P U B L I C H E A R I N G

before

SENATE JUDICIARY COMMITTEE

on

Capital Punishment Procedures

Held:
May 26, 1983
Room 348
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator John F. Russo, Chairman
Senator Edward T. O'Connor, Jr.
Senator Carmen Orechio
Senator John H. Dorsey
Senator John P. Gallagher

ALSO:

John J. Tumulty, Team Supervisor
Office of Legislative Services
Aide, Senate Judiciary Committee

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I N D E X

JB:1-42
JT:e

SENATOR JOHN F. RUSSO (Chairman): The Senate Judiciary Committee is convened to hear testimony from some of the participants of the first two capital cases in New Jersey.

Let me first introduce the Committee. On my far left is Senator O'Conner; on my left is Senate President Orechio; I am Senator John Russo, Chairman; on my right is our Staff Aide, John Tumulty; Senator John Dorsey; on my far right is Senator Jack Gallagher.

Let me briefly tell you what I anticipate are the purposes of this meeting today. New Jersey's capital punishment or death penalty law has been in effect now for awhile, and we have had the first two trials pursuant to that law. The suggestion was made to me by several of the participants of those trials that perhaps it might make sense before New Jersey gets involved in a number of trials that are currently pending to hear from those who were involved in the first two -- with regard primarily to procedures, how perhaps the law might be made to function better, or procedures outside of the law itself which would make a capital case -- the trial of it -- proceed in a more organized and efficient manner. We will not at this hearing get into any discussion as to the merits of the laws or the merits of the individual cases.

A concern, of course, of this Committee and all involved is that we don't want to get involved in anything that might affect any appeals that might be pending. As a result, I discussed today's meeting with the Chief Justice, and I assured him that we would avoid that, so I caution any members of the Committee not to get involved with the merits of these trials for matters that might be involved in Appellate procedures.

We have asked the judges who were involved in the two trials in Monmouth and Essex Counties, the prosecutors, and the Public Defender, to appear and discuss this with us. I say to you now, the Committee has no specific avenue of inquiry or concern in mind. After we have this discussion, there may be nothing resulting from it at all, which in itself, will be an accomplishment because it will tell us that perhaps the law is working all right, at least procedurally, and at least we will know that. Or, we may find some suggestions that we ought to consider with regard to amendments or additional legislation. That is why we are here.

In that regard, we have with us today Judge John P. Arnone, who presided at the Monmouth County trial, and Judge David [illegible] Baime, who presided at the Essex County trial. We have Prosecutor Alexander Lehrer from Monmouth County, and Prosecutor George Schneider of Essex County, and John Ford, defense counsel in the Monmouth County matter. The public defender, the defense counsel in the Essex County matter, is not here.

In that regard, I was advised today that the Public Defender's office would not appear, and frankly, I am a little bit concerned that it was not discussed with us as to their not appearing and why not. I intend to suspect that Mr. Rodriguez does not know of this because-- Since this has been scheduled for some time, I wasn't advised that they were not appearing and why not. That is a separate matter that we will take up at another time.

With those parameters in mind, we'll go on with the discussion. First of all, does any member of the Committee have any comments at this point? (no response) If not, we'll begin then in the order they are on the list with Judge Arnone. Judge, you were just here recently, so you know where the seat is.

H O N O R A B L E J O H N P. A R N O N E: That was in a different room though, Senator.

SENATOR RUSSO: That is right, it was. Judge, first of all, thank you very much for taking the time to come to talk to us. I did assure the Chief Justice that we would get you and Judge Baime on your way as soon as possible because he thinks he can still get a half day's work out of you.

Judge, with regard to the comments that were just made, I wonder if you could tell us your thoughts or suggestions with regard to the procedural aspects of the death penalty law, or any suggestions or criticisms that would be applicable that might help us.

JUDGE ARNONE: As far as suggestions to make, I have none to make with regard to the death penalty law. Procedurally, it proceeds not like any other case. As you know, the jurors are interviewed individually and under oath. If there is a problem, if you want to refer to it as a problem, it is a matter of seating the jurors and selecting the jurors, putting the jurors in the waiting room, and questioning the jurors individually, which has nothing to do with this Committee.

From the standpoint of improvements, I have no suggestions to make to the procedures.

SENATOR RUSSO: Regarding the seating and selection of jurors, you are talking about the accommodations that require that it be done that way. Is that it?

JUDGE ARNONE: That is right.

SENATOR RUSSO: I guess there is nothing we can do in that regard.

JUDGE ARNONE: That is correct.

SENATOR RUSSO: But, do you feel that the law is clear enough with regard to the procedures of a second-phase trial in the aggravating and mitigating factors? Do you think the law spells them out?

JUDGE ARNONE: I think it does in Monmouth County, and we had no problem with that as far as the jury selection was concerned, explaining it to the jury, and even as far as the actual trial of the matter and the second phase of the matter.

SENATOR RUSSO: It seemed from newspaper accounts that there were no unusual procedural problems that came up in Monmouth County, or really in the Essex County matter either. It sort of made me think that it is working all right. You cannot think of any specific--

JUDGE ARNONE: No, I can't. You see, most of this is worked out with the judge in his preliminary instructions to the jury, and we strive to make that very clear to the jury as to exactly how the law operates and what is actually involved in the case. I had no comments from the jury nor questions from the jury in that regard, and they were well aware that once they made their determination, if we went into the second phase of the case, that they were prepared to go into it.

SENATOR RUSSO: Of course, in your situation, you went right on with the second phase, I think the following--

JUDGE ARNONE: Our case terminated on a Saturday.

SENATOR RUSSO: Right.

