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PUBLIC HEARING

before

SENATE JUDICIARY COMMITTEE

on

SENATE, NO. 112

(Death Penalty)

Held:  
February 26, 1982  
Room 223  
State House  
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator John F. Russo (Chairman)  
Senator Joseph Hirkala  
Senator John A. Lynch  
Senator Edward T. O'Connor, Jr.  
Senator Carmen A. Orechio  
Senator John H. Dorsey  
Senator John B. Paoletta  
Senator James P. Vreeland, Jr.  
Senator John P. Gallagher

ALSO:

John J. Tumulty, Supervising Research Associate  
Office of Legislative Services  
Aide, Senate Judiciary Committee

\* \* \* \* \*

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I N D E X

	<u>Page</u>
Edwin H. Stier Director Division of Criminal Justice	3
Senator Wayne Dumont, Jr. District #24	23
Stanley Van Ness Former Public Advocate	27
Elmer Matthews New Jersey Catholic Conference	33
Joseph Chuman Coordinator Northern New Jersey Group Amnesty International	1A & 1X
Dr. Howard Radest Bergen County Committee for Religious Tolerance	6A & 30X
Sarah Dike National Council on Crime & Delinquency	9A & 37X
Neil Cohen Legislative Coordinator Public Interest Lawyers of New Jersey	10A
Frank Askin General Counsel American Civil Liberties Union; Speaking on behalf of Public Interest Lawyers of New Jersey	10A & 46X
Henry Schwartzchild Director, Capital Punishment Project American Civil Liberties Union	18A
Isadore Zimmerman	21A
Doris Havran President Lutheran Church Women of New Jersey	23A & 50X

I N D E X - Continued, page 2

	<u>Page</u>
Raymond Kalainikas	24A & 67X
Enrique Aroyo	27A & 53X
Ann Ricks	30A & 56X
Edwin Kruse	30A & 59X
Lucy MacKenzie	32A & 62X
ALSO SUBMITTED:	
Letter from Rabbi Eric B. Wisnia Congregation Beth Chaim West Windsor, New Jersey	62X
Statement from New Jersey Synod Executive Board Lutheran Church in America	
NJCC Position	71X

[THIRD OFFICIAL COPY REPRINT]

SENATE, No. 112

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1982 SESSION

By Senators RUSSO and EWING

AN ACT concerning capital punishment and amending N. J. S.  
2C:11-3 \*and N. J. S. 2C:13-7\*.

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

1 1. N. J. S. 2C:11-3 is amended to read as follows:

2 2C:11-3. Murder. a. Except as provided in section 2C:11-4  
3 criminal homicide constitutes murder when:

4 (1) The actor purposely causes death or serious bodily injury  
5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
9 one or more other persons, is engaged in the commission of, or  
10 an attempt to commit, or flight after committing or attempting to  
11 commit robbery, sexual assault, arson, burglary, kidnapping or  
12 criminal escape, and in the course of such crime or of immediate  
13 flight therefrom, any person causes the death of a person other  
14 than one of the participants; except that in any prosecution under  
15 this subsection, in which the defendant was not the only participant  
16 in the underlying crime, it is an affirmative defense that the  
17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
19 request, command, importune, cause or aid the commission thereof;  
20 and

21 (b) Was not armed with a deadly weapon, or any instrument,  
22 article or substance readily capable of causing death or serious

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

Matter printed in italics thus is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

\*—Senate committee amendments adopted March 1, 1982.

\*\*—Senate amendment adopted March 15, 1982.

\*\*\*—Senate amendments adopted March 29, 1982.



23 physical injury and of a sort not ordinarily carried in public places  
24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
26 ticipant was armed with such a weapon, instrument, article or  
27 substance; and

28 (d) Had not reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 *"[If a person is convicted under this section, the jury shall specify*  
32 *in writing by its verdict whether the person was convicted under*  
33 *subsection a. (1), (2), or (3), and if under subsections a. (1) or (2),*  
34 *the jury shall also specify if the defendant was convicted as a*  
35 *perpetrator or as an accomplice pursuant to 2C:2-6c. (1) (a).]"*

36 b. Murder is a crime of the first degree but a person convicted  
37 of murder may be sentenced *"[except as provided in subsection*  
38 *c.]"* *\*\*\*, except as provided in subsection c. of this section,"* *\*\*\* by*  
38A *the court "[(1)]" "to a term of 30 years of which the person*  
39 *must serve 15 years before being eligible for parole, or (2) as in a*  
40 *crime of the first degree except that the maximum term for such a*  
41 *crime of the first degree shall be 30 years. Nothing contained in this*  
42 *subsection shall prohibit the court from imposing an extended term*  
43 *pursuant to 2C:43-7 for the crime of murder]"* *\*\*\*[to death, or*  
44 *(2)]" "to a term of 30 years, during which the person shall not be*  
44A *eligible for parole;"* *\*\*\*; provided, however, that nothing contained*  
44B *in this subsection shall prohibit the court from imposing an*  
44C *extended term pursuant to 2C:43-7 for the crime of murder."* *\*\*\**  
44D *\*\*\*or to a specific term of years which shall be between 30 years*  
44E *and life imprisonment of which the person shall serve 30 years*  
44F *before being eligible for parole\*\*\*.*

44G c. *Any person convicted under subsection a. (1) or (2) "as a*  
45 *perpetrator or]" "who committed the homicidal act by his own*  
45A *conduct or who as" an accomplice "[pursuant to 2C:2-6c.(1)(a)]"*  
45B *\*\*\*[who]" "procured the commission of the offense by payment*  
45C *or promise of payment, of anything of pecuniary value" shall be*  
46 *sentenced "[to death or life imprisonment]" as provided here-*  
46A *after:*

47 *"[(1) The court shall conduct a separate sentencing proceeding*  
48 *to determine whether the defendant should be sentenced to death or*  
49 *to life imprisonment. Where the defendant has been tried by a jury*  
50 *the proceeding shall be conducted by the judge who presided at the*  
51 *trial and before the trial jury which determined the defendant's*  
52 *guilt or before a jury empaneled for the purpose of the proceeding*  
53 *if the jury which determined the defendant's guilt has been dis-*

54 charged by the court. Where there has been no jury trial the  
55 proceeding shall be conducted by the judge who accepted the  
56 defendant's plea and by a jury empaneled for the purpose of the  
57 proceeding.

58 The court may conduct the proceeding without a jury upon the  
59 motion of the defendant and with the approval of the court and  
60 of the State.

61 (2) In the sentencing proceeding the court shall disclose to the  
62 defendant or his counsel all material contained in any presentence  
63 report, if one has been prepared, except such material as the court  
64 determines is required to be withheld for the protection of human  
65 life. Presentence reports shall not be given to the jury. Any evi-  
66 dence relevant to any of the mitigating factors set forth in para-  
67 graph (5) may be presented by either the State or the defendant,  
68 regardless of its admissibility under the rules governing admission  
69 of evidence at criminal trials; but the admissibility of evidence  
70 relevant to any of the aggravating factors set forth in paragraph  
71 (6) shall be governed by the rules governing the admission of  
72 evidence at criminal trials; except that evidence determined by the  
73 court to be relevant to both an aggravating and a mitigating factor  
74 shall be admissible regardless of its admissibility under the Rules of  
75 Evidence. The State and the defendant shall be permitted to rebut  
76 any evidence received at the sentencing proceeding, and shall be  
77 given fair opportunity to present argument as to the adequacy of  
78 the evidence to establish the existence of any of the factors set  
79 forth in paragraph (5) or (6). The burden of establishing beyond  
80 a reasonable doubt the existence of any of the factors set forth in  
81 paragraph (6) is on the State. The burden of establishing by a  
82 preponderance of the evidence the existence of any of the factors  
83 set forth in paragraph (5) is on the defendant.

84 (3) The jury, or if there is no jury, the court shall return a  
85 special verdict specifically setting forth in writing its findings as  
86 to the existence or nonexistence of each of the factors set forth in  
87 paragraph (5) and as to the existence or nonexistence of each of  
88 the factors set forth in paragraph (6), its reasons for so finding,  
89 and its determination after weighing its findings whether the pen-  
90 ally should be death or imprisonment.

91 (4) If the jury or, if there is no jury, the court finds that one or  
92 more of the factors set forth in paragraph (6) exists and that any  
93 of the factors set forth in paragraph (5) which it finds exists do  
94 not sufficiently outweigh the factors of paragraph (6) and, there-  
95 fore, recommends that the sentence should be death, the court shall  
96 sentence the defendant to death. If the jury, or if there is no jury,

97 the court finds that none of the aggravating factors set forth in  
98 paragraph (6) exists, or finds that one or more of the mitigating  
99 factors set forth in paragraph (5) exists sufficiently to outweigh  
100 any factors under paragraph (6) which are found to exist, and  
101 therefore recommends imprisonment, or if the jury is unable to  
102 reach a unanimous verdict, the court shall not sentence the defen-  
103 dant to death but shall impose a sentence of life imprisonment.

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

106 (a) The defendant was under the influence of extreme mental or  
107 emotional disturbance but not such disturbance as to constitute a  
108 defense to prosecution;

109 (b) The victim was a participant in the defendant's conduct or  
110 consented to the act;

111 (c) The defendant was under the age of 18;

112 (d) The defendant's capacity to appreciate the wrongfulness of  
113 his conduct or to conform his conduct to the requirements of law  
114 was significantly impaired, but not so impaired as to constitute a  
115 defense to prosecution;

116 (e) The defendant was under unusual and substantial duress,  
117 although not such duress as to constitute a defense to prosecution;  
118 or

119 (f) The defendant has no significant history of prior criminal  
120 activity.

121 (6) The aggravating factors which may be found by the court or  
122 the jury if proven beyond a reasonable doubt are:

123 (a) The defendant has previously been convicted of murder for  
124 which a sentence of life imprisonment or death was imposable, or  
125 murder under 2C:11-3a(3);

126 (b) In the commission of the offense, the defendant purposely or  
127 knowingly created a grave risk of death to another person in addi-  
128 tion to the victim of the offense;

129 (c) The murder was committed in an especially heinous, cruel or  
130 depraved manner;

131 (d) The defendant committed the offense as consideration for the  
132 receipt, or in expectation of the receipt of any thing of pecuniary  
133 value;

134 (e) The defendant committed the offense against a police or  
135 other law enforcement officer, corrections employee or fireman,  
136 while performing his duties or because of his status as a public  
137 servant; or

138 (f) The offense was committed while the defendant was engaged  
139 in the commission of, or an attempt to commit, or flight after com-



140 mitling, or attempting to commit robbery, sexual assault, arson,  
141 burglary or kidnapping.

142 (7) If the jury, or if there is no jury, the court does not find by a  
143 special verdict as provided in paragraph (3) that any of the factors  
144 enumerated in paragraph (6) is present or does not recommend  
145 death, or if the jury is unable to reach a unanimous verdict, the  
146 court shall impose a sentence of life imprisonment.

147 (8) Every judgment of conviction and sentence of death shall be  
148 subject to automatic review by the Supreme Court.]\*

149 (1) \*\*\*The court shall conduct a separate sentencing proceeding  
150 to determine whether the defendant should be sentenced to death  
150A or pursuant to the provisions of subsection b. of this section\*\*\*  
150B where the defendant has been tried by a jury, the proceeding  
150C shall be conducted by the judge who presided at the trial and  
151 before the jury which determined the defendant's guilt except that,  
152 for good cause, the court may discharge that jury and conduct the  
153 proceeding before a jury empaneled for the purpose of the pro-  
154 ceeding. Where the defendant has entered a plea of non vult or has  
155 been tried without a jury, the proceeding shall be conducted by the  
156 judge who accepted the defendant's plea and before a jury em-  
157 paneled for the purpose of the proceeding. On motion of the  
158 defendant and with consent of the prosecuting attorney the court  
159 may conduct a proceeding without a jury.

160 (2) At the proceeding, the State shall have the burden of estab-  
161 lishing beyond a reasonable doubt the existence of any aggravating  
162 factors set forth in paragraph (4) of this subsection. The defendant  
163 shall have the burden of producing evidence of the existence of any  
164 mitigating factors set forth in paragraph (5) of this subsection. The  
165 State and the defendant shall be permitted to rebut any evidence  
166 presented by the other party at the sentencing proceeding and to  
167 present argument as to the adequacy of the evidence to establish  
168 the existence of any aggravating or mitigating factor. Prior to the  
169 commencement of the sentencing proceeding, or at such time as  
170 he has knowledge of the existence of an aggravating factor, the  
171 prosecuting attorney shall give notice to the defendant of the aggra-  
172 vating factors which he intends to rely upon in the proceeding.

173 (3) The jury, or if there is no jury, the court shall return a  
174 special verdict setting forth in writing the existence or non-exist-  
175 ence of each of the aggravating and mitigating factors set forth in  
176 paragraphs (4) and (5) of this subsection. If any aggravating  
177 factor is found to exist, the verdict shall also state whether it is or  
178 is not outweighed by any one or more mitigating factors.

179 (a) If the jury or the court finds that any aggravating factor

180 exists and is not outweighed by one or more mitigating factors, the  
181 court shall sentence the defendant to death.

182 (b) If the jury or the court finds that no aggravating factors  
183 exist, or that any aggravating factors which exist are outweighed  
184 by one or more mitigating factors, the court shall sentence the  
185 defendant pursuant to subsection b. **“(2)”**.

186 (c) If the jury is unable to reach a unanimous verdict, the court  
187 shall sentence the defendant pursuant to subsection b.(2).

188 (4) The aggravating factors which may be found by the jury or  
189 the court are:

190 (a) The defendant has previously been convicted of murder;

191 (b) In the commission of the murder, the defendant purposely or  
192 knowingly created a grave risk of death to another person in addi-  
193 tion to the victim;

194 (c) The murder was outrageously or wantonly vile, horrible or  
195 inhuman in that it involved torture, depravity of mind, or an aggra-  
196 vated battery to the victim;

197 (d) The defendant committed the murder as consideration for  
198 the receipt, or in expectation of the receipt of any thing of pecu-  
199 niary value;

199A **“(e)”** The defendant procured the commission of the offense by  
199B payment or promise of payment of anything of pecuniary  
199C value;**“(e)”**

200 **“(f)”** **“(g)”** The murder was committed for the pur-  
201 pose of escaping detection, apprehension, trial, punishment or con-  
202 finement for another offense committed by the defendant or  
202A another; **“(or)”**

203 **“(f)”** **“(g)”** The offense was committed while the  
204 defendant was engaged in the commission of, or an attempt to com-  
205 mit, or flight after committing, or attempting to commit robbery,  
206 sexual assault, arson, burglary or kidnapping; or

207 **“(g)”** **“(h)”** The defendant murdered a public ser-  
208 vant, as defined in 2C:27-1, while the victim was engaged in the  
209 performance of his official duties, or because of the victim's status  
209A as a public servant.

210 (5) The mitigating factors which may be found by the jury or  
211 the court are:

212 (a) The defendant was under the influence of extreme mental or  
213 emotional disturbance insufficient to constitute a defense to prose-  
214 cution;

215 (b) The victim solicited, participated in or consented to the  
216 conduct which resulted in his death;

217 (c) The age of the defendant at the time of the murder;

7.

218 (d) The defendant's capacity to appreciate the wrongfulness of  
219 his conduct or to conform his conduct to the requirements of the  
220 law was significantly impaired as the result of mental disease or  
221 defect or intoxication, but not to a degree sufficient to constitute  
222 a defense to prosecution;

223 (e) The defendant was under unusual and substantial duress  
224 insufficient to constitute a defense to prosecution;

225 (f) The defendant has no significant history of prior criminal  
226 activity;

227 \*\*\*[(g) The defendant was an accomplice to a murder committed  
228 by another person and his participation in the homicidal act was  
229 relatively insubstantial.]\*\*\*

230 \*\*\*[(h)]\*\*\* (g)\*\*\* The defendant rendered substantial  
231 assistance to the State in the prosecution of another person for the  
232 crime of murder\*\*\*[.]\*\*\*;\*\*\* or

233 \*\*\*[(i)]\*\*\* (h)\*\*\* Any other factor which is relevant to the  
234 defendant's character or record or to the circumstances of the  
235 offense.

236 \*\*\*d. The sentencing proceeding set forth in subsection c. of this  
237 section shall not be waived by the prosecuting attorney.\*\*\*

238 \*\*\*[d.]\*\*\* e.\*\*\* Every judgment of conviction which results  
239 in a sentence of death under this section may be appealed, pursuant  
240 to the rules of court, to the Supreme Court, which shall also deter-  
241 mine whether the sentence is disproportionate to the penalty im-  
242 posed in similar cases, considering both the crime and the  
243 defendant.

1 \*2. N. J. S. 2C:43-7 is amended to read as follows:

2 2C:43-7. Sentence of Imprisonment for Crime; Extended Terms.

3 a. In the cases designated in section 2C:44-3 or 2C:11-3, a person  
4 who has been convicted of a crime may be sentenced to an extended  
5 term of imprisonment, as follows:

6 (1) \*\*\*[In the case of a crime sentenced under 2C:11-3 for a  
7 specific term of years which shall be between 30 years and life  
8 imprisonment, of which the person shall serve 30 years before  
9 being eligible for parole, notwithstanding the provisions of sub-  
9A section b.;]\*\*\* (Deleted by amendment, P. L. .... ,  
9B c. .... )\*\*\*

10 (2) In the case of a crime of the first degree \*\*\*other than  
11 murder\*\*\*, for a specific term of years which shall be fixed by the  
12 court and shall be between 20 years and life imprisonment;

13 (3) In the case of a crime of the second degree, for a term which  
14 shall be fixed by the court between 10 and 20 years;

15 (4) In the case of a crime of the third degree, for a term which  
16 shall be fixed by the court between 5 and 10 years;

17 (5) In the case of a crime of the fourth degree pursuant to  
18 2C:43-6c. and 2C:44-3d. for a term of 5 years.

19 b. As part of a sentence for an extended term and notwithstand-  
20 ing the provisions of 2C:43-9, the court may fix a minimum term  
21 not to exceed one-half of the term set pursuant to subsection a.  
22 during which the defendant shall not be eligible for parole or a  
23 term of 25 years during which time the defendant shall not be  
24 eligible for parole where the sentence imposed was life imprison-  
25 ment provided that no defendant shall be eligible for parole at a  
26 date earlier than otherwise provided by the law governing parole.

27 c. In the case of a person sentenced to an extended term pursuant  
28 to 2C:43-6c. and 2C:44-3d., the court shall impose a sentence  
29 within the ranges permitted by 2C:43-7a. ~~\*\*\*~~ [(1),] ~~\*\*\*~~ (2), (3), (4)  
30 or (5) according to the degree or nature of the crime for which the  
31 defendant is being sentenced, which sentence shall include a mini-  
32 mum term which shall be fixed at, or between one-third and one-half  
33 of the sentence imposed by the court or 5 years, whichever is  
34 greater, during which the defendant shall not be eligible for parole.  
35 Where the sentence imposed is life imprisonment, the court shall  
36 impose a minimum term of 25 years during which the defendant  
37 shall not be eligible for parole.\*

1 ~~•[2.]~~ ~~•3.~~ This act ~~shall~~ take effect immediately.

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE, No. 112

STATE OF NEW JERSEY

DATED: MARCH 4, 1982

The purpose of Senate Bill No. 112 is to reinstate capital punishment in New Jersey. Under the provisions of Senate Bill No. 112, as clarified by amendments adopted by the committee, only a person who actually commits an intentional murder, the perpetrator, and a person convicted as an accomplice who hired the perpetrator, the procurer, would stand in jeopardy of the death penalty. Persons convicted under the felony-murder doctrine and persons convicted as accomplices other than as procurers would not be eligible for capital punishment.

Under an amendment adopted by the committee, those convicted murderers not subject to the possibility of capital punishment and those murderers eligible for capital punishment but on whom the death penalty is not imposed would receive a mandatory minimum sentence of 30 years imprisonment without eligibility for parole.

Senate Bill No. 112 provides a separate post-convention proceeding to determine whether the death penalty is imposed on a murderer eligible for that sanction. As clarified by committee amendments, Senate Bill No. 112 envisions that in most cases the sentencing proceeding would take place upon return of the guilty verdict before the judge who presided over the trial and before the jury which returned the verdict. However, for good cause (i. e. lengthy delay caused by illness of the defendant), the court may discharge the jury and at a later date empanel another jury for the purpose of conducting the sentencing proceeding. Where there has been no jury trial, the proceeding shall be conducted by the judge who accepted the defendant's plea or who found the defendant guilty and by a jury empaneled for the purpose of the proceeding. The judge may conduct the proceeding without a jury upon motion of the defendant and upon approval of the court and of the prosecution.

During this sentencing certain aggravating and mitigating factors are to be considered by the trier of fact. As originally drafted the prosecution had the burden of proving the existence of any aggravating factor by a preponderance of the evidence and the defendant had the burden of proving the existence of any mitigating factor by a pre-



ponderance of the evidence. To aid a defendant facing the possibility of a death sentence, the committee adopted amendments providing that the prosecution must prove the existence of an aggravating factor beyond a reasonable doubt while the defendant merely has the burden of producing evidence with regard to any mitigating factor. The committee also adopted an amendment requiring the prosecution to notify the defendant of the aggravating factors on which the prosecution intends to rely.

A provision of Senate Bill No. 112, as originally drafted, which would have permitted the prosecution to withhold certain information contained in any pre-sentence report from the defendant was deleted as such a provision has been held unconstitutional under recent case law. Another provision of Senate Bill No. 112 as originally drafted which would have made the Rules of Evidence inapplicable to evidence offered by the defendant during the sentence proceeding was also deleted. It was felt that inclusion of this provision could have led to the introduction by the defense of totally irrelevant material solely as a delaying tactic.

As amended by the committee, the aggravating factors to be considered during the post-conviction proceeding are as follows:

1. Prior conviction of murder.
2. In the commission of the offense, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim of the offense.
3. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
4. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value.
5. The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by defendant or another.
6. The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, sexual assault, arson, burglary or kidnapping.
7. The defendant murders a public servant while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

As amended by the committee, the mitigating factors to be considered in the post-conviction proceeding are as follows:

1. The defendant was under the influence of extreme mental or emotional disturbance but not such disturbance as to constitute a defense to prosecution.
2. The victim was a participant in the defendant's conduct or consented to the act.
3. The age of the defendant at the time of the murder.
4. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired; but not so impaired as to constitute a defense to prosecution.
5. The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution.
6. The defendant had no significant prior history of criminal activity.
7. The defendant was an accomplice and his participation was relatively unsubstantial.
8. The defendant rendered assistance in the prosecution of another person for murder.
9. Any other factor which is relevant to the defendant's character or to the circumstances of the offense.

If the jury or the court finds one or more of the aggravating circumstances exist, and that they are not outweighed by any mitigating factors, the death penalty would be imposed. If the jury or the court finds that none of the aggravating factors exists, or finds that one or more of the mitigating factors exist, sufficient to outweigh any aggravating factors which may exist, the death penalty would not be imposed. If the jury is unable to reach a unanimous verdict, the death penalty would not be imposed.

Every judgment of conviction and sentence of death is subject to review by the Supreme Court. As amended by the committee, in its review, the Supreme Court would also determine whether the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

By committee amendment, a new section 2 was added to Senate Bill No. 112. Section 2 amends N. J. S. 2C:43-7 (Extended Terms of Imprisonment) in order to include the mandatory 30 years term of parole in eligibility to any extended term of imprisonment imposed for murder.

---

SENATOR JOHN F. RUSSO (Chairman): This hearing will come to order.

I will begin by introducing the Committee members. On my far left is Senator John Gallagher, and then in order toward this side of the table is Senator John Lynch; Senator Ed O'Connor; Senator Joe Hirkala, the Committee Vice Chairman; and Senate President Carmen Orechio. To my left is the staff aide, John Tumulty. I am Senator John Russo, the Committee Chairman. To my right, nearest is Senator John Dorsey, Senator Jim Vreeland, and Senator John Paoletta.

Now, I will begin by outlining basically what the bill contains, so that perhaps we can save some time for those who might want to testify on some things the bill does not contain. And, also, when we get to witnesses, if you have a written statement, be sure not only a copy is left for the Committee, but with the stenographer at that end of the table. Testimony will be allowed with some considerable leeway. However, stay, please, with the issue that is before us, namely the bill that is before us. It is going to be incumbent upon me in the dual capacity as Committee Chairman and as sponsor to sort of make an extra effort to be fair to those who have a different view. I can tell you in advance that I have nothing but respect for those who have a different view and always have had. I don't intend to steer this hearing in any manner, but rather to allow full leeway. But, whether your view be for or against, it will be conducted with decorum and it will be conducted on the issue.

Now, the bill that is before you is Senate Bill 112. The printed copy only refers to myself as sponsor and Senator Ewing as co-sponsor, but there are a number of co-sponsors and we will announce the names before we are finished here today.

The bill that we will be considering today is basically the same bill that was passed by the Legislature twice, the full legislature, and vetoed by Governor Byrne, and then the third time by the Senate, and was pending in the Assembly when the session ended. I suspect there will be a number of amendments to the bill that we have basically agreed upon. I will talk about those briefly before we get to the representatives of the Attorney General's Office and the Governor's Office. Basically, the bill is drafted in accordance with the United States Supreme Court guidelines that render capital punishment constitutional in the Supreme Court case that so declared. It follows somewhat the form of legislation that has been passed reinstating the death penalty in some 35 states. However, it is probably stricter in a number of instances that I will point out as we go along, or witnesses will point out. It is stricter in the sense that it is not as broad as the legislation in many states. It does not cover as many people as some of the other legislation does. It is drafted with the intent of reinstating the death penalty in New Jersey, but hopefully not in an indiscriminate manner, nor is there any desire or hope that we see wholesale executions in New Jersey. We really hope that we never see one.

But, the bill has some rather rigorous provisions in it for the protection of the defendant, the theory being that before that ultimate penalty is paid, as difficult as that will be on all of us who have a part in it, when that day comes, we want to at least feel we have tried to cover every possible contingency for the protection of the defendant and hopefully it will be utilized only in the most extreme cases.

The bill is a two-tier procedure. First, there is a trial on guilt or innocence, and in that trial the defendant must first be found guilty unanimously and beyond a reasonable doubt of first degree murder, willful, premeditated murder. Should that finding result, then there is a second trial. Under the purposes

of the bill, that second trial would follow immediately before the same jury and judge, in which there is a sentencing procedure, and various factors of aggravation and mitigation that are outlined in the bill are presented to the jury. The leeway for the factors of mitigation is wide. It will be made wider as a result of some amendments I will get to in a moment.

Following that second trial, that jury, in order for the death penalty to result, would have to make a finding again unanimously and beyond a reasonable doubt that the death penalty is justified under the circumstances of that case. Now, as I said earlier, Governor Byrne did not conceptually believe in the death penalty. That is a view that I have nothing but respect for. It has always been the Governor's view and there are legislators who feel the same way, and there can be no quarrel with them. Hopefully, there will be none with those of us who believe differently, but maybe there will.

Governor Kean has a different viewpoint. And, we have had some extensive discussions with him regarding this bill. We have had some extensive discussions with the Office of the Attorney General regarding the bill. Hopefully, we have now come to the point where we are in agreement as to the contents of the bill and those amendments will be discussed by the Attorney General's Office shortly. I want to say that we have not yet discussed the extent of these amendments with the full Committee. I have, with the Governor, and the Attorney General's Office, and I am satisfied, and it will be subject to Committee determination, been satisfied that they have come up with a number of provisions that I think help the bill, strengthen the bill, head off some potential legal problems in the bill. They have been extremely helpful to me in getting together on the contents of this particular bill.

Governor Kean has made clear his belief in the concept of the death penalty and has emphasized his concern that we do pass it if the legislature is in agreement. The cooperation from the Governor's Office and the Attorney General's Office has been just excellent, and, I think, most reasonable. There have been perhaps a few things we have not agreed upon, but we were able to discuss it, and they have been quite reasonable with me in that regard.

The bill deals with a conviction of first degree murder and is limited in its present form only to the actual perpetrator of the murder, the one who wields the gun or the knife, or what have you, that results in the death. The accomplices of a murderer still are subjected to life imprisonment. In that regard, the Governor's Office has made a recommendation that I am prepared to accept, and I think it is a good one, that provides that those who do receive life must serve a mandatory minimum thirty years. I think that makes a lot of sense to me, and we will discuss that as we get to the amendments and hear from the Committee.

The second part of the bill that deals with one other than the actual person who perpetrates the murder is one who hires one to commit murder, and the bill in that regard refers to a section of our law that deals specifically with that, 2C:2-6c.(1)(a). I might point out that was added to this bill after it was originally filed some years ago. That was a suggestion, and frankly an excellent one - because it should have been there in the beginning - of my colleague Senator Dumont, who has long advocated the re-institution of the death penalty in New Jersey and is a co-sponsor of this bill as well, as having other legislation pending of his own dealing with this issue.

That is one instance where one other than the actual perpetrator would be subjected to the death penalty, the contract for hire, one who hires another to commit murder.

So, that is a broad overview of the legislation. We will probably begin with the Attorney General's Office, or the Governor's Office, or jointly, as to the various amendments, so then we know exactly what form the bill is in for witnesses to comment on. I think if we could begin with that, then our first witness after that will be Senator Dumont and then we will go through the witness list.

Before beginning with the Attorney General's Office, does any other member of the Committee want to make any statement at this time? If not, we will proceed then to have the Attorney General's Office. Ed, I want to thank you for the help your people gave me yesterday. We spent a lot of time with your staff, Bill Bolen, Jim Morley and Fred De Visa. They were very good. I see you have Fred with you. Ed Stier.

E D W I N H. S T I E R: Senator, I very much appreciate your kind remarks about the cooperation you have received from my office. My staff has worked very hard to help the Senate to try to produce a bill which comes up to the standards that we all hope that this kind of very important legislation would meet. I think that the bill, as it stands, with some minor suggestions that we have made, should pass muster in that regard.

I am here for three purposes this morning. The first is to indicate the support of the Attorney General of this State for this legislation. The second is to present my own views as a professional law enforcement official and the third is to offer some amendments which Senator Russo has mentioned previously which our Division has worked on very carefully with Senator Russo and the staff of this Committee.

First of all, Attorney General Kimmelman wanted to appear here himself. This, obviously, is an extraordinarily important piece of legislation. Unfortunately, there was a conflict in his schedule which he just could not reconcile with his appearance here, and he has asked me to appear on his behalf to indicate that his support for the re-institution of a death penalty has been consistent and dates back to his service in the State Legislature. We have discussed the bill with him, and our views on it, and he firmly supports the position that we have taken.

I have been involved in law enforcement for seventeen years as a professional at a number of different levels, having been involved in the investigation and prosecution of a number of cases, some of which involved some rather horrible murders. I have also had the responsibility to generally oversee the law enforcement system in this State. The Division of Criminal Justice exercises the Attorney General's power to coordinate the criminal justice system and to establish standards for law enforcement and to generally try and improve the quality of law enforcement in this State. So, I have had the opportunity to think of the law enforcement system and crime from an institutional point of view, rather than on a case by case basis.

I have agonized over this issue for the seventeen years that I have been in law enforcement. I don't come here to tell you that I have arrived at a personal conclusion to support this legislation easily. There are many people for whom I have deep respect who have the opposite view. Stan Van Ness is somebody whom I have known for many years, and I know that his views are opposite from mine on this issue. The fact that someone like Stan and many others feel so strongly to the contrary has given me great pause. It has caused me to search my own mind



and my own experience very deeply before I came to the conclusion that I have. Over the years that I have been in law enforcement, unfortunately, I have witnessed what I view as a beginning of a breakdown, the ability of society to control anti-social behavior. I hope that this trend is not a long-term trend. I hope this doesn't suggest that the institutions that we have created to prevent criminals from preying on innocent people are unredeemable and can never be successful. I hope that we can find a way to turn these trends around.

But, I suspect that among the mechanisms that we have to establish to begin to turn this trend around is the reinstitution of the death penalty. I can't come here and tell you that if this death penalty bill is enacted that within a month or a year that alone is going to solve our street crime problems. I don't believe that alone will solve our street crime problems. I can't even come here and tell you that the rate of murder in this State is going to be significantly affected by the institution of the death penalty, because I don't think there has been a definitive study on that subject. I know there are those who debate it pro and con. I suppose that there must be individual cases of homicide which might have been deterred had there be a death penalty. But, I don't think that we can reach an empirical conclusion, that in fact there is a direct correlation between the fact that there is a death penalty and the murder rate.

I think there is a more basic reason to support the enactment of the death penalty. I think that there is something much more fundamental about our system of social control over criminal behavior. I think there is something that touches not just on murder but on the whole range of criminal acts that we experience day in and day out. For a generation now, we have been taught that the only valid purposes for punishing an offender are to seek his rehabilitation and to deter others from doing similar acts. Basically, those are the essential reasons that we have been given in law enforcement that we in law school have been taught are the legitimate foundations for our system of criminal punishment.

We have been taught that the idea of retribution, the idea of seeking a method of punishment to satisfy a community's needs to see an offender punished is a primitive notion that no longer has a place in our society. I suggest to you, from my own experience, and in my own judgement, that that notion is wrong. The idea that the punishment must fit the crime is something more than the idea that we have to find a way to isolate the offender and to try to rehabilitate him, the idea that somehow we ought to try to discourage others from committing crimes by imposing prison sentences and other forms of punishment. But, that is not enough. Somehow society needs to feel that when a criminal act has been committed, its interests have been vindicated.

Somehow by not recognizing the idea that retribution is an important factor in maintaining the health of a society, we have come around to the moral judgement that those who commit crimes really aren't morally responsible for the crimes they commit. After all, if we blame society itself for the acts of the individual, it is society that is morally responsible for the act, and not the individual. It seems to me that you have to extend that logic further, if you believe it, and come to the conclusion that perhaps we have no right to punish anybody to any degree for a criminal act that he commits. I don't think that most of us sitting in this room, even those who oppose capital punishment, have extended their logic quite that far, and would accept that notion.

So, in a sense, what I am saying is that by drawing a line at the point of taking a human life, we have acted arbitrarily as a society. We have

acted somewhat capriciously and as the result of it, I think that we have created ambivalence in our society toward responsibility of its members to abide by the law. It seems to me that we have to make a very strong statement. And, that statement is that when you commit a criminal act knowingly and willfully, you are responsible as an individual for that act. And, if you are caught, you are going to be punished to the fullest extent that society determines that act ought to be punished, in order for society itself to have a sense that the wrong has been corrected.

If we don't, the frustration, the anger, the rage that we witness growing in our society is going to continue. It shouldn't be forgotten that the riot in Newark in 1967 as was analyzed by the Governor's Commission was caused by a pervasive feeling of corruption, a sense of alienation in the community, the feeling that somehow society was asking too much of the individual and not returning enough to him. Somehow we had lost touch with our social institutions in that community, and that they were not responsive. Crime was going on all around the people and inadequate protection was being provided. The notion that law enforcement is what holds society together, that law enforcement, the Division of Criminal Justice, the county prosecutors, the State Police, the local police, federal law enforcement institutions are what are going to protect society and maintain social order is wrong. It is naive. It is never going to work.

As a society we have to demonstrate that each of us has to sacrifice individual freedom for the sake of holding society together. And, if we in society are led to believe that society itself isn't convinced that those sacrifices are important, or are going to be rewarded, that if we in society witness crime that is dealt with inadequately by society as a whole, I believe we are going to begin to see further deterioration in what holds society together.

When we try to devise a punishment that fits the crime, it seems to me that we can't help but come to the conclusions that there are some crimes that are so serious, so horrifying, so extremely anti-social, that the only punishment that fits is the taking of the life of the person who is responsible for it. We are still haunted today by the killings of Officers Voto and Tedesco in Lodi some fifteen or so years ago. We are about to see a man who was adjudicated as having been responsible for that crime released from our State prison at some point in the near future. It is inevitable that it is going to happen. It is not just that there is a threat that that individual may go out and commit another crime, because he may not. But, society is left with rage and anger at a crime so horrifying that the taking of the life of a killer of those two officers seems to be the only appropriate way to exact retribution. I, in my own mind, can't believe that we demonstrate a respect for the sanctity of human life by stopping short of taking human life for such crimes. In my own mind, I have reached the opposite conclusion, that the only way society demonstrates deep respect for human life is by exacting the highest price possible for the knowing, willful, calculated, cold blooded taking of a human life.

The conclusion that I have reluctantly reached is that in today's society, given the conditions that exist today, our inability to solve problems of moral responsibility on the part of some of our members by some more humane means, among our system of penalties, we must have a death penalty. I believe there are three fundamental conditions that are necessary for such a penalty. It must be applied only in the most extreme cases, and only when we as a society we believe that it is appropriate. The system for the imposition of the death penalty

must be surrounded by the highest possible judicial standards to assure that due process and the fact finding process is as safe from the standpoint of the individual as we can make it. And, it must be even-handed. It must not be imposed as a result of arbitrariness, discrimination, and expression of an emotion of the individuals who are involved in imposing the death penalty. It must be as fair and objective as we can possibly make it.

The bill which is before this Committee with certain modifications as we have suggested to Senator Russo, I think, goes close to accomplishing those objectives as we can possibly make it. There are several points that I would like to emphasize. I don't want to get into some of the more technical amendments which you may want to discuss after I am done, but there are some points that I would like to emphasize that we have suggested. One is that for those who do not receive the death sentence, we believe that there ought to be a mandatory minimum sentence of thirty years imprisonment. We think that that mandatory, minimum thirty years will certainly reach more murderers than the death penalty. In that sense, it may act as more of a deterrent, and in that sense, certainly keep off the streets those who have the capacity and have demonstrated the propensity to commit these kinds of crimes.

Secondly, we feel that certain mitigating factors ought to be added to the legislation. We have suggested one that would permit the jury to consider the de minimus role that the individual who may be convicted of intentional, willful murder may have played in the actual execution of that murder.

We have added a mitigating factor for a defendant who has offered substantial cooperation against his confederates in committing the murder. Very often, it is very difficult, if not impossible, to successfully prosecute a case involving a multiple-defendant murder, without the cooperation of one of the participants.

We have provided a kind of open-ended mitigating category which includes any other matters which the court feels are appropriate for a jury to consider in mitigation of capital punishment. We think that this Committee should be urged to make the mitigating factors as comprehensive as possible. That is one area that the courts have emphasized in recent opinions, that mitigating factors should not be excluded from consideration from the jury and sometimes it is very difficult to anticipate what kinds of mitigating factors might be brought to the surface in the course of a trial.

Third, we would like to suggest that in addition to the other matters that the Supreme Court should consider in its review of cases where the death penalty has been imposed, that the court consider the proportionality of the death sentences which have been imposed throughout the State, that is, to make sure that these sentences are being meted out in a fair, even-handed way throughout the State, and that we do not have either classes of individuals or areas in the State which appear to be arbitrary one way or the other.

With that, I am prepared with the help of Deputy Director De Visa to try to answer any questions you have.

SENATOR RUSSO: Thank you very much, Mr. Stier. Perhaps before we get to the specific amendments, does any member of the Committee have any questions of Mr. Stier on the general statement that has been made thus far?

If not, could we now, Ed, move to the specific amendments one by one. What I think we will do is, as we discuss them, subject to the approval of the Committee, we will vote on the amendments as we discuss it, and that way we won't

have to try to recollect what we went back to.

