PUBLIC HEARING

before

ASSEMBLY JUDICIARY COMMITTEE

on

DEATH PENALTY

(An examination of the death penalty statute, N.J.S.A. 2C:11-3, in light of recent court decisions)

March 14, 1989
Borough Hall Auditorium
Haddonfield, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Thomas J. Shusted, Chairman
Assemblyman John Rocco
Assemblywoman Barbara F. Kalik

ALSO PRESENT:

Patricia K. Nagle
Office of Legislative Services
Senior Counsel, Assembly Judiciary Committee

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ASSEMBLYMAN THOMAS J. SHUSTED (Chairman): Ladies and gentlemen, the meeting of the Assembly Judiciary Committee will be called to order. We do have an agenda, but before we start, I would like to personally thank, on behalf of the Committee, the Borough of Haddonfield for permitting us to use these beautiful facilities to conduct the hearing. We are going to have public hearings concerning the death penalty. Before we do that, since we have a quorum, there are some bills that we would like to discuss and release from Committee.

Now, as you know, today, we'll be discussing the death penalty, an extremely difficult topic which generates strong feelings on both sides. With this in mind, I would ask, that, while you may not be in agreement with some of the views expressed here today, please remain courteous and respect each other's right to speak.

In addition, I would ask that all the witnesses keep their comments brief, since we do want to adjourn at a reasonable hour. Before I call the first witness, I would like to make a few comments concerning capital punishment and the purpose of the hearing.

In the criminal law, subtle distinctions are often drawn among types of crimes in order to determine appropriate punishment. This is true when distinguishing the various types of homicide. But while the difference between punishments for aggravated manslaughter may be ten or twenty years in the life of the defendant, no distinction is more important or more stark than that drawn between the sentence of life in prison and a sentence of death.

Understanding this, the New Jersey Legislature took pains to craft a death penalty statute which would be imposed selectively, and would balance the rights of

defendants with the needs of society. In August of 1982, the death penalty was signed into law. In subsequent years, several amendments were adopted, which were intended to guard the statute against constitutional attack. The careful and thoughtful consideration afforded this statute by the Legislature appeared to pay off in March of 1987, when the New Jersey Supreme Court upheld the constitutionality of the death penalty in capital cases, in the case of State against Biegenwald and State against Ramseur.

In both cases, however, the death sentences were invalidated. Biegenwald was remanded for resentencing and has since been resentenced to death, while Ramseur had his sentence overturned with no remand; the court stating that sentencing proceeding errors were so prejudicial to the defendant that he could not be subjected to the death penalty, thus commenced a string of eleven death penalty appeals, which have yet to yield a valid sentence. While it is incumbent upon the court to insure that no person is wrongfully convicted or punished for a crime, some questions have been raised as to whether the courts are being unreasonable in their interpretation and implementation of the death penalty statute.

For instance, are the trial errors which have formed the basis for overturning several sentences of such a serious nature, so as to warrant new proceedings? Quite simply, is the court looking for a perfect trial in an imperfect world? Then there are questions about the statute itself. Is the death penalty statute unconstitutionally brought as the court held in State v. Gerald, when defendants are made eligible for death, when they purposely inflict serious bodily injury which results in death, even if they did not intend to kill the victim? If the statute is flawed, what should the Legislature do about it, if anything?

We wish to gather information which will permit us to answer these and many other questions. It is this Committee's desire to review the record, and to evaluate the current state of capital punishment in New Jersey, as we enter these proceedings with open minds and wish only to see that the will of the people as expressed through their elected representatives is carried out within the constitutional framework in which we live.

With that, I would like to call upon the first witness, the distinguished Speaker of the General Assembly, Chuck Hardwick.

S P E A K E R C H U C K H A R D W I C K: Thank you, Mr. Chairman, and members of the Committee. At your last meeting you heard some compelling testimony on the death penalty, and I'm sure you'll hear more today and receive more during your deliberations. Clearly, the public, the families of victims, and many lawmakers are concerned that the intent of the Legislature is being frustrated by recent Supreme Court decisions.