JUDGE ARNONE: And on Monday we started with the second phase of it.

SENATOR RUSSO: Do you see any problems with the part of the bill that requires the same jury, unless the judge, with good cause shown, should determine to empanel a new jury?

JUDGE ARNONE: No, I don't.

SENATOR RUSSO: At your trial, did you have two alternates or--

JUDGE ARNONE: I had four.

SENATOR RUSSO: Four alternates.

JUDGE ARNONE: Yes.

SENATOR RUSSO: So, you had a lot of leeway in the event that one or two became ill. What about a delayed trial? Now, I guess really that almost answers it.

Let me ask you this: The four alternates, how did you determine to use four of them?

JUDGE ARNONE: I just took that figure because of the length of the trial, plus the two phases that maybe would have to be tried. I thought it would be advisable to use four alternates. What I did was, once we selected the twelve jurors who made the determination on the first phase, I kept those alternates available. I also kept those alternates available during the second phase of the trial.

SENATOR RUSSO: They sat in on the--

JUDGE ARNONE: That is right, in the event that I may have needed them.

SENATOR RUSSO: What happened, Judge, when the jury went out to deliberate in either phase? Of course, only the twelve went into the jury room. You kept the others available.

JUDGE ARNONE: Yes, I did.

SENATOR RUSSO: Do you see any difficulty-- It really applies in general, I suppose, not just to this type of situtation -- if during deliberations, say they were extended three, four or five days, and in the middle of deliberations you lost a juror. Did you have any difficulty in sending an alternate in there?

JUDGE ARNONE: No, that is provided for.

SENATOR RUSSO: Okay. I get the fact that you have four covers for any extended delay between the first two trials.

JUDGE ARNONE: I would say so.

SENATOR RUSSO: So, probably if that procedure was generally followed, we would probably never get to the need of that exception in the bill where it says, "For good cause shown, a new panel may be--"

JUDGE ARNONE: The good cause in the second phase may have been if one of the jurors became ill, we would have had to use one of the alternates.

SENATOR RUSSO: Right, but I think the bill says, if I recall, that the same jury would hear the second phase unless you, in your judgment for good cause, decided a new jury should be empaneled. I don't think they are talking about an alternate; they are talking about a new jury. So, really, we probably won't ever get to that problem as long as, for example, judges have four alternates available.

JUDGE ARNONE: That would be my impression.

SENATOR RUSSO: Okay, other than that, is there anything else?

JUDGE ARNONE: No.

SENATOR RUSSO: Gentlemen?

SENATOR GALLAGHER: Mr. Chairman, you have got to tell me when I get into an area where the Chief Justice (inaudible). That penalty is his law here in the State of New Jersey now in some instances. This was one of the first where he goes at it, and I was just wondering what the attitude of the people involved was toward these death penalty trials throughout the trial process, particularly with the jurors. Did they have any particular reservations, do you think, of being involved with the death penalty against any others?

JUDGE ARNONE: Some did.

SENATOR GALLAGHER: But it did not in any way affect, in your judgment, the trial itself?

JUDGE ARNONE: For those it did, they were excluded from the jury.

SENATOR GALLAGHER: Those were excluded.

JUDGE ARNONE: Right.

SENATOR GALLAGHER: I understand that, but during the trial itself, did you detect any reservations on the part of any of these people?

JUDGE ARNONE: I would have no way of knowing that during the trial of the matter, except that we went through this exhaustive process. When I say we, I mean the prosecution and the defense, in selecting the jury. They have challenges to exercise, and challenges for cause that were exercised.

SENATOR GALLAGHER: Now, you understand that I am not an attorney, all right? I count that as a blessing; some people don't. The individuals involved in the defense and the prosecutors -- it was probably something new to them, too. I don't think too many of them were around when the death penalty was here. Did they approach it on the basis of the fact that it was law, that their personal philosophies relevant to the death penalty were not to come into play?

JUDGE ARNONE: I would think so.

SENATOR GALLAGHER: You think that their personal philosophy relative to the death penalty did come into play?

JUDGE ARNONE: No, no, I think they approached it that this was the law, and they had to prosecute the case on the basis of the laws that exist.

SENATOR GALLAGHER: The law itself.

JUDGE ARNONE: That is right.

SENATOR GALLAGHER: Thank you very much.

SENATOR RUSSO: Senator O'Connor?

SENATOR O'CONNOR: Judge, how long did the empaneling of the jury take?

JUDGE ARNONE: Mine took about five and a half days.

SENATOR O'CONNOR: So that compared to the same selection in a non-capital case, that would be about how many times longer, would you say?

JUDGE ARNONE: A lot longer. I've never really timed it in a non-capital case, but depending on the type of case, you can empanel a jury anywhere between a half an hour to two hours.

SENATOR O'CONNOR: Do you remember how many jurors sat in the box before you ended up with the sixteen jurors who eventually sat for the trial?

JUDGE ARNONE: Do you mean by way of challenges that were exercised?

SENATOR O'CONNOR: The next question that I was going to ask was if you remembered how many of the people said that they could not serve because they had some problem with the death penalty or didn't feel that they could sit in judgment of a person being tried for a capital offense?

JUDGE ARNONE: I don't have those figures with me, but, all those jurors who were excused -- I have that list with my trial notes. It would be strictly a guess on my part to tell you how many there were.

SENATOR O'CONNOR: How would you compare the length of the trial versus other non-capital trials?

JUDGE ARNONE: The time-consuming factor is the jury selection, but as far as the trial is concerned, the trial proceeds just like any other trial would after the jury is selected.

