social differentials regarding access to the goods or maybe the services, the wealth and the power of the society. This is the point from which I would address it. I wouldn't address it from the point of view of what should we do with the burglar? I am saying you eradicate those conditions which would allow, or permit, or incite someone to steal.

SENATOR RUSSO: And, yet, there are many in the same condition as the perpetrator of the crime - the hypothetical crime we are talking about. There are many in the ghetto areas who don't commit robberies, burglaries, or murders and, yet, who are in the same circumstances and conditions as he who does. The overwhelming number, I might add, do not commit crime. There is still a very, very small percentage of them. Although State prisons, for example, might be populated predominantly by blacks, by way of illustration, nevertheless, most black people don't commit crimes, correct?

MR. JOHN: I would agree.

SENATOR RUSSO: Therefore, why shouldn't we punish those who do, even though perhaps some of what they have done has been contributed to by the society that we live in and the environmental conditions that we have caused them to live in?

MR. JOHN: You see, I believe that we have a tendency to generalize and particularize whenever it serves our own interest, or our own arguments.

Now, individuals will differ. We know this. We must understand that there are certain differentials even involved in the racial absorption in the socialization process, depending upon where you stand in the culture, depending upon your exposure to various things, and depending upon many factors. So, I am saying that it doesn't follow that because you live in a ghetto, you would steal. I think that is an unnecessary stereotype. I am saying that understanding individual differences, understanding - as I said - the different rates of absorption in the socialization process, we are still not dealing with the true causes of crime. I think that is just a very circular argument.

SENATOR RUSSO: Okay. Thank you very much, Mr. John. We appreciate your coming.

Professor Hugo Bedau, Professor of Philosophy, Tufts University. I assume Professor Bedau is speaking on behalf of the American Civil Liberties Union of New Jersey.

PROFESSOR HUGO BEDAU: The fundamental issue posed by these bills that would restore the death penalty in New Jersey law is whether it is sensible social policy to enact any of them and thus bring back the death penalty. On a matter as serious as this, we should leave aside any consideration of whether it is politically expedient to "go along" with such legislation.

In any case, the political expediency or in expediency of this legislation is not my concern today. It is also not my concern whether any or all of the bills before the committee are constitutional under the recent rulings of the United States Supreme Court earlier this month. My sole concern is whether it is good, wise, effective social policy to bring back the executioner in the Garden State.

I respectfully submit that it is not, and that no legitimate purpose of government in New Jersey, or elsewhere in this nation, can be secured by reinstating the death penalty at this time in any fashion.

I would like to deviate from my prepared remarks for just one moment to make a further comment. In a very important sense, it seems to me this entire hearing is - as we used to say when I was in school - "bassackwards". The issue before us now is one of "the burden of proof being on those who want capital punishment, not on those, like myself, who are opposed to it." I haven't heard all the testimony at this hearing today but what I have heard certainly doesn't convince me that a substantial effort has been made by those who favor this legislation to present compelling evidence to show that it is wise legislative policy to reintroduce this legislation.

Twenty years ago, when I first sat at this desk in this Chamber on this issue, I was told by one of your distinguished predecessors that the burden was on those like me and others, to bring forward evidence to repeal the death penalty. In that interval, I, and others, have produced a volume of literature concerning New Jersey and elsewhere in the country to try to discharge that legislative burden of proof. But, I don't find anything that has happened in the last 2 years, or in the last week in New Jersey, to suggest that those who favor this legislation have taken as seriously that admonition they once gave to me, and others, for themselves. So, I find what I hear today and what I expect to read in the transcript, if it is like what I have heard, quite disappointing.

I think that attention ought to be paid to the heavy responsibility of those, like yourself sir, who sponsored one of the bills that is up for hearing today. A heavy responsibility falls on your shoulders, not just to reintroduce legislation, essentially like what this State has had for a long, long time, but to develop an argument, based upon the best possible evidence at your disposal, to show that wise policy dictates what you favor. I haven't seen the evidence that shows that it does.

In the time at my disposal here, there is opportunity only to develop two major points. First, the death penalty is not an effective deterrent to crime, and, second, the administration of the death penalty has been and will continue to be demonstrably unfair.

Let me speak, first, to the deterrence issue. Until quite recently, it was the prevailing opinion of sociologists and criminologists that there was no evidence that the death penalty was a specially effective deterrent for any category of crime - not for murder, not for rape, not for armed robbery, not for treason. All the available evidence pointed to the conclusion that long-term imprisonment and execution were about equally effective as deterrents to serious crimes of violence.

Again, if I may supplement what I have put in my prepared remarks, the issue before the House is not whether or not murder and other crimes of violence should be punished, it is whether they should be punished by death. There may be some who have spoken against these bills, though I am not among them, who are not in favor of a system of punishment, or who are in favor of a system of punishment that plays no retributive role. I don't speak to those issues because I am prepared to agree with you and others who favor this legislation that there is a role for punishment in our society, under law, and that one of the proper functions of punishment is retributive. But, I refuse to draw the conclusion that it follows from that that the death penalty for any of these crimes is appropriate or necessary or desirable.

Within the past three years, new research has caused some observers to doubt the general conclusion of no deterrence to the death penalty. One investigator, an economist at the University of Chicago, Professor Isaac Ehrlich, has received much publicity for his research that purports to reach a different conclusion. Technical and abstract though his work is, it is necessary to review it very briefly in order to give it a fair criticism. Fortunately, an excellent critique was provided by Justice Thurgood Marshall of the United States Supreme Court, in his dissent in the recent case of Gregg v. Georgia, and it will suffice for our purposes here to quote his remarks: "The Ehrlich study focused on the relationship in the Nation as a whole between the homicide rate and 'execution risk' - the fraction of persons convicted of murder who were actually executed.

"Comparing the differences in homicide rate and execution risk for the years 1933 to 1969, Ehrlich found that increases in execution risk were associated with increases in the homicide rate. But when he employed the statistical technique of multiple regression analysis to control for the influence of other variables posited to have an impact on the homicide rate, Ehrlich found a negative correlation between changes in the homicide rate and changes in execution risk."

Of course, by negative correlation he means research shows that as the risk of execution increases, the rate of homicide decreases.

"His tentative conclusion was that for the period from 1933 to 1967, each additional execution in the United States might have saved eight lives.

"The methods and conclusions of the Ehrlich study have been severely criticized on a number of grounds." And I invite your attention to the footnote in which the

criticisms - published criticisms - are cited. "It has been suggested, for example, that the study is defective because it compares execution and homicide rates on a nationwide, rather than a State-by-State, basis. The aggregation of data from all states - including those that have abolished the death penalty - obscures the relationship between murder and execution rates. Under Ehrlich's methodology, a decrease in the execution risk in one state combined with an increase in the murder rate in another state would, all other things being equal, suggest a deterrent effect that quite obviously would not exist. Indeed, a deterrent effect would be suggested if, once again all other things being equal, one state abolished the death penalty and experienced no change in the murder rate, while another state experienced an increase in the murder rate.

"The most compelling criticism of the Ehrlich study is that its conclusions are extremely sensitive to the choice of the time period included in the regression analysis.

"Analysis of Ehrlich's data reveals that all empirical support for the deterrent effect of capital punishment disappears when the five most recent years", - that is to say, 1964 through 1969 - "are removed from his time series - that is to say, whether a decrease in the execution risk corresponds to an increase or a decrease in the murder rate depends on the ending point of the sample period. This finding has cast severe doubts on the reliability of Ehrlich's tentative conclusions. Indeed, a recent regression study, based on Ehrlich's theoretical model but using cross-section state data for the years 1950 and 1960, found no support for the conclusion that executions act as a deterrent."

While it is true that the Ehrlich research has brought new perspectives to bear on the whole study of punitive deterrence, there is no reason to believe at this time that the evidence from his research shows any reliable deterrent effect, or any superior deterrence, in the death penalty. If, therefore, you wish to support capital punishment, and believe that it is an effective deterrent, you must rely on something other than the technical reasoning of Professor Ehrlich.

It should also be noted in relation to the proposed legislation in New Jersey to reinstitute the death penalty, that these bills - any of them - if enacted, offer no serious prospect of improved deterrence. As the very purpose of these bills is to limit the number of cases where the death penalty can be meted out, they necessarily reduce the deterrent efficacy of the threat of execution. Only mandatory death penalty laws, rigorously and promptly enforced, can hope to maximize the deterrent effect, if any, of executions. But mandatory death penalties have been declared unconstitutional by the Supreme Court only this month, in the case of *Woodson v. North Carolina*.

Thus, if the New Jersey Legislature enacts any of these bills, it will find itself in the absurd predicament of touting the death penalty as a more effective deterrent than imprisonment, but by means of legislation that is constitutional only thanks to the fact that it has weakened the possible deterrent effect to the very minimum. Is it not far more sensible to do away entirely with the illusion of special deterrence in an occasional execution and, instead, accept the more effective methods of prompt trial, conviction where appropriate, and imprisonment?

Second, I would like to speak to the issue of arbitrariness. Four years ago, the Supreme Court in its important death penalty decision - *Furman v. Georgia*, declared the death penalty, as then administered, was unconstitutional. The chief reason for the Court's conclusion that the death penalty was "cruel and unusual" was the "freakish" rarity, or else the predictable discrimination against minorities, with which it was applied.

How does the proposed legislation in New Jersey meet these objections? Essentially by introducing a two-stage trial, the second phase of which would require the jury, after conviction of a capital crime, to weigh the sentence to be imposed in an evidentiary hearing and by using criteria provided by statute of several "aggravating" and "mitigating" circumstances. The idea seems to be that in this fashion, the trial jury can mete out individualized justice to each person convicted, and that the jury will sentence to death all and only those guilty of the most heinous, least excusable murders.

Close students of the criminal justice system however, are skeptical that any such results will be forthcoming. I draw to your attention, two considerations in this regard.

First, there is no evidence that, in the states which have so far adopted the bifurcated trial and statutory guidelines for jury discretion - like those proposed here - the results are fair and not biased. Not even in the decisions of the Supreme Court earlier this month in favor of the constitutionality of such capital statutes is there any such evidence. You will read the pages of *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida* to your unavailing aid, looking for evidence from that source to show that the results of not unconstitutional statutes in fact are not arbitrary and not discriminatory. The court had no such evidence put before it by any of the attorneys and the judges themselves record none, based upon their own homework. It would be interesting to know whether anybody testifying at this hearing has offered evidence to the contrary to show that what I have just asserted is in error. It is only a pious hope that such statutes will be an improvement on the older death penalty statutes, with their unguided jury discretion on sentencing.

Second, the late Justice John Harlan, in one of his final opinions for the Supreme Court before his death, addressed himself to this task and declared it impossible. He wrote in part: "...the history of capital punishment for homicides... reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.... Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history.... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." Those very words were quoted by Mr. Justice White in one of the opinions that he wrote in the recent death penalty cases, even though he favors the constitutionality of guided discretion statutes, of the sort that we have before us here, and that I oppose.

It is clear that the proposed New Jersey statutes suffer from precisely these defects. Their language, like the language of similar statutes enacted or proposed in other jurisdictions, is so vague, so porous, that a sentencing jury can work its will, whatever it is, without being seriously hampered.

I want to deviate now and point to passages in one of the bills which illustrates the point I am making. I refer, with no personal animus, Mr. Chairman, to the bill that is sponsored by you, with regard to two features of it that I think deserve some note. A comment in general is that I am struck by the way in which the language was used to formulate the aggravating and mitigating standards. It goes back to what the American Law Institute produced about a decade ago. It is found in all the proposed legislation, not exactly evidence, it seems to me, of careful legislative drafting and reflection

in the State of New Jersey as to the possible improvements that might be brought to bear on that rather familiar and hackneyed language. I draw your attention to page 5 of your statute, line 83, section 3: "The murder was committed in an especially heinous, cruel or depraved manner." That is traditional language being used in statutes of this sort and I simply suggest to you that any jury in the State of New Jersey could drive a truck, carrying whatever murderers they please to the death chamber, thanks to that language. "Especially heinous, cruel or depraved manner", have you ever heard of a murder that wasn't heinous, cruel or depraved? I should think there are very few and they are very rare.

The second thing I would point out is that although in line 103, section g, you stipulate automatic review by the Supreme Court in such cases, which is a practice of New Jersey law for many, many years now, there is no suggestion that one of the things the Supreme Court of New Jersey is to review is the factfinding in special verdicts in the second stage of the trial. Without that review, what does this automatic review come to?

I shall not continue to do the devil's work for him by helping him draft better legislation on this matter, but I do think that just this one illustration, not drawn wholly at random, points up the vagueness, the porosity, of this task that you have set yourself. The result has only the appearance of justice, not the reality of justice. The inevitable selectivity of capital punishment, falling as it always has on those who anger the jury or whom the jury regards as social outcasts, has nothing to do with a system of fair and equal justice.

In conclusion, therefore, what is to be said on behalf of the death penalty today in New Jersey? That it is a more effective deterrent than imprisonment? There is simply no evidence to support that proposition. That the new statutes will guarantee that all and only the worst criminals will go to their deaths? That is an illusion of those who draft legislation and have no serious experience with the actual workings of the criminal justice system here and elsewhere. Retribution? Where is the retribution in punishing hundreds or thousands of homicides with a handful of executions? Punishment as such is retributive. We do not need to lean on the outmoded cruelties of an occasional execution in order to secure retribution, because the condemnation of criminal guilt and imprisonment already accomplish all the legitimate retribution society needs.

If the ends of justice and effective social policy are to be served, none of these bills to restore the death penalty in New Jersey should be enacted, now or later. Thank you.

SENATOR RUSSO: Thank you, Professor. I have to say, I took quite a good going over from you during that presentation and there are a few things that I wouldn't quite feel at ease about unless I responded to them, so I will try to.

Initially, it is unfortunate that you have chosen to criticize the drafting of this bill but, at the same time, say you won't in any way help us to make it better. That sort of tells me you don't want the death penalty, no matter what, and if we are going to pass it, you would rather have us pass a bad bill than a good one, if there is such a thing.

I can only tell you that if this bill is going to be considered by the Legislature, I for one, speaking only for myself as the sponsor of 639, would be open-minded and acceptable to the suggestions and help from anyone - those in favor or against. Even though you might not be in favor of the death penalty, you nevertheless, might have some good thoughts as to how a strong bill can be drafted, if this one isn't, that might at least make it more acceptable than otherwise. But I

leave that to you.

It seems to me as though you began by a strong condemnation of my predecessors. - I hope you didn't mean Senator Woodcock, who was in the Senate before me and who is here now and, I think, agrees with you in general - because they put the burden of proof on you and on those who oppose capital punishment. I agree with you, if that is what happened 20 years ago, I just have no sympathy with that opinion or position which they took. I don't think they should have put the burden on those opposed to capital punishment.

Then, it seems you turned around the very next moment and fell into the same mistake they did - you suggested the burden should be on us who favor the reinstatement of capital punishment. I don't agree with you or them because I don't think, Professor, that anybody can demonstrate a compelling need for capital punishment or a compelling need against it. I don't think it is possible. It is no more possible than you and Professor Ehrlich - is it? Is he a Professor?

PROFESSOR BEDAU: Yes, unfortunately, he is a Professor.

SENATOR RUSSO: Right. Apparently he did a lot of writing on the subject and I assume has a lot of credentials, as you do, and you two can't agree on whether it is a deterrent. I don't think this is that kind of an issue - that I can demonstrate to you, or anyone, why capital punishment should be imposed, nor can you demonstrate to anyone why it should not be. I think it is that kind of an issue that is almost really like trying to argue the existence, really, of God - whether He does, or does not, exist. There are no clear answers to the question.

How do we ever know whether it is a deterrent? For years and years people of your brilliance and training have tried to find the answers and can't, and disagree with one another. I shouldn't say they can't, you may feel you have found it. Professor Ehrlich feels he has. It is just not that simple to answer.

I can only tell you - and I think if Senators Dumont, Hagedorn and Imperiale were there they would tell you the same thing - the question of capital punishment is something one either feels is necessary under our system of government, or feels differently. I would never criticize your view. I have to accept it as being one with just as much - perhaps more, I don't know - basis as mine.

You said in your statement that people who favor and drafted this legislation - and you used the words "have no experience with the actual workings of the criminal justice system -- I don't know. I spent 10 years prosecuting; I spent 6 years defending. Maybe that is not enough years. I am sure I have a lot more to learn. I haven't had the years you have in the field of criminology. But, you see, I don't think it is going to make any difference.

There are those who have in this system 20 or 30 years who feel we should have capital punishment and those who feel we shouldn't. We have had prosecutors here all day today - some in favor and some against - with many, many years of experience. I just don't think it is that simple an issue.

You refer to the words in the legislation - "heinous, cruel or depraved manner" - and you say, what murder isn't heinous, cruel or depraved? Of course, the word which precedes those words is, "especially" heinous, cruel or depraved. I agree with you, it is probably no more or no less a definitive word than "reasonable men" which pervades our law. I think it has a meaning to a jury. It has a meaning to a person. They may disagree. One jury may feel one way and one another. I don't know if there is a better answer. But, at least we now, under this legislation - which we didn't before - try to set forth some standards that before - before - you can execute or declare the penalty, you must find, among other things, that the murder

was especially heinous, cruel or depraved.

That may mean all things to all men. It is better than it was. It may not be good enough. And, I would have to agree with you - it is not clear, it is not definitive, it is the best we can do. There might be a better way and that is why I hope you will reconsider and offer to help us, rather than say that you won't.

So, the recurrent argument -- you seem to rely heavily upon demonstrating that it is not a deterrent, although Professor Ehrlich says it is. I can only tell you, as one sponsor, I don't rely on that as my primary argument, if at all. I refer again - and I don't know if you were here earlier - to the words of the Supreme Court opinion, by Justice Stewart. You may not accept them but here is the Highest Court - the majority - saying that capital punishment is - and I am quoting - "an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help to vindicate their wrongs."

Now, I don't mean to suggest that anyone should accept that. It seems to best put what I feel and I can't say to you that it is clear to me, beyond any question, that I am right and you are wrong. I am not at all clear. I wish I had the feeling that you do, that your position is the correct one and mine is the wrong one. I don't know. I believe, though, that this is the one that makes the most sense to me and it is the one that should be debated and argued legislatively and eventually, hopefully, the will of the Legislature and, perhaps, the people that we represent would be put into effect.

So, I don't know that there is any way I am ever going to convince-- I am sure I am not going to convince you. I won't try to convince anyone else but I will respect those opinions that are contrary to mine and I will only say that I think it is an issue that we are going to have exercise our best judgment, our conscience, our training and our experience on and vote, or proceed, accordingly.

That is all I have to say. Thank you very much for coming down.

If we may, we will now go to Prosecutor Woodcock.

Incidentally, has the Professor left yet? Professor Bedau, I just wanted to add further - I wasn't aware of it but the staff pointed it out to me - in one of the opinions of the Supreme Court, sustaining the death penalty recently, they actually took on the issue of whether heinous, cruel or depraved were too broad, and they concluded - and I won't go into all of the reasoning, but it is in the court's opinion that they were proper words to use.

PROFESSOR BEDAU: I'd love to reply.

SENATOR RUSSO: You are welcome to.

PROFESSOR BEDAU: May I?

SENATOR RUSSO: Yes. Definitely.

PROFESSOR BEDAU: Well, the first thing is, what you are reading from is a matter that interprets the Constitution of the United States and that is not the issue that I have been speaking to at all. I have been speaking to the question of legislative policy, as adopted in this Assembly, not to interpreting the Constitution by a lifetime judiciary, appointed without any democratic process whatsoever.

It seems to me, therefore, it is quite misleading to bring forward the general language of the plurality of opinion that you quoted from earlier and then adding this on, in that context, to shed light on what is sound legislative policy. I don't see the inference at all and I wouldn't think you would either.

If I may just speak to one point, I know you have a heavy schedule and I don't

wish to trespass further on your time. There is one thing that troubles me, Senator Russo, about the spirit in which you prefaced and concluded your comments on my testimony, and that is, you tend to make it look as though having or not having the death penalty is a matter of taste. You didn't say that it was but you presented the issue in such a way that it becomes well-nigh inconceivable, as you view it, that anything could shed important light, one way or the other, on the merit of this policy.

I find that very troubling. I should think that you would too. I would find it appalling to think the sovereign State of New Jersey is ready to embark, once again, on the path of introducing death penalty legislation and sending people to death with it on nothing stronger than a matter of legislative preference. That is an impossible basis on which to determine whether people will live or die.

That is an unacceptable mode of reasoning. It seems to me -- again, I think you have misunderstood. Perhaps I was careless in stating the point about burden of proof. I was prepared, and did, accept that burden offered to me by your predecessor, Mr. David Stepacoff of Middlesex County in 1957 and I expect you to do the same. What is sauce for the goose is sauce for the gander in my book.

It seems to me that as long as you are able to present the matter as one where you can't convince me and you won't try but will respect my opinion, you are treating the issue - with all due respect, sir - as though it were a matter of the length of women's hemlines. And we don't really take that view about this matter. I am sure you don't and you know I don't.

So, again, the question is, what is the kind of evidence that you and your colleagues would deem as relevant, on the theory that you can't just do as you please on these matters, any more than I could if I had political power. That is where, it seems to me, the proponents of the death penalty here, and elsewhere, have not spoken clearly. All of the favorable opinions that were generated by the Supreme Court in Washington earlier this month merely spoke to the issue of the legislative permissibility under the Eighth and Fourteenth Amendment of having the death penalty. There is not a scintilla of argument by even the most radical defender of the death penalty, Justice Rehnquist, indicating that it is legislatively wise to have such policy, and therefore there is no possibility of meeting the evidential burden in a forum such as this by looking for help from Justices Stewart, Powell, etc.

I would say one further thing: I think confining our discussion, as we have, to murder and this penalty is appropriate. But the bill that you are sponsoring proposes to reinact all the ancient legislation, the old McKinley Law of 1902 that would punish with death an assault upon the Chief Executive, and similarly with kidnapping, the old Lindbergh Law that has a very special history in this State, and treason against the State of New Jersey. Now, I think that everything that we have said so far bears not at all, really, upon any of that legislation. Bringing those statutes back from the grave, it seems to me, may perform a public service, but I have yet to hear what it is.

SENATOR RUSSO: I should point out to you also that one of the bills - not mine - would impose the death penalty for the crime of rape. I don't share that.

PROFESSOR BEDAU: Good, neither do I.

SENATOR RUSSO: It may well be too that the final version of my own bill might be limited with regard to the crimes involved.

PROFESSOR BEDAU: I certainly would favor that.

SENATOR RUSSO: I am primarily directing my thrust to first degree, willful and premeditated murder. Let me assure you that I don't treat the issue cavalierly. It is not just a question of do we want it or don't we - like women's hemlines that you

referred to.

I don't want to go into a long discussion now about my own experiences, in my work, and what the bodies looked like, or pull out pictures of them, etc. You know, I don't know, though, that it is treating it cavalierly to say that in the case of a brutal and Manson-type murder, I believe the jury should have the option to impose the death penalty. You know, we can go on and on and illustrate this back and forth and you perhaps could tell me about those who were later determined to be innocent. There are many valid arguments. It is not a question of treating it cavalierly, it is something that maybe we can go into more detail on when we don't have a lot of witnesses waiting. But, this bill does not result from some whim.

PROFESSOR BEDAU: Good. Thank you.

SENATOR RUSSO: Thank you, Professor.

Proceed, Prosecutor Woodcock. I am sorry to keep you waiting.

J O S E P H C. W O O D C O C K, J R.: Thank you very much, Senator.

First let me say that we thank you for the opportunity of appearing here today on the issue of whether or not New Jersey should have the death penalty. I think I would echo the remarks of the professor who just left, that it is not a question of whether or not the Legislature of the State of New Jersey can pass a constitutionally sound death penalty statute, but the issue really is - should we? And I think the issue of whether we should or should not have a death penalty has something to do with where it fits in the criminal justice system and what we expect our criminal justice system to attain in the end. It has always been my understanding that the principal idea of penalty and punishment in a criminal justice system has something to do with and is principally involved with deterring others from committing a like crime because, without that, there is no reason to have any penalty or any punishment in connection with even the lesser crimes of burglary, of welfare fraud, of adoption violations. There can't be any reason for penalties and punishments in connection with those unless there be a reason connected with attempting to deter others from committing a like offense.

I would just say at the beginning that in my twelve years in the Legislature - it didn't go back twenty years, only twelve - I was an opponent of the death penalty then. I would say my two and one-half years as Prosecutor in Bergen County haven't altered that view. I continue to oppose the death penalty as a reasonable, responsible, moral and effective reply to the heinous crime of murder. I just don't think it is and I think it is a sad commentary on the state of society in New Jersey or elsewhere where public opinion polls indicate that people are in favor of the death penalty. I would say with respect to that, I don't really think that the people are for the death penalty in the real sense. I think in the abstract sense they are. But I think there are few people who are in favor of the death penalty that would want to throw that switch and snuff out someone's life.

I would ask, when we talk in terms of there being no compelling reason for or against capital punishment and, therefore, we are all free to do as we please - and I am talking about this in the legislative sense, that you can vote for or against, depending upon how you feel - whatever happened to the concept of the right to life? Perhaps that is the wrong term to use, but I can't think of a better one to use. If it ever had any meaning, I think it has meaning in this context. If the State of New Jersey has no compelling reason for or against taking a life, then how in God's name can we justify taking a life? I think the issue is as simple as that. I really don't think that we can consider it in any other light.

But let's consider the evidence that does exist with respect to capital punishment as a deterrent. Over the past 25 years, there have been countless studies done dealing with the issue of whether or not the death penalty is an effective deterrent to murder. Suffice it to say that the vast majority of those studies point to one conclusion: Capital punishment is not a better protection against murder than the sentence of life in prison. It is generally accepted and established that the existence or non-existence of capital punishment makes no difference in the homicide rate or the attempted homicide rate. The studies uniformly conclude that homicide rates are conditioned by factors other than the death penalty.

I am sure as a Prosecutor from your own knowledge of people who have committed murder, you know the compelling factors in murder have to do with relationships between the parties more times than anything else - and situations. So telling somebody who, let's say, caught his wife in bed with another man that there is a death penalty in the State of New Jersey has little effect upon his actions. The same goes for the man who

finds out his trusted business partner for 20 years has been stealing him blind and has rendered him penniless. The fact that the State of New Jersey declares public policy to be, if you commit murder, you go to the electric chair, is going to have little effect on that man committing murder. And even in the perhaps most brutal types of murders, those dealing with sexual crimes, I doubt there anyone considers the death penalty as an effective deterrent. They just don't think in terms of that and they never have. They are conditioned by factors other than the death penalty.

Comparisons of the homicide rates in selected jurisdictions for periods immediately prior to and after public executions or sentences of death indicate no significant differences. This suggests to me, at least, that execution or sentence did not effectively deter others from committing a like crime. There is no statistical support for the proposition that law enforcement officials are safer in jurisdictions having a death penalty as opposed to those in which it has been abolished. The studies that suggest that the threat of capital punishment acts as a deterrent are usually made up of subjective statements of apprehended felons made to the police that they carried phony or unloaded weapons because they were afraid of the death penalty. I think that anybody who has dealt with people who have been taken in and charged with another crime knows that those reports are at best unreliable because the subjects making the statements might be expected to have said that they believed what the police wanted to hear. Why do they do that? Well, I suggest that they think they might get just a little better treatment if they say things like that.

I can only say that I have never heard one person who was convicted of the crime of murder who said that he ever thought of the death penalty prior to the commission of the act. I have never heard it. I have never seen it reported anyplace.

I conclude from all of this that the death penalty is not a deterrent and this, I think, is the paramount reason why the State of New Jersey should not at this stage re-introduce the death penalty to the State of New Jersey.

I understand that society has a real interest in isolating convicted murderers in order to prevent them from committing similar crimes in the future. This, I submit, is a legitimate objective of punishment. But it seems clear to me that the goal can be effectively obtained by less restrictive means than the death penalty. There are those who suggest that the death penalty is necessary to stop those convicted of murder from committing further crimes. I suggest that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison and the techniques of isolation can eliminate or minimize the danger while he remains confined. I might also add in this regard that murderers in general have proven to be among the least likely to return to that type of crime in the future. This is true with regard to both incidents while on parole and incidents of violence while in prison. And I am aware that anyone can point to isolated incidences where this is not true. I would be the first to admit that such incidences have occurred. But I am talking about in general and in the over all, and that statement stands. There is a very low rate of reconvictions for any criminal offense, let alone for murder, once released from prison.

A 1964 Rutgers Law Review article indicates that there was substantial information then available to show that murderers can be incarcerated and paroled with safety and that there is no discernible difference in this regard by those who are found guilty of one rather than another kind of criminal homicide.

The argument most used to justify the death penalty is that the public wants it and, in order to insure justice and maintain the social compact, it is necessary that

we have it. While I may agree that the penalty should fit the crime, I suggest that the grading of punishment according to the severity of the crime does not require that the upper limit be the death penalty. I believe that it is incompatible with the dignity of an enlightened society to attempt to justify the taking of a life merely for the purpose of vengeance. While retribution may be a permissible aspect of punishment under the most recent decisions of the U. S. Supreme Court, it cannot be considered the dominant objective of the criminal law; it cannot act as the sole justification for the death penalty.

Senator, all I can say is that I would hope that the Legislature in the State of New Jersey and the Governor will dispose of these bills as they should be disposed of, and I think they should be voted down. Thank you very much.

SENATOR RUSSO: Thank you, Prosecutor. Your arguments have considerably more credibility when one considers that in the past two and one-half years as Prosecutor, you have had some rather brutal murders to be concerned with up in your county. So you don't speak to us as one who perhaps has his head in the clouds with no practical experience.

You refer to the right to life and suggest that one could not support the death penalty if one believes in the right to life. I would suggest to you that a man has the right to life until he violates someone else's right to life and then maybe it is questionable as to whether he still has it. But again that is a judgment each has to make.

You referred to a public policy of this State. The suggestion was that under these bills or the bill that I sent to you, 639, the policy of this State would be that when you commit murder you go to the electric chair. Of course, it is quite clear, I think, in the bill, that that is not necessarily the policy under the bill; rather, when you commit murder and are found guilty of it, you are then subjected to the possibility of the electric chair, after consideration of many factors. You used the illustration of the man who catches his wife in bed with another man and commits murder in a crime of passion. You used the illustration about the man who finds out his partner has been stealing from him for 20 years and he is now penniless. I think, Prosecutor, you would have to agree that under S 639, with proper instructions to a jury, as there would have to be, there is virtually no chance of the death penalty being imposed under those standards, although, of course, I suppose we have to say anything is possible. But you didn't mention the best illustration I can think of, if you are trying to think of a popular one, the Manson-type murders. That is really the kind, something less or worse, as the case may be, that the standards under this bill are directed to. No one would suggest - I least of all - and if I were the prosecutor, I wouldn't ask for the death penalty - for the man who suddenly in a moment of passion, having found his wife in bed, commits murder. He ought to be convicted. He ought to be found guilty. And he ought to be punished, but not given the death sentence. And the bill does not suggest that he get the death sentence.

But I am talking about the situation, the especially heinous type that we referred to earlier with the professor. That's the one that troubles me. That is the illustration you didn't cover. I am sure that wouldn't change your opinion. But that's the one that I think comes within the meaning of this bill.

MR. WOODCOCK: Senator, if I may just reply to all of that, first of all, with respect to the illustrations given, the purpose of the illustrations was not to say that that fell into first- or second-degree murder category, but just as a demonstration that people who commit murder do not consider the penalty. It is not the type of crime in which that occurs at all -- well, let me say, in a very limited sense, if at all. There are other factors that are overriding. I wasn't indicating to you that I thought

that your bill would put the wronged husband or wife, as the case may be, in the electric chair. I didn't mean to do that. Even in a Manson-type murder, I don't know that anyone who was involved in that crime ever really thought in terms of what could happen. Quite frankly, I don't know that they cared. But the fact of the matter is that the crime happened.

My reason for the illustration is that, if we are going to have penalties and punishment, they must have some relationship to the act committed and to deterring that act. What I am suggesting is that there is no deterrent in the death penalty for murder. It just isn't there and it has never been proven to be.

Getting back to the issue of the right to life, the issue isn't whether everyone has a right to life. I am in favor of that. What I said was that, if there is no compelling reason for or against capital punishment, then I think the right to life and society's interest in preserving life should be the thing that carries the day. Why then take a life if there is no compelling reason to take it? When I say "reason," I am not talking about passion or emotions or anything else, but something that takes us out of the cave rather than takes us back into the cave. That is what I am addressing myself to when I say that we have to have reasons for reinstating capital punishment.

Let me also add that I think if there is one thing wrong with the criminal justice system as it exists here in New Jersey and elsewhere, it isn't the degree of penalty or punishment that the Legislature declares to be the penalty or the punishment, but rather the lack of certainty and swiftness with which it is carried out. I think if there is anything lacking in our system today, it is just that. It is not that we don't have enough penalties and punishment available and that they are not severe enough. The problem is that they are just not being applied. That is what I am saying we ought to devote ourselves to. I think we could do something, if we could do anything at all with respect to murder, by having punishments which call for long jail sentences, but certainly not the death penalty.

SENATOR RUSSO: Well, you don't think punishment either that swiftly imposed or that lengthy could be any more of a deterrent than the death penalty, do you?

MR. WOODCOCK: Do I think so?

SENATOR RUSSO: Do you think that a swiftly-imposed punishment for murder, involving a lengthy prison sentence, would be more of a deterrent than the death penalty?

MR. WOODCOCK: No, I don't think so simply because what I am saying to you is that I don't think the people who are involved in the crime of murder think in terms of penalty. What I am saying to you is that we are now talking about what the State should do, faced with that situation. I am suggesting that the State should step out of the cave rather than go back into it. I think we should not join with those people who commit heinous crimes. If murder is bad, I think it is bad whether it is done in the name of an individual or in the name of the State. It is the same act. What I am saying is that the only way that the State can justify it is by saying that it serves some reasonable social purpose. If our whole criminal justice system is geared to the fact that we exact a criminal penalty or punishment because it will deter others from committing that crime, in whatever way that will help in this area, let's do it in a lesser manner than committing the same act that we condemn.

SENATOR RUSSO: Thank you very much, Prosecutor.

MR. WOODCOCK: Thank you.

SENATOR RUSSO: Is Sergeant Cohen here yet? (No response.)

There are a number of witnesses left. What I would like to do is call the names in the order they appear. If you are going to need more than five minutes - and I don't

suggest you should take less - but if you are going to need more, tell me because I would like to go down the list and dispose of those who will be brief. At least we can get a large number of short witnesses out of the way and then hear the longer ones. So when I call your name, if it will take you five minutes or less, please let me know.

(Senator Russo polls the people whose names appear on the list to find out those who will take five minutes or less.)

I will call now Neil Cohen, New Democratic Coalition.

N E I L C O H E N: Senator Russo, the New Democratic Coalition of Union County has strongly advocated the abolition of the death penalty and the recent Supreme Court decision does not change our argument in the slightest. The court held only that the Federal and State governments have the power to impose death sentences, not whether they should, in fact, exercise that power.

What will the imposition of the death penalty mean to the State of New Jersey's criminal justice system? Will it be a deterrent? We think not.

Studies by such noted scholars as Thorsten Sellin and Dr. Hugo Adam Bedau have shown that when the death penalty and non-death penalty states are compared, there isn't any significant difference in the homicide rate. On a comparison between states that have changed from the discretionary position of the death penalty to a mandatory requirement, there wasn't any significant change in the homicide rate. Finally, Doctors Robert Dann and Leonard Savitz prepared studies on the deterrent effect capital punishment had on homicide rates three months before the executions of five human beings and three months after. The results -- in spite of a great amount of publicity and the fact that these condemned men were members of the community, no noticeable change in the homicide rate was detected.

I assume you expect it to have a deterrent value. Does this legislative body really believe that most capital crimes are rational acts? Or, are they not more often committed on impulse, in a moment of passion, in a rage, during a state of inebriation, out of fear, without thought of gain or loss?

Those who do commit these grievous crimes have been described as being vicious, without feelings, and abnormal. Will it stop a woman or man from killing their paramour when they are caught with each other? Will it prevent two men from shooting it out in an alley after a violent dialogue in a bar or after a crap game? Will it stop a husband and wife from reverting to violent means after or during a fight over the money situation at home? Will it stop an armed robber when a robber is suddenly confronted by a police officer who prevents the offender from escaping undetected from the criminal scene?

These are exactly the types of human beings who would not be deterred by the death penalty. No punishment can deter such irrational actions. I believe this legislative body is far too astute to think that our citizens will change their emotional composition because the death penalty is part of our State law.

I ask you, we ask you, the public asks you: What will it do? What is the utility of this punishment if it is not a deterrent? For those who argue that the death penalty is necessary to protect members of the law enforcement establishment and correctional guards, we state that the death penalty was not a threat in the outside world. How can it be any more of an effective deterrent within the confines of the prison?

Three studies have been compiled showing the relationship between the death penalty and public safety. In each of these, the results indicate that despite a high rate of executions, the number of police deaths was not affected one way or the other.

The proponents of these bills must assume the burden of proof. We challenge them

to proffer a preponderance of evidence, clear and convincing, substantial evidence, or even a scintilla of evidence that supports the deterrent argument. So let us at least be intellectually honest about this debate on capital punishment. The bottom line for the proponents has to be an eye for an eye, a type of State-authorized vindication on behalf of the victim. I urge you to tell the public that from all available information, the death penalty does not deter. Tell them you wish to even the score, but don't mislead them.

The claim that the death penalty can be used merely as retribution must be analyzed in light of past history. Retribution occurs when all those who commit crime are punished, but because of the arbitrary and capricious use of the death penalty in the past, this amounts to minority group oppression. That discrimination is what *Furman v. Georgia* stood for and still stands for.

Victims of the executioner have been the most inarticulate and dispossessed members of society. The death penalty has always fallen on those least esteemed at the time of the furor for the death penalty: first, the Italians; then the Irish; and, lastly, the Blacks and Porto Ricans.

Senator Russo, the use of the death penalty diverts our attention from more constructive and pragmatic approaches to the prevention and control of violent behavior. Any person who is more influenced by facts than by emotional rhetoric will inevitably realize that the death penalty has no merit and it is a fool's errand to mount a major effort to reinstate it. Capital punishment is inconsistent with the purposes of modern penology. It deters rehabilitation. It is the disastrous substitute for the effort and money needed to develop correctional knowledge and skills. It demeans life. We urge this Committee to vote against these bills and others that may come before the Committee.

I thank you for allowing me to speak. I could have commented on a number of things mentioned, especially Mr. Hamlin's mention about Israel. He fully realizes that American law recognizes that another party can come to the aid of someone who is in imminent peril of death, and that is self-defense, and that is an affirmative defense. I just wanted to mention that.

SENATOR RUSSO: Thank you very much, Mr. Cohen.

Michael Meyers, Assistant National Director, NAACP.