MR. STIER: Okay. Senator, do you have a copy of the amendment sheet we had offered to you?

SENATOR RUSSO: Yes, we all have copies.

MR. STIER: On page 2, section 1, lines 31 through 35, that would be omitted.

SENATOR RUSSO: And the reason it is being omitted, I think, is because you cover it in a different amendment; is that correct?

MR. STIER: Correct.

SENATOR RUSSO: Okay, that is just a technical amendment to clean up the language---

MR. STIER: Do you want me to go through the technical amendments?

SENATOR RUSSO: I think we are going to have to take each amendment, one at a time. So, that particular one is only being eliminated because it is being covered as we discussed with better language elsewhere; is that correct?

MR. STIER: That is correct.

SENATOR RUSSO: Any questions on that, gentlemen? Let me put it this way, to save some time, rather than a full roll call on each amendment, I will simply ask if anyone has an objection to the amendment, if not, I will take it as unanimous; if there is, let yourself be heard. On that, are there any objections to that amendment?

If not, John, let's consider that one passed. These, incidentally, are amendments so that we know what the final bill is. Don't be concerned that we are passing anything here without giving you a chance to be heard. That might be the eventual result, anyway. But, the point is, we are trying to get the bill in final form for discussion and then we will have a discussion on the merits of the bill. Next, Ed.

MR. STIER: The next line is section 1, line 37, omit "Except as provided in subsection C." That is for the same reason.

SENATOR RUSSO: Are there any objections to that? Consider that amended. Next?

MR. STIER: Section 1, line 38 omit, "One to a term of thirty years of which the person must."

SENATOR RUSSO: The reason for that is because of the mandatory thirty year provision that is being added in the subsequent amendment; is that correct?

MR. STIER: Yes.

SENATOR RUSSO: Any objections to that amendment? If not, it will be passed.

MR. STIER: Next, section 1, lines 39 through 43, they would be omitted.

SENATOR RUSSO: For the same reason?

MR. STIER: Yes, that is correct.

SENATOR RUSSO: Okay. Any objections? Passed.

MR. STIER: The next is after line 43 in section 1, we would insert the following language, "To death or, (2) to a term of thirty years, during which the person shall not be eligible for parole; provided, however, that nothing contained in this subsection shall prohibit the court from imposing an extended term pursuant to 2C:43-7 for the crime of murder."

SENATOR RUSSO: So, this is the provision as recommended by the Governor and your office that there be a mandatory minimum thirty-year term for murder,



those not subjected to the death penalty, and leaving open the ultimate question of whether or not that should be our law in this State. For our purposes now, our amendment is being offered to the bill in that form. Any objections to that amendment? If not, consider that passed.

MR. STIER: The next is section 1, line 44, after letter "c" delete the remainder of the sentence.

SENATOR RUSSO: Now, that deals with the murder for hire. What is the reason why you are deleting all that after "C"? Frankly, it doesn't make sense to me.

MR. STIER: What we have done is to include murder for hire as an aggravating factor. Somebody who hires someone to kill another is guilty of the offense of murder. We deal with that as an aggravating factor, rather than leaving it in this section.

SENATOR RUSSO: Why would you do that? Why is that necessary? Because by leaving it here and perhaps having it also added as an aggravating factor, you made very clear the legislature's intent that one who hires someone to murder someone is subject to the death penalty.

The question Senator Dorsey raises is, how can it be an aggravating factor to one who can't be guilty of murder in the first place? But, he can be under the present statute.

MR. STIER: Yes, he can be. A person who hires another to commit a murder is as guilty as the person who actually pulls the trigger.

SENATOR RUSSO: Ed, does it do any harm to leave that provision the way it is and add the aggravating factor as an additional item?

SENATOR GALLAGHER: Who is it going to be an aggravating factor for?

SENATOR RUSSO: John, what it is, after the guilt of the defendant is determined, guilty of murder in the first degree, in this case, one hires another to commit murder, and then the sentencing procedure to determine whether death or life will apply, you have various aggravating and mitigating factors. Whether or not he hired one to commit murder, the Attorney General's Office would suggest that we include as an aggravating factor.

I am not sure that is necessary, but---

SENATOR PAOLELLA: Mr. Chairman, I think Senator Dorsey's point is well taken. I think Senator Dorsey's concern is, the aggravating factor should be considered against which party, the party that hires, or the party that was hired? I don't think it is clear in this discussion as to what I just heard, anyway to answer that question. I think that is what Senator Dorsey was asking.

SENATOR RUSSO: It certainly is applicable only to the person who hires, because he is the only one it is applicable to. The person who commits the murder is still subjected to this bill, although not under that provision.

SENATOR DORSEY: But, did Mr. Stier answer the question? Why is he putting it in?

SENATOR RUSSO: That is what I am wondering.

SENATOR DORSEY: Why are you leaving that section out?

MR. STIER: What we had suggested to the Committee is that regardless of the underlying fact situation, anyone convicted of this degree of murder is eligible for the imposition of the death penalty. And, then, when the jury considers whether or not to impose the death penalty, you have a series of aggravating and mitigating factors that they take into consideration. Instead of including a specific class of fact situations in the first part of the statute, which makes



one eligible for the imposition of the death penalty, we suggested keeping it broad, so that you don't deal with specific fact situations, and you don't isolate one particular set of circumstances under which a murder arose or another, and then you leave it to the aggravating-mitigating factors to determine whether or not the death penalty should be imposed.

What you have done here is you have picked out one kind of murder and said somebody is eligible for the death penalty for this. It is really redundant.

SENATOR DORSEY: Well, the worst thing that has been done here is, on line 44, what you would do is strike out everything on line 44, 45, and 46. The worst that has been done is perhaps being redundant.

MR. STIER: Yes, that is right.

SENATOR DORSEY: I don't know if that is a great stake here.

MR. STIER: I haven't suggested that it is a fatal mistake. It is just a matter of organization rather than anything else. I am not suggesting that it is fatal to the bill.

SENATOR RUSSO: It does no harm to leave it the way it is? I gather that some members of the Committee, including myself, want to leave it if it is only redundant. So, that amendment on line 44, unless I hear to the contrary--- Okay, that would be lines 44, 45, 46 and the insertion, those three items would be then considered, unless I hear to the contrary, rejected. Okay?

Go ahead, Mr. Stier.

SENATOR DORSEY: Just one other question. He said he was going to insert something under the aggravating conditions.

SENATOR RUSSO: That comes later, I think.

SENATOR DORSEY: Okay, fine.

MR. STIER: There are certain suggestions that we have made for reorganization of it, to make it clear. Again, these suggestions are not based on any fundamental weaknesses in the bill. It is a matter of organization. Some of these amendments that we are suggesting are based on that. Perhaps, we should not have to go through them at this point. This is similar to that last point that we talked about.

SENATOR RUSSO: Right. Then, skip those and go to substantive amendments or amendments that you think are important enough as to the make-up of the bill that they ought to be considered.

SENATOR DORSEY: Excuse me, on the top of page two of amendments here, he joined in lines 48 through 60---

MR. STIER: That is another technical change.

SENATOR RUSSO: Those first three amendments on the second page, disregard.

MR. STIER: Now, in section 1, after line 60, we suggest that you insert the following language: "Where the defendant has been tried by a jury, the proceedings shall be conducted by the judge who has presided at the trial and before the jury which determined the defendant's guilt, except that for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea non vult, the proceeding shall be conducted by the judge who accepted the defendant's plea and before a jury empaneled for the purpose of the proceeding. On motion of the defendant, and with consent of the prosecuting attorney, the court may conduct a proceeding without a jury.

We add that, because generally we suggest that the jury which tried the case initially ought to consider whether the death penalty should be imposed.

Otherwise, you are going to have a re-trial of the same case all over again, before a second jury. There may be circumstances in which you either can't or should not try that issue before the same jury, in which case, the court has the discretion to impanel another jury. That is the purpose of this amendment.

SENATOR RUSSO: You might say, gentlemen, that provision was discussed at length at our meetings, and the language makes sense. The only reason you allow the judge to impanel a new jury is in the event - for example, at the end of the conviction the defendant has a heart attack or something and can't come back for six months and three jurors have died, or what have you. We don't want to leave open a loophole that perhaps you can't proceed with the sentencing end of the matter.

So, the theory behind the bill is that the trial will go on for sentencing before the same judge and the same jury. But, we have to allow that option as Mr. Stier outlines in the event something did happen.

Senator Gallagher?

SENATOR GALLAGHER: That was in your original bill. You really only added "for good cause." The question is, are you going to define good cause in the manner that you are talking about, or is this going to be something that you are going to leave up to judicial interpretation? Is it something that could come from the defendant based upon the attitude of the first jury? Or, is it something that comes from outside, extraneous circumstances, such as illness or what have you?

I also don't understand in that paragraph why you limit it to where the defendant has been tried by a jury. Assuming he had waived his right to a jury trial in the first instance on the guilt or innocence, that should not be tantamount to a waiver of his right to a jury trial on the penalty.

MR. STIER: I don't think we intended to do that. I don't know that the language--- No, I don't think so. I take it that the situation that you are talking about is where he has waived a jury and has proceeded to trial by a judge on the issue of his guilt. He should be then entitled to a jury trial on the issue of whether the death penalty should be imposed. I agree with you, we did not intend to exclude that. I don't think the language does, but perhaps it could be tightened up to show that.

SENATOR LYNCH: Well, you don't cover the other area, because what you are saying is, someone is tried without a jury by judge only and he doesn't have a two-trial right or privilege, whatever you want to describe it as?

MR. STIER: Well, you could do that very easily by adding language after where the defendant has entered a plea of non vult or has been tried without a jury, proceedings shall be conducted by the judge who accepted the defendant's plea and before a jury impaneled for the purpose of the proceeding.

SENATOR LYNCH: And then the last sentence is purely surplus because he has that right anyhow under the rules.

MR. STIER: Yes, but I think there are no rules that cover this specific type of proceeding, and I would suggest that you ought to make it clear that he does have that right with respect to the second half of the proceeding, that is, whether the death penalty should be imposed.

SENATOR RUSSO: All right, so we can add those words. Senator Lynch makes sense. We will add that language to the amendment.

Any other questions on the amendment? As was indicated, it is basically what is in the bill, but with some better language, I think, to clear it up, and if there be no objection, we will amend it accordingly.

MR. STIER: The next series of amendments that we propose, that is, section 1, line 61, lines 62 to 70, lines 71 to 83, are all intended to change the language of that section to add the following. That is the next amendment that we have suggested, which is section 1, insert after line 83, "At the proceeding the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph 4 of this subsection. Defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph 5 of this subsection. The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor. Prior to the commencement of the sentencing proceedings, or at such time as he has knowledge of the existence of any aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to rely upon in the proceeding.

The intention with that amendment is to do two things, number one, establish that the burden of the State is to prove beyond a reasonable doubt the existence of any aggravating factors, and, secondly, to provide a notice to the defendant of any aggravating factors that the prosecution intends to prove.

SENATOR RUSSO: Have you later covered what the burden is on the mitigating factors, if any?

MR. STIER: The defendant has the burden of coming forward, yes.

SENATOR RUSSO: Now, in the original bill, the burden was on the defendant to establish by a preponderance of the evidence the mitigating factors. Basically, you have eliminated that. Have you replaced it with anything? If not, what is the test? The trial judge is sitting there and he is asking himself.

MR. STIER: What we have tried to do is to establish the State's burden beyond a reasonable doubt, to establish sufficient aggravating factors to outweigh the mitigating factors which exist. The defendant has no burden of proof on those mitigating factors. That is what we intended to do with this.

SENATOR RUSSO: You know, I might add, I have no quarrel with that at all, as we discussed yesterday. It gives the defendant a better break than he originally had, if that can be said, and that is fine with me, because of what we are dealing with. I just wonder, will it raise any confusion in the trial judge's mind of, "Is there a burden of proof on the part of the defendant." We just don't mention it.

MR. STIER: Yes.

SENATOR DORSEY: Well, he does mention it, because he says, "Shall have the burden of producing." He doesn't say what the weight of that burden is.

SENATOR RUSSO: That is different. That is the burden of coming forward, as you, being a skilled lawyer, know. You have two functions in criminal law and civil law, too. One is, who has the burden of producing the evidence. Now, it could be that the State has the burden or the defendant has the burden of producing and the State has the burden of proof. It can have that. The intention, which I agree with, on the part of the Attorney General, is that the defendant only have the burden of coming forward. Now, the ultimate test is, do the aggravating factors outweigh the mitigating. I raise the point I am raising now just to make sure we don't have some trial judge that may be as confused as we lawyers here saying,

"What do they intend?" I raise that, Ed, because I want to know if you see any need to spell it out any more?

MR. STIER: At this point, I can't say that I do. I think what we have here is a situation in which the proceeding according to the way the bill is drafted would proceed as follows: The jury would have to find any aggravating factors beyond a reasonable doubt. Factually, they would have to find those factors beyond a reasonable doubt. And, then they would weigh those aggravating factors against the mitigating factors. And, if they found that the aggravating factors outweigh the mitigating factors, they would impose the death penalty. Procedurally, that is how it would occur.

SENATOR DORSEY: John, not being an experienced criminal counsel as yourself, it seems to me incomplete to be so specific about the State's burden, beyond a reasonable doubt, and then not to be specific, not only about the defendant's burden of coming forward, but what that burden shall consist of? Aren't you just doing what you have outlined leaving an open question?

SENATOR RUSSO: That is why I raise it, because in the bill---

SENATOR DORSEY: I mean, I am not arguing with you substantively, what the weight of that burden should be, but we were so specific about the State's burden, why not be as specific about this?

SENATOR RUSSO: In the original bill, at the bottom of page 2 and the top of page 3, I drafted it to provide that the State have the burden of proof beyond a reasonable doubt of aggravating factors; the defendant had the burden of proof by a preponderance of the evidence only on mitigating factors.

SENATOR DORSEY: You were waiting for me to wander into that.

SENATOR RUSSO: That is right. I was hoping you would leap into it. Now, the difficulty is, we discussed this yesterday, and you know, I am tired of getting my bill vetoed, so here comes the administration that says, "We would like it this way." I am not sure that is right. I think I agree with Senator Dorsey that it should be a little more specific, but, you know, I don't want to be arbitrary about it and get another veto.

SENATOR DORSEY: I don't know that Mr. Stier is saying that substantively he disagrees with that; are you?

MR. STIER: No. I am not saying either for policy or legal reasons that I would be in disagreement with it. We have tried to even ease the defendant's burden a little bit more by saying that his only burden is to come forward. The jury can consider whatever the evidence he presents on those mitigating factors for whatever purposes it wants to. In fact, he has no burden---

SENATOR RUSSO: Why don't we specifically say--- I have no problem putting no burden on them. Why don't we specifically say that the defendant has the burden of producing the evidence, shall not in any way impose the burden of proof upon the defendant to prove those aggravating factors, but merely to present them to the jury. I think that would solve, John, your concern and mine.

SENATOR DORSEY: I liked your original language much better. Are you telling us that perhaps Mr. Stier is necessarily speaking entirely from the Administration's position on this question?

SENATOR RUSSO: He also raises a point that modifies the language to make it more beneficial to the defendant. I have no problem with that at all.

SENATOR DORSEY: Yes, but knowing absolutely nothing about criminal law, if we simply say that his burden is to come forward, that almost creates the impression that if he comes forward with any evidence as to a mitigating circumstance,



the jury is forced to accept that. He doesn't even have to come forward with sufficient evidence in terms of mitigating circumstance by a preponderance of the evidence for it to be accepted by the jury. I mean, aren't we doing something substantively here in terms of this whole burden?

SENATOR RUSSO: What can you say about that, Ed?

MR. STIER: Senator, my concern - and I can't say that I have any case law at my finger tips to support this - is that at some point an Appellate Court is going to say that a defendant should have no burden of proof on any issue, particularly having to do with whether the death penalty should be imposed. The jury has a right to consider whatever evidence he presents in mitigation of the imposition of the death penalty. And, by imposing some threshold burden, whether it is preponderance of the evidence, or some higher or lower standard, the jury's consideration of that evidence may be in some way cut off. That is my concern.

SENATOR DORSEY: Well, now he is saying something very substantive. He is saying that the way you drew it, as I understand it, is perhaps inappropriate, given the guidelines that the U. S. Supreme Court has set; are you not?

MR. STIER: No, it is really speculation more than it is any anticipation---

SENATOR RUSSO: Or anticipation. You are trying to anticipate that some Appellate Court may come along and say, "Hey, you put the burden on the defendant; that is unconstitutional, and we don't really need it anyway."

I can only say, John, that I am satisfied, from my viewpoint, as one member.

SENATOR DORSEY: Well, if you are satisfied, that ends the discussion.

SENATOR RUSSO: I may be wrong, because if I insist on the language as I had it and Ed's fear should turn out to be founded in the future, we will have an unconstitutional statute. If we do it the other way, I see no great harm being done. That is why I think it is acceptable.

SENATOR LYNCH: In the form of having it a burden?

SENATOR RUSSO: No---

SENATOR DORSEY: Just the burden to come forward.

SENATOR LYNCH: For the burden to come forward, is something that is taken in the context of the law usually in terms of a presumption where one has to go forward, and not with the burden of proof, but with the burden of going forward has to do with the area of presumptions, whether they are rebuttable, or irrebuttable, what have you. The burden of proof may be on the other side, but one side has to go forward when there is a presumption in the first instance. You certainly don't want to be in the presumption area here. What is wrong with just having the defendant having the right to go forward to demonstrate mitigating factors.

SENATOR DORSEY: That is in essence the way they described what this language said.

SENATOR LYNCH: The defendant shall have the burden of producing evidence.

SENATOR DORSEY: What you are saying is that this suggests a presumption that there are no mitigating circumstances, and he must go forward.

SENATOR RUSSO: What about saying the defendant shall have the right of producing evidence of the existence of any mitigating factors?

MR. STIER: The reason that we put it in terms of the burden of going forward is to show that the State does not have the burden of disproving any mitigating factor. I mean you have a list of mitigating factors in the statute, and the question is, does the State have any responsibility to, in the first instance,



offer any evidence to demonstrate that those mitigating factors should not be considered by the jury. I think this makes it clear that on that side, on the mitigation side, the defendant has the burden of producing some evidence, or else those mitigating factors won't be considered by the jury.

It certainly doesn't create a presumption that there are no mitigating factors. We hadn't intended to do that. But, I think it makes it clear procedurally how this issue should be resolved by the trial court.

SENATOR RUSSO: Let me suggest this: That we accept the amendment as drafted, take these concerns back and should there be any basis to them, we can amend the bill before a Senate vote on the floor; we can amend the bill in the Assembly or wherever. We really can't resolve that issue any more at this time. If it is agreeable to the Committee, I will suggest that we accept the amendment as drafted, subject to that. Is that all right, John?

SENATOR LYNCH: I have just one other question. I don't know the rationale behind it, the deletion on line 61, page 2, dealing with the pre-sentence report, which is left out of the amendment. I don't know the rationale.

SENATOR RUSSO: It is unconstitutional. Am I right, Fred?

MR. DE VISA: That information cannot be withheld. There was a court case on that.

SENATOR RUSSO: All right, go on to the next amendment.

MR. STIER: The next matter of substance is section 1, after line 103, where we talk about the aggravating--- We have re-written some of the language of the aggravating factors and as we now propose it, it would read as follows: " (a) The defendant has previously been convicted of murder; (b) In the commission of the murder, the defendant purposely and knowingly created a grave risk of death---

SENATOR RUSSO: As you go through each one, why have you left out the rest of that?

MR. STIER: The only one we have really changed is "C" on this list. We felt that we should broaden the scope of the coverage. It was somewhat more limited in the bill. We suggested that it be broadened somewhat.

SENATOR RUSSO: Okay, and for "B."

MR. STIER: "(b) In the Commission of the murder, the defendant purposely and knowingly created a grave risk of death to another person in addition to the victim. (c) The murder was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." We tried to make that conform to the most recent case law on the subject.

SENATOR RUSSO: We discussed that yesterday at some length. There have been some cases handed down since the bill was drafted originally. The amendment makes sense, and I agree with it.

MR. STIER: "(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;"

SENATOR RUSSO: That is the murder for hire.

MR. STIER: Right. "(e) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another.

" (f) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, sexual assault, arson, burglary or kidnapping."

SENATOR DORSEY: They have totally excluded your number "c." Haven't they excluded your line 111? I am on page 4.

SENATOR RUSSO: Okay, now, an unusual problem. You have changed item "e." Where the bill originally had, "The defendant committed the offense against a police or other law enforcement officer, corrections officer, or fireman, while performing his duties, or because of his status as a public servant." And, interestingly, that is a position I have had a lot of problems with, although it was in the original bill. Perhaps, maybe you changed it because of my insistence. I don't know. But, what concerns me is your people and the Governor's people yesterday raised an interesting point I totally had not thought about, and that is, if you don't have that provision in, for example, if someone were to plan an assassination of the Governor, or the President, forgetting federal law, dealing with New Jersey law, he may not be subject to the death penalty unless one of the aggravating factors is shown. And, in a typical straight assassination, that may not be.

So, it causes me to wonder whether you were right originally and whether I was wrong originally. I am inclined to think I was wrong, because otherwise, we could have a calculated murder of a public official because of his public capacity not subjected to the death penalty.

SENATOR DORSEY: How can you have that, if in the initial sections it says, "The act purposely causes death, or the act knowingly causes death." So, how can you have a first---

SENATOR RUSSO: That is the question as to whether he is guilty of first degree murder. It doesn't mean he gets the death penalty. Now, in the second trial---

SENATOR DORSEY: He will be subject to possibly receiving this.

SENATOR RUSSO: Oh, yes, but here is the point the Attorney General's Office raised. We have the person who commits that crime. He is guilty of first degree murder. Now he goes before the jury and in order for him to get the death penalty, the jury must affirmatively find the existence of at least one of these aggravating factors. Now, if you looked at those aggravating factors, under that hypothetical case we are talking about, there may not be one. And, that is what caused me concern, because, frankly, I am of the opinion - and I have told this to many police organizations and most agree with me - that the death penalty should not be subjected dependent upon whether the victim is a police officer or a little girl. I can't condone that. However, without that provision in here, you may not have even the possibility of a death penalty without at least some portion or all of that provision. Do you follow?

So, Ed, how can we combine the two to have me eat all crow? I think you really have to have---

MR. STIER: We have some language that you might want to consider. It would read as follows: "The defendant murdered a public servant as defined in 2(c) 27-1 while the victim was engaged in performance of his official duties and because of the victim's status as a public servant."

SENATOR RUSSO: Okay, that makes sense. And, that can be added as an additional aggravating factor, can it not?

MR. STIER: Yes. That is a personal suggestion from me, not necessarily the Administration's point of view as a whole. This has not been raised and discussed with the Governor and Governor's Counsel at this point, but this is my suggestion. I think it would be an appropriate amendment.

SENATOR RUSSO: And, it would be in addition to what you have here.

MR. STIER: That's right. It would be in addition to the aggravating factors listed on page 4 of our recommendations.

SENATOR RUSSO: It would be "G." Now, adding "G," and the language will be put together with staff, to those factors, that entire amendment--- Are there any other questions or discussions on that amendment on page 4. If not, may I consider that with the addition of "G" that amendment adopted.

Ed, your staff and ours will put that language together. Go on to the next one.

MR. STIER: The next matter of substance is on page 5 of our suggested amendments. It would be after line 120, insert, and it would read as follows, as we would suggest that it be amended. The only three substantive changes in that would be the last three that I am going to read, "G,H,I."

I am sorry, I don't have the correct page. It would be page 3.

SENATOR RUSSO: Instead of saying after line 120, you should have said after line 104; is that right?

MR. STIER: Well, they are changing the bill.

SENATOR RUSSO: You want to put the aggravating first and then the mitigating; is that it?

MR. STIER: That is correct.

SENATOR RUSSO: If that makes them happy, that is fine.

MR. STIER: Do you want me to read all of them, or just the ones that are changed?

SENATOR RUSSO: The ones that are changed only.

MR. STIER: That would be " (g) The defendant was an accomplice to a murder committed by another person and his participation in the homicidal act was relatively insubstantial."

SENATOR RUSSO: Wait a minute, now. He didn't pull the trigger. If he didn't pull the trigger, aren't you really dealing with maybe a felony murder situation here which we don't have in this bill?

MR. STIER: No, we are dealing with an accomplice situation where the defendant will have known and intended that the murder be committed, but his participation will have been relatively insubstantial. It is not the trigger man, someone who aided and abetted, as we formerly used to say.

SENATOR RUSSO: Yes, but under this bill---

MR. STIER: There is a misunderstanding here.

SENATOR RUSSO: I think so. Under this bill, there are only two people who can get the death penalty, one is the fellow who wields the instrument of death and the other is the fellow who hires the one to commit the crime.

MR. STIER: I don't think so. I think it is broader than that.

SENATOR RUSSO: Well, wait a minute. Let's start this way. Under the bill as it was originally drafted, is it not limited only to the actual perpetrator of the murder and one who hires one to commit murder?

MR. STIER: Well, the problem is that you have something of an ambiguity in here. On page 2 of the bill, subsection (c) it says, "Any person convicted under subsection a. (1) or (2) as a perpetrator or an accomplice pursuant to 2-6 (c) shall be sentenced to death or life imprisonment as provided hereafter."

SENATOR RUSSO: That is the one who hires one to commit murder.

SENATOR PAOLELLA: Well, first of all, that has been omitted, in any event.

SENATOR RUSSO: No.

SENATOR GALLAGHER: No, we left that in.

SENATOR PAOLELLA: An accomplice is not one who hires in the traditional sense.

SENATOR RUSSO: He is referred to as an accomplice under the 2 (c) statute.

SENATOR PAOLELLA: Historically it is not.

MR. STIER: If you check 2c (2)(6) c. it reads as follows, "A person is an accomplice of another person in the commission of an offense if, 1 (a) with the purpose of promoting or facilitating the commission of an offense he solicits such other person to commit it." So, it covers more than somebody who hires.

SENATOR RUSSO: All right, I think we do have a problem. What you are saying is, murder for hire is--- For example, if I hire you to commit an assassination, that is clear; and, it is clear that it is covered under that. But, I think what your suggestion is, if I, without hiring you, said "Ed, I don't like Fred," and I solicit you to get your gun and go shoot him and you do, that I would be under ---

MR. STIER: That is right.

SENATOR RUSSO: All right.

SENATOR DORSEY: That is the accomplice under 1 (c).

SENATOR RUSSO: That is not the intent.

SENATOR DORSEY: What about in the murder for hire where you have a whole team, but only one wields the weapon. What about the rest of the team, the driver, the stake-out?

SENATOR RUSSO: No, no, they are not covered. Well, they are going to only get life.

SENATOR DORSEY: Yes, but their participation made the crime possible.

SENATOR RUSSO: That is true. Let's talk about that for a moment. You know, you fellows on the Committee may disagree with me. My purpose as sponsor is that this bill apply only to two categories, not that it couldn't perhaps be justified to more, but I want to limit it to two categories and always have. One is the person who wielded the instrument of death and two is the person who hired someone, the contract case. I don't make the argument by that that others should not be subjected to the death penalty. I just don't want to go that far at this time.

You know, you can really make an argument to extend to many people. Some have said kidnapping, even without a death to be included. I, as sponsor, do not want to go any further than that at this time. As we see if this does work in our society, the legislature may want to expand that. I don't think we should at this time. I think we should take only this first step - the actual person who wields the instrument of death and the person who hires one, not solicits. So, we are going to have to clean that language up if you go along with me. We are interested in the person hired for a contract killing.

SENATOR DORSEY: I only speak in terms of the accomplice who pays to have it done.

SENATOR RUSSO: Exactly. Unfortunately, I was not aware of that until you raised it.

SENATOR PAOLELLA: That is my understanding. The only reason I would consider supporting this is if the guidelines are drawn the way you are suggesting them. I want nothing to do with this if it is going to be expanded beyond that.



SENATOR RUSSO: I agree with you. I think we can have other problems on the floor, if we go beyond that. And, I think if we try to do too much, we are liable to end up with no bill.

SENATOR DORSEY: I am willing to go along with your judgement as to how to get the bill through, but it seems to me incongruous if you are talking now about the situation of a contract for murder if you have a whole team that only one member of the team is subjected to this, because it seems to me that everybody is equally bad---

SENATOR RUSSO: Good argument. I respect that.

SENATOR ORECHIO: The team is required in order to accomplish the act.

SENATOR RUSSO: That is all true, and the team is going to get life imprisonment for the mandatory thirty years. The idea is that you are dealing with the ultimate here, fellows. Somebody is going to be executed, and I don't know that we will ever feel comfortable the day that happens, but at least we will be a lot more comfortable with the fellow that did it.

SENATOR ORECHIO: It will be a roulette wheel to decide who pulled the trigger.

SENATOR RUSSO: Well, that is up to the jury.

SENATOR O'CONNOR: Worst than that, the man who may be the brains, the master mind, is not going to be the one to wield the weapon.

SENATOR ORECHIO: Absolutely; it will be, you go first, that kind of thing.

SENATOR RUSSO: If some people escape the death penalty under this legislation, that doesn't bother me. What I am worried about is if somebody gets it that perhaps shouldn't.

SENATOR DORSEY: Well, it doesn't disturb me if some people escape the death penalty because they are able to establish mitigating circumstances. What disturbs me is perhaps the unevenness in a given situation of the death penalty applying to one person and not applying to other persons who are equally involved. I think Senator Hirkala makes the point. It is the master mind you really want.

SENATOR RUSSO: We may plan a murder, but until that trigger is pulled, that murder has not been consummated. You know, we may decide that I may wield the gun, and I will say, "Sure, I will do it." Maybe I won't. The point is, under this bill, he did it, you see. That accomplice may or may not have done it when he saw what really was in front of him. We don't know; we will never know. So, he is going to get life.

SENATOR DORSEY: I will defer, because I understand the enormous problems and perserverance you have gone through to have this bill become law. Therefore, I take it that there is more making a judgement, that to incorporate what we have suggested may in some way cause the bill not to be passed or signed into law. And, I don't wish to do that.

SENATOR ORECHIO: John, just one observation. If you are hiring a team, everyone is paid the same, there is parity. So, that, to me demonstrates the degree of guilt. They are all guilty.

SENATOR RUSSO: Sure they are.

SENATOR ORECHIO: Then it just seems that one person was selected to wield the gun that day.

SENATOR RUSSO: He is the fellow that ended somebody's life. I really can't argue that it is totally logical. I am concerned about two things. One, I think it is going to make us feel a little bit more comfortable, and, secondly,



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I am also concerned about it. You heard John Paoletta. We may end up losing votes.

SENATOR ORECHIO: Maybe John can be convinced to accept that.

SENATOR RUSSO: I have had a number of legislators tell me---

SENATOR ORECHIO: John, let me ask you a question; if there are multiple participants in a murder, can't you have some special agreement that applies to the team concept?

SENATOR DORSEY: What you are really talking about is the concept of murder for hire. Will you ask Mr. Stier what his position is on that? Can we have your substantive position in terms of participants in the criminal enterprise of murder for hire as it is referred to?

MR. STIER: This is a personal point of view. I am not speaking for the Governor on this. The Governor has not as yet taken a position on this narrow issue. My own view is, I can envision circumstances where, in my own judgement, the death penalty should be imposed on someone other than the trigger man. That is why we drafted this proposed mitigating factor which would deal with those individuals who were peripherally involved.

SENATOR DORSEY: In other words, you drew that amendment assuming that the other people were in fact covered by these---

MR. STIER: I think that you have another ambiguity here, which, if you want to narrow it, really ought to be considered. That is, right at the beginning, on page 1, where you defined who is guilty of murder, when you say, "The actor purposely causes death or serious bodily injury," that the term "cause" is somewhat ambiguous, whether it is necessarily the trigger man, or includes the person who supplied the gun, or includes the person who fingered the victim, that is, who brought the victim to the place where he was going to be killed. There are a whole variety of participants who may be involved in causing the death of a victim.

SENATOR RUSSO: How would you clarify that?

MR. STIER: I really don't know at this point. I mean, it seems to me, the way I would construe the language as it is drafted, it would be broader than simply dealing with the person who actually pulls the trigger.

SENATOR RUSSO: Let me add, if you can't make it any more specific, then why---

MR. STIER: You may be. I mean, I am not prepared to tell you specifically now how I would narrow it, if I wanted to narrow it to the person who actually pulls the trigger. I mean, I just don't have the language.

SENATOR LYNCH: You want to limit the bill. Why don't we do what we don't ordinarily do, and that is, just spell it out in laymen's language what it is you are trying to limit it to, instead of getting all sophisticated about the legal jargon that we see in the opinions. You can spell that out.

SENATOR PAOLELLA: Mr. Chairman, I would just submit for consideration that possibly the word "inflicts" might be more relevant for more causes.

SENATOR RUSSO: Why don't we do this, whether we make that change, John, or leave it, I want a statement added to this bill, as part of the bill, incorporating exactly what we have said, what the purpose and the intent of this legislature is in this bill, in nice simple laymen's language. I think that makes a lot of sense. We will put that statement together and the statement will say that it is intentioned to restore capital punishment only for the actual perpetrator of the murder, and one who hires another to commit murder.

We still have to amend page 2, lines 44 to 46, so that it does not cover one who solicits, or rather only what we are talking about, one who hires one to commit a contract murder.

So, Ed, we will get together with your people and work on the language together.

I think what brought us to this particular discussion was "G," which, in view of what we said, is out.

MR. STIER: My suggestion would be that if there is any conceivable reason for leaving it in as a mitigating factor, you ought to leave it in. Now, if you can't envision the set of circumstances where a defendant might be covered by something like this mitigating factor, then take it out.

SENATOR RUSSO: Okay, I can, and I will tell you where; two or more defendants jointly beat a victim with a hammer. The only thing is, one hits him 140 times, and the other hits him once. Theoretically, you can't separate the cause of death. They both in effect inflicted the death, but one's part was inconsequential. I can see where that might be a case for leaving it in.

MR. STIER: I think that is a good hypothetical. I mean, there are circumstances where it might be important.

SENATOR RUSSO: What other substantive changes in that section?

MR. STIER: The next proposed amendment would be "(h) The defendant rendered substantial assistance to the State and the prosecution of another person for the crime of murder. This is not automatic, but it is a fact that the jury could consider.

SENATOR RUSSO: I agree.

MR. STIER: And, the last is, "(i) Any other factor which is relevant to the defendant's character or record, or to the circumstances of the offense."

SENATOR RUSSO: That covers the changes in the mitigating factors?

MR. STIER: That covers it.

SENATOR RUSSO: With those changes, are there any questions on those factors? If not, may we consider that those amendments be adopted in the form they are in?

Okay, they are all right. Go on to the next, Ed.

MR. STIER: The next are on page 4, after line 148, insert the following language, "Every judgement of conviction which results in a sentence of death under this section shall be appealed pursuant to the rules of court to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." That is the proportionate-disproportionality judgement.

SENATOR RUSSO: That is required by some decisions that have come down. Any questions on that amendment?

You may consider that adopted.

SENATOR DORSEY: What decisions have come down in connection with this particular aspect?

MR. STIER: I don't have the citations offhand, but I would be happy to supply them to you. There are cases.

SENATOR DORSEY: Do I understand that the function of this amendment is that you are trying on a statewide basis to apply the death penalty and some kind of uniform method across the State?

MR. STIER: That is correct.

SENATOR DORSEY: In other words, what a jury in Morris County may think are aggravating circumstances, a jury in Camden County might not think are, and somehow you are going to let the Supreme Court even it all out?

MR. STIER: Generally speaking, yes. Obviously, there are going to be differences between each and every case. But, it's to guard against an imbalance,

a disproportionate imposition of the death penalty in any one area, with respect to categories of defendants or particular types of crimes to avoid against arbitrariness, to avoid against a capricious action in one part of the State or another.

SENATOR DORSEY: All right, I hope by Monday you will be able to get a copy of a case that is requiring this as one---

SENATOR LYNCH: I can't vote for that amendment. You might as well abandon the jury system and have a computer.

SENATOR RUSSO: Well, I am told that this is necessary under the court decisions. I agreed to it on that basis.

SENATOR DORSEY: Now, if he can't support that, then neither Ed or I can support the amendment.

SENATOR LYNCH: So what you are saying is after you have built up a backlog of case histories across the State, you can plug those circumstances into a computer and put the next case in there, because that is where you are coming out to.

SENATOR RUSSO: What would happen if we didn't have this amendment, Ed? They either would or wouldn't do it anyway; is that right?

MR. STIER: The court would not review it on that basis. They couldn't review it on that basis. We think that the cases require it. You may disagree with our judgement. I am just told that there is a case entitled Gregg versus Georgia, but I will have to supply you with copies of it. The name of the case isn't going to be very much help. I will have to give you a copy of the case.

SENATOR RUSSO: Are you saying that the Gregg case requires it to be in the statute, or it is something that requires the State Supreme Courts to do?

MR. STIER: It requires that there be this finding, and I think the only way to get this kind of finding is to put it in the statute and require the court to consider that specific issue.

SENATOR RUSSO: May I suggest that we make this amendment and you will get us the information. If we are not satisfied, assuming the bill is released today, pending Senate vote, this Committee can meet with that committee, with that information, and if it is not necessary, we will rescind the amendment. If it is required constitutionally, we don't have any choice. So, suppose we accept the amendment and we will do it with two abstentions, just for the record, Senator Lynch and Senator Dorsey.

SENATOR DORSEY: We said we accept it if he substantiates it.

SENATOR RUSSO: Just for the record, we will have those abstentions. Are there any other substantive amendments?

MR. STIER: Nothing else of any substance. The last is just simply a matter of adding additional language in order to complete something we had already agreed upon. It is not necessary for us to discuss here.

SENATOR RUSSO: Well, is it necessary for us to make an amendment?

MR. STIER: Yes, that is the thirty-year sentencing provision. You would have to amend 2C:43-7 to include the mandatory minimum of thirty years. In other words---

SENATOR RUSSO: So, we need another bill.

SENATOR DORSEY: No, no, you can just add it as another section to this bill.

SENATOR RUSSO: That is no problem, it is just procedural, then. Consider it done. What else?

MR. STIER: That is it.

SENATOR RUSSO: Let me ask a couple of questions, Ed. On the plea bargaining, are the prosecutors right to plea bargain? The way this bill is amended now, does he have that right?

MR. STIER: It is not discussed in the bill. When you say plea bargain---

SENATOR RUSSO: Does he have the right to waive the death penalty?

MR. STIER: It is not discussed in the bill, and in our judgement, common law would give him that authority.

SENATOR RUSSO: Isn't that what killed the original New Jersey statute? Wasn't that the basis? I am not sure, but as I remember, I was still in the prosecutor's office, and what I think the court said was, you were saying to the defendant, if you plead guilty, we will waive the death penalty.

MR. STIER: I think that what you are thinking of was an automatic provision for the avoidance of exposure to the death penalty by a plea of non vult, which the prosecutor had the authority to recommend.

SENATOR RUSSO: Yes, right.

MR. STIER: In that sense, though, it was not a matter of waiving the death penalty. It was a matter of the court found that the fact that he could avoid the death penalty by entering the non vult plea was compulsion to enter non vult pleas, and thereby escape exposure to the death penalty notwithstanding the fact that he might not have been guilty.

SENATOR RUSSO: Don't we have that here?