I ask that you take the information you gather and present it to the Administrative Office of the Courts and to the Legislature for their full consideration. It is time that we had a meaningful death penalty in this State. I hope you pay particular attention to the pleas by a number of witnesses, including me, that the appeals process be expedited. Justice delayed is justice denied, not only for the accused, but for the families of the victims as well.

At your last hearing you heard the tragic story told by Mr. Jim O'Brien whose daughter Deidre was murdered back in 1982. Once his daughter's killer had been convicted of the murder, the O'Brien family had hoped to put the pieces of their life back together, but the appeals process has dragged on for four-and-a-half years with no end in sight, forcing the O'Briens to endure lasting

emotional pain. It is a crime in itself to inflict that kind of damage upon grieving families.

I believe we can shorten the appeals process by setting a firm deadline for the Supreme Court to conduct its reviews. I'm not suggesting that we sacrifice the thoroughness of an appeal; in our society, even the most heinous murderer has the right to a trial, if you will. But we can assign the highest priority to the death penalty cases, placing them at the top, rather than at the apparent bottom of the judicial heap.

With this change, and others, we can send a clear signal to violent criminals that we're serious about stopping murder in this State. We can make the death penalty the formidable deterrent it should be, and now have the criminals in our State fear the death penalty to deter them from killing. If they know there's no realistic chance that the sentence will be carried out, it means nothing at this point.

I believe the court has been asking the wrong questions in trying to determine if a death penalty is warranted. Because of this, convicted killers have been able to avoid the death penalty, not because their crime isn't vile, but because the court emphasized the wrong issues in reviewing the sentence.

In the case that you referred to, Walter Gerald, for example, the State Supreme Court decided that Gerald could not be put to death for the brutal murder of Paul Mateus of Pleasantville, because the jury did not specifically state in its verdict that Gerald intended to kill him, despite the fact that Gerald beat Mr. Mateus so badly that he died that same night. He was hit over the head with a television and kicked in the face. Police were able to match the sneaker print dug into his face. He beat Mateus' sister and beat his 89 year old crippled father so badly that he also died. The intent to kill standard could

allow the Supreme Court to avoid implementing the death penalty in almost every case, if you can't prove that a person intended to kill another human being. Using this test, then a murderer cannot be subject to a death penalty if he beat the victim to death, unless the prosecutor can get inside his head and prove that he really intended to kill his victim, and not merely to beat him within an inch of his life, and then leave him permanently disabled.

As I've said previously, I believe this Committee ought to consider resolving this problem by amending the Constitution so it clearly states that someone who viciously beats another person to death should be made to pay with his life.

I also believe the court is using the wrong standard in determining death sentences. In this proportionality issue with regard to sentences, the Supreme Court must compare the sentence in each case with sentences handed out in similar cases in the State, but no two crimes are exactly alike; no two prosecutors are exactly alike; no two jurors are exactly alike.

The circumstances are not the same in all cases. It makes no sense to say that a murderer in one case cannot be given the same sentence as a murderer in another case, when a jury in a different case, acting on a different set of facts, and without its own individual judgment, decided not to invoke the death penalty.

Proportionality review was included in the New Jersey statute, because the Legislature thought erroneously that the U.S. Supreme Court was going to require it. However, the U.S. Supreme Court does not mandate a proportionality review, and we should consider eliminating it. The fault in our system lies not with the death penalty, but with the way we have enforced it, or more accurately, not enforced it. If it is carried out, the

death penalty would serve as a deterrent also for would-be murderers who would see we're serious about it, people, who, by committing the most heinous crimes they are too dangerous to ever be allowed back in our society, and they deserve the sternest punishment we have at our disposal.

I commend you for your ongoing review of the statute, admittedly a very difficult issue to decide, but your deliberations, I think, are taking this incrementally, putting this whole issue forward, in the right direction. And I thank you for going out, getting out of the State House, going out to where the people live, throughout our State, so, they, too, can have an opportunity, if they so desire, to testify on this important issue.

ASSEMBLYMAN SHUSTED: Thank you very much. Thank you very much for coming. I might comment, you made reference to the prosecutor. We are pleased to have the Camden County Prosecutor Samuel Asbell and his first assistant Dennis Wixted here observing and listening to what is transpiring today. I'm sure that at some future point, the New Jersey State Prosecutors' Association and the Attorney General's Office may have some input.