With the other non-capital cases, the jury is questioned collectively, whereas in this case, they had to be questioned individually, so that is what took the time. I had probably over sixty questions, and then each of the attorneys questioned the jury with respect to the death phase of it. A number of their questions depended upon the answers that were given by the prospective juror as to how many more questions they might ask.

SENATOR O'CONNOR: Thank you very much.

SENATOR RUSSO: I think I would just point out that, as I recall, comparing the present law selection of the jury, the death penalty before (inaudible). During the last capital case that I tried as a prosecutor in 1967, it took eight days to select the jury. I think basically the procedures for jury selections are the same today primarily as they were then, so that hasn't been changed as a result of this law that I can recall anyhow. Are there any other questions? Senator Orechio?

SENATOR ORECHIO: Mr. Chairman, I just have one question. Does a judge see any problem where in the composition of the jury, somehow it is changed because of illness or whatever, at the two trials where you don't have the same people serving?

JUDGE ARNONE: As I was discussing with Senator Russo, that is why we picked these alternates, so that in case there was illness, we could utilize one of the alternates in the deliberations.

SENATOR ORECHIO: What I am saying is, in your case you said you had four alternates.

JUDGE ARNONE: That is right.

SENATOR ORECHIO: Supposing you had four faces change in the second trial having to do with the penalty. Do you see the defendent handicapped at all in any way with the process somehow?

JUDGE ARNONE: I don't know, but I kept those alternates available for the second phase of the trial because if I didn't, then we would have in all probability had to pick a new jury, and that would maybe be the good cause shown. There has been no determination of this, so my thinking was that I would keep those alternates available, that in the event we did lose a juror or jurors, then I could utilize those alternates -- whether that would be for an Appellate Division or the Supreme Court to tell me whether that was or was not the proper procedure. But, that was the way I perceived it, that I could use it.

SENATOR ORECHIO: I have a second question. Because of the length of time of the two trials, do you feel that the numbers should be raised in terms of the maximum number who serves?

JUDGE ARNONE: Well, what do you mean by that?

SENATOR ORECHIO: Well, right now, you can have to twenty, right?

JUDGE ARNONE: Challenges, you mean or jurors?

SENATOR ORECHIO: Up to twenty members.

JUDGE ARNONE: I see what you mean.

SENATOR ORECHIO: Do you think that number should be raised because of the--

JUDGE ARNONE: I don't think so, because I--

SENATOR ORECHIO: To provide some more alternates.

JUDGE ARNONE: I didn't even utilize the twenty, so I don't think it should be raised.

SENATOR ORECHIO: I have no other questions.

SENATOR RUSSO: Are there any other questions? Senator Gallagher.

SENATOR GALLAGHER: I have just one, following up on Senator Orechio's question. Because of the type of trial that is was, Judge, -- the death penalty, and because we do have a certain number of people who honestly feel that they do not want to be involved in making any decision in a case like that, do you see any problems that we might run into with regard to getting the type of balance in juries that we would like to have? Do you find a certain class of people or type of people or women or minorities, etc. who shy away from serving on such a panel?

SENATOR RUSSO: Excuse me, Judge.

SENATOR GALLAGHER: We'll stay away from that. Go ahead. Thank you, Judge. I told you I wasn't a lawyer.

SENATOR RUSSO: Are there any other questions or comments? (no response) Judge, thank you very much for taking the time to come here. I appreciate it. If you are able to stay around in case some other things come up, there may be some suggestions that arise, and we may want to get your thoughts. We can reach you by phone -- whatever your schedule permits. We would love to have you stay.

JUDGE ARNONE: Thank you, I will.

SENATOR RUSSO: Thank you very much. Judge Baime? The Committee welcomes Judge Baime back. He spent half his time before this Committee when he was with the Attorney General's Office.

HONORABLE DAVID S. BAIME: That is right. We were working on the penal code at the time.

SENATOR RUSSO: That is right.

JUDGE BAIME: I appreciate your invitation.

SENATOR RUSSO: Well, thank you very much for coming. You have heard the preliminary comments.

Judge, I guess what we would really like you to do is to give us your thoughts. Do we have any problems? Are there any suggestions? Is everything working fine? What do you think?

JUDGE BAIME: At the outset, I would note that I did prepare a very brief statement. What I have done basically is to provide some recitation with regard to the problem areas of the statute. Obviously, my list is not exhaustive. These problems were presented during the course of pre-trial motions and during the course of the trial. What I have done is, I've attempted to provide you with some of the statutory problems that arose during the course of the trial.

To some extent, I have given opinions with regard to several of these issues, and they are a matter of public record, so there is nothing wrong in disclosing them to the Committee. I don't know whether you want me to go through some of these areas or--

SENATOR RUSSO: Well, why don't you touch upon them?

JUDGE BAIME: All right. You have already noted that trials of a capital nature, in all likelihood, will be protracted, so the first problem pertains to obtaining a jury both willing and able to impartially serve in that type of case.

One of the major problems relates to the number of preemptory challenges accorded the prosecutor and the defense. Under our present statute, the prosecutor is given twenty challenges and the defense is given twelve in a single defendant case. That statute was enacted many years ago. At the time the statute was enacted, a jury was composed of twelve members.

As you know, now we use juries composed of fourteen, sixteen, eighteen, and sometimes twenty members, depending upon the length of the case.

At the conclusion of the case, we select alternate jurors in the event that one or more of the deliberating jurors becomes ill or otherwise unable to proceed. When one expands the jury panel, the question is whether the number of challenges accorded the litigants is sufficient to provide them with a basis to obtain an impartial jury.