MR. STIER: I think it is distinguishable. I would have to go back and read the case. It has been a long time since I have read that case. I think it is distinguishable. But, before I would give you a definitive answer on that question, I would have to go back and read it.

SENATOR RUSSO: Could we ask you to do that?

MR. STIER: Yes.

SENATOR RUSSO: That is critical. Everything you have done, and that we have done, could go down the drain if we suffer that defect.

SENATOR DORSEY: Could I ask one question? What is the discretion of the prosecutor? When a man pleads not guilty and he is then convicted of a crime of murder, under this statute, which would subject him to the second trial as to the penalty, what discretion does the prosecutor have at that point?

MR. STIER: At that point, in our best judgement, the common law would give him the right of not seeking the death penalty. That is, not causing the second hearing to occur, the second jury finding, which would then expose the defendant to a mandatory thirty-year imprisonment. In addition, of course, the prosecutor has the discretion to introduce or not introduce whatever evidence he thinks is appropriate on the question of mitigating and aggravating circumstances. So that even if you removed any prosecutorial discretion to have the second hearing, the prosecutor in developing his evidence and offering it before the jury still would have a good deal of latitude in what is presented.

SENATOR DORSEY: In other words, you are saying that his discretion would be, at the outset of the second trial not to request the death penalty.

MR. STIER: That's right.

SENATOR DORSEY: That seems a little incongruous with the statement on line 45, "Shall be sentenced to death."

SENATOR RUSSO: You will look into that point.

SENATOR LYNCH: Wouldn't that be better if it were spelled out in the bill? It seems to be the practical approach anyhow?



SENATOR RUSSO: What?

SENATOR LYNCH: That the prosecutor has the right. Instead of dating back to common law, as we relate to this particular bill, we are saying that he will have the discretion.

MR. STIER: Spell it out one way or the other, you mean?

SENATOR LYNCH: Sure.

SENATOR RUSSO: Well, I am concerned that spelled out or not, if he has the right, might we run into a constitutional defect?

MR. STIER: I will get you the answer as best that we can come up with it to that question, first; and then if the answer is that there would be no constitutional infirmity as we see it, then you can decide as a matter of policy whether it ought to be in or out.

SENATOR RUSSO: Okay, let's get the answer, and then this Committee will discuss it. If we should decide there should be an amendment, we will offer it as a floor amendment for the Committee. Let's get the answer first, though. I am concerned about the constitutional question.

So, are there any other questions of Mr. Stier from any members of the Committee? Is there anyone else from your office who wants to be heard?

MR. STIER: I am going to have to go back to work, but I will have staff here throughout the entire hearing. Thank you very much for your patience.

SENATOR RUSSO: We thank you very much. You have been very helpful. Gentlemen, do we need a few minutes?

As a professional courtesy, we will hear from Senator Dumont.

SENATOR WAYNE DUMONT, JR.: Now, Mr. Chairman, and members of the Committee, my testimony will be oral, primarily because I don't have any time to write out anything. I would rather express it orally, anyway.

Secondly, I appreciate this opportunity to be heard today. There are a few comments that I want to make and they will be short and succinct, I hope.

Let me say, Mr. Chairman, that I appreciate the problems that have caused you to sponsor this legislation. You have been a prosecutor, and a very good one, over the years. You also had a personal tragedy in your own family, and I have not had the time to be a prosecutor. In fact, I practice only what law I have to in order that we can eat regularly, because of the great amount of time that this job has taken me, since 1952. So, what I have to say is not intended to be critical in respect to the bill, but there are only a couple of points that I disagree on, and they may be covered in some way in the amendment that was suggested by Mr. Stier.

I wish to point out that since I believe fully in the tradition of the United States and this state, of three co-equal branches of government, that I view legislation when I get it ready and this is not that I don't want to consult with the Executive Branch, because I am always glad to. But, first of all, I have to convince a majority of my own colleagues that a bill that I am sponsoring is good enough to pass. And, I have great respect for the Committee system because more times than not I have received valuable suggestions as to how to improve legislation from my colleagues.

Secondly, I must convince the majority of the Assembly that a bill I have sponsored is good enough to pass.

And, thirdly, then comes the job of convincing the Governor. So, that normally what I try to do is take it by steps and make sure that each

step is provided for in order, because I know that the Governor always had the right to return a bill with a conditional veto with amendments that he suggests, without which or concurrence he would not sign it into law. Secondly, if he doesn't like it at all, he will give it an absolute veto, and then it is up to me, if I can to persuade two-thirds of the members of the Senate and of the Assembly to override the veto in case of an absolute, of course.

Now, the reason why I have for a long time now believed that the death penalty has to be restored in New Jersey - and I can't think of any better example than one that happened on December 21, 1981, when State Trooper Philip Lomonaco was brutally and wantonly killed on Interstate 80 in Warren County. He was a very special kind of person and trooper and we all mourn his death, particularly the way in which it occurred. For at least twenty years, and probably it goes back closer to thirty, I found that too many people have been too much concerned about the rights of the accused, and not deeply enough concerned about the rights of the victims and the families of the victims. They are the one I am deeply concerned with, not that I have no concern about the rights of the accused. That is not the point. That is why both your bill and mine were drafted, since they have too many points in which they are similar, and as a matter of fact, identical in some language, because they were drafted by the same bill drafters, because I gave up trying to draft legislation within one month after I was first here in January of 1952. I don't want to repeal a law or amend a law unwittingly, because that is not my intention. So, we leave it up to the experts whom we hire to draft legislation to do that.

Some of the comments that were made by Mr. Stier I would agree with, without any question, such as the minimum thirty-year term of imprisonment without parole. There are other things that he has inserted into the extenuating or mitigating factors, with respect to the accused, with which I would agree. I am not sure that I would agree with all the things that he has suggested. I don't usually agree with, necessarily everything that comes from the Executive Branch of the Government, and that is where our co-equal status comes in. I can appreciate your desire to pass a bill and have it signed into law.

As a matter of fact, when you first arrived in the Senate, which I think was in January of 1974, you requested to be a co-sponsor of the death penalty bill I had in at that time. I was very happy to add you as a co-sponsor. And, the following year, and I recognize the political facts of life; I always have been knowledgeable about that, because of the experiences I have had over the years in connection therewith, that your bill is the one that is going to be released by the Committee, even though, of course, I gave you a note several weeks ago to ask that my bill be considered or listed for a hearing at the same time as your bill. I know that you got the note, because you acknowledged it.

SENATOR RUSSO: I definitely received it.

SENATOR DUMONT: The point is, I am going to vote for your bill, because I think it is a long step in the right direction. There are a couple of things I am not in agreement with, however. One is that in this language which is in lines 44 to 46 - and I am not exactly sure of what was done with that language under the amendments proposed by Mr. Stier - I am concerned with the fact that you have omitted therein as it is worded in the bill, Senate 112, that you have not included number 3 from (a) on page 1 in there. That goes

to what we used to call felony murder. That is the commission of a killing, a homicide in the course of committing a serious crime. And, of course, under the old law, that could be punished with the death penalty, not as the law stands today, or even as I understand it, would be under your bill. But, at the same time, while we call them high misdemeanors in New Jersey, it was still a crime of the type that was called a felony in other states. We now consider robbery, sexual assault, arson, burglary, kidnapping, or criminal escape. I happen to think that the death penalty should be optional, at least, in that kind of a killing. That is what I am concerned about with the language that you have here, because I do not think that language - particularly where it says "shall be sentenced to death or life imprisonment was intended to cover the situations that could arise under a. 3 on page 1, which, of course, is the definition of murder under 2C:11-3, and I am bothered about that, because while the bill that I have may be too strong on that score, it does not make any distinction between 1, and 2, and 3. It does say that murder is a crime of first degree, but a person convicted of murder shall be sentenced - that, perhaps should be changed to "may" rather than "shall" - to death or life imprisonment as provided hereafter.

The other thing I am concerned about, which I guess you have accomplished, and I appreciate your early reference to the fact that I had suggested this to you a couple of years ago, is that out of the aggravating circumstances in your bill is not included - or was not prior to any amendments this morning - the wording "that he, the defendant, procured the commission of the offense by payment or promise of payment of anything of pecuniary value." I think that should be included definitely, and perhaps it was by these amendments this morning, as an aggravating circumstance and of course it should be included previously in the bill - and I know you have it included in there previously - that it represents a course of killing by hire.

There is one thing that I know from my Army experience of such a long period of years, that we never refer to pulling the trigger but rather, squeezing the trigger. Because if you got somebody in your line of sight, the easiest way to get a shot off that does not do him any harm - and in many a situation particularly in attempted murder, that is good, if we cannot do him any harm. The way to do it is to pull the trigger and not to squeeze it. But, in any event, whether you call it pulling or squeezing, the person that hires someone to do that should be just as guilty of the murder and just as punishable by death or life imprisonment as the one who actually squeezes or pulls the trigger. I know you have covered that, and I appreciate that fact.

There is one other slight difference between the two bills, and that is in the fact that my bill would make some amendments to 2C:43-7 in regard to the sentence of imprisonment for crime in the extended terms. I think you have covered that pretty well on the fact that the mandatory minimum sentence would be thirty years - in fact, better than it is covered in this bill. There are some other parts to it that simply state that the defendant or accused will not be eligible for parole where certain sentences of life imprisonment particularly are imposed. That is, at least, not for a long period of time. But, I think you have covered that very well in the minimum mandatory sentence of thirty years.

Those primarily are the comments I would make, and I sincerely hope that the bill that you are sponsoring, about which this hearing is being held, will pass, because I think very much so, even though I have never been a prosecutor,

that we have to go back to the penalty of death in order to deter or try to deter people from committing the crimes of violence which are increasing every single year. Obviously, the idea of being so concerned about the rights of the accused or the defendants are not in any way holding down the commission of violent crimes. I believe the restoration of the death penalty in certain instances, at least, or the option of granting it, particularly where you have to have either the same or a different jury deciding upon the type of sentencing or penalty that will be punishable against the accused, that this can be a deterrent, and I hope will be, in respect to crimes of violence.

Certainly, what we have been doing the last 20 or 30 years has not in any way deterred crimes of violence. Therefore, it is time now to go to something else and probably to go back to what we used to have. That is why I support it. I don't do any of the prosecuting. That is up to our sons. All I am concerned about is legislating fairly and impartially. I don't think the system we are using today is necessarily a fair or impartial system. We have to get back to this kind of a possible penalty that would be assessed by either a same or different jury or a judge alone, if there is no jury.

Those, basically, are my comments. I appreciate the opportunity to be heard. Thank you very much.

SENATOR RUSSO: Thank you, Wayne. I should point out that the murder for hire provision, as you mentioned, is incorporated. That is the suggestion, as you indicated, you made several years ago. The felony murder, that is just a problem that maybe we will tackle some time in the future. I would not at all suggest that I am correct and you are not. I just don't know, because of the kind of penalty we are dealing with, I would just as soon take the one step at this time.

You accurately state the facts. I think, Wayne, you were fighting for a capital punishment bill probably when I was still in law school.

SENATOR DUMONT: Well, I don't know when you were in law school.

SENATOR RUSSO: I don't think there is any question, as you pointed out, but for the courts of politics, namely a democratic legislature, we would probably be discussing the bill you mentioned, because there is no question that your position was clear on this even before I was elected, and probably the bill drafters took many of the thoughts of my bill from what you had put together even before I was here.

Hopefully, we will get something done along the lines you and I have been fighting for, and maybe you should go further thereafter, and maybe not. Take it as it comes, I guess.

SENATOR DUMONT: Well, in any event, Mr. Chairman, I commend you for sponsoring the bill and I know that you are going to have success with it this time, and I hope that it won't be necessary to override any veto, that you are going to get it signed into law, and that will take care of it. I am concerned about the fact - and this was the reason why I voted against the criminal code - that people in the non-legal professions and businesses were just getting acquainted with high misdemeanor, misdemeanor, and disorderly persons and so forth, and then we changed everything to crimes of the first, second, third and fourth degree and maybe more degrees. Frankly, I don't know what anything fits under by way of degree unless I consult the criminal code.

SENATOR RUSSO: Does anyone have any questions of Senator Dumont? If not, thank you very much for taking your time. We will take a break at this time, a short five-minute recess.



AFTER RECESS:

SENATOR RUSSO: Prosecutor Lehrer was on our list of witnesses. He is not able to appear personally. His statement will be incorporated into the record as is Rabbi Eric Wisnia's statement from the New Jersey Association of Reformed Rabbis Union of Hebrew Congregations, of West Windsor.

I will now proceed with our Public Advocate, Public Defender and all kinds of illustrious titles, Stanley Van Ness.

S T A N L E Y      V A N   N E S S:      I hasten to correct the Chairman. I am no longer the Public Advocate. I am the Public Defender and soon to become private citizen.

SENATOR RUSSO: Whatever you are, we love you and we think you have done a fantastic job while you have been there, Stanley.

MR. VAN NESS: Well, I wish that view were universally held, but I am sure it is not.

SENATOR RUSSO: It is almost universally held, if not universally.

MR. VAN NESS: Senator, I don't have a prepared statement. I will try to be brief. You and I have been over this ground on a number of occasions, most recently last night. I think my views are pretty well known. But, as I was listening to the Committee deliberations this morning, I sort of realized that this question of capital punishment was really threaded through my career in government. It was in 1963 when the last execution occurred in the State. I was a senior in law school and a part-time employee of the Department of the Treasury. Dave Goldberg, who was then Assistant Counsel, asked me whether I wanted to attend Mr. Hudson's execution. My initial reaction was, "Yes." I thought about it during the course of the day, and I got cold feet. I didn't go. But, I got as close to going as I think anybody in this room might have.

In 1969, I became the Public Defender. There were 23 people on death row at that time. In 1972, as the Public Defender, I argued the case in this state which resulted in the death penalty being declared unconstitutional and those 23 people being sentenced to life imprisonment. In 1973, I appeared before a committee of this legislature, right after the Supreme Court had struck down the death penalty across the country in the Furman decision. In 1976, I was back, after the Supreme Court had ruled that under certain circumstances the death penalty was constitutional. And, I am here again today.

There is no doubt now that a constitutional statute can be drawn. I commend the Attorney General on his legal research. He has indeed filled some holes that existed in your original bill, which I was not about to volunteer any information on. There is no question that the bill can be drafted in such a manner as to pass constitutional muster. Although, certainly, that will be challenged in court and there may indeed be some defects remaining and a good lawyer may find them.

I don't think it is a question of whether the bill is constitutional or not. I think the issue before the Legislature is, is it good social policy to reinstate the death penalty. My answer to that question is, unalterably, no. It is not good social policy and I say so for these reasons: I would think that one who was seeking to justify the taking of another life, no matter how depraved that person might be, ought to be put to the test of demonstrating their sum utility in that final act. Certainly, if you could show that someone

else's life would be spared, that might be justification indeed. But, there is no proof that that will happen. In fact, the proof that has come to my attention is really to the contrary. You take the situation in Florida now. Florida was the first state to reinstate the death penalty after the Gregg decision in 1976. They now have more than 150 people on death row. I think about a quarter of the people in the United States under sentence of death are in the State of Florida. Yet, the City of Miami is a veritable jungle. There are parts of that city that the police don't even patrol anymore. The homicide rate is astronomical. There seems to have been no influence whatsoever on that rate occasioned by the reinstitution of the death penalty in that State.

Closer to home, the State of New York abolished the death penalty for all murders of police and corrections officers. The instances of murders of police officers have climbed astronomically, notwithstanding the existence of the extreme penalty. And, you could go on and on and on.

In the State of Delaware, there was a period of time they had the death penalty and they repealed it. They reinstated it after a particularly heinous crime and they found that the incidents of murder were less during the period of time they didn't have the death penalty than it was either before or after. So, I don't think that you can get very far trying to demonstrate the utility of this extreme penalty by saying it deters other people. Yes, indeed, it deters the person that you put in the electric chair. Certainly, he is not going to commit another murder, but he is not going to commit any other act, either, good or bad. But, he can be deterred by a thirty-year prison term, and I note that you are now talking about a prison term without the possibility of parole for life imprisonment. He can effectively be deferred and isolated from society. So, I don't find that as justification.

Another problem with the application of the death penalty - I don't care how carefully you draw this bill or how many standards can be corrected to guard against it - you cannot squeeze all of the discretion that is possible in the trial of a death case, and a trial on the question of penalty out. And, that discretion previously was exercised so as to favor those groups in this society that have been advantaged and to disfavor those groups in society that were presently disadvantaged at the time. You can almost follow the immigration pattern of this nation by looking at the ethnic background of the people who were put to death since the death penalty started to be imposed. At first it was the Irish, the Italians, and now it is black, Hispanics, chicanos in other parts of the country. It is clear that discretion will be exercised against those people who are least favored by the general society.

When the death penalty was abolished in 1973, about 55% of the people on death row were black. Now that the death penalty has been reinstated under the standards approved of in Gregg, about 55% of the people on death row in Florida are black. I think that pattern will continue in the State of New Jersey if this bill is enacted.

Another problem, and, Senator, as a fine trial lawyer, I know you are aware of this, no matter how hard we try, we can't squeeze the possibility of a mistake out of a judicial proceeding. I don't think there is anything more damning in a court room than for a witness to stand up and point a finger at the defendant and say, "That is the man." In front of a jury, that is overwhelmingly ruled as dispositive of the issue. Yet, we know that is probably the least credible of testimony that you can find. If not the least credible, it is certainly

suspect in many instances. There is no shortage of cases where you find somebody doing time for a crime and someone else comes forward and you look at them and they are look alikes. It happened in Philadelphia within the last two years. There is still this possibility for a mistake. I don't care how good the lawyers are; I don't care how careful the judge is, how finely drawn your statute is, there is a possibility of sending an innocent person to the electric chair and you are eliminating the margin for error in our judicial process when you enact this kind of law.

We are still talking about the guilt or innocence of Bruno Hauptmann, some thirty years after the fact. Perish the thought that they should now decide that the man was innocent at that point.

Another problem is the burden that this legislation will put on a system that is staggering already under mounting case loads under overworked public defenders and prosecutors and judges. There should be a fiscal note requested, in my honest opinion. You should be asking what it is going to cost the public defender to provide representation in the number of death cases that will be covered by your statute. It has been narrowed somewhat since I did our original calculations so I am somewhat reluctant to give you a number. But, I will tell you this, it will probably cost two to three million dollars even as drawn now to provide the representation that must be provided for a person charged in a capital case. The prosecutor will have to spend more money; the judges will spend more time. The trial of a capital case, as you well know, Senator, is going to be at least twice as long as the trial of a first degree murder case presently. It will take two to three, maybe four, weeks to empanel a jury under Witherspoon standards. You will have individual voir dire. You will have to inquire as to their views on the death penalty. You will have to inquire about their views on the pre-trial publicity of an individual. You will be spending an enormous amount of time and energy and money. To what end?

I noticed last night when you and I were on television that the commentator suggested that someone indeed might be executed during the term of the present Governor. I submit to you respectfully that a good lawyer, and there are plenty of them around, is going to keep these people alive a hell of a lot longer than four years. And, the courts are going to bend over backwards to make sure that every possibility of error has been eliminated. When the death penalty was overturned in '72, of the 23 men on death row, one had been there fifteen years. I think the median was about nine or ten years. Now, that is where it cuts into this argument that people say for economical purposes, why do we keep these rats alive; why don't we just snuff them off. Well, the fact of the matter is, you won't be snuffing them out that quickly. They will be there running this gauntlet of appeals, both direct and collateral appeals. They will be housed in a separate section of the State Prison. The statutes require they be kept separate. Obviously, that makes great sense, if you are going to have somebody on death penalty status, that they be housed in a separate situation. The expense of doing that will be added to the other expenses that I talked about.

But, the fact that you will have people who are accused of the very crimes that caused this furor, the murderers, the rapists, the robbers, these people will be pending trial while you will be going through what I think is a charade of deciding whether two or three people will die ten or eleven years from now. Those are the things we ought to be dealing with. That is, I think,



the final observation that I would like to make. There is no question in my mind that the public opinion is in favor of the restoration of the death penalty. In 1972, that was not the case. By a rather sizeable majority, people opposed the death penalty no more than ten years ago. Things change. One of the things that has happened, has indeed been an increase in the amount of violent crime. But, another thing that has happened, and I say this with all due respect, is there has been a growing tendency on the part of people in office and seeking office, to throw out the death penalty as the panacea for a problem that they don't really have an answer to or they are not willing to undertake trying to answer.

The death penalty will not do anything to make the streets of Newark any safer or the streets of Trenton any safer, in my judgement. It will take this State backwards in time. Now, as I said at the top of this diatribe, I suppose, I am going to be a private citizen pretty soon. This is as good a place to get off as any, as far as I am concerned. I will not have any personal involvement in this process. But, I will continue to be a citizen of this State, and I will continue to be ashamed if we go backward in time. Thank you very much.

SENATOR RUSSO: Thank you, Stanley. As usual, you offer eloquent and persuasive arguments that make a lot of sense, even though some of us may not totally agree with you or even partially agree with you.

I would just like to comment on a couple of things you said very briefly. I totally discount and do not consider the cost involved either way. I have had many people say we ought to have the death penalty, because why should we spend \$20,000 a year to maintain someone for the rest of their life. That is utter and sheer nonsense to me. I don't care what it costs. If the death penalty is wrong, it is wrong. If it is not wrong, it is not wrong. It doesn't matter what it costs. Contrary-wise, it matters not to me what it costs to try them in the appeals and so forth. We are dealing with something far too important to be influenced either way, in my judgement, as to what it costs, one way or the other.

The other point you make is one that causes us tremendous concern I am sure every one of us, and I know it has me, the innocent man. I read Borchard's book, "Convicting the Innocent." It scares you. It sort of led me, for the reasons I have indicated, prior to today, to try to draw this bill so tight and so limited that at least that risk will be minimized. I agree with you. You cannot guarantee that risk is not present. There is no answer to that argument on my part to you.

I do not agree with you on what some might call the racists argument as you pointed out. Today, most people who would get the death penalty meted out to them would be black. At the turn of the century, most of them were Italian. Probably there were no blacks. That is a result of the fact that the blacks today and Hispanics today, and Italians around the turn of the century and so forth lived in high crime areas. But, the simple fact is, that is no justification for murder, in my judgement, because 99.9% of the blacks don't commit murder, the Italians didn't commit it around the turn of the century and so forth, and of course, my statistics indicate that for example today most of the victims of black murderers are black people.

MR. VAN NESS: I think if you look at the Florida experience, you will find that there is no black person on death row for murdering a black person.



SENATOR RUSSO: I don't know about Florida, nor am I dealing with the Florida legislature and the climate and the personality of the people down south. I don't have too much sympathy for the attitudes they hold down there and never have had. But, commenting briefly on the Florida situation, Stanley, I think you are absolutely right. That is why I have never attempted to justify the death penalty on an empirical deterrence argument. It cannot be done. I equally do not agree with you. That doesn't mean I am right or you are wrong, with the analogy to Florida, Delaware, or New York and so forth. In Florida, we have a different situation there. We have an influx as a result of the Cuban problem and the Haitian problem. That is why the police can't go into those streets, not because the death penalty has been reinstated.

It is hardly---

MR. VAN NESS: Well, you have turned that argument on its head, if you will pardon me. I didn't suggest they didn't go there because the death penalty was reinstated. I suggested that the death penalty has had no effect on the operation ---

SENATOR RUSSO: And, my argument is that the crime rate in Miami has increased so tremendously because of the refugee problem and has nothing to do with the death penalty either way. I hardly think we can argue that having a death penalty will increase murders. I just don't buy that.

I will not argue because you can't prove that having a death penalty will deter murders. I have a feeling that it will, but I can't prove it. I could not argue that you are wrong. So, I simply say that when we--- You might say, how many murders would there have been of cops in New York had we had no death penalty. Would there have been more? I don't know.

MR. VAN NESS: I am sorry I cut in. I suppose that what I am trying to suggest is that there should be a burden on you and on those of you who favored your position to demonstrate the utility, not the burden on me to demonstrate the reverse.

SENATOR RUSSO: Well, yes, Senator Vreeland says, "Why." I say, "Why," too. I don't think there is any---

SENATOR VREELAND: Why do you make that statement?

MR. VAN NESS: Well, because you are now talking about passing an act that will result at somewhere along the way in all probability in somebody's life being taken. I think there ought to be somebody's clear justification for that. Now, if you have it in your mind and you tell me you don't think it is deterrence---

SENATOR RUSSO: I didn't say that. I said I can't prove it is a deterrent.

MR. VAN NESS: You can't prove those deterrents. You think there might be some deterrent. If that satisfies enough of you, then by all means we will have a law. But, in my judgement, that isn't sufficient justification, and you ought to be sure that when you do something as drastic as this thing that you are contemplating that you know what you are doing. I say that respectfully.

SENATOR RUSSO: I think if we were to assume or agree with you on that, then, yes, it would be a different situation. I don't think that it is a prerequisite to voting for the death penalty, that I can be sure. You are dealing with human events. You are never going to be sure. You have to make the judgement that you think is right and hope that you can live with it. Because,

as we have talked about this before, I know that some day somebody is going to be executed. It is going to be a very traumatic day for me, because now I will always wonder, because I will never be able to prove that I was right or wrong. So will the Governor who will sign that last paper that says, "Execute." He will always wonder. We will never be sure, Stanley. Some of us have reacted with the feeling that this penalty is necessary in those unusually aggravating and severe murders in our society for the benefit of society. We will never know until, I guess, the day we die and if there is a hereafter, whether we were right or wrong. We will never know. There is no way.

MR. VAN NESS: Well, we may know after the passage of time. This popular opinion that now favors your position may indeed change when we start to kill people.

SENATOR RUSSO: Yes, it may, and I just might point out to you that the position I hold is not because it is a popular one. It happens to coincide with that today. I have taken some very unpopular ones during my legislative term, as you have especially. Whether it is right or wrong doesn't depend on whether the winds are blowing in the right direction.

MR. VAN NESS: I wouldn't suggest that in your case, John. I have known you too long and I have too much respect for your views on the subject to suggest that is why you are doing it.

SENATOR RUSSO: Thank you, Stanley. Are there any other questions? Senator Hirkala.

SENATOR HIRKALA: I don't have a question as such, but, Mr. Chairman, I want to agree with you when you brought up Stanley's remarks in regard to Florida crime statistics, and those who are incarcerated for the commissions of murder, and also relative to court costs.

Stanley, when you were making your presentation, I sort of got an implication that if we were to reinstitute the death penalty in New Jersey, this would occasion more crimes of murder being committed. That is the kind of implication I got, and I think the Chairman covered that.

MR. VAN NESS: Well, then, I certainly didn't intend to give you that impression.

SENATOR HIRKALA: And, about the costs. Certainly costs are going to be high. Stanley, you know what, costs are high today. We seem to have a bill of rights for the criminals, but no bill of rights for the victims of crimes.

MR. VAN NESS: The bill of rights is for all of us, Senator.

SENATOR HIRKALA: Yes, yes, but particularly that bill of rights in court decisions in the last ten or fifteen years has played up to the criminal element in our society and has not given a proportionate share of concern for those who are victims of crime. How do we equate the costs of that? Do we only consider the costs relative to giving the criminal every right in society and don't equate the cost of human suffering and human misery as a result of those dastardly crimes.

MR. VAN NESS: I am sure you are not suggesting that I don't feel for victims of crime, Senator. I am sure of that.

SENATOR HIRKALA: No, I would never make that suggestion.

MR. VAN NESS: The pendulum has swung and it has swung quite perceptibly. It didn't just swing. It swung to the right about six to eight years ago. The

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Federal courts are according fewer and fewer rights, as you say, to the criminal defendant.

Justice Warren has long been out of the Supreme Court. You passed a very stiff criminal code last year. I am not saying that these things are improper. What I am saying is that you are getting a test of your philosophy in operation now, and I am not saying the changes that some people told me would happen when people stopped being soft and lenient on defendants. It is not changing the situation. I just throw that out for your consideration.

SENATOR HIRKALA: I think you are going to find that you are going to respect the opinions of the members of this Committee as we are going to respect every opinion that is presented before us. But, in your testimony there was one word in particular that got to me. That is, you talked about appeal procedures and so forth, and you said that after eight or ten years you will find out that this is a charade. Do you really mean that---

MR. VAN NESS: Charade may not be the right word. But, I think the gain will not have been worth the gamble.

SENATOR HIRKALA: I just had to take exception to it.

MR. VAN NESS: I withdraw that word. Charade is hardly the word.

SENATOR RUSSO: Are there any other questions of Mr. Van Ness? If not, I thank you very much.

We are going to take one more quick witness before lunch. That will be Elmer Matthews of the New Jersey Catholic Conference. He told me he was going to be very brief.

ELMER MATTHEWS: Senator Russo, thank you very much for the opportunity to appear before your Committee this morning. To those who don't know me, my name is Elmer Matthews. I appear as the Attorney for the New Jersey Catholic Conference, the conference of Catholic bishops. On their behalf, I will read a short statement.

But, prefatory to that statement, I would like to just recount something that is going to take about two minutes, because Stanley Van Ness and Senator Russo in their comments whetted some sentimental remembrances, or I might use the classic term, in my years in the Legislature, I sat in the same place where you were and considered this same question but from a different viewpoint. At that time, the vote was to abolish the death penalty which was in existence, and it was a very serious vote, as I realize all of you are looking on it in a very, very serious way. At that time, the advocates of abolishing the death penalty did not carry the day. And, the death penalty went on in New Jersey. I am talking about the late '50's and early '60's. Some of us who sat in the legislature lived through that traumatic day when someone was executed. The death penalty was carried out, and believe me, it is a traumatic day. It is a day that I very vividly remember, and I probably will carry with me to the end of my life.

So, in effect, what Wayne Dumont said, and what Mr. Stier said and what Mr. Van Ness said is right. You are taking a first step today. I would just recommend as an elder statesman - I am entitled to that because I have gray hair - I think I am entitled to say to you that it is something that you should think about long and hard. You have a lot of lives in your hands. As a first step, that last step can be completely irreversible.

Now, the statement that I deliver to you on behalf of the bishops will not be a philosophic statement. I don't intend to engage John in a discussion of Tertullian and Lactantius, the early Christian writers, or St. Thomas Aquinas, or St. Augustine, rather, but I would like to say that the New Jersey Catholic Conference respectfully opposes the provisions of S-112 listed for consideration by the Committee today.

It is the bishops' belief that the bill as drawn would seek a return to the the death penalty in cases - although not actually specific - where it is almost arbitrary in its application. Although the death penalty often seems to ride the wave of popular support in the aftermath of crimes that shocked the sensitivity of the public, there is no way to escape the fact that the death penalty, as emotionally popular as it may sound, is a simplistic solution and a harsh attempt to eradicate problems profound in their complexity. The death penalty implies that man shall be denied the right to rehabilitate himself, and this raises moral and social questions not easily diminished. It raises a question whether society is really protected through a process of capital punishment that may be directed by a followable tribunal, or is a life sentence without parole an equally effective deterrent?

The death penalty acts more as an active retribution which is incompatible with respect to human life, even to the lives of the individuals whose violent acts upset the order and harmony of society. The New Jersey Catholic Conference endorses the statement of the National Conference of Catholic Bishops, wherein it was stated, "We believed in the conditions of contemporary American society; the legitimate purpose of punishment does not justify the imposition of the death penalty. We should acknowledge that in the public debate over capital punishment, we are dealing with values of the highest importance: respect for the sanctity of human life, and the protection of human life, the preservation of order in society, and the achievement of justice through law. May I on their behalf ask you to be supportive or at least respectful of that position. We respectfully request and offer our urgent cooperation that you might direct your energies instead to the solution of the many social problems which demean and degrade life, and which in turn motivate individuals to violent acts. Thank you for your time.

SENATOR RUSSO: Thank you, Elmer. Let me say that I think every one of us respects that statement and that view. I, however, resent the statement in general, not your statement, but the statement of the Catholic Conference of Bishops, and let me tell you why. First of all, let me tell you that I went to Catholic grade school and we are fellow alumnus of the University of Notre Dame, and I am a practicing Catholic today. I am not going to say I am a good one or a bad one. I don't miss mass on Sunday, at least.

MR. MATTHEWS: You are pretty good.

SENATOR RUSSO: But, what I resent about the Catholic Conference of Bishops is, I wrote to them the last time this bill came up and I said, "Look, will you at least put out a statement that this is your personal view of those who sign it," because not all of them signed that. That is a minority view.

MR. MATTHEWS: Excuse me, John, this is the statement of the New Jersey Conference of Catholic Bishops and they have been circularized as late as last Friday.

SENATOR RUSSO: Okay.



MR. MATTHEWS: This includes Bishop Mc Carrick who is the Bishop of the new Diocese of Metuchen, so any question as to the New Jersey Catholic Conference of Bishops for whom I speak, there is no question.

SENATOR RUSSO: You see, what bothers me about it is it conveys the impression that this is Catholic theological belief. It doesn't say that there, and you can't criticize any of the language in it, but to a Catholic, it almost makes the average Catholic feel, "Wait a minute, if I believe in the death penalty, am I opposing my church? Is it a mortal sin?" And I had hoped that they would say this is their view. It is not a theological belief of the Roman Catholic Church. In fact, the Roman Catholic Church for centuries to date supported the death penalty concept. There is much justification---

MR. MATTHEWS: I want to disagree with you there. I think we are saying a lot of things down the road here, John, that I think have to be met, and I am not taking notes as to what you said, but as to whether the Catholic Church supported the death penalty throughout the years as a dictum of the church; I disagree with that most violently.

I think if we want to talk about things like that, we can talk about the darkest days of the Catholic Church and the inquisition, where the church itself refused to participate in the death penalty. Now, you say that is quibbling, but they always left the death penalty to the State. I can trace you back to Tertullian and Lactantius, and theologians like that, if you want to, but I am sure you don't want to.

SENATOR RUSSO: No way would I, because I would get massacred.

MR. MATTHEWS: I don't think so, John, we sat at the feet of the same professors.

SENATOR RUSSO: The only point I am making, and I think you really hit on is that. The Catholic Church has always left this issue to the State, and the only point I want to make is---

MR. MATTHEWS: The imposition to the State, not the theology of it.

SENATOR RUSSO: Well, they have never come out dogmatically in opposition to the death penalty; do you agree?

MR. MATTHEWS: Ex cathedra, absolutely not, because I do not think that the church can speak ex cathedra on this issue. All we can do is give our moral suasion. All I hope to be this morning is a small voice with white hair saying, "Listen."

SENATOR RUSSO: The only point I want to make is, for example, in my own parish, my parish priests support the death penalty. I didn't convince them, believe me. They support it.

MR. MATTHEWS: I can appreciate that, but he is an individual and is entitled to his judgement and conscience. We learned theology in the same place.

SENATOR RUSSO: My point is, the view you have expressed today is the view of a number of Bishops, perhaps all in New Jersey, and perhaps the majority in the United States. It is not necessarily---

MR. MATTHEWS: I am not speaking for the Catholic Church. You are part of the Catholic Church and there are other people at this table who are members.

SENATOR RUSSO: Okay, I just want to make sure that I don't have to go to confession if I vote for this bill.

MR. MATTHEWS: I speak for the New Jersey Conference of Catholic Bishops whose voice I just ask you to listen to, but not to necessarily heed ex cathedra, okay, John.

SENATOR RUSSO: To respect that opinion, but not necessarily be supportive of it.

MR. MATTHEWS: Well, I ask you to be supportive of it, and that is why I am here.

SENATOR RUSSO: And, if not, I think the message though should be made clear to all Catholics in this State that the bishops are speaking individually. They are giving their personal views. This is not church dogma.

MR. MATTHEWS: I distribute my statement to the press. We published the statement in the Catholic Press. I don't think we are at that stage of any religion where we send lightning bolts from Olympus.

SENATOR RUSSO: And, Elmer, I want to make clear that I did not mean by my comments to suggest that you were trying to convey that impression.

MR. MATTHEWS: I always very carefully lead up all my statements by saying I speak for the Bishops, because the church has a small "c."

SENATOR RUSSO: Any questions from any members of the Committee? Thank you, Elmer. Does anyone have any problem with resuming this hearing in thirty minutes? We will come back at one-thirty. Thank you.

(Whereupon luncheon recess was taken.)

AFTERNOON SESSION

SENATOR RUSSO: All right. We will now come to order. Mr. Joseph Chuman.  
J O S E P H C H U M A N: First of all, I would like to thank you for this opportunity to testify before the Judiciary Committee. As you noted, I am Joseph Chuman. I am the coordinator of the Northern New Jersey Group of Amnesty International, and I am also the former Chairman of Amnesty International U.S.A.'s Committee on the Death Penalty.

Amnesty International is a worldwide human rights organization with more than 300,000 members in 134 nations. Amnesty International has over 80,000 supporting members in the United States. Six thousand of these members live in New Jersey. Amnesty International is a movement of individuals which was founded twenty years ago in London where it remains headquartered. Amnesty is independent of any government, political grouping, ideology, economic interest, or religious creed. It is a private organization, and its fiscal independence as well as non-governmental status are scrupulously maintained.

The activities of Amnesty focus strictly on prisoners. And, the organization, with regard to prisoners, has three primary objectives.

The first objective is to win the freedom of what we call "prisoners of conscience;" that is, men and women detained anywhere for their beliefs, color, sex, ethnic origin, language, or religion, provided they have not used nor advocated the use of violence.

Our second objective is to ensure fair and early trials for all political prisoners, and to work on behalf of those who are detained without charge or trial.

And, our third objective -- which is the one pertinent to the discussion today -- is to work to bring about the end of torture and the death penalty unconditionally that is whether it is inflicted on political or common criminals, on the violent or the non-violent. In other words, Amnesty International stands opposed to the death penalty in all cases without reservation.

In 1977, Amnesty International was the recipient of the Nobel Peace Prize, giving it international recognition for its overall human rights work, including its work in opposing capital punishment. Today, I am representing our international movement, in effect Amnesty's viewpoint on capital punishment.

Although we comment on this issue from an international perspective, we also believe that the approach we bring is relevant to the death penalty discussion here in New Jersey, for three reasons.

The first is because the moral arguments that speak in favor of the abolition of the death penalty are, in fact, universal -- they pertain everywhere.

The second is that the United States, of which, of course, New Jersey is a part, is a signatory to the Universal Declaration of Human Rights, which states in Article 3 that, "Everyone has the right to life...", and in Article 5 that, "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."

Third, by its example to other states, the Federal jurisdiction, and beyond, New Jersey can promote an abiding appreciation for the inviolability of human life or undermine that very appreciation. We can either join the rush toward capital punishment, or resist it, and thereby declare that we recognize the civilized and civilizing limits of state authority.

Amnesty International is opposed to the death penalty, because it views

capital punishment, just as it views torture, as a fundamental violation of human rights. Capital punishment is not only a question of who should be executed and for what reason. It is not only a matter of protecting the community from violent crime. As a human rights issue, it is also a matter of determining and defending the fundamental principles upon which any human community is based. A society which is committed to human rights also commits itself, in theory and in practice, to the notion that there are very definite limits of State power, vis-a-vis the individual. And, a society that respects human rights accepts implicitly that no violation of human rights is ever permissible or serves a socially useful purpose.