M I C H A E L M E Y E R S: Mr. Chairman, I am Michael Meyers, Assistant National Director for the National Association for the Advancement of Colored People. I am also a graduate of Rutgers Law School in Newark. Our national headquarters is located at 1790 Broadway, New York City. We have several active branches of the NAACP in the State of New Jersey, but as Assistant Director, I am obliged and privileged to represent to you the views of our entire organization, with a membership of 500,000 people, Black and White. This is by way of our having clear policy on the issue of capital punishment, adopted by our delegates in convention who are elected to represent the volunteer membership in our 1700 branches, college and new chapters around the country.

A policy which is adopted by the convention is binding on all units, sub-units and parts of our Association. We now have several branches of the NAACP in various prisons, including a very active branch at Lewisburg Federal Penitentiary. So we have a special interest in the subject of discussion today.

Let me say right off that I share with many of you the concerns that you have about the rising crime rate, particularly incidences of violence. And I agree that something needs to be done right away to reduce primitive, barbaric, violent human behavior.

Nothing is more urgent or important to a democracy and civil society than rational behavior. It is regrettable that the United States Supreme Court has responded, in many respects, to the irrational, the erratic pulse of public opinion rather than to measure the depth, stability and solidity of the American people's conscience.

Essential to our survival will be the approach and methods we adopt to help make human beings better than they are, to check and counteract primitive passions and prejudice. Quite frankly, I find it odd that in the latter part of the 20th century in what must be the most advanced technological and democratic society in history, in a state of the Union which has demonstrated its commitment to start correcting social injustice, alleviating poverty and bringing about essential reforms in the criminal justice system and in the administration of its own social services, that we do not yet have in New Jersey or in this Nation a consensus, a belief, a fixed position on what we believe to be cruel and inhumane punishment, of what we as a society believe to be right and wrong standards of behavior for governmental units.

There are reams of information, studies and reports about capital punishment. It hardly seems necessary or desirable or worthwhile to recite the various sources and authorities on the subject, or even to restate the principles, concerns or arguments for or against. Still it is my duty to let you know which side of the issue the NAACP comes out on. We are plainly and unequivocally opposed to the death penalty as cruel, unusual and inhumane punishment. We urged the Supreme Court of the United States to abolish the death penalty as cruel and inhumane punishment, violative of the equal protection clause. It was then and it continues to be our view - and the evidence on the point is incontrovertible - that the death penalty is imposed almost exclusively upon the poor, the under-educated and members of minority groups.

We submit to you, sir, that ours is not a perfect system, that many persons who have been convicted of capital crimes were convicted by juries that did not, in fact, have representatives of that person's peer group, that racial discrimination, and, in some cases, intense racial prejudice were operative and critical determinants of a person's "guilt."

In stating our opposition to the death penalty, we are not coddling criminals. No people are more deserving of law and order and protection from violence than Black people. Indeed, this is a pivotal reason for our opposition. We have been not only the primary victims of lawlessness in the Nation, but also of violence perpetrated against us by the state. Ours is a double penalty, a double discrimination. Many of you know the NAACP's abhorrence for violence. We have counselled against violence as a means for securing social justice and so we will counsel against the use of officially-sanctioned violence as a means for social control. The extermination of human beings for whatever reason will not deter crime, but will induce and perpetuate human cruelty.

Practice what you preach is what the cry of the youth is in the ghettos and in the suburbs of our country of people who look to the state, to government, to be fair, just and even merciful. We would conclude that the base human impulses to perpetuate brutality, pain, violence and death were better not encouraged or served by the law.

Finally, we submit to you that the State ought never be put in the position of killing an innocent person. We can debate and discuss the causes, effects and remedies of crime, but no amount of debate, apology or tortuous legal reasoning can rectify a mistake, however honest or fair the procedure, by the State in taking an innocent person's life.

The long-term battle against human cruelty and degradation, the commitment to what is not expedient for the moment, but just for all time, is always a more difficult and the least popular road to take. Mr. Chairman, it is that road which the NAACP urges

you to take. Thank you for extending to us an invitation to share a few of our views on this most important and, fundamentally, moral issue.

SENATOR RUSSO: Thank you very much, Mr. Meyers, and we appreciate your coming. Mr. Clark.

MR. CLARK: Senator, Paul Stagg of the New Jersey Council of Churches, passed for five minutes, but he has to leave and I would like to give my time to him because he said he could do it in five minute.

I hope that our version can get into the documents.

SENATOR RUSSO: You mean your prepared statement? That will be made part of the record. All that are submitted to us will be made part of the record.

MR. CLARK: Some of it is in handwriting. Could we have a few days to get that in?

SENATOR RUSSO: Absolutely. The record will be kept open for a week or more anyway.

P A U L L. S T A G G: Mr. Chairman, my name is Paul Stagg and I am here to represent the New Jersey Council of Churches. My testimony is before you and for the sake of brevity and in consideration of my colleagues who also have waited, I will summarize - reading parts and summarizing.

The first thing I would like to say is that the argument which is being used to support the re-enactment of the death penalty is a circular argument. The Supreme Court, by its own testimony, was influenced by action of the legislatures and by public opinion. Now, here we are today, faced with several proposals to re-enact the death penalty, which is based upon the Supreme Court's decision. It is a nice, circular kind, of argument which really proves virtually nothing.

The various bills that are here before us differ in some respects, but they are all open to serious objection in that they re-introduce the death penalty as an approved sentence for certain crimes, and it doesn't relieve matters to say that these bills have been circumscribed by certain conditions which limit the kinds of crimes which will be subject to the death penalty and the conditions under which those sentences will be imposed. It does not relieve the fact that the death penalty remains an abhorrent and barbarous kind of thing for a civilized society, which we thought we had long since left behind. Wise judgment would say that we should not base our opinions upon the changing tides of public opinion nor upon dubious theories of the death penalty, either as an effective deterrent or as a just measure for retributive justice.

The central thesis of what I want to say, Senator, is that New Jersey should not ape 35 other states. If they don't have the gumption to do what ought to be done, we in New Jersey should. We should follow our own best judgment and not base what we are doing on popular opinion, Gallup polls or what 35 other states may have done, nor upon the dubious kind of basis for making decisions which the changing character of the composition of the Supreme Court gives to us.

There are five considerations that I would like to mention - five or six - only briefly.

One is that the trend in history has been to curb or abolish the death penalty. In the early colonial experience, our forefathers condemned people to death for all kinds of foolish things: stealing grapes, trading with Indians, killing farm and household animals without permission, adultery, cursing God and their parents, witchcraft, being a rebellious son, etc. I suppose that we would not be imposing death sentences for such things, and I do not read in the bills before us that we are. Nevertheless, I think that we might

take a clue here from history and take note of the fact that in the awakening conscience of people as they are informed and their moral judgments are more clear, they more and more draw back from the death penalty. I think we have seen evidence of that today in some of the wonderful testimonies that have been made.

The second thing that I would say is that we should caution against the re-introduction of the death penalty at a time when there is a tendency to let emotion override judgment. During periods of national stress, war, anxiety over national security and concern over crime and subversion, there has been this tendency to re-enact the death penalty. Some people call it moral outrage. In times of peace, in times when the tenor of things is more even, the tendency in our history has been to oppose the death penalty. Now we are at one of those times when we are desperate, when we are anxious, when we are talking about moral law and order, and yet we do not have the capacity to say to even the President of the United States that he must be under law and order and must not Christmas-bomb people to death and must not appoint someone who will in turn pardon him for the crimes that he has done. We talked earlier today about the fact that it is the poor who commit crimes and there are environmental reasons which would give credence to that fact. But it needs to be pointed out here very strongly, I think, that the rich and the powerful have their ways of committing crime, their ways of killing people, and their ways of getting by without having any kind of sentence imposed upon them, and enjoying the luxury of their retirement at the expense of ordinary citizens like those of us who are testifying here.

The next thing that I would like to say is that it is a fatal flaw to make policy about life and death on the basis of public opinion polls. The Supreme Court has shifted, if not reversed, its own position. If I had time, I would quote from the Justices to prove this. But I would like to confine it by saying just two things in respect to this public opinion argument, on the basis of which the death penalty is posited.

The first is that it assumes that morality can be determined by a popular poll rather than upon the perception of an informed conscience. The history of the human race is replete with instances in which the majority was wrong. The history of penology supports this. Punishments on the rack, the screw, and the wheel, and public hangings, all once popular, have long since come under the judgment of an informed society. This is what Justice Brennan meant in his dissenting opinion when he said that ". . . the primary moral principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings -- a punishment must not be so severe as to be degrading to human dignity." This is precisely what capital punishment is. It is an obscenity and it is degrading to human dignity, and there are alternative ways by which an intelligent and informed society can deal with persons who have committed heinous crimes.

This argument based upon public opinion is also, I think, flawed by the fact that while the majority seems to favor laws permitting or mandating capital punishment, it does not necessarily follow. Public Advocate Van Ness was so right in one of the most significant statements that were made today, when he pointed to this fact, and I would simply like to reiterate it and to comment from a quote from Tom Wicker, who said in the New York Times recently that it is one thing to entertain death as an abstraction - it is quite another thing to entertain the execution of any human being.

I saw your picture, Senator Russo, in the paper, observing an electric chair. And I tried to think what might be going through your mind. I will not attempt to say. But I am sure it must be a shocking thing to look at an electric chair and imagine a human being in that electric chair and imagine that you might pull the lever that would

kill that person and take away a life that neither you nor I gave, nor neither you nor I could restore once it is taken away.

What parent today would want to see his children watch on television the electrocution or the hanging of a person? When Congress restored the death penalty to the federal crime law, it voted by a wide margin against an amendment to require that executions be televised. What could have more pointedly demonstrated public revulsion, or the difference between a death sentence and a man dying grotesquely in a gas chamber? And the punch question I really would like to ask — and I would say, despite the fact that I am angry about this, I have respect for you and I feel that you too, as a human being and as a respected legislator are struggling with this issue. I have heard you struggling with it all day. I would like to put this question: If it be true that when the actual moment arrives of pulling the switch to electrocute a human being, we draw back, why should we authorize in principle something we consider morally abhorrent in practice?

The next thing I wish to say is something that has been said so well, and I will not really repeat it, and that is that there is really no empirical evidence to support the death penalty as a deterrent to crime.

Concerning retribution, I would like to just say a few things quickly. Since justification for capital punishment seems to rest on retribution because no one here today has contended in any definitive way that it can rest on deterrence, then one must say that this too is a dubious kind of thing. The view of retribution holds that the taking of a murderer's life is itself morally good. But the majority admit that punishment must — and here I quote the high court — "comport with the basic concept of human dignity," which is at the "core" of the eighth amendment. Under this standard, as Mr. Justice Marshall aptly put it — a Black Justice, and that is not without significance — "the taking of human life, 'because the wrongdoer deserves it,' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth." The death penalty is, sir, an excessive form of punishment. It serves no penal purpose more effectively than a less severe punishment, and must be rejected as a cruel and barbarous form of penology that a sensitive conscience cannot sanction. Blood revenge is a form of vengeance which was sanctioned at a stage of lower morality, but persons of conscience are affronted by the invitation to play God with the life of offenders. The mere fact that the community demands execution of a felon in return for the evil he has done cannot justify the death penalty. Any punishment that can have the sanction of a moral conscience must comport with the dignity of life.

Now, in closing, I simply say that the answer to crime lies in another approach, not in one that has been tried and found wanting, as the death penalty has. The evidence is there. It is found wanting. And an intelligent people will find a more appropriate alternative. It lies in alternatives that both protect society against felony by eradicating the causes of crime and by finding ways to rehabilitate and save life rather than destroying persons and robbing them of life society cannot restore. We have set before us life and death. Let us choose life and live. Thank you, sir.

(Written statement submitted by Rev. Staggs can be found beginning on page 58x)

SENATOR RUSSO: Thank you, Reverend. I do think I ought to respond to the question you proffered to me in the course of your testimony. You mentioned about the talk of requiring executions to be public — and I have heard it many times — and perhaps if we put them on television we would so revolt — I guess that would be the word — our society that no one would be in favor of the death penalty. I think the simple answer to that would be, yes, that would be a good approach, provided only there was some way at the same time to televise the murder that preceded the execution. Maybe if we did them both, the revulsion wouldn't be as great.

As to the second question, you know one has to sit here and wonder why, or at least ask why, those who don't know - why it is we heard the PBA chief so strongly support the death penalty, police officers so strongly in favor of it, and most prosecutors so strongly in favor of it. Is it that we are a blood-thirsty lot that feel we ought to be barbaric? Of course, the answer might be something different. I don't know your own experience and I don't mean that it applies to you. Maybe it is because those people have seen so many times what the man who would sit in the chair, the switch of which would be pulled, did, what he really did at the time. Yes, we can argue it isn't going to undo it or help by executing him, but it does at least explain why most people in those categories, not all - we have heard prosecutors who are opposed to it - why most support the death penalty. If we focus only on the man in the chair on whom we are now being asked to pull the switch to snuff out his life, I can tell you if I had to do that I would find it very, very difficult, and I probably would have a difficult time after it, and I hope I am never asked to do it. But if we focus on what brought him there or maybe if we have some close involvement with some situation like that, then maybe it becomes a little easier to understand why one thinks that way. I don't mean that you will agree with him. But that is why it becomes something that we feel is justified. Perhaps that is why - I'm not sure.

I don't know, except to say to you that no one ought to be asked to pull the switch as proof of his sincerity or of his justification, because that is a tough thing to ask any human being to do. The only question is: Does he believe he is right in supporting it and why? What's the motivation behind it? Maybe the law enforcement people feel it is justified because they see first-hand the victim in a murder.

But I do thank you for coming and I appreciate having you here.

REV. STAGG: Thank you very much. If I might make just one brief comment - I think a simplistic look at what is happening in society would tend to make most of us very self-righteous with respect to any criminal and say, you know, he has committed or she has committed that dastardly act and they have got it coming to them and they ought to get it. We have argued that there are more appropriate ways.

What I am saying here is, as some of my brothers and sisters who have testified here, particularly the Black brothers have said, there is a complicity of society in the creating of a situation in which criminality takes place. I think this is particularly true at the level of poverty and at a level where there is racism that is involved. So I think a more humble kind of society might see that there are a lot of factors that we ought to try to correct.

I heard one of the prosecutors, at least, saying very convincingly, at least from my viewpoint, that we ought to get at the roots of the crime, and I don't really hear you objecting to that. I would like to urge you, sir, that we get on with the business of dealing with these crimes and have some economic development in this State of New Jersey so that we can undercut a lot of the poverty which may lie, in part, at the basis of the crime in our State.

SENATOR RUSSO: Thank you very much, Rev. Stagg.

We are going to have to take a five-minute recess.

(Five-Minute Recess)

SENATOR RUSSO: Ms. Mc Cormick.

T H E R E S A M C C O R M I C K: I am Miss Mc Cormick. I feel very humble here today. I am here in an unofficial capacity representing no one but myself, hoping to give light to the oft abused rationale that the public wants the death penalty. Dr. Carl Meninger, after a lifetime of clinical study and experience with criminals completely repudiated the death penalty. He wrote, "There is not a particle of preventative value in reaping vengeance and anger in the elimination of one poor wretch. Actually, his death weakens the public security by creating a false sense of diminished danger. It does not remedy but bypasses completely the real and unsolved problem of how to detest and detain the potentially dangerous citizens."

This is the red herring issue that I believe Prosecutor Humphrey alluded to this morning. I would like to touch on the morality, or I prefer to call it the immorality of the death penalty. As a mother and an educator, I know that children acquire moral values not by what we preach, not by what we teach, not by what we stamp on our coins, but rather what we live and how we live. If truly America is one nation under God, does not the command, "Thou shalt not kill," apply to government as well as to individuals? If it is wrong, depraved, and immoral for an individual to take the life of another, is it not more depraved and more immoral for a state government representing the collective will of its most enlightened citizens to deliberately and willfully execute another, albeit in the name of justice? Why in this matter do we cling to the ancient law, "An eye for an eye," and insist on taking a life for a life, inspite of the more recent command that we forego the satisfaction of revenge and replace it with the law of love and forgiveness.

Clinton Duffy, in his capacity as Warden at the San Quinton Prison for more than a decade became so profoundly convinced of the immorality and futility of capital punishment that he is now in his years of retirement devoting his full energy to the complete abolition of the death penalty. I would like to close with the words of the present governor of Massachusettes, Governor Dupikiss, who earlier this year vetoed a bill thzt mandated the death penalty for certain categories of murder. It is a bill similar to the one proposed by you, Senator Russo. He said, "I do not believe any state ahas the moral authority to execute human beings. It is easy to sign a death penalty bill. It is much more difficult to build a strong and effective law enforcement program embracing the police, the courts, and the correctional institutions. I intend to take the later course."

Senators, that is the challenge that I am thrusting at you today. Thank you very much for this opportunity.

SENATOR RUSSO: Thank you very much. I almost wish I agreed with you because you are the first one who knew what five minutes meant. We are very grateful to you. Thank you for coming.

Councilman Tucker.

D O N A L D T U C K E R: Since Reverend Scharff is not here today, I would like to put into the record, the results of the public hearing which was held in the City of Newark, New Jersey, which you were supposed to come down and speak on. I have a copy here of that which is the minutes of that hearing, and the recommendations, as such.

SENATOR RUSSO: I think we all received copies of that. I just read it last night, as a matter of fact. What you have is a summary of the meeting.

MR. TUCKER: Yes, right, a summary of the hearings.

SENATOR RUSSO: Let me just make sure it is the same one. Yes, I have read it, and I think every legislator got it. Do you want this copy to be a part of the record?

MR. TUCKER: Right, because he is not here, I wanted to submit this as a part of the record. The other point that I wanted to clarify was that I am here not only as a Councilman from the City of Newark, but also representing the National Black Caucus of Local Elected Officials, which basically speaks for our local elected black officials within the State of New Jersey. Rather than go into a lengthy discussion, I would like to just pinpoint my position on the matter.

On July 2, 1976, the Supreme Court held that capital punishment is not cruel and unusual but left the decisions up to the local state legislatures, you know, as to whether or not they want to enact that. I think it is important to know that the Supreme Court did not say that capital punishment must be placed in affect. My position on the matter - and I would like to make it clear - is that I am in favor of mandatory and stronger punishments for those criminals who commit heinous crimes. As a private citizen, and as a duly elected municipal representative who must be concerned with the right of private citizens to feel safe on our streets, I strongly believe that criminals must be punished according to the severity of their crimes. I am not, however, in favor of the reinstatement of the death penalty. The belief that punishment must be graded according to the severity of the crime does not require that the upper limits of severity be the death penalty.

I am against the death penalty for many reasons, including its dubious value as a deterrent, which is the argument which is most often put forth by those in favor of its reinstatement. My opinion, which is supported by representatives of the psychological and psychiatric and sociological community, is that the perpetrators of murders rarely, if ever, consider the possibility that they may face execution as a punishment for their crimes. Murder for the most part is committed out of anger or desperation; hence, the symbolism of the electric chair holds little value in the way of a conscious deterrent.

Governor Brendan T. Byrne, during his gubernatorial candidacy, and as former prosecutor and Superior Court Judge, stated that in his opinion on the reimposition of the death penalty, "I would support the restoration of the death penalty if it could be shown that it will save the life of just one policeman." "However," Byrne said, "there is no available evidence to support this, therefore, I have to oppose capital punishment." This statement was made in light of the states' legislatures seeking to reinstate the death penalty for special causes, including the killing of a policeman or prison guard or other uniformed officials. A further argument against capital punishment, as a deterrent, is the Federal Bureau of Investigation Uniform Crime Reports, 1969, which states, "Indeed the states without the death penalty are by and large those of the fewest homicides. In 1969, the three states with the lowest homicide rates, and five of the lowest of the seven were abolition states. The six states with the highest rates, and the twelve of the top thirteen retain the death penalty."

In his last annual message to the legislature, as he left office in January, 1970, former Governor Richard J. Hughes, now Chief Justice of the New Jersey State Supreme Court told the lawmakers that for the first time he had grave questions about the usefulness of executing convicts.

The use of the death penalty is sporadic, arbitrary, economically and racially discriminatory. Statistics show that the rich and the influential with the money and means to good legal counsel are the least likely to be executed for their crimes. It has long been known that the death penalty fell largely upon black defendants. Almost half of the blacks convicted of crimes are sentenced to death in comparison to those who are white convicted or sentenced. The United States Department of Justice, National Prisoner Statistics on Capital Punishment covering a period between 1930 through 1968, which was published in 1969

stated, "Blacks constitute 76 percent of those executed for robbery, 83 percent of those executed for assault by a life prisoner, and 100 percent of those executed for burglary in the same period. In 1930, 49 percent of those executed for murder have been black, although blacks made up only 10 percent of the population during that period. Of all the persons executed since 1930, 53.5 percent have been black. Of all the prisoners on death row at the end of 1968, 52 percent were black. Of the 455 men executed for rape in this country since 1930, 405 or 90 percent have been black. In the six of the nineteen jurisdictions which impose the death penalty for rape, only black defendants have been executed for that crime."

Criminals with money and/or influence are better able to bargain for their release in comparison to blacks and the poor. Racial discrimination within our society is not exempt from the decisions made by representatives of the criminal justice system.

In conclusion, I wish to state that the murder of an innocent person, a child or police officer kindles a desire for revenge. This call for revenge is a human reaction, a reaction which is not easily suppressed. However, unlike other criminal punishment, the death penalty is irrevocable. If a mistake is discovered after an execution, it cannot be undone. This point, I believe, is the most serious one to consider, for a life is our most precious commodity. Once taken away, it cannot be replaced by the most sincere effort. We must control this natural impulse to cry out in favor of the reinstatement of the death penalty. We know that it is not a deterrent. It has been demonstrated that homicide rates do not decline when the death penalty exists. It has been proven that economically deprived and the undereducated are more frequently the victims of capital punishment.

Almost four years ago, our enlightened State of New Jersey had the foresight to abolish the death penalty with no exceptions to the rule. We, as civilized and intelligent thinking citizens, should take into consideration the basic faults within our society and the possibilities for mistakes within our criminal justice system, and not demand a life for a life.

Further, if we are concerned with the victims of our crimes and not the criminals, then it is morally wrong to assign a higher value of life to a correction officer or a policeman than we do to a child by prescribing the death penalty when a murder victim is a law enforcement official. I raise the question, "Is our society moving toward a total understanding and commitment to resolve the social problems of human experience within our nation, or are we reverting to the cry for vengeance, knowing full well that no action taken by any group of people can replace the God-given gift of life?"

If I might just close on that, I will say that I think that you raised the question before in dealing with the involvement of representatives of the criminal justice system, with all of the negative aspects of our society, and that to a great degree may be some of the motivating factors that may spur them to cry for the death penalty. All I can say is, if they are involved in that particular process, and if they are making that decision, I think that what they are dealing with is acting subjectively and not necessarily objectively. And if that is the case, I think we as elected representatives, and also as people who represent people, have to understand that we must be objective and not necessarily be capricious and arbitrary about determinations that we make.

I am hopeful that the State legislature, not only under Senator Dugan's tutorship but also your's Senator Russo, will consider this very strongly and will take into consideration deeply the points raised by representatives who have spoken here this morning and also this afternoon. I thank you very much.

SENATOR RUSSO: Thank you, Councilman Tucker. I might just point out that I agree with you, of course, on the point about whether the victim is a police officer or correctional

guard, as compared to a child, and I have expressed that earlier in these hearings. I don't know whether you were here or not. I could not support Assemblyman Codey's bill that you referred to and that I guess you testified to at the other hearings. As to the subjective influences of law enforcement people, I can only say to you that probably there is not one of us who is capable of formulating opinions on an emotional issue such as this, in which a subjective approach does not play a part. I think as part of our make-up we call upon experiences we have had throughout our life, and it plays a part in our judgements. We have to certainly try to be entirely objective. I don't know whether anyone can accomplish that, though, on an issue as emotional as this one. I agree with you that we ought to try.

I thank you for coming, Councilman, very much. Rita Cohen, League of Women Voters of New Jersey.

R I T A C O H E N: Senator, my name is Rita Cohen. I am Vice President of the League of Women Voters of New Jersey, representing over 8,000 members organized in 95 communities in every county of the State.

For the last three years, the League has been engaged in the study of New Jersey's system of justice. Last spring, our members made an intensive investigation of current sentencing practices under the New Jersey penal code. In the course of that study, we examined the question of the reinstatement of the death penalty. Our study consisted of reading an extensive bibliography by experts in the field, interviewing judges, prosecutors and police, and attending the hearings of the Hawkins' Committee here in Trenton.

For those of you who are unfamiliar with the league methods, this committee's research was then sent to every league in the state, where local committees presented the material for all the members for protracted discussion of the issues involved. The results on the issue of reinstatement of the death penalty was so evenly divided that the state board had to find that there was no consensus.

While this does happen occasionally, it is quite infrequent, especially on a statewide basis. I wanted to share that information with you, particularly in light of the recent United States Supreme Court decision which put such store in the fact that public opinion constitutes a factor to which they look to indicate how society feels about capital punishment. Here, in New Jersey, enlightened opinion, as evidenced by the League members, is neither for nor against such reinstatement. They were, however, almost unanimous in their consensus that, should capital punishment be restored in New Jersey, no one victim's life should be treated differently from another's.

At the time of this study, the Codey Bill, A-3289, was being discussed. League members felt that while the work of the peace officer was important, his training and understanding of the risks involved when he undertook this work made him less in need of protection than the innocent bystander. The League feels that in a democratic society no one life is more valuable than another. Thus, the league would find incompatible with its position Paragraph 6 of Subsection e of Section 6 of S-639, your bill, Senator Russo, and I have other citations which are in your copy.

SENATOR RUSSO: What was that section?

MS. COHEN: It is Paragraph 6, Subsection e, in the aggravating circumstances. Section 4 a/5 of S-46, the Hagedorn bill, and Section 8 of S-1100, Imperiale, which makes taking the life of a policeman, fireman, peace officer either a prima facie cause for capital punishment or even one of the aggravating factors used in determining the culpability of the convicted felon.

We should like also to suggest that special culpability for the murder of the President, Vice President, Governor, or other high official also flies in the face of league

members thinking. The League position is that premeditated purposeful murder under particularly aggravating circumstances is the same whoever the victim. In all our discussion of the death penalty, even those who favored reinstatement did so with great reluctance and only for the most heinous, capital crimes. Therefore, even those who favored reinstatement would be most distressed to find that S-938, Dumont, opens the door for the death penalty for rape; that S-1098, Imperiale, authorizes the death penalty for the sale of drugs, and that S-639 reinstates the death penalty for kidnapping. The state should not be taking the life when there has been no life taken.

The league is pleased to see the provisions for automatic sentence review written into all of the bills according to the Supreme Court ruling. We should like to further recommend that some system for automatic sentence review be written into the new penal code for all felony convictions. Our studies have revealed extreme disparity of sentencing which both the public at large cannot comprehend and which is a source of discontent to the prisoners.

Our position on this issue reads as follows: "The League favors automatic sentencing review that would help correct disparity in sentencing. The League supports determinate sentencing with legislatively-fixed sentences of confinement. We support shorter, definite terms, rigorously enforced, consistently applied, and with additional penalties for repeat offenders."

We should also like to question the wisdom of suggesting such long sentences, such as 30 years for second degree murder, and certain other crimes. The League is aware that much of the public discontent with the present system of justice stems from their perception that our jails have been revolving doors, that sentences have been shortened by early paroles with convicted felons serving only tiny portions of their sentences. We feel that the way to correct that problem is not to swing to the other extreme - unduly lengthening of sentences - but for there to be more legislatively-fixed sentences for specific crimes, with longer periods of incarceration for repeaters.

It is our contention that deterrence is best achieved by swiftness and certainty of punishment and not by the length. Shorter, more definite sentences would be better. A system of weighing aggravating and mitigating factors should be built into all sentencing procedures with a formula to guide judges in a uniform, statewide system. While we realize that prison serves many purposes - to punish, to deter - we still believe that the State should continue to perceive its prison system as a means to re-orient men and women into the community. An unduly long sentence removes the motivation for reform from the prisoner and will serve to destroy any hope the state has to restore - after great expense to the taxpayer - these people to useful productive lives as citizens. I commend you to the latest 20th Century Fund Report called Fair and Certain Punishment.

In conclusion, I think it would be fair to say that the League members are sympathetic to the difficult problem you have set for yourselves in trying to determine whether or not to restore the death penalty in New Jersey, and in marking out what limits the state should invoke in using that sanction. The problem we found in our extensive research is that there are no hard factual or statistical guideposts in this field. Statistics on the violent crime rates in states where the death penalty has been restored have not proved either way whether the death penalty is a deterrent to such crimes. Even the Supreme Court discounted that as a factor. It is a punishment which this state may choose to restore to its list of sanctions. It is a philosophical and moral problem on which rational men will always differ.

SENATOR RUSSO: Thank you, Mrs. Cohen. I might say that all too often I agree with the League of Women Voters, and it gets me in trouble, such as with the income tax. But I

have been contemplating - prior to these hearings and particularly as a result of these hearings - amending this bill of mine, anyway, to limit it only to the actual perpetrator of a first degree murder, and perhaps eliminate kidnapping and assault and things of that sort.

The other point you raised, quite frankly, escaped me completely, and that was the Paragraph 6 on page 5. It does run counter to my thinking insofar as the victim not being an important factor as to whether or not the death penalty should be imposed, and I believe I will amend that out of the bill, so I do thank you for calling that to my attention.

MS. COHEN: Senator, the League is always glad to be of some help. Thank you.

SENATOR RUSSO: Gilbert Lugossy, Freeholder of Mercer County.

G I L B E R T L U G O S S Y: Thank you, Senator. I am Gilbert W. Lugossy, a member of the Board of Chosen Freeholders, Mercer County. I also currently serve as President of the New Jersey Association of Chosen Freeholders. However, I am here entirely in my private capacity, if I have any as an elected official. But I am here as an individual and a resident of Mercer County, and New Jersey.

It is my sincere and personal belief that there should be enacted an effective and enforceable law for capital punishment in New Jersey. New Jersey should have a death penalty. I believe we can have a capital punishment law which meets all of the guidelines and conditions set forth by the United States Supreme Court, and at the same time will perhaps in some cases serve hopefully as an effective deterrent to shocking and senseless killings.

I believe we can carefully spell out crimes, those crimes for which a person will go to the electric chair as a just penalty for willful and premeditated murder, and at the same time still maintain and protect the rights of any and all individuals who stand accused of those crimes. Also, certainly we are all very much concerned with the killing of a policeman and other law enforcement, or fire fighter, or correction employees. That certainly calls for capital punishment. The legislation, of course, should also again clearly spell out the guidelines and conditions in addition to those inflicted upon any citizen of our state.

Thirty-five other states, as you know, have re-enacted the capital punishment laws since 1972. It is my personal feeling - and the feeling of many of the people in my district that I have come into contact with - that for too long we have been hearing about the most horrible crimes committed against helpless citizens by persons with no regard for the rights of others to live their lives without fear of violence. For too long we have heard too much about the rights of the killer, and not a word of sympathy for his or her victim. The word must go forth, I believe, through legislation which meets the guidelines set by the courts that the reality of the electric chair awaits any would be murderer in our state.

I would like to add, Senator, also that a recent readers poll in one of our local Trenton daily newspapers produced an overwhelming number of responses which supported the enactment of a death penalty law. This poll was published as recently as July 17, 1976, in the Trenton Times newspaper, and I might add that many people signed their names, gave their addresses, and were very loud and clear either pro or con for the death penalty. The great majority were for the enactment of the death penalty law in our state.

I feel that in our state and in the legislature we do have the expertise to frame and enact a suitable bill. We do have a fine public defender and a public advocate system in our state, legal aid services, and I think we should continue to work and

strengthen and improve those safeguards for those who stand accused and need those services.

Life imprisonment sentences for murder quite often has enabled murderers in our state to get out in 14 years with so-called good behavior if he so qualifies, and I believe the jury should under certain circumstances have the option of the death penalty as a sentence. Thank you.

SENATOR RUSSO: Thank you very much, Freeholder Lugossy. We appreciate your coming here, especially your brevity and consideration of our time problem. Thank you.

Reverend Jarrette C. Atkins.

J A R R E T T E C. A T K I N S: Thank you. I am Reverend Jarrette C. Atkins, Sr. of the Department of Christian Social Relations of the Episcopal Diocese of Newark speaking on behalf of the Right Reverend George Rath Bishop of the Episcopal Diocese of Newark, and the Right Reverend John Shelby Spong, also of the Diocese of Newark and of the Department of Christian Social Relations of the Episcopal Diocese of Newark.

We state herewith our opposition to capital punishment imposed under any circumstances and to bills in particular S-46, S-639, S-938. I am grateful to you, sir, for the opportunity of appearing before this Committee to record the mind of our Diocese and the National Church on the subject.

First, we reaffirm the official stand of the Episcopal Church in the United States of America as adopted by its governing body, the general convention, in its opposition to capital punishment. The Resolution adopted by the general convention reads in part, "Inasmuch as the individual light is at infinite work in the sight of Almighty God, and whereas the taking of this human life falls within the province of Almighty God and not within the right of man, therefore be it resolved that the general convention goes on record as opposed to capital punishment."

We reaffirmed the official stand of the Episcopal Diocese of Newark as expressed in a similar resolution adopted by its 88th annual convention which reads in part, "Whereas capital punishment is contrary to the Christian doctrine of redemption, rehabilitation and reverence for life, and in view of the stand of our general convention against capital punishment, be it resolved by this convention that the diocese of Newark go on record as being opposed to capital punishment."

SENATOR RUSSO: Reverend, might I interrupt you? I notice you are reading your statement in detail, and it will take a lot longer than five minutes. Do you think you can perhaps summarize it somewhat?

REVEREND ATKINS: Our basic stand is this, capital punishment brutalizes both the condemned person and the condemning society. It allows the condemned to bear the sins of all in such a way that he has no opportunity for a redress or reform, because his life has been taken from him, and it allows society to forget its corporate guilt, and its responsibility for a single man's wrongdoings.

Because capital punishment affords no redress to those wrongfully accused, tried and executed, and because it is barbarous in nature, because it makes us unequal, and makes for unequal justice, because it fails in its announced purpose, but most of all because it usurps a prerogative, it belongs only to the God who gives us life, and because it is against the dictates of a religion that professes belief in the mercy and justice of God, and in the practice of forgiveness among men, we urge you not to release these bills from your committee. I speak for the Bishops of the Episcopal Diocese of Newark and the Department of Christian Social Relations.

SENATOR RUSSO: Thank you, Reverend. Your statement in full will be distributed to each member of the Committee. I do appreciate your comments. Thank you. (Prepared statement appears on page 100 X in the appendix.) Eleanor Howell.

E L E A N O R H O W E L L: Good afternoon. Thank you. I am Eleanor Howell of Hopewell Township, Mercer County, New Jersey, testifying in place of John Howell, my husband on behalf of the New Jersey Friends Council, an all New Jersey Quaker organization. While we cannot speak for all Quakers in New Jersey, we do undertake to discover and truthfully represent those views on which members of the Religious Society of Friends, that is, Quakers, are in substantial unity. Opposition to the death penalty is a position on which Quakers are generally in agreement - in New Jersey or elsewhere.

We understand that there are before you six legislative proposals that include death penalty provisions, the bills identified as S-46, S-639, and S-938, S-1100, and S-1119, and S-1477. Since we oppose them all on the grounds of our general opposition to the death penalty, I will not distinguish among them except to note in passing that some would give more sweeping application to the death penalty than others. If the death penalty is wrong in principle, as we believe it to be, then the more widely it is applied the greater the harm.

We oppose the death penalty first for reasons of principle - on religious and moral grounds - and secondly for practical reasons, as an ineffective means of assuring that the rightful interests of society are protected and enhanced. We believe that there is a divine spark in each human being and that everyone, no matter how depraved, is potentially capable of responding to this inner light, this impulse for good. It is therefore incumbent upon us to encourage the good in each human soul and to oppose those notions and impulses that lead to evil. In this we seek divine guidance at all times.

It follows that we cannot sanction or condone the killing of a human being in cold blood in the name of society. Although we agree that the crimes for which the death penalty is advocated are abhorrent, and although we share the sense of outrage when murder, kidnapping, and other horrible crimes are committed, we do not think it right for society through its agents to express its indignation and our won indignation through another act of violence of the very same kind. We utterly reject revenge as a proper motive; although the impulse for revenge may be understandable in human terms, we must disclaim it and abstain from any action to implement it.

In practical terms there are several good reasons for opposing the death penalty. The first is that it places irrevocable consequences upon the occasional and always possible miscarriage of justice. Although our judicial system is designed to minimize error, experience has shown that some errors do occur. A study by Hugo Adam Bedau, who was here this afternoon, published in 1967, reported 74 cases of wrongful convictions of criminal homicide. Eight of the accused persons were executed. Twenty-four others received the death sentence, but were not executed. There are cases on record in which a man accused of murder has confessed because of duress or poor advice from counsel, but later has been proved innocent. Even the appeals process is not infallible.

Are you thinking the time limit has been reached?

SENATOR RUSSO: It has.

MS. HOWELL: Okay.

SENATOR RUSSO: You see, where you have a prepared statement it is going to be distributed to each member of the Committee. They are going to have it before them. What I would suggest you do, perhaps, is either highlight it - or if there is something that you would like to add to it, please feel free to do so. To go through them and read them, even though you are going to submit them also is really not necessary, because they will be distributed to every member of the Committee.

MS. HOWELL: Under practical considerations, that point has already been made numbers of times this afternoon. The death penalty is usually claimed as given, and

when the law allows to the poor person who committed murder. And the third one is, we don't think that the death penalty is a deterrent.

SENATOR RUSSO: Thank you, Mrs. Howell, very much. (Prepared statement appears on page 103x in the appendix.)

Willis Thomas. Do you have a prepared statement, Mr. Thomas?

W I L L I S T H O M A S: I would like to read it.

SENATOR RUSSO: In its entirety?

MR. THOMAS: Yes, sir.

SENATOR RUSSO: Do you have a copy for the Committee?

MR. THOMAS: I have a copy for the whole committee. I would like to read this primarily because the National Council on Crime and Delinquency, whom I represent, is a national organization with its headquarters here in New Jersey, and it has been in the business of helping to devise better and a more effective systems of justice for some 70 years. The National Council on Crime and Delinquency is opposed to the death penalty in any form, for any offense, and in any jurisdiction.

It is difficult to understand why in a country as great as ours, where taking a life feloniously is considered the greatest crime, taking a life as a punishment is not considered cruel or wrong.

It would appear from the various findings over the years that a primary concern of the U. S. Supreme Court is whether we take life by execution in an equitable manner. I do not believe that in our society we will ever achieve that equity in sentencing, even of a gross kind. If we ever were able to achieve gross equality in sentencing, we would no longer have a society interested in killing people for crime.

The Board of the National Council on Crime and Delinquency in 1963 adopted a resolution condemning the use of the death penalty, and calling for its discontinuance and abolition in states where it still exists. I have given you copies of that, so I won't read from it. I would just like to point out that one of the reasons for adopting this policy is contained in the statement, "Sentences should not be based on vengeance." But you will find that the published statement goes into the possibility of it being a deterrent, and it goes into inequity and so forth.

Now, in 1971, the New Jersey Criminal Law Revision Commission issued its final report, and it said, generally, "We consider the issue of the abolition of the death penalty to be beyond the scope of the Commission's mandate although there is considerable sentiment within the Commission for abolition." And of course it did then go on and include the death penalty in its recommendations.