Some judges have read the statute as restrictive. By that I mean, some judges read the statute as meaning they had no discretion to increase the number of preemptory challenges to be given to the prosecutor and the defense. Others have construed the statute as not being mandatory in the sense that it restricts the number of challenges. I chose the latter alternative in the recently decided capital punishment case, and I increased the number of challenges in a proportionate manner. I believe the defense was given twenty-six challenges, and the prosecutor, I believe, was given sixteen.

Again, the reason why is, we wanted to ensure that in a case of this nature, such a sensitive case, both counsel would be able to obtain a jury that they had confidence in, and that would be impartial in the trial of the matter. So, that was one problem -- again, the number of challenges to be accorded both parties.

A second issue, which had already been raised before the Committee relates to the present statutory provisions, which strongly favor the same jury deciding the guilt or innocence of the defendant and the appropriate penalty. The question arises as to what happens where one or more of the deliberating jurors becomes ill or otherwise unable to proceed after the guilt phase, but before or during the penalty phase? In other words, can the judge at that point put the alternates, or one or more of the alternates, as a deliberating member of the jury? I see no reason why, under the statute, that the judge could not do so, but there is some feeling that when the Legislature used the term "the jury" or "the same jury" -- There is some question as to whether that meant solely the deliberating jurors in the penalty phase, or whether one could substitute one or more of the alternate jurors for the deliberating jurors after the guilt phase, but before or during the penalty phase.

The issue may become important because of the protracted length of the trial.

Another question that arose during the course of the case that was conducted in Essex County pertains to whether the rules of evidence apply to the capital penalty phase of the proceedings. The Senate bill initially provided that the rules of evidence were to apply to the prosecutor, but not to the defense. Thereafter, at some point during the legislative process, the bill was amended, and the statute presently is silent as to whether the rules of evidence are to apply.

United States Supreme Court cases say that anything of a mitigating nature should be admissable at the penalty phase of the trial. Nonetheless, there is a question as to whether our rules of evidence apply at that point.

In my case, I held that the rules of evidence should apply, but there is a rule of evidence -- I believe it is rule five, which states that "adoption of the rules shall not bar the growth and the development of the law of evidence in accordance with fundamental principles to the end that the truth may be fairly ascertained." To ensure that the jury at the penalty

phase of the trial was to obtain all information relevant to the sentence, I substantially relaxed the rules of evidence, and in essence, permitted the defense to introduce anything it wished as long as it had some superficial relevance and some reliability.

Another difficulty pertains to the burden of proof with regard to mitigating factors. In most states, the statute specifically states that the defendant bears the burden of proving mitigating factors by preponderance of the evidence. I believe the bill, as it was initially introduced, also said that the defendant had the burden of persuasion by a preponderance of the evidence with regard to mitigating factors.

The bill was amended after is was introduced, however, and now it provides only that the defendant has the burden of producing evidence relating to mitigating factors. So, the judge, to some extent, is in a quandary as to what to charge the jury. Should the jury be charged that the defendant's burden is by a preponderance of the evidence or should the jury merely be advised that once evidence for mitigating factors is introduced, they are bound to consider it? Obiviously, they can always consider whether such evidence is accurate or inaccurate. I chose the latter course in the most recent case.

The statute provides that if aggravating factors are found to exist, the death penalty is to be imposed unless mitigating factors outweigh those aggravating factors. The question arises as to what happens where the jury determines that the aggravating and mitigating factors are in equipoise. By that, I mean they are in complete balance. Under the wording of the statute, as it currently reads, it would appear that in such a situation, the death penalty would apply. In other words, the death penalty would seem to apply in every case unless the jury finds that mitigating factors outweigh aggravating factors.

The wording of our statute is consistent with, I believe, the Florida statute and the Ohio statute, and the courts of Ohio and Florida, I believe, have read the statute as meaning that where the aggravating and mitigating factors are in complete balance, they are in equipoise. In such a case, then the death penalty is imposed.

SENATOR RUSSO: It is imposed?

JUDGE BAIME: Yes. Now, I construed the statute in the same manner, but I did provide a special verdict sheet with isolated cases of this kind. In other words, I had a special section where the jury was to say if they found that the aggravating and mitigating factors were in complete balance. I felt that by doing so, I could isolate that issue for Appellate review.

In my case, however, the jury found that the mitigating factors did not outweigh the aggravating factors, nor were they in complete equipoise, so the problem will not be presented to the Supreme Court in my case. Perhaps it will be in some future case down the road.

Another issue is whether the reasonable doubt standard is to apply to the weighing process. The statute presently provides that aggravating factors must be proved by the prosecution beyond a reasonable doubt. The statute is silent as to whether the prosecutor bears the burden of proving beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors.

Some judges have taken the position that the reasonable doubt standard is a Constitutional mandate and thus should be applied to the

weighing process. Other judges apparently feel that the reasonable doubt standard applies only with respect to factual disputes, the findings of facts, and it should not be applied to the weighing process. When I say the weighing process, I mean the process by which the jury weighs aggravating against mitigating factors. So, there is a question under the statute whether the reasonable doubt standard is applied in that situation.

Another question exists as to whether the jury should be advised of the consequences of its verdict. Now, obviously the jury has to be advised that if they find mitigating factors do not outweigh aggravating factors, then the death penalty will be imposed by the judge automatically. The question rises as to whether they should also be advised that if they find mitigating factors outweigh aggravating factors, the court will impose a sentence somewhere between thirty years and life, and that the minimum parole in eligibility terms is thirty years.

So too, there is a question as to whether the judge should advise the jury as to the effect of a hung jury. By that I mean a jury that is unable to reach a unanimous verdict.