Therefore, when we are concerned about human rights, we are concerned not only with the protection of the individual, but ultimately with the protection of the society as a whole. That is a point that I think needs underscoring. Once human rights are violated, and furthermore when those violations are upheld through the law, everybody in that society is potentially threatened. When a state appropriates to itself the authority to kill its own citizens, then the state sets the stage, in posse, for the abrogation of any right. In times of increasing social and political tensions, this initial transgression -- that is the execution of the most despised members of society -- can expand to include broader categories of offenses and other infringements on basic liberties. Via the death penalty, the state declares that its own authority over the individual is potentially total; and if the right to live can be infringed on, so can other rights as circumstances -- political, social, and economic circumstances -- change. And, this knowledge comes out of the twenty years of empirical experience by Amnesty International looking at other societies who employ the death penalty.

There are nations, as Amnesty International very well knows, which reserve the death penalty for certain political crimes, others for sexual offenses, and others for members of specific religious groups. In each case, the respective government will invoke the rationale as to why capital punishment is, in fact, justified in that case.

Now, I am quite sure that in such cases both you and I would find the death penalty inappropriate, and I suspect abhorrent. In this country, and in this legislation under consideration, the rationale is murder. But, in the absence of any demonstrated deterrent effect especially, we find the death penalty likewise abhorrent. Moreover, careful studies in the post-Furman period indicate that who receives the death penalty is in part determined by extra-judicial considerations, despite every effort to build in safeguards. Race prejudice remains an important factor in who receives the death sentence and who does not.

The move to reinstate the death penalty in New Jersey, as well as other states in this country, runs counter to important international trends. The United Nations General Assembly in Resolution 32/61 of December 8, 1977, reaffirmed that: "The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed with a view toward the desirability of abolishing this punishment."

And, in August, 1980, former United National Secretary General Kurt Waldheim, told the United Nations Congress on Crime Prevention, meeting in Caracas, Venezuela, that, "The taking of life of human beings in the name of retribution, incapacitation, and an unsubstantiated deterrent effect on others, clearly violates respect for the dignity of every person and the right to life as stated in the basic postulates of the United Nations."



With the abolition of the death penalty in France last year, no nation in Western Europe, with the partial exception of Greece and Ireland, retains the death penalty for civilian crimes. Canada abolished the death penalty in 1976. And, I should say parenthetically, that since the abolition of the death penalty in Canada in 1976, there has been a continuous decrease in that country of the homicide rate.

SENATOR RUSSO: Do you attribute that to the abolition of the death penalty?

MR. CHUMAN: No, I do not, but I am making the minimal statement that a nation does not need a death penalty in order to ensure a decreasing crime rate. Obviously, there are multiple variables.

Of Western industrialized nations -- major nations -- only South Africa makes common use of capital punishment. There are now close to 1,000 men and women on death rows in this country. If they were to be executed in a relatively short time -- let's say over the next two or three years, or even if just a small majority of those were to be executed -- the United States would have more executions than any nation, with the possible exception of Iran, and we would hope, and I would hope, that New Jersey would not add to that long list.

It is sometimes argued by proponents of capital punishment that we need it for the purpose of maintaining respect for the moral order and to demonstrate that the cause of retributive justice is served. And, I head that argument being thrown around most saliently this morning. Yet, this contention loses all meaning when we subject it to empirical comparisons. If we compare those societies which regularly impose capital punishment with those that do not, we cannot say that those who do use it have greater respect for the moral order or for human life than those that don't. In fact, quite the contrary seems to be the case. Amnesty International's experience tends to show that rather than uphold the moral order in any tangible sense, the imposition of capital punishment leads to the continued disintegration of societal stability. Again, this is an empirical observation, not one that is merely hypothetical.

Capital punishment erodes the moral order because it violates the very value it is attempting to uphold, namely the inviolability of human life. When a state, be it a foreign state or the State of New Jersey, employs capital punishment it is sending out a clear and dramatic message that killing is an acceptable means of dealing with difficult social problems. It legitimates the revenge motive in both public and private life. Given the exemplary role of the State, it is not surprising that no statistical deterrent effect can be found for the death penalty, and that new research points to the plausibility of a brutalizing effect; that is, that executions may actually stimulate the commission of homicides.

We agree with Nobel laureate, Andrei Sakharov, when he says: "I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of society. A state, in the person of its functionaries who, like all people, are inclined to make superficial conclusions, who like all people are subject to influences, connections, prejudices, and egocentric motivations for their behavior, takes upon itself the right to the most terrible and irreversible act -- the deprivation of human life. Such a state cannot expect an improvement in the moral atmosphere of its country." That is a statement by somebody whom, I think, most people in this country would uphold as an exemplar of moral values and a commitment to basic human rights.

Amnesty International does not have a position opposing just punishment, nor retribution as a basis for punishment. But, as we have been saying, punishment

must stop short of transgressing the fundamental human rights of the individual.

Furthermore, punishment does not require the death penalty in order to be retributive. In no other case does society ask for equivalence with regard to punishment. We do not punish the arsonist by burning down his house, nor do we rob the robber, or mug the mugger, or rape the rapist. Rather, we employ, or attempt to employ, some utilitarian considerations in our conception of punishment and seek to insure that it serve and uphold some civilizing standard and purpose. The death penalty, like torture, is a barbarism which in no way can serve this purpose. And, I would just like to deal with a conceptual notion at this point. Amnesty International draws, purposely draws -- and I think rightfully so -- an analogy or comparison, positive comparison, between torture and capital punishment, even though we tend not to look at them in the same way.

In several countries in the world, mostly Islamic countries -- Pakistan and Mauritania being an example -- a punishment, albeit not a common one for thieves, and multiple offenders, is to remove their limbs, usually their hands. I think if we were to institute this type of penalty in this country, there would be an automatic and instantaneous revulsion at that idea. Yet, when we subject the individuals to capital punishment, be it by putting them in an electric chair, a gas chamber, or through lethal injection, what we are doing is, we are cutting their lives off entirely; we are cutting it all off, in effect. Yet, we tend not to construe that type of barbarism in the same light as torture, in the same mode as punishments that are inflicted in countries of the world which we would consider from our perspective less civilized. I am saying that there is very little -- very little -- functional difference between the two.

SENATOR RUSSO: Is your statement very lengthy?

MR. CHUMAN: No, I just have a few more things.

Belief lingers that capital punishment will deter future homicides in some areas -- this, despite virtually no substantiating data. What continues to sustain this belief is intuition, appeals to "common sense," anecdotal material, and wishful thinking, perhaps generated by a great deal of fear. Study after study, looking at the phenomenon from virtually every angle, has consistently failed to find a deterrence value to the death penalty. This has been shown in studies which have compared retentionist with abolitionist states, particular states before and after institution of capital punishment and executions, and states which have had a death penalty, abolished and reinstated it. Studies have shown that police officers in death-penalty states are no safer from homicide than their colleagues in non-death-penalty states. The same has been shown to be true for prison personnel working in states which have had a death penalty -- personnel working with people on death row.

Contrawise, data put forth recently by Professors William Bowers and Glenn L. Pierce of the Center for Applied Social Research at Northeastern University have shown that in New York State, for the period 1907-'63, there were, on an average, two additional homicides per month after an execution. This brutalizing effect was noted to have occurred in the decade of the 1930's and '40's, when executions often took place at the rate of more than one hundred per year.

We would ask that this Committee look at such data, scientific data, and studies very seriously. We would assume that bills pertaining to such issues as vehicular traffic and teenage drinking, and so on, would not be passed on the basis of intuition or assumptions derived from anecdotes alone. We would hope that reference would be made to the best data that the relevant studies could produce. We ask no

less when what is at stake is human life and an issue which strikes at the moral foundations of society.

International data tends to parallel these domestic studies. For example, according to Interpol -- the International Criminal Police Organization -- most nations which have abolished the death penalty have lower rates of murder and attempted murder than those which retain it. Perhaps a reason for this can be found in a statement by Sir Robert Mark, former Commissioner of the Metropolitan Police, to the Canadian Association of Chiefs of Police at the time of the death penalty debate in Canada. He said: "I am opposed to the death penalty, and so are most of my senior and most experienced colleagues, simply because its continuance prevents the reforms necessary to increase the effectiveness of criminal justice." I would submit that this insight is extremely relevant to the situation in New Jersey.

It is sometimes suggested that we need capital punishment in order to insure that those who murder will not have an opportunity to do so again. Technically, this isn't deterrence; it is actually prevention. In addition to the possibility of longer prison sentences, it must be pointed out that studies have shown that the recidivism rate of convicted murderers, who are later released from prison, is lower than any other class of major offenders. If we wish to protect society by means of capital punishment, safety would be much better served by putting to death armed robbers, for instance, because the rate at which they kill -- commit murder -- after release is far greater than that of murderers. This is a remedy which your bill cannot constitutionally propose, and one which, of course, Amnesty International does not propose either.

One final remark -- and I would like to leave you with this closing thought: After all is said about this issue, the one inescapable thought that remains is that capital punishment is an act of killing. By appropriating capital punishment into its judicial procedures, the State enters into, and adopts as its own, the moral universe of the murderer. The fact that it does this in the name of all of us, does not make it all the more right, but rather all the more wrong. The death penalty is the ultimate act of despair on behalf of the executing power. It is an act which is degrading to the victim and to the authority imposing the sentence. The reinstatement of the death penalty will signal that the State of New Jersey, in part, is turning its back on the ideal of a just and human society. We at Amnesty International, who document and struggle every day against the use of torture and the death penalty around the world, urge you not to bring it into this jurisdiction. Thank you.

SENATOR RUSSO: Thank you, Mr. Chuman.

MR. CHUMAN: You're welcome.

SENATOR RUSSO: Are there any questions of Mr. Chuman? (no response) We thank you for coming and giving us the benefit of your views. Do you have a copy of your statement?

MR. CHUMAN: Yes, I do.

SENATOR RUSSO: Would you leave it with the stenographer?

MR. CHUMAN: I also have some additional material I would like to leave -- some of the literature and documentation we have compiled on the death penalty

SENATOR RUSSO: All right. Copies will be made and given to each member of the Committee.

MR. CHUMAN: Thank you.

SENATOR RUSSO: Dr. Howard Radest. Dr. Radest, do you have a prepared statement?



H O W A R D     R A D E S T: Yes, I have already given a copy to the secretary.

SENATOR RUSSO: Okay. We would ask, since we will have the benefit of a copy, that perhaps you summarize your statement instead of reading the entire thing.

DR. RADEST: I have already abbreviated it. I assure you, I am fully sensitive to the kind of work you gentlemen are doing, and I am trying to be as brief as I can. I am sure you know -- as you will see in a moment -- that Professors in Philosophy are notorious for not starting anything that ends in less than fifty minutes. But, I promise you, it will be nothing like that.

SENATOR RUSSO: Thank you, Doctor.

DR. RADEST: I do want to thank you for hearing me. I am representing the Bergen County Committee for Religious Tolerance. The Committee is made up of clergy from Roman Catholic, Lutheran, Presbyterian, Episcopalian, Methodist, and Unitarian Churches, from the Jewish Faith, and from the Ethical Culture Society.

For the record, I am Director of the Ethical Culture Schools in New York City, Chairman of the International Humanist and Ethical Union, a member of the Council of Leaders, which is my clergy credential of the American Ethical Union, and I have been a resident of Fair Lawn, in Bergen County, since 1959. I might add, I have been here before, but not before this particular Committee. From 1971 to 1979, I was Professor of Philosophy at Ramapo College in Bergen County, and I am still Adjunct Professor Philosophy at the Union Graduate School in Ohio.

I am, and have been, opposed to the death penalty on ethical grounds. I have some material in the text on deterrence and that kind of thing, but I am deliberately excising it for the sake of brevity, although it will be in the written testimony.

Important as the facts are for legislative purposes, the essential issue for me, and I trust for you -- certainly the Chairman has made this clear, I think -- is resolving the ethical arguments that lead to the approval or disapproval of the death penalty. On ethical grounds, I believe there is only one defensible position in the light of modern ethical knowledge.

The case for the death penalty relies on the ethical status of retribution, which, as I shall try to show, reduces, in the instance of execution, to simple revenge. Approval of the death penalty rests on the injunction: "An eye for an eye; a tooth for a tooth." My colleagues from other faiths, either prior to my comments or later, will indicate that this element of biblical ethics has long been superseded by much of the religious community, and for good reasons.

It is argued that the death penalty is a fitting punishment for someone who has willfully taken another human being's life. Yet, no act of punishment can effectively and adequately redress the act of murder. Life cannot be restored to the victim. The pain of his or her family and friends cannot be assuaged. The loss of love and support cannot be compensated for by the payment of a death for a death. Retribution then cannot be effective in this instance, since it cannot restore what was taken away by the act of the murderer. That is, retribution is ethically defensible with respect to crimes of property, for example. It is precisely such a restoration of the balance of things, as it were, that is the basis of a moral argument for retribution. That being the case, in the case of murder or homicide retribution, regrettably -- for I know that those who defend it, and I heard it this morning, are sincere and honorable, and I respect that -- reduces ultimately to an act of revenge.

It is argued that there is something in us psychologically that is satisfied by the death penalty. Yes, the past is irretrievably fractured by murder. Nevertheless, the future will feel better if death is paid for by death. That feeling is what the support of the death penalty really comes down to. The moral status of an act



of revenge, however, remains questionable because it treats a person as an object to satisfy my feelings. That is its ethical problem, and that is why it is ethically dubious. The value of that feeling, by the way, and the satisfaction it is alleged to bring is often short-lived and bitter.

Now, like you, I have feelings of horror and anger in the presence of murder. Like you, I really want to see the killer suffer. But, like you, in my calmer moments I ask whether I can morally justify those feelings. For, when the state, acting for me and mine, establishes a death penalty, it does so, or ought to, in the calm of reason and the majesty of legal reflection. The state, the legislator, the judge, the jury, the attorney are simply not privileged to enjoy the luxury of the heat of the moment. That is why we do not permit a person to be a judge in his or her own case. That is why we surround all punishment in our kind of country with the safety of due process. Indeed, the legislation we have before us, and the amendments we heard this morning, confess their discomfort by the scrupulous minutiae of detailed procedure they call for. And, I suspect there will probably be even more. But, the law ultimately must be morally defensible and not merely our passions writ large, or else it is not law.

Two moral facts appear: That the heat of the moment is not a valid ground for moral judgment; and the involved subject is not a valid moral judge in his or her own cause. These moral facts suggest that the call for the death penalty is really an unwitting indulgence, deeply felt to be sure, that cannot be justified ethically any more than revenge can be justified ethically.

The moral consequences of vengeance as public policy, of indulging emotion as public policy, and of ignoring moral facts as public policy, should be of the deepest concern to this Committee and to all of us. If the willful taking of human life is the penultimate horror, even more abhorrent is the reasoned and so even more willful taking of human life by the state in the name of justice. As it were, the state confirms the legitimacy of death-taking at the highest levels. The message is, alas, all too clear. The state holds life cheaply in its own act. This is the contrary irony denying the claims of those who see the state defending the preciousness of human life by the use of the death penalty.

What the state may do, in other words, in the name of rightfulness, others learn to do in the name of rightfulness. Imitation following executions, by the way, suicide -- something I know very much about because of my work with young people and children -- is a well-documented phenomenon.

It was a crucial insight of classical wisdom that claimed that the state, whatever its utility, was also a moral educator. We know this too. We know that when the state is corrupt, then it corrupts society and increases cynicism in its members. We know that when the state is neglectful, the neglect afflicts society and charity vanishes among its citizens. And, when the state takes life -- that is why a return to the death penalty would be regarded, and rightly so, as moral reversion, a betrayal of the ethical role of the state, vis-a-vis its members.

It is also important to consider the nature of a death penalty in itself as different in kind from other punishments, and to consider it as a legal and moral act. The act of execution is irretrievable and irreversible. Ethical knowledge instructs us, quite clearly, that irreversible acts should be avoided whenever possible. Such acts, although sometimes unavoidable, permit of no redress, no possibility of admitting error, and, above all, no way of atoning for moral evil. Yet, if the history of ethics has taught us anything, it has taught us of the moral urgency of redemption.

To foreclose it for all time -- to foreclose the possibility of redemption -- is to commit an immoral act in and of itself.

It will be argued that there are incorrigible among us who are beyond hope and thus beyond redemption, and so beyond the concern of you and me and the citizenry in general. We would all be better off if such as these did not exist, or if they ceased to exist. And, the act of murder is taken as evidence of incorrigibility.

Of course there are incorrigibles. I am not a sentimentalist, and I am not foolish. Many killers may well be beyond redemption, and be beyond hope. But, we do not know, and cannot know, who among those many is really beyond hope, nor will we know until they have lived out their lives naturally. We do not know and cannot know which of them can move beyond their fate to realize as yet unrealized possibilities.

Finally, we need to understand the disastrous consequence of a death penalty for a democratic society. Democracy relies, among other things, on the perennial hopefulness of the human condition -- that however I am or you are at any given moment, I may in my own future and you may in your own future do otherwise. History for a democrat -- small 'd' -- is not destiny. For a free human being, yesterday is instructive but not determinative. The novel and wondrous idea that democracy introduced into human history is that all human beings are capable of being free, free in the deep sense of having the capacity to reach beyond the moment, to transcend the past for the sake of a different and, with luck, even better tomorrow. Democracy then commits us, as a moral point of view, against irretrievable acts. That is its glory, and, by the way, it is our burden. And, that is its moral vision.

These then, Mr. Chairman, and gentlemen, are my reasons for urging defeat of the death penalty, not because of a sentimental concern for the downtrodden criminal who may need our pity but often doesn't deserve it, and not because I am immune to the passion for vengeance; I am not. But, there is that in me, and I am sure in each of you, something that knows the urgency of hope and of redemption as moral necessity. These things have been struggled for in the history of human societies over and over again, and occasionally we win a victory. It is this, it seems to me, that is at stake in that other passion that moves me and brings me here to afflict you with these philosopher's thoughts. Thank you.

SENATOR RUSSO: Thank you, Doctor, very much. Are there any questions?  
(no response) We appreciate your coming here. Thank you very much.

DR. RADEST: Thank you. (Dr. Radest's complete statement on page )

SENATOR RUSSO: Sarah Dike. I might just say, while waiting for Ms. Dike, that we have heard the last three speakers give some eloquent and forceful statements in opposition to the death penalty. Basically, we hear, in different ways, arguments that those of us who have studied this issue over the years have considered, pro and con, and our difficulty is that I have two pages of witnesses. So, I would ask of the remaining witnesses, if any of you have written statements that you can just submit to us, unless they do incorporate something new, it would help us an awful lot if they could be made part of the record. Submit them to us rather than have us hear the statement in its entirety, because they are really just different forms of saying things you feel very strongly and sincerely about. Some of us here agree with you and some don't, but we have basically considered those particular issues. If you do not do this, we will not get through with the hearing. So, we hope you will help us as best you can so that we can get everyone's views into the record at least, and copies into the hands of the committee. That will expedite this hearing for all concerned.

We will now go to Ms. Dike, from the National Council on Crime and Delinquency.

S A R A H      D I K E: I am here to present the statement of the National Council on Crime and Delinquency, in opposition to the bill. I will constrain my remarks, because I recognize the limits of time, and also because some of my points have been made previously.

We are opposed to the death penalty in principle. But, what I would like to talk about for just a few moments is the empirical evidence that is absolutely in opposition to enactment of this bill. Starting with deterrence, we have to form some kind of moral justification for our acting in defense of life, in opposition to a rise in street crimes and a rise in violence. I am talking in numbers, but these are lives, whether they are Isaac Ehrlich's seven or eight lives saved from execution -- and his study has been reputed repeatedly -- or whether it is William Bowers' study in New York State, which Mr. Chuman drew attention to, where he showed that each execution is followed by a rise of murders committed. What's interesting about that evidence is that the rise in murders committed is within the first two months following an execution, and then it drops, which indicates that you are dealing with a pool of potential murderers, and probably they would have killed anyway. But, the violent atmosphere surrounding an execution inspired them to commit the murder sooner. You are not dealing with the man on the street; you are talking about people who are engaging in aggressive acts, aggressive thoughts, and who are stimulated to act by identification, perhaps, with the State.

If you take the characteristics of the typical man who is put to death, nobody particularly wants to identify with him. It is much more likely that the potential killer would identify the victim with the executed.

The fact is that we haven't used the death penalty in a way that is directing it to the population that even might be deterred. For example, there was a study done of gangland killings in Chicago over a twenty year period, at which time there were over 1,000 gangland killings. There were 23 convictions, 4 sentences to life, and not a single death penalty imposed. The fact is that we impose the death penalty for murders committed in the height of passion and rage, and they are not the kinds of murders that are going to be deterred under any circumstances.

Retribution has been spoken of as an ambiguous concept. It is a concept that is argued philosophically without success. And, practically speaking, its proximity to blood punishment, to vengeance in the height of anger, is appalling. It has enabled us to direct the death penalty at those whom we find least fit and unworthy, for other reasons that have nothing to do with their culpability. If you look at the three states on whose statutes the rest of the United States is basing its death penalty bills -- Georgia, Florida, and Texas -- you see that the man who is black and who has killed a white, is nineteen times as likely as a white who has killed a black, who has committed exactly the same crime in all its other conditions, to get the death penalty. There are very, very few people there on death row. Blacks are there for having killed whites, and I would argue that the situation here is not that different.

There have been studies done of conviction severity in northeastern cities where it is correlated, taking exactly the same crime, and if you are from the wealthy class and you commit a murder as opposed to someone from the lower class, you are much less likely to get a high severity conviction than if the opposite is true.

I would also just like to say a little bit about the situation in New Jersey. You have overcrowded prisons; you have overcrowded jails. You have people putting



prisoners in the jails because there is no room for them in the prisons. You have people looking for extra space here and there. By 1983, if the trends continue, there is going to be a need for 4,000 new cells. The death penalty is not an isolated process. When we pass the ultimate punishment, punitiveness in general rises. The other states' experiences have shown us this. And, the situation in New Jersey is going to get worse - the correctional situation -- as a result of this. Apart from the criminal justice processing situation, which was also mentioned, is the jamming up of the courts.

There is no evidence in support of the death penalty, and I would say that despite your reasoning to the contrary that financial cost has nothing to do with it, the financial cost alone argues against this bill.

I would just like to conclude by reading what I consider to be perhaps the most damaging aspect of the death penalty. Supporters of the death penalty have criticized abolitionists as unconcerned about the victims of violent offenses. But, to execute the murderer is of no help to the victim. In the long run, the public is better protected by ameliorative and preventive than by punitive measures. Apart from the lack of evidence of any deterrent effect of the death penalty, the execution decision, by focusing on a single event, engenders a false sense of security among citizens, serving to divert attention away from the difficult task of reducing violence in our society.

SENATOR RUSSO: Thank you very much, and especially thanks for cooperating by abbreviating the statement. I assure you that each member of the Committee will have a copy of it in their hands.

Before you leave, maybe there is someone who wants to question you. Are there any questions of Ms. Dike? (no response) I guess there aren't any. Thank you very much, Ms. Dike.

Frank Askin or Neil Cohen. Which one is going to testify?

MR. COHEN: We will both sit at the table. I just want to introduce Mr. Askin and perhaps reserve a few remarks.

SENATOR RUSSO: Okay. And, do you have a prepared statement?

MR. ASKIN: Yes, we do.

SENATOR RUSSO: Okay, if you will leave that with the stenographer, we will ask you to help us out by summarizing and abbreviating your remarks, rather than reading the entire statement. You are Legislative Coordinators for the Public Interest Lawyers of New Jersey, is that correct?

N E I L C O H E N: I am the Legislative Coordinator. I am also a criminal trial attorney, as many of the individuals in our organization are. So, we are very much concerned about this legislation.

On behalf of the Public Interest Lawyers, I have submitted a statement. And, Mr. Askin, who is a law school professor at Rutgers Law School and also one of three general counsels to the American Civil Liberties Union, will speak on behalf of the Public Interest Lawyers of New Jersey.

I would ask, if possible, to perhaps add a few remarks subsequent to Mr. Askin's testimony.

SENATOR RUSSO: Certainly.

F R A N K A S K I N: Members of the Committee, thank you for this opportunity to appear on behalf of the Public Interest Lawyers. I do have a prepared statement. I will not read it, but there are a few comments I want to make from it.

Our organization does stand unequivocally opposed to any legislation that



would restore the death penalty as an available sanction under the State's criminal code. That opposition grows from many of the traditional arguments, which I am sure are familiar to you, and I do not plan to repeat them here.

I am glad that today, I think, we have gotten out of the way the issue of deterrence. It seems clear to me that even the proponents of this legislation do not really seem to be claiming that there would be any deterrent value. If it is to be justified, it has to be justified under some other public policy notion.

SENATOR RUSSO: That's not entirely correct. We should resolve that. There are some proponents of this legislation that argue forcefully that it is a deterrent. There are some who feel it is a deterrent but don't rely on that basis because they can't demonstrate it scientifically. And then, there are some who perhaps have a position either way. So, I don't--

MR. ASKIN: It seems pretty clear that there is no empirical demonstration that anybody can point to show that it would have such a deterrent effect.

SENATOR RUSSO: That's correct.

MR. ASKIN: What we as lawyers are, I think, painfully aware of is that even as it stands today our criminal justice system is still a fallible system, susceptible to all kinds of failures, including fraud, occasional prosecutorial misconduct, and outright error.

In our own state, we recall, recently, a case of some considerable notoriety which I think makes this point rather clearly. It was the case of George Merritt. Now, Mr. Merritt was three-times convicted of the killing of a police officer. Three times his conviction was reversed on appeal and remanded for retrial. After more than a decade in prison for a crime for which many in the public would certainly have wanted the death penalty -- the murder of a police officer -- Mr. Merritt was released from jail when defense counsel, through slow and painful search of police files, discovered and brought to the attention of the court, the prosecuting officer's evidence which had been withheld in earlier trials, which impeached the credibility of the crucial prosecution witness, who identified Merritt as the assailant. If the death penalty had been in place in New Jersey at that time, Mr. Merritt might well have been executed long before that suppressed evidence came to public attention. And, the question is, can we afford such an irreversible and uncorrectable form of punishment in a system that, by its very nature, is subject to the errors that permeate any human institution?

Now, I think that we probably all really know -- and I think the public really knows -- that the reason New Jersey will probably have a death penalty soon-- Although I am opposed to this legislation, I am pessimistic that my view will prevail; I do suspect there will be a death penalty statute signed in New Jersey in the near future. I think the outcome of this debate is probably settled. I think we know this will happen not because I really think in the considered judgment of most legislators this is really going to be an effective weapon for the State in the effort to combat crime; rather, this bill, or some other legislation like it, will probably be adopted because the members of the Legislature read that to be the popular will -- such a strong will that they dare not ignore or defy it. It is true that the public is frustrated with crime.

SENATOR RUSSO: How will you explain those legislators that go against it?

MR. ASKIN: I commend them for standing up to the public cry for the quick fix of the death penalty.

SENATOR RUSSO: Shall we then follow the principle that if the public is in favor of something, you better vote against it because otherwise it can't be right?

MR. ASKIN: No.

SENATOR RUSSO: Or might it not be consistent with right?

MR. ASKIN: I don't agree with that at all. Often the public is right, and when the public is right, I think the Legislature should clearly follow their will. I think the Legislature has more of a responsibility not merely to follow mass psychology at a time when it is operative, but sometimes to give some leadership, to give real leadership to public opinion, to help shape it not merely to follow it.

SENATOR RUSSO: There is no disagreement with that. You see, I interrupt you because your comment offends me.

SENATOR GALLAGHER: It offends me too.

SENATOR RUSSO: It offends you too?

SENATOR GALLAGHER: Damn right.

SENATOR VREELAND: I think it does all of us.

SENATOR RUSSO: All right. You see, what you seem to be saying is, the fact that your position is contrary to the popular view, and that ours may be contrary to your view, ergo we are only going the way we are -- those of us who are going in that direction -- because it is popular. Sometimes you can be right and be on the popular side, and sometimes you can be right and be with the unpopular side. There are people in this Legislature who will vote against this bill even though it is very popular because they believe in what they are doing. There are others of us who will vote for it because we believe it is right, and that happens to coincide with the fact that it is popular. And, there may be some who vote for it just because it is popular. I think you ought to at least concede that much because otherwise you will offend us.

MR. ASKIN: I absolutely concede that. I do not mean to offend the Committee or the members of the Legislature. I do think though that it is an easy way out. It is a placebo which is being offered to the public. I have difficulty believing that anybody thinks it is really going to have any impact on crime. Now, there may be other justification. Mr. Stier, this morning, thought retribution was a popular public policy. I have difficulty acknowledging that for many of the reasons that the other witness have spoken about today. But, as a real mechanism for doing something about-- What the public is concerned about is crime, the spread of crime, and what they are hoping is that somehow this is going to be a quick fix. It is hard for me to believe--

SENATOR RUSSO: Condemn the public then for their view, but not the Legislators -- or certainly not all of us. Let me tell you something very briefly. In 1967, I prosecuted a man in a death penalty case. At the time of his conviction, when the jury recommended a verdict with no mercy, as it was then, the judge -- I had forgotten they did this because it was the first capital case I prosecuted -- had him immediately stand up and read him those terrible words: "I command that you be taken on such a day--." Dr. Askin, I fought for that conviction. I believed in it and I still do. I will tell you now that I had to go straight into the Chambers after the verdict and I stood there in tears. And, you know, I will probably do the same thing the day of the first execution, if this passes.

It is not easy for us. We believe in it, some of us. Some of us don't, and not because it is a placebo, although some may, and not because it is so easy.

It would be a lot easier, I think, really, when you come down to it, to vote "no," because you never have to face that day when there is an execution.

SENATOR HIRKALA: It would be a lot easier for you, Mr. Chairman, not to even have brought the bill up; yet, you have taken that position.

MR. ASKIN: There is a public clamor. I mean, you know, elected officials obviously do have an obligation -- not just political concern, but an obligation to be concerned with public opinion and with what the public wants. There is a public clamor for this.

I would hope, and this is my final comment, that every member of the Legislature would seriously search their own conscience as to whether they really believe this is going to somehow really do something about the serious crime problem in this State, and not merely just get carried along by a wave of public enthusiasm for the restoration of the death penalty. I thank you.

SENATOR RUSSO: Thank you very much.

SENATOR HIRKALA: Mr. Chairman, I just want to bring out one point to Mr. Askin. I have been in the Legislature for 14 years. I might have gotten six letters in all that time that favor the death penalty. So, there has been no public outcry, as such. There has been no public outcry. The outcry comes when newspapers and the media take polls, and they disseminate the results of those polls. I am not getting any telephone calls. I don't think I have ever gotten one telephone call saying: "Senator, I want you to vote for the death penalty." I don't get that kind of an outcry.

SENATOR VREELAND: Mr. Chairman, I would like to make a comment. Mr. Askin, I think some of us who sit here -- and I happen to be one of them -- think that it will be a deterrent. I don't agree with all those who oppose it and don't think that it will be a deterrent.

The other thing is, when you talk about a public outcry, when the Trooper was killed, up on Route 80, in cold blood, just recently -- I think it was December of 1981 -- yes, that is when there was an outcry. You're right. When a law enforcement officer is gunned down in cold blood, yes; you are right.

SENATOR RUSSO: Thank you, Senator.

Senator Orechio.

SENATOR ORECHIO: I just want to remind Dr. Askin that a lot of us on this Committee are not "Johnny come lately's" in terms of the position of supporting the death penalty. We, I know Senator Vreeland and Senator Russo, in the early '70's, 1974-- The public outcry wasn't evident then at all. As a matter of fact, I understand that Mr. VanNess testified that in the '70's there was no public outcry in favor of it; there was opposition at that point. It is only in the last four or five years that we have seen the pendulum swing.

MR. ASKIN: I think that is true, and that is why I am afraid that the State of New Jersey is about to reinstitute the death penalty.

SENATOR RUSSO: You see, because now the Governor is in favor of it. It would have been done eight years ago.

MR. ASKIN: Right.

SENATOR RUSSO: And, I always respected Governor Byrne for that view. We are the best of friends -- still are and were then. I never tried to change another legislator's view on this kind of an issue. But, New Jersey would have had a death penalty in 1975 had Governor Byrne believed in it. It isn't that it is as a result of some recent outcry; it is a result of the change in the Governor of the State.



Mr. Cohen, did you want to add anything?

MR. COHEN: Yes, Senator. In 1973, I came down to the Assembly as a college student and began to get involved in politics. I was working for State Senator Menza, and I came down to testify. I was a college student and I had a lot of ideas about sociology and people's human behavior.

In 1976, I was legislative aide to Senator Menza, and I was also in law school. So, I came down to the legislature in 1976 when, Senator Russo, you yourself chaired the committee on another public hearing.

Well, it seems I am back again, this time as a criminal trial attorney. I have sort of gone through a metamorphosis. I have all the transcripts from all the hearings, and you seem to have all the information that is necessary for you to make a decision. The State Library has all the information; studies which were presented in 1973, information regarding deterrence, looking at geographic, economic, non-death penalty states, death penalty states. You have a myriad of information in order to make a decision.

The same type of speakers who came in 1973 and 1976 are back again, because they have a sincere question as to the efficacy of the death penalty.

As a trial attorney, I am going to be trying death cases. I look at it in a different vein. I have submitted a statement on behalf of our organization, but as a trial attorney I know the criminal justice process, as you do, Senator Russo. You were a prosecutor.

SENATOR RUSSO: And, a defense counsel.

MR. COHEN: And defense counsel. So, you should particularly understand the question. In terms of the process, death penalty cases come up in situations where there are dramatic offenses, where the media takes a particular offense and it is all over the newspapers for three or four weeks. During the last gubernatorial campaign, just prior to the campaign, there was an officer that was shot in Hudson County -- I believe on the Path. There was a tremendous outcry because of this tragedy. Law enforcement put its forces to work to investigate; to find the culprit. Witnesses were brought forth who gave descriptions. Witnesses were brought forth who gave information to the sketch artist. A picture was produced. Based on this information, the prosecutor then took over. And, in doing so they arrested an individual in North Carolina. They charged him with homicide and extradited him back to Hudson County to stand pre-trial. Well, it just turns out-- And, there was a large cry for the death penalty.

As Senator Vreeland just indicated, when there are those kinds of events, that is when the cry comes out. I do believe it is at that stage when you start to get letters, because I remember when I worked for Senator Menza that letters came in all the time, and the Senator was opposed to the death penalty.

It turns out that the individual who was arrested and brought back to Hudson County was the wrong person. He easily could have slipped through the system.

SENATOR RUSSO: He didn't, did he?

MR. COHEN: No, he didn't, but that doesn't mean that it hasn't happened, or that it won't happen. That is the danger, and the danger is, can we put that aside and say, "Well, those are the mistakes of the system; therefore, what can we do? It is beyond our scope to do anything. If someone is electrocuted after being falsely accused and tried, so be it." I don't think anyone can take that position, unless we ourselves are willing to make either our children, our nieces and nephews, or uncles that person. I don't think we can do that.



As a trial attorney I know what misidentification is. I also know that when law enforcement expends a great deal of resources, or money-- For instance, the Atlanta situation -- where money is expended or where energy is expended by law enforcement, when statements can be molded, contrived, and even perjured, are we willing to have the death penalty when those kinds of situations can arise? Because as we all know -- and I am not making light of this -- it is irreversible. We can't change it.

I have re-read the transcripts, and I have re-read Senator Russo's remarks from 1976. I have also seen Senator Russo in action on the Senate floor. Being logical and reasonable about this, Senator, you have already indicated that you are not exactly sure whether or not is a deterrent. Maybe you have a gut feeling. You have a sense. Studies, and the library has all the studies, show that the can't make a decision about whether it is a deterrent. So, I think what the bottom line is, or what boils down to is that it is a punishment. New Jersey grades its punishments from petty disorderly persons' offenses up to first degree, a new gradation under the criminal code. Therefore, I would assume it will be your position that the highest penalty should deserve-- The highest crime should deserve the highest penalty.

This takes us back to my initial point -- and that is dealing with the irreversibility of the penalty and the large scope of error that is possible during the course of a trial. Now, you have heard some testimony about this, and I believe some Senators have indicated that passion isn't the kind of case that will get a death penalty, nor the lover, paramour situation. There is a very fine line -- as the Senator knows as a prosecutor -- between which offense you decide to prosecute on, and if the prosecutor, as an advocate, can convince a jury that a passion case is a murder case that deserves the death penalty. It is up to the defense counsel to convince the jury to say either he is not guilty -- that he didn't do it -- or that it is not a death penalty situation, but is a manslaughter situation. That is a very fine line.

So, there are many cases, and there will be many cases, where you have traditional manslaughter situations which will result in a death penalty situation. It is a danger.

The safeguards which you have been working on, and which the Attorney General's office has -- of course, our organization is not going to offer amendments to strengthen a potential law which we feel is unconscionable. But, all the safeguards that you have worked out, and all the laborious tasks that you went through today, and which the Committee is going through, those are safeguards in terms of the person getting the death penalty, but there are no safeguards in terms of the jury's decision as to whether the person is guilty or not guilty. You can have all the procedural safeguards you wish, but as soon as that jury says, "We believe that is the person", and they may be wrong, the rest of the safeguards go out the window. They are of no consequence. I thank you.

SENATOR RUSSO: Thanks, Neil. I am hoping I can get one concession from you. I don't know if I can. If there had to be a death penalty bill -- and you, of course, studied this, I am sure, and being a lawyer and a former legislative aide, you have knowledge of this -- to at least be the least offensive from your viewpoint -- or most protective -- would you agree that this one is at least that?

MR. COHEN: I heard your remarks earlier, in terms of the burden of proof. You have set forth standards of "beyond a reasonable doubt." You have reduced the burden that a defendant has in terms of mitigation. If I am trying a death case, clearly the better points of the bill are those areas where I have to produce at

least a minimal amount of material to sustain my position.

I am against the death penalty, but removing that for a moment, some of the safeguards that you have built in make it a little more difficult for the State to succeed, or sustain, their direction in trying to get the death penalty. I would urge the highest standards possible. Of course, I wish there were better times and there wasn't this kind of a situation where a bill was being offered. But, nonetheless, if I am looking for a bill that would be the most helpful to me, I, of course, would want a bill which increases the burden on the part of the State.

SENATOR HIRKALA: Mr. Chairman.

SENATOR RUSSO: Senator Hirkala.

SENATOR HIRKALA: Before these witnesses leave, I just want to make a short statement. It is primarily directed toward Mr. Askin in as nice a vein as I can put it in. Mr. Askin, the easy way out would have been if some of us went to Senator Russo and said: "John, don't even move this bill." That would be the easy way out. It would be easy if we didn't ever have to vote on it. That's what I would call the easy way out. Everytime you take a vote, 95% of the time bills sail through without any opposition; that's easy. This one, some of us have been in opposition to in prior years. But, believe me, right up until today I hate the thought that we have to vote on it. It is going to come up for a vote and we are going to vote on it. Believe me, in my 14 years -- and I am going to reiterate it again -- this is going to be the toughest vote that I have ever faced.

The people who have come here have made very cogent arguments. I am not discounting them at all. It is going to be tough, real tough, to face this issue. The easy way out is if we didn't vote.

MR. ASKIN: Well, maybe the Committee should vote not to report it out; maybe that is your solution.

SENATOR RUSSO: We don't take the easy way out. Senator Orechio.