ASSEMBLYMAN HARDWICK: Thank you.

ASSEMBLYMAN SHUSTED: Next speaker, Assemblyman Alan Karcher had indicated a desire to testify on this bill. He has not appeared yet, but should he appear, I know we'll be glad to hear from him.

At this point, I would like to call Karen Spinner from the New Jersey Association on Correction.

K A R E N S P I N N E R: Good afternoon, and thank you for the opportunity to allow me to speak before your Committee this day.

For the record, my name is Karen Spinner, the Director of Public Education and Policy for the New Jersey Association on Correction. The Association is a statewide citizens' organization. We're not for profit, and we're

concerned with the enormous cost of the criminal justice and correction system.

From the outset, I should mention -- and I'm sure some of you who have been in the Legislature for awhile have heard me -- we are opposed to the death penalty and have been so since our inception in 1961. Be that as it may, since the death penalty is a law in New Jersey, it's our goal to see that the legislation does not expand it beyond what it currently is. Expanding the statute along the lines that have been suggested would certainly open the statute to a number of constitutional challenges.

The suggestion that a time limit be placed on the appeals process is probably unconstitutional. In New Jersey it has served a fine goal in serving to protect people whose trials were badly flawed. I think some of our original death penalty cases did suffer from that, probably because of a lack of guidelines in how cases should be conducted. Anyway, the fact that you can't reverse a death penalty if there's an error, there really is no room for mistakes. We must allow the appeals process to go on, to really get to the root cause, the answer to the problem.

Extending the statute's applicability to those who unintentionally commit a murder in the process of another crime really goes beyond what the Legislature intended, from my understanding, from both Senator Russo and the Governor. It's intended only for most heinous types of crime. To extend it to other types of crimes, to include accomplices, really does not per se constitute a crime of a heinous nature. And I really do think this is a dangerous precedent to start looking at.

Inclusion of all drug related murders as automatically death eligible is definitely not appropriate. Drugs are a serious problem and we acknowledge that. It's not logical to lump all drug related murders as those into the category as deserving the ultimate sanction.

Each defendant needs to be judged as an individual, and the mitigating and aggravating factors must be weighed. Not all drug related murders are of the heinous variety that the Legislature intended to be covered under the current death penalty statute. No crime, regardless of circumstances, should automatically get the death penalty.

We really need to be very careful in this area. We also oppose the refinement which would remove proportionality review as a requirement in all death penalty cases. The history of the death penalty is one which is replete with blatant examples resulting in the unequal application of the sanction. Proportionality review is our safeguard, our fail safe system, if you will, to check on the arbitrariness in the life or death decisions. It can also be a useful tool for the courts in helping set the standards to define the death eligible case. And, since the public defender has been collecting this data, it does not seem to be an unreasonable burden in terms of finances or anything else at this current time.

Finally, and most importantly, there is no data, still no data, which supports a correlation between State sanctioned murder, the death penalty, and the murder rate. The death penalty has never been a deterrent to the crime. The crime rate across the nation was not that significantly less. It's unlikely the death penalty would have any impact on those we would like to have it impact on. Those who are going to commit murder are going to do it without considering the consequence, except perhaps those who murder for money.

Our death penalty does serve the goal of vengeance and the Judaic tradition of an eye for an eye, but its impact on reducing murder is really very nil. Violence begets violence. In this supposedly enlightened society, when all the western countries have outlawed the

death penalty, why do we still kill people to prove that killing people is wrong?

I think that we have probably progressed beyond that point in this State, and I just wanted to share with you some of the things that were published in the papers in Florida after Ted Bundy was executed. It was really a very sad commentary on the character of the individuals who participated. Ted Bundy did a lot of vicious things, but the behavior of the public after his execution was absolutely, in my opinion, criminal: dancing, laughing, Bundy burgers. This is not the hallmark of a civilized community. We can't just kill people to prove killing people is wrong.