In 1972 a majority opinion of the California Supreme Court, written by Chief Judge Wright we find the following conclusion, "We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members."

The responsibility for the re-establishment of the death penalty, Senator, is in the hands of you and it is in the hands of the Governor, and in the hands of the courts. You are the people who must act and you do act before a person may be executed and none of you can be excused if the death penalty is an evil, which it is.

I sincerely hope you will not spend your valuable time in the vain effort of devising a statute that will eliminate disparity in the application of the death penalty.

No doubt a statute can be drawn that will meet the guidelines of the recent U. S. Supreme Court decisions, but it cannot eliminate disparity.

In all good conscience, can you justify the state - which is yourself, the governor, and the courts - committing the same crime as the person you would execute? I submit that whether you pull that switch yourself or not, if you vote for a law, it is just the same as if you were pulling that switch.

SENATOR RUSSO: I will agree with your last comment, that a vote for this bill is just the same as pulling a switch, and I think any legislator who is prepared to vote for this bill should approach it that way. I don't at all agree with you that to do so would be committing - as you put it - the same crime as the person you would execute. If I agreed with you on that, that it was a crime, we wouldn't be here. It is a difference of opinion, and I respect yours, and I hope you will respect mine.

MR. THOMAS: Thank you.

SENATOR RUSSO: Thank you very much, sir. We will take a short recess at this time.

(Whereupon a short recess was taken.)

SENATOR RUSSO: Mr. Ernest Lettieri.

E R N E S T L E T T I E R I: My name is Ernest Lettieri. I live at 894 Avenue C in Bayonne, New Jersey. You people here today are listening to the common people - the breadwinners. Most of all, the people who are concerned with this hearing are people who have taken time to express their concerns and the wishes of friends and/or neighbors and relatives or some concerned group. The group I am concerned with is the Bayonne Taxpayers and Rent payers Research Association.

I am speaking on behalf of myself and family and sensible friends, and I wish to relate to you here and now that capital punishment is in order, and should never have been rescinded. Oh, yes, we do have our ultra-liberals and so-called champions of the impoverished groups who in their contention will bear the brunt of capital punishment. But they will bear the brunt of this capital punishment law because they will be the most frequent offenders. These are the people who believe because they have not been given the right to have, that they be given the right to have by taking what they need by force, regardless of the means. The law of the jungle. This, in my opinion, is wrong, and should not go on unpunished. The conditions that prevail today did not come overnight. They came upon us gradually, because our legislators and senators have become soft pawns of powerful lobbying groups and organizations.

These people want to perpetuate their existence in the political limelight by doing the bidding of these organizations. I believe they have lost touch with the people. Keeping in tune with the changing times and the constituents, they are only available to their friends and a chosen few, and I say to you people today, go out into the vineyards of the law abiding citizens and they will attest to what I am trying to convey to you here today. The great country of ours was born of revolution. It was nurtured under disagreement. It prospered under resolution, the resolution that if you wanted to get ahead you worked, and what you earned was yours to have and to hold and not to be taken at the point of a gun or by threats or by intimidation.

There are people who favor capital punishment under certain conditions, the killing of a police officer in the discharge of his duties, but it is at home quite okay. I say this is wrong. A life is a life, regardless of whose it is, white, black, red or yellow. There can be no fine line of division as to where, when, how or whom, and an eye for an eye, a life for a life. I know that down deep in my own soul I could not be a party to letting someone go free, if any member of my family's life were taken by anyone at any time except by the good Lord. Because I can say I would not rest until

the act was avenged. I could go on for hours on end and discuss the pros and cons of the issue of capital punishment, but my suggestion to you is write your bills and submit them to the voters in referendum form. Let them have the last say; let them have the last word, or forever keep their peace. Gentlemen, there is no doubt in my mind and no doubt in yours that you know I favor capital punishment.

SENATOR RUSSO: I suspected that. Mr. Lettieri, you and I obviously agree on capital punishment, but I have on occasion this afternoon very much resented those who disagree with me who have suggested, as one speaker did, that it is a crime to propose capital punishment and so forth.

I must equally express resentment of those members of the Committee who are not here who do not agree with you and I - at your suggestion - that if they don't agree with you, it is because they are doing the bidding of groups or what have you, the things you mentioned. There are legislators who feel one way or the other on this issue, obviously, and in the deepest of conscience they don't agree with us, but it is because they just deeply believe that capital punishment is wrong, and it would be just as unfair for us to subscribe any motive to their viewpoint as it would be for them to subscribe a motive for someone like myself who is in favor of capital punishment.

I commend you for taking the position that you have taken. I appreciate your coming here and giving it to us, but, please, don't be too quick to subscribe an ulterior motive to one who disagrees with you. He may just believe in his conscience, as you and I do in the viewpoint we have taken, that what he thinks is right.

MR. LETTIERI: Sir, let me say this to you in all sincerity and candor, because I know of no other way to speak, capital punishment was rescinded in this state a few years ago - four or five or six years ago.

SENATOR RUSSO: It was declared unconstitutional by the Supreme Court.

MR. LETTIERI: Right. I believe this sort of gave the unruly element a carte blanche attitude to go out and take from those that have. I know I have worked hard and I have worked long. I know that if a robber came into my house to take what I have or to take what I hold, and I have a weapon in my hand, he doesn't walk out of that house. I know I am going to face the consequences, so I could not in good conscience plead temporary insanity because that man was in here, but yet you have lawyers today who will go before a judge and a jury and plead the cases of these people, knowing down deep in their hearts that they are guilty, but yet that is their just due, and that is their day's pay - to do what they are supposed to do. I say that in all candor to you.

SENATOR RUSSO: Mr. Lettieri, I will answer you by telling you that I am a lawyer, and I would also make that same plea in defense of a man accused of murder, because under the system we live under, the whole concept is based upon a man being given the best legal counsel he can be given. That is part of the criticism, that the poor cannot get that.

In my opinion, the lawyer who does that which you criticize is performing the highest - the highest - duty and obligation of his profession, and I hope this democracy never changes in that regard. I hope lawyers never refuse to do that. I thoroughly disagree with you in that criticism also. Any more?

MR. LETTIERI: No, I appreciate your disagreement. As I said, we were born under revolution, and we were nurtured under disagreement, but by the same token, when you work for something, you want to keep it. This is all I am after, and I would like to see justice given to everyone. Everyone is entitled to their day in court, whether they be guilty or not, and it is the attorney's job to defend that person, whether he is guilty or not. Of course, an attorney, knowing he is guilty should not take the case. If he knows,

that is. Now, I can clarify it by saying, if he knows.

SENATOR RUSSO: We can go on all day with that. Let me just say that I disagree with you.

MR. LETTIERI: Not knowing whether he is guilty or not, then, I would say, yes, the attorney is right.

SENATOR RUSSO: All right, thank you. Miss Laurie Anderson, speaking for Mr. Lennox Hinds, Esquire, National Conference of Black Lawyers.

L A U R I E A N D E R S O N: I will take excerpts from Mr. Hinds' statement, and I have a few comments that I would like to make in addition to that.

SENATOR RUSSO: Can you keep it within the five minutes?

MS. ANDERSON: I will do my best.

SENATOR RUSSO: Thank you.

MS. ANDERSON: It is unfortunate that you had to put a time limit on us.

SENATOR RUSSO: Yes, I wish we didn't have to. The only alternative, unfortunately, would be to bring you people back another day and we can do that. I will come back again, but I thought it would be much better, since you have a written statement, to do it this way.

MS. ANDERSON: I understand. I am also sorry that more of your colleagues from the Senate and Assembly are not here to have this experience. I think there is something to be gained by live testimony rather than reading it.

SENATOR RUSSO: I agree with you.

MS. ANDERSON: It may be advantageous having another hearing simply for that purpose, so that more people can be here from the Legislature to hear these statements.

SENATOR RUSSO: I might say, that, of course, is up to the Chairman of the Committee Senator Dugan. But in the event this bill does or any of these bills do pass the Senate, the procedure starts all over again in the Assembly, so I assume they will have public hearings. The issue is far from close to resolution.

MS. ANDERSON: I hope not.

SENATOR RUSSO: Go ahead.

MS. ANDERSON: Perhaps no other single event to occur in this bicentennial year more aptly symbolizes the ways in which legal argument can be used to mask and justify the perpetuation of the two parallel systems of justice which have marked this country's history since its inception than the passage of the death penalty in any number of the 35 states or the holding of the Supreme Court on July 2nd, and July 6th.

From our arrival as slaves in Jamestown in 1619 until 1865, the law justified our condition as chattel slaves and the brutal quelling of our rebellions; after 1865, the law was used to suppress our disconcerting struggles to achieve the rights of citizens and to create and maintain our second class status on constitutional grounds.

Throughout this country's history lynchings, bombings, burnings, rapes and murders against black, brown and red people have been disregarded by the Federal law enforcement agencies as outside of their jurisdictions. While they have been initiated and encouraged, illegal surveillance of our struggles as rebellious minorities have been controlled by constitutionally acceptable armed force. Racist application of State criminal law enforcement continues to select black and poor people for arrest, prosecution, conviction, imprisonment and death no differently in 1976 than in 1876.

The inescapable inference that the death sentence as applied prior to the challenge in Furman perpetuated an historic and institutionalized pattern of discrimination was obvious to even outside observers. In 1944 Gunnar Myrdal reported in "An American Dilemma" that "The south makes the widest application of the death penalty and Negro criminals come in for much more than their share of the executions."

Bald statistics confirm his view as to the frequency of this discrimination, but it is not confined to the south.

I will not go into the statistics in detail. They have been read to you earlier today, and they are in this report, but I would like to note and reaffirm what has been said that despite the Supreme Court's conclusion in Gregg versus Georgia that the guided discretion statutes on their face prevent the use of the death penalty in an arbitrary and capricious manner, statistics still support the fact that a disproportionate number of blacks have been sentenced to death. This is true under the very statutes which the Supreme Court very specifically upheld. For example, in Florida 40 persons are white, and 33 are non-white; in Georgia 11 are white and 18 are non-white; in Texas 21 are white and 21 are non-white. Therefore, those statutes which were bound to be constitutional have the same impact on poor and minority peoples as did the statutes found constitutional in Furman versus Georgia.

This discrimination will occur no matter how well drafted a death penalty statute may be, because racial discrimination in the operation of the criminal justice system occurs before a jury is convened. The prosecutor is accorded wide discretion over the exercise of his authority. There exists no effective procedure to review the prosecuting attorney's decision not to seek prosecution nor his decision concerning what level of criminal culpability to charge not subject to any rigorous standard of review. I may note one example of this occurred in the trial of Joanne Little in North Carolina last summer. I participated in that trial. At the end of the evidence put forth by the state and after the trial was over the judge in that case who had sat on approximately 100 capital punishment cases in his career stated that the State had no evidence to support a first degree murder indictment. If it had not been for the criminal defense team that Miss Little was able to have, she may very well have been convicted of first degree murder, and she may very well have been one of those people sitting on death row in North Carolina today.

The biases of a particular community follow the accused from the time he is first arrested and indicted to the point at which he is sentenced. We have not yet eradicated racism and bias from this criminal justice system. The Supreme Court noted in the Furman Versus Georgia opinion by Justice Douglas and Justice Marshall that it dealt squarely with the racism of the application of capital punishment. I would like to read two short quotes from Justice Douglas and Justice Marshall.

Justice Douglas stated, "It is cruel and unusual to apply the death penalty - or any other penalty - selectively to minorities whose numbers are few, who are outcasts of society and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." Justice Thurgood Marshall was equally unequivocal on the class and race assumptions on which the application of the death penalty was based. He stated, "It is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better represented, just-as-guilty person can escape. So long as capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo because change would draw attention to the problem and concern might develop."

The political climate in the United States has not changed significantly since Colonial days when the branding and slaving and corporal punishment of black slaves, native Americans and Hispanic minorities were both legal and commonplace. The death penalty

and other criminal sanctions are still tools selected by those in power to be applied to those who are most powerless to resist. It has been noted frequently during the day today that the public's support for capital punishment is currently at its highest point in many decades. But I may note that this concern for law and order was chiefly brought to the public forefront by our past President Mr. Nixon, and his Attorney General Mr. Mitchell.

Rather than focusing on the poor problems of crime and why we have the crime that we do in our society, we are now focusing on a band-aid cure. It has been admitted by many people here today that capital punishment will not solve the problems of crime. Capital punishment, the Supreme Court even noted, there is no study which definitively states that it is a deterrence. As a citizen of the state, it would be my most urgent request that the Legislators focus their attention not on perfecting a death penalty statute, which would be found constitutional and which can be utilized by this state, but rather on the ills of our society, providing an educational system which is equal for all, solving the unemployment rate.

Frequently, Senator Russo, you questioned my colleagues before me as to why the numbers of people who commit crimes are from the black community and from the ghettos. I think one suggestion as to that is the fact that there is such a high unemployment rate in the ghettos. Currently in Newark right now the unemployment rate for black males between 18 and 24 is about 50%.

It has been shown in a recent study that first offenders, once they are released from prison, if they are given a job then their recidivism rate is 10%. I think we will only reduce the crime in our society when we begin to deal with the very real problems that affect society across the board.

SENATOR RUSSO: I thank you very much. Your statement will be distributed to the Committee members.

MS. ANDERSON: Senator Russo, I would also like to put into the record, if possible, a study done by Marc Riedel on Discrimination in the Imposition of the Death Penalty.

SENATOR RUSSO: Fine. That will also be included in the record. (Prepared statement and study appear on page 112x in the Appendix.)

P H I L I P S. S H O W E L L, J R.: Senator, my name is Philip Showell, Jr. I am Executive Director of the New Jersey Association on Corrections. Before making some brief comments on procedural matters, I should note that the Association's Board of Directors has taken no formal position on any of the ten legislative proposals designed to reinstate the death penalty in New Jersey. As, I suppose, was the case with other bodies, we awaited the guidance of the United States Supreme Court.

Unfortunately, that Court's July 2nd decision has not, in our view, settled the issue definitively. In a series of plurality rulings on six death penalty statutes, the Court indicated the kind of sentencing procedures required to meet constitutional standards for any execution ordered by a state. The Court thus chose to focus on the narrow question of how to fairly impose a death penalty. But, as noted in an objective and thoughtful July 13th editorial in the Courier-News, the Court sidestepped - as we had hoped it would not - the big question: "whether execution is a 'proper' penalty for any crime in any case. . ."

That "big" question remains, and is squarely before this Legislature. We do not believe it is a question that should be answered amid the noise and confusion of a presidential election campaign when rational address to serious public policy issues is apt to be at its lowest ebb. Nor do we feel it is a matter to be decided by mail from constituents or the latest public opinion poll. Every citizen, including legislators, is free to state his or her opinion on the death penalty, despite or because of legitimate concern over the reported increase in the homicide rate. But only legislators are obliged to decide, for themselves and the rest of the citizenry, that big question: Is there both moral and social justification for the taking of any human life in the name of all the citizens of New Jersey?

Reinstatement of the death penalty is a matter whose gravity and complexity cannot be overestimated. We would submit that the "big" question deserves at least as much analysis and sober consideration as we are confident will be given to the procedural questions addressed by the most recent Supreme Court decision. It seems clear that even the most careful application of the guidelines for sentencing suggested by that decision may not, even with a bifurcated procedure and full consideration of aggravating and mitigating circumstances, prevent the death penalty from being imposed disproportionately, and therefore unconstitutionally, upon the poor and members of minority groups.

Address to the "big" question usually is reduced to consideration of the utilitarian question: Does imposition of the death penalty deter others from committing homicide? With due respect to others who have or may testify today, either for or against reinstatement, we submit that an objective review of the empirical data on capital punishment leaves us with a "Scotch Verdict." That is to say, the case is "unproven" with no firm indication that the death penalty either does or does not deter. However, we would submit, further, that the burden of proof in justifying reinstatement of the death penalty on grounds of its deterrent capability, lies not with the opponents but with the proponents. In short, there must always be some logical, attainable objective established before any public policy is changed or implemented, especially when substantial tax dollars may be required.

That brings me to our final point, one which we have been in the habit of addressing, since the Legislature saw fit to enact a new Juvenile Code without even a two-dollar appropriation. We believe that any measure to reinstate the death penalty should be accompanied by a fiscal note and an appropriation. For any who doubt that we are talking about a multi-million-dollar statute, please consider the clear need to provide 50 or more new "death row" cells at fully-allocated costs of up to, or perhaps exceeding,

\$80,000 a cell, annual incarceration costs of \$12 to \$14 thousand for each year an inmate spends on death row. Those with resourceful lawyers have spent a dozen years waiting to exhaust their legal remedies. To that must be added the additional costs of bifurcated sentencing, requiring two juries for each case in which the State seeks a death penalty, the costs of mandatory appeals from both conviction and sentence, and the expense of new trials when juries refuse to convict or sentence to death.

In summary, then, we urge the Legislature to give the closest and soberest attention to the "how to" principles enunciated by the Supreme Court, the "big" question and the costs involved, before offering any measure to reinstate the death penalty because we do not think that we have heard the last from the U. S. Supreme Court on this, the most fundamental legal question of all.

That is the statement. I have submitted it in writing and have read it practically verbatim.

I have one other question of you, Senator, and I recognize and respect the fact that you have been here since the hearing started this morning. Can you tell me whether or not the procedural rules for either or both Houses of the Legislature permit the conduct of such a public hearing as this without a quorum of either or both bodies being present?

SENATOR RUSSO: They do. A public hearing is to give the public an opportunity to present their viewpoints. Were there not this young lady here, our rules would not allow it. The theory is that so long as one member of the Committee is present and the testimony is being taken, which will later be transcribed and given to each member of the Committee, this procedure can be followed. I would say that the number of public hearings at which you have a full Committee or anywhere near it are very, very rare. That is the procedure.

MR. SHOWELL: I ask the question, not based on experience only here today, but on much experience in several similar hearings; and it is only really to help make the point that there is substantial taxpayer expense involved in the taking of this testimony and its transcription and the production of multiple copies.

SENATOR RUSSO: It has to be done anyway.

MR. SHOWELL: I am aware of that. I am simply raising the question without a firm conclusion of my own as to the answer; and, that is, whether or not considering some of the voices heard here today - and I don't include myself among them - both for and against this very complex, very weighty issue, whether the written word and the opportunity to inquire of certain experts, and we have certainly had some on both sides of this issue here today, are really not substantially lost when legislators are confronted, as you alone have been today, with that opportunity, to listen and suggest, and then to inquire.

SENATOR RUSSO: I don't know how to answer that. Let me only say that certainly I felt I ought to be here, even if there were other members of the Committee --- But were that significant to the Committee, the hearing would have had to be scheduled at another time because we knew that a number of legislators could not be present today. But because a record is being taken, the Committee felt and the Chairman felt the hearing should go on and we would study the transcript. I don't know what else to add to that.

MR. SHOWELL: Thank you, Senator.

SENATOR RUSSO: Thank you, sir.

Professor Singer.

R I C H A R D S I N G E R: Mr. Chairman, I have a prepared statement, but I have given that to you and I just want to summarize the things that are in it.

Let me begin by saying that I have been here most of the afternoon and I have found one very startling proposal; and, that is, that legislation on such a weighty

issue need not have any basis in reason, that there is no requirement that there be a rational basis for legislation. It strikes me that if any legislation is to be evaluated on the basis of reason, it is that legislation which takes life.

Thus, without going into questions of punishment - and, as the statement indicates, I favor punishment as the general goal of the criminal justice system, rather than rehabilitation and other goals - it seems to me that there are only two potential reasons for the death penalty: One is retribution and the other is deterrence.

On retribution, let me simply say that the strongest argument that I know of for the death penalty on that is that the felon has taken a life; therefore, it is fair and just, at least morally just, that we might take a life as well. But the fact is that we don't do that in our regular criminal justice statutes. If a felon, for example, lops off an arm, we do not say, "Then we will lop off an arm." The eighth amendment, we know, prohibits that, as do our moral guidelines and principles as well.

The mere fact that we are talking about a murderer in this case - and I want to limit it to that because I think there is no justification for the death penalty on retribution grounds - would still not justify the death penalty.

I must turn next to the only other argument I know of, which is deterrence, and I think Professor Bedau has talked about, so far as I know, the only study in the last 25 years which has done any real work on deterrence, and suggested that there is a deterrent effect, and that is Ehrlich's study.

SENATOR RUSSO: Could I break in at this point and ask you something which might help me in my own thinking? You have taken the approach that so many people here have today; namely, that we must justify the death penalty on the deterrent ground or there is no justification for it. What I would like to ask you about - and I do this because I respect your training and your background and perhaps you can enlighten me a bit - is this: If a man, for example, in a crime of passion comes home and finds his wife in bed with another man and murders her - you know we talked about that - that man wouldn't be deterred. Yet if he only wounds her, we punish him with imprisonment. It is still no deterrent. If a man commits rape, we punish him. Yet the punishment for rape is not a deterrent because, I think we agree the rapist like most criminals doesn't expect to get caught. So punishment does not deter, I think. Yet we punish him. Why should it be different with death? Isn't really the only issue here not whether it is a deterrent, but is it a proper and fair penalty for the crime committed? You may feel not; I may feel so. But why does deterrence have to be the basis? We punish people for so many crimes and the punishment is not a deterrent because they committed them not with the idea, "Gee, I can only get 15 years, but I'm not going to get caught."

PROFESSOR SINGER: That is probably correct in almost every instance.

SENATOR RUSSO: Why should it be different in this ---

PROFESSOR SINGER: I think there are two potential justifications for the death penalty. The one is deterrence and I think you are now agreeing with me that it does not deter. So then, even marginally, which it seems to me is the only kind of a deterrence that we are, in fact, talking about - we are not talking about the death penalty versus a pat on the hand; we are talking about the death penalty versus life in prison -- so we talk about the efficacy of marginal deterrents rather than the efficacy of punishment itself.

Now let me turn to the other. The other aspect of it is the punishment aspect. And I think we are justified, whether it deters or not, in punishing people who have committed crimes. The question then is: On what grounds are we justified in taking a life? I suggest to you that if you accept, as I think everyone does, that there are

certain limitations upon punishment - we will no longer boil in oil; we will no longer cut off arms or hands; we will no longer put on the wrack; we will no longer pillory, even if the offender has done precisely those things to his or her victim - then it seems to me that what we are talking about is the dignity of the human person. And when we talk about particularly the death penalty, we are talking about the person and the dignity of an individual. That is the limiting factor. An eye for an eye was never meant to be a justification for taking an eye. It was meant to be a limitation on the punishment that could be inflicted for the offenders having taken an eye. It is not a sanctioning principle or a justifying principle; it is a limiting principle. That is the history of Hammurabi's code. So we can say death would be only the outer limit. Are we then justified in imposing that punishment?

It seems to me that for many of the reasons that have been suggested here today we are not. We can talk about dignity. We can talk about personal integrity. We can talk about it, as Justice Blackmun did when he outlawed whipping in the Arkansas State prison system, as being a punishment that both debases the punished and the punisher. It seems to me that that is the heart of the argument against the retribution argument for capital punishment.

Everybody focusses, I think, on deterrence because deterrence is a rational way of articulating a goal. And the fact is that there is no deterrence, no marginal deterrence, in the death penalty.

Having fallen out of that, it then becomes, I suppose, a matter of where does one draw the line on punishment. It seems to me that if one takes boiling in oil and those kinds of things and says, "We can't do those because they are too barbaric and are outside the scope of civilized society to do," then we must similarly say that about the death penalty, even though we recognize that the punishment inflicted is no greater on the offender than the injury which he or she inflicted upon the victim. It seems to me that that is the limiting principle of the code of lex talionis. That is basically, I think, what I was suggesting.

Let me take one other aspect, if I may, so that I can deal a little bit with the deterrents. Professor Bedau mentioned the fact that Ehrlich's study was nationally based rather than state by state. And that is a major problem. There is another aspect that is very important in Ehrlich's work; and, that is, that Ehrlich's whole data system is very suspect. The data base that he used was the FBI Reports from 1930 to 1969 and it is virtually agreed by everybody on both sides of the fence on this that in the early '30's and really up until about the middle '40's, the FBI was very, very insubstantial and very spotty. So, if you remove from Ehrlich's multiple regression analysis the shaky data of the 1930's, it is quite clear that he has no basis at all to find any kind of deterrence in his analysis. I would suggest - I think Professor Bedau did -- but there are several articles in 85 Yale Law Journal dealing with Ehrlich's analysis, including a rebuttal by Ehrlich. While I am no statistician, but a lawyer, I am convinced after reading those articles and Ehrlich's rebuttal that Ehrlich is wrong and that his data base simply is not sufficient to justify his conclusions. Being the only major study that has suggested there is a deterrent value in the death penalty in the last 25 years, it seems to me that there is no evidence that it deters.

One other thing on this burden of proof point, if I may - it has been hassled over a lot today - but it does strike me that, if one is going to discuss any legislation, one party or the other, proponents or opponents of the legislation, must carry the burden. In this instance, the Supreme Court in its decision said, we will assume the constitutionality of the death penalty statutes because that is what we do with all other statutes. I am

appalled at that not only because I disagree with the result, but because the court in other instances in the last generation or even in the last decade has said that the burden in many instances is on the legislature to justify the statute. It didn't do that. All right - that is by the board. But certainly before this legislative body acts, it seems to me the burden ought to be on those who argue that there is some reason for imposing death as opposed to life imprisonment or some lesser sanction which has proven to be at least as effective, if not more effective, than the death penalty is itself. That would be the negative correlative of the findings that the death penalty itself does not deter, that life imprisonment does deter, at least as effectively. That is what the negative correlative would be.

So it seems to me that that is one of the reasons that everybody talks about the burden of proof. And I think with that and with my written statement, I will stand. If you want to chat, I am here.

SENATOR RUSSO: I think you made your point. We probably could chat an hour or two on this and still not exhaust it. But your written statement is in the record and I am going to have to just study that as will the other members of the Committee.

(Written statement submitted by Professor Singer can be found, beginning on page 123x)

PROFESSOR SINGER: Could I say just one other thing; and, that is, that I haven't had a chance to really look at the bills. I just looked at them briefly today. I would hope, if there is any thought of ultimately passing the death penalty, that there is going to be serious looking at those bills. Just taking yours, for example, and I am not picking at it - it just happened to be the first one I saw - "all first degree murder is subject to the death penalty." Now, in New Jersey, you have a lot of felony murders that would then be subject to the death penalty. We know the typical felony murder - hypothetically, the burglar goes in, kicks over a stand, it falls on the dog, the dog jumps on the master and the master dies. That is a first-degree murder, subject to the death penalty. It seems to me that at the very least you are going to have to very, very much narrow that statute.

SENATOR RUSSO: I am considering and have already instructed the staff to prepare the necessary amendments. I am considering limiting my bill to the actual perpetrator of a willful, premeditated first-degree murder and not attempt to cover in this bill felony murder, perhaps not even kidnapping, perhaps not even assaults upon the President or attempts to kill, as distinguished from murder of the President, himself. In other words, to make this statute --- As you say, if we are going to have consideration of a death penalty, perhaps it ought to be a very tight statute with very tight standards, first of all, limited as to the crimes to the actual murderer, first-degree murderer, and with very tight standards prior to the imposition of the death penalty. I do not want to see the death penalty indiscriminately applied in New Jersey.

PROFESSOR SINGER: I gathered that from the discussion today.

SENATOR RUSSO: If it is going to be reinstated, I want to see it only in those most serious and unusual cases. Along the lines you mentioned, I believe that is what I will do in mine. Of course, I can't speak for the other sponsors of their bills, but I believe mine will be so limited.

PROFESSOR SINGER: I understand. Thank you.

SENATOR RUSSO: Thank you, Professor, very much.
Prosecutor Anthony Martone of Essex County.

SENATOR RUSSO: Anthony Martone, Essex County.

A N T H O N Y M A R T O N E: Senator Russo, let me say at the outset that I envy your position here today, not as a state Senator, but as Chairing this discussion, because I would at many points have liked to answer questions of both proponents and opponents who have addressed you so far today. Fortunately for the brevity of this hearing, I don't have that right.

Before I begin, let me preface my remarks by saying I am here on behalf of Mr. Lordi, the Essex County Prosecutor, and that the references that I make to the prepared statement will be references that are his opinion, all of which is shared by me, and I do represent him in that capacity. There are several other things to which I will address myself, and I have dicussed them with the Prosecutor, and I think I should direct myself to these today.

In addition to the prepared text, there are several notes and comments that I have added as appendages thereto. I will give you the prepared text subsequent to my presentation.

On behalf of Joseph P. Lordi, the Essex County Prosecutor, I have been requested to appear before you in support of legislation such as Senate Bill 639 proposed by Senator John Russo abdicating the death penalty for certain classes of criminal conduct. That doesn't mean, Senator, that we absolutely would adopt your bill as it presently is. This bill is one of several proposals submitted to the Senate concerning the reimposition of the death penalty in New Jersey. Recently the United States Supreme Court rendered a series of opinions on death penalty statutes from other jurisdictions. In those opinions the court preliminarily stated that the death penalty is not cruel or unusual per se. Historically cruel and unusual punishment connotes torture or lingering death, punishment out of proportion to the offense, or arbitrary and capricious selection of convicted defendants exposed to sanctions.

It was emphasized by our Supreme Court that there were situations in conformance with the temporary values where the death penalty could be applied constitutionally. In the death penalty cases under discussion, the Supreme Court approved the various modes for applying the death penalty to those convicted of the crime of murder. I think it is interesting to note, Senator, that in the five cases considered in that opinion, which I have read at length and attempted to digest as best as I could, the court only dealt with the death penalty, vis-a-vis the crime of murder. So, for example, the court approved of the following: One, a bifurcated proceeding to separately determine guilt and punishment; two, a weighing of mitigating and aggravating circumstances by the fact-finder to give guidance in sentencing, and corollary to that, at least one of the statutory aggravating factors must be found to have existed in order to impose the death sentence, and another corollary would be, that an open hearing for the presentation of any other relevant evidence to the imposition of the sentence; and, third, direct review by the highest appellate court of the jurisdiction.

I must digress at this point, Senator, to tell you that in reviewing your bill I frankly found some problem with ambiguity relative to that criteria set up by the Supreme Court of the United States. As I read the cases, the Supreme Court mandated that any other relevant evidence to the imposition of the sentence should be admissible at that second bifurcated hearing relative to sentencing. I think that the present status of the laws that exist in New Jersey would agree with that concept as annunciated by the Supreme Court. Your bill would seem to limit in Section 6a the evidence presented with respect to the imposition of the sentence. Perhaps it wasn't meant to do so, or perhaps

I am reading it incorrectly.

SENATOR RUSSO: Let me stay with that point a minute, because I want to be sure I understand what you are saying. You don't think that the standards set forth in the bill are broad enough in Section 6a?

MR. MARTONE: Excuse me, sir, I question whether or not these standards are broad enough and the note that I have, having reviewed your bill is in reference to page 3265 of the Supreme Court decision, wherein it is said by the court - and this is in conformance with present New Jersey law - that the defendant should be allowed to present evidence relevant to sentencing which may not be included in one of the statutory mitigating factors of your bill.

If your bill, sir, limits the presentation of evidence, which is included in your mitigating factor, then it might not be broad enough to come within the purview of the Supreme Court decision. I don't know if your bill means that. I just point that fact out for your consideration, sir.

SENATOR RUSSO: Mr. Martone, in line 20 -- do you have a copy of the bill?

MR. MARTONE: Yes, sir, I do. In going through the bill I raised this question with respect to the potential ambiguity of lines 27 to 30. I question whether or not the bill allows for the inclusion of all relevant evidence, because in lines 27 to 30, "Except that evidence determined by the court to be relevant to both an aggravating and mitigating factor shall be admissible under the rules of evidence." It would seem to me that that section of your bill satisfies the mandate of the Supreme Court decision, but there is a question of ambiguity in my mind, at least, going back up to Section "A" where it says, "Any evidence relevant to any of the mitigating factors set forth in Subsection B may be presented by either the state or the defendant, regardless of its admissibility."

SENATOR RUSSO: And it seems to be broad?

MR. MARTONE: Yes, sir, but then it continues, "...but the admissibility of evidence relevant to any of the aggravating ---

SENATOR RUSSO: Aggravating factors.

MR. MARTONE: Yes. Okay, I just merely point that out because there is a potential ambiguity here as we have gone through the bill.

SENATOR RUSSO: Okay, thank you.

MR. MARTONE: Back to the prepared statement. By comparison Senate Bill 639 provides one example of a sentencing procedure which could conform to constitutional standards for the imposition of the death penalty, we feel. This proposal contains those elements mentioned by the court with approval.

Preliminarily, by amendment the murder statute would allow for the entry of guilty pleas to murder charges. Whether an adjudication of guilt is either by way of plea or trial, a convicted defendant would be given a separate sentencing hearing with a judge and a jury to weigh statutory mitigating and aggravating circumstances, and apparently - and I say apparently because of the question I have already raised - all other relevant factors. I would hope that the bill is not ambiguous to others as it potentially was to us. A jury could be dispensed with only upon affirmative request of the defendant. The defendant is further protected by those provisions which place a heavier burden of proof upon the state, and which mandate a direct review by the New Jersey Supreme Court in every case where the death penalty is imposed.

To digress again, for a moment, your bill imposes the burden upon the defendant to show the mitigating factors by a preponderance, and the burden upon the state to show

beyond a reasonable doubt those aggravating factors. Again, we would question whether or not the court would require the defendant to prove his mitigating factors at all, no matter what his burden of proof, or should the state be required to disprove. We concur with your position in your bill, sir. And the Prosecutor's position is that your bill sets forth fair criteria within the guidelines and parameters set up by the United States Supreme Court decision, because not to require the defendant to proceed at all, it seems, would put the state in a rather untenable position with respect to ever showing a death penalty case.

However, in reviewing the Supreme Court's decision of some 75 pages, I find nowhere really where the Supreme Court actually addresses itself to that particular issue. Our position is, that your bill is sufficient with regard thereto, but it is another question for consideration.

In 1975 the County Prosecutor's Association of New Jersey passed a resolution urging the New Jersey Legislature to reimpose capital punishment. Today, the Essex County Prosecutor remains convinced that capital punishment is necessary for the entire law enforcement community and for the general welfare of the public. As noted by the United States Supreme Court, the death penalty serves two principle social purposes, retribution and deterrence of capital crimes by potential offenders. Apart from these considerations, capital punishment has been viewed as an expression of moral outrage and revulsion felt by the great majority of citizens for heinous crimes.

A person who commits repetitive violent actions now faces sentencing secure in the knowledge that no matter what the nature of his latest offense, no matter what the pattern of his recidivism, no matter how inhumane, socially reprehensible or freakishly bizarre the nature of his crime may be, he can suffer no greater punishment than a finite term of imprisonment. Such defendant being intimately familiar with the prison and parole systems is inevitably aware that the term of his incarceration is subject to reduction. Unless and until that segment of the criminal society which commits such morally contemptible and depraved savagery is made to realize that society will no longer tolerate these acts without ultimate retribution, these acts will undoubtedly continue.

For these very reasons the Essex County Prosecutor endorses the concept of capital punishment and legislation which would reimpose the death penalty in New Jersey. I might add to that prepared text, sir, some comments that I have been constrained to write down while listening for the past four and a half hours to some of the remarks of my predecessors and some of the questions that you postulated to them.

I don't think we should lose sight, nor should you as a legislator and your fellow legislators, of the fact that we are not talking of all crime, and almost everybody that sat in this chair before me - although they addressed themselves to specifics - seemed to talk about all crimes. The Prosecutor doesn't profess a death penalty to be the answer to crime, nor is it the answer to murder. The death penalty as proposed by you - and as endorsed by the Prosecutor - would only be applicable to a very small segment of criminal activity. I don't say this with any degree of vanity, but I don't think anybody who sat before you today has investigated more homicides than I have. And I am constrained to disagree with the Professor who preceded me several hours ago now, the Professor of Philosophy whose name I cannot recall, who posed the question to you, isn't all murder heinous and horrible and depraved and cruel. I say to you in answer to that question, the answer is no. I don't mean to condone any type of murder; I don't mean to condone any of the instances that we have heard other people come up with, such as Former Senator Woodcock. I don't think you or any bill or any legislator or the prosecutor, nor do I contemplate that a man who comes in and sees his wife in bed with another man

and kills either or both of them should be or would be under your bill or any bill that we would endorse subject to the death penalty. People say that, and they lose sight of the mitigating circumstances that you propose and the aggravating factors that you propose.

There are some murders, sir, and I have been involved in the investigation of 700 or 800, not a lot, but some murders committed by some people, not a lot of people, that are of such a horrible nature that give evidence of such a recidivistic attitudes that give evidence of absolutely no potentiality for rehabilitation, that would warrant the death penalty. That same Professor conceded - surprisingly to me - the concept of retributive justice, and if retributive justice is conceded to be acceptable and desirable, then it becomes a judgment of society and you as a legislator in representing that segment of society who are your constituents could vote on and conclude what is in effect penal retribution. We feel that some types of crimes in some instances committed by some individuals that are punishable by the death penalty.

I was also interested to hear you say, sir, that deterrence was not your primary concern. I would concur with that on a personal basis, and this is me to you. I think that we have to begin conceptually with a purpose for the imposition of the death penalty just as we have to have a concept for the imposition of any penal sanction that goes along with any law enacted by any legislature. Conceptually, then, it would seem that we should conclude that specified types of crimes are subject to this specified type of retributive justice.

I listened again with interest to some of my predecessors who talked about all of the experience that they had. I don't know how many of them investigated a homicide. I don't know how many of them were present on the scenes of particularly horrible homicides. I assume that you have been, sir. I know that I have been. And I listened with interest to your remarks in response to some of the remarks of some of the predecessors at this microphone, and you said it would be interesting if we could show to a jury or to the public the crime happening. I have recently finished trying a case - and I won't mention the particularities of it, because there are other defendants left to be tried - where it might in fact very well constitute, at least with respect to the actual perpetrator of this felony murder, a capital case - what might very well be an appropriate case in which the death penalty might well be imposed, and I have the commission of that crime at least with respect to the primary perpetrator on video tape. So, Senator, that is the only instance I know of where I could help you with your idea.

Other people talked about Furman versus Georgia, which is old law now. I don't think that any of us who are proponents of capital punishment would disagree with the holding of Furman versus Georgia, and I don't think that your bill as proposed - or any bill such as your bill - and I haven't looked at any of the other bills other than yours, sir - is in divergence with the holding in Furman versus Georgia, nor do I think that the views of the proponent such as Mr. Lordi are antagonistic toward the views of Furman versus Georgia. You will note that within the prepared text that I have read to you, and within all of my remarks I have made no reference to the opinion of anyone, other than the Prosecutor's position, and I have quoted from no learned professors, and I have quoted no statistics, because I basically feel that your opinion as an individual and as a legislator based on what I assume to be - and I know from experience - and I know will be conscientious exercise of your own ideas and feelings with respect to how you should vote on this case, and I know that your vote and the votes of your fellow legislators will be exercised predicated upon knowledge that you have assimilated with respect to this.