SENATOR ORECHIO: To follow up Senator Hirkala, we heard the well-prepared and eloquent testimony of Elmer Matthews before when he was representing the New Jersey Bishop's position on capital punishment. Of course, we don't know how that is going to be transmitted to the parish priests nor how the parishoners feel about it. We, who are Catholics, run the risk of maybe being subject to retribution from them. But, I would like to say that we talked before about some slipping through, such as the George Merritt case. How do you react to a multiple murderer -- the person who commits murder, is released and goes out and does the same thing again?

MR. ASKIN: I think it is a terrible, awful thing. I think we should keep those people where they can't do it again. But, I don't think killing them is the solution.

SENATOR ORECHIO: Okay, then what you are advocating is a life sentence with no parole, right?

MR. ASKIN: Well, somebody gets to be 75 years old, and I am not saying you should keep them there forever. There comes a point, I am sure, when it just does not make any sense to keep somebody in prison forever. So, I am not actually saying that there should be no such thing as -- I don't think there should be such a thing as no possibility for parole. But, I do agree that it would be preferable to capital punishment to say no parole, life sentence. That would be preferable to capital punishment, if that is the alternative.

SENATOR ORECHIO: But, isn't the argument just as strong when you say there could be innocent people who will be given the chair and their lives will be taken? Isn't the argument just as strong that when you confine or incarcerate somebody

for the commission of a crime, such as murder -- first degree murder -- and then release them or subject them to parole, you then run the risk of having them murder somebody else?

MR. ASKIN: Of course, it is a terrible thing. I am not quite sure. I mean, that's like saying--

SENATOR ORECHIO: What I am saying is, you are concerned about somebody being--

MR. ASKIN: If we executed everybody that committed a crime, I suppose that would guarantee they would commit no more crime. But, I don't think that anybody is going to propose that.

SENATOR ORECHIO: What I am saying is, the anti-capital punishment people say capital punishment isn't good, it is inhumane, and all the other adjectives that they use, because there are some innocent people whose lives will be taken. Now, what I am asking you is, what about the other side of the coin, the person who has been convicted of murder, serves his time, is released, and then does the same thing again? And, we have had a number of those. I think we have had more people who, probably, have committed more than one murder than those who have slipped through and may have been confined in error. What I am saying is, we ought to have equal concern for those people as well, because it is very hard to explain to the victim's family.

MR. ASKIN: But, we have to take the chance of executing innocent people in order to guard against somebody in the future who will kill a second time. I don't think the execution of innocent people, which is what you are willing to risk, is an appropriate answer to protecting public safety. That does not, to me, seem to be an acceptable answer, the answer of, "Yes, we will take the risk of executing an innocent person."

You know, I would rather, if necessary, have the life sentence without the possibility of parole, because at least then if it later comes out that evidence turns up to show that the person was innocent, you can just let him out of jail. Once he has been executed, it is too late.

SENATOR ORECHIO: You said that when they became 75 you would parole them.

MR. ASKIN: I think I probably would.

MR. ORECHIO: But, you don't have people at 40 or 50 who are murdering. Most of them are in that younger, 26 to 33, bracket.

SENATOR RUSSO: Senator Vreeland.

SENATOR VREELAND: Can I just ask this gentleman one question?

SENATOR RUSSO: Yes.

SENATOR VREELAND: You said in accusing the wrong person it was just luck that the person didn't get the death penalty or life imprisonment. Now, we have three states that have, as I understand it, the death penalty, is that correct?

MR. COHEN: I believe so. There may be more. There are more -- Utah, Georgia, Florida--

SENATOR VREELAND: Well, is there a record in those three states of how many false accusations, or people being given the death penalty, there have been? How many do you know of?

MR. COHEN: Senator, let me explain that. First of all, I don't think there are records which are kept.

SENATOR VREELAND: Why wouldn't they be kept? You just mentioned one case that was kept pretty well, I thought.



MR. COHEN: Well, that's just one that we know about because it happened just last year. I don't know what the situation is. I don't get Utah newspapers. Once that person is executed--

SENATOR VREELAND: Yes, I understand that.

MR. COHEN: Once a person is executed, everyone -- even the defense attorney -- has the tendency-- Well, the defense attorney doesn't easily forget about it. But, there is no more pursuing to find out whether that person was the wrong person or not for the next five years to try and find out. So, you never do find out, except in the kind of case where it is prevented initially, or if there is a dramatic offense where years later a person is arrested and he says, "By the way, you executed the wrong person; I was the individual who did it." But, they are generally not reported. You usually find them out through events such as happened in Hudson County. But, they are never reported anywhere. When someone is executed, basically the law enforcement people believe that is the person who committed the crime. They are certainly not going to go out and look for any new information.

But, sometime down the road, someone may be in jail and gives information to someone else, or to a correction officer, and five or six years later is when you finally realize that a person may have been wrongfully convicted or executed.

MR. ASKIN: I do want to say that Mr. Zimmerman, who is due to testify very shortly, can provide some information about innocent people on death row. He himself spent several years on death row. (complete statement on page )

SENATOR RUSSO: Incidentally, 35 states have reinstated the death penalty.

SENATOR VREELAND: I thought I heard three mentioned here this morning.

SENATOR ORECHIO: He might have said three; he may not have been accurate.

MR. COHEN: There were three that they used as examples.

SENATOR VREELAND: That is a big difference.

SENATOR RUSSO: Okay, thank you, gentlemen.

MR. COHEN: That doesn't necessarily make them correct.

SENATOR RUSSO: Of course not. Thank you very much, Neil. Good to see you again. Thank you very much, Mr. Askin.

Is Henry Schwartzchild here? (affirmative answer) Mr. Schwartzchild is from the ACLU.

H E N R Y S C H W A R T Z C H I L D: Yes, Mr. Chairman. I am the Director of the Capital Punishment Project of the American Civil Liberties Union, and I have been working on the subject now for well over six years, around the country.

SENATOR RUSSO: Excuse me, Mr. Schwartzchild. As you begin, Senator Dorsey will take over the Chair for just a few moments. I have to leave for a minute; I will be right back.

SENATOR DORSEY: Please continue.

MR. SCHWARTZCHILD: Mr. Chairman, I do not have a prepared statement, and I do not want to rehearse here the classical arguments that are raised by the prospect of the reinstitution of the death penalty. You have heard them alluded to a good many times by now -- whether they are deterrents, arbitrary discrimination, brutalization, or the unavoidability of mistakes. We suggest that we oppose the death penalty because we believe it to be in violation, fundamentally, of the eighth amendment ban against cruel and unusual punishment, as well as the equal protection clause and the due process clause of the United States Constitution.

I don't want to now tire you any further with the details of those considerations. Let me submit to you a few significant principles. It seems to us fundamental that



a society, or a state, that believes the killing of human beings is an acceptable answer to some kind of a problem, is a fundamentally uncivilized society. Every potential murderer who walks the street believes that he or she has a problem for which killing somebody is the right answer, and that he or she is the right person to do it, and can learn that lesson from the fact that the State of New Jersey can kill people because it has a problem which it believes it ought to solve by killing human beings. The notion that the Chairman propounded earlier this morning, that one ought to testify to the respect that the State of New Jersey has for human life by occasionally killing human beings is truly absurd beyond belief. It is paradoxical and absolutely beyond belief. How could one teach that killing human beings is wrong by killing human beings?

The State will testify by executions, and teach its citizens merely and only that in certain circumstances the killing of human beings is precisely the right thing to do. In fact, if you compare the disaster, the destructive and appalling disaster, of a killing that we call murder with the appalling and destructive disaster of a killing that we call execution, in some respects, with respect to the social implications, one could argue that the kind of killing called execution is socially worse. Why? Because to begin with, murder happens to a victim who is almost always unaware -- nobody expects to be killed next Thursday morning at 7:30 in the morning. And, secondly, because every rational human being in society -- you as members of the Senate of New Jersey, every one of your constituents, and we included -- is appalled and utterly condemns and abhors the killing called murder. But, consider the kind of killing we call execution. It happens with a long foreknowledge of the victim -- sometimes on the order of five, six, seven, or eight years. It happens with the long premeditation of the killer, namely the State. It happens under the color of law, in the name of everyone in the jurisdiction that does it, with great ceremony, and what is worst of all, with the widespread approval of a great many people in society who learn, as I said, that if the right people do the killing and think they have a good enough reason for doing the killing, then killing a human being is all right. That is the most destructive possible lesson for you gentlemen, as representatives of your constituencies, to impart to your own state.

I would almost confine my comments. I could speak, as you may possibly imagine -- other people speak at great length, and I could easily match their length and perhaps also their passion. I don't deny any of you the genuineness of your feelings, that you ought to help the State of New Jersey in supporting this measure.

I say to you in all seriousness that the lesson you will teach the citizens, the adults and particularly the children of New Jersey, will be an utterly destructive and useless lesson -- worse than useless, it will not make a single citizen of the State of New Jersey any safer. The studies, as you have heard, suggest not only that there is no deterrent effect; there may be a counter-deterrent effect, that is to say an incentive. Classicly, Gary Mark Gillmore, executed by a volunteer firing squad in Utah on January 17, 1977, came from a non-death penalty jurisdiction at that time, namely California, into a state where there were seven or eight other people on death row, well known to be a capital jurisdiction, and then insisted upon being executed -- that is to say, it is clear if you have read Norman Mailer's book about Gillmore, or if you read the Playboy interview with Gary Gillmore himself, if you read the accounts of what he said and how he felt about himself, he was clearly insistent upon ending his life. He did not have the resolve, the courage, or the means to do it, and took two innocent lives in order to force the state of Utah to commit suicide for him.

You have a great many pathological people walking the streets who will learn to listen to what you will teach them, namely that killing is all right under the right circumstances. They always believe, as you now genuinely believe, that his or hers are the right circumstances.

I shall end there, because it has been and it will be a long day. Let me only make one more comment to the Chairman of this Committee, who has rejoined us. It seems to me, if I understood him correctly, that he was concerned to confine the applicability of this measure -- I will find my copy in a moment -- to people who either committed the homicide themselves or by monetary incentive procured the commission of that homicide. When that matter was discussed this morning in the presence of somebody from the Attorney General's office, it seemed to me that this question then was discussed in terms of resolving it -- in the statutory draft here -- in terms of subsection 2, lines 6 and 7, of Senate 112. That, I submit to you, Mr. Chairman, is an error. The crucial problem of felony murder is not particularly that of the accomplice -- it is not restricted to the problem of the accomplice that your Chairman examined this morning, but it goes much further. If, for example, a friend of mine and I were to hold up a bank and the police surprised us in the act, and there was a shoot-out, and the police killed my co-criminal, I would then, though I did not kill that person and did not intend to kill him -- when the police kill that person, I am then guilty of a capital homicide and could be sentenced to death under the provisions of that bill. I think, subject to your correction, Mr. Chairman, I will point to you where that is.

In Subsection 3--

SENATOR RUSSO: Page?

MR. SCHWARTZCHILD: On page one -- Section 1, Subsection 3, the language suggests that if murder exists, when the actor, acting either alone or with one or more persons engaged in the commission of a series of felonys, causes the death of a person, other than one of the participants -- any person, including the police in the commission of my felony -- that is where the felony murder problem lurks, I believe, in your draft. And, if the Chairman is as intent as I understood him to be about confining the applicability of a bill that we, on a whole host of other grounds, profoundly and seriously oppose -- if he is concerned about restricting it to people who either commit the act itself or procure the act, then that is the language that has to be corrected, and not Subsection 2.

SENATOR RUSSO: You misread the bill.

MR. SCHWARTZCHILD: I'm sorry.

SENATOR RUSSO: The provision you are referring to defines murder.

MR. SCHWARTZCHILD: Right.

SENATOR RUSSO: It defines who may be guilty of murder.

MR. SCHWARTZCHILD: Quite so.

SENATOR RUSSO: The part dealing with the death penalty is the remainder of the bill in the amendments. Adding to that is the statement that we have incorporated into the bill today, that only the actor may be subjected to the death penalty.

MR. SCHWARTZCHILD: Then I have a different draft. I have Senate 112. If I am in error then I apologize. That point is moot, but I merely wanted to make sure that the Chairman's intention was reflected in this bill. Beyond that, I will be glad to answer your questions. I shall not, as I said, trouble you with further arguments that you have had rehearsed to you sufficiently, I believe.

SENATOR DORSEY: The Chairman is always explicit as to his views. He

worked very hard this morning. He has always taken this position. He wasn't involved with the felony murder situation. He did expressly say this morning that he was including the statement in the record to only include the actor and those who hire someone.

SENATOR RUSSO: That will be made part of the bill.

MR. SCHWARTZCHILD: Then you can be satisfied that you have at least met your purpose.

SENATOR DORSEY: Are there any other questions of Mr. Schwartzchild? (no questions) Thank you very much.

MR. SCHWARTZCHILD: Thank you.

SENATOR RUSSO: Joseph Woodcock. (no response) Mr. Isadore Zimmerman. Welcome, Mr. Zimmerman.

I S A D O R E        Z I M M E R M A N: How are you, Senator. I think you and I shared a lot of platforms.

SENATOR RUSSO: Yes, some few years ago.

MR. ZIMMERMAN: Yes, we have.

SENATOR RUSSO: Mr. Zimmerman and I were--

MR. ZIMMERMAN: We are still arguing about the same subject.

SENATOR RUSSO: We were on a couple of television programs together. Mr. Zimmerman, gentlemen -- although he will expound upon that -- I believe spent a number of years under a death sentence, and I think it was later determined that you were not the person.

MR. ZIMMERMAN: I was completely exonerated, Senator. As a matter of fact, this is what I would like to talk about. You gentlemen seem to have some doubts about what you are trying to do here today. I suggest if you do have doubts, why vote for capital punishment? I think we should just all get up and forget the whole thing, and proceed from there.

I am the outrageous victim of a miscarriage of justice. And, if you gentlemen think that it doesn't go on yet, you are sadly mistaken.

Recently, I did a show with four people who were victims of a miscarriage of justice, on the Phil Donahue show. I was highly instrumental in getting them out. People like me were executed back in '38 and '39, and these people undoubtedly would have been executed.

So, I say our system is definitely not infallible. People like me can still be executed. Don't forget, I was only two hours away from my execution. When I think back on the thirteen people that I saw executed, there is no doubt in my mind that four of them were totally innocent.

Actually, I try to speak for them from the grave. That is pretty hard for anybody to do. But, I want to talk for them. I want to make you realize that innocent people are still being slaughtered. It is a terrible thing.

For instance, out of a total of thirteen, there were four innocent. Three were retarded, going back to a balance of nine. Three were totally insane. Four were considered normal. What was the definition of normal? It was determined by a civilian board that really had no definition of sanity, no training whatsoever, and on the basis of a few informal talks, they decided whether you were sane or insane. And, because they said you were sane, you were executed -- almost automatically.

So, when I was on death row, I saw maybe as many as thirty people executed, overall, because these people determined that they were sane -- this civilian review board. And, these people had the power over life and death, literally. So, when

I tell you about innocent people being put to death, this is what happened. And, this is still happening.

The four men that I was talking about recently on the Donahue show all came out of death row. We had to expand our activities to the point where we ran down the witnesses after several years and finally got the witnesses to admit that they perjured themselves, and we proved the perjury -- and these people are walking the street today, good, solid citizens of the community. And, also because a man like me was not executed.

I have touched hundreds of lives to make better people of some of the people I was able to turn out. I became a jail house lawyer. Its a funny term, but, unfortunately, that is what I became. In my practice of the law, I was able to help over seven hundred people, although I handle thousands of cases. Out of the seven hundred people came a band of children who are today research chemists, doctors, lawyers, and professional people of all kinds. And, if I get one major discovery from them, such as a cure for cancer, I will feel that even the twenty-five years I spent in prison for a crime I didn't commit was worthwhile. This is my philosophy. And, I think these kids may be on the verge of it, because they are brilliant. I feel that I brought them into the world, because I gave their fathers the means to get out of prison. I set new precedents. I was able to convince courts. I was able to do a lot of things for these people. And, these kids survive today because I was not executed. If I had been thrown into a grave, as some of my friends were -- I use the word friend loosely because I was on death row with them -- this would not have occurred.

Who knows? Some of the people they executed may have had kids that would change the history of the world. Who can say no? Who can say yes? But, the fact remains that innocent people are still being put to death. Our system is not infallible, and if the State of New Jersey brings back capital punishment, your hands are going to be full of blood. I don't think you will ever be able to wash it off. And, if you resent what I am saying, I am really sorry. I didn't come here with malice in my heart. I came here with love.

For the years I spent in prison, I devoted myself to those who were less fortunate than I. I helped everybody I could. I felt that in helping others, I was helping myself. And, this is exactly what happened.

I came out of prison a better person than when I entered prison, although I had never been arrested in my life before this. Yet, I consider myself a very good person because I was given the opportunity to help my fellow man. And, I still want to help my fellow man. That is why I entreat you, I beg you, to consider this very, very carefully. You cannot reinstitute capital punishment and be sure in your minds that this is the right thing to do.

Senator Russo, you and I have talked about this quite a bit. I think I gave you some of the same arguments before. I wish you would say to me what you said then, that you would give it careful consideration.

Thank you for your kind consideration and careful attention. If you have any questions, I would be delighted to answer them. Just don't do a hatchet job on me that's all.

SENATOR RUSSO: Thank you, Mr. Zimmerman, and not only do we not resent your coming, but we appreciate it. You see, if you change a view or two, of more, it has been constructive. And, if you only make us think deeper into our conscience and trouble us more, even that is helpful, because at least then if we still maintain the position that some of us do, we at least know we listened and thought about it.



MR. ZIMMERMAN: Wonderful.

SENATOR RUSSO: I think I learned the first time we appeared together that your motives are good. You are sincere.

MR. ZIMMERMAN: Highly dedicated.

SENATOR RUSSO: You are. And, you present your argument in a way that I think people have to respect, and I certainly do.

MR. ZIMMERMAN: Thank you.

SENATOR RUSSO: So far, I haven't come around to your way of thinking.

MR. ZIMMERMAN: Well, that is your decision to make. One day I may convince you.

SENATOR RUSSO: But, I think if the test were, "if we are troubled, then let's go home," then I would be the first to go home. I think so long as we are dealing with an issue of this type, I am going to be troubled.

MR. ZIMMERMAN: If and when it occurs, I will be happy to hold your hand.

SENATOR RUSSO: Thank you.

SENATOR ORECHIO: That's the best offer we have had all day.

SENATOR RUSSO: Thank you very much for coming. Good luck to you. Take care of yourself.

Paul Stagg or Dudley Sarfaty, New Jersey Council of Churches. (no response)  
Hubert Williams.

MEMBER OF AUDIENCE: There is somebody here who will speak for Mr. Sarfaty.

SENATOR RUSSO: Will you give us your name, please?

D O R I S     H A V R A N: Reverend Sarfaty is alive and well. He asked me to take his place. I am Doris Havran; I am due to speak a bit later. In fact, although I have a rather small head, I am wearing a couple of hats. One of them is Reverend Sarfaty's, and the other is, I am President of the Lutheran Church Women of New Jersey, and I am on the Board of Church Women United.

I have for Senator Russo the Lutheran Church's statement on capital punishment. I believe it is taken from St. Augustan: "The State's Right to Take Life."

SENATOR RUSSO: Would you give that to the court reporter and see that copies are distributed to the members of the Committee?

MS. HAVRAN: I am representing the Council of Churches.

SENATOR RUSSO: Do you have a written statement?

MS. HAVRAN: Yes, I do.

SENATOR RUSSO: Is it something you can submit, and summarize for us?

MS. HAVRAN: I'm trying to.

SENATOR RUSSO: All right, because we have a lot of witnesses left.

MS. HAVRAN: In fact, I am going to do something now that the Bishops cannot do; I am going to be brief.

SENATOR RUSSO: Thank you.

MS. HAVRAN: First, Dudley asked that I tell you that the New Jersey Council of Churches joins the Roman Catholic Bishops in opposing the death penalty as a moral issue, and asks members to ponder the religious issue after they have considered everything else, no matter how popular or unpopular is the issue in the public mind.

The Lutheran Church's New Jersey Executive Board, yesterday, voted unanimously to reinstate their agreement with the statement that I forwarded to you.

Now, I would like to speak to you as the President of the Lutheran Church Women and Church Women United, and also as a prison volunteer. I know Tommy Trantino; I know George Merritt. I have sat alone in their rooms with them, and no matter what the punishment is, I know that will not get rid of murder. It will not stop

another young man from getting so high on drugs, that in his insanity he kills someone else. I know that to be true. I wish I could say if you kill one it will never happen again, or it will deter another youngster from drugs, violence, hatred, anger, or jealousy; it won't. I wish I could say that. I can't. But, what I ask you to consider is how we made essentially decent people into killers too, and those decent people are the prison guards. I have worked with prison guards. I realize that when they must regard another human being as something disposable, that takes their humanity from them. When one murderer is killed, it takes at least ten executioners, and those executioners have a life to live among us. I am not sure we even want them near us after they have done our work for us.

I ask you to consider the fact that the murderer will die, but the killers of the murderer have lives to live that go on, and that will not leave them. What you do here will not leave you either, I acknowledge that. But, to have your hand on the man you are killing is a horrendous thing that you will never forget. You are, in fact, taking their humanity from them by asking them to be the executioners for you.

I thank you for your attention. I can't answer for the Council of Churches, and I certainly wouldn't dare answer for a Bishop.

SENATOR RUSSO: Thank you very much. Are there any questions (no response) Will you leave your statement with the reporter?

MS. HAVRAN: Yes, I have a bunch of them.

SENATOR RUSSO: Okay. Hubert Williams. (no present) Raymond Kalainikas.

R A Y M O N D K A L A I N I K A S: Gentlemen, I wouldn't have waited so long, other than the fact that I believe that what I have to say is so radically different from what you have been listening to, you may want to listen to is.

I live down John's way; I live in Ocean County. John has placed in the Ocean County Reporter, which is a paper that comes out twice a week, his case against the death penalty.

SENATOR RUSSO: Against?

MR. KALAINIKA: I'm sorry -- his case for the death penalty. I have placed in that same paper my case against the death penalty. Of course, I have placed it in the Times Observer, and I am only a matter of a few blocks from his district.

I am simply a citizen. I have no professional status. But, I would like to present to you the case against the death penalty, as I understand was the case against the death penalty as presented by a carpenter 2,000 years ago, or more. It is my understanding of his case against the death penalty, and I think you will find it relatively new to you.

I have three points I would like to make. Let me briefly state the three points, and let me start with point three and then go back to one and two. The first point is, this carpenter, 2,000 years ago, stated: "Human life does not belong to the state, but, rather, to the essence of life, or what we call God. Therefore, jurisdiction over human life belongs to the essence of life and not to the State." He was tested with regard to jurisdiction.

SENATOR RUSSO: What is that from?

MR. KALAINIKA: Well, this is basically an interpretation of something I am about to tell you. I am going to speak about the case of where the coin was presented to the carpenter. More or less, they tested him with regard to the power of the state. He said, "Whose inscription is on the coin?" And, they all said, "Caesar's." His response was, "Give to Caesar that which is Caesar's, and to God that which is God's." Now, your life, my life, and that of every single human being is a creation or expression of the essence of life, or God. It doesn't belong to

the state. The air we breathe, the water we drink, the land we walk on is a creation or an expression of the essence of life, or God; and, therefore, the state doesn't have jurisdiction over it. So, in effect, point number one is we don't have the right to destroy a human life for any reason, because we don't have jurisdiction over human life. It is not ours to have.

Point number two, he stated, in effect, that the will, or the push and pull, or the command, or the dictate of the essence of life by the human mind is to build and foster its life within the human state. What do I mean by that? Well, the push and pull on your mind to feed the body, we call hunger. The push and pull of the essence of life on the human life to rest the body, we call becoming tired. The push and pull or the dictate or command of the essence of life on the human mind to procreate, we call the sex drive. What I am saying is, he put it in two simple dictates -- or two simple commands -- that he said are the dictates of the essence of life: "Love God first; and love your neighbor as yourself," meaning build and foster the life or the essence of life within the human state, within the body and mind of humanity, all of humanity. That is the absolute law of human existence. We don't have a right to violate it. No one has a right to violate it.

Now we come to point number three, which I would like to dwell on. We speak of justice. Humanity thinks it has the right to dispense justice. Well, he indicated that humanity does not have the right to dispense justice on humanity. Humanity is incapable of dispensing perfect justice, and everyone we have had here up to date has indicated that. We are not capable of that, gentlemen -- of dispensing perfect justice. We make too many mistakes.

Now, here is what is radically different from anything you have heard, whether you be Protestant or Catholic. This carpenter, 2,000 years ago, believed in the principle of an eye for an eye and a tooth for a tooth, and I do too. That's exactly why I am against the death penalty, because I believe in that principle. So, did he. Let me explain what I am trying to say. You know, when we violate that absolute law of love that says to build and foster god's life within the human state, we pay the price. If we give life to that life movement, life is given to us; if we take life from that movement, life is taken from us. In effect, what he was saying was, if an individual kills another human being, at some point within his existence he will be killed very much the same way. If we give life to ourselves or another human being, life will come back to us in very much the same way.

Let me explain the premise, or the understanding of reality, that this was based on, and let me show you how he expressed it and how he lived it. He held basically -- and this is something that you may have disagreement with, but you will have to admit it is going to be logical, and that it makes sense -- that the life is more than the body, and that the life essentially -- just the way the life of a tree takes on a set of leaves, season after season after season, seeking maturity and seeking growth -- is more than a body and takes on the human condition, over and over again. In the East they call it reincarnation; in the West it has become known as the evolution of the soul. But, in effect, he said justice goes over many lifetimes, not one single lifetime. He held that heaven and hell -- what you often call heaven and hell in the Protestant realm and the Catholic realm -- is within the human state, not something outside of the human state. In other words, your joy and your sorrow today is your heaven and hell. And, everything you do today to that life is creating your heaven and hell for the next ten minutes, the next ten years, the next ten lifetimes.



So, maybe you will understand the statement he made when he more or less indicated to people -- and we don't really understand what he was talking about, according to the way Catholics and Protestants generally view it -- he stated: "Do not condemn, and you shall not be condemned." In effect, he was saying don't condemn anyone to death. If you do, at some point within your existence you will be condemned to death.

SENATOR RUSSO: Ray, let me interrupt you.

MR. KALAINIKAS: Yes.

SENATOR RUSSO: And any member of the Committee who wishes to, may feel free to disagree with me. I am not prepared to say whether your interpretations of the teachings of the carpenter are correct or not. I don't think that is the function of this Committee. Suffice it to say that there are many different views of those interpretations, right in this entire room, not just among this Committee. We are not going to resolve this issue by, basically, theological or scriptural argument on the issue. Because, you say, "Basically, what he said was--" and then you give us your words. Well, we may agree with you, or we may not. We have a pragmatic matter of legislation to deal with, and there are two things that you don't generally argue about, politics and religion. Politics we have to argue about down here, but religion we can't. I don't think it is going to accomplish anything to go into a long discussion of interpretation of scripture and theology. We could end up, on that alone, with a two or three day debate. I don't think it is going to help us on this issue.

MR. KALAINIKAS: I think that you will agree that a man's politics is based on his understanding of life. Politics is basically based on a man's religion or understanding of life.

SENATOR RUSSO: Not necessarily; I don't agree with you.

SENATOR HIRKALA: Mr. Chairman, may I ask one short question, please?

SENATOR RUSSO: Sure.

SENATOR HIRKALA: Do you feel that there is never one instance when, as you call it, the state can take someone's life?

MR. KALAINIKAS: Yes, I would say the state--

SENATOR HIRKALA: In World War II, when some great military powers were overrunning country after country after country, do you feel that those countries which were being overrun had no right to fight back and protect their citizens, which, in effect, would have resulted in the killing of hundreds and hundreds of thousands of lives? Is that your feeling?

MR. KALAINIKAS: Well, basically, what I am saying is, if you say "fight", I believe in fighting for freedom and I believe in fighting for your rights.

SENATOR HIRKALA: But that results in killing.

MR. KALAINIKAS: Wait a minute. I do not believe in killing people; I do not believe in killing people for your rights or even in self-defense. The Quakers have been fighters all their lives, but they are not killers. They have done a lot of good for people because they fought for freedom and for human rights. But, they don't kill people.

SENATOR RUSSO: Your argument is basically against any sort of killing, whether it be in a war, whether it be to defend your life or your family's lives, or whether it be an execution.

MR. KALAINIKAS: That's exactly what the carpenter said 2,000 years ago.

SENATOR RUSSO: Is that the gist of your argument to this Committee, that killing is wrong no matter what category it is in?



MR. KALAINIKAS: I am speaking of killing with regard to killing human beings.

SENATOR RUSSO: Yes, whether it be in any of those categories, not just an execution?

MR. KALAINIKAS: That's right.

SENATOR RUSSO: All right. I think if that is the gist of your testimony, I think we understand that. Certainly, we respect the views of those groups, Quakers and others who feel that way.

MR. KALAINIKAS: John, have you ever been confronted with this situation? In other words, we will take that individual 2,000 years ago. He was caught in a kill or be killed situation. He wouldn't kill. His own friends were ready to kill in his defense, and his only response to them was the principle of an eye for an eye: "Peter, if you kill, at some point you will be killed, so don't do it."

SENATOR RUSSO: I don't agree with you on the interpretation of his teaching.

MR. KALAINIKAS: You don't agree with me?

SENATOR RUSSO: No. I believe in that carpenter and his teachings, but if I were faced with that situation, I would kill.

MR. KALAINIKAS: You would?

SENATOR RUSSO: Yes, in self-defense or to protect my family -- or perhaps in the cause of my country. Yes, I would. And, I don't believe that in doing so I would be violating the teachings of that carpenter, but I don't want to debate that now. That is a debate that goes on. You know, there are Quakers and there are Catholics, and there are Protestants, and there are agnostics, and it is not our function here to solve theological arguments. The gist of your argument is that this bill is wrong because it is killing, and you are against killing of any kind. I think we understand that, and we have heard and considered those arguments through our lifetimes as part of our experience in education and in growing up, and I don't think we ought to try and get into a discussion of the merit or lack of merit of that argument.

MR. KALAINIKAS: But, I think you will agree with me that you have never heard the principle of an eye for an eye explained quite the way I have explained it.

SENATOR RUSSO: I don't recall offhand.

MR. KALAINIKAS: That's right. That's exactly why I was here. Thank you.

SENATOR RUSSO: Enrique Arroyo.

ENRIQUE ARROYO: Mr. Chairman, I have this in writing, so I just want to point to just one or two paragraphs in my statement.

In the period between 1950 and 1963, twenty persons were executed by the State of New Jersey. Of these, thirteen were members of a minority group -- ten blacks and three Hispanics -- and so they constituted 65% of all persons who suffered capital punishment, which, as you know, is well above the proportion of blacks and Hispanics in the general population.

SENATOR RUSSO: Was it well above the proportion of the crime rate of those groups?

MR. ARROYO: Both. Both the crime rate and the general population. I am not going to bore you with the statistics, because as Neil said before, they are all in the library.

These three Puerto Ricans that were killed among the twenty that were executed, represented 15% of all the persons executed in the State of New Jersey, again at

a time when that population constituted less than 1% of the population. Today, we represent 6.7% of the population, so you might want to make your own calculations as to how high we will rate on the priority list of executions.

We oppose executions for the reasons that have been stated previously, with the exception of the last speaker's reasons, and because of our experience of what this means, particularly, to us as a population. I am afraid, Mr. Russo, that you sort of made is more scary for me with the comments you made this morning -- and I was disappointed at that -- where you very lightly attributed a causal relationship between the increase in crime in the State of Florida and the recent migration of Cubans to that community -- and I suppose of Haitians too, although a lot of them are behind bars. That kind of interpretation has also been tried in New York. It has been splashed all over the newspapers. New Yorker magazine had a large article, and basically the thrust of it was saying that crime in New York is due to migrants from Cuba, and this just doesn't hold water if you look at the statistics, where murders were larger in the three years before any Cubans hit the shore of New York than is currently the case.

So, it just doesn't comfort us any more to have that kind of impression thrown about, but it is something that we fully expect because of past history. That is what has happened, that is what has been happening, and that is what our prisons are about today, statistically. The pattern of discrimination and racism involved in making the decision as to who is guilty, who is innocent, who goes to jail, who doesn't go to jail, who is executed, and who is not executed is an uncomfortable one for us, because of our accident of birth in Puerto Rico -- which, incidentally, under the American flag does not have and has never had the death penalty. Thank you.

SENATOR RUSSO: Mr. Arroyo, just a brief statement. When my parents came here, and Senator Orechio's -- I guess around the same time -- and settled in New York, the crime rate was predominantly higher for Italians, and so were the murder rates and executions. Just so there is no misunderstanding, and I am sure you didn't misunderstand me, I don't suggest to you at all that Puerto Ricans are more pre-disposed as a group to murder or crime, any more so than I suggest Italians were at the time of their immigration. What I do suggest to you, though -- and this applies in Florida; we may disagree, so be it -- is that crime is generally indigenous to the ghetto areas, which today happen to be populated most heavily by Puerto Ricans, blacks, and in the past -- and still today in some areas -- Italians. And, crime is out of proportion to their percentage of the population if you take a country as a whole, or a state as a whole, or a city as a whole, in the ghetto groups. If they happen to be black, Puerto Rican or Italian, then crime is out of proportion in those groups, not because a Puerto Rican is more inclined to commit a murder than a white, Anglo-Saxon Protestant. I would never concede that, no more than I would that an Italian is or was, back in the early part of the century or today. But, the simple fact is, when you throw poor people into a large congested area, you have a higher crime rate, and you also have a higher murder rate.

I do emphasize though that the overwhelming number of those people in those areas, Puerto Ricans in New York, Cubans in Miami, Italians, back at the turn of the century in New York, do not commit murder and do not even commit crime. But, there are more of those in the ghetto areas that commit crimes than those who are not in the ghetto area. That is the point I tried to make. If we don't agree, then so be it. But, don't interpret my remarks -- I am sure you didn't -- as a suggestion

that by nature people of your ethnic origin or mine are more likely to commit crimes than those who have been here since the time of the Indians.

MR. ARROYO: Apparently what we do agree on is that it was tough luck in the late 1800's, and the early part of this century, if you had this kind of a bill in the State of New Jersey, for Italians, because they were going to get hit a hell of a lot harder than your non-Italians.

SENATOR RUSSO: Sure.

MR. ARROYO: Because folks who happened to be Italian at that time, because of the racism that existed against the Italians -- and the Italians were not judges and they were not lawyers and they were not the folks in the criminal justice system -- were more likely to just be picked up on the street; they were more likely to be accused; they were more likely to be arrested; and they were more likely to be falsely arrested than a person who was not Italian in some other neighborhood. That's what I am saying.

SENATOR RUSSO: My point is, if he was picked up and it was proven, with some strict standards, as in this bill, that he took the life of another person -- and generally the life of the person that he took was one of his own kind -- he ought to be subjected, at least, under the right circumstances, to the proper punishment, which in this case is the death penalty. That is the only point I make, that the person who is subjected to it ought to be subjected to it, regardless of his own race, color, or creed, and regardless of the race, color, or creed of his victim. That is the only point I am making.

MR. ARROYO: If I can leave with just this one thought.

SENATOR RUSSO: Sure.

MR. ARROYO: This whole day -- and a lot more time that I am sure you will be spending on this -- might more profitably be spent discussing ways that you can eliminate those ghettos, whether they were for the Italians in the '20's, or for the Puerto Ricans and blacks in Trenton and all over the State of New Jersey presently, that breed crime, than by finding out how you can kill a few people to try and set an example. I am afraid that I would like to spend a heck of a lot more time doing that with this Committee than to find ways by which we, unprovenly, can take retribution. I'm afraid I would like to see a lot more of the other done. I don't get too many chances to testify on that other end of the stick.

SENATOR RUSSO: We just passed some bills yesterday, dealing with the urban community problems. We have done that, and we do it whenever we can, within the budget constraints we have. They are worse now than ever because of the Federal system. But, we do that, and we are concerned about that.

MR. ARROYO: Thank you.

SENATOR RUSSO: Ann Ricks.



A N N R I C K S: Mr. Chairman, I will be very brief. I don't want to go over ground that has already been well covered by these excellent witnesses that preceded me. I only want to emphasize one point: we hear so much about, "think of the victim". If it were one of your own, you would feel differently. Of course my answer to that is why should I not think of the victim when it was my own daughter? I do know what the victim goes through and what the victim's family goes through. I want to assure you that you could do nothing for a murder victim. The victim is beyond help. The families cannot be helped. Another execution, another death, is only adding to their burden. It is only compounding the tragedy that they are already going through. My own family tells me that they could never endure it if there had been an execution in our case. I know many other families that feel the same way. They don't want vengeance. As far as restitution is concerned, what restitution can you make? In lesser crimes, perhaps you can, such as robbery, assault, and even rape there can be some restitution. But what can you do with murder? Could they give me back my daughter? Could they restore to her one hour of her precious life? They would only add another death. You simply exacerbate the pain that the family is already going through, and you further degrade and debase the entire society, including the loved ones of the murder victim. Believe me, I know whereof I speak.

Did you have a question?

SENATOR RUSSO: I was just going to say, I thought your friends would say to you-- We all have situations we react to differently. Yours is not unique. I went through the same one you did, and I don't agree with you.

MS. RICKS: I realize there are different reactions.

SENATOR RUSSO: We all have different feelings on that subject. I am not sure that you make it worse for the victim's family by punishment that is, in their opinion, just. Some would think it is just. It would have made it worse for you. It would not for others. Everyone is different. Go ahead. I didn't mean to interrupt you.

MS. RICKS: Perhaps you don't agree with me that it does degrade the entire society, and by degrading the whole society, it debases it, it dehumanizes it, and it belongs in the dark ages.

Let me make just one personal point. I was not born in New Jersey. I only lived here twelve years. But those twelve years encompassed my entire schooling-- from first grade through graduation. I graduated from Vineland High School. So, I have the feeling of coming home when I come to New Jersey. I claim New Jersey as my state because even though it was only a comparatively short time, it was probably the longest period in anyone's life, when it covers their entire school days. So, I have a very warm feeling for New Jersey. I take it personally when I see New Jersey trying to enact what I consider such a completely dehumanized law. I urge you as strongly as is possible to urge anyone, don't turn your state back into the dark ages. When you vote on this bill, vote to bring New Jersey up into the ranks of civilized society. Thank you.

SENATOR RUSSO: Thank you very much, Ms. Ricks.

Next, we will hear from Mr. Edwin Kruse.

E D W I N K R U S E: Good afternoon.

SENATOR RUSSO: Do you have a written statement?

MR. KRUSE: Yes. I would like to read it.

SENATOR RUSSO: Could you not read it in its entirety?

MR. KRUSE: I will abbreviate it.



SENATOR RUSSO: Could you? Because it is getting so late in the day. We are trying to keep the Committee in tact.

MR. KRUSE: I appreciate the problem.

My name is Edwin Kruse. I live in Chatam, Morris County, New Jersey. Today I am testifying on the Death Penalty Bill on behalf of New Jersey SANE, of which I am a board member. SANE was founded in 1957, nationally, and New Jersey SANE was founded a year later. The organization's initial efforts were to get an "A-bomb test-ban treaty", accomplished to some extent in 1963. Since then, SANE has been concerned with preventing nuclear holocaust either from weapons or power plants, and, in general, with the abolition of war and killing, and the directing of governmental resources and efforts, as well as individuals--

SENATOR RUSSO: Could you go to the portion of your statement that deals with this issue?