We have a death penalty, and having a death penalty really allows these murderers a forum beyond which not having the death penalty, if you give them a thirty year or forty year sentence, they don't have a forum to come back and reap that -- what is the word I want to say? -- that feeling on that victim's family, that whole reliving of that act. We've given them a forum, through the death penalty, if we were to eliminate the death penalty, we would eliminate that forum. I'm not saying they should get out-- The death penalty gives them a forum to come back and make people relive that.

ASSEMBLYMAN SHUSTED: What's the forum, the appellate process?

MS. SPINNER: Part of that is, but part of the fact that crime keeps going on, people have last minute appeals.

ASSEMBLYMAN SHUSTED: Wouldn't that happen if they got a thirty or forty or life sentence?

MS. SPINNER: If they got a forty or fifty year life sentence, there's no need for them to relive that crime. There's no appeal to that. They probably could appeal it. If it's a flat term, what is the appeal to a

flat thirty year term? I don't think the appeals process would kick in as readily as it kicks in with the death penalty. Death penalties have automatic appeals.

ASSEMBLYMAN SHUSTED: On the death penalty, their appeal is automatic?

MS. SPINNER: There is no recourse to a life without parole, unless you're talking about commutation, and we don't give them out too readily in this State.

ASSEMBLYMAN SHUSTED: It's your testimony essentially that we should just repeal the death penalty?

MS. SPINNER: That would be our goal, to repeal it. However, knowing it's probably unlikely, we would not like to see any more expansion. We would not like to see it expanded to any other class of murders.

ASSEMBLYWOMAN KALIK: It is certainly nice to hear support of my position. I was very lonesome at the last meeting. I thought I was the only one in the world who was opposed to the death penalty any more, and I oppose it for very much the same reasons.

I think the public behavior in Florida was crass, to say minimally what it did to me inside. And I wondered if we were not putting on a circus performance instead of a very serious killing of another human being? I was just appalled.

ASSEMBLYMAN SHUSTED: May I ask you, doesn't your Association, or hasn't it taken the position in the past that you were opposed to mandatory sentencing?

MS. SPINNER: Yes, we were opposed to mandatory sentencing.

ASSEMBLYMAN SHUSTED: But, you wouldn't be opposed to mandatory sentencing here?

MS. SPINNER: In this case, because I can't speak for the board, it's quite possible, as a trade-off, we might consider, for no death penalty, we might consider life without parole. That might be the trade-off that the Association might be willing to take.

In general, we're opposed to mandatory sentences for what they are given out for in the other levels of crime. And one of the main reasons, of course, is overcrowding. That concerns us. And that's where our opposition to mandatory stems from. If we can have our choice, we might take it in this case.

ASSEMBLYMAN SHUSTED: Thank you very much. William Buckman, Criminal Defense Attorneys' Association.

W I L L I A M H. B U C K M A N, E S Q.: Thank you, Mr. Chairman. Mr. Chairman, members of the Committee, thank you for allowing me some time today to introduce some of the positions of the Association of Criminal Defense Lawyers in New Jersey. I'd like to make clear at the outset that although I am employed as a public defender, and am involved in capital litigation, I do not speak for the public defender. I don't want to be interpreted as speaking for the public defender's office.

I am here as a representative of the Association of Criminal Defense Lawyers of New Jersey. I would like to stress that.

ASSEMBLYMAN SHUSTED: That includes the private bar, as well as public defenders?

MR. BUCKMAN: Yes, it does. Our members come from both areas. I, having read remarks that were rendered previously, again, would like to stress at the outset the fact is that New Jersey is harsh when people are accused of capital murder. New Jersey is not, or should not be, seen in any respect to be lax.

In my experience, and from my research of the cases, there is no one who has been accused of capital murder since the inception of the statute who has been released on bail, as Ms. Spinner has stressed, even one convicted of a capital offense in New Jersey during this appeal process faces thirty years to life with a minimum of thirty years before parole on each count of murder.

I am regularly astounded when I speak to people in New Jersey that, although we talk about this term, "the will of the people," my experience is that most people in New Jersey do not realize how harsh that is. When you tell them that murder in New Jersey without the death penalty means life or thirty years to life, with a minimum of thirty years before parole, their response is, well, with all that legal mumbo jumbo, they will be eligible for parole in ten years. No, they are astounded when I tell them there's thirty hard years. There's no parole. That is the effective end of someone's life. They will die in prison or become very old, as it is.