So, I don't think that you should superimpose the opinions of Professor Ehrlichman or anybody else for your own, because yours are just as good as his. I listened to the

last person who preceded me at this microphone talking about boiling in oil and cutting off arms and the origin of Hammurabi's Code of Law, and its guidelines and its purposes for enactment, and I suggest to you, sir, that the reason that people are no longer boiled in oil, and the reason that you don't cut off an arm when an arm has been previously cut off is because by and large with the defendants who have committed crimes which centuries ago might have subjected them to be boiled in oil or retributively had his arm cut off if he had done so, those defendants, sir, are very likely to be good candidates for the rehabilitative processes which our penal system is supposed to consider as one of its criteria. We lose sight of the fact that there are three criteria for sentencing, among which are deterrence and rehabilitation, but punishment is almost completely forgotten these days.

There are some people, who, by their actions, and the type of crimes they recidivistically commit have demonstrated that they are not candidates for rehabilitation and who have committed such horrible, morally outrageous crimes that the only appropriate sanction to be imposed upon them would be the death penalty. Thank you.

SENATOR RUSSO: Mr. Martone, needless to say, your reputation as an outstanding prosecutor with regard to homicide work, particularly, has preceded you, and we are very, very appreciative of having had the opportunity to have your testimony entered into the record. I am sure my colleagues will be as interested in reading it as I was in hearing it. We thank you and Prosecutor Lordi for giving us this opportunity.

MR. MARTONE: Thank you, sir.

SENATOR RUSSO: Mr. Larry Loigman.

L A R R Y L O I G M A N: Mr. Chairman, I am Larry Loigman, a resident of Lincroft, Middletown Township in Monmouth County. I am a third year law student at George Washington University, Washington, D. C., and I am here on behalf of Chief Joseph Mc Carthy, the Middletown Township Police Department.

I have worked as a special police officer for that Department for the past five summers handling many aspects of criminal investigations and special assignments from the Chief's office. Several months ago I served as Chief Mc Carthy's principal research assistant in connection with the Governor's Special Committee to study the prison furlough program, which he chaired.

Mr. Chairman, the death penalty is an awesome and powerful criminal justice tool, one not to be used lightly, but also one which must be available when its use is required. The bills before you today address some of those situations - which measures would allow the State of New Jersey to execute certain persons found guilty of first degree murder, kidnapping for ransom, treason, and assaulting high government officials.

SENATOR RUSSO: It is obvious that you are reading from your prepared statement. The other nine members of the Committee are not here, but they are going to have the statement before them. It really does not serve any purpose to read aloud for an almost empty chamber and one member of the committee the entire statement that you are going to give us anyway.

MR. LOIGMAN: No, it was not my intention to read the entire thing. I am going to read several paragraphs, but not the entire statement.

SENATOR RUSSO: Thank you.

MR. LOIGMAN: Retribution is the most obvious goal of society in executing those guilty of the most heinous crimes. The social order cannot survive when certain persons threaten its very fabric by murdering, robbing, and plundering. There is a feeling of revulsion, moral outrage, which decent people feel about the gravest of crimes, and

society must be allowed to express such feelings. In the case of the ultimate crime, that feeling is best expressed through the ultimate penalty, which is death.

We must reestablish the principle of personal culpability for criminal acts. Contrary to what our social scientists tell us, the individual is, in large measure, the force that must be held responsible for his own actions. My experience with the furlough study groups showed me vividly that our current prison system is not working. It does not rehabilitate, and it does not prevent crime.

Capital punishment, on the other hand, exacts from the individual criminal the penalty which society must demand. Recent sociological studies provide important empirical support for the belief that the use of the death penalty decreases the number of murders. In any event, how can we measure the number of crimes which are not committed, or persons who are alive today because their potential killers were executed years ago or deterred by the ever present threat which the death penalty constitutes.

I would like to mention a few points regarding the various bills before you. S-46, S-1100, and S-1477 would eliminate death penalties for kidnapping for ransom, treason, and assaulting high governmental officials. We feel that these, in addition to first degree murder, should be capital crimes. They threaten the lives of many, just as first degree murder takes the life of one. The legislation, on the other hand, continues to include the killing of law enforcement officials under the category of first degree murder, and for good reasons. Policemen, unlike ordinary citizens, cannot turn and run when approached by a violent criminal. They have no right to retreat. They must stand and act. Our criminals should know that when they kill a police officer, their lives, too, will be cut short.

The provisions in some of your bills calling for minimum sentences which cannot be reduced by parole or probation are also steps in the right direction. In 1964, the Commission appointed to study capital punishment in New Jersey concluded that capital punishment should be retained. Twelve years later, as we again debate this question, we still need statutes providing for capital punishment. Society must not be deprived of its ultimate sanction against the wrongdoer, its only way of revenging the cruelty shown to murder victims.

I urge you to act favorably on a bill to restore the death penalty in our State. Our citizens who seek the protection of their police department, as well as other legislators, deserve no less. Thank you.

SENATOR RUSSO: Thank you very much. Winifred Canright.

WINIFRED CANRIGHT: My name is Winifred Canright. I speak as a private citizen who has had considerable experience, since Attica, as a volunteer in the Trenton State Prison.

The young man mentioned the death penalty for people who injure or who kill policemen. I would like to say, if that is being considered, I would like to have that extended to legislators. Now I like legislators even better than I do policemen. I think you are very valuable to the State and I would like to have the same protection for you.

SENATOR RUSSO: First of all, you are music to my ears and you revive me at this late hour. But, secondly, I feel it is only fair to warn you that in this room right now there is one legislator and two policemen. So be careful.

MS. CANRIGHT: I said I like them both.

SENATOR RUSSO: We appreciate that comment very much.

MS. CANRIGHT: I am going to try to be brief. How much time do you want me to cut it to?

SENATOR RUSSO: I can only plead to you for mercy because it is so late.

MS. CANRIGHT: Eight minutes?

SENATOR RUSSO: Less if you can.

MS. CANRIGHT: Five? All right.

I don't have a typed version because my typist didn't arrive. I have a handwritten one.

I have handled my paper from an entirely different viewpoint than the others. I knew you would have a lot of learned people with legal backgrounds and statistics. So I have tried to keep mine to the personal.

I appreciate speaking as a citizen who is concerned with law and order. My concept of law and order is impartial justice under law, administered not for vengeance or retribution, but for the permanent good of society. Most of us here were brought up to honor the ideas expressed by the prophet Amos: "Love mercy, do justice, and walk humbly before thy God." If our justice system applied those words, we would have real justice. The man who walks humbly before his God could not possibly usurp divine power by decreeing the death of any person. He could not play God by consenting to turning the switch on an electric chair.

Tom Wicker says, "The palpable inability of fallible human beings to determine fairly who deserves life and who deserves death is reason enough to leave the question of death where it properly belongs - out of human hands."

One brief statistic is all I am going to give on statistics concerning deterrence: There were 8,500 homicides in the United States in 1964; 2,620 were convicted; 81 were sentenced to death; and 2 were executed. Now I ask you, is that any kind of deterrent? 1964 was picked because it was the last year that all over the country there was capital punishment and statistics available.

SENATOR RUSSO: You understand, of course, around that time there was much talk about the constitutionality of the death penalty and that might have influenced the fact that there were very few executions.

MS. CANRIGHT: It could.

"Cruel and unusual" are easy words to say, but it is hard to realize their meaning unless you are personally involved. In 1968, I spent three months attending the trial of 12 Plainfield youths, accused of the riot killing of a policeman, who had just shot a young black man. About 75 people were involved in the spontaneous, retaliatory killing. The prosecutor demanded the death penalty for the twelve.

One morning I was chauffeuring four of these young men from their homes in Plainfield to court in Elizabeth. They fell into a discussion of which method of execution they would prefer - electrocution or the gas chamber. The details, even when impersonal, are gruesome, but when you hear them, knowing that they may soon apply to the young speakers, it is a shattering experience.

Louis Nizer described the execution of Julius Rosenberg:

"Two thousand volts, delivered at the maximum eight amperes, crashed Julius violently against the straps. . . His body snapped back and forth like a whip. . . His neck seemed to grow several sizes. Yellow-gray smoke rose in wisps from his head. There was a hideous stench in the room of burning flesh, urine and defecation. . ."

Then I bring you an invitation.

SENATOR RUSSO: Mrs. Canright, let me just offer a thought to you at this moment. I thought that argument would have been presented earlier today - it hasn't come yet - namely, a somewhat emotional description of a person being executed. I think it is a horrible thing. But I ask you to keep in mind what some of these victims of murders look like too.

MS. CANRIGHT: I agree.

SENATOR RUSSO: I think it would be inappropriate for me, for example, supporting the death penalty, to display photographs of victims of murder, because then I seek support on an emotional basis - and that is wrong. I think it might be equally inappropriate to seek opposition to it, based upon a description such as you have given. I don't criticize you for it. I merely say, in my judgment, either approach would be inappropriate because they are gruesome either way. The victim of the murder, the murder, itself, and the execution - none of it is pleasant business.

MS. CANRIGHT: We have heard a lot of comments about the horrors of murder today so I felt it was fair to put in this. But that's all of that. I am at an end on that.

The thing that I do want to say most is that I have been good friends of quite a few people who have been on death's row and who are also serving life sentences in the prison. I feel that the most hopeful thing in our prison system in New Jersey is inmate organizations which are organized, most of them, to help other inmates prepare for going out on the street and who are working to make community contacts for them to get housing, jobs and some income. These have spread out in cases where they have been given community release and a tremendous job is being done. Forum has gotten jobs for some 300 inmates. I have heard several men that they have helped say they had never in their lives ever been out of prison more than a month at a time until they came to Forum and they have been out a year and are never going back. CAVID is another organization. If you read today's Trentonian, Ken Carolan has an article about its work. There are inmate organizations like that at Rahway and Leesburg. The ILA are working to prevent riots by working on legal means. These organizations are nearly all of them headed by men who are doing life sentences. Some of them have been people who have been on death's row until released in 1972. I ask that we think: Can we waste lives of people who are ready and eager, after having been incarcerated, thinking through things and changing their values? Can we waste the lives of those people who have such potential and who are actually doing a great deal to better the society in which they live?

Thank you. (Mrs. Canright's written statement can be found beginning on page 138x)

SENATOR RUSSO: Thank you very much, ma'am.

MS. CANRIGHT: I think I kept it pretty short.

SENATOR RUSSO: You sure did. You were very helpful. I appreciate it.

Our final witness is Richard J. Stuart.

R I C H A R D J. S T U A R T: Let me say that I wish to thank Winnie Canright for making her presentation short because that gives me more time now, since we figured on going until about nine.

SENATOR RUSSO: No, it doesn't. We don't mind if you stay. We will leave and you can continue.

MR. STUART: Well, I would hope that what I have to say might hold your interest. I find that what has not been said here today is as interesting perhaps as what has been said over and over again. Some of the assumptions that I have heard here today have interested me.

There has been an ongoing discussion here of the death penalty as though the death penalty did not exist in the State. I find this interesting when one considers the fact that we have armed policemen. I am not taking issue with the fact that we have armed policemen. But I am saying, as a matter of fact, we have armed policemen who are in a position to impose the death penalty any day of the week, either because they are a good shot or because they are a sloppy shot, and for a range of offenses, because many times when they are firing at a fleeing suspect, they don't even know what the offense might be. But the person is just as dead as though he were executed in a death chamber.

We have talked about deterrence, whether there is or there isn't a deterrent. I have objected over a long period to people arguing that there is no deterrent to this because they have not been able to statistically establish it, in that where there have been laws, crimes are still committed, and this proves that there isn't a deterrent. I believe it hasn't been brought out strongly enough that we have no way of knowing and probably never will have any way of knowing how many people are deterred from a crime by the penalties, whatever the penalties may be, people who do for a moment stop and think of the penalties and never commit the crime.

There has been an assumption apparently on the part of most of the speakers that murder is the worst crime and, therefore, murder is something that we should punish with what, when we get done with the semantics, is another murder by the state. I wonder if this has really been thought through. As I listened to some of the speakers today, I couldn't help but think of two cases that have been in the news in New Jersey. One of them was the case of a young girl a few years back who was grabbed, I believe, but I am not certain of this, on the way home from church - a 12- or 13-year-old girl - dragged into the basement of a deserted building by a man, brutally beaten - I think the appropriate term would be ravished rather than just raped - and is in a mental institution today as a result of this experience. I look at something like that, and, though no murder was committed, I wonder if the crime was not worse than a murder. There is a case more recently up in Prosecutor Lordi's territory where a young man was robbed and injured - I don't recall now how - but he is in a wheel chair today. Of course, the person who perpetrated the crime is out. He may still be on parole. But he was sent to the Youth Complex and he is out on the street. Here is a young man who will be in a wheel chair the rest of his life.

If we are looking for the most horrible crimes, I am wondering if we should really focus just on murder of a victim as being the worst possible crime.

Then there is another thing that no one has touched upon. There seems to have been an assumption that an execution is the ultimate way in which we can get even with an offender. And that is what we are doing when you strip off all the rhetoric. But I am pretty certain that none of these people who spoke today have served anything more than a day in a jail. I perhaps bring a different perspective to this, in that I served seven and one-half consecutive years, four and one-half of those years in Trenton Prison. Each offender is an individual case. Some people cannot deal with imprisonment.

SENATOR RUSSO: Say that again. You say you served what?

MR. STUART: Seven and one-half years in various institutions consecutively, and I served four of those years in Trenton and Rahway.

SENATOR RUSSO: As an inmate?

MR. STUART: Yes.

SENATOR RUSSO: For what crime?

MR. STUART: Robbery. It was the New Jersey crime - armed robbery.

SENATOR RUSSO: Armed robbery.

MR. STUART: Right.

I know a young man in the prison system right now who is serving a life sentence and the last I heard from him before he broke contact with me was a little over a year ago on what, I believe, was his eleventh trip to the Vroom Building at the Psychiatric Hospital. From the point that he got the life sentence while he was serving a five-year indeterminate in Bordentown - he was involved in a murder in Bordentown - he got the life sentence and he was never able to handle that mentally and he has gone back and forth to the Psychiatric Hospital. There are others who have had more trouble with time. I would like to say that I had no trouble handling time. I am not one of those who comes out and tells you how horrible the prison experience was in that dimension. I was not fearful.

It has been another interesting thing to me to sit here and listen to some of these people talk of their experience with murderers. I probably have had more day-to-day exposure to people who committed murder than all of the people who testified here today collectively. I have lived with these people day in and day out. I was locked with them in cells. One person that I locked with in New York was one of those people who came in and found his wife in bed with another man, picked up a chair, and beat the both of them to death right then and there, and then called the police.

What I would like anyone who is considering the death penalty to look at is whether the death penalty is the answer if you are really going to try to punish some of these people or whether a natural life sentence is the answer. I have problems, very frankly, with the games we play with the public in talking about life sentences which are not life sentences. This is something that perhaps needs to be addressed. If we were talking about a life sentence -- in your bill, incidentally - this is something I wanted to point out - you talk about life sentences. I think that the public has got to know that a life sentence is between 14 and 15 years before parole eligibility in this State.

SENATOR RUSSO: That is the minimum.

MR. STUART: Yes.

SENATOR RUSSO: They know it.

MR. STUART: Well, that is not clear in their minds. Let me also explain that I do not have any hard attitude in favor of a death penalty or against a death penalty. I can live with both of them personally. When I pick up the paper and read about certain crimes, my personal instinct is that if it were within my power, very frankly, and I had a button there and there was no question regarding the guilt, I would push the button. I have no problems about this. But, on the other hand, with all of problems that we encounter in dealing with the death penalty, is it worth it? Not one of these bills has a fiscal note attached. One gentleman said he was speaking - I don't know whether it was for the Taxpayers Association or just for taxpayers. I wish he had addressed the cost of the death penalty in terms of litigation and then in custody. We talk about imposing the death penalty and all of us who know something about it know that you are talking about six or eight years before that person can possibly be

executed because of the litigation. And we are talking, I would say, minimally about, aside from all of the court costs, the transcripts, the lawyer's time -- I am glad that Mr. Van Ness raised the question of the time that his people have to spend that could be better spent in giving more adequate representation - and you know that the Legislature has not been generous with Mr. Van Ness in ladling out money for the Public Defender's Department. I believe that we have to look at the cost. The minimal cost, as I see it, for board and room of these people is \$10,000 a year. It has been brought out here that we are talking about really very few offenders who would ultimately end up being subject to the death penalty. The fewer the people, the higher the per-inmate costs go. We are minimally talking about \$10,000 a year, which means we are talking about \$60,000 to \$80,000 to keep that person in custody while he appeals all of these things.

I am wondering if the taxpayers have really sat down and asked: Do we want to spend that kind of money to ultimately eight years down the road kill this man?

SENATOR RUSSO: He would be in custody anyway.

MR. STUART: Not at the cost. It is a higher cost because it is a different custody arrangement. If you are familiar - and I am familiar with the way the death house was run over here ---

SENATOR RUSSO: Don't you really ---

MR. STUART: Be careful. I am wondering whether there is something in the decor or the air of this room because I heard you say we shouldn't really sweat the cost, in effect, of these things. I sat here a couple of weeks ago and listened to Mr. LeFante stand right up there and say, when they were talking about the cost for the Bicentennial Sail-By and some other things and they were talking about \$500,000, a half a million dollars, "we're talking about peanuts." I listened to that and I wondered if we were transmitting on the same frequency.

SENATOR RUSSO: Mr. Stuart, would you suggest an argument for the death penalty is that we won't have to support these people all their lives in prison? Would that be a valid argument?

MR. STUART: No.

SENATOR RUSSO: Of course not.

MR. STUART: I am not saying that.

SENATOR RUSSO: I know you are not and I am not either. Why would it be any more of a valid argument ---

MR. STUART: Because there is much more litigation involved in the death penalty and there are increased costs for a death house.

SENATOR RUSSO: Mr. Stuart, you may not agree with this, but when I am dealing with a question as deeply important as the death penalty in New Jersey, my decision is not going to be made on what it is going to cost. You may not agree with that.

MR. STUART: I am glad to hear you say that because I wanted to bring out for contrast something that you may not be aware of. We have listened for months and months about adequate funding for education in this State, full funding. I don't know as you are aware and I don't know that other legislators are aware that this State authorized some years ago what they called gate money - up to \$150 per inmate coming out of the prison. The Legislature has never adequately funded that legislation.

SENATOR RUSSO: That is aside from the issue. That has nothing to do with the death penalty.

MR. STUART: It has everything to do with it.

SENATOR RUSSO: Mr. Stuart, come on. We have been here nine hours. I am telling you gate money and adequate funding do not have anything to do with the issue here.

MR. STUART: I have sat here since you arrived here this morning. I listened to you speak at greath length with a number of speakers. I did not certainly take exception to the time that you took.

SENATOR RUSSO: That does not matter, Mr. Stuart. Because you sat here does in no way require me now to sit as long as you want to talk on something that is ---

MR. STUART: You are cutting me off.

SENATOR RUSSO: Let me finish or we will terminate very abruptly. (Continuing) --- in my judgment - and I am chairing this for better or worse - extraneous to the issue. Now, if you want to talk on the death penalty, you may. But I am telling you what you are talking about now is out of order. You may continue on the death penalty.

MR. STUART: When I am talking about funding, you are saying on one hand that money is available and on the other hand you are saying it is not available.

SENATOR RUSSO: I didn't say either thing.

MR. STUART: The costs are not being addressed. I would hope that you perhaps, in connection with your bill, would at least do it, even if the other ones do not do it. This is something that certainly I am going to try to bring to the attention of the public in connection with any death penalty.

I would like to bring out something in connection with a remark that I believe that you made earlier today, that crime today is a black problem. This was very early in the testimony.

SENATOR RUSSO: You don't quite accurately state it.

MR. STUART: I want to say that the crime that we hear about in the newspapers, street crime, is very properly considered, esentially because of economic and social factors, etc., a black problem. But crime across the board, if we take all forms of crime, I suspect that the whites are percentagewise even way ahead of the blacks, if we look at all of the forms of white-collar crime.

In connection again - let's come back to the death penalty for a moment.

SENATOR RUSSO: Yes.

MR. STUART: If the death penalty is something that is a deterrent --- I appeared at a hearing and listened to most of this testimony a couple of years ago - as a matter of fact, three years ago - when Chairman Dickey presided at a similar rundown. I said then and I am saying again that, if it is a deterrent, is murder the most horrendous crime? I would like to see this extended to political misconduct. I have no problem at all seeing the death penalty included for crimes where a politician, in effect, morally and financially rapes 100,000 or 200,000 taxpayers and citizens. I believe that the death penalty should seriously be considered for that type of crime. And I don't see any legislators addressing that in any of their bills.

SENATOR RUSSO: I will mention it to them.

MR. STUART: Another thing - I am sure that Mr. Dickey did the last time - it is an interesting comment upon the laws that are written in connection with the death penalty and other laws, that the people who write them never put many stiff penalties in for the type of crime that they are most likely to perhaps be guilty of - they or their friends.

SENATOR RUSSO: Let me just assure you that the reason I have not included those kinds of crimes in my bill is not because I am afraid that I may some day do something wrong. I can assure you I have no intention of it. I don't intend to and that is not the motivation. Okay?

MR. STUART: I'll buy that.

SENATOR RUSSO: As a matter of fact, I have suggested earlier that I am even thinking of limiting my death penalty statute to only the individual who actually commits

the murder, not even his accomplice in a felony murder case. But that is just to make a point.

MR. STUART: I want to mention that both in connection with your testimony and Mr. Yacovino's testimony, I was very happy to see that both of you agreed that if we are going to have a death penalty for murder, it shouldn't be restricted just to a narrow category because that is one problem that I have had with a number of other proposals.

There is one other thing that I want to mention and then I will close on that note; and, that is, I wonder if you and others supporting the death penalty have thought all the way through to the ramifications of the state having the right to murder someone when they feel it is justified. And, again, as I say when you strip away the word games - we say in one case that a man has murdered a policeman, but we don't say that a policeman has murdered someone who was escaping from what he thought might have been a crime. We don't say that the State has murdered someone that they have put to death. But in a way you are saying that, when a certain number of people get together and decide that a certain offense has been committed that they object to, they do have the right to put that person to death. Can we really as a society say that and, at the same time, tell other people that they do not have --- Most crimes, I think, are committed by people who at the moment, at least, feel that they have ample justification for committing that crime.

I want to say one more thing that I think is very important that I want to add here. I may come across to you more strongly as being against the death penalty than for it. But what no one has addressed here today is the problem of what would happen if we don't have a death penalty. What happens if we don't have a death penalty? Now, I was an inmate in the prison when the death penalty in effect was terminated by the courts. The question that arose in my mind and that I presented to Millicent Fenwick at the time when she was in the Assembly and was speaking out on the subject was: With the termination of the death penalty, were they going to let these people come back to Ann Klein's neighborhood in Morristown or Millicent Fenwick's neighborhood? Were they going to come back to your neighborhood? No, they came out into my neighborhood. I was living in a society of approximately, let's say, 11 to 13 hundred people in Trenton Prison. If these people had committed a crime - and I am not disputing the horrible nature of some crimes for which people should be considered for the death penalty - and if they should not be allowed out into general society, should they be put in the same institutions with people who are there serving two-year sentences, four-year sentences, eight-year sentences, or who having had a fifteen-year sentence are now maybe within two months of going home? Should they be in the next cell?

I would suggest that, if people are talking about not having the death penalty, I would like to see some of the opponents of the death penalty seriously address what the alternatives are for the correctional system. I submit, bearing in mind the type of crime, that perhaps we should consider regional facilities for what will be natural-life offenders. And I am not talking about horrible places where they are going to be subjected to all sorts of mistreatment, but I am talking about places where they would be segregated from the type of prisoner that you expect to return to the street.

SENATOR RUSSO: We are off the subject.

MR. STUART: No, this bears upon the death penalty.

SENATOR RUSSO: What should be done to someone convicted of murder is perhaps a legitimate legislative inquiry with another hearing at some other time, but not today. We are only considering here whether or not we should have the death penalty. And, Mr.

Stuart, I would like you now to conclude.

If there is nothing further, I would like to adjourn this hearing.

MR. STUART: Thank you for your attention.

SENATOR RUSSO: Thank you, sir.

This hearing is adjourned.

(Hearing Concluded)

STATEMENT OF THE ATTORNEY GENERAL REGARDING
CAPITAL PUNISHMENT
JULY 29, 1976

I. INTRODUCTION

Death is a unique penalty in its finality, its enormity and its rejection of the convicted offender's reformation as a basic object of our criminal justice system. Despite its severity, capital punishment is a traditional societal sanction in the sense that it has been employed throughout our history. Although its precise origins are difficult to trace, it would appear that the ultimate penalty was recognized in Israel's ancient laws.¹ Capital punishment in this country had its roots in the common law of England where its application was widespread.² By shortly after 1800, capital offenses numbered more than two hundred in England and included crimes against the person, property and the public peace.³ Suffice it to say that the death penalty was not as common a punishment in the American Colonies.⁴ Even in the seventeenth century,⁵ there existed strong opposition to capital punishment. At different times in our history, strong abolitionist movements have developed. Although never completely successful, they

¹ G.R. Scott, The History of Capital Punishment 1 (1950).

² ⁴ W. Blackstone Commentaries (Lewis Ed. 1902).

³ T. Pucknett, A Concise History of the Common Law 424, et seq. (5th ed. 1956).

⁴ H.A. Bedau, The Death Penalty In America (1967).

⁵ Id. at 124.

have had a major impact upon our law, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury or judicial discretion, and developing more humane methods of conducting executions.

At present, many states, including New Jersey, are in the process of considering reinstatement of the death penalty. In a society that so strongly affirms the sanctity of human life and the value of the individual, it is natural that the controversy has evoked strong emotions on the part of those who favor capital punishment and those who oppose it. Opponents of the death penalty argue that its very existence constitutes a morally repugnant renunciation of all that is embodied in society's concept of humanity. They contend that taking a life is so brutalizing to the public spirit as to be fundamentally unjust and thus beyond the scope of governmental authority. On a practical level, they point to what they perceive to be a paucity of scientific data which would disclose that the death penalty deters criminal activity in any significant degree. Although several recent studies suggest that capital punishment has a deterrent effect with respect to criminal conduct, there is little, if any, empirical data which supports such a view. The absence of such proof, they contend, compels the conclusion that capital punishment can only be grounded upon societal retribution.

Those who support reinstatement of capital punishment base their argument upon the spiraling rate of violent crime which, they claim, has resulted from its judicial abolition. Citing the primary obligation of government to protect the innocent from criminal attack, proponents of the death

penalty argue that the punishment acts as an effective deterrent. In response to the claim that there exists no scientific evidence of deterrence, they answer that prevention is not susceptible to objective measurement. Further, many contend that societal retribution constitutes a legitimate penological goal at least when applied to the most heinous and savage criminal offenses. The United States Supreme Court has recently recognized that retribution is a legal "expression of society's moral outrage at particularly offensive conduct."⁶ So too, our Supreme Court has stated that retribution is a proper philosophical justification for punishment.⁷ Nevertheless, the Court has noted that "[p]resent day thinking emphasizes deterrence and rehabilitation."⁸

Against this background of continuing moral controversy, it now becomes incumbent upon the Legislature, duly elected by our citizens, to translate the public will. Needless to say, reintroduction of the death penalty is a subject upon which fair minded men can reasonably disagree. Significantly, our research has not revealed a formulation of public policy considerations or a compilation of objective scientific evidence so singularly persuasive as to compel a conclusion that capital punishment is or is not a proper and legitimate criminal penalty. Perhaps, because the issue is clouded by one's personal view of public and individual morality,

⁶ Gregg v. Georgia, U.S., 44 U.S.L.W. 5230, 5235 (U.S., July 2, 1976)

⁷ State v. Ivan, 33 N.J. 197, 199 (1960).

⁸ Id. at 200.

each citizen has his own perception of the need for capital punishment. It can reasonably be anticipated that no judgment, no matter how carefully considered or well informed, can in all respects be wholly satisfying. Resolution of the issue must therefore be predicated upon a legislative reconciliation of competing social values.

We have noted that no single aim or thesis regarding capital punishment can claim scientific verity or universal support and that agreement can hardly be expected until much more is known about human behavior. It is evident that reinstatement of the death penalty is fraught with legal and practical difficulties. The number of bills concerning capital punishment presently under consideration by the Legislature and their diverse provisions starkly reveal the difficult constitutional questions presented. That is not to say that these problems are insurmountable. Rather, the questions presented must be carefully reviewed. We thus perceive it to be our role to analyze the legal issues presented by the various bills which have been introduced to date and to offer alternative solutions with respect to the constitutional difficulties which appear. We have also traced the history of capital punishment in New Jersey and have provided the Legislature with a synopsis of the salient features of our present statutory scheme. Finally, we have surveyed the efforts of other jurisdictions and have included an analysis of recent legislation in an appendix.

II. THE CONSTITUTIONAL STATUS OF THE DEATH PENALTY IN NEW JERSEY

The history of capital punishment in Anglo-American jurisprudence reveals a continual effort, uniformly unsuccessful, to identify before the fact those crimes for which the convicted defendant should die. Although New Jersey's statutes and the laws of other jurisdictions have historically made the death penalty applicable to a variety of "heinous offenses," capital punishment has generally been closely associated with the crime of homicide. At first there was no clear distinction in terminology or in consequences among the various kinds of criminal homicide. The laws of Alfred provided that any person willfully slaying another shall be punished by death, and the Statute of Gloucester, 6 Edw. 1, c. 9 (1278), provided that in cases of self-defense or misadventure the jury should neither convict nor acquit, but should find the facts specially, so that the King could decide whether to pardon the accused. In time, these pardons came to issue as a matter of course. All types of criminal homicide were prima facie capital, but were subject to the benefit of clergy. This was a privilege of exemption from capital punishment anciently conferred only upon clergymen, but which eventually was extended to all those who could read. During the sixteenth century, Parliament removed the benefit of clergy from all those convicted of "murder of malice prepensed." During the next 150 years, the concept of malice prepensed developed into "malice

aforethought," which distinguished murder from manslaughter. Malice aforethought could be inferred without more from the act of killing and did not require an actual ill will.⁹

Although the states, including New Jersey, had mandatory death penalties for murder, soon after independence there was a rebellion against the common law rule imposing the mandatory death sentence on all convicted murderers.¹⁰ Statutes were enacted dividing murder into degrees and reserving capital punishment for "murder in the first degree," defined to include all "willful, deliberate and premeditated"¹¹ killings. In practice, the distinction between first and second degree murder was often obliterated by jury nullification. Juries frequently refused to convict on the capital offense where mercy was deemed appropriate, despite clear evidence of premeditation.¹²

At common law it was not possible for a defendant to confess his guilt and obtain mercy from the court. If an accused confessed to an indictment for murder, he condemned

⁹ McGautha v. California, 402 U.S. 183, 197-198 (1971).

¹⁰ State v. Sullivan, 43 N.J. 209, 242 (1964).

¹¹ McGautha v. California, supra, 402 U.S. at 198.

¹² Id. at 199.

himself to death. In order to ameliorate this harsh rule, §68 of the 1874 revision of the New Jersey Crimes Act conferred upon the trial courts the authority to hear witnesses after an accused was "convicted on confession in open court," to determine whether the offense confessed was first or second degree murder and to punish accordingly. If the court found the accused guilty of second degree murder, he was subject to imprisonment at hard labor for not less than five nor more than twenty years. The penalty for first degree murder was death.

In 1893 the authority of the court to impose the death sentence on a plea of guilty was withdrawn. Section 68 of the revision was altered so as to ban a plea of guilty and to authorize the court, in its discretion, to accept a plea of non vult, in which event "the sentence to be imposed ... shall be the same as that imposed upon a conviction of murder of the second degree."

As previously noted, juries had already usurped the power to grant mercy through jury nullification by acquitting on the capital charge of first degree murder and

¹³ Rev. Stat. 1874, §68, p. 145; State v. Sullivan, supra, 43 N.J. at 242.

¹⁴ Rev. Stat. 1847, §69, p. 145.

¹⁵ L. 1893, c. 36.

convicting, if at all, on the lesser included charge of second degree murder. The legislative response to this process was to grant juries full discretion to impose the death penalty or a term of imprisonment upon conviction of first degree murder.¹⁶ These statutes provided no standards for guiding the jury in its decision.¹⁷

In 1916, New Jersey juries were authorized to recommend life imprisonment in cases of first degree murder.¹⁸ Shortly thereafter, the authorized maximum on a plea of non vult was increased to life imprisonment. This amendment was designed to encourage trial courts to accept a non vult plea in circumstance in which a term of years might be deemed inadequate, and therefore to avoid the trial and the possibility of imposing capital punishment,¹⁹ which would follow if the plea were rejected.

Even though the death penalty was authorized for convictions of first degree murder, juries were not necessarily

16

McGautha v. California, supra, 402 U.S. at 199-200.

17

Id. at 200, n. 11.

18

L. 1916, c. 270; State v. Forcella, 52 N.J. 263, 278, rev'd sub nom. 403 U.S. 948 (1971).

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L. 197, c. 238; State v. Forcella, supra, 52 N.J. at 278.

presented with the alternative of imposing it. It became the practice in New Jersey that the prosecutor could, with approval of the court, elect to waive the death penalty.²⁰ Indeed, New Jersey prosecutors did not seek death penalties unless they believed the killing was so horrendous and defendant's guilt so plain that their duty to the public demanded it, either as punishment or as a deterrent or both. Waivers of the death penalty became the rule, and the State's demand for jury determination as to whether a death sentence was warranted occurred in but a small percentage of murder cases. When given the option, the jury returned a death sentence²¹ in approximately one third of those cases. The result of this system was, as stated by former Chief Justice Weintraub:

"That as to every murder indictment some official agency considers the fitness of the death penalty, the judge in doing so on a plea of non vult, and either the prosecutor with the trial court's approval or the trial jury doing so when the defendant stands trial."²²

Thus, the non vult plea and the right of prosecutors to waive the death penalty were designed to ameliorate the harshness of capital punishment by limiting its application

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In re Waiver of Death Penalty, 45 N.J. 50 (1965), reaffirmed in State v. Laws, 51 N.J. 494, 510-11 (1968); R. 3:1-3.

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State v. Funicello, 60 N.J. 94 (Francis dissenting), cert. denied sub nom. New Jersey v. Presha, 92 S.Ct. 2849 (1972).

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State v. Forcella, supra, 52 N.J. at 279.

to a small class of defendants. But introduction of the non vult plea created a constitutional crisis which was to have historic and far reaching consequences upon the legal efficacy of the death penalty.

Under New Jersey's statutory scheme of capital punishment, a defendant who wished to avoid the possibility of the death sentence could, with the permission of the court, enter a plea of non vult and be subject to a sentence of either life imprisonment (the penalty for murder in the first degree) or imprisonment up to thirty years (the penalty for murder in the second degree).²³ By pleading non vult, the accused could thus avoid the danger of being exposed to the death penalty. The constitutional infirmity inherent in our statutes was forecasted by the United States Supreme Court in United States v. Jackson, 390 U.S. 570 (1968). There, the Court declared

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This procedural scheme is set forth in N.J.S.A. 2A:113-3 and 2A:113-4.

2A:113-3. "In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

"Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

2A:113-4. "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurors, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

"Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years."

invalid the Federal Kidnapping Act under which a defendant who insisted upon trial by jury could suffer the death penalty. As construed, the statute subjected a defendant to the risk of a death sentence if he was tried by a jury, but no more than life imprisonment if tried by a judge. Since only a jury could impose the death sentence, a defendant who pled guilty and was sentenced by a judge could also receive no more than life imprisonment. A defendant fearful of execution could either elect to be tried before a judge without a jury or plead guilty and thus eliminate any possible capital sentence. The Court held that such a procedure discouraged the assertion of both the Fifth Amendment right not to plead guilty and the Sixth Amendment right to demand a jury trial.

As a result of the decision in Jackson, grave doubts were generated with respect to the validity of statutes which permitted a criminal defendant to avoid capital punishment by foregoing a jury trial. Like the Federal Kidnapping Act, our murder statute provided that only a jury could impose the death penalty.²⁴ However, our statutory scheme differed because a defendant could not be tried by a judge.²⁵ Furthermore, acceptance of a plea of non vult, by which a defendant could escape the possibility of facing death, was discretionary with the trial court.²⁶ In State v. Forcella, supra, our Supreme

²⁴ State v. Forcella, 52 N.J. 267 (1968).

²⁵ Id. at 269.

²⁶ Id. at 270-71.

Court held that the Sixth Amendment challenge was meritless because our statute required trial by jury in all cases in which the accused contested his guilt.²⁷ As for the claim that the Fifth Amendment was violated, a majority reasoned that acceptance of a plea of non vult was discretionary with the trial judge and, thus, the impermissible encouragement to plead guilty that existed under the Federal Act was not present under our statute.²⁸ The majority further reasoned that the non vult plea was enacted in pursuance of a valid governmental interest to provide lenity for those who were willing to admit their guilt.²⁹ Our Supreme Court, therefore, upheld our capital penalty provision in recognition that it constituted nothing more than a form of plea bargaining by allowing consideration to be given to the accused who admits his guilt.³⁰

The United States Supreme Court was unconvinced by the majority's reasoning in State v. Forcella, supra, and summarily reversed and remanded the matter three years later.³¹ On remand, our Supreme Court struck the capital penalty provision. It ruled that in all future cases, those found guilty of first degree murder by a jury would be sentenced to a mandatory term of life imprisonment and that the penalty provisions

²⁷ Id. at 272.

²⁸ Id. at 279-80.

²⁹ Id. at 275.

³⁰ Id. at 275-276.

³¹ Funicello v. New Jersey, 403 U.S. 2278 (1971).

applicable upon a plea of non vult would remain intact.

Hence, our Supreme Court in 1972 provided the framework under which our murder statute is to be applied and administered. Accordingly, at present, a defendant who proceeds to trial faces the possibility of receiving a life sentence if found guilty of first degree murder. He may also be found guilty of second degree murder, in which case he faces a maximum exposure of 30 years imprisonment,³³ or manslaughter, in which event he faces a maximum sentence of ten years.³⁴ A defendant who pleads non vult to murder may receive a sentence of life imprisonment. The Court may, however, impose a maximum term of 30 years.³⁵

It is significant that our Supreme Court declared unconstitutional the capital punishment provision in New Jersey's murder statutes because they penalized those who elected to contest their guilt before a jury. The Court expressly held that the death penalty as contained in our murder statutes was not violative of the Eighth Amendment's proscription against cruel and unusual punishment.³⁶ Rather, the United States Supreme Court generated questions of this nature in its lengthy and somewhat confusing decision in Furman v. Georgia, 408 U.S. 238 (1972). As will be more fully set forth, the rationale of Furman was recently rejected.

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60 N.J. at 68.

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N.J.S.A. 2A:113-4.

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N.J.S.A. 2A:113-5.

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N.J.S.A. 2A:113-3.

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State v. Forcella, supra, 52 N.J. at 293.

III. THE EIGHTH AMENDMENT'S "CRUEL AND UNUSUAL PUNISHMENT" PROSCRIPTION.

It was against this backdrop of historical development and social controversy that the United States Supreme Court rendered its opinions in five recent cases which questioned the constitutionality of capital punishment.³⁷ The Court's opinions are most instructive for they examine the death sentence both in the absolute constitutional sense and as applied under the murder statutes of Georgia, Florida, Texas, North Carolina and Louisiana.