MR. KRUSE: (continuing) --to the enhancement of life on this "spaceship earth" we all inhabit.

One of the precepts of a better way of life that this democracy glories in is that of justice. The pledge of allegiance to the flag speaks of "liberty and justice for all", almost as if the goal were already obtained, rather than an ideal to strive for.

We all know that there was denial of liberty in the first four score and seven years of our nation's existence when slavery flourished, and was condoned by our system of justice, and duly recognized in our constitution. We know of current attempts to reinstitute the concept of involuntary servitude on a discriminatory basis to foster potential killing.

When it is expedient, a government can ignore concepts of justice in order to accomplish so-called "desired" goals. Mass killing of innocent civilians is condoned, such as the Kissinger/Nixon Christmas time saturation bombings of Vietnam, as justifiable. The prime movers or instigators of that slaughter in 1972, Henry Kissinger and Richard Nixon, are now multi-millionaires.

SENATOR RUSSO: Excuse me. I am going to interrupt you and ask you to confine your remarks to the Death Penalty Bill that is before this Committee today. We are not going into the world problems and Nixon and Kissinger. If you have to paraphrase it, do so, but confine your remarks to the bill that is before us.

MR. KRUSE: Okay. One might question the concept of what is just treatment for a murderer. Certainly all murderers cannot be given multi-million dollar suburban retreats in Bergen County. It just wouldn't be fair to Bergen County.

The social ills in this State and nation, though many are less than elsewhere, so I am led to believe-- How thankful I am that I don't live in El Salvador, where the ruling junta, with American-made hardware -- isn't that a pleasant term for killing machines like guns and attack helicopters?-- regularly kill helpless civilians.

SANE recognizes that we all have a long, long way to go to eliminate injustice. SANE believes the proper function of government is to sustain life-enhancing programs -- and I am glad you passed that legislation yesterday -- such as education, housing, health care, transportation, job fulfillment, combatting hunger, recreation, and many others -- and ideals such as justice, liberty and freedom, equality of opportunity, all of which uplift society.

The recent emphasis on death-dealing capacities, whether they are astronomical deficit exploding increases in the pentagon budget--

SENATOR RUSSO: Excuse me, Mr. Kruse. Has your statement been given to the reporter?

MR. KRUSE: No. I will give it to her.

SENATOR RUSSO: Give it to her now and we will read it.

MR. KRUSE: Thank you.

SENATOR RUSSO: Thank you very much, sir.

Next we will have Lucy MacKenzie.

LUCY MACKENZIE: Thank you, Mr. Chairman. I will be brief.

SENATOR RUSSO: Thank you, Lucy.

MS. MACKENZIE: During the debate on this Bill in 1976 and 1977 -- I think it was -- I happened to be in the Gallery of the Assembly and the Senate, and I found it a very moving experience -- perhaps the most moving moments that I have spent in the Legislature over the past ten years.

There were eloquent things said on both sides. Today I would simply like to quote very briefly from five of the people who spoke against the bill at that time:

Assemblyman Ronald Owens said, "The entire history of capitol punishment demonstrates a pattern of discrimination beyond challenge. You know that fifty-four percent of those executed between 1930 and 1960 were black, although they are only 10.5 percent of the population."

Assemblyman John Froude said, "My seven year old daughter sees rape, murder, carnage of all kinds on TV. We must think through our passions. I don't want to be debased any further, to fall into the pit which makes me no better than they are."

Senator James Dugan spoke, "Over six hundred people in the United States are on death row now, waiting to be gassed, garroted, hung, or electrocuted. Of the six hundred, a substantial number are poor and from minorities, but they have a common denominator -- they don't have the money to buy a life sentence. The death penalty should not be reinstated here. Swift and certain punishment should be our concern if we want to deter others. I'm concerned about the victims of crime, but not so blinded as to accept the illogical response that this bill represents. It panders to the outrage of the people of this state without protecting anyone. We will do a disservice to humanity by committing an act which approaches the act we are trying to punish."

Senator Martin Greenberg said, "Senator Russo is sincere, but he can't convince me. The law is not infallible -- the margin of error is one percent in the conclusion of cases. The irreversibility of the penalty is a crucial factor. I won't be stampeded by talk of bleeding hearts and no compassion for the victims, especially when the sponsors say that deterrence can't be proven. I come back, over and over, to the question, don't you have to be sure before you execute somebody? I think that the public wants the death penalty, but not death. They think that people will not really die, but can appeal or will be pardoned. This is a sorrowful choice".

And last, Senator Charles Yates, who was an Assemblyman at the time said, "There is a history of man's inhumanity to man, but we've made some slow progress. Today we'll take a small step forward or backward. I welcome this moment because I have this unique chance to speak and cast my vote against this one mean bill .

Thank you, Mr. Chairman.

SENATOR RUSSO: Thank you very much, Lucy.

That concludes our witnesses. For the gentlemen on the Committee, I suspect that the arguments we have heard today, pro and con, are sincere and well motivated -- they all were -- from the witnesses and from the Committee. I don't know if there

has been anything terribly new. I suspect that we have considered and sweated over these arguments for years. Unless there be anything further from the Committee, I will entertain a motion on this bill as amended, although first, if there is anyone from the Committee that would like to make any comments-- Senator Paoletta?

SENATOR PAOLELLA: Mr. Chairman, after all I have heard today, I have to tell you in all honesty, I changed my mind. I definitely want to support the bill.

SENATOR RUSSO: Senator Lynch?

SENATOR LYNCH: One thing that I have come to realize, after listening to everyone today, is the area of deterrence. The death penalty would certainly deter someone of my thinking. I think the point that someone made is that you are not dealing with people who are of the same mind that we are. I don't believe, myself, that we will deter people who are likely to commit murder anyway. That is one thing that I picked up today, which I don't think I believed or was aware of prior to today.

SENATOR RUSSO: Senator Orechio?

SENATOR ORECHIO: Mr. Chairman, I make the motion, as amended.

SENATOR PERSKIE: As amended?

SENATOR RUSSO: As amended.

SENATOR DORSEY: I second the motion.

SENATOR RUSSO: Moved by Senator Orechio and seconded by Senator Dorsey.

Roll call.

(Roll called by John Tumulty)

Senator Russo - yes.

Senator Hirkala - yes.

Senator O'Connor - no.

Senator Orechio - yes.

Senator Dorsey - yes.

Senator Gallagher - yes.

Senator Paoletta - yes.

Senator Vreeland - yes.

SENATOR RUSSO: Senator Lynch asked to be recorded in the affirmative.

MR. TUMULTY: The Bill is released.

SENATOR RUSSO: I thank you, gentlemen, for a good job. The co-sponsors added today -- some may have already been on it -- are Senators Orechio, Hirkala, Lynch, Gallagher, Paoletta, Vreeland, Dorsey, and there are a number of others on the Bill, listed in the index.

(Hearing concluded)

# AMNESTY INTERNATIONAL

## PROPOSAL FOR A PRESIDENTIAL COMMISSION ON THE DEATH PENALTY IN THE UNITED STATES OF AMERICA



APRIL 1980



## PROPOSAL FOR A PRESIDENTIAL COMMISSION ON THE DEATH PENALTY IN THE UNITED STATES OF AMERICA

1. As a worldwide human rights organization, Amnesty International is deeply concerned about the reintroduction of the death penalty in the United States of America and the resumption of executions. In September 1979 Amnesty International published a country-by-country survey of death penalty laws and practices throughout the world, together with an analysis of the international legal norms which favour the progressive abolition of capital punishment. From 3 to 11 December 1979, Martin Ennals, Secretary General of Amnesty International, carried out a human rights mission to the United States, visiting California, Ohio, Georgia and Washington, D.C., for discussions about the death penalty with state and federal officials, legislators, community organizations, the media and others.

2. On the basis of the Secretary General's visit and other material gathered at its International Secretariat in London, Amnesty International recommends the establishment of a Presidential Commission to study the death penalty in the United States. Amnesty International's principal reason for this recommendation is that the death penalty is not merely an issue of penal sanction for criminal conduct but is itself a matter of internationally recognized human rights.

3. In the view of Amnesty International, the death penalty violates the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment as guaranteed in the Universal Declaration of Human Rights, a document which the United States is pledged to uphold. The reintroduction of the death penalty, whether on the state or federal level, also contravenes both spirit and letter of recent United Nations resolutions for which the United States has voted and of international agreements which the United States has signed and whose ratification the President strongly supports.

4. The United Nations General Assembly in Resolution 32/61 of 8 December 1977 reaffirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment".

5. Article 6 of the International Covenant on Civil and Political Rights imposes restrictions on the use of the death penalty "in countries which have not abolished [it]" and states: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

6. Article 4 of the American Convention on Human Rights prohibits the reintroduction of the death penalty in countries that have abolished it. Recent moves to reintroduce the death penalty in federal and state legislation contravene these international agreements.

7. Although the United States has not yet ratified the International Covenant on Civil and Political Rights and the American Convention on Human Rights, it has expressed its moral obligation to abide by them by signing them. The Vienna Convention on the Law of Treaties provides that a signatory nation has an obligation to do nothing that would defeat the object and purpose of any signed treaties.

8. In Principle VII of the Final Act (1975) of the Conference on Security and Cooperation in Europe (the Helsinki Final Act), the participating states declare their intention to act in conformity with the Universal Declaration of Human Rights and to fulfil their obligations under other international declarations and agreements in the field of human rights, specific mention being made of the International Covenants.

9. Amnesty International's concern also stems from the growing number of men and women who are being sentenced to death in the United States. As of February 1980, there were more than 600 people under sentence of death in the United States, one of the largest such populations known in the world. Over the last six months, prisoners have been sentenced to death at the rate of approximately 10 a month. Should executions of even a small number of those currently under sentence of death actually occur, the government's position on human rights would be undermined and the tendency of other governments to respond to political or social unrest with executions would to that extent be reinforced.

10. Since the 1972 United States Supreme Court decision in *Furman v. Georgia*, which overturned existing death penalty laws, 36 states have introduced new death penalty legislation to comply with Supreme Court guidelines, and similar attempts are being made in other states. There is also a move to introduce new federal death penalty legislation.

11. International human rights treaties also make reference to the continuing validity of national human rights standards. Article 5, paragraph 2, of the International Covenant on Civil and Political Rights provides: "There shall be no restriction upon or

derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

12. At the national level, the imposition of the death penalty by the states of the United States arguably violates a number of federal constitutional guarantees. Although the United States Supreme Court has not declared the death penalty to be *per se* unconstitutional, the manner in which the death penalty is carried out, the pattern of its infliction and the fairness of state statutory procedures are all matters of federal concern. Although the federal government does not have a direct role in state law enforcement, it is charged with the enforcement of several guarantees of rights in the United States Constitution. The states must, for example, afford all citizens the right to due process of law and the equal protection of the laws. Both the Executive and the Congress have constitutionally mandated roles in enforcing federal constitutional requirements in the several states. Under Article II of the United States Constitution the President is required to "preserve, protect, and defend the Constitution of the United States", he is charged with the duty to enforce federal laws, and he is empowered to recommend legislation "as he shall judge necessary and expedient" to the Congress. Under Section 5 of the Fourteenth Amendment, the Congress is given explicit authority "to enforce, by appropriate legislation" the right of all citizens not to be deprived by the states of equal protection of laws, due process of law, or the "privileges or immunities of citizens of the United States".

13. A Presidential Commission on the death penalty would be particularly timely now because of the world attention focused on the death penalty this year. The United Nations Economic and Social Council will have the question of capital punishment on its agenda this spring in preparation for the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders which meets in August-September 1980 in Caracas, Venezuela. The death penalty is one of the main items on the agenda of the Caracas Congress. It will be recalled that the Fifth United Nations Congress in 1975 was responsible for drafting the United Nations Declaration on Torture which played an important role in establishing the world consensus against torture and cruel, inhuman and degrading treatment or punishment. The death penalty will be on the agenda of the United Nations General Assembly in autumn 1980 as a follow-up to the Congress, just as torture was in 1975.

14. The establishment of a Presidential Commission on the death penalty to study all aspects of the issue would enable the United States to play a positive role

in these deliberations. Establishment of such a Commission would reaffirm the commitment of the United States to international human rights standards and would demonstrate that the United States recognizes the human rights dimensions of the question of the death penalty. Establishment of a Presidential Commission would further demonstrate the commitment at the highest level of government to a full and objective study of this question, a study which could serve as an example both for the states within the United States and for other members of the United Nations.

15. Since the Second World War, several study commissions on the death penalty have been established in other countries. Among them were the Royal Commission on Capital Punishment in Great Britain, whose report was published in 1953; the Canadian Joint Committee of the Senate and House of Commons on Capital and Corporal Punishment and Lotteries, whose report was published in 1956; and the Ceylon Commission of Inquiry on Capital Punishment, whose report was published in 1959. Most recently, the Minister of Justice of Jamaica in June 1979 appointed a committee to "consider and report within a period of 18 months whether liability under the criminal law in Jamaica to suffer death as a penalty for murder should be abolished, limited or modified and if so to what extent, by what means and for how long, and under what conditions persons who would otherwise have been made to suffer capital punishment should be detained and what changes in the existing law and the penal system would be required."

16. The three previous Commissions—those in Great Britain, Canada and Ceylon—succeeded in collecting and publishing new information on the administration of the death penalty in their respective countries. Each report constituted an unimpeachable and authoritative record of the national experience of capital punishment and was used in subsequent deliberations on death penalty legislation.

17. In a similar way a Presidential Commission in the United States would serve to remove the issue of capital punishment from the political and emotional climate which presently surrounds it. The Commission's report and recommendations could provide federal and state officials, legislators and the public with an objective body of information to guide decisions on this issue.

18. Specifically, the Commission should be empowered to gather and examine information on the following aspects of the death penalty:

**i) The Death Penalty and International Human Rights**

In view of the growing international consensus that the death penalty is incompatible with internation-



ally recognized human rights standards, the Commission should examine the conflict between the retention of the death penalty and the United States' formal pledges and commitments to international human rights standards. The Commission should also examine the impact of the resumption of executions on the United States' position on human rights, and the undermining of the United States' moral authority to question executions in other countries.

## ii) The Death Penalty and United States Constitutional Rights and Guarantees

a) *The cruelty of death row.* 1. It has long been the practice in the United States for prisoners under sentence of death to be segregated from other prisoners on what has come to be known as "death row". They are placed there not because they are dangerous but because they have been convicted of capital murder. Prisoners under sentence of death wait there, often in isolation and under special deprivations and restraints, until the hour of their execution. For many prisoners, and for their families, this has been a living death, lasting for months and years. Yet apart from testimony introduced in the courts in some recent cases, there has been little examination of death row conditions, or of the justification for its existence. The Commission should consider whether the psychological and physical conditions of death row constitute cruel and unusual punishment as prohibited by the United States Constitution and violate the prisoners' right to equal treatment under the law.

2. By common law and under certain state statutes, execution of the insane is prohibited. Because of the stresses of death row, it is possible that a number of prisoners become insane while awaiting execution. Recent reports suggest that psychiatric treatment is absent or inadequate in most prisons and that procedures for determining legal insanity are unreliable and arbitrary. The Commission should examine the question of the determination of the mental condition of prisoners at the time of execution. It should also consider whether prevailing conditions in death row contravene the United Nations Standard Minimum Rules for the Treatment of Prisoners, in particular Rule 8, which sets forth criteria for the separation of prisoners (the nature of a prisoner's sentence is not among them); Rule 22, which stipulates that every institution should have a medical officer with knowledge of psychiatry and a psychiatric service "for the diagnosis and, in proper cases, the treatment of states of mental abnormality", and that sick prisoners who require specialized treatment should be transferred to specialized institutions or civil hospitals; and Rule 57, which states that "... the prison system shall not, except as incidental to justifiable segregation

or the maintenance of discipline, aggravate the suffering inherent in [imprisonment]."

b) *Discrimination in the imposition of capital punishment.* The President's Commission on Law Enforcement and Administration of Justice, appointed by President Lyndon B. Johnson, stated in its 1967 report that in the United States "the death penalty is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups". The proposed Presidential Commission should investigate whether this remains the case, and if so, attempt to determine the reasons for it. The Commission should also examine recent data showing that the death penalty is imposed disproportionately on those who kill whites, whether or not the killers themselves are white (that is, that the administration of the death penalty may be seen to place a higher value on the life of a white victim than on the life of a non-white victim).

c) *Arbitrariness of indictments and prosecutions.* The Commission should examine studies of felony indictments in death penalty jurisdictions which suggest that, apart from racial and economic factors, there is no clear pattern in determining whether a person accused of homicide is indicted and prosecuted for capital murder or instead for second-degree murder or manslaughter. This apparent arbitrariness would seem to result from discretion on whether or not to prosecute, from plea-bargaining policies and from other factors. Jurisdictions vary in the degree of randomness and arbitrariness in prosecutors' practice, but there is some evidence that virtually every jurisdiction lacks legal standards to indicate which offenders will face a death sentence and which will not.

d) *Possibility of error.* There have been a number of cases in the United States and other countries in which innocent people have been sentenced to death and executed. The Commission should examine the adequacy of current legal safeguards to prevent such errors. In deciding whether to sentence a person to death, a judge or jury must determine not only whether the defendant committed a homicide but also whether it was first or second degree, whether the defendant was sane or insane, and whether other "aggravating" or "mitigating" circumstances applied. It is important to know whether there are or could ever be adequate guidelines for making such judgments where the penalty is irreversible.

e) *Adequacy of legal representation of the poor.* It is a recognized fact that most prisoners under sentence of death are poor. In consequence, they cannot afford counsel of their choice and have been represented by state-appointed lawyers. The Commission needs to consider whether such counsel is adequate. Equally needed is a study of legal rep-

resentation in capital cases in state and federal proceedings beyond the direct appeal. Most states make no provision for state-financed legal representation in such "post-conviction proceedings".

f) *Fairness of state clemency procedures.* The procedures for determining which prisoners shall have their death sentences commuted to life imprisonment vary widely from state to state. Some research indicates that these highly informal and discretionary procedures are affected by racial and economic factors. A systematic examination of the clemency process throughout the country would provide important clarification in this area.

g) *Fairness of jury selection in death penalty cases.* It is still common practice in capital cases to exclude potential jurors who express opposition to the death penalty. The Commission should examine evidence that this practice produces juries who are biased against defendants both in the determination of guilt or innocence and in sentencing.

### iii) Social Consequences of the Death Penalty

a) *Impact of the death penalty on crime.* The Commission should review recent econometric studies and comparisons of crime statistics in states and countries where the death penalty has been practised and then abandoned to determine whether there is any evidence that the death penalty has a special deterrent effect.

b) *Impact on the criminal justice system.* The Commission should gather information on the impact of the death penalty on the administration of justice with regard to rate of disposition of cases, special due process requirements, notoriety of cases, and the determination of innocence or guilt. Because costs are sometimes cited as an argument for retention of the death penalty, the Commission may also wish to examine this aspect of the problem.

c) *Impact on the correctional system.* The Commission should study the impact of executions on the correctional system with regard to security, morale, guard and prisoner brutality, the effect on the surrounding community, and the reputation of the correctional system.

d) *Impact on families of the victims of crime.* The Commission could usefully examine the needs of the families of victims and whether, on ethical and psychological grounds, executions constitute an appropriate response to their grief.

e) *Impact on family members of the condemned prisoner.* Any punishment of an offender can affect

his or her family as well, but the death penalty is a qualitatively different punishment. The Commission should examine the degree of suffering and psychological damage which the death penalty imposes on the relatives of those who are to be (or have been) executed.

f) *Impact on public respect for life and for law.* The Commission should consider the atmosphere created by an execution; what message it communicates to different sectors of the population; whether it tends to enhance or devalue life and the public's sense of justice.

### iv) Alternatives to the Death Penalty

a) *Basis of public support.* The Commission should try to discover the reasons for public support for the death penalty, what the public wants to see accomplished, and what factors lead to demands for execution in particular cases. Such information could be vital for any discussion of alternatives to the death penalty.

b) *Alternative penalties.* Various countries and various states of the United States have abolished the death penalty at one time or another without experiencing a consequent increase in the rate of homicide. It would be useful to study what alternative penalties they have used and what experiences there have been. The Commission in this connection could examine recent proposals from criminologists and law enforcement personnel on how to deal most constructively with those who commit murder and other violent crimes.

19. There can be no more serious act of government than the deliberate killing of a human being. Yet more than 600 men and women are currently under sentence of death in the United States and several more are sentenced to death each week. Before the United States proceeds on a path that could lead to widespread executions, it should examine at the highest level all the information available on the social impact, constitutionality and desirability of such a policy.

20. Amnesty International expresses its strong hope that a Presidential Commission on the death penalty will be established and that there will be a moratorium on all executions until the Commission reports its findings. Amnesty International hopes that the Commission will provide evidence leading to the total abolition of the death penalty in the United States of America.

April 1980



**AMNESTY INTERNATIONAL** is a worldwide movement which is independent of any government, political grouping, ideology, economic interest or religious creed. It plays a specific role within the overall spectrum of human rights work. The activities of the organization focus strictly on prisoners:

- It seeks the *release* of men and women detained anywhere for their beliefs, colour, sex, ethnic origin, language or religion, provided they have not used or advocated violence. These are termed "*prisoners of conscience*".

- It advocates *fair and early trials* for all *political prisoners* and works on behalf of such persons detained without charge or without trial.

- It opposes the *death penalty* and *torture* or other cruel, inhuman or degrading treatment or punishment of *all prisoners* without reservation.

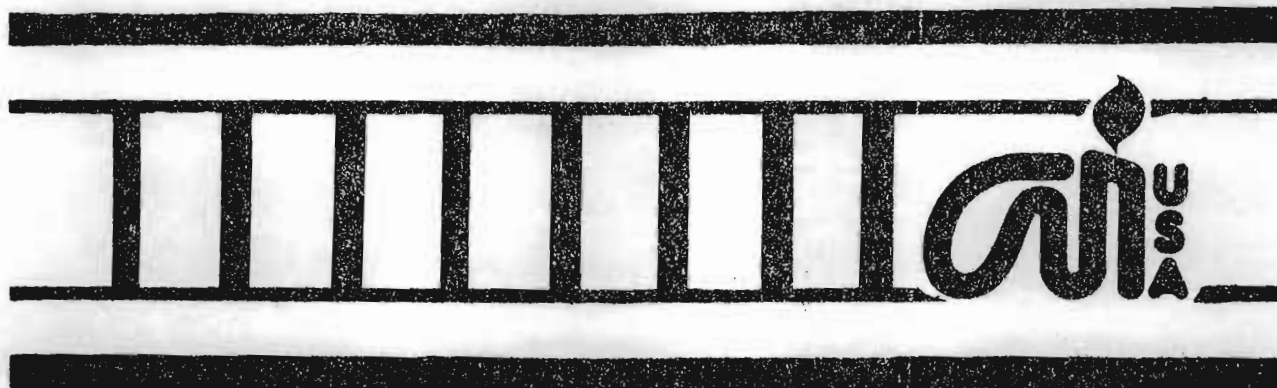
**AMNESTY INTERNATIONAL** acts on the basis of the United Nations Universal Declaration of Human Rights and other international instruments. Through practical work for prisoners within its mandate, Amnesty International participates in the wider promotion and protection of human rights in the civil, political, economic, social and cultural spheres.

**AMNESTY INTERNATIONAL** has over 2,000 adoption groups and national sections in 39 countries in Africa, Asia, Europe, the Americas and the Middle East, and individual members, subscribers and supporters in a further 86 countries. Each adoption group works on behalf of at least two prisoners of conscience in countries other than its own. These countries are balanced geographically and politically to ensure impartiality. Information about prisoners and human rights violations emanates from Amnesty International's Research Department in London.

**AMNESTY INTERNATIONAL** has consultative status with the United Nations (ECOSOC), UNESCO and the Council of Europe, has cooperative relations with the Inter-American Commission on Human Rights of the Organization of American States and is a member of the Coordinating Committee of the Bureau for the Placement and Education of African Refugees of the Organization of African Unity.

**AMNESTY INTERNATIONAL** is financed by subscriptions and donations of its worldwide membership. To safeguard the independence of the organization, all contributions are strictly controlled by guidelines laid down by AI's International Council and income and expenditure are made public in an annual financial report.

# WHY AMNESTY INTERNATIONAL CALLS FOR A PRESIDENTIAL COMMISSION ON THE DEATH PENALTY



**AMNESTY INTERNATIONAL**, a worldwide human rights organization and recipient of the 1977 Nobel Peace Prize, is deeply concerned about the reintroduction of the death penalty in the United States, the resumption of executions, and the large and rapidly growing number of men and women on death row.

**AMNESTY INTERNATIONAL** opposes the death penalty as a violation of the right not to be subjected to cruel, inhuman and degrading punishment and the right to life as guaranteed by the Universal Declaration of Human Rights. Because of these concerns, Amnesty International is calling for the establishment of a **PRESIDENTIAL COMMISSION ON THE DEATH PENALTY** to study the death penalty and the impact of its use in the United States.

A **PRESIDENTIAL COMMISSION** would serve the essential function of removing the issue of capital punishment from the political and emotional climate which presently surrounds it. The Commission's findings would provide lawmakers, Federal and state officials, and the public with an objective body of information on which to base sound policy.

**THE PRESIDENTIAL COMMISSION WOULD GATHER & EXAMINE INFORMATION** on all aspects of the death penalty — much of which information has never been adequately reviewed by any authoritative governmental body. Possible areas of study include the following.

#### **CONFLICT WITH INTERNATIONAL HUMAN RIGHTS STANDARDS**

There is a growing international consensus that the death penalty is incompatible with internationally recognized human rights standards. The United Nations General Assembly in Resolution 32/61 of December 8, 1977 reaffirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.

The American Convention on Human Rights prohibits the reintroduction of the death penalty where it has been abolished.

- Is the death penalty consistent with internationally recognized human rights standards and U.S. human rights commitments?
- Might resumption of the use of the death penalty affect the United States' reputation as an advocate of human rights or undermine its legal and moral authority to challenge executions in other countries?

#### **DETERRENT EFFECT**

Recent econometric studies and comparisons of crime statistics in states and countries where the death penalty has been practiced and then abolished are inconclusive on the question of whether the death penalty is an effective deterrent. A United Nations committee charged with studying capital punishment found that "the data which now exist show no correlation between the existence of capital punishment and the lower rates of crime."

- Does the death penalty deter more effectively than any other punishment such as lengthy imprisonment?

#### **DISCRIMINATION IN THE IMPOSITION OF CAPITAL PUNISHMENT**

The President's Commission on Law Enforcement and Administration of Justice, appointed by President Lyndon B. Johnson, states in its 1967 report that in the United States "the death penalty is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." Recent data show that the death penalty is imposed disproportionately on those who kill whites, whether or not the killers themselves are white.

- Is the death penalty still imposed disproportionately on the poor and members of minority groups?

### **ARBITRARINESS OF INDICTMENTS AND PROSECUTIONS**

Studies suggest that there is no clear or consistent pattern in determining whether a person accused of homicide is indicted and prosecuted for capital murder or instead for 1st degree non-capital murder, 2nd degree murder or manslaughter.

- Are procedures adequate for insuring consistent treatment of like offenders?

### **POSSIBILITY OF ERROR**

Several investigations have uncovered cases, totalling over 75 in the last 100 years, in which an innocent person was sentenced to death and in some cases executed. In the last 5 years there have been at least 7 cases of persons condemned to death who were later found innocent.

- Are there adequate safeguards to protect against the sentencing and/or execution of innocent persons?

### **ADEQUACY OF LEGAL REPRESENTATION OF THE POOR**

Most prisoners under sentence of death are poor and so are represented by state appointed lawyers. Most states make no provision for state-financed legal representation beyond the trial and direct appeals.

- Is legal representation of the poor adequate?

### **FAIRNESS OF STATE CLEMENCY PROCEDURES**

Procedures for determining which prisoners shall have their death sentences commuted to some lesser punishment vary from state to state. Some studies suggest that these discretionary procedures are affected by racial, economic and geographic factors.

- Are state clemency procedures fair?

### **IMPACT ON THE CRIMINAL JUSTICE & CORRECTIONAL SYSTEMS**

While studies show that there is no trial in 90% of non-capital murder cases, in most capital murder cases there are two trials — one to determine guilt or innocence and a second to set the sentence. All states provide for a mandatory appeal, and most states allow for several appeals. The defendant further has the right to a series of federal appeals.

- What are the costs of the death penalty in terms of financial and workload burden on the courts, and psychological, social and financial burden on the correctional system?



**SINCE WORLD WAR II**, study commissions on the death penalty have been established in several nations including GREAT BRITAIN, SRI LANKA, and CANADA. These three commissions were successful in collecting and publishing new information in their respective countries.

The establishment of such a commission in the United States has become a pressing need because of the growing number of death sentences being passed. More than 650 men and women were on death row as of May 1980 and the number is growing at the rate of over 10 a month. This is the largest death row population in U.S. history and currently may be the largest in the world. Before the United States proceeds on a path that could lead to widespread executions, it should examine all the information available on the social impact, constitutionality, efficacy and desirability of such a policy.

**SUPPORT FOR A PRESIDENTIAL COMMISSION** does not in itself imply support for the abolition of the death penalty. Rather, it demonstrates a recognition of the seriousness of the problem and a concern that any decisions made be based on a thorough examination of the issues and of all alternatives.

\* \* \* \* \*

YES, I support the call for a Presidential Commission on the Death Penalty

Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_ (zip) \_\_\_\_\_

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10x

EXTERNAL

AI INDEX : ACT 51/05/80

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NEW STATEMENTS ON THE DEATH PENALTY

1. United Nations Secretariat

"Despite much more advanced research efforts mounted to determine the deterrent value of the death penalty, no conclusive evidence has been obtained on its efficacy ...

It ... seems to be an important task of Governments, the academic community, the mass media, and other publicly minded organizations ... to educate the public as to the uncertainty of the deterrent effect of capital punishment ...

The death penalty constitutes 'cruel, inhuman or degrading punishment', which even in the light of the behaviour at which it is directed, should not be acceptable. The anti-criminal reaction of society to the capital offender should not exclude a priori the possibility of rehabilitation."

- Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August to 5 September 1980.  
Capital Punishment : Working Paper Prepared by the Secretariat. A/CONF.87/9

2. United Nations Secretary-General

"The General Assembly has affirmed that the main objective to be pursued is that of progressively restricting the number of offences liable to the death penalty with a view to the desirability of eventually abolishing this punishment in all countries. Current evidence indicates, however, the distressing fact that there might well be a trend towards an increase in laws creating capital offences, in the number of death sentences imposed, and in the number of executions in many countries. An opinion seems to prevail that the death penalty is essential to the maintenance of law and order, justifiable against singularly heinous offences, and a vital deterrent against escalation of crime. This appears to be disproved by the experience of the countries which have abolished capital punishment. It is necessary to give serious consideration to the question of capital punishment and to ways and means of its restriction since the taking of life of human beings in the name of retribution, incapacitation and an unsubstantiated deterrent effect on others clearly violates respect for the dignity of every person and the right to life as stated in the basic postulates of the United Nations."

- Statement by Secretary-General Kurt Waldheim at the opening in Caracas on 25 August 1980 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, read on his behalf by Jean Ripert, Under-Secretary-General for International Economic and Social Affairs

3. Revised draft resolution on the death penalty submitted to the Sixth UN Congress

Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August to 5 September 1980. A/CONF.87/C.1/L.1/Rev.1 (1 September 1980).

Committee I, Agenda item 7

United Nations Norms and Guidelines in Criminal Justice from Standard-Setting to Implementation, and Capital Punishment.

Death Penalty

Austria, Ecuador, the Federal Republic of Germany and Sweden : revised draft resolution

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Having regard to article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights which protect everyone's right to life,

Having regard further to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights which prohibit torture as well as cruel, inhuman or degrading treatment or punishment,

Recalling General Assembly resolutions 1396 (XIV) of 20 December 1959, 1918 (XVIII) of 5 December 1963, 2393 (XXIII) of 26 November 1968, 2857 (XXVI) of 20 December 1971, 3011 (XXVII) of 18 December 1972 and 32/61 of 8 December 1977, as well as Economic and Social Council resolutions 934 (XXXV) of 9 April 1963, 1337 (XLIV) of 31 May 1958, 1574 (L) of 20 May 1971, 1656 (LII) of 1 June 1972, 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975 and 1979/22 of 9 May 1979 which confirm the continuing interest of the United Nations in the question of capital punishment with a view to restricting and eventually abolishing that punishment,

Noting in particular that in resolution 2857 (XXVI) the General Assembly affirmed that, in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries,

Being aware that the evidence on the deterrent effect of capital punishment is inconclusive,

Noting that it has not been established that the total abolition of the death penalty has led to negative consequences in the field of criminal policy,

Considering that there <sup>are</sup> important humanitarian considerations which speak in favour of a restrictive use and the eventual abolition of capital punishment,

Having regard to the Secretary-General's second five-year report on capital punishment and his report on practices and statutory rules which may govern the right of a person sentenced to capital punishment to petition for pardon, commutation or reprieve,

Noting that there has been within a number of Member States in recent years a trend, de jure and de facto, towards final abolition of the death penalty,

Having discussed, in compliance with General Assembly resolution 32/61, the various aspects of the use of capital punishment and the possible restriction thereof, including, as a first step, a more generous application of rules relating to pardon, commutation or reprieve,

1. Declares that further restriction in the application of capital punishment and its eventual abolition would be a significant contribution to the strengthening of human rights, in particular the right to life;
2. Reiterates that the ultimate objective is the total abolition of capital punishment throughout the world and that, with a view to achieving this objective, the use of capital punishment should be gradually restricted;
3. Expresses the hope that all States which have not abolished capital punishment will work towards that end, taking into account the particular circumstances prevailing in each State;
4. Further expresses the hope, while recognizing the sovereign right of each State to determine its own criminal policy, that capital punishment will not be re-established in States which have abolished it and that, in States which have not abolished capital punishment, its application will not be extended to new categories of offences;
5. Recommends to States which have not abolished capital punishment to consider establishing a moratorium in its application, or creating other conditions under which capital punishment is not imposed or is not executed, so as to permit those States to study the effects of abolition on a provisional basis;
6. Urges those States which have not abolished capital punishment to review their rules and practices regarding judicial appeal, pardon, commutation and reprieve so as to provide for a more generous application of such rules and practices in regard to persons who have been sentenced to death;



7. Invites those States which have not abolished capital punishment to apply, inter alia, the following generally accepted international human rights standards :

- (a) Capital punishment may be imposed only for the most serious crimes;
- (b) Capital punishment may be imposed only in accordance with the law in force at the time of the commission of the crime;
- (c) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women;
- (d) Capital punishment shall not be carried out pending any appeal proceedings or other proceedings relating to pardon or commutation of sentence;
- (e) Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, including the right of anyone suspected of or charged with a crime for which death sentence may be imposed, to adequate legal assistance at all stages of the proceedings;
- (f) Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction;
- (g) Anyone sentenced to death shall have the right to seek pardon or commutation of sentence;
- (h) Amnesty, pardon or commutation of sentence may be granted in all cases of death sentences;

8. Invites the Economic and Social Council:

- (a) To request the Secretary-General to obtain from Member States and from other available sources information about death sentences imposed or carried out in different countries;
- (b) To request the Secretary-General to monitor, on the basis of such information the world-wide development relating to the legal provisions as well as the actual imposition and execution of the death penalty;
- (c) To request the Sub-Commission on Prevention of Discrimination and Protection of Minorities to include the problem of capital punishment in its work programme;
- (d) To review regularly the question of capital punishment and the measures taken by States for its restriction and eventual abolition.

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(NOTE: The revised draft resolution will be included in the report of the Sixth Congress to the United Nations General Assembly. Discussion of the revised draft resolution could not be completed at the Congress for lack of time.)

4. Emergency resolution on the death penalty, adopted by the 13th International Council of Amnesty International in Vienna, Austria, 14th September 1980

The International Council,

noting the attention given to the issue of the death penalty at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recently concluded in Caracas,

welcomes the statement of the United Nations Secretary-General to the Congress that capital punishment "violates respect for the dignity of every person and the right to life as stated in the basic postulates of the United Nations",

urges the General Assembly of the United Nations, at its 35th Session (autumn 1980), to confirm and clarify that the death penalty violates fundamental human rights, specifically the right to life and the right not to be subjected to cruel, inhuman or degrading punishment,

calls upon all AI national sections and members to appeal to their governments to seek within the United Nations General Assembly such a declaration on capital punishment,

reiterates the resolve of Amnesty International to mobilize public appeals to governments until executions are halted and the death penalty is everywhere abolished.

EXTERNAL

RESOLUTION

on the abolition of the death penalty in the European Community adopted on 18 June 1981

The European Parliament,

- having regard to the motion for a resolution (Doc.1-20/80),
- having regard to petitions Nos. 16/80 and 41/80,
- whereas the European Community is not simply a 'common market', but also a common civilization,  
whereas any concept of human rights consonant with the principles of European civilization requires that the right to live be respected and guaranteed for all, therefore the Law must be both strong to defend potential victims and consistent by never ordering that human life be taken,
- aware that the responsibilities deriving from universal suffrage give the European Parliament a political and moral duty to contribute to the formation, guidance and expression of the opinion of the peoples of Europe faithful to the principles of European civilization,
- whereas the application of the death penalty makes it impossible to correct judicial errors,  
whereas the death penalty may be replaced by long prison sentences that are just as powerful a deterrent (in cases where the assailant can be deterred) and whereas, as the statistics in countries which have abolished capital punishment have amply demonstrated, the incidence of those crimes for which the death penalty was formerly imposed has not varied significantly from the incidence of crime generally,
- whereas efforts must be directed towards preventive care and curative treatment to reintegrate the criminal into society wherever possible,
- whereas an implementing agreement to the European Convention on the suppression of terrorism was signed in Dublin December 1979 and work has begun at the request of the Ministers of Justice of the Nine meeting in Dublin on the preparation of a draft Convention for cooperation in matters of criminal law between the Member States of the European Community,  
whereas cooperation in matters of criminal law should not consist solely of repressive measures, but must also help to strengthen existing humanitarian measures,
- voicing the hope that this initiative will provide inspiration for all countries in the world which still enforce the death penalty,  
having regard to Article 230 of the EEC Treaty ('The Community shall establish all appropriate forms of cooperation with the Council of Europe'),
- having regard to Resolution 727 (1980) and Recommendation 891 (1980), in which on 22 April 1980, the Parliamentary Assembly of the Council of Europe declared itself in favour of the abolition of the death penalty for crimes committed in times of peace and asked that Article 2 of the European Convention on Human Rights be amended accordingly, 16x

- having regard to the joint declaration by the European Parliament, the Council and the Commission on respect for fundamental rights,
  - drawing attention to its resolution of 21 November 1980 on the abolition of the death penalty in the Community (Doc. 1-589/80) in which it called upon the Member States to abandon capital punishment,
  - having regard to the report of the Legal Affairs Committee (Doc. 1-65/81),
1. Expresses its strong desire that the death penalty should be abolished throughout the Community;
  2. Invites the Member States to amend their legal provisions, where necessary, and to take active steps within the Committee of Ministers of the Council of Europe to ensure that the European Convention on human rights is amended accordingly;
  3. Hopes, with that end in view, that a wide-ranging debate on the abolition of the death penalty will take place within the competent national bodies and in the necessary spirit of calm consideration;
  4. Instructs its President to forward this resolution to the parliaments and governments of the Member States and to the Council and Commission.