With that in context, speaking on behalf of the Association of Criminal Defense Lawyers, I can only say that we are somewhat astounded that some of the remarks make it seem as if our New Jersey Supreme Court is somewhat lax with this statute. We don't interpret the cases as meaning that the Supreme Court is trying to avoid this statute.

The Supreme Court has specifically upheld the constitutionality of the statute. The issues that have been addressed in the cases, and the cases that have been reversed, have been reversed not on mere technicalities, as has been said, or on legalisms, but issues that are very central to our standard of law in this State and in this country.

But, let me backtrack a bit. The fact that these appeals are taking some amount of time is of no surprise to anyone. The Committee reports on the committees and Legislature that originally considered the death penalty are replete with references that they knew it was going to take this amount time. The term of ten years before the first possible death penalty litigation prior to the 1982 statute clearly showed that those who passed this law knew that this was a very time-consuming process.

Death penalty litigation prior to the reenacted New Jersey statute was a lengthy process, and the fact that it is a lengthy process now should come as no surprise. The appeals that we have heard in New Jersey to date are still the appeals less the Federal appeals that will still have to be taken. No one should be surprised and, frankly, we think it is a "make wait" issue that persons are saying the Supreme Court is behind the length of time involved here.

The Supreme Court is simply reinterpreting a very new and very complex statute. One only has to pick up the Code of Criminal Justice for New Jersey to see that our death penalty statute in comparison to other crime statutes in that book is much more complex and raises many more issues.

I would also stress to you that since 1982, when the statute was enacted, we are in essence dealing with the statute that no one has experience with. When we talk about the extensive review that the Supreme Court has to deal with concerning this statute and concerning the trials that were conducted pursuant to the statute, we're talking about a statute that has been utilized by people inexperienced to use it.

Most of New Jersey's judges, most of New Jersey's prosecutors, most of New Jersey's public defenders are people who did not practice capital litigation ten, fifteen, twenty years ago. The issues that we're hearing in these cases are issues to be determined anew. And the complexity of those are only tenfold, now that we have a statute that requires even more steps than probably previous statutes did.

ASSEMBLYMAN SHUSTED: Do you think the existing statute is too complex?

MR. BUCKMAN: Not at all, sir. I think the existing statute, putting aside the issue of whether or not

we should have a death penalty statute, the existing statute cannot be anything less than complex. If we are going to enact a death penalty statute, it has to be complex from the standpoint of constitutionality. We are told by the United States Supreme Court that we cannot automatically condemn to death anyone convicted of murder. There has to be a statute. There has to be a scheme that calls, that differentiates between classes of offenders in murder cases. Were we to randomly and/or blanketly condemn people to die as a result of a murder conviction, it would not pass constitutional muster.

I think that you said it in your prefatory remarks, Mr. Chairman, that we have to call the different types of cases. The question is, given the realm of human experience, given the realm that every case is different, it is going to be a complex process to determine who should meet this terrible fate under the statute.

I would also indicate that, contrary to the remarks that you've heard, the cases that we've seen come to the Supreme Court have not been reversed on frivolous matters, not been reversed on mere technicalities. They have been reversed on issues that, in essence, are the guts. Marco Bey was reversed based on the voluntariness of his statement, pursuant to Miranda v. Arizona and its progeny. Whether or not the evidence in Marco Bay also stands for the proposition of what standard of review the Supreme Court will exercise in these cases, I think that both opponents and proponents in these cases would agree with that standard of review, which is, it has to be meticulous, serving an exclusive type of review that will not take any shortcuts. We can do no less in a death penalty case.

The Gerald case had to interpret the issue of what does a jury have to find. If a jury-- Or, if our statute would be unconstitutional, if everyone who is

convicted of murder were condemned to die, then it only goes without saying that the jury has to find that a person intended to commit murder, because, without finding that there is an intent to commit murder, then how can we say that we have a statute that deals with the different classes of people accused of this?

ASSEMBLYMAN SHUSTED: Didn't Justice Clifford declare part of that case unconstitutional?