In the leading case, Gregg v. Georgia, ___ U.S. ___, 44 U.S.L.W. 5230 (U.S., July 2, 1976), the Court traced the development of the proscription against "cruel and unusual" punishment incorporated in the Eighth Amendment from its early days as a restraint upon barbarous methods of punishment. The prohibition has grown into a fluid concept which draws its meaning from the continually "evolving standards of decency that mark the progress of a maturing society."³⁸ Within this context of contemporary values, the constitutionality of a given sanction is measured in terms of the proportion between the punishment and the crime. To meet the requirements of

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Gregg v. Georgia, ___ U.S. ___, 44 U.S.L.W. 5320 (U.S., July 2, 1976); Proffitt v. Florida, ___ U.S. ___, 44 U.S.L.W. 5256 (U.S., July 2, 1976); Jurek v. Texas, ___ U.S. ___, 44 U.S.L.W. 5262 (U.S., July 2, 1976); Woodson v. North Carolina, ___ U.S. ___, 44 U.S.L.W. 5267 (U.S., July 2, 1976); Roberts v. Louisiana, ___ U.S. ___, 44 U.S.L.W. 5281 (U.S., July 2, 1976).

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Trop v. Dulles, 356 U.S. 86, 101 (1958).

the Eighth Amendment, a form of punishment must neither involve the "unnecessary and wanton infliction of pain" nor "be grossly out of proportion to the severity of the crime," as viewed in light of "evolving standards of decency."³⁹

Applying this test to the punishment of death, the Court found that the standards of decency accepted by contemporary society demonstrate an endorsement of the death penalty for the crime of murder.⁴⁰ Moreover, although the evaluation of one of the social purposes advanced for capital punishment, deterrence, was left to the legislature, the Court found retribution, the other purpose generally cited, to be an objective neither forbidden nor inconsistent with the basic concept of human dignity. The Court noted that the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of society's moral outrage at conduct so offensive that lesser responses are inadequate. Although conceding that this function might be unappealing to many, the Court found that providing an adequate societal response to grievous crime may be "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."⁴¹

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Gregg v. Georgia, supra, ___ U.S. at ___, 44 U.S.L.W. at 5235-36.

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The Court noted the legislative response to Furman v. Georgia, 408 U.S. 238 (1962), (over 35 capital punishment statutes passed), the results of the statewide referendum in California and the willingness of juries to impose the death sentence as support for its view. Id., ___ U.S. at ___; 44 U.S.L.W. at 5237-38.

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Id., ___ U.S. at ___; 44 U.S.L.W. at 5239.

Therefore, the Court concluded, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe. In considering whether the punishment of death is disproportionate to the crime for which it is imposed, the Court observed that its concern was limited to "the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender." The Court concluded that death, a punishment unique in its severity and irrevocability, was "an extreme sanction, suitable to the most extreme of crimes," and was not invariably disproportionate to the heinous offense of depriving another of life.⁴²

The Court then turned to consideration of the manner in which this extreme sanction may be imposed in compliance with the Eighth and Fourteenth Amendments of the Constitution. To pass constitutional muster, it is clear that a sentencing procedure must direct and limit the court's or jury's discretion so as "to minimize the risk of wholly arbitrary and capricious action."⁴³ Adequate and accurate information concerning the circumstances of the offense and the character of the offender must be provided to the sentencing authority (whether court or, preferably, jury) if a reasonable determination

⁴² Id., __ U.S. at ____; 44 U.S.L.W. at 5240.

⁴³ Id.

is to be made as to whether a defendant shall live or die. Since the nature of the information relevant to the sentencing decision may be immaterial or even prejudicial to a fair determination of the defendant's guilt, the Court advised that the best answer to the problem was to provide for a bifurcated procedure in which the sentencing question is not considered until the determination of guilt is made. Then, the jury may receive the appropriate information in a hearing free of unnecessary restrictions with regard to the admissibility of evidence. Of equal importance is the provision of standards to guide the jury or judge in using this information. The jury's attention must be focused on the circumstances of the offense and the character of the defendant. Thus directed to the aggravating and mitigating factors in a particular case, the jury should be given standards for weighing these circumstances, individually and against one another in reaching its decision. By requiring the sentencing authority to specify the factors it relied upon, meaningful appellate review is possible, an additional safeguard against the capricious or freakish imposition of the death penalty.

The Court found the mandatory death sentences imposed in Woodson v. North Carolina and Roberts v. Louisiana to be unconstitutional. It was noted that the "evolving standards of decency" indicated a repudiation of automatic death sentences.⁴⁴ Moreover, the Court stated that "in capital

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Woodson v. North Carolina, ___ U.S. ___, 44 U.S.L.W. 5267, 5271 (U.S., July 2, 1976).

cases, the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 45

When no provision is made for such particularized consideration the decision of whether a defendant will live or die depends only upon the willingness of the jury to act lawlessly by refusing to convict him of the capital offense. Thus, statutes imposing mandatory death penalties do not eliminate the unbridled discretion on the jury's part condemned by the United States Supreme Court in Furman v. Georgia. 46 In declaring the North Carolina and Louisiana statutes constitutionally deficient, the Court also noted that they failed to provide for appellate review to check the arbitrary exercise of the capital jury's de facto sentencing discretion. 47

In summary, then, the following elements appear to be indispensable to a constitutional procedure for the imposition of the death sentence: (1) a bifurcated proceeding in which the question whether a defendant shall live or die is addressed at a separate hearing after the determination of guilt; (2) the provision to the sentencing authority adequate information relevant to the character of the defendant

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Id., ___ U.S. at ___; 44 U.S.L.W. at 5275.

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408 U.S. at 250.

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Woodson v. North Carolina, supra, ___ U.S. at ___; 44 U.S.L.W. at 5274; Roberts v. Louisiana, supra, ___ U.S. at ___; 44 U.S.L.W. at 5284.

and the circumstances of the offense, with few restrictions placed upon the evidence presented; (3) guidance to the jury in using this information, including the consideration and weighing of both aggravating and mitigating factors; (4) meaningful appellate review.

Finally, it should be noted that the five capital punishment cases decided by the Supreme Court all involved convictions for murder. The Court's holding was that the infliction of death as a punishment for murder is not invariably disproportionate to the crime and thus is not unconstitutionally severe. Although the Court specifically noted that it did not address the question whether capital punishment is a proportionate sanction where no victim has been deprived of life,⁴⁸ there are certain indications in the opinions which suggest that the death penalty may not be appropriate with regard to crimes in which death has not resulted. The Court noted that "death is an extreme sanction, suitable to the most extreme of crimes."⁴⁹ Throughout its opinions, the Court emphasized the unique severity of a sentence of death. For example, the Court stated that "death is a punishment different from all other sanctions in kind rather than degree,"⁵⁰ that it was "appropriate ... in extreme cases

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Gregg v. Georgia, supra, ___ U.S. at ___; 44 U.S.L.W. at 5240, n. 35.

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Id., ___ U.S. at ___; 44 U.S.L.W. at 5240.

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Woodson v. North Carolina, supra, ___ U.S. at ___; 44 U.S.L.W. at 5274.

[as] an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 51
In holding the North Carolina statute (which made the death sentence mandatory for all first degree murders) unconstitutional, the Court stated,

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Similarly, there is a corresponding need for reliability in the determination that death is the appropriate punishment for a category of offenses, and the inference is strong that death may not be an appropriate punishment for offenses which do not entail a loss of life.

In addition to the proportionality of the punishment to the crime, an important factor in the constitutionality of a capital penalty statute is that the death sentence must not be imposed in a "wanton" or "freakish" manner. In this regard, it is significant that the Court wrote approvingly of the Georgia Supreme Court's having vacated death sentences imposed for rape and armed robbery. The Supreme Court of

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Gregg v. Georgia, supra, ___ U.S. at ___; 44 U.S.L.W. at 5239.

Georgia had reasoned that although both these crimes were capital offenses under the statute, such death sentences were unusual and rarely imposed. Therefore, the court concluded, they must be considered excessive or disproportionate to the penalties imposed in similar cases. In light of the reasoning underlying the Court's decision, and the indicia noted above, as well as the general tone of the opinions, it should be noted that the constitutionality of the death penalty may be limited to offenses in which a life has been taken.

We will now review the specific elements emphasized in Gregg v. Georgia, supra, and its companion cases.

(1) A bifurcated proceeding. The United States Supreme Court did not actually require all capital punishment statutes to provide for a bifurcated proceeding. However, the three statutes upheld by the Court did so provide. Further, although in State v. Forcella, supra, our Supreme Court ruled that a bifurcated trial was not constitutionally compelled

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Id., ___ U.S. at ___; 44 U.S.L.W. at 5245. The Court's apparent approval of the Georgia court's rulings is significant in light of its view of the Eighth Amendment as a restraint on legislative power and the role of the judiciary. In Gregg, the Court stated that in assessing a punishment selected by a legislature against the constitutional measure, a court will presume its validity and may not require the legislature to select the least severe penalty possible "so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 44 U.S.L.W. at 5236. [Emphasis added] Once again, then, there is the suggestion that the death sentence might be disproportionately severe as punishment for a crime other than murder.

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It may be noted that S-46 limits the availability of capital punishment to murders committed "purposely." Two other bills, S-1100 and S-1119, reserve capital punishment for cases of first degree murder (other than felony murder).

in capital cases , that conclusion is now questionable. If a capital punishment is to be sanctioned in New Jersey, a bifurcated proceeding provides "the best answer" to the problems arising from the sentencing question in capital cases.

(2) Adequate sentencing information. The United States Supreme Court stated that the sentencing authority should be furnished with a wide range of information relevant to the question of the disposition of the offender. This would include information concerning the circumstances of the offense and the character of the defendant. To this end, the Court encouraged the avoidance of unnecessary restrictions with regard to the admission of evidence.

(3) Adequate standards. Although the Supreme Court did not specify what standards should be employed to guide the sentencing authority in the exercise of its discretion, it did indicate that the procedure must permit a meaningful opportunity for consideration of both aggravating and mitigating factors. The procedures adopted by Georgia and Florida appeared to have been favored. Certain aggravating and

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52 N.J. 263, 289 (1968).

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It should be noted that S-46, S-639, S-938 and S-1119 provide for bifurcated proceedings.

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It should be noted that in S-46, S-639, S-938, and S-1119, any information relevant to any of the enumerated mitigating factors may be presented regardless of its admissibility under the Rules of Evidence. This would appear to conform to the Court's suggestion.

mitigating circumstances are enumerated in each of those statutes. The jury weighs the evidence presented with respect to these factors, makes factual findings, and bases its decision upon these findings. Although it is only clear that a death sentence should be based upon the finding of at least one aggravating circumstance, it would seem preferable to provide for the weighing of the mitigating circumstances against the aggravating circumstances in this procedure.

(4) Appellate review. To make review meaningful, the sentencing authority should be required to make specific findings which document the basis of its decision. In this way, appellate review provides an additional safeguard against the "wanton" and "freakish" imposition of the death sentence.

IV. CONCLUSION

Many considerations must be taken into account in determining whether to restore capital punishment. The philosophical justification for punishment has divided men for centuries. Historically recognized aims or bases are (1) retribution, (2) deterrence of others, (3) rehabilitation

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S-46, S-639, S-938 and S-1119 all provide for the consideration of aggravating and mitigating factors. While S-1119 permits the imposition of the death sentence only if no mitigating factors are found, the other bills permit the death penalty if the mitigating circumstances do not "sufficiently outweigh" the aggravating circumstances found to exist.

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Although Section 18 in S-1100 and S-1477 does not so specify, it is assumed that those bills, like S-46, S-639, S-938 and S-119, provide for direct review of capital convictions by the Supreme Court. S-46, S-639, S-938 and S-1119 provide for specific findings by the sentencing authority.

of the offender, and (4) protection of the public by isolation of the offender. At this posture, we cannot say whether the values of retribution, deterrence and public protection outweigh the hope that the criminal defendant can be rehabilitated. However, it is appropriate to observe that capital punishment, if it is to be legally sanctioned, should be confined to the most heinous offenses, presumably those involving the death of the victim. The United States Supreme Court has provided further guidance. If the death sentence is to be reinstated, bifurcated proceedings best safeguard the rights of the defendant and those of the public. Further, the sentencing authority ought to be guided by standards which point to the aggravating and mitigating circumstances applicable to the particular case. So too, the sentencing authority should have at its disposal ample information encompassing the offense committed and the background of the offender as well. At least with respect to mitigating factors, the rules of evidence should not be strictly applied. Finally, a defendant convicted of a capital offense and sentenced to death should be afforded the right to directly appeal to the Supreme Court.

We suggest that the controversy regarding whether the penalty is to be restored requires an accommodation of the competing social values noted above. We will endeavor to assist the Legislature in every way possible to insure that the constitutional rights of our citizens will be safeguarded and the public interest advanced.

I. UNITED STATES STATUTE

- A. Capital offense: Aircraft piracy, or the attempted commission of aircraft piracy, which results in the death of another person.
- B. Procedure established:
 - 1) Punishment shall be death or life imprisonment.
 - 2) The defendant commits the offense if, while aboard an aircraft, he unlawfully and through intimidation, exercises or attempts to exercise control over the aircraft, or, is an accomplice of a person who performs or attempts to perform such act.

Antihijacking Act of 1974, 49 U.S.C. §§1472(i), (n) (Supp. IV).

II. ARIZONA STATUTE

- A. Capital offense: murder in the first degree
- B. Procedures established:
 - 1) Bifurcated trial
 - 2) Sentencing hearing before trial judge alone
 - a) The court shall inform defendant of all information contained in any presentence report, except information withheld for the protection of life.
 - b) Any such information withheld from defendant shall not be considered in determining the existence of mitigating or aggravating circumstances.
 - c) Any additional information relevant to any of the mitigating circumstances shall be presented by either prosecution or defendant regardless of its admissibility under the criminal trial rules of evidence.
 - d) The admissibility of information relevant to any of the aggravating circumstances shall be governed by the criminal trial rules of evidence.
 - e) Evidence admitted at trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroduction at the sentencing hearing.
 - f) Prosecution and defense permitted to rebut any information received at the hearing.
 - g) Legal argument.
 - h) The burden establishing the existence of any aggravating circumstances is on the prosecution.
 - i) The burden of establishing the existence of any mitigating circumstances is on the defendant.
 - 3) Sentencing determination:
 - a) The court shall impose a sentence of death if it finds one or more aggravating circumstances "and that there are no mitigating circumstances sufficiently substantial to call for leniency."

Ariz. Rev. Stat. Ann. §§13-452 to 13-454 (Supp. 1973).

III. ARKANSAS STATUTE

- A. Capital offense: [Repealed January 1, 1976]
- B. Procedure established: Punishment shall be death or life imprisonment without parole.

Ark. Stat. Ann. §41-4706 (Cum.Supp. 1975).

IV. CALIFORNIA STATUTE

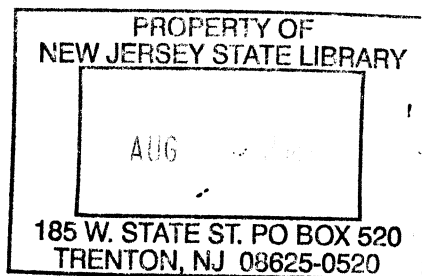
- A. Capital offenses:
- 1) First degree murder.
 - 2) Kidnapping for ransom, where the kidnapped person suffers death.
- B. Procedures established:
- 1) Bifurcated trial.
 - 2) Sentencing hearing:
 - a) The trier of fact shall hear evidence regarding "special" aggravating circumstances necessary in order to impose a death sentence
 - b) The standard applied to any aggravating circumstances is that it be found beyond a reasonable doubt.
 - c) The trier of fact shall be a jury, unless waived by defendant; in that case, it shall be by the court.
 - 3) Sentencing determination:
 - a) If at least one "special" aggravating circumstance exists, the penalty shall be death.
 - b) If there is no unanimous verdict that at least one of the "special" aggravating circumstances exists, and no unanimous verdict that none of the "special" aggravating circumstances exists, the court shall dismiss the jury and impanel another jury to try the sentencing issue.
 - c) The new jury shall not retry any "special" aggravating circumstance found to exist by a unanimous verdict of the previous jury.
 - d) If the new jury is unable to reach a unanimous verdict that at least one of the "special" aggravating circumstances exists, the court shall dismiss the jury and impose a sentence of life imprisonment.
 - e) The existence of at least one special mitigating factor precludes the imposition of the death sentence.

Cal. Penal Code §§190.1, 209, 219 (West Supp. 1974).

V. COLORADO STATUTE

- A. Capital offense: Class 1 felony.
- B. Procedure established:
- 1) Bifurcated trial.
 - 2) Sentencing hearing before the trial judge or jury:
 - a) The State or defendant may present evidence relevant to any aggravating or mitigating factors, subject to the trial rules of criminal procedure.
 - b) The State or defendant may rebut any evidence presented, and may present legal argument.
 - 3) Sentencing determination:
 - a) If, after all the evidence is heard, the judge or jury finds the existence of at least one aggravating factor, and no mitigating factors, the sentence shall be death.
 - b) If, after all the evidence is heard, the judge or jury finds the existence of at least one mitigating factor, and no aggravating factor, the sentence shall be life imprisonment.

Col. Rev. Stat. §16-11-103 (Supp. 1975).



VI. CONNECTICUT STATUTE

- A. Capital offense: Capital felony, which involves the following circumstances:
- 1) Murder of a police officer or detective, a law enforcement constable, a special police officer, a corrections official, or any fireman, while such victim was acting in the line of duty.
 - 2) Murder committed by a defendant for hire and for remuneration or murder committed by a person who is hired by defendant.
 - 3) Murder committed by one who has previously been convicted of intentional murder or felony-murder.
 - 4) Murder committed by one under a life imprisonment sentence at the time of the commission of the crime.
 - 5) Murder by a kidnapper of a kidnapped person before such person is returned to safety.
 - 6) The illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of such sale, provided the seller was not drug-dependent at the time of the sale.
- B. Procedure established:
- 1) Bifurcated trial.
 - 2) Sentencing hearing before the trial judge, and the jury which determined guilt or a jury specially impanelled for this purpose:
 - a) The hearing will not be held if the State stipulates that no aggravating factors, or one or more mitigating factors, exists.
 - b) The court shall disclose to defendant all information contained in any presentence report; no information withheld shall be considered in determining the existence of any aggravating or mitigating factors.
 - c) Any information relating to mitigating factors may be presented by the state or defendant, regardless of its admissibility under the criminal trial rules of evidence.
 - d) Any information relevant to aggravating factors shall be subject to the criminal trial rules of evidence.
 - e) The state and defendant shall be permitted to rebut any information received at the hearing, and to present legal argument.
 - f) The burden of establishing any aggravating factors shall be on the state.
 - g) The burden of establishing any mitigating factors shall be on the defendant.
 - 3) Sentencing determination:
 - a) The court or jury shall return a special verdict specifying its findings as to any mitigating or aggravating factors.
 - b) If at least one aggravating factor exists, and no mitigating factors, the penalty is death.
 - c) If no aggravating factors exist, or at least one mitigating factor exists, the penalty is life imprisonment.

VII. DELAWARE STATUTE

- A. Capital offense: First degree murder
- B. Procedures established:
 - 1) Mandatory death sentence
 - 2) If the death penalty is deemed unconstitutional, the penalty shall be life imprisonment.
 - 3) The court or governor may suspend execution of the sentence until a later specified date solely for the purpose of completing the process of judicial review.

11 Del. Code Ann. §4209 (Cum.Supp. 1975).

VIII. IDAHO STATUTE

- A. Capital offense: murder in the first degree.
- B. Mandatory death sentence.

Idaho Code §18-4004 (Wm.Supp. 1975).

IX. ILLINOIS STATUTE

- A. Capital offenses:
 - 1) Murder
 - 2) Aggravated kidnapping for ransom

- B. Procedure established:
 - 1) Bifurcated trial.
 - 2) In any case where defendant is convicted of murder, the State shall seek imposition of the death penalty in all cases involving the following circumstances:
 - a) The victim was a peace officer, fireman, corrections employee, acting in the line of duty, or was present in a corrections facility with the approval of the corrections officer.
 - b) Where defendant has been convicted of murdering two or more individuals, regardless of whether the deaths occurred as a result of the same transactions or series of events.
 - c) The murdered person was killed as the result of a hijacking of a commercial vehicle.
 - d) The defendant committed the murder for hire in return for remuneration.
 - e) The murdered person was killed in the course of a robbery, rape, aggravated kidnapping, arson, or was a child with whom indecent liberties were taken by a party to the crime.
 - 3) Sentencing hearing before three judges
 - a) Evidence heard
 - b) The State shall have the burden of proving beyond a reasonable doubt the facts requiring imposition of the death penalty.
 - 4) Sentencing determination:
 - a) If any of the facts enumerated in subsection (2) occurred, in the opinion of a majority of the judges, the sentence shall be death.
 - b) If a majority of the judges determine that there are "compelling reasons for mercy," the sentence shall not be death.
 - c) The standard for determining the facts which give rise to an imposition of the death penalty shall be: "beyond all reasonable doubt."
 - 5) Appellate review:
 - a) If the appellate court finds no errors justifying reversal or modification of the trial court's findings, it shall conduct an evidentiary hearing to determine whether the death sentence was the result of discrimination.
 - b) In determining discrimination the court shall consider whether the death sentence was

Illinois Statute (cont'd)

- disproportionate to the defendant and the crime, or the result of discrimination based on race, creed, sex or economic status.
- c) If the death sentence is found to be the result of discrimination, the sentence shall be modified to life imprisonment.
 - 6) In the event that the death penalty in this Act is held to be unconstitutional, by the United States or State Supreme Court, defendant shall be sentenced to not less than fourteen years.
 - 7) No death sentence shall be executed unless there has been a final adjudication that the sentence is constitutional; but final adjudication does not contemplate exhaustion of all available remedies.

Ill. Rev. Stat. C.38, §§9-1, 1005-5-3, 1005-8-1A (1973).

X. INDIANA STATUTE

- A. Capital offense: Murder in the first degree, which involves the following situations:
- 1) Killing a police officer, corrections employee or fireman acting in the line of duty.
 - 2) Detonation of an explosive.
 - 3) Killing in the perpetration of an attempt to commit rape, arson, robbery or burglary by a person who has had a prior unrelated conviction of rape, arson, robbery or burglary.
 - 5) Kidnapping or attempting to kidnap.
 - 6) Hijacking or attempting to hijack a commercial vehicle.
 - 7) Killing by a person lying in wait, by a person hired to kill, by a person previously convicted of murder, or by a person serving a life sentence.
- B. Mandatory death sentence

Burns Ind. Stat. Ann §35-13-4-1 (1975).

XI. KENTUCKY STATUTE

A. Capital offense: Murder, which involves the following situations:

- 1) Intentional killing for hire and remuneration.
- 2) Intentional killing during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree.
- 3) Defendant was a prisoner and the victim was a corrections employee acting in the line of duty, and the killing was intentional.
- 4) Intentional killing through the use of a destructive device.
- 5) Defendant's intentional killing resulted in multiple death.
- 6) The victim was a police officer, sheriff or deputy sheriff acting in the line of duty, and the killing was intentional.

16 Ky. Rev. Stat. §507.020 (1975).

XII. MARYLAND STATUTE

- A. Capital offense: First degree murder.
- B. Procedure established:
 - 1) Sentencing determination
 - a) Every convicted defendant shall be sentenced to life imprisonment unless otherwise provided.
 - b) Before sentencing defendant to death, the trier of fact shall find that:
 - i) defendant actually committed an act which proximately caused the victim's death.
 - ii) defendant was 18 years of age or older at the time of the commission of the act
 - iii) the murder was committed under at least one aggravating circumstance
 - c) Every defendant convicted of aiding, abetting, or counselling the commission of any murder shall be sentenced to life imprisonment.
 - d) Mandatory death penalty of defendant convicted as specified in subsection (b).

Md. Code Ann., Art.27, §413 (Cum.Supp. 1975).

XIII. MISSISSIPPI STATUTE

- A. Capital offense: Capital murder, which involves the following situations:
- 1) Killing a peace officer or fireman while such person is acting in his official capacity or by reason of an act performed in his official capacity.
 - 2) Murder perpetrated by person under sentence of life imprisonment.
 - 3) Murder perpetrated by use or detonation of a bomb or explosive device.
 - 4) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such murder are guilty as principals.
 - 5) Murder perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.
 - 6) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies.

B. Mandatory death penalty.

Miss. Code Ann. §97-3-19, 97-3-21, 97-25-55, 99-17-20
(Cum.Supp. 1975).

XIV. MISSOURI STATUTE

A. Capital offense: capital murder.

B. Procedure established: mandatory sentence of death.

Vernon's Mo. Stat. Ann. §559.009, 559.05 (Supp. 1976).

XV. MONTANA STATUTE

A. Capital offense: Deliberate homicide.

B. Procedure established:

- 1) A mandatory death sentence shall be imposed if the victim was a peace officer killed while acting in the line of duty.
- 2) For all other deliberate homicides, the court shall impose a death sentence if an aggravated circumstance exists, unless there are mitigating circumstances.

Mont. Rev. Codes Ann. §94-5-105 (Spec.Crim.Code Supp. 1973), as amended, C.262, 43d Legislative Assembly (Mar.21, 1974).

XVI. NEBRASKA STATUTE

- A. Capital Offense: Murder in the first degree
- B. Procedure established:
 - 1) Sentencing hearing held before judge or judges.
 - 2) Sentencing determination:
 - a) Sentencing is based on the following considerations:
 - i) "whether sufficient aggravating circumstances exist to justify imposition of a death sentence."
 - ii) "whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances."
 - b) Death sentence must be supported by written findings which refer to the aggravating and mitigating circumstances involved in its determination.
 - 3) Automatic review by Nebraska Supreme Court, which has the right to reduce a death sentence to life imprisonment.
 - 4) The Board of Pardons has the right to commute any death sentence to life imprisonment.

Neb. Rev. Stat. §§28-401, 29-2521 to 29-2523 (Cum.Supp. 1974).

XVII. NEVADA STATUTE

- A. Capital offense: Capital murder, which involves the following circumstances:
- 1) Killing a peace officer or fireman while such person is acting in his official capacity, with knowledge that the victim is or was such public official.
 - 2) Murder perpetrated by a person under sentence of life imprisonment without possibility of parole.
 - 3) Murder by a person executing a contract to kill.
 - 4) Use or detonation of a bomb or explosive device.
 - 5) Killing more than one person wilfully, deliberately and with premeditation as the result of a single plan, scheme or design.
- B. Mandatory death penalty.

Nev. Rev. Stat. §200.030 (1973).

XVIII. NEW HAMPSHIRE STATUTE

- A. Capital offense: Capital murder, which includes the following circumstances:
- 1) Killing a police officer while he was acting in the line of duty.
 - 2) Killing a person during a kidnapping or attempted kidnapping.
 - 3) Killing for hire and remuneration.
- B. Procedure established: There shall be a mandatory death sentence, unless the defendant is under seventeen years of age.

N.H. Rev. Stat. Ann. §630:1 (1974).

XIX. NEW MEXICO STATUTE

- A. Capital offense: Capital felony.
- B. Procedure established:
 - 1) Sentencing determination:
 - a) Judge shall sentence a convicted defendant to death unless the jury shall recommend life imprisonment; in cases where defendant has pled guilty, the court may sentence defendant to life imprisonment.
 - b) A death sentence shall be imposed only where:
 - i) defendant killed a police officer or prison or jail guard while in the performance of his duties
 - ii) the jury recommends the death penalty when defendant commits a second capital felony after time for due deliberation following commission of a capital felony
 - c) If defendant has not reached the age of majority at the time of the commission of the crime, the judge shall sentence him to life imprisonment.

N.M. Stat. Ann. §40A-29-2 (Supp. 1973).

XX. NEW YORK STATUTE

A. Capital offense: Murder in the first degree, which involves the following circumstances:

- 1) A premeditated killing where the victim was a police officer or a corrections employee acting in the line of duty, and defendant knew or should have known the victim's identity.
- 2) At the time of the commission of the crime, defendant was serving a sentence for life, or was serving a sentence for life, or was serving a term the minimum of which was at least fifteen years and the maximum was life, or defendant had escaped from such custody or confinement and had not yet been returned.
- 3) Defendant was more than eighteen years old at the time of the commission of the crime.

B. Mandatory death sentence.

N.Y. Penal Law §60.66 (added by S.21028 (Cal. No. 1548)
(Ass. B.11474-A), (N.Y. Laws 1974).

XXI. OHIO STATUTE

- A. Capital offense: Aggravated murder.
- B. Procedure established:
- 1) Bifurcated trial.
 - 2) Sentencing determination:
 - a) The death penalty is precluded unless the indictment contains a specification of one or more aggravating circumstances, in the absence of which life imprisonment must be imposed.
 - b) If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and the specification.
 - c) If the verdict is guilty of the charge but not guilty of the specification, the sentence is life imprisonment.
 - d) Sentencing hearing:
 - i) if the verdict is guilty of the charge and of at least one specification, the jury is discharged
 - ii) the penalty is determined by a a panel of three judges or the trial judge
 - iii) the court shall require a presentence investigation and a psychiatric exam, copies of which shall be furnished to the prosecutor and defendant
 - iv) the court shall hear testimony, other evidence, defendant's statement, and legal argument
 - e) If at least one mitigating factor is established by a preponderance of the evidence, the penalty is life imprisonment; otherwise the penalty is death.
 - f) The panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded.

Ohio Rev. Code Ann. §§2929.02-2929.04 (Page Spec. Supp. 1973).

XXII. OKLAHOMA STATUTE

- A. Capital offense: Murder in the first degree, which involves the following circumstances:
- 1) The victim was a peace officer, prosecuting attorney, corrections employee or fireman acting in the line of duty.
 - 2) The crime was committed in the perpetration of or attempt to perpetrate rape, kidnapping for the purpose of extortion, arson in the first degree, armed degree, or sexual molestation of a child under the age of sixteen years.
 - 3) When perpetrated against any witness subpoenaed to testify at any hearing, grand jury proceeding or trial against defendant, who kills the witness or another while intending to kill such witness.
 - 4) When perpetrated against the President or Vice President of the United States, any official in line of succession to the United States presidency, the State Governor or Lieutenant Governor, a judge of the state, or any person actively campaigning for the United States presidency or vice presidency.
 - 5) When perpetrated by any person in the course of hijacking a commercial vehicle.
 - 6) When perpetrated by a person who kills for remuneration, or by the person procuring the killing.
 - 7) Murder by a person under sentence of life imprisonment.
 - 8) When perpetrated against two or more persons arising out of the same transaction or series of events.
 - 9) When perpetrated against a child while in violation of Oklahoma Statute, Title 21 §843.
 - 10) Murder by the unlawful use of a bomb or explosive device.
- B. Procedure established:
- 1) Sentencing determination:
 - a) Mandatory death sentence.
 - b) Sentence of death shall be imposed by the trial judge or jury upon a finding of guilt
 - c) The trial judge may instruct the jury on the lesser and included offenses and lesser degrees of homicide, and shall state his reasons for doing so in the record.
 - 2) Review by the Oklahoma Court of Criminal Appeals
 - a) The court shall firstly determine if there are trial errors of law requiring reversal or modification
 - b) If there are no errors of law, the Court shall review the sentence of death at an evidentiary hearing, to determine if the sentence comports with the principles of due process and equal protection of the law.

- c) The court shall determine whether the death sentence was the result of discrimination, and shall specifically determine whether the death sentence is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
- d) If the court finds that there was discrimination, or that the sentence was substantially disproportionate, it shall modify the death sentence to a term of life imprisonment at hard labor.

21 Okla. Stat. Ann. §701.1-701.3 (Supp. 1973).

XXIII. PENNSYLVANIA STATUTE

- A. Capital crime: Murder of the first degree.
- B. Procedure established:
- 1) Instructions to jury before determination of guilt
 - a) jury informed of the penalties
 - b) jury informed that if it finds a capital offense, it will consider aggravating or mitigating circumstances
 - 2) Jury verdict of capital offense not subject to reconsideration by the jury.
 - 3) Sentencing hearing held before judge and jury
 - a) additional evidence relevant to aggravating and/or mitigating circumstances heard
 - b) legal argument
 - 4) Sentencing determination:
 - a) Standards:
 - i) Aggravating circumstances must be proved beyond a reasonable doubt.
 - ii) Mitigating circumstances must be proved by a preponderance of the evidence
 - b) failure of jury to agree on aggravating and mitigating circumstances in no way impeaches or affects the validity of the verdict.
 - c) Trial court's role:
 - i) court may, in its discretion, discharge the jury from further consideration if it believes that further deliberation by a jury in disagreement upon the aggravating and mitigating circumstances will not result in agreement.
 - ii) Upon discharge of the jury, if no retrial is directed, the court shall sentence defendant to life imprisonment.
 - d) Aggravating and mitigating circumstances:
 - i) Sentence of death if there exists at least one aggravating circumstance and no mitigating circumstance
 - ii) Sentence of life imprisonment if there exists at least one mitigating circumstance; or no aggravating circumstance
 - 5) Record of death sentence shall be transmitted to the Governor within ten days.
 - 6) Automatic review by Pennsylvania Supreme Court
 - a) Review within 60 days after certification by the sentencing court of the entire record.
 - b) If death sentence is invalidated, the sentence shall be life imprisonment.

Pa. Act. No. 46, 158th General Assembly (Mar. 26, 1974).

XXIV. RHODE ISLAND STATUTE

A. Capital offense: murder in the first degree, which involves the situation in which defendant commits murder while committed to confinement to a correctional institution.

B. Procedure established: Mandatory death sentence.

R.I. Gen. Laws Ann. §11-23-2 (Supp. 1975).

XXV. SOUTH CAROLINA STATUTE

A. Capital offense: murder

B. Procedure established:

- 1) Mandatory death sentence in the following situations:
 - a) Murder while in the commission of rape, assault with intent to ravish, kidnapping, burglary, robbery while armed with a deadly weapon, larceny with use of a deadly weapon, housebreaking, killing by poison, or lying in wait.
 - b) Murder for hire, based on remuneration.
 - c) Murder of a law enforcement officer or correctional officer while acting in the line of duty.
 - d) The convicted defendant had previously been convicted of murder, or was convicted of committing more than one murder.
 - e) Willful, deliberate and premediated murder.
- 2) Mandatory life imprisonment for any person guilty of murder in any other situation.
- 3) No mandatory death death penalty for a pregnant female while she is pregnant.

S.C. Code §16-52 (Cum.Supp. 1975).

XXVI. TENNESSEE STATUTE

- A. Capital crime: murder in the first degree, which involves the following circumstances:
- 1) A premeditated killing, where the victim is
 - a) A corrections employee.
 - b) A prison inmate.
 - c) Known to defendant to be a peace officer or fireman acting in the line of duty.
 - d) A judge acting in the course of his judicial duties.
 - e) A popularly elected public official.
 - 2) The offense is committed for hire.
 - 3) The offense is committed while attempting to evade law enforcement officials.
 - 4) Defendant hires another to commit a premeditated killing, and such hire causes the victim's death.
 - 5) A premeditated killing during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing or discharging of a destructive device or bomb.
- B. Mandatory death penalty for conviction of murder in the first degree, or condition as an accessory before the fact of such crime.

Tenn. Code Ann. §39-2402, 39-2406 (1975).

XXVII. UTAH STATUTE

- A. Capital offense: Criminal homicide in the first degree, which includes the following circumstances:
- 1) Killing by a prisoner while he is serving a jail sentence.
 - 2) Killing by a defendant who previously committed another homicide.
 - 3) Where defendant created a risk of death to another person other than the victim.
 - 4) Where defendant committed the homicide while engaged in committing or attempting to commit aggravated robbery, robbery, rape, forcible sodomy, aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, kidnapping.
 - 5) Killing for the purpose of avoiding arrest by a police officer acting in the line of duty, or for the purpose of effecting escape from the lawful custody of a police officer acting in the line of duty.
 - 6) Killing for remuneration.
 - 7) Killing after previously committing a homicide.
 - 8) Killing for the purpose of hindering a witness from testifying or participating in any legal proceeding.
- B. Procedure established: Death penalty.

Utah Code Ann. §76-3-206-207, 76-5-202 (Supp. 1975).

XXVIII. VIRGINIA STATUTE

- A. Capital Crime: Capital murder, punishable as a Class 1 felony
- B. Procedure established: mandatory death penalty in the following situations:
- 1) The killing of any person in the commission of an abduction, when such abduction was committed with the intent to extort money, or a pecuniary benefit.
 - 2) The killing of a person by another for hire.
 - 3) The killing by an inmate in a penal institution or while in the custody of an employee thereof.

Va. Code §18.2-10, 18.2-31 (1975).

XXIX. WASHINGTON STATUTE

A. Capital offense: Aggravated murder in the first degree, which involves the following situations:

- 1) The victim was a law enforcement officer or fire fighter acting in the line of duty.
- 2) At the time of the commission of the offense, defendant was serving a term of imprisonment.
- 3) Murder for remuneration.
- 4) Defendant had solicited another to commit the murder, and had paid/agreed to pay such person remuneration for the commission of the murder.
- 5) Murder with intent to conceal the commission of a crime, or to protect a person committing the same, or with intent to obstruct the administration of justice.
- 6) More than one victim, and the murder was part of a common scheme or plan, or the result of a single act of defendant.
- 7) Murder in the course of furtherance of rape or kidnapping or in immediate flight therefrom.

B. Mandatory death sentence

Wash. Rev. Code §§9A.32.045, 9A.32.046 (Supp. 1975).

XXX. WYOMING STATUTE

- A. Capital offense: Murder in the first degree.
- B. Procedure established:
- 1) Mandatory death penalty in the following situations:
 - a) Murder of peace officer, corrections employee or fireman acting in the line of duty.
 - b) Murder for remuneration.
 - c) Use or detonation of an explosive.
 - d) Murder committed by person previously convicted of first or second degree murder.
 - e) Murder committed by defendant under life imprisonment sentence.
 - f) Murder committed in the perpetration of an attempt to perpetrate rape, arson, robbery or burglary where defendant had previously been convicted of said offense.
 - g) Murder in the course of kidnapping.
 - h) Murder in the course of hijacking a commercial vehicle.
 - i) Murder committed by defendant to conceal this identity or to conceal the fact of the commission of a crime, or to suppress evidence.
 - j) Murder of two or more persons in one series of related events.
 - 2) Mandatory sentence of life imprisonment where the offense does not involve the conduct described in subsection (1).
 - 3) Automatic review by Wyoming Supreme Court, with priority over all other cases.