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15 September 1979

THE DEATH PENALTY:

LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES

Attached is a list of countries indicating whether or not their laws provide for the death penalty. This list has been compiled on the basis of information available to Amnesty International as of 15 September 1979. If a country does not appear on the list, it is because Amnesty International has no information on the death penalty in that country.

Any changes and corrections to this list will be issued as necessary.

\*\*\*\*\*

ABOLITIONIST BY LAW FOR ALL CRIMES

(Countries whose laws do not provide the death  
penalty for any crimes)

AUSTRIA  
BRAZIL  
COLOMBIA  
COSTA RICA  
DENMARK  
DOMINICAN REPUBLIC  
ECUADOR  
FIJI  
FINLAND  
FEDERAL REPUBLIC OF GERMANY  
HONDURAS  
ICELAND  
LUXEMBOURG  
\*\* NICARAGUA  
NORWAY  
PANAMA  
PORTUGAL  
SWEDEN  
URUGUAY  
VENEZUELA  
FRANCE

TOTAL: 21 countries

\*\* On 21 August 1979 the Nicaraguan government introduced a Bill of Rights which abolished the death penalty for all crimes. The document will be reviewed by a Council of State.

- 2 -

ABOLITIONIST BY LAW FOR ORDINARY CRIMES

(Countries whose laws retain the death penalty ONLY under exceptional circumstances or for exceptional crimes such as: military offences, crimes committed in time of war, national security offences including treason. These countries do not impose the death penalty for crimes such as: murder, rape, theft or drug trafficking)

CANADA  
ISRAEL  
ITALY  
MALTA  
NEPAL  
NETHERLANDS  
NEW ZEALAND  
PERU  
SEYCHELLES  
SPAIN  
SWITZERLAND  
UNITED KINGDOM

TOTAL: 12 countries

\*\*\*\*\*

FEDERATED COUNTRIES WITH DIVIDED JURISDICTIONS

(Countries in which some states are abolitionist and others are retentionist)

AUSTRALIA  
MEXICO  
USA

TOTAL: 3 countries

\*\*\*\*\*

RETENTIONIST

(countries and territories whose laws retain the death penalty for ordinary crimes. However, some of these countries have not in practice carried out executions in recent years)

AFGHANISTAN  
ALBANIA  
ALGERIA  
ANGOLA  
ANTIGUA  
ARGENTINA  
BANGLADESH  
BAHAMAS  
BAHRAIN  
BARBADOS  
BELGIUM  
BENIN  
BERMUDA  
BOLIVIA  
BHUTAN  
BOTSWANA  
BRITISH VIRGIN ISLANDS  
BRUNEI  
BULGARIA  
BURMA  
BURUNDI  
CAMEROON  
CENTRAL AFRICAN EMPIRE  
CHAD  
CHILE  
CHINA (People's Republic)  
CONGO  
CUBA  
CYPRUS  
CZECHOSLOVAKIA  
DJIBOUTI  
DOMINICA  
EGYPT  
EL SALVADOR  
EQUATORIAL GUINEA  
ETHIOPIA  
~~FRANCE~~  
GABON  
GAMBIA  
GERMAN DEMOCRATIC REPUBLIC  
GREECE  
GRENADA  
GUINEA  
GUINEA-BISSAU  
GUATEMALA  
GUYANA  
HAITI  
HONG KONG  
HUNGARY  
INDIA  
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IRAN  
IRAQ  
IRELAND  
IVORY COAST  
JAMAICA  
JAPAN  
JORDAN  
KAMPUCHEA  
KENYA  
KOREA (Republic)  
KUWAIT  
LAOS  
LEBANON  
LESOTHO  
LIBERIA  
LIBYA  
LIECHTENSTEIN  
MADAGASCAR  
MALAYSIA  
MALAWI  
MALI  
MAURITANIA  
MAURITIUS  
MONGOLIA  
MOROCCO  
MOZAMBIQUE  
MUSCAT & OMAN  
NAMIBIA  
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YEMEN (People's Dem. Rep.)  
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ZAMBIA  
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Ghana  
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Yugoslavia

120  
TOTAL: ~~114~~ countries



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England

AMNESTY INTERNATIONAL  
CONFERENCE ON THE ABOLITION OF THE DEATH PENALTY  
STOCKHOLM 1977

Original: Russian

Letter to the Organizing Committee of the Conference  
on the Abolition of the Death Penalty: A message sent to  
Amnesty International by academician Andrei Sakharov

I am grateful for the invitation to take part in this symposium devoted to the subject of the need for abolition of the death penalty, a subject which has long disturbed me ... I cannot go to Stockholm, and I ask that this letter be considered as my statement to the symposium.

I fully support the basic arguments advanced by opponents of the death penalty.

I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of a society. A state, in the person of its functionaries, who like all people are inclined to making superficial conclusions, who like all people are subject to influences, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act - the deprivation of life. Such a state cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true - that savagery begets only savagery.

I deny that the death penalty is practically necessary or effective as a means of defending society. The temporary isolation of offenders which may be necessary in some cases must be achieved by more humane and more flexible measures which can be amended in the event of judicial error or changes in society or in the personality of the offender.

I am convinced that society as a whole and each of its members individually, not just the person who comes before the courts, bear responsibility for the occurrence of a crime. There are no simple solutions for reducing and eliminating crime, and in any event, the death penalty provides no answer. The reduction of crime and even its full elimination can be achieved in the future only through prolonged evolution of society, a general humanistic ascent instilling in people a deep respect for life and human reason and greater attentiveness to the difficulties and problems of one's neighbour. So humane a society is now no more than a dream and only manifestation of humanness today can create hope for the possibility of its future realization.

I consider that the essential importance of the full abolition of the death penalty justifies looking away from those objections by advocates of its retention which are based on fragmentary, exceptional circumstances.

While still a child I read with shuddering the distinguished anthology Against the Death Penalty, published in Russia with the participation of my grandfather I N Sakharov in 1906-1907 during the years of executions after the 1905 revolution (Syтин Publishers). I know of the impassioned statements of the writers Lev Tolstoy, Dostoyevsky, Hugo, Korolenko, Rozanov, Andreyev and many others. From the above-mentioned anthology I know the arguments of a number of scholars - Solovyov, Bazhenov (the psychology of condemned persons), Gernet, Goltsovsky, Davydov and others. I share their conviction that with its psychological horror the death penalty is not commensurate with the majority of crimes and that it is never a just retribution or punishment. And indeed there can be no question of punishment of a person who has ceased to exist. Like them I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Bloodthirsty and calculated revenge, with no personal danger for the executioners, with no temporary insanity on the part of the judges and therefore shameful and disgusting.

I pause briefly on the currently widely discussed subject of terrorism. I consider that the death penalty is totally ineffective for the struggle with terrorism and other political crimes committed with fanatical motives. In such cases the death penalty serves only as a catalyst for a more massive psychosis of lawlessness, revenge and savagery. This does not mean that I in any way justify contemporary political terrorism, often accompanied by the death of uninvolved persons who just happen to be on the scene, by the taking of hostages including children and by other dreadful crimes. However, I am convinced that prison confinement, possibly under laws which would in cases indicated by the court forbid release ahead of sentence, is a more rational means of physical and psychological isolation of terrorists for the prevention of further acts of terror.

The abolition of the death penalty is especially important in such a country as ours, with its unrestricted dominance of state power and uncontrollable bureaucracy and its widespread contempt for law and moral values. You know of the decades of mass executions of innocent people which were carried out without any semblance of justice (while still more people perished without any court judgement at all). We are still living in the moral atmosphere created in that era.

I wish especially to draw your attention to the fact that in the USSR the death penalty is assigned to many crimes which in no way involve attempts on human life. Many will remember for example the case of Rokotov and Faibishenko who were charged in 1961 with underground trade in valuables and illegal currency operations. In the time when these two had already been sentenced to prison confinement the Presidium of the Supreme Soviet adopted a law which provided the death penalty for major property crimes. They were put on trial again and in violation of the most elementary judicial principle they were sentenced retroactively to death. Subsequently many others were sentenced to death under this and similar laws, especially for private entrepreneurial activity, the organization of artels, etc. In 1962 an old man was shot for having prepared a few counterfeit coins which he buried in his yard.

The total number of executions in the USSR is not known - these facts are officially secret - but there are grounds to suppose that it now comprises several hundred persons per year; that is, more than in most other countries where this barbaric institution still exists. There are also other features of our contemporary reality which are relevant to the matter under

.../...



- 3 -

discussion. I mean the grievously low cultural and moral level of our present criminal procedure, its subservience to the state and frequently its corruption, accessibility to bribes and dependence on local "leadership".

I receive a great many letters from persons convicted in criminal cases. Although I cannot check out these cases in every concrete instance, taken all together they create an irrefutable and terrible picture of illegality and injustice, of superficial and prejudiced investigation, of the impossibility of obtaining a review of clearly mistaken or dubious verdicts, of beatings during police questioning.

Some of these cases involve death sentences. Here is one such case. I have before me a copy of the court verdict in the case of Rafkat Shaimukhamedov, documents on his case prepared by lawyers, letters by his mother. On 31 May 1974 in Issyk-Kule Shaimukhamedov, a worker and by nationality, a Tatar, was sentenced to be shot. He had been convicted of murdering a female shop assistant with motives of robbery together with two young accomplices. (The latter were sentenced to several years' imprisonment.) Shaimukhamedov denied his guilt, refused to ask for pardon and declared a hunger strike. He passed 20 months in the death cell expecting either execution or a review of his case. Throughout this time his mother and lawyers submitted dozens of complaints, but all higher instances sent them back without any examination of the matter. In January 1976 the sentence was executed with the sanction of the Deputy Procurator of the USSR, Malayrov.

The court verdict on Shaimukhamedov is striking for its illiteracy, both in the literal sense and the juridical sense of the word, its lack of proofs and its contradictory nature. An even more vivid picture emerges from the complaints of the lawyers and the mother's letters. The convicted person's presence at the scene of the crime was not proved. The court ignored the contradictory versions of the accusation, the testimony of witnesses and the facts of the expert examination (according to which the victim's blood group did not match that of a spot of blood found on Shaimukhamedov's clothing). The mother's letters state that the reasons for this bias was the selfish material interest of two procurators (Bekboyeva and Kleishna). She describes scenes of extortion, bribes received by them from another accused, the fabrication of a criminal case against her second son with the same goal of extortion - already after the shooting of Rafkat. I cannot verify these reports, but to me the main thing is clear: with what ease and absence of argument the death penalty was passed, and how easily so terrible a case becomes routine.

I have dwelt on this case in detail because it seems to me that it clearly reflects the complete horror of the death penalty and its corrupting effect on society.

I hope that this symposium will make a contribution to the noble effort of many generations towards the complete abolition of the death penalty throughout the world.

19 September 1977

Andrei Sakharov  
Laureat, Nobel Peace Prize

# Capital Punishment: Wrong on All Counts

By JOSEPH CHUMAN

**T**HE current furor over capital punishment, and efforts to reinstate it in New Jersey, lead my thoughts back to when it first became a moral issue for me.

I have my mother to thank for it. Her intuitive wisdom and strong conscience made a lasting impression on me. The death penalty was the first issue that became a cause for me, and it is the only one on which I have never wavered.

When I was a little boy and capital punishment was still in force, talk about executions with schoolyard chums came easily. The execution scene was mysterious and dramatic and tapped our morbid imaginations, as did conversations about cops and robbers and other conflicts over good and evil.

Scenarios of the final meal, "walking the last mile," the technology of imposing death and the presumed dignity of the condemned as he said his departing words were often discussed in graphic detail.

The fact that executions were horrible and painful was something that a 10-year-old was ill-equipped to entertain emotionally. The awful realities of putting a man to death were hidden behind a mythos, grotesque yet fascinating. For most people, I think they still are.

It was my mother who dispelled my innocence. The occasion for that moral awakening was the execution of Caryl Chessman.

Although my mother did not glorify Chessman, she did convey to me that he was an intelligent and creative human being and that the State of California was about to commit a terrible wrong by putting him to death. Her simple appeal was convincing, and I believe it still lies at the heart of the matter.

Arguments over deterrence, retribution theory and the garnering of statistics are all crucial to the debate over the death penalty. But what lies beyond all analysis is a matter of sensitivities — sensitivity as to the value of human life and how our society should incorporate that value through its legal institutions.

A colleague of mine, a survivor of the camps at Auschwitz and Buchenwald, has written that the willingness to save

human lives from the clutches of Nazi extermination was not a matter of cultural refinement or intellectual clarification but, rather, was grounded in the basic decencies of otherwise ordinary people.

This insight bears directly on our society's collective decision on whether to restore capital punishment. What rests in the balance is nothing less than our self-identification as a humane, and I would propose, civilized society. This pertains whether those condemned are innocent children or despised murderers.

There are many defenders of capital punishment who contend that, by executing murderers, the state is upholding the value of life — "the ultimate sanction for the extreme crime." But it is frankly hard to see how a respect for human life can be exemplified, much less taught, by means of reciprocal brutalization. No, closer to the truth is George Bernard Shaw's observation that murder and capital punishment are not opposites that cancel one another, but similars that breed their kind.

To oppose the death penalty through an appeal to basic sensitivities and humane values is not to be equated with a desire to coddle criminals. It is an issue of practical consequences that go beyond the lives of the 650 men and women who now fill America's death rows.

For example, at stake is the integrity of an already beleaguered criminal-justice system, which is further strained through the disproportionate expenditure of resources that must surround capital cases if the innocent are not mistakenly to be put to death.

On the international front, the existence of the death penalty compromises our nation's human-rights policy in a world where the expedient of death is becoming more and more a tool of governmental policy, both legal and covert. It becomes more difficult for us to plead for the life of an Ali Bhutto or a Kim Dae Jung, or to rail against executions in Iran, when we have a death penalty ourselves.

I fervently hope that capital punishment is not restored in my own state, and once again falls into disuse in those states in which it has been reinstituted. I maintain this hope for the sake of preserving what I believe best reflects the ideals of the American character as they pertain to standards of decency, humanity and fundamental rights.

And now that I am a parent myself, I hope for a society free of the specter of legalized killing, a society that, officially supports my efforts to raise my children to be sensitive to the inviolability of human life. ■

*Joseph Chuman, who lives in Hackensack, is the leader of the Ethical Culture Society of Bergen County and a member of several groups opposed to capital punishment.*

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N.J. Edition 25x

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# amnesty international

## APPEAL TO THE UNITED NATIONS FOR THE ABOLITION OF THE DEATH PENALTY

We, the undersigned,\*

**ALARMED BY** executions of political opponents and criminal offenders in many countries;

**AFFIRMING THAT** the death penalty is incompatible with the right to life and the prohibition of cruel, inhuman or degrading treatment;

**CONVINCED THAT** the abolition of the death penalty in all countries would represent a great advance in the respect of governments for the human person;

**APPEAL TO** the United Nations and its member states to take all necessary steps for the immediate and total abolition of the death penalty throughout the world.

### **Australia**

Gough Whitlam, former Prime Minister

Keith Seaman, Governor of South Australia

Senator Alan Missen, Member of Parliament

Senator Wreidt, Member of Parliament

Barry Jones, Member of Parliament

Sir Justice John Minogue, former Chief Justice of Papua New Guinea

Bob Hawke, President, Australian Council of Trade Unions

Reverend Keith Dowding, National Secretary, United Nations

### **Austria**

Bruno Kreisky, Federal Chancellor

Dr. Christian Broda, Minister of Justice

Otto Roesch, Minister of Defense

George Praden, former Minister of Defense

Professor Hans R. Kleeatsky, former Minister of Defense

Dr. Walter Schuppich, President Austrian Bar Association

Anton Benya, President of the Austrian Federation of Trade Unionists

Dr. Leopold Ungar, Director, Austrian Section of Caritas

### **Barbados**

Branford Mayhew Taitt, former Minister of Trade, Industry and Commerce

\*Organizational affiliation is noted for purpose of identification only

Leo Tindemans, former Prime Minister

Leon Defosset, Minister of the Brussels Region

Paul Schreurs, Bishop-Assistant of Hasselt

Professor Ilya Prigogine, Nobel Prize Winner in Chemistry

Senator Alfred Califice

**Canada**

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Reverend Dr. Lois Wilson, former President, Canadian Council of Churches

Dr. Joel Hartt, Director, Criminal Justice Institute, Chairman of the Police Technology Program  
at John Abbott College

Margaret Atwood, writer

Marie-Claire Blais, writer

**Chile**

Hortensia Bussi de Allende, widow of former President Salvador Allende

Isabel Letelier, widow of Orlando Letelier

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Anker Jørgenson, Prime Minister

Lise Østergaard, Minister Without Portfolio, with special responsibility for foreign policy

Professor Ole Espersen, Member of Parliament

Erik Skinhøj, Vice-Chancellor, University of Copenhagen

Ole Bertelsen, Bishop of Copenhagen

Mogens Hvidt, President of the Supreme Court

**Ecuador**

Edmundo Duran Diaz, Attorney General of Ecuador

Alejandro Roman Armendariz, Secretary General, the Ecuador Civil Service

**Federal Republic of Germany**

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Heinz-Oskar Vetter, Chairman of the DGB (trade union federation)

Heinrich Böll, writer, Nobel Prize winner

Günter Grass, writer

**Finland**

Dr. Mauno Koivisto, Prime Minister

Paavo Väyrynen, Minister of Foreign Affairs

Christoffer Taxell, Minister of Justice

**Iceland**

Kristján Eldjárn, President

**India**

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Camilla Cederna, journalist and writer

Professor Franco Fornari, Director, Institute of Psychology, State University of Milan

Tomas Maldonado, architect and writer

Eugenio Montale, poet, Nobel Prize winner

Cesare Musatti, Professor Emeritus of Psychology, University of Milan

Maurizio Pollini, pianist

Vittorio Sereni, poet

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Georgio Strehler, Director, Milan Piccolo Theatre

Professor Umberto Veronesi, Director, National Institute for the Study and Care of Tumours

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Kozo Inomata, lawyer

Shigeki Miyazaki, Professor of International Law, Meiji University

Dr. Shichi Kato, novelist

## **Korea, Republic of**

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Lee Chun-Hwan, Bishop, Anglican Church

Kim Kwan-Suck, General Secretary, Korean National Council of Churches

Ham Suck-Hum, Quaker leader

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Member of the United Nations Commission on Human Rights

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Henri Guillemin, writer

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Denis de Rougemont, writer

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Getin Altan, journalist

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Basdeo Panday, Member of Parliament

Bishop Abdullah, Anglican Bishop

Archbishop Pantin, Roman Catholic Bishop

Mr. George Weeks, President, Oilfield Workers Union

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Lord Fenner Brockway, House of Lords

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Jane Ewart-Biggs, widow of the former British Ambassador to Ireland

Iris Murdoch, writer

**Venezuela**

Dr. Carlos Andres Perez, former President

**International Organizations**

Niall MacDermot, Secretary General, International Commission of Jurists

Philip Potter, General Secretary, World Council of Churches

Sean MacBride, former UN Commissioner for Namibia, winner of the 1974 Nobel Peace Prize

June, 1980



TESTIMONY

HOWARD B. RADEST, Ph.D.

BERGEN COUNTY COMMITTEE FOR RELIGIOUS TOLERANCE

February 26, 1982

Re: Capital Punishment (S. ~~111~~<sup>112</sup>, et al.)

Thank you for permitting me to testify on behalf of the Bergen County Committee for Religious Tolerance. The Committee is made up of clergy from Roman Catholic, Lutheran, Presbyterian, Episcopalian, Methodist, and Unitarian Churches, from the Jewish Faith, and from the Ethical Culture Society. For the record, I am Director of The Ethical Culture Schools in New York City, Chairman of the International Humanist and Ethical Union, a member of the Council of Leaders of the American Ethical Union and have been a resident of Fair Lawn, in Bergen County, since 1959. From 1971 to 1979, I was Professor of Philosophy at Ramapo College and am Adjunct Professor of Philosophy at the Union Graduate School.

I have been and am opposed to the death penalty on ethical grounds, and I urge defeat of the legislation before you.

I will not comment at length upon certain pragmatic grounds for the defeat of the legislation. It is true that the evidence for the efficacy of the death penalty as a deterrent to crime does not exist. (Sources for this statement are numerous, e.g., see Charles L. Black Jr: "Objections to S. 1382" and William J. Bowers, Glenn L. Pierce: "Deterrence or Brutalization" pp 441ff, pp 453ff, Crime and Delinquency, Vol. 26, Number 4, October 1980; National Council on Crime and Delinquency, Hackensack, N.J.)

Indeed, all the evidence we have indicates that the presence or absence of a death penalty has no measurable consequences with respect to crimes of violence. It is also true that the death penalty is inequitable in practice. In those jurisdictions

which have a death penalty, its victims -- and I use that term advisedly -- are preponderantly the poor and the black. It is also true that nearly all of those who have been executed or who are today on death row are male. (i.e., 42% black as of 1981; 98+% male as of 1981. As to poverty, almost all death row inmates have had court-appointed or volunteer counsel on appeal, etc. Justice Potter Stewart, in his opinion in Forman vs. Georgia (1972) wrote, "... if any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race.") It is also true that nearly all western democracies have abolished the death penalty. Among some 38 nations with no peace-time death penalty (20 of which have no death penalty in peace or war) are: Austria, Canada, Denmark, Finland, West Germany, Iceland, Israel, Italy, Luxembourg, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom. Only France, Greece, and Ireland in the west retain the death penalty. Parenthetically, Eastern Europe, including the USSR, maintains the death penalty as do most 3rd world nations.

Those nations that have no death penalty have not experienced any measurable increase in the incidence of homicide or of deaths related to violent crime.

Important as the facts are for legislative purposes, the essential issue for me, as I trust it is for you, is resolving the ethical arguments that lead to approval or disapproval of the death penalty. On ethical grounds, I believe there is one and only one defensible position in the light of modern ethical knowledge.

The case for the death penalty relies on the ethical status of retribution which, as I shall try to show, reduces, in the instance of execution, to simple revenge. Approval of the death penalty rests on the injunction: "an eye for an eye," "a tooth for a tooth." My colleagues from other faiths have no doubt already indicated or will indicate that this element of Biblical ethics has long been superseded and for good reasons. For example, see Capital Punishment: What the Religious

3.

Community Says, National Interreligious Task Force on Criminal Justice, Work Group on the Death Penalty, New York, New York, which includes official statements against capital punishment from 22 major national religious bodies.

It is argued that the death penalty is a fitting punishment for someone who has willfully taken another human being's life. Yet, no act of punishment can effectively and adequately redress the act of murder. Life cannot be restored to the victim, the pain of his/her family and friends cannot be assuaged, the loss of love and support cannot be compensated for by the payment of a death for a death. Retribution then cannot be effective, since it cannot restore what was taken away by the act of the murderer. Yet it is precisely such a restoration of the balance of things as it were that is the basis of a moral argument for retribution. That being the case, retribution, regrettably -- for I know that those who defend it are sincere and honorable -- reduces ultimately to mere revenge.

It is argued that there is something in us psychologically that is emotionally satisfied by the death penalty. Yes, the past is irretrievably fractured by murder. Nevertheless, the future will feel better if death is paid for by death. That feeling is what the support of the death penalty really comes down to. The moral status of an act of revenge remains questionable, and the value of the feeling of satisfaction it is alleged to bring -- the latter often shortlived and bitter indeed -- cannot be ethically defended.

Now, like you, I have feelings of horror and anger in the presence of murder. Like you, I want the killer's pain and death. But, like you, in my calmer moments I ask whether I can morally justify such feelings. For, when the state -- acting for me and mine -- establishes a death penalty it does so -- or ought to -- in the calm of reason and in the majesty of legal reflection. The state, the legislator, the judge, the jury, the attorney are not privileged to enjoy the luxury of the heat of

the moment. That is why we do not permit a person to be a judge in his or her own cause; that is why we surround all punishment with the safeties of due process. Indeed, the legislation before us confesses its discomfort by the scrupulous minutiae of detailed procedure it calls for. And yet, it cannot succeed in calming our doubts because no matter how detailed, it cannot account for all cases or for the future. There is a time-honored wisdom in judicial objectivity and due process. Historically, that is why the mark of progress in civilization is the elimination of the blood feud and the evolution of law. But law must ultimately be morally defensible and not merely our passions writ large -- or it is not law.

Two moral facts appear: that the heat of the moment is not a valid ground for moral judgment; and that the involved subject is not a valid moral judge in his or her own cause. These moral facts suggest that the call for the death penalty is really an unwitting indulgence -- deeply felt to be sure -- that cannot be justified ethically any more than revenge can be justified ethically.

The moral consequences of vengeance as public policy, of indulging emotion as public policy, and of ignoring moral facts as public policy should be of the deepest concern to this committee and to all of us. If the willful taking of human life is the penultimate horror, even more abhorrent is the reasoned and so even more willful taking of human life by the state in the name of justice and surrounded by all the panoply of law and due process. As it were, the state confirms the legitimacy of death-taking at the highest levels. The message is alas all too clear: the state holds life cheaply in its acts. This is the contrary irony denying the claims of those who see the state defending the preciousness of human life by the use of the death penalty. And the message is well understood. As W. J. Bowers and G. L. Pierce report: "In summary, studies of the long-term effect and short-term impact of executions give ample indications that executions may have -- contrary to prevailing belief -- not a deterrent but a brutalizing effect on



5.

society by promoting rather than preventing homicides..." ("Deterrence or Brutalization: What is the Effect of Executions?" Crime and Delinquency, Ibid. pp. 467-468.)

What the state may do in the name of rightfulness, others learn to do in the name of rightfulness. Imitation following executions (or suicides) is a well-documented phenomenon.

It was a crucial insight of classical wisdom that claimed that the state, whatever its utility, was also a moral educator. We know this too. We know that when the state is corrupt, then it corrupts society and increases cynicism in its members. When the state is neglectful, then neglect afflicts society and charity vanishes among its citizens. And when the state takes life... That is why a return to the death penalty would be regarded, and rightly, as moral reversion, a betrayal of the ethical role of the state towards its citizens.

It is also important to consider the nature of a death penalty in itself as a moral and legal act. The act of execution is irretrievable and irreversible. Ethical knowledge instructs us quite clearly that irreversible acts should be avoided whenever possible. Such acts, although sometimes unavoidable, permit of no redress, no possibility of admitting error, no way of atoning for moral evil. Yet, if the history of ethics has taught us anything, it has taught us of the moral urgency of redemption. To foreclose for all time the possibility of redemption is to commit an immoral act in and of itself.

There was a time, not so long ago, when an ethics of retribution permitted us to cut off the hand of the thief, to blind the eye of the voyeur, to castrate the rapist -- in short, to cripple and to maim in the name of justice. When we learn that these punishments still are used today in some parts of the world, we are rightfully disgusted. It is precisely this way of conduct, however, that we adopt when we invoke the death penalty, a difference in kind and frequency, but not in

moral quality. Maiming and blinding and castrating are cruel to be sure, and morally they are irretrievable acts, too. As with capital punishment, the deliberateness of the modern state is a double affront. When we find a state punishing crime thusly, we expect to find it defining crime in primitive fashion -- e.g., by ignoring issues of sanity. For the morally immature, the act itself, whatever its circumstance, cries out for retribution. Does that not sound familiar? And when we find a state punishing crime thusly, we also expect to find a state backward in its care for human rights and human dignity. We ought to be better than that -- we are better than that -- in our conduct, and we ought to grant the validity of history in the struggles to do away with barbarism over the ages.

It will be argued that the incorrigible among us are beyond hope and beyond redemption -- and so, beyond our concern as it were. We would all be better off if such as these did not exist or if they ceased to exist. And the act of murder is evidence of incorrigibility. (Yet, most murderers do not repeat their acts. As the evidence shows, murder is nearly always an act of passion and its victims are nearly always known to the murderer.)

Of course, there are incorrigibles -- I am not a sentimentalist -- and many killers may well be beyond redemption and beyond hope. But, we do not know and cannot know who among those many is really beyond hope, nor will we know until they have lived out the lives they have. And we do not know and cannot know which of them can move beyond their fate to realize as yet unrealized possibilities. That is, of course, the horror of murder and it is ironically, the horror of a death penalty, too -- the moral horror of it all. In a sense, it turns the justice of the state into a vicious lottery of losers.

Finally, we need to understand the disastrous consequence of a death penalty in a democratic society. Democracy relies on the perennial hopefulness of the human

7.

condition -- that however I am or you are, I may yet do otherwise and better, and so will you. History is not destiny. For a free human being, yesterday is instructive but not determinative. The novel and wondrous idea that democracy introduced into human history is that all human beings are able to be free, free in the deep sense of having the capacity to reach beyond the moment, to transcend the past for the sake of a different and even better tomorrow. Democracy then commits us against irretrievable acts for the sake of that future. That is its glory and its burden ... and that is its moral vision as well.

Thus, then, my reasons for urging defeat of death penalty legislation ... not because of a sentimental concern for the downtrodden criminal who may need our pity but often doesn't deserve it, and not because I am immune to the passion for vengeance ... But there is that in me -- and in you -- that knows the urgency of hope and redemption as moral necessities. Struggled for endlessly in the history of human societies taken with difficulty over and over again, this is that other passion that moves me and brings me here to urge against legalizing execution.

Thank you.

HBR:PMS

STATEMENT ON PROPOSED AMENDMENT

TO  
N.J.S. 2C:11-3

TO THE

N.J. SENATE JUDICIARY COMMITTEE

February 1982

Submitted by: Sarah Dike  
Editor and Staff Specialist on the Death Penalty  
National Council on Crime and Delinquency

Attachments: Sarah T. Dike, "Capital Punishment in the United States:  
Parts I-III"

William J. Bowers and Glenn L. Pierce, "Deterrence or Brutal-  
ization: What Is the Effect of Executions?"

William J. Bowers and Glenn L. Pierce, "Arbitrariness and  
Discrimination under Post-Furman Capital Statutes"



The following statement of the National Council on Crime and Delinquency is submitted in opposition to the proposed amendment of N.J.S. 2C:11-3, to permit capital punishment by the State of New Jersey:

The National Council on Crime and Delinquency opposes capital punishment as unacceptable in principle and intolerable as it has been applied. The right to life is equal among all men and women, and unless under life-threatening conditions we are obligated not to violate that right acting either as individuals or as a government. To the degree possible, law should not passively reflect contemporary social standards, which contain what are very likely confused and conflicting values, but should be educative, promoting the cause of a reasonable and universal social justice. The function of a just government is to protect and enhance the value of life; the government violates that function in terminating the lives of any of its members. Furthermore, there is no indication of consequent social benefit, either through the exercise of retribution or through enhanced social protection by the deterrence of potential capital offenders.

As practiced, the death penalty reveals a divergence between what the public will allow the law to say with respect to criminal conduct and what it will allow the law to do in punishing criminal offenders. We have shown ourselves unwilling and probably unable to dispense justice equally, instead reserving the supreme form of punishment for a subclass defined by extralegal characteristics, race and social class the most prominent among them. The death penalty in its extreme severity has served the extralegal functions of distinguishing the social worth of different racial, ethnic, and socioeconomic groups, and of oppressing minority group members. Execution is merely the endpoint of a process necessarily pervaded by the possibility of choice, from apprehension through the clemency decision--choice constantly adapting itself to public conscience. We cannot allow the criminal justice system the latitude to perpetuate this practice in selecting who will receive and who will avoid the penalty of death.

#### Arbitrariness and Discrimination

The record of death sentences handed down since 1972 in the three states with the largest death row populations--namely, Florida, Georgia, and Texas--indicates that race of offender and race of victim have a sig-

nificant effect on the execution decision. A black offender arrested for murder whose victim is white is 19 times as likely as a white offender whose victim is black to receive the death penalty. This difference cannot be accounted for by type of killing; in fact, among nonfelony killings (i.e., killings unaccompanied by another felony), which are relatively unlikely to be punished by death, the killing of a white by a black is particularly apparent as a basis for differential treatment. Racial discrimination is evident at discrete stages of the criminal justice process and remains unaltered by appellate review. Moreover, substantial differences in treatment by judicial circuit within states have been found; likewise, these differences are apparent at separate points of the criminal justice process and remain uncorrected by appellate review.<sup>1</sup> Yet the capital statutes in these three states were upheld by the Supreme Court as constitutional, as ensuring that true individualization of sentencing was possible, yet that sentencing discretion would be limited in accord with the law, resulting in even-handed justice.<sup>2</sup> These capital statutes have served as the models for statutes enacted by other state legislatures and for the bill under consideration. We believe that racial discrimination will inevitably be a determining factor in death sentences imposed by the courts if this bill is enacted.

The figures above correspond with the findings of another study of capital sentencing, published in 1976. This too applies to offenders sentenced under post-Furman capital statutes. The study compared the 493 offenders on death rows in December 1971 with 376 offenders under death sentence on December 1976. Of the offenders on death rows in 1971, 53 percent were nonwhite; by contrast, of the offenders under death sentence in 1976, 62 percent were nonwhite. The percentage of nonwhites sentenced to death in the western part of the United States, in particular, increased considerably: from 26 percent to 52 percent.<sup>3</sup>

In 1969, a study of California capital sentencing between 1958 and 1966 found low social class, measured in terms of occupation,<sup>4</sup> to be strongly correlated with the likelihood of receiving a death sentence. More recent studies of presentencing decisions in potentially capital cases have also reflected the tendency for social class to be correlated with differential treatment. Between 1955 and 1973, for example, among offenders in one northeastern city convicted of murder, conviction on the most severe charges (subject to the most severe punishment) was most likely among offenders from a low social class whose victims were from a higher socioeconomic level.<sup>5</sup> Likewise, in a northern city in 1972, the prosecutor's decision to press charges against persons arrested for murder was correlated with social status of the offender and his victim. A suspect from a low socioeconomic level whose victim was more advantaged was least likely to have the case dismissed.<sup>6</sup>

What these and other comparable studies indicate is that revised systems of capital sentencing, approved in the post-Furman decisions, have not served to sever the criminal justice process from extralegal bases for judgment.

### Deterrence

With the prominent exception of Isaac Ehrlich's econometric analyses of execution risk and homicide rates,<sup>8</sup> none of the evidence from long-term studies of capital punishment and deterrence supports the hypothesis that the

statutory availability or use of the death penalty in a given jurisdiction will reduce the number of homicides in that jurisdiction. Although Ehrlich's analysis has continued to serve as a functional rationalization for the death penalty among persons inclined to support the penalty on other grounds, his findings have been refuted by equally methodologically sophisticated studies.<sup>9</sup>

Ehrlich's 1975 analysis presumably corrected for the methodological weaknesses in earlier studies comparing homicide rates in (1) contiguous jurisdictions, at least one of which had abolished the death penalty, and (2) the same jurisdiction before and after abolition of capital punishment. Although neither of these types of comparisons found a deterrent effect of capital punishment,<sup>10</sup> they were critically flawed by, predominantly, their failure to control adequately for a variety of demographic, sociocultural, and socioeconomic factors. Ehrlich included in his analysis of the effects of executions on homicide rates over the period 1933-69 a variety of criminal justice, social, economic, and demographic variables. Yet his finding, that each execution may deter seven to eight homicides, is critically dependent on the period included. That is, the association is determined by the period 1962-69, a time when crime rates in general rose and executions fell to de facto abolition. Indeed, the strongest conclusion drawn from a review of econometric studies of the long-term effects of executions on homicide is that ever higher standards of proof are needed--and will probably remain beyond reach.<sup>11</sup>

Granted that some murders are calculated events, the reward to be gained can often be increased to balance the risk incurred. As Thorsten Sellin showed, in reference to punishment accorded hired killers in Chicago, the risk may not be great. During 1949-68, there were 1,004 gangland murders in Chicago, 23 convictions, 4 sentences to life imprisonment, and no death sentences imposed.<sup>12</sup> Although defenders of the death penalty point to the potential for such crimes as demanding the death penalty, the history of capital punishment indicates the penalty has not been used in this way. Instead, it has been used to punish murderers whose crimes were committed under great stress, resulting from rage, fear, intoxication, madness, or other conditions mitigating the capacity to calculate rationally.<sup>13</sup>

Deterrence as justification for the death penalty fails to account for our decisions to execute or not to execute. And it is doubtful whether execution could be used effectively to inhibit homicide. What we know about most murders--that they are acts of passion, that they are impulsive acts--makes it unlikely that they can be prevented by capital punishment.

### Brutalization

Although open to similar criticism of methodological shortcomings, a number of studies of the immediate effects of an execution in terms of homicides committed have produced results in direct conflict with the deterrence theorists.<sup>14</sup>

In the most recent and extensive study, of executions and homicides in New York State between 1907 and 1963, each execution was shown to be succeeded by an average of two additional homicides in the month immediately after, with a third homicide in the next month likely. In contrast, in the third month following an execution, the rate of murders dropped. Thus,



rather than serving to reduce homicides among potential felons, executions may, through a variety of means, actually stimulate others to kill. Some potential murderers may have been deterred from their crimes, but, as indicated by the decrease in homicides in the third month, it appears that the increase in homicides also occurred among potential offenders, some of whom would have killed anyway, but who did so sooner because of the execution.<sup>15</sup> For "the potential killer [who] has a justification, a plan, a weapon, and above all a specific intended victim in mind,"<sup>16</sup> the violent atmosphere surrounding an execution may convey a message that lethal vengeance may justifiably be carried out against the deserving, stimulating such persons who are already predisposed to engage in aggressive thoughts and ideas to proceed to open aggression.

### Retribution

Undeniably, the desire for retribution is a significant factor in the desire to punish criminal offenders; however, the National Council on Crime and Delinquency rejects the notion that retribution can or should serve as moral justification for punishment, above all, for the death penalty. With such a basis for punishment, the potential is great for gross injustice in conditions of heightened community sentiment.

In the United States, as in other nations of the western world, "the struggle about [the death penalty] has been one between ancient and deeply rooted beliefs in retribution, atonement, or vengeance on the one hand, and on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century. . . . It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing punishment."<sup>17</sup>

The National Council on Crime and Delinquency affirms the view that the law should embody the aims of a morally just society, that the principle of restraining the degree of punishment a civilized society may impose precludes the infliction of blood punishment, even in the height of anger.

### Criminal Justice Processing

There is a conflict between permitting members of the judicial system to exercise discretion in the criminal processing and sentencing of an offender, and constraining that discretion with guidelines promoting reliability, predictability, and even-handed justice. The dual requirements have resulted in an imprecise system of punishment, ridden with the "capacity for caprice and mistake."<sup>18</sup>

Those who are to die have been chosen by a process which, at every critical stage, proceeds on no clearly articulated or understandable criteria. This starts with the stage of charging and pleading; the decision of the prosecutor as to what to charge and as to whether to offer a plea-bargain is not only unfettered and unreviewable but also without any clear authoritative standards for the exercise of discretion. The luck of the draw of the jury is what I have called it,



the luck of the draw. In a great majority of cases, the jury is instructed upon and may find "guilty" upon a lesser included offense, rather than on the charge that makes the defendant eligible for death; there is no review of this decision, and even instruction from the bench upon the difference between first and second degree murder, on premeditation, on the provocation that justifies or compels a manslaughter finding, and so on, is necessarily vague, for the law itself is vague. The "insanity defense," allowed in every state but in no state given a really intelligible definition, is a wild joker in the deck. At the separate sentencing stage, the state statutes . . . contain other wild jokers which make unfaultable and unreviewable a decision for or against death at this point.<sup>19</sup> The decision for or against clemency is designedly standardless.