Under the statute that the jury is unable to reach a unanimous verdict at the penalty phase, then the court is to impose the sentence, and of course, it cannot be life.

Other statutes that we have found, I believe, in Tennessee and one or two other states, specifically state that the jury should not be advised as to what could occur if there is a hung jury, nor should the jury be advised as to the consequences of finding that mitigating factors outweigh aggravating factors. So, that presently is an issue.

SENATOR RUSSO: If I may break in at this point, what are the reasons why the jury should be advised of either of them?

JUDGE BAIME: In my case, I felt strongly that the jury should be advised and that the defendant would be subject to a life term as a maximum, and a thirty-year minimum term during which he would not be eligible for parole. But, the facts of my case were somewhat peculiar. The defendant had previously been convicted of murder in 1966. The defendant was sentenced to a term of years between twenty-four and twenty-eight years. He was released on parole after some six or seven years.

These facts were made known to the jury in the penalty phase. I was concerned that the jury would consider that fact. By that, I mean the fact that the defendant had been released after such a relatively short period of time, considering that it was a prior killing of his wife, and that that could coerce the jury or could affect them in the deliberations, and in effect, cause a death verdict where one might not otherwise be provided.

Concerning the average case, I don't know.

SENATOR RUSSO: The other side of the coin is, not that either of them are relevant-- The other side of the coin is, if you tell them that the alternative is life, mandatory thirty years, that might not influence them away from the death penalty, and maybe it shouldn't. But, that is the other side of the coin.

JUDGE BAIME: Maybe it should, and maybe it shouldn't. I don't know.

SENATOR RUSSO: If I were a prosecutor and felt very strongly that this defendant should get death for a terrible, terrible crime, I would cringe at that part of the charge telling the jury of-- Really what it would amount to is "Well, don't feel so bad if you don't give him death because he

is going to get this long sentence." So, that is just another way to look at it, although--

JUDGE BAIME: Well, the prosecutor did cringe, and I think he is still cringing.

SENATOR RUSSO: Are you still cringing, George?

JUDGE BAIME: I felt obliged to do so; I thought it was the only fair thing to do because of the peculiar facts of the case.

SENATOR RUSSO: I'm not so sure it isn't a good idea anyway, just to dwell on a comment there. The attitude I always had, and I think most of my colleagues agree with me on capital punishment, was that it is here, not because we want to a wholesale death row population, but rather to have it in those extreme cases. Those, in three cases, even though the jury knows the alternative sentence, the jury will still overcome that as apparently they did in that particular case in Essex. If they feel it is justified, they will give it to him anyway.

So, if it takes a few to the borderline, and they go in for life instead of execution, I'm not too upset about that, and I don't think most of my colleagues would be either.

JUDGE BAIME: That was one of the concerns. Also, what dovetails with that issue is, when the mitigating factor set forth in the statute is the age of the defendant. Now, the age of the defendant in the Ramser case, I believe, was forty-four years old. So, the defense wanted to argue that age was a mitigating factor because, under the statute, if they did not return a death verdict, he would be in jail until he was seventy-four in any event. I don't know how you feel about that. I do feel it is a substantial issue, and perhaps should be addressed. I don't know.

SENATOR RUSSO: As to whether age should be a mitigating factor?

JUDGE BAIME: More so with respect to whether the jury should be advised of the thirty years.

SENATOR RUSSO: My initial reaction is that they should. I want to hear from the prosecutors though.

JUDGE BAIME: I know it is my gut reaction.

SENATOR RUSSO: As to the cringing, I'm inclined to think so, because it is, again, a case of, you know, if we err, we're erring on the side of caution rather than perhaps have something that we don't really want to happen. Go on, Judge.

JUDGE BAIME: One of the aggravating factors is where the defendant has previously been convicted of murder. Again, the jury ultimately is asked to weigh aggravating factors against mitigating factors. A question exists as to whether the circumstances surrounding the prior murder conviction should be admitted into evidence at the penalty phase.

My review of other states indicates that there is a split of authority judicially. Some statutes specifically state the murder conviction and the circumstances attendant to it and surrounding it to constitute the mitigating factor. Because the language of the statute in New Jersey was restricted to murder conviction, it did not permit the prosecutor to introduce evidence pertaining to its circumstances.

But, the prosecutor made a very good argument, and that is, the jury is asked to weigh aggravating against mitigating factors. How can they properly do so without being advised as to the circumstances surrounding the prior murder? Again, I think it is a substantial issue.

SENATOR RUSSO: Yes, I think for example, what comes to mind is, suppose the prior murder is a crime of passion, not that that is permitted

but, shouldn't the jury know that, as compared to the fact that he sexually assaulted and murdered three eight-year-old girls? Should they only be told he was convicted of murder in 1971, or isn't it very important for them, if a prior conviction of murder is relevant, to know something about it anyway? The caution that comes to my mind is, are we going to be retrying it all over again? How do you handle that? But, it still makes a lot of sense that if a prior conviction of murder is relevant, as it is, there is something about me-- There is murder, and then there is murder. Shouldn't a jury have some knowledge about what kind of murder that was? There are just so many extremes to a layman, and if they found out that this fellow committed some brutal, cold-blooded, calculated murder, they may give the death penalty here. Otherwise, they might not.

If they found that prior murder was, although not justified, of course, or it wouldn't be murder -- nevertheless, one of those at the lower end of the scale in an emotional deal, you might say -- I think that makes sense.

Okay, go on.

JUDGE BAIME: The last problem area pertains to the use of the words "aggravated battery" in one of the aggravating factors in the statute.

SENATOR RUSSO: That has got to be changed.