SUBMITTED BY: Irving Joiner, Director of Criminal Justice Program
United Church of Christ

DEATH ROW INHABITANTS IN NORTH CAROLINA
WHO WERE SUBSEQUENTLY ACQUITTED AFTER THEIR
CONVICTIONS WERE REVERSED

| | | |
|---------------------|---|-------|
| Anthony Carey | - | Black |
| Vernon Brown | - | " |
| Bobby Hines | - | " |
| Harold Jerome White | - | " |
| Samuel Poole | - | " |
| Fernando Hunt | - | " |
| Johnny Boyd | - | " |
| Chris Spicer | - | " |
| John Thomas Alford | - | " |
| Claude Buchanan | | White |
| Mark Burnes | - | White |
| Ivey Lee Whittley | - | Black |
| James Britt | - | White |
| William Bryant | - | White |

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
HEARING, ASSEMBLY CHAMBER, JULY 29, 1976
ON PROPOSED LEGISLATION TO REINSTATE CAPITAL PUNISHMENT

PRESENTED BY
(THE REV.) PAUL L. STAGG
GENERAL SECRETARY
NEW JERSEY COUNCIL OF
CHURCHES

My name is Paul L. Stagg, and I am here to represent the New Jersey Council of Churches.

Agitation for the enactment of a death penalty has recently been given impetus by the Supreme Court of the United States in its divided opinion (7 - 2) affirming that capital punishment is not inherently cruel or unusual. The Court relied heavily in reaching its decision on the fact that many state legislatures had enacted laws imposing the death penalty reflecting contemporary popular opinion, and that in doing so, the legislatures had considered the penalty necessary as a deterrent and as a retribution.

The recent action of the Supreme Court has set the stage for the various bills proposing that the New Jersey legislature enact a death penalty that would meet the court's test of an appropriate and constitutional sentence. The various bills proposed differ in some respects, but they all are open to serious objection in that they re-introduce the death penalty as an approved sentence for certain crimes. The fact that these bills limit the kinds of crimes for which the ultimate penalty of death may be enacted and specify conditions under which it may be imposed does not overcome the abhorrent and barbarous character of capital punishment as an instrument of a civilized society. It is the central thesis of our testimony that New Jersey should exercise its option and not follow the dubious practice of those states which have rushed to enact laws imposing the death penalty because current popular opinion supports capital punishment for certain crimes. Wise judgement should not be based upon the changing tides of public opinion, nor upon a dubious theory of the death penalty as an effective deterrent and a just measure of retributive justice. It is understandable that many people, confronted by heinous crimes, should cry out for blood. In no sense can crime be condoned, but the issue is whether society does not have other alternatives that are both more effective and in keeping with the dignity of life with which to counteract it than the death penalty. We believe that it does and that New Jersey can set an example that will redound to its credit by refusing to bow to the current cry for the death penalty.

Perspective in reaching a just decision in regard to the death penalty is imperative, and the following considerations focus salient factors in making a decision that will stand the scrutiny of history: (1) In American and colonial experience, the trend has been to curb or abolish the death penalty. In early colonial history, laws exacting death were harsh compared to modern standards, although more lenient than those in most of Europe. In Virginia from 1612 through 1619, the death penalty could be imposed for stealing grapes, trading with Indians, or killing farm and household animals without permission. In the 1650's, colonists could be put to death for denying the true God or cursing their parents. An earlier Massachusetts code included adultery, witchcraft, and being a rebellious son as grounds for the death penalty.

Although the course of history has been uneven, there has been a fortunate trend to limit, and in some states to abolish, the death penalty. As far back as 1785, there was a bill by a committee headed by Thomas Jefferson to limit capital punishment to treason and murder, a bill narrowly defeated by one vote in the House of Delegates. While some citizens in the early 19th century advocated abolition of the death penalty, the chief result was the enactment, in the 1830's, of statutes barring public hanging in the states of New Jersey, Rhode Island, Pennsylvania, New York, and Massachusetts. This was done, however, more as a matter of taste than of conscience. In 1837, Maine, reacting against a public hanging in Augusta that precipitated a riot, became the first state to declare, in effect, a moratorium on capital punishment. In the 1840's, abolition of capital punishment became a major public cause, supported widely by editors, writers, professional reformers, and clergy. Since then, numbers of states have voted to abolish capital punishment: Rhode Island, 1852; Wisconsin, 1853; Iowa, 1872; Maine, Kansas, 1907; Minnesota, 1911, followed by Washington, North Dakota, South Dakota, Oregon, Arizona, and Missouri. By 1917, twelve states had banned the death penalty. Although not yet states, Hawaii and Alaska abolished the death penalty in 1957. Delaware abolished it in 1958. In the 1960's, the following states abolished or limited capital punishment: New York, Iowa, Vermont, West Virginia, and New Mexico.

From this, as conscience and experience have sharpened the issue, it must be seen that the trend of history has been to limit, if not to eliminate the death penalty.

(2) A second factor which dictates caution in re-introducing the death penalty is the tendency to let emotion override judgment during periods of national stress, war, anxiety over national security, and concern over crime and subversion. In the history of capital punishment, advocates for its abolition have gained ground during times of peace and internal security, while proponents of the death penalty advanced their cause in turbulent periods of war and crime. Anxiety, desperation, and racial prejudice haven often conspired to call for execution as though venting feelings would eliminate the causes complained of. A more intelligent and effective approach would examine and remove the causes of crime rather than cursing the darkness. While the causes of crime are multiple and criminals come both from affluent as well as poverty classes, it is significant that there is a high correlation between poverty and unemployment and crime in New Jersey. Why not tackle at least these sources of crime rather than adjust to a current mood of anxiety and desperation that looks to the death penalty as a solution to the crime problem.

(3) A third factor to be weighed is the fatal flaw of making policy about life and death on the basis of public opinion polls. It is revealing that within the time span of four years, the Supreme Court should have shifted its position and now holds by a 7 - 2 vote that "the death penalty does not invariably violate the constitution." There is evidence that the majority position was influenced by the changing composition of its membership and by undue weight given to opinion polls. In the 1972 court decision (Furman vs. Georgia), the majority viewed the death penalty as unconstitutional. In his comment on the 1972 decision, Mr. Justice Stewart conceded as much: "Four justices would have held that capital punishment is not constitutional per se; two justices would have reached the opposite decision; and three justices, while agreeing that statutes then before the court were invalid as applied, left open the question of whether such punishment may ever be imposed." Why do the majority now say that the death

penalty is not invariably in conflict with the cruel and unusual clause of the eighth amendment? In their own words, the majority answer that they have been heavily influenced by public opinion. For example, they say "...it is now evident that a large proportion of American society continues to regard it (the death penalty) as an appropriate and necessary sanction." Continuing, they say: "The most marked indication of society's endorsement of the death penalty is the legislative response to Furman. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person."

This argument based on public opinion is defective in at least two respects:

(a) It assumes that morality can be determined by a popular poll rather than upon the perception of informed conscience. The history of the human race is replete with instances in which the majority were wrong. The history of penology supports this. Punishments on the wrack, the screw, and the wheel, and public hangings, once very popular, have long since come under the judgement of society. The most discerning persons today know, as Mr. Justice Brennan affirmed in his dissenting opinion (*Gregg v. Georgia*), that "...the primary moral principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings -- a punishment must not be so severe as to be degrading to human dignity." A better informed citizenry would consider the death penalty, in the words of Mr. Justice Marshall, "shocking, unjust, and unacceptable." With this assessment, leading religious persons are in agreement. Commenting on the court's decision affirming the death penalty, Dr. Francis J. Butler, a spokesman for the United States Catholic Conference, said the decision "can only mean a further erosion of human life and an increased brutalization of our society."

(b) This argument is also flawed by the fact that while the majority do seem to favor laws permitting or mandating capital punishment, it does not necessarily follow that most people want anyone actually put to death. It is one thing to entertain death as an abstraction; it is quite another thing to entertain the execution of any human being. The revulsion of the public to actual executions is evident in the fact that executions have declined from 199 in 1935 to one in 1967 to none since. When the constitution was formulated, public hangings were common. Even children watched the execution of criminals in the town square. But as Tom Wicker has sensitively written, "What parent today would want that -- would want even to see such a spectacle himself or herself?" Mr. Wicker adds: "When Congress restored the death penalty to federal criminal law, it voted by a wide margin against an amendment to require that executions be televised. What could more pointedly have demonstrated public revulsion, or the difference between a death sentence and a man dying grotesquely in a gas chamber?" But if it be true that when the actual moment arrives of pulling the switch to electrocute a human being, we draw back, why should we authorize in principle something we consider morally abhorrent in practice?

(4) A fourth factor to be considered is that there is no empirical evidence which proves that capital punishment is a deterrent to crime. The record of states which have abolished the death penalty shows that there has been no increase of murder and other felonies traceable to the end of the death penalty; nor is there evidence to show that states which have reenacted the death penalty have experienced a decrease in crimes which the death penalty is supposed to deter. Studies have shown that the death penalty in a given state does not decrease the subsequent rate of criminal homicide in that state. Nor do death penalty states as a group have lower rates of criminal homicide than non-death penalty states.

(5) A fifth factor to be considered in assessing the death penalty has to do with its purpose as retribution. Since the justification for capital punishment is on shaky grounds if its objective is deterrence, the justification must be sought elsewhere. The majority in *Gregg v. Georgia* find that justification is retribution. This view holds that the taking of a murderer's life is itself morally good. But the majority admit that punishment must "comport with the basic concept of human dignity" which is at the "core" of the eighth amendment. Under this standard, as Mr. Justice Marshall aptly put it, "the taking of human life, 'because the wrongdoer deserves it,' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth." The death penalty is an excessive form of punishment, serves no penal purpose more effectively than a less severe punishment, and must be rejected as a cruel and barbarous form of penology that a sensitive conscience cannot sanction. Blood revenge is a form of vengeance which was sanctioned at a stage of lower morality, but persons of conscience are affronted by the invitation to play God with the life of the offenders. The mere fact that the community demands execution of a felon in return for the evil he has done cannot justify the death penalty. Any punishment that can have the sanction of a moral conscience must comport with the dignity of life.

(6) A final factor to be considered in assessing the reenactment of the death penalty is the fact that capital punishment in practice discriminates against the poor and members of minority groups. On July 2, 1976, of the 610 persons on death row, 310 were black and over 56% were non-white. Of the 22 persons awaiting execution in New Jersey when the penalty was abolished in 1972, 14 were Blacks. Since 1960, 36 persons in New Jersey have been sentenced to death, and of these 27 were listed either as "Black" or "non-white". This fact throws light on why Blacks and other minorities predominantly object to the death penalty while many whites as members of an affluent dominant class favor capital punishment.

When one takes into account the factors we have reviewed, the case for rejecting the death penalty is compelling.

The death penalty is fundamentally immoral. Primitive tribes early learned to limit revenge; and as civilized society developed, the moral conscience rejected killing as a form of punishment. No society can countenance it without being degraded and brutalized. The death penalty is not a form of justice; it is an obscenity. As Albert Camus, quoted by Justice Brennan in his dissenting opinion, put it: "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." The death penalty panders to the lust for revenge, and it is a "cop-out" for a rational, human effort to get at the roots of crime and develop therapeutic ways of treating offenders while protecting society from felony. There is no way by which provision for the death penalty can be amended that will relieve it of its odium, its failure to be a deterrent, its basic unfairness, its affront to civilized society and the dignity of the human person, its cruel and irrevocable character.

The answer to crime lies in another approach, not in one that has been tried and found wanting. It lies in alternatives that protect society against felony by eradicating the causes of crime and by finding ways to rehabilitate and save life rather than destroying persons and robbing them of life society cannot restore. We have set before us life and death. Let us choose life and live.



NEWARK HUMAN RIGHTS COMMISSION

R E P O R T

on

PUBLIC HEARING ON CAPITAL PUNISHMENT

MUNICIPAL COUNCIL CHAMBERS

Newark, New Jersey

May 12 & 13, 1975



KENNETH A. GIBSON

MAYOR

NEWARK, NEW JERSEY

07102



September 26, 1975

The Honorable Brendan T. Byrne
Governor, State of New Jersey
State House
Trenton, New Jersey 08625

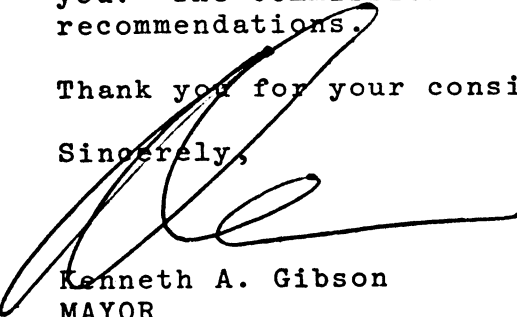
Dear Governor Byrne:

The Newark Human Rights Commission held Public Hearings on May 12 and 13, 1975 on the question of the restoration of the death penalty in New Jersey. The specific bill addressed was A3289, which would employ capital punishment for the killing of law enforcement, corrections and fire officers.

I am pleased to forward the enclosed resultant report to you. The Commission has made a statement of position and recommendations.

Thank you for your consideration of this report.

Sincerely,



Kenneth A. Gibson
MAYOR

KAG/rk

enclosure



KENNETH A. GIBSON
MAYOR
NEWARK, NEW JERSEY
07102



September 26, 1975

The Honorable Frank J. Dodd
Senator
President of the Senate
State House
Trenton, New Jersey 08625

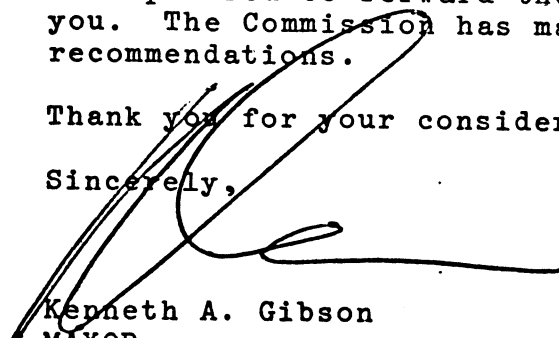
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September 26, 1975

The Honorable S. Howard Woodson
Speaker of the Assembly
State House
Trenton, New Jersey 08625

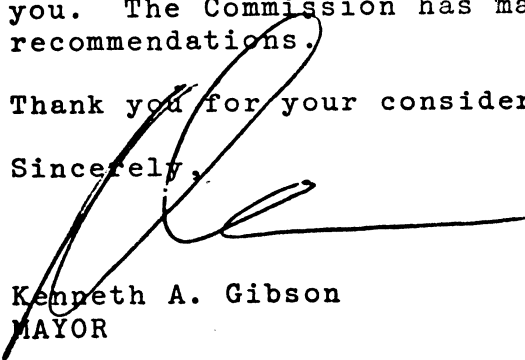
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Human Rights Commission

920 Broad Street
Newark, New Jersey 07102
201 733-3890

Daniel W. Blue, Jr.
Executive Director

September 16, 1975

The Honorable Kenneth A. Gibson, Mayor
City of Newark
City Hall
Newark, New Jersey 07102

Dear Mayor Gibson:

The Newark Human Rights Commission is proud to present to you the report resulting from our Hearings on Capital Punishment.

The report includes a compilation and evaluation of testimony of the May 12 and 13, 1975 hearings, and recommendations from the Commission.

We wish to express our appreciation to you for your support in this and other endeavors.

Sincerely,



Rev. John R. Sharp
Chairman

Human Rights Commission

920 Broad Street
Newark, New Jersey 07102
201 733-3890

Daniel W. Blue, Jr.
Executive Director

September 16, 1975

Members of the Municipal Council
Newark Municipal Council
City Hall
Newark, New Jersey 07102

Dear Council Members:

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Rev. John R. Sharp
Chairman

CONTENTS

| | |
|--------------------------------------|---------|
| Preface | Page 1 |
| Purpose and Background | Page 3 |
| Compilation of Testimony | Page 5 |
| Major Arguments Presented | Page 8 |
| Position of the Commission | Page 22 |
| Legislative Alternatives | Page 27 |
| Commendation of the People of Newark | Page 30 |

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PREFACE

The Newark Human Rights Commission's responsibilities are broad. The goals are set forth in the charter of creation, "Article 11" of the Revised Ordinance of Newark:

2:2-40 Functions, powers and duties

- (a) The functions of the Commission shall be to:
- (1) Foster mutual understanding and respect among all racial, religious and ethnic groups in the City,
 - (2) Discourage and prevent discriminatory practice against any such group or its members,
 - (3) Cooperate with federal, state and municipal agencies and non-governmental organizations having like or kindred functions; and
 - (4) Make such investigations and studies in any field of human relationship as in the judgement of the Commission will aid in effectuating its general purposes.

The Human Rights Commission realizes that in order to effect positive social change we must act as a catalyst in matters of human and civil rights.

Public Hearings

The Commission holds public hearings in order to determine how the Newark citizenry feels relative to pertinent issues in the Civil Rights field. The issue of the restoration of the death penalty in the State of New Jersey was of prime interest to the Commission and citizens.

Therefore, the Commission initiated public hearings on this subject. This report includes a summation of the two day hearing on the restoration of the death penalty. After careful study of the results of the hearing, the Newark Human Rights Commission has adopted a position it believes to represent those results, as well as its own position on the subject of restoration of capital punishment in the State of New Jersey. The report will be sent, with the Commission's recommendations, to the New Jersey Legislature in order to make the Senate and Assembly aware of the feelings expressed by the citizens of Newark in regard to the question of capital punishment.

PURPOSE AND BACKGROUND

The Newark Human Rights Commission Hearings on Capital Punishment arose from a specific request by a member of the Municipal Council, Councilman Donald Tucker. Councilman Tucker's request, pointing to the alleged discriminatory manner with which capital punishment has historically been practiced in this country, was discussed at a regular meeting of the Commission. Following a lengthy discussion, the Commission voted to hold public hearings on the subject of capital punishment. It was felt that members of the public deserved an opportunity to express their views on as crucial a matter as the death penalty. The Commission further realized its obligation to respond to the allegations that such punishment, if re-instated in the State of New Jersey, would indeed be imposed in a discriminatory manner against the residents of the city, as well as the state. The Commission voted to hold both afternoon and evening sessions, in order to provide an opportunity for all segments of the Newark population to speak. The staff was requested to undertake an extensive publicity program with the aim of alerting a large segment of the population of the availability of the hearings.

The hearing panel consisted of Reverend John R. Sharp, Chairman of the Commission, and eight Commissioners appointed by him. They were: Ms. Hope Jackson, 1st Vice Chairman, Mr. Manuel Geraldo, Mr. Joseph Manghisi, Mr. Jacinto Marrero, Mr. Carl Peterman, Mr. Courtney Weekes, Dr. Russel Greco, and Mr. Daniel Warnock. These Commissioners served as an impartial panel, for the purpose of gathering the information. Orientation sessions were held in order to assist the Commissioners in the task at hand. Personal views were neither expressed nor

considered at the time of the hearings.

Notification of the hearings was given to the public in several ways. Articles were published in local newspapers requesting speakers to register. Local radio stations broadcast announcements of the same. Large posters were displayed prominently throughout the five wards of Newark. Public notices were mailed to community groups throughout the city, as well as to groups, on both sides of the issues, whose views on capital punishment were a matter of public record.

COMPILATION OF TESTIMONY

The following is a breakdown of speakers at the public hearings according to their affiliation. Some of these groups were represented by more than one speaker, however, the same views were presented, so that only the organization's name is listed.

In addition, fifteen (15) individual Newark residents stated their views. Of these, eleven (11) opposed Capital Punishment, and four (4) were in favor of it.

1. Human and Civil Rights Organizations

OPPOSED TO CAPITAL PUNISHMENT:

Commission for Racial Justice

Coalition for Penal Reform

American Civil Liberties Union

New Jersey State Advisory Committee to U.S. Commission on Civil Rights.

2. Property Owners

FOR CAPITAL PUNISHMENT:

North Ward Property Owners Protective Association

3. Community Organizations

OPPOSED TO CAPITAL PUNISHMENT:

Congress of African People

Newark Jaycees

West Ward Citizens Group

Schley Street Block Association

Osborne Terrace Block Association

4. Professional Groups

OPPOSED TO CAPITAL PUNISHMENT:

Association of Black Psychologists
National Conference of Black Lawyers

5. Churches

OPPOSED TO CAPITAL PUNISHMENT:

New Hope Baptist Church

6. Police Groups

OPPOSED TO CAPITAL PUNISHMENT:

Bronze Shields

7. Private Associations

FOR CAPITAL PUNISHMENT:

Veterans Civic League of New Jersey

8. City Agencies

OPPOSED TO CAPITAL PUNISHMENT:

Consumer Action

9. Quasi-City Agencies

OPPOSED TO CAPITAL PUNISHMENT:

New Hope Development Corporation

10. Elected Officials

OPPOSED TO CAPITAL PUNISHMENT:

Mayor Kenneth A. Gibson
Councilman Donald Tucker

Councilman Jesse Allen

FOR CAPITAL PUNISHMENT:

Councilman Henry Martinez

Councilman Anthony Carrino

Assemblyman Richard Codey

MAJOR ARGUMENTS PRESENTED

The speakers who were not in favor of Capital Punishment were opposed for three major reasons; moral and religious, fear of discriminatory application, and the absence of a deterrent effect.

The following is a listing of those speakers opposed to Capital Punishment and a listing of their rationales.

Elected Officials

Mayor Kenneth A. Gibson-Newark

Mayor Gibson stated that historically the death penalty "... has been imposed on the poor and disenfranchised and those who cannot receive, for one reason or another, adequate legal representation and those who have...not been properly educated in our society..."

He cited the lack of a deterrent effect, and, "... a higher question... whether or not we as human beings have the right ourselves to decide whether or not another human being should live..." and the problem of mistakes being made.

Mayor Gibson mentioned the need for the further development of rehabilitation and proper social services before considering use of capital punishment.

Councilman Donald Tucker-Councilman-at-Large, Newark

Councilman Tucker stated, "...I'm in favor of mandatory and stronger punishments for those criminals who commit heinous crimes....I am not,

however, in favor of reinstatement of the death penalty. The belief that punishment must be graded according to the severity of the crime does not require that the upper limits of the severity be the death penalty."

The Councilman cited FBI statistics indicating the "... dubious value as a deterrent." Also, "The use of the death penalty in this state of New Jersey; in our nation as a whole, is sporadic, arbitrary, economically and racially discriminatory." He cited a U.S. Department of Justice report showing the disproportionate application against blacks." Criminals with money and/or influence are better able to bargain for their release in comparison to the black and the poor."

In concluding he said, "We, as civilized and intelligent thinking citizens should take into consideration the basic faults within our society and the possibility for mistakes within our criminal justice processes, and not demand a life for a life".

Reverend Levin West-speaking for Councilman Jesse Allen,
Central Ward, Newark

Rev. West presentation was extracted from a document prepared by Councilman Tucker. He noted the "dubious value as a deterrent" of the death penalty, as well as other information previously cited.

Rev. West had polled members of his community, and found that... "98 per cent of those persons that we have polled feel that because of the economic conditions that affect the lower (class) blacks, whites, browns and other ethnic groups, we find that they were unable

to get the type of lawyers, type of defense that many of the persons in the upper class are able to retain."

He concluded, "...none of us has a right to take that God given life that God has put in our bodies."

Human and Civil Rights Organizations

Commission for Racial Justice- Irv Joyner, Director, Criminal Justice Program

Mr. Joyner stated that his organization... "is vigorously opposed to the use of capital punishment." He mentioned that an estimated 75 to 80 percent of all homicides occur between family, friends and acquaintance... and the fear of the death penalty would not deter these emotional incidences.

Mr. Joyner believed the death penalty is discriminatory both racially and economically. "Our information," he said, "shows that Blacks and poor people are the recipients." He cited North Carolina, where, "of 69 people on death row, 60 percent are Black, 100 percent are poor.

Charles Tonic- Executive Coordinator, Coalition for Penal Reform

Mr. Tonic cited the American Civil Liberties Union position as one with which he agreed, "Capital Punishment is cruel and unusual violation of the eighth amendment of the United States Constitution... a barbaric practice, it has no place in this civilized society. ...executions in prison gave the...message to all society that life ceases to be sacred when it is thought useful to take it..."

Mr. Tonic also stated that the death penalty is "...imposed almost

exclusively against racial minorities, the poor, the uneducated persons..." is not a deterrent, and denies due process of law.

Bernard Freeman-Project Director, Community Legal Action Workshop
of the American Civil Liberties Union

Mr. Freeman stated that the use of the death penalty"...perpetrates and exacerbates the inequality of wealth, social opportunity, educational opportunity, which exists in this country. ...85 percent of the defendants that come before the courts are victims of their social or economic position."

Also, "there is no way that we can legislate or avoid discretion by legislation in the administration of the death penalty.

Nadine Taub-Chairman, New Jersey State Advisory Committee to the
United States Commission on Civil Rights

Ms. Taub stated, "...there can be no question that the death penalty has had a disproportionate impact on the minorities, particularly blacks."

She quoted a former Governor of Ohio, "During my experience as governor of Ohio, I found that men on death row had one thing in common, they were penniless. They are...poor, unable to manipulate the system to their own advantage." Ms. Taub continued, "There is no reason to believe that a new death penalty in New Jersey would avoid the discriminatory impact overall."

Community Organizations

Retha Perry- West Ward citizen's Group

Ms. Perry stated, " I won't call it capital punishment, I call it

murder. I am against murder, whether you have a position to do it or whether you go out and commit murder... we know the Ten Commandments say 'Thou shall not kill'and yet we feel we should kill."

Ms. Perry also mentioned economically discriminatory application of capital punishment.

Richard McClish- President, Schley Street Block Association

Mr. McClish stated, " The citizens on my block and my community are very fearful of this legislation because they feel that, let us say, it is somewhat discriminatorily used against Black minorities and they also feel that the legislation will not, in fact, deter crime or lessen the threat on life. They also feel that to bring back the death penalty would be inhumane and cruel punishment perpetrated upon any individual."

He asked "...that the legislators should direct their attention to try to correct some of the social ills that breed these type of desperate actions by individuals."

Ms. Arlene Henry-President, Osborne Terrace Block Association

Ms. Henry stated, " We should be talking about causation of crime instead of trying to deal with it by wiping people out." She spoke of the necessity of alleviating social problems, and also feared racially and economically discriminatory application of capital punishment.

Mrs. Henry also said "...the Bible says that Thou shall not kill."

Thazavu-Congress of African People

Thazavu stated, "people of the Black and other minority communities are definitely opposed to the death penalty whose victims will be Black and Puerto Rican people who already make up 75 percent of the population of big city jails. The death penalty only speaks to legally murdering victims of hardships, Black, Puerto Rican and poor Whites who are exploited by the system that they are forced to live in.

"The Congress of African People openly opposes the death penalty as an instrument to support the ruling class..."

Richard Rogers - President, Newark Jaycees

Mr. Rogers felt the death penalty was not a deterrent, since a person who would kill "...has overcome all of his inhibitions.." and also", ...it is really a miscarriage of justice for this person to be convicted if common sense tells us he has to be crazy to do it."

He mentioned, "There ought to be more productive ways of removing someone from society.

New Hope Development Corporation

The following speakers represented the New Hope Development Corporation Rev. Joseph Dale, Thurman Smith, Stanley Winters, Sharon Thomas, Roberta Warren, Roslyn Holmes, James McClain, Nathan Davis.

These speakers all represented the same point of view. The statement of Stanley Winters sums up these views.

Mr. Winters stated, "The death penalty, once carried out, is irrevocable. Judicial errors have occurred and innocent people, we cannot know how many, have suffered because of failures in the justice system.

"Data also show that there is a far higher proportion of persons sentenced to death from oppressed and disadvantaged groups in American society than from the middle class and white groups... because of social bias in the criminal justice system which works against them."

Mr. Winters stated that the threat of death is not a deterrent, and "...that the assurance of a definite punishment and not necessarily the severity of that punishment is the best deterrent to crime.

"So long as we fail to unite against the social foundations of crime, ...then so long will we be sidetracked into divisive issues like the question of restoring the death penalty."

Rev. Charles Thomas- Pastor, New Hope Baptist Church

Rev. Thomas stated, " I've been asked by my committee today to express their total opposition to the reinstatement of the death penalty. ...I express it very strongly but I also stand here representing a higher authority...a very emphatic man, and he said 'Thou shalt not kill.' We must believe that a murder is a murder any time it cuts short a man's life span..."

Professional Groups

Dr. George Jackson- National Chairman, Association of Black Psychologists

Dr. Jackson stated, "...capital punishment in the context of the current criminal justice system...accelerates a poor, already debased assessment of human life, and, therefore, compounds the problem already existing in the nation which persistently deals in a very negligent manner with the poor.

"The Association of Black Psychologists say that certainly, rather than severity, is the yard stick by which any sort of punishment or rehabilitation should be meted out."

Dr. Jackson also noted "...that the greatest incidence of violence is perpetrated by the police against Black people as White people against Black people. In such a context, we feel that it will be criminal... to have a group of individuals set aside for whom capital punishment would so-called protect, but in the end will hurt them."

Detective Herbert Friday, President, Bronze Shields

Detective Friday stated, "We feel this law as so many other laws are only being used in cases that involve the poor and disadvantaged that come before the court. To live in a system of this (capital punishment) would only be another way to keep a disadvantaged person in a disadvantaged position. A person sent to death and later found innocent, where is...the Court of Appeals for those..."

Detective Friday continued, "The Fourteenth Amendment states no person shall be given a cruel or unusual punishment. The death penalty is cruel, it's painful and it's unusual because there's no regress from it."

Dave Edwards- National Conference of Black Lawyers

Mr. Edwards felt that the death penalty would be used in a discriminatory fashion against the poor. He also asked, "what happens if there's a mistake?", saying that this would be paid for by "a person with his life."

Daniel Tindall- President, Association of Black Building and Construction Contractors of New Jersey

Mr. Tindal stated, his group's opposition, saying, " I think its an opposition based on logic, on humanity and on contra-brutality and violence." He hoped our society had progressed further than"... an eye for an eye....,"

He continued, "...we must delve into the apparent trend of violence in the total system and this is one small part of it." He raised the possibilities of mistakes being made, discrimination against minorities and "...divisions in our society organized to brutalize the society so that the ones who control the society will do it more easily."

City Agencies

Dennis Cherot, Director, Consumer Action, Newark

Mr. Cherot stated, "In this case I think the argument is very well made, capital punishment is discriminatory, economically and racially and that the individuals who are least in a position to afford the type of representation..." necessary are poor and minorities."

Also, "The death penalty is not being imposed as a deterrent to capital crimes but is a form of revenge for capital crimes...statistics will indicate that the bruden of vengeance (will be) upon minorities, poor, or those left in a position...to protect themselves from the results of this."

Eleven un-affiliated individuals also spoke against capital punishment. Five cited the death penalty as being against their moral and religious beliefs. All concurred that the death penalty would be used in a discriminatory manner against blacks and minorities. The deterrent effect was also rejected by these speakers.

MAJOR ARGUMENTS PRESENTED

The speakers in favor of Capital Punishment in New Jersey cited many varied reasons for their positions. The major concerns were for the safety of society, vengeance for the aggrieved citizens, and the deterrent effect the death penalty would have on potential offenders.

The following is a listing of speakers in favor of the death penalty and a breakdown of their rationales.

Assemblyman Richard Codey-26th Assembly District

Assemblyman Codey is the sponsor of bill A3289, which provides for the death penalty"... upon motion of the prosecutor if such offense (murder) was committed against a police or other law enforcement officer, corrections employee or fireman who was performing his duties or because of his status as a public servant."

The Assemblyman stated, "In providing its members protection, society must do what it necessary to deter those who would break its laws and punish those who do so in an appropriate manner. It is my conclusion that capital punishment applied to the most serious of offenses fulfills these functions."

Mr. Codey also cited "the incapacitating effect of capital punishment..." and "... the inherent logic of the deterrent power of the threat of death."

Councilman Henry Martinez- East Ward Newark

Councilman Martinez stated, "capital punishment is the cornerstone of any credible system of law enforcement." The Councilman mentioned that "...once (a killer) has been eliminated, he is forever incapable of killing again ... additionally, it appears that since the time when the right to private justice was taken over by the government, grief stricken relatives were, in effect, guaranteed that their cry for justice would be acted upon." The Councilman quoted William F. Buckley, who wrote, "...some people refer to the taking of a life of a convicted killer as immoral when they should be content with calling it distasteful."

Councilman Anthony Carrino- North Ward, Newark

Councilman Carrino stated, "...I don't believe the death penalty should be invoked just for the killing of a police officer, but everyone who is killed during the course of a crime which may be interpreted as premeditated." The Councilman also cited the need for the protection of citizens, the rising crime rate, and the finality of the death penalty as reasons for its reenactment.

Michael J. Picone, President- North Ward Property Owners Protective Association

Mr. Picone stated, "We do need a deterrent to vicious criminal acts of murder. I am in favor of restoring the death penalty for the killing of anyone, not only of law enforcement, corrections or fire officers, ...justice now is for the criminal and not for the innocent. I believe in capital punishment because I believe that this is the justice for the innocent person."

Ann Groves

Ms. Groves stated, "I am speaking in opposition to (capital punishment) if you are basing it as they specified only for firemen or policemen. I am for it on one specific thing, and that is for rapists of children."

Samuel Sachs-Commander- Veteran's Civic League of New Jersey

Mr. Sachs read a resolution unanimously adopted by his organization, calling on the Governor and Legislature to "re-enact capital punishment as the penalty for murder in the first degree."

Mr. Sachs cited the deterrent effect, and felt the death penalty should include every rape, kidnapping and murder of any kind.

James Treadwell

Mr. Treadwell said, "I'm in favor of the death penalty if it covers all murders. Murder in the event of a mugging attempt or a mugging robbery or robbery attempts, burglary, burglary attempts or kidnapping. I am opposed to the death penalty if it does not include any citizen who commits these crimes."

If there were life sentences with no provisions for parole, Mr. Treadwell would support it.

John V. Hanrahan

Mr. Hanrahan had witnessed executions in 1952, and believed in their deterrent effect. He did not feel convicted murderers should be allowed to return to society to repeat their crimes.

John H. Bakman

Mr. Bakman stated "... the laws should cover the acts of murder for civilians, as well as police and firemen and other public employees." He called for the death penalty for murder by robbery, mugging, rape, or arson by hired killers, or for murders while committing crimes using guns, knives, clubs or physical brute force. He noted the deterrent effect. "When these killers realize they will be punished with their own lives, they will hesitate to take someone else's..."

Robert Doherty

Mr. Doherty stated, "when a perpetrator acts outside the bounds of the community, he forfeits his rights to life. Both society and the victim, I believe, are entitled to vengeance."

He went on to mention the need to keep killers incarcerated, or executed, as a deterrent and means of protection against repetition. Mr. Doherty was in favor of capital punishment for any premeditated, first degree murder.

NEWARK HUMAN RIGHTS COMMISSION POSITION

ON

CAPITAL PUNISHMENT

The Newark Human Rights Commission, having completed public hearings on the subject of Capital Punishment, and more particularly, on the reintroduction of legislation that would again make such punishment legal in New Jersey, is overwhelmingly and resolutely opposed to the reintroduction of Capital Punishment in the State of New Jersey.

This Commission was created to protect the human rights of the citizens of Newark. We are convinced, upon study of the public testimony and printed material, that Capital Punishment, as it has historically been practiced, would, if reinstated in New Jersey, be an affront to the very mandate this Commission has to protect the human rights of Newark's citizens. This Commission is in full accord with those who testified at the Hearing that they saw no way to condemn murder by an individual while legislating it for the State. It is immoral for the State to take away what it could in no way ever give back. The immorality of capital punishment becomes ever more clear when one notes - as has been proven time after time - that the act accomplishes nothing but death. The existence of capital punishment does not deter persons at all. Studies have, in fact, shown a higher rate of capital crimes in states which have the existing legislation, while abolitionist states have enjoyed lower rates of such crimes. The immorality is further exhibited in the discriminatory manner in which such legislation has historically been administered.

The evidence of discriminatory practice, aimed chiefly at minorities, is overwhelming. The testimony of Newark's citizens in viewing such practice as discriminatory is also overwhelming; resulting in 89% of the groups and 73% of the individuals who spoke opposing Capital Punishment in any form.

In the two day hearings, we were repeatedly reminded by the representatives of community organizations and concerned individuals that it was they - the poor and the black residents of New Jersey's largest city-that would suffer the brunt of this legislation. Studies were brought to our attention to show that the pattern of application in New Jersey was the same as in other states, that is, equally as discriminatory in application.

Whereas nearly half of the blacks convicted of capital crimes were executed in New Jersey, less than one third of the whites, convicted of the same crimes, suffered the ultimate penalty. The discrepancy grows even greater when one looks at the record of commutation in New Jersey: where whites were twice as likely to have their sentences commuted as were blacks. The existence of discrimination is not simply limited to the victims of racism; the added need of expensive legal proceedings means that the poor, of any race, creed or religion, are at a disproportionate disadvantage. Capital Punishment has been called the "privilege of the poor."

We are acutely aware that the economic plight of our country, the rising frustrations of our poor and unemployed, and the physical conditions of our center cities produce breeding grounds for violence and bloodshed. We see the need to banish these, the "murderers" of

our people, if society is ever to be truly just.

In a just society, those who are seemingly unable to cope with life in a rational and non-violent manner will be aided rather than further persecuted. Even as society must be protected from them, they must be protected from an angry society that has created them.

This Commission, composed of representatives from the disciplines of law, education, medicine, religion, penal enforcement, mental health and social service, believes that alternatives can and must be found for the creation of a sane and just society in our cities and our states. It is time that those who frame our laws, as well as those who enforce them, put aside the emotional arguments of groups who would retain or reinstate such cruel and discriminatory punishment. We are convinced by the evidence set before us that the concept of Capital Punishment serves no logical or positive purpose: it does not deter crime; it cannot restore life; it is frighteningly fallible and absolutely irreversible; it is neither practically nor economically good penal practice. Those who have witnessed it have never believed it to satisfy the call for justice. It is the imperfect solution of a frustrated, society that refuses to create just alternatives. Those who are rightly concerned about the safety of our citizens must move beyond retaliation and address the needs of restoration and rehabilitation, of our communities and our families are ever to be safe.

We, the Newark Human Rights Commission, call upon our legislators and our governor to oppose the reinstatement of Capital Punishment in New Jersey. We urge the passing of laws that will establish viable alternatives to Capital Punishment while preserving the rights of all our citizens.

CONCURRING POSITION
ON
CAPITAL PUNISHMENT

After careful review and analysis of testimony presented at the Public Hearings, relative to the restoration of the Death Penalty in the State of New Jersey, the Newark Human Rights Commission concludes the following:

It is abundantly clear that the interested members of the Greater Newark Community are overwhelmingly opposed to the Assembly Bill which reflects selective application of the death penalty as it is applicable to specific groups, under special circumstances. The concept of this bill is totally unconscionable and unacceptable. Our collective society can neither condone nor permit legislation that sets a greater value on the human life of one individual or group as opposed to others, their specific contributions to society as a whole notwithstanding.

Opponents and proponents of the application of the Death Penalty without reservation appear to find the Death Penalty and its finality abhorant on moral grounds. It is therefore the considered position of this Commission that to effectively deal with the subject matter, we must divorce ourselves of the moral concept as it applies to the Death Penalty. This does not reflect abandonment of the principles of human life and its value, but is a realistic appraisal of history; that moral values are essential ingredients in the application of true and equal justice, and cannot be imposed on others through legislation.