MR. BUCKMAN: Unconstitutional to the extent that we have to call or make distinctions in the various types of cases, especially talking about innocent--

ASSEMBLYMAN SHUSTED: That should be an area that we as legislators should look at in the statute?

MR. BUCKMAN: I would agree with that. Certainly the Legislature should look at that; however, when we are trying to, say, lay blame at the foot of the Supreme Court, this is an issue that they had to deal with. When we're talking about the length of time that these appeals are taking, certainly this is an issue that had to be dealt with in the constitutional framework of our law.

ASSEMBLYMAN SHUSTED: We're not trying to lay blame. The purpose of this hearing, or these hearings, is essentially to try and find out, if the statute isn't working, is it because of the statute itself, or because of the interpretation that's being placed on that statute by the courts.

I agree with you, I think the court should be as meticulous as it can in this type of case. If, in fact, the statute needs some refinement, then we as legislators are trying to find that out.

MR. BUCKMAN: I would also note, of course, the Legislature can be interested in the continuing refinement of the statute. However, again, I'm responding to my analysis of remarks that have been made to this Committee,

which seem to lay blame at the Supreme Court for "avoiding the statute" or trying to "let it die on the vine," so to speak.

When we talked about issues as central to the law as determining the intent of an actor accused of murder, and perhaps even facing the death penalty, that is not a mere technicality, and that is not an issue that we can say is being used just to avoid allowing the statute to be operative. In the Williams and the Rose cases, we dealt with issues of overwhelming prosecutorial misconduct in those cases.

The Supreme Court basically said, if we are going to kill someone, pursuant to the death penalty statute, we are going to have to kill them pursuant to a fair trial. We're not going to kill them pursuant to a circus atmosphere. That is not a mere technicality of a case.

But, I would also point out, if I could, in that context, the appellate process, in these cases, has not been unduly slow. I don't say that this has been scientifically conducted, but a random poll of colleagues of mine who do appellate work would indicate that the process in the appellate cases is not much longer than, especially in that context, non-death penalty review by the Supreme Court.

I would indicate the case of State v. Van Nostrum, certification granted April of 1987, it was decided in February of 1988; State v. Odum, appeal filed in August of '88, it's not even scheduled for argument yet. State v. Bowens, appeal filed 12-85, decided 10-87. State v. Howard, certification granted January of '87, decided 4-88. The list goes on.

The fact of the matter is that the Supreme Court has a great deal to do in a death penalty case. I don't know what previous testimony you've heard, of course, but a death penalty case, in my experience, and in the experience

of most of my colleagues, is perhaps the most complex type of litigation we can engage in.

A standard criminal case compared to a death penalty case, I would suggest to you, is the comparison between building a house and building a skyscraper. A standard case, if it is a long case, leaving aside, for instance, such gigantic cases as the mega conspiracy trial in Newark in the Federal realm, if a non-capital case takes a month to try in New Jersey, that's fairly lengthy.

However, on the other hand, it is not uncommon for a capital case to take three to four months to try. Jury selection in and of itself is a very extensive process in capital cases. Jurors are very hard to find in capital cases.

I'm sure you heard the term "death equals life indication." To qualify a jury that can sit in a potential death penalty case is an extensive, grueling, time-consuming process. There are people who have to be stricken from the jury because they would automatically give the death penalty upon the conviction of murder. They would not consider the penalty of life in prison. There are people who would not consider the death penalty. When we get to the views of those two opposing groups, the remaining number of jurors is few. And the process drags on day after day, sometimes month after month.

I participated in a case where jury selection took two months. However, jury selection is a constitutional right. The right to the assistance of counsel, and the right to a fair jury picked from the community-at-large is a State and Federal constitutional right. Jury selection in and of itself must be reviewed by the State Supreme Court, and I would indicate to you, that a great deal of the appeals in death penalty cases are consumed and talked about or deal with jury selection. It is not an issue that we can avoid. It is an issue that we

are starting to get guidelines on, but it is an issue that was basically untouched prior to the new statute.