JUDGE BAIME: The one I am referring to says, "An aggravating factor exists where the murder was outragiously or wantonly vile, horrible or inhuman and involved torture, depravity of mind, or an aggravated battery to the victim."

Aggravated battery probably was taken from the Georgia statute and, I think, in New Jersey, what we really mean is aggravated assault, and that is what I charged the jury.

SENATOR RUSSO: Right, I think you are clearly correct. That was your last point.

The first thing I want to say, Judge, is that this information is absolutely -- I don't know how to commend you. I want to run through these quickly and see if the other members of the Committee have any comments. I have difficulty in rejecting any one of these. I think they are excellent, and I appreciate it very much, because you obviously really went into it and came here with the intention of helping us with solving our problems, and you have.

The first thing is preemptory challenges. You construe the statutes as allowing the judge, in his discretion, to increase the number of preemptory challenges. I think we ought to make that statutorily so.

Incidentally, I might say that if you go through the -- the procedure I would suggest we follow is this: I'm going to ask staff to prepare an analysis of these suggestions. I would like legislation prepared which I'll introduce, and any members of the Committee who would like to join with me, I would like to have you on the bill that will be introduced.

I don't intend to exhaustively complete the analysis before it is introduced. Rather, I think the way to do it is to put the legislation in, and then we'll have the Attorney General's Office, Public Defender's Office and all people interested before this Committee debate to see whether it should be passed in that manner.

But, that first point is, to my judgment, clear. That discretion should be granted.

The second point about the use of alternate jurors-- The Judge suggests that perhaps that is not clear in the statute. To resolve any doubt, I think we should make it explicitly clear that it is permissble.

The third is as to the rules of evidence; I remember that we went through this -- ad nauseum, when we changed it back and forth with the Attorney General's Office and the Public Advocate. I thought we had fully resolved it, but in any event, we haven't. I think we have got to take that issue on and clarify what I think is clear in the statute. If we have to make a determination whether the rules apply to only the aggravating factors, not mitigating, we ought to do that. We ought to consider it and resolve it once and for all.

As far as the burden of proof, I think the proposed amendments that state "that after consideration of the aggravating and mitigating factors, the final burden is still on the State to prove that the death penalty is warranted" -- in other words, the state of equipoise argument that the Judge raises. If the evidence is in the state of equipoise, then the jury should be told that the death penalty is not to be applied. It is not to be applied. I think Judge Baime suggests that the way the statute reads now, it might read the opposite, and I do not feel that that is my intention, and it is subject to the Legislature and the Governor signing any amendment. I think we ought to make it very clear if it is not otherwise clear -- that where they are in equipoise, the death penalty does not apply.

The next point about whether the State must prove beyond a reasonable doubt that mitigating factors do not outweigh the aggravating factors-- In my judgment, the statute, if necessary, should be amended to provide that they do; they should have that burden.

These comments are subject to the discussions that we will be having with the prosecutors and the defense counsel. But, subject to that, this will give you some idea of what I think we ought to proceed with, assuming that we hear nothing different before we're through.

As far as advising the jury about the penalty, as we said before, I want to hear from the prosecutors, but I think this might be the only one situation where I would be inclined to think we should advise them. Again, if we are going to cause them to lean one way or the other, I would rather have them lean in favor of not imposing the death penalty rather than imposing it, for reasons that I've expressed over the ten years that I have been proposing this legislation. Mistrial? I have difficulty with that as to whether the jury should be told anything about what the effects of that are. Of course, the effects of that are simply to have another trial.

JUDGE BAIME: Yes, as to the guilt phase, but as to the penalty phase, then the judge imposes the sentence.

SENATOR RUSSO: Right, of life. It can only be life.

JUDGE BAIME: Thirty years to life, yes.

SENATOR RUSSO: In other words, the effect of a mistrial, the effect of a hung jury in the penalty phase is the same as the jury concluding no death penalty. The result is the same.

JUDGE BAIME: That is right. It could be considered. If the judge tells the jury that if they cannot agree, the judge will impose sentencing. That might coerce the jury toward reaching a death penalty because they know that if we can't agree, that is a verdict of one kind.

SENATOR RUSSO: That is right.

JUDGE BAIME: But then again, I just don't know.

SENATOR RUSSO: My suggestion will be subject again to the discussions with the prosecutors that they should be told, because if they cannot agree on a death penalty, then they can't agree that we should end this man's life, as dramatic and extreme as it is. Maybe it is not a death penalty case, and my feeling is that if that jury isn't convinced enough to impose death unanimously, then I would just as soon see that be a life case. But again, this is subject to talking to the prosecutors. That is the way I think we ought to proceed, that they should told the effect of that.

We talked about the prior murder, and we'll talk about that further here today. Aggravated battery, I think, is a technical change. I think that covers my thoughts on the Judge's suggestions.

Again, please believe me that you are not closing my mind. They sound excellent to me, but when we hear from some of the other people, we may decide that the Judge was not so wise as I think he is, and we'll make final judgment. But, I wanted to give you those thoughts.

Does any member of the Committee have any comments on these requests? (no response)

I don't know how we can thank you enough, Judge.

JUDGE BAIME: Thank you.

SENATOR RUSSO: (continuing) except to ask you to stick around if you could, because--

JUDGE BAIME: Just don't tell the Chief Justice.

SENATOR RUSSO: I won't tell him. Thank you very much. Okay, Prosecutor Lehrer. Prosecutor Alexander Lehrer of Monmouth County.

Prosecutor, we thank you very much for taking the time to be with us today.