Transcripts of testimony of persons of all stations who appeared before the Commission expressed their positions and those of their constituencies pro and con, as it applies to the restoration of the death penalty. Careful consideration of the views expressed revealed another significant fact, the fear of discrimination, and unequal application of justice. While the specific purpose of the hearings was consideration of the restoration of the Death Penalty in New Jersey in general and Assembly Bill 3289, in particular. We of the Commission cannot ignore these fears and the cries against injustice and unequal application of the law.

It is apparent that the death penalty, and for that matter any alternative form of penalty imposed by our legal system for serious crimes, are meaningless, unless these fears are totally addressed.

This is an awesome responsibility placed in the hands of our elected legislators. We of the Newark Human Rights Commission stand ready to assist them in any way we can to meet the challenge that all our society cries out for-Equal Justice for all, freedom from prejudice, bigotry and hate.

ALTERNATIVES FOR LEGISLATIVE REVIEW

Following the Hearings on Capital Punishment, the Commissioners and Staff met to review the transcript and consider recommendations to the State Legislature. It was clear, from a review of the material gathered at the hearings, that the overwhelming sentiment of those testifying was against reenactment of capital punishment. What was not as clear, however, were alternatives for consideration by the Legislature. Since legislation is generally the result of an effort to meet the needs of the people - in this case, securing proper justice and maintaining safety - simply adopting a negative position would leave those needs unmet. The Commission, therefore, convened several times to discuss recommendations that would go beyond merely advising the defeat of capital punishment legislation. The following recommendations are the result of those meetings.

Prevention

The Commission is acutely aware of the need to focus legislative attention on the plight of our urban areas, areas which are literally becoming breeding grounds for crime and murder.

We submit the following alternatives for your consideration:

- (a) The establishment of neighborhood youth programs.
- (b) Counselling programs
- (c) Alternative education, designed to reach drop-outs, is essential.
- (d) Employment should be a guaranteed state right. (as long as the unemployment lines continue to grow, and the sense of frustration they bring continues to rise, crimes of desperation will inevitably continue.)

- (e) Medical services, particularly to the emotionally disturbed, must be moved from the distant and megalithic institution to the neighborhood.
- (f) Gun Reform, we propose consideration of a ban on all hand guns with the exception of properly constituted law enforcement agencies.

Rehabilitation

Penal Reform: The Commission believes that the alternative to overcrowded penal institutions, which, according to the critics, would be even more crowded with the life-terminer, is only to be found through a hard look at the pressing need for penal reform.

Therefore, we submit the following recommendations;

- (a) Reformatories not dungeons. Our institutions need to be reformatories in the best sense of that term.
- (b) Character Redevelopment. The emphasis has to be on character redevelopment. The commendable record that first generation therapeutic communities have built in working with drug addicts - a group formerly thought to be incorrigible - should show the "myth of the incorrigible" to be precisely that - a myth. Our society should put a high premium on the re-cycling of human potential rather than destroying it. Such a review of the existing patterns of reform should take a long look at the best the rehabilitative skills can offer.
- (c) The abolishment of victimless crimes would provide an immediate relief for the penal and court system.
- (d) There is a need for a review of the Parole System - a system which needs to give maximum protection to the public, while remaining an incentive for new character development by the incarcerated.

- e) Replace punitive staff with educational, rehabilitation and psychological trained staff.

Persons reading this report, and looking for an alternative way to satisfy the cry for vengeance will look in vain. This Commission believes that the human dignity and worth of an individual is inviolable. Even though society cannot replace the life of a victim of a capital crime, it is far better to attempt to reform and re-channel the life of the remaining victim (the murderer) than to give up his/her life-while making the state the newest victim in this endless chain of life-taking.

A COMMENTATION TO THE NEWARK COMUNITY

The Hearing Panel, after review of the transcripts, requested a fellow Commissioner, Dr. Robert Small, who had been unable to attend the hearings, to review the transcripts independently. Dr. Small is a prison psychologist, and distinguished author in the area of criminal justice. Most significant is his book "The Legal Slaughter of Peace," in which he devoted an entire chapter to the subject of capital punishment. Dr. Small worked independently of the Commission, and submitted his evaluation only after the Commission Panel had completed its report. It is significant that his evaluation concurred completely with that of the Commission. In his review he commended those who testified, noting that "such points of view (expressed at the hearings) reflect an approach to human dignity which should be of importance to all thinking persons. We can deduct from the overall approach that there are still some persons who do not believe in simply preaching the commandments but also living them. The reviewer is in full accord with those persons and organizations who stood firm against capital punishment."

The Honorable Kenneth A. Gibson, Mayor

Newark Human Rights Commission:

Rev. John R. Sharp, Chairman

Mrs. Hope Jackson, 1st Vice Chairman

Mr. Leonard Chavis, 2nd Vice Chairman

Mrs. Jean Falumbo, Secretary

Mr. Frank Curry

Mr. Manuel Geraldo

Dr. Russel Greco

Mr. Joseph Manghisi

Mr. Jacinto Marrero

Mr. Carl W. Peterman

Mr. Johnie Peterson

Prof. Robert VanDyke Small

Mr. Daniel J. Warnock

Mr. Courtney Weekes

Mr. Daniel Williams

Daniel W. Blue, Jr., Executive Director

July 29, 1976

Mr. Chairman, and Members of the Senate Judiciary Committee:

I am the Rev. Jarrette C. Atkins, Sr., of the Department of Christian Social Relations of the Episcopal Diocese of Newark, speaking on behalf of the Rt. Rev. George Rath, Bishop of the Episcopal Diocese of Newark; and of the Rt. Rev. John Spong, Bishop Coadjutor; and of the Department of Christian Social Relations of the Episcopal Diocese of Newark. We state herewith our opposition to Capital Punishment imposed under any circumstances and to bills: S.46, S.639, S.938 in particular. I am grateful to you for the opportunity of appearing before this Committee to record the mind of our Diocese and National Church upon the subject. First, we reaffirm the official stand of the Episcopal Church in the U.S.A. as adopted by its governing body, the General Convention, in its opposition to capital punishment. The resolution adopted by the General Convention reads in part:

"Inasmuch as the individual life is of infinite worth in the sight of Almighty God; and whereas the taking of this human life falls within the province of Almighty God and not within the right of man; therefore be it RESOLVED, that the General Convention goes on record as opposed to capital punishment."

And we reaffirm the official stand of the Episcopal Diocese of Newark as expressed in a similar resolution adopted by its 88 Annual Convention which reads in part:

"Whereas Capital Punishment is contrary to the Christian doctrine of redemption, rehabilitation and reverence for life, and in view of the stand of our General Convention against capital punishment, Be it resolved by this Convention that the Diocese of Newark go on record as being opposed to capital punishment."

Resolutions similar to those above have been passed by no less than fourteen other national religious bodies, including those of both Jewish and Christian persuasions. The Judeo-Christian heritage teaches us respect for the worth of every individual and the deepest concern for those who offend against the laws of society. The forgiveness of the sinner, the reclamation of the offender, and the rehabilitation

of the criminal are the ways in which our faith teaches us to deal with those who have made even the most serious mistakes. We do not accomplish this perfectly within our individual lives, but we cannot support or condone practices which make a mockery of these goals in our corporate relations. Capital punishment has been defended as a deterrent to crime, as a warning to criminals, as a safeguard for our society and its laws. It has proved to be none of these. An enlightened public conscience has removed from the list of capital offenses many of the original acts which were so regarded only a few centuries ago. Sociological and penological studies today show no significant difference in the criminal records of states within which capital punishment has been outlawed and those within which it is still legal. Psychiatrists, parole officers and others who have studied the psychology of the murderer tend to agree that the threat of his own destruction is no deterrent to his act. Even if it were true that capital punishment acted as a deterrent to those contemplating murder and as a safeguard to society, there would still remain the monstrous injustice of the way in which the law is administered. Relatively few women are condemned to die; relatively few wealthy individuals are condemned to die; relatively few white persons are condemned to die. The sentence of death is most frequently pronounced in cases involving members of minority races who are too poor to employ their own counsel or to make use of the elaborate systems of appeals and reviews.

Capital punishment brutalizes both the condemned person and the condemning society. It allows the condemned to bear the sins of all in such a way that he has no opportunity for redress or reform because his life has been taken from him; and it allows society to forget its corporate guilt and its responsibility for a single man's wrongdoing. Some of our religious colleagues will quote liberally from the Old Testament about "an eye for an eye and a tooth for a tooth," and if they are Christians, they forget that Jesus himself declared in the Sermon on the Mount: "Love your enemies and pray for them which despitefully use you." Others will claim that this

is all right and necessary for personal relationships, but impossible in a society at large. But Jesus was speaking to everyone in His discourse, not only to His disciples. From our vantage point we are led to say that the new must interpret the old; and that Jesus reinterprets the Law and the Prophets, and He becomes the basis of our moral attitudes and actions.

Some will call our concern for the abolition of capital punishment, or in this case, its reinstatement as suggested by these bills, unrealistic and sentimental and out of touch with man's real nature. But surely, to assume that one man can be condemned to death and thus make any further rehabilitation impossible, and that his death can atone for the sins he has committed against another person or society is another kind of unrealism and sentimentality, naive, and in some instances brutal and cruel. Rather than destroy all a man's chances and opportunities in the name of revenge and as a supposed deterrent; and the statistics are very uncertain and not at all conclusive here; it seems much more humane and reasonable to pursue vigorously all avenues of rehabilitation in our prisons, our probation offices, our courts, our half-way houses, and in our training and use of as many volunteers as possible. Not for a moment are we claiming that laws and penalties should not be imposed. These are all necessary if we are to maintain law and order, but there are limits and points beyond which we go to our own and society's detriment.

Because capital punishment affords no redress to those wrongfully accused, tried, and executed, and because it is barbarous in nature, because it makes for unequal justice, because it fails in its announced purpose, but most of all because it usurps a prerogative that belongs only to the God who gave us life, and because it is against the dictates of a religion that professes belief in the mercy and justice of God and in the practice of forgiveness among men, we urge you not to release these bills from your Committee. I speak for the Bishops of the Episcopal Diocese of Newark and the Department of Christian Social Relations.

TESTIMONY OF ELEANOR HOWELL

on behalf of New Jersey Friends Council

before the Senate Judiciary Committee

July 29, 1976

I am Eleanor Howell of Hopewell Township, Mercer County, New Jersey, testifying in place of John Howell, my husband, on behalf of New Jersey Friends Council, an all-New Jersey Quaker organization. While we cannot speak for all Quakers in New Jersey, we do undertake to discover and truthfully represent those views on which members of the Religious Society of Friends--i.e. Quakers, are in substantial unity. Opposition to the death penalty is a position on which Quakers are generally in agreement--in New Jersey as elsewhere.

We understand that there are before you six legislative proposals that include death penalty provisions, the bills identified as S-46, S-639, S-938, S-1100, S-1119, and S-1477. Since we oppose them all on the grounds of our general opposition to the death penalty, I will not distinguish among them except to note in passing that some would give more sweeping application to the death penalty than others. If the death penalty is wrong in principle, as we believe it to be, then the more widely it is applied the greater the harm.

We oppose the death penalty first for reasons of principle--on religious and moral grounds--and secondly for practical reasons, as an ineffective means of assuring that the rightful interests of society are protected and enhanced. We believe that there is a divine spark in each human being and that everyone, no matter how depraved, is potentially capable of responding to this "inner light", this impulse for good. It is therefore incumbent upon us to encourage the good in each human soul and to oppose those notions and impulses that lead to evil. In this we seek divine guidance at all times.

It follows that we cannot sanction or condone the killing of a human being in cold blood in the name of society. Although we agree that the crimes for which the death penalty is advocated are abhorrent, and although we share the sense of outrage when murder, kidnapping and other horrible crimes are committed, we do not think it right for society through its agents to express its indignation and our own indignation through another act of violence of the very same kind. We utterly reject revenge as a proper motive; although the impulse for revenge may be understandable in human terms, we must disclaim it and abstain from any action to implement it.

In practical terms there are several good reasons for opposing the death penalty. The first is that it places irrevocable consequences upon the occasional and always possible miscarriage of justice. Although our judicial system is designed to minimize error, experience has shown that some errors do occur. A study by Hugo Adam Bedau, published in 1967,

reported 74 cases of wrongful conviction for criminal homicide. Eight of the accused persons were executed. Twenty-four others received a death sentence but were not executed. There are cases on record in which a man accused of murder has confessed because of duress or poor advice from counsel but later has been proved innocent. Even the appeals process is not infallible.

A second practical consideration is the unequal incidence of convictions leading to the death penalty. It is well known that the price of a first-rate defense is not equally available to all. It is well known that a disproportionately large number of those unable to afford the best possible legal defense are of minority racial or ethnic background. The possibility of being ill advised or unskillfully represented by counsel is greater if you are poor, and so it seems inevitable, even with improvements in the law, that poor people will continue to bear the brunt of executions under death penalty provisions.

A third practical consideration--the last to be mentioned here although there are others--is the lack of effectiveness of the death penalty as a deterrent to homicide or the other crimes for which it is sometimes imposed. The question of deterrence has been studied extensively and lack of evidence for the effectiveness of the death penalty as a deterrent has been one of the principal reasons for its abolition in many jurisdictions in this country and abroad.

Thank you.

STATEMENT ON CAPITAL PUNISHMENT

By: Willis O. Thomas
Eastern Regional Director
National Council on Crime
and Delinquency
411 Hackensack Avenue
Hackensack, New Jersey

July 29, 1976

N.J. Senate Judiciary
Committee, Trenton, N.J.

The National Council on Crime and Delinquency is opposed to the death penalty in any form, for any offense, in any jurisdiction.

It is difficult to understand why, in a country as great as ours, where taking a life feloniously is considered the greatest crime, taking a life as a punishment is not considered cruel or wrong.

It would appear from the various findings over the years that a primary concern of the U.S. Supreme Court is whether we take life by execution in an equitable manner. I do not believe that in our society we will ever achieve equity in sentencing, even of a gross kind. If we ever were to achieve gross equality in sentencing, we would no longer have a society interested in killing people for crime.

The Board of the National Council on Crime and Delinquency, in 1963, adopted a resolution condemning the use of the death penalty, and calling for its discontinuance and abolition in states where it still exists.

I will not take your time to read that resolution as I have brought along copies for the Committee members. I would like to point out, however, what I believe to be the most important reason given for that position - "sentences should not be based on vengeance".

In 1971 the New Jersey Criminal Law Revision Commission issued its final report, and in the Commentary Volume, page 168

it said:

"Generally, we consider the issue of the abolition of the death penalty to be beyond the scope of the Commission's mandate although there is considerable sentiment within the Commission for abolition."

In the 1972 majority opinion of the California Supreme Court, written by Chief Judge Wright, the following conclusion was stated:

"We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with dignity of man and the judicial process. Our conclusions that the death penalty may no longer be exacted in California....is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members."

The responsibility for the re-establishment of the death penalty is in the hands of those in authority - the legislature, the governor, the courts. These are the people who must act, and do act, before a person may be executed. None of these can be excused, if the death penalty is an evil.

I sincerely hope you will not spend your valuable time in the vain effort of devising a statute that will eliminate disparity in the application of the death penalty. No doubt a statute can be drawn that will meet the guidelines of the recent U. S. Supreme Court decisions, but it cannot eliminate disparity.

In all good conscience, can you justify the state - legislature, court, and governor - committing the same crime as the person you would execute?

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NATIONAL CONFERENCE OF BLACK LAWYER

~~CONFIDENTIAL~~

NATIONAL OFFICE

Lennox S. Hinds, Esq.
National Director

Victor M. Goode, Esq.
Associate Director

TESTIMONY OF:

LENNOX S. HINDS, ESQ.
DIRECTOR,
NATIONAL CONFERENCE
OF BLACK LAWYERS

Before the Senate Judiciary Committee,

James P. Dugan, Chairman

In Opposition to:

| | |
|--------------|-------|
| Senate Bills | S 46 |
| | S639 |
| | S938 |
| | S1098 |
| | S1100 |
| | S1119 |
| | S1477 |

July 29, 1976

112 x

Perhaps no other single event to occur in this bicentennial year more aptly symbolizes the ways in which legal argument can be used to mask and justify the perpetuation of the two parallel systems of justice which have marked this country's history since its inception.

From our arrival as slaves in Jamestown in 1619 until 1865, the law justified our condition as chattel slaves and the brutal quelling of our rebellions; after 1865, the law was used to suppress our disconcerting struggles to achieve the rights of citizens and to create and maintain our second class status on constitutional grounds.

Throughout this country's history, lynchings, bombings, burnings, rapes and murders against black, brown and red people, have been disregarded by Federal Law enforcement agencies as "outside their jurisdiction" while they have initiated and encouraged illegal surveillance of our struggles as rebellious minorities have been controlled by constitutionally acceptable armed force. Racist application of State criminal law enforcement continues to select black and poor people for arrest, prosecution, conviction, imprisonment and death no differently in 1976 than in 1876.

On June 29, 1972, when the Supreme Court declared that "the imposition and carrying out of the Death penalty . . . constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," six hundred persons were waiting in Death Rows in thirty-two states, for the opinion that would determine if they would be hung, gassed or electrocuted.¹

1. Furman v. Georgia, 408 U.S. 238, 1972.

The inescapable inference that the death sentence as applied prior to the challenge in Furman perpetuated an historic and institutionalized pattern of discrimination was obvious to even outside observers. In 1944; Gunnar Myrdal reported in An American Dilemma that "The south makes the widest application of the death penalty, and Negro criminals come in for much more than their share of the executions."

2. The basic source book on all aspects, of capital punishment in the United States has been The Death Penalty in America, rev. ed. H.A. Bedau, 1967, Doubleday Anchor books. Two other volumes, also available in paperback, contain valuable supplementary information: Capital Punishment, ed. T. Sellin, Harper & Row, 1967; and Capital Punishment, ed. J.A. McCafferty, Aldine, 1972.

A scholarly essay anticipating the Supreme Court's decision in Furman is A.J. Goldberg and A.M. Dershowitz, "Declaring the Death Penalty Unconstitutional," Harvard Law Review, vol. 83, June 1970, pp. 1773-1819.

Among the many public documents published under various auspices, three contain information of specific national interest: "Capital Punishment, Hearings Before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 92nd Congress, 2nd Session, March, May 1972"; "To Abolish the Death Penalty, Hearings Before Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 90th Congress, 2nd Session, March-June 1968"; "Abolition of Capital Punishment, Hearings Before Subcommittee No. 2, House of Representatives, 86th Congress, 2nd Session, May 1960."

The general issue of deterrence for all crimes is reviewed by F. E. Zimring, Perspectives on Deterrence, National Institute of Mental Health, Crime and Delinquency Issues, 1971. The argument of this monograph has been expanded in the definitive work by Zimring and G. E. Hawkins, Deterrence: The Legal Threat in Crime Control, University of Chicago Press, 1973.

The most substantial single study of the crime of murder in urban America is by M. E. Wolfgang, Patterns in Criminal Homicide, University of Pennsylvania Press, 1958.

Statistical information on death sentences and executions since 1930 may be obtained in National Prisoner Statistics.

Of particular interest to a class and racial analysis of the application of the death penalty are Brief Amicus Curiae, National Conference of Black Lawyers, Fowler v. North Carolina, No. 73-7031; Brief Amicus Curiae, National Alliance Against Racist and Political Repression.

Bald statistics confirm his view as to the frequency of this discrimination but it is not confined to the south.

Constitutional due process requires that the judicial functions of trial and sentencing be conducted with fundamental fairness. The application of the death penalty in rape and murder cases (since 1930, 99 percent of all executions have been for these crimes) is clear and unmistakable.

Since 1930, 3859 persons have been executed in the United States. Of these, 2066 or 54 percent were black. During these years blacks were about one eleventh of the population. For the crime of murder, 3,334 were executed; 1,630 or 49 percent were black. For rape, a total of 455 have been executed, all but two in the south; 405 or 90 percent were black.³ In New Jersey, of the 22 who were awaiting execution when the penalty was abolished in 1972, 14 were black.⁴ It must also be noted that despite the Supreme Court's bold conclusion in Gregg v. Georgia, 44 U.S. L.W. 5242 (U.S. July 2, 1976) that the 'guided-discretion' statutes on their face (i. e. those of Georgia, Florida and Texas; which provide for a bifurcated trial where the sentencing authority is apprised of information relevant to sentencing and is provided with standards to guide its use of that information) prevent the use of the death penalty in an arbitrary or capricious manner, statistics still support the fact that a disproportionate number of Blacks have been sentenced to

3. See National Prisoner Statistics (1969)

4. The New York Times, July 25, 1976, "A Matter of Life or Death", Martin Waldron.

death. This is true under the very statutes which the Supreme Court specifically upheld in these recent opinions upholding the penalty. For example, in Florida forty persons on death row are white, thirty-three are non-white; in Georgia eleven are white and eighteen are non-white; and in Texas twenty-one are white and twenty-one are non-white. Therefore those statutes which were found constitutional have the same impact on poor and minority peoples as did the statutes found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972)

This discrimination will occur no matter how well drafted a death penalty statute may be because racial discrimination in the operation of the criminal justice system occurs before a jury is convened. The prosecutor is accorded wide discretion over the exercise of his authority. There exists no effective procedure to review the prosecuting attorney's decision not to seek prosecution; nor is his decision concerning what level of criminal culpability to charge subject to any rigorous standard of review. The prosecutor is not compelled by any legal standards to charge one of the enumerated statutory capital offenses based on any given set of facts. Because a local prosecutor is often a product of the community he serves, he is in a position to adjust prosecutorial policy to local conditions. Therefore the biases of a particular community follow the accused from the time he is first arrested and indicted to the point at which he is sentenced.

5. President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Courts (1967), p. 75.

The Supreme Court in the (5-4) opinion in Furman v. Georgia came one vote away from sending the 600 to their deaths. Only Justice Douglas and Thurgood Marshall dealt squarely with the racism of the application of Capital Punishment. The three others in the majority opinion were more disturbed by its lack of efficacy in deterring crime. Douglas identified the way in which the Death penalty is a tool in the hands of those in power when he said:

It is cruel and unusual' to apply the death penalty -- or any other penalty -- selectively to minorities whose numbers are few, who are outcast of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. 408 U.S. 238 at 245.

Justice Thurgood Marshall was equally unequivocal on the class and race assumptions on which the application of the death penalty was based.

It ... is evident that the burden of Capital Punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against Capital Punishment. Their impotence leaves them victims of a sanction that the wealthier, better represented, just-as-guilty person can escape. So long as the Capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo because change would draw attention to the problem and concern might develop. 408 U.S. 238 at 365-366.

The shaky majority in the Furman case did not resolve the blood lust for the death penalty as a facile politician's solution to public concern with crime and violence.

6. See infra at Note 7 for further analysis on the Furman courts reasoning.

In the four years since the Furman decision thirty-four state legislatures have reinstated the death penalty, redrafted to "satisfy" the majority opinion Supreme Court's objections to the prior laws.⁷

As of July 1, 1976, 30 states had a total of 611 people on Death Row; including 9 women, 312 black males, 267 white males, 5 native American males and 17 chicano males. 75% non-white; almost all with appointed counsel (the surest index to a poor defendant). 90 of those condemned are in North Carolina alone where death may be the penalty for arson and burglary as well as murder and rape.

The political climate in the United States has not changed significantly since colonial days when the branding, enslaving and corporal punishment of black slaves, native Americans and hispanic minorities were both legal and commonplace. The death penalty and the other criminal sanctions are still tools selected by those in power to be applied toward those who are

7. Capital Punishment is cruel and unusual in the constitutional sense or denies the equal protection of the laws if it can be established that it is imposed and executed in a manner that discriminates against blacks or other racial minorities or the poor in violation of the Eighth and Fourteenth Amendment. The Furman court divided on this common ground. Justices Douglas, Marshall and Stewart based their objections to the death penalty on that reasoning. There was no firm consensus on any aspect of the five man majority opinion but certain elements were touched upon by all. The majority agreed that the death penalty is a cruel and unusual punishment because it is imposed under no clear standards; that the Eighth and Fourteenth Amendments should bar legislatures from imposing sanctions which as administered serve no valid social purpose; and that the death penalty is unpredictably used.

All members of the court with the exception of Justice Rehnquist personally opposed capital punishment.

most powerless to resist.

"Public support for capital punishment is currently at its highest point in nearly two decades".⁸ The Gallup Poll reported that 57 percent of all adults said they favored the death penalty for convicted murderers. This public support has been carefully and calculatedly nurtured by staunch public advocates of the death penalty like Richard Nixon whose hand-picked appointees to the Supreme Court now are in the majority. Philadelphia Mayor Frank Rizzo, and presidential hopeful, former California Governor Ronald Reagan, to name just a few of the politicians who warmly support the reinstatement of capital punishment.

It is important to note that former U.S. Attorney-General Mitchell's (and Nixon's) legacy to the Federal Criminal Code includes Senate Bill 1 (S-1) which would reinstate capital punishment for kidnapping, assassination, bombing of a public building, aircraft hijacking, and killing a prison guard.

We at the National Conference of Black Lawyers whose daily work takes us into the courts of this country know that the face on the target of the criminal law is black, brown, red and poor. We know, as all black people know, without reading statistics that our chances of being arrested, convicted, sentenced, imprisoned and executed are disproportionately high.

8. New York Times, Nov. 23, 1972, p. 18.

We know that the worst and most dangerous criminals are rarely the ones executed. The death penalty is applied randomly at best and discriminatorily at worst. It violates the constitutional guarantees of the equal protection of the laws because it is imposed almost exclusively against racial minorities, the poor, the uneducated -- persons who are victims of selective prosecution, overt discrimination in the sentencing process and who cannot afford sophisticated legal defenses.

Statistical studies support what our impressions tell us.

In Pennsylvania it has been shown that only the defendant's race explains the fact that among persons convicted of felony murder and sentenced to death, most whites will eventually have their sentences commuted to life imprisonment and blacks will not.

In New Jersey, juries tended to bring in the death sentence for more blacks convicted of felony murder than did for whites convicted of the same crime.

The most thorough statistical proof of racial bias in capital punishment has been compiled in the study of rape convictions. "Negroes convicted of rape are disproportionately sentenced to death compared with whites ... we are now prepared to assert that a significantly higher proportion of

9. Wolfgang, Kelly and Nolde, J., Criminal Law, Criminology and Political Science, 1(1962).

10. Wolf, in Rutgers Law Review (1964)

blacks are sentenced to death upon conviction of rape ... because they are
black... and the victims were white."¹¹

At recent Annual Meetings, black lawyers from throughout the country have pledged their energies to alert those who can still listen to this renewed attack on the sanctity of the lives of black, poor and minority people. The power to kill under color of law must be taken away from those who see us as expendable. To these ends the conference has submitted a brief Amicus Curiae to the Supreme Court in Fowler.

Mindless reliance on the death penalty, never a deterrent to crime at any time in any country, obscures the pathological, economic and social conditions which foster crime and distracts our society from the changes needed to deal with it. Execution irrevocably deprives a person of the benefits of new law or new evidence; and most obviously it brutalizes the society that practices it.

We lawyers may argue in the highest court by every means possible but it will not be attorneys who shall vanquish this new move toward legalized racism. As in the past, it will be the people of this country, telling those in power clearly and unmistakably that the legalized death penalty must

11. Wolfgang, "Capital Punishment", H.R. Hearings (1972), pp. 178, 179.

join chattel slavery and other badges and indicia of racism in the blood
stained pages of the American Experience: legal lessons to be learned from
and not perpetuated in our next hundred years.

LENNOX S. HINDS, ESQ.
NATIONAL DIRECTOR
THE NATIONAL CONFERENCE
OF BLACK LAWYERS

Lennox S. Hinds, National Director of the National Conference of Black Lawyers, is an attorney admitted to the New Jersey Bar, former Chemist, and community activist and author of a number of articles on the race and class biases of the law. The National Conference of Black Lawyers is a tax-exempt non-profit organization composed of activist members of the black bar and law students throughout the United States and Canada. They provide legal defenses to the politically unpopular and attack by affirmative legal actions racist practices in every phase of life: the military, hiring and working conditions, prison conditions, etc. Recent and current clients include Judge Bruce McM. Wright, among others Angela Davis, the Republic of New Africa defendants, the Attica Brothers, alleged BLA members, H. Rap Brown and less known individuals and groups throughout the country. NCBL filed an Amicus Curiae Brief to the U.S. Supreme Court in Fowler v. State of North Carolina, O.J. 1973, No. 73-7031 in opposition to the death penalty. The National Office is at 126 West 119th Street, Harlem, New York 10026.

Mr. Chairman, Members of the Committee:

Let me first say how grateful I am to be here, and how much I appreciate the opportunity to discuss with you the death penalty. Let me begin by saying that, notwithstanding the normal reputation which law professors often carry, I believe in punishment. I believe, in fact, that punishment should be the primary goal of our prison sentencing system, and that other considerations, such as rehabilitation, must take a secondary position. Indeed, two committees for which I have been serving as reporter--one by the American Bar Association, and the other of the Commissioners on Uniform State Laws--will, within the next two weeks, publish drafts of rules which take punishment as the key purpose of imprisonment. I hope that at some later time, when the committee is reconsidering sentencing in general, we can talk about that philosophy.

But even with that punishment philosophy, with that outlook, I come here today to oppose any legislation which would reimpose the death penalty. I do so not only on moral grounds, which I believe other speakers can address more forcefully than I can, but also because I find absolutely no evidence that the penalty deters murders of the first degree. Finding no such evidence, I believe the penalty to be disproportionate to the offense, a test which, Mr. Justice Brennan whose opinions graced the courts of this state before he was elevated, twenty years ago this year, to the United States Supreme Court, ^{has argued is the test of the Eighth Amendment.} As he recently said, dissenting in the death penalty cases in that Court, "Death...serves no penal purpose more effectively than a less severe punishment; therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment."

Let me expand on that for a moment if I may, leaving the question of deterrence for later. The principle of proportionality, that no sentence should be greater than "deserved" is a lodestar of the Eighth Amendment. Now I know that the argument is often made that death cannot be disproportionate, cannot be excessive, when it is, after all, "only" that which the murderer inflicted on his victim. But that reasoning is faulty. Assume for a moment that a felon chopped off the left arm of his victim. Notwithstanding the lex talionis--an eye for an eye--the Eighth Amendment, which embodies the principle that punishments must conform to the dignity of man, to the norms held by a civilized society, would prohibit the state from ^{emulating that conduct.} ~~The~~ concept of an eye for an eye, first enunciated in Hammurabi's Code, was NOT meant to urge exact retribution; it was first established not as a justifying principle, but as a LIMITING principle--no MORE than an eye was to be taken for an eye; there is no expression inherent in that phrase that requires that we take an eye, or in this case a life, even though the perpetrator of the crime has done so. Even when the perpetrator of a crime, that is, acts beyond civilized norms, we are not justified in mimicking, in an unthinking way, that barbarity. The Eighth Amendment, and more importantly the concepts of justice that it brings to us, forbid that; we can ONLY inflict a proportionate penalty. Therefore, I believe that the death penalty cannot be justified, per se, as consonant with equal retribution; some punishments are forbidden to us even if--even though--they inflict an injury no greater than that inflicted by the perpetrator.

I therefore must ask, "What might justify the state in becoming an agent of death"? What might justify cold blooded taking of life? I find only one such purpose which might, in the best of circumstances, justify that act--deterrence. If we could save more lives by the infliction of such a gross pain, such a mammoth penalty, we might--just might--be able

to justify the penalty. But there is no evidence that so finds. And, therefore, I find no justification for the death penalty.

Before reviewing the evidence on this point, I should stress the definitional issue: when we speak of deterrence in the context of the death penalty, we are not really speaking of deterrence in the absolute. We are not asking: "If there were a choice of no penalty and the death penalty, would the death penalty deter?" We are talking, instead, about marginal deterrence: "Given a very severe sanction, such as life imprisonment without parole, what additional amount of deterrence, if any, does the death penalty add"? That is a very different question. And we should always keep in mind that the alternative punishment can be very severe indeed.

Until recently, there was almost uniformity in the findings of social scientists that the death penalty did not deter. The most well-known of these are the studies by Sellin. Sellin compared the homicide rates of neighboring states, over a lengthy period of time, some of which had the death penalty, others which did not. He found no distinction in the homicide rates; indeed, he found a slightly greater rate in those states that did have the death penalty. He therefore concluded that the death penalty did not deter.

In the past two years, however, new statistical studies have arisen which have purported to find a deterrent effect. The strongest of these is the study of economist _____ Erlich. Erlich reviewed the homicide rates of the country as a whole over a period of almost forty years. He found, as well, that the statistics, viewed from an absolute perspective, indicated that the "execution risk", which is to be distinguished from the mere presence on the books of the death penalty, did not deter; that is, even where the execution risk was higher, the rate of homicides did not decrease.

Erlich did not stop there, however. Using a highly sophisticated statistical procedure called regression analysis, he concluded that, holding all other facts constant, the execution risk did in fact deter.

Erlich's findings have been subjected to incredible scrutiny and, to my own satisfaction, at least, I am persuaded that his analysis is incorrect. I am not a statistician, and I certainly could not put the statistical criticism of Erlich's study in proper words or perspective. Let me, instead, attempt to put them in terms I can understand.

The critics of Erlich suggest at least two major faults with his studies. First, the data base which he used is said to have been exceptionally faulty. For example, the data which he used--the FBI statistics from the early 30's through 1969--are grossly underreported. Every major analysis of these numbers has concluded that they manifestly underreport homicides during the early years. Statistical experts have examined Erlich's data and have concluded that, if you remove those very shaky data, or if you interpolate the actual homicide rate in those years from the more reliable data of later years, the finding is that the penalty did not deter at all.

A second criticism is that Erlich's data was national. It did not discriminate between jurisdictions which had the penalty and those which did not. Thus, for example, if the murder rate decreased in a state in which the execution risk had remained the same, but, at the same time, the murder rate in a second state, which had an increasing execution rate, remained the same, Erlich would conclude that there was a deterrent effect, because nationally, he would see an increasing execution rate, and a decreasing murder rate, although they were, in fact, in two unrelated states.

All this, and other criticism, can be summarized by saying, as the Supreme Court did in the recent death penalty cases, that at the very least, "there is no convincing empirical evidence either supporting or refuting" either view of the deterrent value of the death penalty. At the very best, it can be said that there is no strong evidence supporting the deterrence thesis.

Where, then, does that leave us? It left the United States Supreme Court upholding the death penalty, in some states and under some procedures, because of its position that the legislation had to be presumed constitutional.

But we should not share that presumption. Even assuming (as I, for one, would not have assumed) that the Court's position is correct as a matter of judicial restraint and federal comity, it strikes me, as an initial matter, that if the evidence is not convincing--and I would say strikingly convincing--that the state benefits by becoming an agent of death, then it should not accept that role.

Unless, that is, the proponents of death can demonstrate beyond cavil that there will be deterrence, I would urge this legislature to reject their advocacy on the simple ground of parsimony--achieving an end by inflicting the least injury necessary to achieve it.

Surely this is salubrious advice any time. But when the position advocated is death--final, ultimate, irreversible--that advice seems, to me, compelling. I point out to this committee that we know there have been errors in the imposition of the death penalty. Writers as diverse as Erle Stanley Gardner and Professor Charles Black of Yale Law School have demonstrated that. It might well be that, in New Jersey, with a death penalty, under a statute like the one the Supreme Court upheld in Georgia, Rubin Carter might now be dead. I pass no judgment at this point

on the validity of his conviction. But surely it is stunning to realize that fact.

I could, of course, go on at length about the inconsistencies which I think are plainly present in the Supreme Court's recent decisions. The distinction which that court drew between mandatory death penalties and discretionary ones is, to me, gossamer. For once

I find myself in agreement with Mr. Justice Rhenquist; if the one procedure is correct, then so is the other. And the myriad of contradictions could, and probably will, fill at least one book of law.

In conclusion, I urge this committee to reject any form of the death penalty and, as the saying goes, to choose life. Thank you.

SENATORS:

On behalf of Joseph P. Lordi, the Essex County Prosecutor, I have been requested to appear before you today in support of legislation such as Senate Bill 639 proposed by Senator John Russo, advocating the death penalty for certain classes of criminal conduct. This bill is one of several proposals submitted to the Senate concerning the reimposition of the death penalty in New Jersey.

Recently the United States Supreme Court rendered a series of opinions* on death penalty statutes from other jurisdictions. In those opinions the court preliminarily stated that the death penalty is not cruel or unusual per se. Historically, cruel and unusual punishment connotes: torture or lingering death; punishment out of proportion to the offense; or arbitrary and capricious selection of convicted defendants exposed to sanctions. It was emphasized by the court that there were situations in conformance with contemporary values where the death penalty could be applied constitutionally.

In the death penalty cases under discussion the Supreme Court approved of various modes for applying the death penalty to those convicted of the crime of murder. So, for example, the court approved of the following:

*Gregg v. Georgia, 19 Cr.L.3250 (1976)
Proffitt v. Florida, 19 Cr.L. 3276 (1976)
Jurek v. Texas, 19 Cr.L. 3282 (1976)
Woodson v. North Carolina, 19 Cr.L. 3287 (1976)
Roberts v. Louisiana, 19 Cr.L. 3301 (1976)

1. a bifurcated proceeding to separately determine guilt and punishment;
2. a weighing of mitigating and aggravating circumstances by the fact finder to give guidance in sentencing
 - a. at least one of the statutory aggravating factors must be found to have existed in order to impose the death sentence
 - b. an open hearing for the presentation of any other evidence relevant to the imposition of sentence; and
3. direct review by the highest appellate court of the jurisdiction.

By comparison Senate Bill 639 provides one example of a sentencing procedure which could conform to constitutional standards for the imposition of the death penalty. This proposal contains those elements mentioned by the court with approval.

Preliminarily, by amendment the murder statute* would allow for the entry of guilty pleas to murder charges.** Whether an adjudication of guilt is by way of plea or trial, a convicted defendant would be given a separate sentencing hearing with a judge and a jury to weigh statutory mitigating

*N.J.S.A. 2A:113-3

**Nolo contendere - no longer used as a plea. R.3:9-2

and aggravating circumstances, and apparently all other relevant factors. A jury could be dispensed with only upon affirmative request of the defendant. The defendant is further protected by those provisions which place a heavier burden of proof upon the State and which mandate a direct review by the New Jersey Supreme Court in every case where the death sentence is imposed.

In 1975 the County Prosecutors' Association of New Jersey passed a resolution urging the New Jersey Legislature to reimpose capital punishment. Today the Essex County Prosecutor remains convinced that capital punishment is necessary for the entire law enforcement community and for the general welfare of the public. As noted by the United States Supreme Court the death penalty serves two principal social purposes, retribution and deterrence of capital crimes by potential offenders. Apart from these considerations capital punishment has been viewed as an expression of moral outrage and revulsion felt by the great majority of citizens for heinous crimes.

A person who commits repetitive violent actions now faces sentencing secure in the knowledge that: no matter what the nature of his latest offense; no matter what the pattern of his recidivism; and no matter how inhumane, socially reprehensible and freakishly bizarre the nature of his crime may be, he can suffer no greater punishment than a finite term of imprisonment. Such defendant, being intimately familiar

with the prison and parole systems, is inevitably aware that his term of incarceration is subject to reduction. Unless and until that segment of the criminal society which commits such morally contemptible and depraved savagery is made to realize that society will no longer tolerate these acts without ultimate retribution, these acts will undoubtedly continue.