A truly mandatory system, unlike the forms of sentencing ruled unconstitutional in Woodson v. North Carolina<sup>20</sup> and Roberts v. Louisiana,<sup>21</sup> would have to exclude the possibility of such mitigating factors as the differentiation of degrees of murder, the power to accept pleas to lesser offenses, and commutations, except to correct error at the trial court level. Under the current system, the specifics of each case may interact with the exigencies of the entire criminal justice process, to distort the very purpose served by an apparently closely defined statute.<sup>22</sup>

The death penalty thus provides the state with a means of coercion that spreads beyond the limited number of cases proceeding to capital sentencing--as in the prosecutor's use of the possibility of capital punishment as an inducement to defendants to submit a guilty plea. Equally important, the potential for execution heightens the permissible severity of other forms of punishment, which will, in general, be deemed less drastic than execution. Execution is the most explicit expression of the possible relation of the state to its citizens, and the effect of that expression on other measures the state may impose is to validate all other forms of state action as apparently less drastic. Thus, the statutory availability of execution obstructs efforts to promote ameliorative forms of justice.

### The Problem in New Jersey

What is the corrections picture in New Jersey at present? In part, it is that--

- o The state prisons are overcrowded.
- o The county jails are overcrowded.
- o The state has ordered the counties to keep state prisoners in their overcrowded jails because the prisons are overcrowded.
- o The state is seeking to house prisoners in temporary spaces which it has not been able to find.

The Department of Corrections has predicted the adult prison population could double in 5-10 years as the result of the recently enacted mandatory gun laws. The prison population has been spiraling upward over the past year because of longer sentences being handed down by the judiciary, mandatory sentencing provisions of the new criminal code, and a significant reduction in the number of parole releases being granted. A study by the Administrative Office of the Courts indicates that, as a

result, the populations in the three state prisons for men could practically double by 1983 and triple by 1990, if present trends continue. If the figures prove accurate, the Department will experience a space shortfall for adult prisoners of almost 4,000 cells within two years, and perhaps 9,000 by the end of the decade. Today the cost of building each additional cell is quoted by the Department of Corrections as \$80,000, and the cost is rising about 1 percent per month.<sup>23</sup> If New Jersey passes this act, the situation will be even worse. The experience of other states shows a general heightening of punitiveness along with passage of the ultimate punishment. And the effect on the overcrowded judicial system of years of appeals to stave off each execution will divert badly needed resources into this protracted review of cases. The discretion permitted the jury in ruling on felony murder cases poses a particularly strong threat of an overburdening of the courts. The financial costs and the effects on the efficient operation of the justice system, in the face of the death penalty's failure to fulfill any of its professed functions, argue strongly in favor of rejection of this bill.

### Conclusion

Supporters of the death penalty have criticized abolitionists as unconcerned about the victims of violent offenses. But to execute the murderer is of no help to the victim. In the long run, the public is better protected by ameliorative and preventive than by punitive measures. Apart from the lack of evidence of any deterrent effect of the death penalty, the execution decision, by focusing on a single event, engenders a false sense of security among citizens, serving to divert attention away from the difficult task of reducing violence in our society.

# Footnotes

1. William J. Bowers and Glenn L. Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," Crime & Delinquency, October 1980, pp. 563-635. For the comparison reported in the text, the individual state averages are weighted by the number of offenders in each category.
2. *Profitt v. Florida*, 96 S. Ct. 2960 (1976); *Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976).
3. Marc Riedel, "Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman," Temple Law Quarterly, Winter 1976, pp. 261 ff.
4. Charles J. Judson et al., "A Study of the California Penalty Jury in First Degree Murder Cases," Stanford Law Review, June 1969, pp. 1297-1497.
5. Victoria Lynn Swigert and Ronald A. Farrell, Inequality and the Law: Differential Treatment in the Legal Process (Lexington, Mass.: D. C. Heath, 1976); Victoria Lynn Swigert and Ronald A. Farrell, "Normal Homicides and the Law," American Sociological Review, February 1977, pp. 16-32.
6. Steven B. Boris, "Stereotypes and Dispositions for Criminal Homicide," Criminology, August 1979, pp. 139-58.
7. *Furman v. Georgia*, 408 U.S. 238 (1972).
8. Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," American Economic Review, June 1975, pp. 397-417; Isaac Ehrlich, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," Journal of Political Economy, August 1977, pp. 741-88.
9. For example, Peter Passell and John B. Taylor, "The Deterrent Effect of Capital Punishment: Another View," American Economic Review, June 1977, p. 445; William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," Yale Law Journal, December 1975, pp. 187-208; David C. Baldus and James W. L. Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," Yale Law Journal, December 1975, pp. 170-86; Burley V. Bechdolt, Jr., "Capital Punishment and Homicide and Rape Rates in the United States: Time Series and Cross Sectional Regression Analyses," Journal of Behavioral Economics, Summer/Winter 1977, pp. 33-66; Lawrence R. Klein, Brian Forst, and Victor Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates," in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds. (Washington, D.C.: National Academy of Sciences, 1978), pp. 336-60; Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," Stanford Law Review, November 1975, pp. 61-80; Brian E. Forst, "The Deterrent Effect of Capital Punishment: A Cross State Analysis of the 1960's," Minnesota Law Review, May 1977, pp. 743-67.
10. See, for example, Raymond T. Bye, Capital Punishment in the United States (Philadelphia: The Committee on Philanthropic Labor of Philadelphia Yearly Meeting of Friends, 1919); Edwin H. Sutherland, "Murder and the Death Penalty," Journal of Criminal Law and Criminology, February 1925, pp. 522-29; George Vold, "Can the Death Penalty Prevent Crime?" The Prison Journal, October 1932; George Vold, "Extent and Trend of Capital Crimes in the United States," Annals of Political Science, vol. 284, no. 2 (1952);

Karl Schuessler, "The Deterrent Influence of the Death Penalty," Annals of Political Science, vol. 284, no. 2 (1952), pp. 54-62; J. Thorsten Sellin, The Death Penalty (Philadelphia: American Law Institute, 1959); J. Thorsten Sellin, "Capital Punishment," Federal Probation, September 1961, pp. 3-11; J. Thorsten Sellin, ed. Capital Punishment (New York: Harper & Row, 1967); Walter Reckless, "The Use of the Death Penalty," Crime and Delinquency, January 1969, pp. 43-56.

11. Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C.: National Academy of Sciences, 1978).

12. Thorsten Sellin, The Penalty of Death (Beverly Hills, Calif.: Sage, 1980), p. 73.

13. William Bowers, Executions in America (Lexington, Mass.: D. C. Heath, 1974), p. 194.

14. William F. Graves, "A Doctor Looks at Capital Punishment," Journal of the Loma Linda University School of Medicine, vol. 10 (1956); David R. King, "The Brutalizing Effect: Execution Publicity and the Incidence of Homicide in South Carolina," Social Forces, December 1978, pp. 683-87; Robert H. Dann, "The Deterrent Effect of Capital Punishment," Friends Social Science Review, vol. 29 (1935); Leonard Savitz, "A Study in Capital Punishment," Journal of Criminal Law, Criminology and Police Science, November-December 1958.

15. William J. Bowers and Glenn L. Pierce, "Deterrence or Brutalization: What Is the Effect of Executions?" Crime & Delinquency, October 1980, pp. 453-84.

16. Ibid., p. 483.

17. Justice Brennan arguing in Gregg v. Georgia at 2971, quoting Furman v. Georgia at 296.

18. Charles L. Black, Jr., Capital Punishment: The Inevitability of Caprice and Mistake (New York: W. W. Norton, 1974).

19. Charles L. Black, Jr., "Reflections on Opposing the Penalty of Death," St. Mary's Law Journal, May 1978, pp. 1-2.

20. Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

21. Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

22. Hugo Bedau, "The Courts, the Constitution, and Capital Punishment," Utah Law Review, May 1968, pp. 201-39.

23. See Diane Steelman, Overcrowding in New Jersey: No Easy Answers to a Crisis in Corrections (Hackensack, N.J.: NCCD, October 1981).



My name is Frank Askin. I am on the faculty at Rutgers Law School - Newark where I hold the position of Distinguished Professor. I am also one of three General Counsel to the American Civil Liberties Union. I also serve as Vice President of Public Interest Lawyers of New Jersey and it is in that role and in behalf of that organization that I am before you today. I thank the Committee for this opportunity to comment on the legislation now under consideration.

As already explained by Mr. Cohen, our organization stands unequivocally opposed to any legislation that would restore the death penalty as an available sanction under the state's criminal code. That opposition grows, as might be expected, from many of the traditional, time proven arguments that may be all too familiar to some of you. At the risk of trying your patience, I will briefly summarize the most important of those reasons.

First, while proponents of capital punishment frequently laud its deterrent value, the facts do not substantiate this claim. Studies are available that, with the detached statistics that can be used to compare apples and oranges, don't prove anything at all. One study may show a rise in homicide simultaneous with the passage of the death penalty while another will show a decline. Still other studies prove conclusively that homicides decline around the time of an actual execution while others as conclusively prove the opposite. That you or I might, in our emotional guts, expect the threat of death to deter crime is of little value here. We are deliberating rationally, not in the heat of passion or under the influence of the impaired judgement of an alcohol or narcotics addled brain. Few homicides are committed under such clear headed conditions.

Neither are we likely to be the kind of people who would be apt to commit a clear headed murder. It is important to note that that reluctance grows not so much from our fear of punishment, I would suggest, as from our own moral sensibilities. That is, we do not go out and kill because we have our own ethical code which condemns murder, not because we are kept in check by the prospect of frightening punishment, capital or otherwise. With that as a starting point, can our own instinctive reaction to the fear of capital punishment be validly factored into a determination of the potency of the deterrence of a given form of punishment? In the absence of a statistical measure that can be called reliable can we defer to our own gut reactions? I think not.

Why would we expect to be uniquely capable of deterring heinous crime through use of the death penalty? Other sanctions available should be as apt to be deterrents as the capital sanction. Almost all penologists agree that the real indicator that will control whether or not a sanction has any deterrent value is the swiftness and certainty of punishment, not the severity of the punishment.

History has shown us that when it comes to swiftness and certainty of punishment the death penalty is perhaps the least reliable sanction. In fact, the U.S. Supreme Court in striking down the death penalty broadly a decade ago, noted that the imposition of the death penalty was so freakish, so arbitrary and capricious that it resembled nothing more than it did the accident of getting struck by lightning.

The randomness of it's distribution does not prevent the death penalty from being racially and economically discriminatory in its impact. There is no question but that the result of enacting the death penalty statute will fall hardest, perhaps only, upon those who are nonwhite, poor, uneducated, and socially undesirable: those unable to obtain the quality of legal counsel that will represent the wealthy, and the privileged.

The death penalty also sets into motion other forces that are destructive to the judicial and penal systems themselves. Lengthy and protracted appeals necessary to secure fairness in a fallible system consume vast amounts of time in an already overburdened and backlogged criminal court system. And some suggest that the presence of execution as an available alternative sanction may prod some jurors to be less willing to convict despite the evidence.

What is clear is that as it stands today the system itself is still fallible, susceptible to fraud, prosecutorial misconduct and outright error. In our own state, a case of some considerable notoriety makes this point more clearly than any hypothetical that we might construct. George Merrit was three times convicted of killing a police officer, and three times his conviction was reversed on appeal and remanded for retrial. After more than a decade in prison for a crime for which many in the public would certainly have wanted the death penalty, the murder of an on duty police officer, Merrit was released when defense counsel through slow and painful search of police files discovered and brought to the attention of the court, evidence that had been withheld which impeached the credibility of the crucial prosecution witness who had identified Merrit as the assailant. If the death penalty had been in place in New Jersey at the time, Merrit would almost certainly have been executed long before the suppressed evidence had come to the public attention. Can we afford such an irreversible and uncorrectable form of punishment in a system that by it's very nature is subject to the errors that permeate any human institution?

Finally, the death penalty is the ultimate barbarism. An anachronism from a common law age noted for trial by combat, it is nothing less than the calculated and deliberate infliction of death upon a person by the state apparatus itself. Such a model cannot help but cheapen life. Rather than setting a moral example, society through it's representative agent, the state, is condoning the very act that

it purports to abhor. In the words of a now well worn lapel button, "Why is killing people who kill people the way we show that killing people is wrong?" By participating in the act of murder itself, the state is staining its own hands with blood. The moral lesson that is being taught is that murder is permissible when done by the "right" people to the "right" people for the "right" reasons.

You and I know that the reasons why there should or should not be a death penalty are hardly relevant here today. The outcome of this debate is already known. We will have a death penalty bill signed into law in this state in the very near future. We also know that this will not happen because, in the considered judgment of most legislators, this is an effective weapon for the state in the effort to combat crime. Rather, this bill or some other legislation like it will be adopted because the members of this legislature read that to be the popular will; such a strong will that they dare not ignore or defy it.

In some sense I come before you today ultimately to talk about a theory of governance that may be out of favor in the public debate in recent days. The time once was when public officials were community leaders and opinion makers and when true American patriots did not so much reflect the popular will as help to shape it. In all honesty you and I both know that the overwhelming majority of legislators who intend to vote for this legislation do not believe for one minute that it will actually reduce crime.

The public is frustrated with crime. Our law abiding citizens are terrorized by what they perceive, incorrectly through the distortion of New York Post type distortion, to be a jungle-like atmosphere of runaway crime. And the truth be told, fear of crime, however unsubstantiated by statistical data, is in a very real sense making homebound captives of a significant portion of the populace. It matters little whether the terror is justified by the real social conditions. If that is the public perception, it will follow your constituent into the voting booth.

Increasingly, demagogic political leaders have come forward to offer the quick fix of blood to propose the solution that only requires a flip of the switch. But I also know that many of you are responsible public officials who recognize that a fraud upon the public like a placebo given by a doctor to an ailing patient may produce a temporary psychological boost but it is dangerously deceptive. The patient who now believes that a cure is at work may turn attention away from the festering illness. Untreated it will grow to kill the patient and to haunt the doctor.

The death penalty will not eliminate or even reduce crime. Rather it will placate an unknowing electorate who, beset with fear and frustration, have heeded the word of the emotionally appealing but barbaric call for revenge, a call for the blood of people who are themselves victims. The public will come to recognize this fraud and with the same shame, horror and fury with which they turned out of office

those who would fight an illegal and immoral war in their name, they will one day remove these deceivers. We also know that despite my bold predictions, this day, if it is going to come at all, is not here yet. And until the public comes to realize that it has been taken, those who cry hardest and loudest for revenge may well be returned to office on the crest of this misguided public wave. I for one believe that there are more important obligations for public officials than staying popular. Popularity can be self serving. It will take a great deal of courage for legislators to vote not as followers but as leaders but I know that my conscience will sit better for having said what I thought was right, and not what I thought was popular. I hope that each of you will find the courage to vote your conscience so that you will do what the public truly elected you to do, to act in the public interest through your own good judgment. Defeat the death penalty and move onto the difficult task of rebuilding our state, it's laws, it's economy, it's educational system, to eliminating injustice and suffering so that crime might plague our citizenry no more.

Thank you.





# Social Statements

THE LUTHERAN CHURCH IN AMERICA

*See Puss*

## CAPITAL PUNISHMENT

Adopted by the Third Biennial Convention, Kansas City, Missouri  
June 21-29, 1966

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. This situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement, efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of convicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden: intolerable conditions of life which render them especially vulnerable to forces that incite to crime, and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. The Right of the State to Take Life

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command

from God that death shall necessarily be employed in punishment for crime. On the other hand, a decision on the part of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. *Human Rights and Equality Before the Law*

The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. *The Invalidity of the Deterrence Theory*

Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crimes of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In the light of the above considerations, the Lutheran Church in America:

urges the abolition of capital punishment;

urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

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I would like to speak to you from the vantage point of a prison volunteer. Over the years I have spoken with and counselled many prison inmates, some of them convicted of capital offenses. I really wish there could be a way to stop murder, but there isn't. Killing will go on as long as there is human passion, hatred, jealousy, greed, envy, anger, despair.

The thing that concerns me most is not simply that we devalue ANY human life, but that we will ask other, decent people to be our executioners. We will turn many people into killers in order to destroy one murderer. In order to kill a human being methodically and with great planning requires those responsible for the execution to consider the convicted person as less than a significant human. Once we demand that a man practice an inhumanity to earn his living, we dehumanize him. The fact is that executioners will always themselves be considered as ugly reminders of our inability to find a way to feel safe from murder. There has been little research done on what happens to executioners, but the few cases I did find showed that one executioner later murdered his own family and another committed suicide.

I am president of Lutheran Church Women of New Jersey. The Lutheran Church is opposed to the death penalty. I attended an Executive Board Meeting yesterday at which time all the members present voted to affirm the Church's position against the death penalty and that congregations be encouraged to communicate the church's stance to the Legislature.

I am also on the Executive Board of Church Women United and we have for many years belonged to a coalition to oppose the death penalty.

Respectfully submitted,

*Doris Havran*



## PUERTO RICAN CONGRESS OF NEW JERSEY

Nina Rios  
Chairperson

ENRIQUE ARROYO  
Executive Director

Statement by Enrique Arroyo, Executive Director,  
Before the Senate Judiciary  
Committee.

Felipe Nieves Ríos, 27; Joaquín Rodríguez, 33 and José Cruz, 25 were executed by the State of New Jersey on May 3, 1955. All there were Puerto Rican.

In the period between 1950 and 1963, twenty (20) persons were executed by the State of New Jersey. Of these, 13, were members of a minority group (10 blacks, 3 Hispanics) and so they constituted about 65 per cent of all persons who suffered capital punishment, well above the proportion of blacks and Hispanics in the general population.

In fact, Nieves, Rodríguez and Ríos made up about 15 percent of all persons executed in New Jersey, at a time when they were members of a minority population that numbered less than one (1) percent of the entire population of the State.

What I am saying, quite clearly, is that as a representative of a Puerto Rican/Hispanic organization, we do not find justice to be blind to color or nationality-it discriminates. And it has discriminated in New Jersey in two ways: minority persons are more likely to face capital punishment, well out of proportion to any indicator and, as you may verify in various studies, a capital offense against a white person is more likely to result in a capital penalty than if the capital offense is committed against a minority person.



While this is undeniably and statistically verifiable, the argument for capital punishment as a deterrent to serious crime is, at best, one that stands on shaky ground.

Is there evidence to show that states that impose the death penalty have a lower crime rate, a lower rate of serious crime? No.

To the contrary, a study in New York of executions between 1900 and 1965 has shown an increase in murders for every three month period following an execution. This is, perhaps suggestive evidence that state executions have the effect of an incentive to kill to the pathological.

Many sociological studies tend to show a causal relationship between criminality that is punished (on the one hand) and poverty, undereducation, underemployment and young age (on the other).

If this is true, and it seems to be, Puerto Ricans, along with Blacks and other minorities, would seem to have a better chance to be prime candidates for capital punishment. We don't get too many chances to be at the top of most lists.

According to the 1980 Census, Hispanics represent the youngest population in the Country and the State, with 42% of our population 18 years of age or younger, compared to 29% for all others.

Only 57% of Hispanics under 30 have completed a high school education, in contrast to 87% of the non-Hispanic counterparts.

Hispanic families had a median income of \$11,421 in 1979, as compared with a median income of \$16,284 for non-Hispanic families.

We are predominantly poor, undereducated, underemployed, ill fed and ill housed. We are potentially grist for the mill of capital punishment.

When 15% of all persons executed in the State were Puerto Rican our total population was a little over 55,000 persons, today we number close to one-half a million Hispanics in New Jersey (491,867 Hispanics) or 6.7 percent of the population as against less than 1% then.

The prospects of this bill to us as a people are frightening. We ask that such killing not be sanctioned by the State, but rather that the State turn its attention and its resources to obliterating the causes of the root problems of poverty, disease, malnutrition, poor housing and education, unemployment and racism.

# # #

Mr. Chairman, Gentlemen: Thank you for the opportunity to discuss with you this extremely important subject--our custom of inflicting death as a punishment--which many of us feel is a survival of the Middle Ages--a custom so barbarous as to have no place in modern civilized society.

"But," we are told, "think of the victim! If it was one of your own, you would feel different." This is often offered as the final, conclusive, unanswerable argument. But they are not really thinking of the victim. ~~The victim is beyond help or harm.~~

There is validity in considering the victims of lesser crimes--rape, assault, robbery--in which there is some possibility of restitution but trying to help the murder victim or the families of the murder victim, is futile. Could they give me back my daughter? Could they give her back one hour of her precious life? No, we have to think beyond the needs of the victim, for which we can do nothing, to the larger needs of our society, which are the deep concerns of us all.

It is assumed by many that the family of the victim, having suffered the ravages of the ultimate crime, must favor the ultimate retribution. As if, somehow, vengeance could eradicate the death, could assuage their grief and anguish. It is true that, in the first shock of horror and fury, some families do feel that vengeance will be some compensation for their loss, and surely we must sympathize with this reaction. But after a period of calm, when logic and reason have returned, how will they feel? After a month, a year, if there has been an execution, will they not come to the stark, painful <sup>BITTER</sup> realization that they are carrying another corpse along with that of their loved one? Most distressing of all, what if, later, incontrovertible evidence is produced that an innocent person had been executed? Could

they live with that knowledge? Even if there is no doubt of guilt, the burden of this second corpse must lie heavy on the hearts of the victim's family. This is not "a life for a life." It is another death, the more brutal and shocking for being officially imposed. No matter how much talk there is about "justice" the infliction of death--cold-blooded, premeditated, socially-sanctioned death--cannot be anything but barbarous and degrading.

Degrading not specifically to the perpetrator of the crime, nor even to the executioners, but to all of us who participate as members of a consenting society.

Speaking for my own family--

--and this includes the son of the murdered woman--and speaking, I believe, for many other families--this is something we could never have borne.

ADDED DEATH

The point has been made--and it is a valid point--that society is also ravaged and debased by the violence in our streets, in our homes, the violence of crime that we are living with and suffering from. True. This is <sup>certainly one of</sup> our greatest problems today, and should take top priority. But we can never solve the problem by compounding it with official violence. Most of us realize today that police brutality and vicious <sup>PRISON</sup> conditions are not only worse than useless, they double and treble the difficulties. But far too many of us still have faith that death of the accused is the answer--though some advocates of the death penalty seek to reduce its brutality. At the time of the Spunkelink execution, many thoughtful Floridians were appalled, not so much by the FACT of execution, as by its MANNER, and were advocating "more humane" methods. But there is no humane method. Killing is killing. There is NO WAY to humanize this inhuman and barbarous act. So far from being a solution to the crime problem, it is the greatest barrier to any solution. We cannot solve, we cannot even begin to attack the question, so long as we keep <sup>available the idea</sup> that "Oh, well, if we can't control crime,



*we can just kill off the animals!*

We must not only abolish this custom, we must completely eliminate it as an option. Our first step toward a solution of the crime problem must be to renounce utterly the whole idea of the ultimate violence of judicial murder.

Thank you for listening.

Statement on Capital Punishment by N.J. SANE / Edwin C. Kruse

Hearing, State House, Trenton, N.J. February 26, 1982

My name is Edwin C. Kruse. I live in Chatham, Morris County, New Jersey. Today I am testifying on this "death penalty" bill on behalf of New Jersey SANE, <sup>of which I am a board member.</sup> SANE was founded in 1957 nationally, and New Jersey SANE was founded a year later.

The organization's initial efforts were to get an A-bomb test-ban treaty (accomplished, to some extent, in 1963). Since then SANE has been concerned with preventing nuclear holocaust (either from weapons or power plants), and, in general, with the abolition of war and killing and the directing of governmental resources and efforts (as well as individuals') to the enhancement of life on this "space ship earth" we all inhabit.

One of the precepts of a better way of life that this democracy <sup>is</sup> ~~press~~ <sup>agents</sup> ~~glory~~ in is that of justice. The pledge of allegiance to the flag speaks of "liberty and justice for all," almost as if the goal were already obtained, rather than as an ideal to strive for.

We all know that there was denial of liberty in the first "four score and seven years" of our nation's existence when slavery flourished, was condoned by our system of justice, and duly recognized in our constitution. We know of current attempts to re-institute the concept of involuntary servitude, on a discriminatory basis, to foster potential killing.

When it is expedient <sup>for</sup> a government ~~to do something, no matter how heinous,~~ it is usually quite easy for executives and legislators <sup>can</sup> ~~to~~ ignore concepts of justice in order to accomplish so-called "desired" goals. Mass killing of innocent civilians is condoned -- such as the Kissinger / Nixon Christmas-time saturation bombings of Vietnam -- as justifiable. The prime movers or instigators of that slaughter in 1972 -- Henry Kissinger and Richard Nixon -- are now multi-millionaires. Indeed, the latter, though an unindicted co-conspirator in the Watergate matter, now bills the

SANE testimony; February 26, 1982

page 2

government almost half-a-million dollars annually in pension, business, and security costs. The former has exorbitant "advisor" contracts with tv-networks and multi-national corporations, and obtains huge lecture fees.

So one might question the concept of what is "just" treatment for a murderer. Certainly all murderers should not be given multi-million dollar suburban retreats in Bergen County -- that would be unfair to Bergen County.

Is the death penalty "just treatment" if it is applied only to killers of certain persons -- say a policeman? Wouldn't that imply that a policeman's life is "more important" than other people's lives: a clergyman's, a mother's, a legislator's, a governor's, an embezzler's, a philanderer's, a street hood's? What sort of criteria can be used to establish the "worth" or "merit" or "non-violatable" status of any human life? Where is the justice of any such criteria?

Then there is the question of fallibility; fallibility on the part of the legislature and governor for enacting a capital punishment law, on the part of the judges, juries, prosecutors and lawyers who implement the law, on the part of the executioners who deal the fatal coup de grace.

For example, in New Jersey there has been speculation followed by belated inquiry about whether the real killer was executed in the celebrated Lindbergh kidnapping case almost forty years ago. How many less celebrated cases don't get questioned? How many potential miscarriages of justice, of the death penalty, go unexamined by "common consent?"

The social ills in this state and nation, though many, are less than elsewhere, so I'm led to believe. (How thankful I am that I don't live in El Salvador, where the ruling government junta, with American-made

"hardware" -- Isn't that a pleasant term for killing machines: guns and attack helicopters and all-- regularly kill helpless civilians.)

SANE recognizes that we all have a long, long way to go to eliminate injustice. SANE believes the proper function of government is to sustain life enhancing programs -- education, housing, health care, transportation, job fulfillment, combatting hunger, recreation and many others -- and ideals -- justice, liberty and freedom, equality of opportunity, etc. -- all of which uplift society.

The recent emphases on death-dealing capabilities -- whether they be the astronomical deficit exploding increases in the pentagon war budget at the expense of human services, or the retrogressive re-instituting of capital punishment -- serve neither to maintain, sustain, or enhance life.

Surely the legislators and governor can do better than glory in the passage of death-making laws.

Thank you for this opportunity to testify.



Edwin C. Kruse

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## NEW JERSEY ASSOCIATION ON CORRECTION

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INTERIM EXECUTIVE DIRECTOR  
TIMOTHY WEEKS, Esq.

February 24, 1982

TO: Senate Judiciary Committee

FROM: Lucy Mackenzie, Director  
Citizen Action Division

RE: S-112, the Death Penalty

In preparing a statement in opposition to S-112 for this meeting, I found it hard to be original. So much has been written and said about the terrible decision which the Legislature will soon make. But the problem was resolved when I came across a record of the debate which took place in the Senate and Assembly in 1977, on the same bill.

Nothing in the volumes written about capitol punishment approaches the eloquence of the opponents who spoke at that time. I would like to quote briefly from the statements of five of them, without identifying the speakers.

1. *ASSYMAN RONALD OWENS*  
"The entire history of capitol punishment demonstrates a pattern of discrimination beyond challenge. You know that 54% of those executed between 1930 and 1960 were black, although they are only 10.5% of the population."
2. *ASSYMAN JOHN FROUDE*  
"My seven year old daughter sees rape, murder, carnage of all kinds on TV. We must think through our passions. I don't want to be debased any further, to fall into the pit which makes me no better than they are."
3. *JAN JAMES DUGAN*  
"Over 600 people in the United States are on death row now, awaiting to be gassed, garroted, hung or electrocuted. Of the 600, a substantial number are poor and from minorities, but they have a common denominator -- they don't have the money to buy a life sentence. The death penalty should not be reinstated here. Swift and certain punishment should be our concern, if we want to deter others. I'm concerned about the victims of crime, but not so blinded as to accept the illogical response that this bill represents. It panders to the

outrage of the people of this state without protecting anyone. We will do a disservice to humanity by committing an act which approaches the act we're trying to punish."

SEN. MARTIN GREENBERG

4. "Senator Russo is sincere, but he can't convince me. The law is not infallible -- the margin of error is 1% in the conclusion of cases. The irreversability of the penalty is a crucial factor. I won't be stampeded by talk of bleeding hearts and no compassion for the victims, especially when the sponsors say that deterrence can't be proven. I come back, over and over, to the question, don't you have to be sure before you execute somebody? I think that the public wants the death penalty, but not death. They think that people will not really die, but can appeal or will be pardoned. This is a sorrowful choice."

SEN. CHARLES YATES

5. "There is a history of man's inhumanity to man, but we've made some slow progress. Today we'll take a small step forward or backward. I welcome this moment, because I have this unique chance to speak and cast my vote against this one mean bill."

# Congregation BETH CHAIM

P.O. BOX 128 • HIGHTSTOWN, N.J. 08520 • 609-799-9401  
LOCATED ON VILLAGE ROAD IN WEST WINDSOR

בית חיים

Rabbi:  
Eric B. Wisnia

President:  
Richard Stoller

February 27, 1982

Shevat 26, 5742

Senator Russo and distinguished members of the committee. I am Rabbi Eric Wisnia, Rabbi at Congregation Beth Chaim in West Windsor, New Jersey. I am president of the Hightstown Area Ministerium, and president of the Shore Area Board of Rabbis.

Today I wish to speak before you as a representative of the New Jersey Association of Reform Rabbis and also of the New Jersey Council of the Union of American Hebrew Congregation, a Federation of all Reform synagogues here in central and northern New Jersey. I will speak against capital punishment, for I feel it is contrary to the spirits of morality, justice and the Jewish religion.

Future generations may look back at the death penalty with much the same revulsion that many of us now have when we consider how trial by combat was used in the middle ages. In those days when might made right, the death penalty was carried out against many more criminals than is now suggested. They included blasphemers, witches and pickpockets. It was not uncommon in England during the three centuries when to be a pick pocket was a capital offence, to have the pockets picked of the very crowd that had gathered to watch the execution.

The death penalty then was no more a deterrent to pick-pocketing than it is now to other crimes. Recognizing this, at least 45 countries, including almost all the western democracies have abolished the death penalty. An exception among the Western Democracies is the United States, where the death penalty still exists in some states and where you would like to introduce it in our state.

# CONGREGATION BETH CHAIM



PAGE 2

Back in 1959, at a national meeting, the Union of American Hebrew Congregations, a Federation of over 700 Reform Synagogues across the nation, adopted the following resolution:...."We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment either by a state or by the national government, is no longer morally justifiable. We believe that there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime."

The death penalty is not a deterrent! On the contrary, the taking of life by the state may well encourage a climate of violence, for the death penalty cheapens our respect for human life and brutalizes the spirit of all of us.

The United States Supreme court acknowledged in its decision in 1972 that overturned the then existing capital punishment laws, that the death penalty violated the principle of equal protection. Executions, the court said, were carried out mainly against the poor, the black, the uneducated, the "pariahs of society". Former Supreme Court Justice, William O. Douglas observed"....one searches our chronicles in vain for the execution of any member of the affluent strata of this society."

Capital punishment is merely a garbage disposal system for eliminating of those we no longer want, those we can no longer handle, those whom we do not care to rehabilitate. It is because of the failures in our penal system, because of our lack of commitment to rehabilitation and correction that we even discuss the death penalty. Even though it is effective, are we to admit that the death penalty is the only cure for recidivism?



# CONGREGATION BETH CHAIM



PAGE 3

Law is a human instrument. Human beings, even judges and juries, make mistakes. The legal system is administered by a vast number of different people in different circumstances and they can produce inequalities and errors. The taking of a life by capital punishment is radically different than any other sort of punishment because it is final and irreversible. If there has been an error, the carrying out of an execution is beyond correction. Let us seek better, more effective and humane ways of dealing with crime. Executions cheapen life. If we are ever to still violence in our society, we must learn to cherish life.

I conclude with a quote by former Supreme Court Justice Benjamin Cardozo in his book Law and Literature (1931)...."The death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life."

112 Larchmont St. R.D. 4  
Toms River, N.J. 08757

Phone 201-244-8170

I have on paper the strongest and the only argument against the death penalty. New Jersey is about to reinstate the death penalty. If you agree with the position I have stated, then you have the means to make this position known to the people of New Jersey. And if the people of New Jersey fully understand the case against the death penalty, they will not bring it back. You can draw attention to the case against the death penalty as no one else can. Briefly, here is an introduction to the only case against the death penalty:

The principle of "An eye for an eye, a tooth for a tooth" means that if you murder, you will be murdered; if you condemn a human being to death, you will be condemned to death. If you do good, good will come back to you; if you do harm, harm will come back to you.

HERE IS THE REALITY UPON WHICH THIS PRINCIPLE IS PREDICATED [REDACTED]:

This principle is based on the premise that the life is more than the body and that the life takes on the human condition over and over again in its journey for perfection within the human state. I am speaking of what is known as reincarnation or the evolution of the soul. It is here understood that justice is spread out over many lifetimes. The joy or sorrow experienced today is the result of what occurred ten days ago, ten years ago, or ten lifetimes ago. In all actions there is perfect justice. Heaven and Hell is within the human condition and not something apart from it. We determine or create our own Heaven and Hell within the human state by the manner in which we treat God's life within the human state. No one understood this case against the death penalty better than the son of a carpenter:

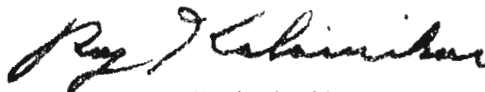
"Do not condemn, and you shall not be condemned. Forgive, and you shall be forgiven;... for with what measure you measure, it shall be measured to you."

"You have heard that it was said, 'An eye for an eye,' and, 'A tooth for a tooth.' But I say to you not to resist the evildoer; on the contrary, if someone strike thee on the right cheek, turn to him the other also."

"All those who take the sword will perish by the sword."

I AM WORKING TO BRING THIS CASE AGAINST THE DEATH PENALTY BEFORE THE PUBLIC IN ITS COMPLETE UNDERSTANDING. CAN YOU HELP ME AND WILL YOU  
RAY KALAINIKAS

Sincerely,



Ray Kalainikas

WRITTEN  
BEFORE THE ELECTION

112 Larchmont St. R.D. 4  
Toms River, N.J. 08757  
Phone 201-244-8170

LETTER TO THE EDITOR:

ON THE DEATH PENALTY: A CITIZEN'S CHALLENGE TO A MAJORITY OPINION

The political candidates, Kean and Florio, and the State senator, John F. Russo, together with 70% of the State's population are ready to bring back to New Jersey the death penalty.

But here's the catch. Those who condemn a human being to death will also be condemned to death. Let me put it in another way. If the physical life of a human being is destroyed by the State, all those who supported and participated in the destruction of this human being's physical life will have their own physical existence destroyed in very much the same way. Preposterous ! Ridiculous ! Well, let's take a look at a position opposing the death penalty, a position that very few people know of.

The principle of "An eye for an eye." means exactly what it says. If you do harm, harm will come back to you. If you do good, good will come back to you. If you condemn a murderer to death, you will be condemned to death. Perhaps now you will understand this statement, "You have heard that it was said, 'An eye for an eye,' and, 'A tooth for a tooth.' But I say to you not to resist the evil-doer; on the contrary, if someone strike thee on the right cheek, turn to him the other also..". This statement is predicated on a perception of reality that very few understand. The life is more than the body and as the life of the tree takes on the leaf, season after season, so do our lives take on the human condition, over and over again, until perfection is attained. The greatest deterrent to crime or ~~to~~ the doing of harm to ourselves or others is the principle of "An eye for an eye.". But people do not understand this principle or the reality it is based upon. For this reason crime and violence increase along with support for the death penalty.

Heaven and hell is within the human condition, not outside of it. The statement, "All those who take the sword will perish by the sword.", means perish by the sword within the human condition, and not outside of it. The statement, "...do not condemn, and you shall not be condemned. Forgive, and you shall be forgiven;... ..for with what measure you measure, it shall be measured to you.", refers to the human condition and not something apart from it. This position is expressed clearly in what is called the New Testament. The words are attributed to a man called Jesus. His teaching he refers to as the teaching of Christ. Ironically, Florio, Kean, and Russo call themselves Christians, on what understanding, I do not know.

The Christian can never use scripture in support of the death penalty. And the Christian can never use the false premise of the divine right of kings to justify assisting or supporting the state in the destruction of any human life.

The man Jesus held to but one authority over human existence. The life-giving movement of the essence of life (God) that flows through the body and pushes and pulls on the mind to feed and rest the body he



regarded as his only authority. This movement of God on the human mind he called Christ ( ..do not you be called 'Rabbi': for one is your Master, and all you are brothers. And call no one on earth your father; for one is your Father,.. Neither be called masters; for one only is your Master, the Christ.). The teaching of Christ is to build and foster the life-giving movement of the essence of life (God) within the mind and body of all humanity. He regarded this teaching as absolute.

He challenged all political and religious authority that violated the teaching of Christ. He disregarded any law, rule, or precept that violated the teaching of Christ. As for the scriptures, he quoted them where they reflected the teaching of Christ and he challenged them where they did not reflect the teaching of Christ. The case of the adulteress is a good example of how he challenged the scriptures. The Scribes and Pharisees tested him with a woman caught in the act of adultery. They said to him, " ..this woman has just now been caught in adultery. And in the Law Moses commanded us to stone such persons. What, therefore, dost thou say?". He responded by saying that those without offense should cast the first stone. In time, all ~~those~~ ready to stone the woman walked away. Jesus said to the woman, " Has no one condemned thee?". Her reply was, " No one, Lord.". Then he said, " Neither will I condemn thee.". He understood thoroughly what the principle of an eye for an eye means. If he condemned this woman to death, at another point somewhere within his human existence he would have been condemned to death in very much the same way( ..for with what measure you measure, it shall be measured to you,).

Because of their support for the death penalty, I have publicly judged Russo, Kean, and Florio as having a false understanding of Christianity. Likewise, I expect my understanding of Christianity to be judged publicly. But as long as my judgement is correct, I have nothing to fear.

Sincerely,

Ray Kalainikas

SPECIAL NOTE: If this letter is too long for the letter to the editor section, I would appreciate it if you could print it as a special column. The concepts I have expressed are rarely exposed to the general public.



We the members of the NJ Synod Executive Board have assembled to affirm the 1966 Social Statement of the Lutheran Church in America on Capital punishment — and that we will communicate our church's stance to the Governor and State legislature.

N J C C position.

Goins R C. Bishops  
in opposing death penalty,  
as a moral issue, and  
asks members to ponder  
the religious issue - after  
they have considered  
everything else, no  
matter how popular  
or unpopular is the issue  
in the public mind -

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