PROSECUTOR ALEXANDER LEHRER: It is my pleasure. Senator, may I have Alton Kenney, the Chief of my Trial Section who tried this case, sit with me?

SENATOR RUSSO: Sure you can. Are you afraid to handle this all alone?

MR. LEHRER: No sir, I've never been afraid to handle it all alone.

SENATOR RUSSO: I wonder if you see (inaudible), Prosecutor, but I was going to suggest, how about touching on the Judge's suggestions first, and then going on and adding? Or, if you want to do it in a different order, feel free to do so.

MR. LEHRER: That is fine, sir. Judge Baime, when he was in the Attorney General's Office, was also a hard act to follow, and he is certainly a hard act to follow today. I think he has covered most of the issues that we were prepared to cover.

I would just like to say from a law enforcement point of view, I think the bill as it exists is an excellent bill. It is an excellent tool to law enforcement, and it has worked well in Monmouth County. It worked well in Monmouth County because there were really professionals in the courtroom. We had Al Kenney trying the case for the prosecution, who is the Chief Trial Attorney, and an excellent lawyer, Jack Ford, counsel for the defense, and Judge Arnone, who handled the case, in my opinion, the best any judge could handle it.

As to the issue of preemptory challenges, I agree that they should be increased. I would respectfully suggest that you consider giving the prosecution as many preemptory challenges as you do the defense.

SENATOR RUSSO: Why?

MR. LEHRER: Because of the fact that it is just as important a case to the prosecution as it is to the defense. I find no legal requirement to have the defense have more challenges, and we are trying to find an impartial jury. It is a very important issue.

SENATOR RUSSO: It has never been that way though. It has always been that the defense in New Jersey that has the greater number of challenges, as far as I can remember--

MR. LEHRER: That is correct, it has been that way. As far as I can remember, it has never been that way either, but if we are legislating numbers of preemptory challenges, it would be just as easy to give the prosecution as many as the defense.

Senator Gallagher raised an interesting issue before, if I may address that, and that was the philosophies that enter into the trial of cases. Obviously, I have not tried the death penalty case in Monmouth County, but I can tell you how, from a policy decision, from a policy aspect, I handled it in the Monmouth County Prosecutor's Office.

As Judge Baime so aptly pointed out, and I'm sure others will, this is a very critical issue to a number of people, and prosecutors, as defense attorneys, have varied opinions on the issue of the death penalty.

The death penalty is the law of our State. Prosecutors are sworn to uphold that law, but by the same token, certain people have problems with the death penalty.

The way we have handled it in our case in our office is, we have candidly discussed that issue with all Assistant Prosecutors, and there are some Assistant Prosecutors who have asked not to try murder cases as a result, and they do not try murder cases as a result. I think that is the only fair way to handle it; at least that is the way we are handling it in the Monmouth County Prosecutor's Office, and I hope that answers your question, sir, about the philosphy.

The issue that was raised by Judge Baime as to whether or not a jury should be told of the import of their inability to reach a verdict as to death, I think is absolutely fair, and I think it should be done, because--

SENATOR RUSSO: They should be told?

MR. LEHRER: They should be told that their inability, the fact that they can't reach an issue as to death, that there will be a life sentence imposed. The reason I feel that way is that a jury in this case is really acting as a sentencing judge, and it is the only time in the history of our law, that I can remember, where a jury would act as a sentencing judge. A judge would have the full knowledge of what the import of things are, and I think in order for them to reach a fair and just decision, that would be an element in it. I have no quarrel from a prosecution standpoint of letting the jury completely know what the import of their decision is, and what the effects of their decision is, because, as I think you said, Senator, if there is a doubt as to doubt, then it should be resolved in favor of a defendant not dying.

SENATOR RUSSO: It seems like, unless I misunderstood, you feel that the jury should be told that, "Hey, if you can't reach a verdict of death, which is a mistrial, the defendant is going to get life."

MR. LEHRER: That is correct.

SENATOR RUSSO: If they are not told that, you are absolutely correct. I had the thing a little bit reversed. Telling them that will, in

effect, perhaps tip the scale in favor of them staying away from the death penalty, either remaining hung or recommending life.

MR. LEHRER: Well, they have to reach a unanimous verdict as to everything.

SENATOR RUSSO: What I mean is this, Al: If the jury knows that the alternative to death is life imprisonment with a mandatory thirty years--I think Judge Baime talked about that. So, they know the fellow is going to be out in a few years. They would be--

MR. LEHRER: A few years is thirty before he is even eligible for parole.

SENATOR RUSSO: Exactly. The Judge talked about the prior conviction in the Essex County case where he was out in seven years after his prior murder.

MR. LEHRER: Yes, but under the new act, it can't happen. He's--

SENATOR RUSSO: Exactly.

MR. LEHRER: Right.

SENATOR RUSSO: So your suggestion is that they be told what the penalty is as an alternative to death, and by telling them, we might tip the scales a bit, and a few cases away from death to life imprisonment by telling them that.

MR. LEHRER: That is correct. I believe that the death penalty in this State, as I believe you believe, and I certainly don't mean to speak for you, is to be used in the extreme cases. Candor with juries in telling them all about what the process is that is going to happen would opt in favor of those extreme cases and would protect society against that being administered in cases where we all had questions.

SENATOR RUSSO: You are absolutely correct in my judgment, Prosecutor. I had that thing a little bit reversed, and actually, anytime I disagree with you, I find that you are right.