I would indicate to you that it troubles me to hear the comment, that death penalty cases would somehow get priority or be mandated to get priority in the appellate process. There are victims of non-death penalty cases, also. These victims are still live victims. I don't know, or I can only speculate, and speculate that the trauma would be intense, for instance, for a rape victim who must be told that the appeal in that case might take even longer, and she might have to testify even further down the road than she would normally in this appeals process. I suspect to talk about giving death penalty cases priority is to rob Peter to pay Paul.

The other side of the coin is, it is not uncommon to have an innocent person convicted. And it is not uncommon, and it is in my experience that people who are convicted wait in jail for their appeals to be heard.

I personally represented a gentleman convicted at a trial which we contested as being grossly unfair. The Appellate Division agreed. However, it took three years. My client waited in jail for three years for that appeal to be heard. When the appeal was heard, he was granted a new trial, a second trial, much better conducted than the first. The jury took exactly 45 minutes to find him not guilty. Now, to tell him, and other litigants like him, I'm sorry, we have to put you even further on the back burner because we're giving these other cases priority, when these persons are already on death row for life or in jail for thirty years without parole, seems somewhat askew.

Perhaps the biggest problem we raise, if we talk about speeding up the system, is reliability. Even the staunchest proponents of the death penalty, I would think, would hope that the system is reliable, and that we would never execute an innocent person; that we would never

condemn to life in prison with thirty years before parole, an innocent person. Unfortunately, American justice does not have a history of reliability.

In a recent study done by two professors, Hugo Bedau of Tufts University and Michael Rodolay of the University of Florida, they have found that in the death penalty litigation, or capital murder cases, since the turn of the century, 243 people have been wrongfully convicted; 25 of those innocent people, proven to be innocent after the fact, were executed. To speed up the process is only to ask for this unreliability figure to go up.

Their present calculations are that out of 7000 death penalty cases since the turn of the century, 343, or roughly 5% were inaccurate. That does not include the figure of cases which were reversed because the trial was unfair, or because due process was violated. These are cases where they were comfortable to conclude that the person executed or sent to life in prison was not the person who did it, or that the crime did not even occur. That is a shocking figure, and it is something that we must think about very carefully before we even talk about speeding up the process. But their study should come as no surprise. Even presently circulating in the theaters there are two films out which both document shocking cases of people convicted of capital murder. One man who was sentenced to die and it was later found out that both of them were innocent. I'm referring to the true stories documented in "A Thin Blue Line" which is currently circulating, and "A Cry in the Night," about an Australian case under the Anglo-American type of justice system.

Particularly, in the Randall Adams case, he was convicted of killing a Dallas policeman in the late '70s. He was convicted and sentenced to die. His death conviction or death penalty was overturned via the United States Supreme Court. Before the Texas courts could decide what

to do in this case, it came forward that critical evidence was suppressed, that there had been perjured testimony, that an eyewitness identification did not occur, and that police coaxed an eyewitness as to the identification of this gentleman, and that, probably more shocking, the person who did commit this crime confessed while he was in prison on another charge. Mr. Adams would have died had the situation been sped up in his case.

We cannot afford to make the system move quicker than it is. This is not the type of law that can be speeded up. We have to make-- If we are going to make these decisions at all, we have to make them calmly, away from mass hysteria, away from the bias and prejudice which would make us act too quickly and do something that we would regret for the rest of our lives. And proportionality, that is related to this situation. Not only must we assure if we are going to engage in capital litigation that it be reliable, we also have to make sure that it is not arbitrarily meted out.

Preliminary studies, and studies for the last twenty years, have indicated that the race of the victim and the race of the perpetrator are often much more accurate indicators of who is going to get the death penalty than the "balancing of the statute." We have to see whether or not even in a State such as New Jersey we are nevertheless still suffering under a situation where black people are going to be twice or three times more likely to get the death penalty than white people for similar crimes.

I would only indicate that it is our position that in the decision that has to be made, as serious and as awful as meting out the death penalty, we have to make sure that whatever decision is made, that we are at least assured and not ashamed that when it is ultimately made that we at least dealt the right result under the statute.

There are questions of whether or not the statute is even appropriate at the outset. However, I would conclude by saying, I see nothing in the cases rendered to date that would indicate that this court is attempting to avoid the statute. I would suspect that ultimately they will allow an execution to go through, once we have refined the statute and once it is clear that someone has gotten a fair trial, and the statute has been appropriately adhered to. Thank you.