For these very reasons, the Essex County Prosecutor endorses the concept of capital punishment and legislation which would reimpose the death penalty in New Jersey.

The Township of Middletown

POLICE DEPARTMENT

(201) 671-3300



UTE 35 & KINGS HWY
MIDDLETOWN, N.J. 07748



JOSEPH M. MCCARTHY
CHIEF OF POLICE

29 July 1976

Judiciary Committee
Senate of New Jersey
State House
Trenton, New Jersey

Gentlemen:

This will authorize Larry Loigman of this Department to represent me at your hearings regarding the capital punishment bills, to be conducted today, and to make any statements on my behalf that he deems appropriate.

Would you kindly extend to him all necessary and proper courtesy, which will be sincerely appreciated by the undersigned.

Respectfully,


JOSEPH M. MCCARTHY,
Chief of Police

PREPARED STATEMENT OF
LARRY S. LOIGMAN
BEFORE
JUDICIARY COMMITTEE,
SENATE OF NEW JERSEY

State House, Trenton

29 July 1976

Distinguished members of the Senate; ladies and gentlemen:

I am Larry Loigman, a resident of Lincroft, Middletown Township, in Monmouth County. I am third year law student at George Washington University, Washington, D.C. I am here on behalf of Chief Joseph M. McCarthy, Middletown Township Police Department. I have worked as a special police officer for that Department for the past five summers, handling many aspects of criminal investigations and special assignments from the Chief's office. Several months ago, I served as Chief McCarthy's principal research assistant in connection with the Governor's Special Committee to Study the Prison Furlough Program, which he chaired.

Gentlemen: The death penalty is an awesome and powerful criminal justice tool--one not to be used lightly, but also one which must be available when its use is required. The bills before you today address some of those situations. These measures would allow the State of New Jersey to execute certain persons found guilty of first degree murder, of kidnapping for ransom, of treason, and of assaulting high government officials. The purposes behind such a penalty are, I expect, not unfamiliar to you; but I ask you to permit me to reiterate them.

Retribution is the most obvious goal of society in executing those guilty of the most heinous crimes. The social order cannot survive when certain persons threaten its very fabric by murdering, robbing, and plundering. There is a feeling of revulsion, of moral outrage, which decent people feel about the gravest of crimes, and society must be allowed to express such feelings. In the case of the ultimate crime, that feeling is best expressed through the ultimate penalty, which is death. What words can describe the loss which is felt by one's friends and relatives--by society at large--when an innocent person is struck down in cold blood? There are no words; and there are no punishments proportional to such a crime, save one--and that one is death.

We must re-establish the principal of personal culpability for criminal acts. Contrary to what our social scientists tell us, the individual is, in large measure, the force that must be held responsible for his own actions. My experience with the furlough study group showed me vividly that our current prison system does not work; it does not rehabilitate; and it does not prevent crime. Capital punishment, on the other hand, exacts from the individual criminal the penalty which society must demand.

If you believe that any punishment deters crime, you must logically agree that a more severe punishment will deter even more crime. Criminals (other than those who are insane) are as able to comprehend the penalties established by law as any other person. Some will be deterred from any crime; as for the others, even if their behavior is modified only to the extent of NOT carrying a firearm with them when burglarizing or robbing or assaulting, so that the level of violence will at least be decreased if the overall crime rate is not, that too is an accomplishment.

Recent sociological studies--which control for all variables, unlike most earlier examinations of the problem--"provide important empirical support for the a priori logical belief that the use of the death penalty decreases the number of murders," according to the Government's brief in this year's Supreme Court death penalty cases. In any event, how can we measure the number of crimes NOT committed--of persons alive today because their potential killers were executed years ago, or deterred by the ever-present threat which a death penalty constitutes?

On the other hand, there are some sociopathic individuals--not many, but enough to be important in our deliberations--who must be totally incapacitated because they cannot be dealt with in any rational manner. Executions obviously serve that function. We do not advocate that executions replace the efforts at rehabilitation, whatever the poor performance of that system might be. But there are those whose uncontrollable propensity is to commit crime after crime, often violent. If they cannot be stopped by prisons, they must be stopped by death.

This is what was said in 1953 by the Royal Commission on Capital Punishment:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. . . . The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely, the death penalty.

It is true that the death penalty offends human dignity. So does every punishment which is inflicted, since that is the purpose of all punishment, the expression of society's disapproval of an individual's conduct. But let us not cheapen the lives of the innocent, either. Every time a person is stabbed to death on a city street, or raped and murdered in her home, or executed by the forces of organized crime, human dignity is offended.

It is true that the death penalty is infrequently imposed; and we should be thankful that it is needed only in the rarest of cases. But, as the Solicitor General of the United States pointed out, "The Constitution ought not to be read to compel the state to engage in mass executions in order to preserve the power to execute anyone at all." Since the death penalty is so sparingly used, we have more reason to be confident that our judicial system will bend over backwards to insure that only those deserving such punishment beyond the shadow of a doubt will receive it.

It is true that the death penalty is imposed only by the court's discretion; so, however, is every punishment imposed. It is this discretion structured and defined in terms of aggravating and mitigating factors by your bills--that makes this a human system of justice, not a computer-run world of automatons. The Supreme Court, in its decisions on July second of this year, specifically endorsed bifurcated trials, in which the circumstances to be considered by the jury in its punishment phase are carefully spelled out for its guidance.

Briefly, I would like to mention a few points regarding the various bills before you. S46, S1100, and S1477 would eliminate death penalties for kidnapping for ransom, treason, and assault of high governmental officials. We feel that these--in addition to first degree murder--should be capital crimes. They threaten the lives of many, just as first degree murder takes the life of one. Witness, for example, the recent California kidnapping in which an entire busload of school children were abducted. Treason, of course, is a very rare offense--- but the statute must remain, with the most stringent penalty, since the crime represents the attempted destruction of the State itself.

Your bills continue to include the killing of law enforcement officials under the category of first degree murder, and for good reason. Policemen, unlike ordinary citizens, cannot turn and run when approached by a violent criminal. They have no right to retreat; they must stand and act. Our criminals should know that when they kill a peace officer, their lives too will be cut short.

The provisions in some of your bills calling for minimum sentences which cannot be reduced by parole or probation are steps in the right direction. Prison terms imposed today are not served in full; prisoners have come to expect early release, and it is no longer a privilege or a means to rehabilitation. In the case of the most serious crimes, this early release--well in advance of what judge and jury wish--must be ended. A life sentence must mean just that; and a thirty year sentence must not mean 8 years. Certainty of punishment will work as an effective deterrent to crime, where sentences liberally reduced cannot.

We are talking, in every case, about planned criminal activity. The wife, shot by her husband in a fit of anger, is just as dead as any other murder victim, and society must exact some penalty. But the magnitude of the horror is of a different dimension when a so-called "felony murder" occurs.

These are being committed at a growing rate. Nationwide, 28% of the 1974 homicides were of the known or suspected felony type. In New Jersey last year, 32% of the killings fell into that category. Murder rates overall are climbing; the 20,600 persons murdered in the United States last year represent 127% more than the number killed just 15 years earlier.

Even at its height, capital punishment took only a few lives compared to those snuffed out by murderers. In 1960, for example, only 56 offenders were executed across the country under civil authority-- compared to 9,030 victims of fatal criminal attacks.

Gentlemen, in 1964, the Commission Appointed to Study Capital Punishment in New Jersey reported that,

This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe. . . . The Commission recommends the retention of capital punishment.

Twelve years later, as we again debate this question, we still need statutes providing for capital punishment. Nothing has changed in the world of crime, except that the tide of crime which law enforcement tries so vigorously to suppress is nearly overwhelming. Society must not be deprived of its ultimate sanction against the wrong-doer, its only way of avenging the cruelty shown to murder victims. I urge you to act favorably on a bill to restore the death penalty in our State. Our citizens, who seek the protection of their police departments--as well as their legislators--deserve no less.

Thank you.

SUBMITTED BY WINIFRED CANRIGHT

I am Winifred Canright. Ten years ago I became involved in criminal justice as a court watcher, and after Attica, as a volunteer in the State Prison system.

I appreciate the privilege of speaking to you as a citizen concerned with law and order. My concept of law and order is impartial justice under law, administered not only for vengeance or retribution, but for the permanent good of society.

Most of us were brought up to honor the ideal expressed by the prophet Amos, "Love mercy, do justice and walk humbly before thy God." If our justice system applied these words, we would have real justice.

The man who walks humbly before his God could not possibly usurp divine power by decreeing the death of any person. He could not play God by consenting to turning the switch on an electric chair.

Tom Wicker says, "The palpable inability of fallible human beings to determine fairly who deserves life and who deserves death is reason enough to leave the question of death where it properly belongs--out of human hands."

Much has been argued about the deterrent effect of capital punishment. In 1964, the last year when capital punishment was general, and for which statistics are available, there were in the United States 8500 homicides. Of these, 2620 were convicted, 81 were sentenced to death, and 2 were executed. I ask you, is this a deterrent?

"Cruel and unusual" are easy words to say, but it is hard to realize their meaning unless you are personally involved. In 1968,

I spent three months attending the trial of 12 Plainfield youths, accused of the riot killing of a policeman, who had just shot a young black man. About 75 people were involved in the spontaneous, retaliatory killing. The prosecutor demanded the death penalty for twelve.

One morning I was chauffeuring four of these likable young men from their homes to court in Elizabeth. They fell into a discussion of which method of execution they would prefer--electrocution or the gas chamber. The details, even when impersonal, are gruesome, but when you hear them, knowing that they may soon apply to the young speakers, it is a shattering experience.

Louis Nizer described the execution of Julius Rosenberg:

"Two thousand volts; delivered at the maximum eight amperes, crashed Julius violently against the straps... His body snapped back and forth like a whip... His neck seemed to grow several sizes. Yellow-gray smoke rose in wisps from his head... There was a hideous stench in the room of burning flesh, urine and defecation..."

How would you like to attend such an execution? If any of these bills pass, it will be easy. I have a copy of an invitation from the Principal Keeper of New Jersey State Prison "to be present at an execution by electricity." I'm sure invitations would be available.

If anyone is really serious about deterrence, how about spreading the effect by holding the executions on the State House lawn?

The paragraph which I just read seemed even more shocking when I read in the New York Times (May 14, 1976) that State

Supreme Court Justice Irving Saypol, who, as a federal prosecutor, had won death sentences for Julius and Ethel Rosenberg, was indicted on three counts of perjury, and one count of bribery.

How far dare we trust our courts and judges to determine something as irrevocable as death?

I have a fear that men could be executed because of the failure of our courts to provide "equal justice to all." A black friend of mine who spent three years on death row was convicted by an all-white jury. He investigated and found that in the 45 years preceding his 1967 trial, there had been only two blacks on grand juries in Bergen County. There has been some improvement. I recently served on a grand jury in Somerset County where whites outnumbered blacks 22 to 2. There was subtle racial bias in the prosecutions and in the voting.

In the petit juries I have watched, it is a bit better, but still tokenisms.

You gentlemen know better than I the handicaps a poor or minority defendant faces in our courts -- a prosecutor who feels that his future career depends on getting convictions, and who must keep good working relations with the police. The State has far greater resources available to develop and investigate its case than the defendant's lawyer, who can't afford much time on a case for which he is poorly paid. He lacks the aid of a skilled investigator. Lack of bail money prevents the defendant from helping to locate witnesses. If a police officer is put on the stand, the jury is likely to trust

his reports and give them greater credence than the testimony for the defense. Because many identifying white witnesses unconsciously accept the myth that all black people look alike, they observe only racial characteristics which are common to many. Ghetto language or Puerto Rican accent are also handicaps.

It is small wonder that a poor person or black tried for murder is more likely to be convicted than a prosperous white defendant, who may be acquitted or have the charge reduced.

During the last years of New Jersey's death row, there were 18 occupants--12 black, 5 Italian and Edgar Smith.

Until our courts can provide equal justice, we should avoid the death penalty.

Mistakes in giving a life sentence can be corrected. There is a terrible finality in death.

While I respect many, perhaps most, of our police officers, I know that the testimony of many cannot be trusted. Here are clippings from 1976 local New Jersey newspapers. I shudder to think that the life or death of a defendant can be determined by the testimony of such officers. I give you only the headlines.

Prosecutors may present flimsy evidence.

In the trial of the Plainfield 12, one witness admitted that on the day of the murder he had had five bags of heroin, beer and whiskey and couldn't stand alone. When the police pressured him to sign a statement they kept him until he was so sick and desperate for his heroin that to

get away he said, "I'll sign whatever you want."

One witness who said he was offered freedom from jail on an unrelated charge if he testified as instructed, was later found to have been in Somerville jail at the time of the riot. Near the end of the trial, Judge Weidenburner announced that charges against 18 year old Chico Brown were dropped because "there was no evidence to show that Mr. Brown was even in the county."

Our courts must operate with greater integrity before we give them the power to impose the death penalty.

In the case of "Hurricane" Carter and Artis, the possibilities of a wrong verdict are strong enough to convince the Supreme Court of New Jersey to grant a new trial.

In the volunteer work I have done at T.S.P., many men tell me they did not have a fair trial. I discount most claims of innocence, but here is one story I believe. A wealthy woman of Morris County was murdered. The only witness reported that she saw a man running from the scene. He was white, 5'7", weighed about 170 lbs. No such subject could be located. The prosecutor, under tremendous pressure to convict someone, is alleged to have altered the written statement. Ben Thompson, who had previously worked for the woman, was convicted. Ben is 6'2", a Negro, and weighs about 225 lbs. After Ben had spent time in the Death House, a man fitting the description of the witness was brought to T.S.P. for an unrelated crime. That man confessed to the murder for which Ben was now serving a life sentence. The story does not end happily. The confession was rejected by the authorities on the ground that the man

must be crazy. Ben is a talented self-taught artist and is teaching art in the prison school.

In my work in the prisons, I have worked closely with several inmate organizations designed to help other inmates and guide them into useful lives on their return to the community. The outstanding leaders are nearly all lifers who have had time for deep thinking, and who have changed their values.

This morning's and last Thursday's Trentonian carried informative articles by Ken Carolan, describing one of the organizations, called CAVID, their aims, and the obstacles they meet. The leader of this constructive program, which is backed by A.T.T. and several banks, is a lifer. His plans could change the correction system for the better.

The Forum Project has been doing remarkable rehabilitative work with ex-inmates. This is headed by two lifers of high integrity and ideals of service. The community should be grateful that they were not executed.

I close with a quotation from President Ford. He favors capital punishment for certain Federal crimes, but closes with these words:

"Constitutionally, I think that capital punishment is by its nature cruel and unusual punishment. I also think that no matter what 'mandatory' death penalty statutes are placed on the books, the actual application will always be biased against the poor members of minority groups.

"On the policy side, capital punishment is not a deterrent to crime and is inherently unequal in its application. Further, there is always a possibility that even the most vicious criminal can be rehabilitated and returned to society as a

useful person."



NEW JERSEY SENATE

RAYMOND J. ZANE
SENATOR, 3RD DISTRICT
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JUL 30 1976

July 29, 1976

STATEMENT REGARDING CAPITAL PUNISHMENT

The question of the moral or legal right of a State to maintain the penalty of death for designated crimes constitutes a question which has been a controversial topic for debate for years and no doubt will continue to initiate arguments for decades to come.

Perhaps the overriding issue can be taken from our present social atmosphere. Whatever our belief regarding the area of Capital Punishment, it is difficult for anyone to disregard the increase of violent crimes: Kidnappings, assaults, and terrorism. These acts and their effects are far too visible. Not only must we consider the victims of the direct attacks, but also, we must account for the indirect victims suffering from the fear and apprehension of probable attack. One time commonplace experiences such as a leisurely walk at night, a visit to the city, or driving alone through a wooded glen are rapidly vanishing from the American scene - vanishing because of the ever - present fear of violent crime.

Consider the apartment dweller who dreads doing

their laundry simply because the washers and dryers are located in the basement. Consider the woman who wants and needs to work but waiting for the bus at night has caused her to reconsider the value of her present employment. Consider the fireman, shot down while attempting to save a neighbor's home. Consider all of these examples and you easily come to understand why there now exists a demand for a stricter interpretation of and enforcement of our laws; a demand that will hopefully bring to the mind of the prospective criminal and peace of mind to the law-abiding citizen.

The argument for the return to Capital Punishment is a major focus in this concern; a focus closely examined because of the increase of violent crime. Political assassination, hijackings, kidnappings, terrorist attacks, and mass murders have illuminated the need for tougher laws.

It may long be debated over whether or not Capital Punishment is a deterrent; certainly it seems to be for the so-called "average-rational" citizen. But what of a Charles Manson or Charles Whitman. Both acted out their tales of horror at a time when Capital Punishment was in existence. The psychotic criminal does not seem to be deterred. Our argument then seems to be: Does the punishment fit the crime? If so,

page 3

then appropriate legislation must detail those crimes which apply. Steps have been made in this area in New Jersey, as a number of bills have been introduced to establish regulations regarding Capital Punishment. My general reaction is favorable to this legislation but there are some questions which must be raised:

1. Often mentioned is the death penalty being imposed for the murder of a policeman. While the reasoning behind this position is evident, I believe we run the risk of specificity. Murder is murder, and should be judged accordingly. If the killing of a law enforcement official is deemed to fit the general precepts of murder punishable by death, then so be it; but let each case be judged on those qualifications.

2. The rights of the accused, and even the convicted must be considered. Should some one be found guilty of murder, prior to sentencing, mitigating circumstances must be considered (as stated by example in Senate Bill 639 - Russo). If no circumstances exist then the sentence should be delivered and executed.

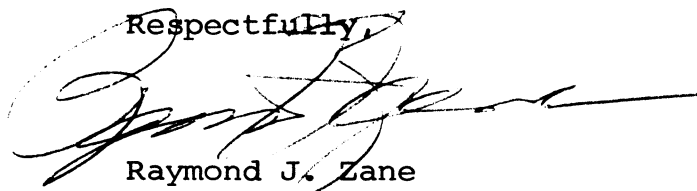
In conclusion, I would raise another concern. While the need for stricter laws and their enforcement is obvious, so too is the need for equitable sentencing under the law. One of the major aggravations of Americans today is the

existence of a so-called "double standard" of justice. There should be no such thing as a "rich man's law" or a "poor man's law"; "white man's law" or a "black man's law"; a "politicians's law" or a "special interest law". There is only - The Law, and that law exists for the benefit and protection of all people, no matter their color, race, sex or their station in life. When this Constitutional concept becomes at last a reality, Justice will be the victor and the American people will again enjoy the blessings granted them with the birth of our nation, and will exhibit the confidence necessary to face the challenges for the years ahead.

I do believe that capital punishment should be re-instated. It should not be variable in its application by race color, creed, wealth nor by political or influential station in life.

In my opinion the true value of a man's life is not enhanced by his position or function in society, as this goes not to the value of life but to the importance of the position. I further believe that any law adopted reinstating capital punishment must provide for mitigating circumstances for the trier of fact to consider in deciding on a proper punishment.

Respectfully,



Raymond J. Zane
Senator, District 3

CAPITAL PUNISHMENT FEATURE

- 1- Does capital punishment prevent crime? - Probably not.
- 2- While the presence of capital punishment does not prevent crime, we believe that its absence acts as a positive incentive for the criminal to murder his victim - i.e. - dead men tell no tales. Evidence of this fact is the steady increase in the homicide rate since the abolition of the death penalty.

"MURDER (1st Degree) WITH A "GUN"

- 1- A gun is the easiest weapon with which to committ murder.
- 2- Legislators have tried to quell the rise in crimes committed with firearms by controlling guns. Why not control those who use them to committ crime by severe punishment.
- 3- The punishment for illegal possession of guns and bullets could never be as harsh as that for the crimes committed with them.
- 4- Because of the ease with which one may committ murder with a gun it is logical that such a crime receive the most severe punishment.

1ST DEGREE MURDER

- 1- 1st degree is "not"murder in passion.
- 2- 1st degree is "not"murder by accident.
- 3- 1st degree is "not"murder by mistake.

IT IS:

- 4- premeditated murder
- 5- murder committed during the commission of a felony.

i.e.

robbery murder
sodomy murder
rape murder
arson murder
kidnap murder
mayhem murder

GEWERTZ BILL

- 1- Gewertz bill makes capital punishment mandatory for 1st degree murder with a firearm only.
- 2- Punishment for all other murder crimes the same as they are currently.
- 3- Gewertz bill does not allow indeterminate sentence.
- 4- The Gewertz Bill is a new approach to a difficult and elusive problem.

HAWKINS BILL

- 1- Hawkins bill makes all murder 1st degree crimes. Creates new punishments.
- 2- Hawkins bill allows the following punishment for all murders at discretion of the judge.
 - 1- 8 to 15 years
 - 2- 30 years, 15 yrs. min before parole
 - 3- 30 years-indeterminate
- 3- Hawkins bill creates the indeterminate sentence in N.J. The indeterminate sentence was invented in California 30 years ago. Cali Attorney General Evell Younger recently requested that legislation be passed to eliminate the Cal law.
- 4- The Hawkins Bill is a step 30 backward.

-MISTAKE

- 1- Mistake cannot be eliminated. Where men conspire to convict a man of murder punishable by death, they are guilty of murder. A mistake committed by the State because of such a conspiracy does not make the State a co-conspirator no more than a man who is duped into serving his friend poison.
- 2- 1st degree murder with a gun is a narrow, circumscribed, evil crime whose conviction would be difficult in all but the most obvious case.

MORALITY

- 1- Is the death penalty cruel and unusual punishment? Perhaps! Society is the victim when one of its members is killed. It is anomalous that society should be called upon to harbour and protect a convicted murderer. It seems as though we seek to protect a cancer that would consume and destroy us.
- 2- Does society have the right to take a life by the death penalty? It can be said that a murderer has a right that is superior, than that of society.



KENNETH A. GIBSON
MAYOR
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FOR IMMEDIATE RELEASE
JULY 28, 1976

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MAYOR KENNETH A. GIBSON'S STATEMENT ON RE-ENACTMENT OF
CAPITAL PUNISHMENT IN NEW JERSEY

"The matter of whether or not capital punishment should be re-instated in the State of New Jersey is, at best, complex and seething with fears and emotions. In my opinion, fear and emotion cannot be factors in making a final decision, because these are the primary problems of people who commit acts of violence which some people believe should be punishable by death.

"In the Midado written in 1895, are the lines: 'My object all sublime I shall achieve in time--to make the punishment fit the crime.'

"To the contrary Nietzsche wrote in 1887: 'The broad effects which can be obtained by punishment in man and beast are the increase of fear, the sharpening of the sense of cunning, the mastery of desires; so it is that punishment tames man, but does not make him 'better.'

add two

Minorities and the poor are generally the people who end-up in the electric chair. It is difficult for me to believe that this is accidental, or reflective of equal justice under the law, or absolutely free from decisions influenced by latent or active racism.

"The death penalty as a deterrent has been proven to be wrong so thoroughly that there is no need to comment on this misconception. However, Nietzsche was right when he stated that punishment increases fear and sharpens cunning.

"In my personal opinion, killing is wrong. It doesn't matter if it is done in a fit of emotion, premeditated, ordered by generals, plotted by organized crime, legalized by legislative action or constitutionalized by the courts. Killing is still wrong.

"Moreover, placing more value on certain people's lives, because of 'professional hazard', over other people adds insult to injury. What about the natural hazards of being a coal miner, steel worker, a fireman in the normal performance of his duties, or the many other productive jobs where a man's life is at stake?

"According to the latest F.B.I. annual report, 11,100 people of 20,600 killed were killed by firearms (54%). Ironically, a high percentage of elected officials and men of influence have opinions and votes which are controlled by the various gun manufacturers' lobbies, and voted down stronger gun control legislation. At the same time, some of the same people want capital punishment re-enacted. This borders on criminal irresponsibility. Obviously, for some people, profit is more important than life.

add one

"If we were absolutely bound by the philosophy of the first quote, we could bind our society to the absolute notion of an 'eye for an eye, and a tooth for a tooth.' Considering the fact that all human beings have transgressed against our fellow human beings, in one way or another, this could leave us with a society which would be, in large measure, blind and toothless.

"The second quote states, in essence, that punishment does not make better people. If this is true, it certainly cannot make a better society. Someplace in that vast void between the deplorable act of a person killing another human being and the State killing that person as a method of punishment is a course of action for reasonable men--a system of justice which will protect human beings without de-humanizing society. This goal has never been attained in the entire history of the United States or any other society of which I am aware.

"Those who advocate the death penalty be re-enacted for committing murder when the victim is a policeman, fireman or prison guard, could believe that the killing, or execution of the murderer, if you will, is justice, a deterrent to other such acts, the conclusion of the case at hand, and morally right. All of these beliefs are false. More than false, these notions are tainted by a certain degree of absurdity.

"When the switch is pulled, what if the man in the chair is the wrong person? It may be a person, in the chair, who did not have the money to exhaust the judicial process in order to prove innocence.

add three

"At this point, our society has too many basic shortcomings and permissive corruption even to consider having the right to impose the 'cruel and unusual' penalty of death. It is my belief that if, and when, our nation's people enjoy political, social and economic freedom, bolstered by a true criminal justice system and rooting-out of corruption, crimes of all nature will decrease to a manageable level.

"Those who believe executing a convicted murderer ends the issue are mistaken. Children should not have to live with the stigma for life, and haven't committed any crime. Families can be forced to relocate because of embarrassment, harassment and cruelty. More tragic, if some member or members of the family truly believe that the executed person was innocent, this can lead to more severe anti-social behavior in misguided retaliation.

"If the State of New Jersey, re-enacts the death penalty, it will be doing nothing more than killing society's mistakes."



POLICE DEPARTMENT

NEW YORK, N. Y. 10013

October 2, 1972

STATEMENT ON CAPITAL PUNISHMENT OF
POLICE COMMISSIONER PATRICK V. MURPHY;
ASSEMBLY CODES COMMITTEE HEARING;
OCTOBER 16, 1972.

Before taking a position on capital punishment I would like to discuss the question of punishment in general. As I understand it, society punishes, or has punished, for the following reasons: to retaliate, to rehabilitate, to isolate, to deter.

Retaliation, quite literally, has been ruled out of the court. In the eloquent words of Justice Thurgood Marshall.

"Retaliation, vengeance and retribution have been roundly condemned as intolerable aspirations for a government in a free society. Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance... At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The cruel and unusual language limits the avenues through which vengeance can be channeled."

Rehabilitation, on the other hand, is almost universally recommended as the most socially constructive way of influencing the attitudes and behavior of convicted criminals. I don't know whether or not murderers can be rehabilitated. But the continued use of capital punishment would certainly make such speculation irrelevant - at least with regard to individual cases.

Isolation, too, is almost universally recommended -- not so much as a way of influencing behavior, but rather as a way of protecting society against incorrigibles. Used this way, isolation can be advanced as an alternative to capital punishment.

This leaves deterrence, which, I submit, is the central issue as regards the justification for all forms of punishment, but especially of capital punishment.

The decision in the landmark case of *Furman v Georgia*, handed down by the Supreme Court of the United States on June 29, 1972, declared that the discretionary imposition of the death penalty which is so infrequently and randomly imposed that it has lost its deterrent value, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Unfortunately, this decision did not settle the issue. Chief Justice Warren Burger suggested as much when he said in a dissenting opinion that .. "the future of capital punishment in this country has been left in an uncertain limbo." What he meant was that although the Court has abolished the death penalty when it is imposed and carried out in a random and unpredictable manner, it has not abolished the death penalty, per se. Legislatures can, if they wish to, retain capital punishment by:

1. Setting clear and fair standards for courts and juries to follow in determining sentences in capital cases.
2. More narrowly defining the crimes for which the penalty is to be imposed.
3. Creating mandatory death sentences in certain cases to prevent juries from finding an accused guilty on a lesser charge.

The last choice would restrict the options of the jury to finding the defendant guilty and thereby automatically sentencing him to death or acquitting him of the charge. Even though Chief Justice Burger dissented in the main opinion, he stated that if the only realistic choice for legislators to pursue was to create mandatory death sentences he "would have preferred that the court opt for total abolition."

Today, proponents of capital punishment argue that the retention of the death penalty will more effectively prevent the commission of capital crimes. Justice William Brennan points out

in his concurring opinion in the Furman case that there are actually two arguments here. The first asserts that the death penalty is necessary to prevent the convicted criminal from ever committing further crimes. He rejects this, explaining that convicted criminals who are dangerous to society can be isolated in prison and kept in such isolation for as long as necessary through careful administration of the laws governing pardon and parole. The second argument asserts that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. He rejects this also, explaining that there is much evidence to indicate "although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment."

Karl F. Schuessler in an article published in the November 1952 edition of the Annals of the American Academy of Political and Social Science reports that research studies conducted in the United States for the thirty five years preceding 1952 have uniformly concluded that the death penalty is not a more effective deterrent than imprisonment, and that the relative frequency of murder in a given population is a function of the cultural conditions under which the group lives. Schuessler concludes:

"The fact that men continue to argue in favor of the death penalty on deterrence grounds may only demonstrate man's ability to confuse tradition with proof, and his related ability to justify his established way of behaving."

Many studies made after 1952 have sustained similar conclusions.

I take the position that the death penalty should not be retained. Further, I take the position that state legislatures should not take advantage of the opportunity presented by the limited nature of the Furman decision to retain capital punishment. My position is based on the conviction that the arguments presented above are valid -- that is, that the Supreme Court and social science are right in asserting that the death penalty is not more effective than imprisonment as a deterrent to the commission of capital crimes.

Patrick V. Murphy
POLICE COMMISSIONER

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July 28, 1976

James P. Dugan, Senator
New Jersey State Senate
Trenton, New Jersey 08625

Dear Senator Dugan:

In view of prior commitments, I am unable to appear before the New Jersey Senate Judiciary Committee to testify in opposition to the several proposals before the Committee to reinstate capital punishment in New Jersey. I would request that a statement on behalf of the New Jersey State Advisory Committee To The United States Civil Rights Commission previously given before the Newark Human Rights Commission be included in the record of your hearings.

Thank you.

Very truly yours,



Nadine Taub
Chairperson, New Jersey
State Advisory Committee

NT:jb.

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STATEMENT OF NADINE TAUB,
CHAIRPERSON OF THE N.J. STATE
ADVISORY COMMITTEE TO THE U.S. CIVIL
RIGHTS COMMISSION AT THE NEWARK HUMAN RIGHTS
COMMISSION HEARINGS ON CAPITAL
PUNISHMENT

May 13, 1975

My name is Nadine Taub and I am an Assistant Professor of Law at Rutgers Law School-Newark. I am here today to make a statement as Chairperson of the New Jersey State Advisory Committee to the United States Commission on Civil Rights. The U.S. Civil Rights Commission is a independent non-partisan fact finding agency of the federal government, and the State Advisory Committee is consists of 24 concerned citizens, balanced as to age, party affiliation, sex and race. Our mandate is to investigate questions of discrimination on the basis of race, color, religion, sex or national origin.

It is this mandate which brings us here today, for there can be no question that, the death penalty has had a disproportionate impact on minorities, particularly blacks. The most dramatic evidence of course concerns executions for rape: as reported by the Washington

Research Project of the 455 men executed for rape in this country between 1930 and 1969, 405 (nearly 90 percent) were black. With respect to other capital crimes, there is an equally strong indication of racial discrimination. Blacks constitute 76 per cent of those executed for robbery, 83 per cent of those executed for assault by a life prisoner, and 100 per cent of those executed for burglary during the same period. The NAACP Legal Defense Fund reports that of the 262 persons on death row in 23 states as of April 22, 1975, at least 57.3 per cent are non-white-considerably more than their proportion of the overall population.

Moreover, this phenomenon occurs in the North as well as the South. Studies in our own State reveal that between 1930 and 1961, just under half the blacks convicted of capital crimes were sentenced to die, while less than one-third of the whites convicted of the same crimes received death sentences. The studies also show that between 1907 and 1960 whites in New Jersey were twice as likely as blacks to have their sentences commuted.

While it is hard to specify all the causes for this disproportionate impact on minorities, certain factors can be identified. Even with a mandatory death sentence for crimes, there is room for a large amount of discretion in the system; for example, the prosecutor need not charge a capital crime; the jury may convict of a lesser included offense, and the sentence may be commuted. A key element in determining how that discretion is used is the defendant's

poverty or wealth. Former Governor Disalle of Ohio summed it up this way: "During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless."

It is a matter of common knowledge that minorities are way over-represented in the ranks of the poor, just as they are under-represented in the ranks of the influential. They are therefore peculiarly unable to manipulate the system to their advantage.

There is no reason to believe that, if enacted, a new death penalty in New Jersey would avoid the discriminatory impact of the old. As Chairperson of the New Jersey SAC, I must therefore oppose the enactment of A 3289.

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
ON PROPOSED LEGISLATION TO RE-INSTITUTE CAPITAL PUNISHMENT

Presented by Donald B. Clark, Chairperson
Community Life Commission
New Jersey Council of Churches; Outreach Commission
New Jersey Association, United Church of Christ
Co-chairperson, Operation Understanding, Essex County

Senator Russo, I have rewritten my remarks during the process of this hearing, hoping to reflect upon prior testimony and eliminate some duplication. Everything that I wanted to say and much more has been said very eloquently by others. My fear is that it will be lost in an imposing volume and go unread by all those senators and assemblymen who are not here today.

Those opposed to capital punishment have presented a very convincing, reasoned, carefully researched case ... without dramatic emotional appeals but evidencing deep convictions which I'm sure you have heard and respect. Those few in favor of capital punishment have presented no evidence of its effectiveness as a deterrent and you have repeatedly conceded that you believe it would have little, if any, deterrent effect and that there is no available evidence to substantiate this view.

The value of retribution as a public policy has not been seriously defended.

Those for capital punishment have claimed that the people want it, that respect for laws would be increased by it, that it should be available to the people to get even with villains like Charles Manson and Adolph Hitler and that other penalties are not adequate because murderers and rapists are being paroled.

There very frankly, has been no defense of the death penalty which I perceive that we would agree is not flawed in some respect. Certainly, the weight of evidence tips the balance heavily against re-instituting the death penalty.

If the sponsors of the legislation accepted the challenge that the burden for proof were on them, as it should be, I would have no worries that legislation would be reported out of committee, especially after today's hearing.

If legislators were prioritizing the vital issues facing this state or even just this committee, I would be confident that measures on criminal justice reform would consume the available energies.

If you, Senator Russo, were not anxiously pressing for this legislation with so much energy, I'd not be so frustrated. If you had more reason (than what I have heard you express today) to motivate your efforts for capital punishment, I'd feel more comfortable and less disappointed.

The literature contains three major arguments that are put forth in defense of the death penalty .

The first is that capital punishment is a deterrent, a greater threatener than life imprisonment or stiffer mandatory sentences or other manipulations of the criminal justice system . This argument is the most often used and "feels right" to many people who say "who in their right mind would not think twice with death hanging over their heads ." You and the other prosecutors have flawed this type of thinking .

While there is no evidence that capital punishment is a deterrent, there isn't evidence that anything else is a deterrent either . However, there is some evidence that the opposite may be true . Psychiatrists frequently maintain that the death penalty may encourage rather than deter the commission of homicide or other violent crimes . . . that the death penalty can breed murder . There are some published case reports where murderers, on psychoanalysis, were revealed to be hoping thereby to be executed by the state . In other words, they had suicidal motivations .

The second major argument for the death penalty is that it is necessary to protect society . . . it is needed to keep the criminal from repeating the offense or being ransomed by terrorists or whatever . This argument has been adequately refuted by Stanley Van Ness and others today .

The third argument for capital punishment is that it serves society's needs for vengeance or retaliation, i.e., society's way of obtaining atonement or of "getting even" .

Dr . Neil Vidmar surveyed Canadian adults in a study examining the motives behind and other social/psychological correlates of attitudes on capital punishment . His studies suggest that for a substantial percentage of people, the motive of retribution may be more important than deterrence as a reason for favoring it . Other findings indicate that the more strongly people favored the death penalty, the more likely they were to score high on measures of authoritarianism, punitiveness, dogmatism and prejudice . They also were more likely to be older and less educated .

Other studies seem to substantiate the importance of the motive of retribution for those supporting capital punishment and that these people seem to be considering capital punishment in the abstract . Few would pull the lever to execute a person themselves .

Some individuals believe that society's punishment of the criminal has a cleansing effect upon the entire community, that this discharge of the community's aggression towards a wrong-doer helps to "stabilize" all citizens individually and collectively. By killing the murderer, society finds an outlet for its aggressions and at the same time emphasizes the virtue of its conforming citizens. This argument is vague and unproved.

The quality of "stability" based on vindictiveness is highly questionable. It is not unlikely that society's release of aggression against the offender creates a social climate of antagonism in which those who have grievances against society become progressively more alienated and aggressive.

The psychological reasons behind the demands for vengeance are clear. There is deep, repressed hostility within all of us which is released especially by murder and sex crimes. Guilt attached to early sexual feelings of hostility not toward white collar criminals who peddle drugs or invade legitimate businesses with racketeering techniques but toward men and women who have unleashed, in a moment of passion, what has simmered in all of us: the urge to destroy. There murderous deeds allow us to vent upon them our pent up guilt and hostility without guilt or remorse. Our urge to destroy is fulfilled by putting them to death.

The punishment is rationalized as protection for society and deterrence. Thus, it comes full circle: we vent our hostility, doing in the name of society what we could not dare do individually and at the same time deter our own urges until another despicable crime lets us do it all over again.

The "eye for an eye" formula says more about us than it does about the criminal. It rips away the veneer and exposes us for what we are: hostile, guilty, vengeful people letting it all loose on others whom we recognized to be so like ourselves.

We cast away our sins on to the criminal.

The Judeo-Christian faith knows another urge: the urge to redeem. It goes against the natural urge to seek vengeance. The urge to make new is a gift. The motivation implanted by the gracious activity of God.

This urge or call, in part, has led many faith groups to take positions against capital punishment. As exhibits for this statement, I'd like to include an editorial by James M. Wall on the subject, a resolution of the Community Life Commission of the New Jersey Council of Churches, a recent action of the Southern Conference of the United Methodist Church and an article from the Christian Century entitled, "Green Haven Prison and the Death Sentence."

Thank you.

Resolution on Capital Punishment

Whereas, we believe in the sovereignty of God's grace and in His power to redeem and restore the lost to meaningful and useful life and

Whereas, we further believe in the ultimate significance of each individual person as one for whom Christ died and

Whereas, the New Jersey and some other state legislatures are considering legislation reinstating capital punishment as part of their penal systems and

Whereas, we note the grave and irrevocable nature of execution as punishment, that human agencies of legal justice are fallible and that statistical evidence does not support the contention that the death penalty is more of a deterrent to crime than a prison sentence

Therefore, the New Jersey Council of Churches, Community Life Commission:

1. reaffirms its opposition to capital punishment
2. calls upon all religious bodies and congregations in the state to restudy the moral imperatives of their faith attendant to capital punishment and
3. urges all groups, both religious and secular, to make their views on capital punishment known to their state legislators, as soon as possible.

Unanimously Adopted
April 20, 1976