ASSEMBLYMAN SHUSTED: Thank you very much. Any member of the Committee have any questions of Mr. Buckman?

ASSEMBLYMAN ROCCO: On that 5% number, 5% you're saying a wrong decision was made. Of course, those of us in the Legislature are very concerned, obviously. Is that data based on recent cases or are you going back to the turn of the century for that information? Do you find it proportionally minimizing itself as we move through the century or--

MR. BUCKMAN: It seems to be getting worse. The average would be 38 persons per decade under that scheme. However, there were 49 such cases in the '70s. There were 15 up until 1985, which is the end point of the study. And, of course, since 1985 executions and capital litigation, I would suspect it is increased somewhat in this country.

So, the point of the study is that we cannot rest on our laurels thinking that it is 1980, this kind of stuff doesn't happen any more. This kind of stuff does happen. Randall Adams--

ASSEMBLYMAN ROCCO: If the overall percentage is 5%, would you have a percentage for the '80s? Is it higher or lower than 5%?

MR. BUCKMAN: I don't have an overall percentage for the '80s. I'm saying the figures up until 1985 indicated that 15 such cases existed in the '80s, 49

existed in the '70s. So, in terms of whether or not it is going down, at least for the '70s and '80s, it seems like it has gone up. It has gone beyond the average of the previous decades--

ASSEMBLYMAN ROCCO: In the--

MR. BUCKMAN: We have to consider the fact that at least during the '80s, many, many states had not reenacted its statute. New Jersey is only getting into full swing.

ASSEMBLYMAN ROCCO: Your statement is inaccurate. If there are 49 or so in the '70s, and 15 in the '80s, and we're coming to the end of the '80s--

MR. BUCKMAN: Yes, but I can't say that the 15 figure has gone down because of the process.

ASSEMBLYMAN ROCCO: I'm only asking you for the process. I think that's inaccurate information.

ASSEMBLYMAN SHUSTED: The standard changes.

ASSEMBLYMAN ROCCO: Forty-nine to 15, it's going down. If you want to say it's going down because the statutes were being changed is a different story. It's going down percentage-wise.

MR. BUCKMAN: I don't have those figures to agree that it would be going down. If we had less capital litigation in the '80s, 15 could very well be a significant number for a similar percentage of the litigation we've had in the '80s so far.

ASSEMBLYMAN ROCCO: With the data that's available, it's difficult to make a determination, because you're not sure of what the factors are that brought it to 15?

MR. BUCKMAN: I would have to agree with you. I can't make an out-and-out statement that it has radically gone up, or exactly this or that figure in the '80s. I was responding to the general question of has this-- Is this phenomena something which happened more in the beginning of

the century and not as much in recent times, let's say since the '70s and '80s, and I'd have to say, we can't say that because there were 49 in the '70s, and 15 up until 1985. So, I can't say that it is going down or that our era is more than previous times.

ASSEMBLYMAN ROCCO: You can't say it's any better or any worse?

MR. BUCKMAN: I could not say that.

ASSEMBLYMAN ROCCO: That's all I'm saying.

ASSEMBLYWOMAN KALIK: Could you tell me again the name of that study and where I might obtain it?

MR. BUCKMAN: The study is published by Hugo Bedau and Michael Rodolay, entitled "Miscarriages of Justice." I have a copy of it, as a matter of fact, of the study. I could present it to the Committee as an exhibit.

ASSEMBLYMAN SHUSTED: That would be helpful.

ASSEMBLYWOMAN KALIK: I just wanted it for myself.

MR. BUCKMAN: I'll be happy to forward one.

ASSEMBLYMAN SHUSTED: Is there any other member of the public that wishes to testify for or against the death penalty? (no response) Hearing no other person who wishes to testify, then I move that I entertain a motion that we adjourn.

ASSEMBLYMAN ROCCO: So moved.

ASSEMBLYWOMAN KALIK: Second.

ASSEMBLYMAN SHUSTED: Adjourned. Thank you for coming.

(HEARING ADJOURNED)