MR. LEHRER: I don't believe that to be true at all, Senator. The only other issue I would like to address, and I am sure that Mr. Kenney has issues that he would like to address, is the fact of circumstances surrounding prior murders being made aware to the jury. I would feel that that is absolutely essential under the same philosophy I just espoused. If we are going to tell a jury, if a jury is going to act as a sentencing judge, as a sentencer, which it does do under the new Death Penalty Act, a sentencing judge would have the same circumstances surrounding the prior murder available to him before he passed sentence. I would think that a jury should have those too.

You have cited examples in your colloquy with Judge Baime which I think are excellent examples. A crime of passion kind of murder, although it is a murder, is that the same as a triple ax murder? Shouldn't a jury know the propensity for violence of a person throughout his career or throughout his life in order to make that decision? If there is an escalation of violence in a person's life, I think the jury ought to take that into consideration when looking to impose the death penalty or not. By the same token, I think the facts and circumstances surrounding prior murders are absolutely essential.

That is what I prepared to address. Mr. Kenney is, again, the Assistant Prosecutor and the Chief of the Trial Section for the Monmouth County Prosecutor's Office, who publicly, I would like to say did an admirable job in the trial of that matter. I respectfully ask that Mr. Kenney able to--

SENATOR RUSSO: Sure, let me just make one point. It is very appropriate that throughout accolades, and you know, sometimes they are meaningless. But, let me just say one thing. Based on newspaper accounts and television accounts of the Monmouth and Essex County trials, and anyone who wants to accept them as just a casual accolade can do so, but I'm telling you that the impression that we got down here, that I got, was that in those two trials, professionalism was extreme on the part of the prosecutors, the judges, and the defense counsel. You may say, "well, that is because they are all here." That is nonsense. I really mean that. The trials were handled just beautifully. The decorum and the control by the judges and the attitude of the prosecutor and defense counsel didn't degenerate into a donnybrook or a charade, as some people feared death penalty cases would. I hope that is an indication that that is going to be the pattern in the future in other counties with other judges and other participants. Really, I have not heard a single adverse comment from anyone regarding the conduct or attitude of the prosecutors, defense counsel or judges in either of those two matters. That is not a casual statement; it is truely meant.

MR. LEHRER: Thank you, Senator. I can accept that because I was not an active participant in the trial, other than policy decisions.

SENATOR RUSSO: But it was your office.

MR. LEHRER: But it was my office. I would agree with you, certainly in the Monmouth County case, and I was not privy to what happened in Essex County, but as I indicated in my earlier statement, it works because the bill is good. It works because we had true professionals in the system who were aware of the seriousness and the magnitude of these cases and treated them professionally and treated them like any other case and did them well. I thank you for your comments.

SENATOR RUSSO: Prosecutor Kenney?

PROSECUTOR ALTON D. KENNEY: Thank you. There were some initial questions before about the amount of challenges, the number of challenges, and the time it took. My recollection of just qualification was, I think, there were possibly five individuals who felt that they could not be called "death qualified" out of about fifty-five people who were examined. In light of that, the concept of who should have more challenges, it is clearly historical that it is twenty and twelve under our current rules and statutes.

I would suggest that you are looking for a fair and impartial jury. The State and defense should both have an equal number of challenges, because the composition of the panel will not change. The composition of the people who are being examined will not be changed. I think it is only fair to have an equal number of challenges, and they could, of course, be expended by the trial court. I agree with Judge Baime in that regard, because it is not a numbers game. It is the seeking of a fair jury.

One of the things that Judge Baime raised was the question of the rules of evidence. I believe the rules of evidence should apply, at least as to proving the aggravating factors. The question then becomes of the mitigating factors, and we treated that as any relevant evidence to be admitted. The difficulty then comes under the statute of what do we then do with rebuttal, because the statute gives us an opportunity to present rebuttal evidence. But, if the defendant choses not to put in that kind of evidence, that would open the door to rebuttal; the State may not get into those background matters of the defendant. The focus

has to be under the statute, that you have selected a jury who has told you that they can put their feelings about the death penalty aside, or any punishment aside, and try the case as to guilt or innocence. They tell you that under the death qualification questions.

Once you have reached the penalty provision, you are talking about the issue of punishment, and that jury is sitting as a judge would. A jury may, in certain circumstances, not get all of that information that a judge would have by way of a pre-sentence report -- you are, in effect, in the penalty phase, trying a pre-sentence report or a pre-sentence investigation. I think it is fair to construe the rules of evidence in order to prove the aggravating factor.

In terms of what shall be done under mitigating factors and rebuttal from that, that is a question I think should be broader and should not deprive a jury of information about the defendant's background and about things in his life. You must recognize under the aggravating factors that with the exception of the prior murder, you are dealing in all other aggravating factors that concern and touch upon the act the defendant committed and not the individual who committed that act, his background, and the reasons why he made have done that. But, you have chosen only the category of prior murder, rather than the broader category that other states may use. That aggravating factor alone is one that deals with his background. All others deal with the act itself, and I would suspect, that in many cases in the future, the State will put in very little evidence in the death phase or the punishment phase, becasuse they have, in effect, proved their case once before. I think it would be essential for a juror to know the man's background, at least in the area of the prior murder. Certainly, they should know the facts about that, what that was. If it was murder that was committed in the 1940's, 1950's or 1960's, as the Senator can tell you, there were any number of cases that were tried on the issue of first-degree murder versus second-degree murder, that willful, deliberate, premeditated concept, as opposed to a second-degree murder conviction that would be relevant, I think, to background.

I think one of the things that is very important, though, and I would urge that it really be resolved at a very early date, is the beyond a reasonable doubt standard, and how it shall apply in the punishment phase. The statute says that "the State shall have the burden to prove the existence of an aggravating factor beyond a reasonable doubt, that the defense shall then have the burden of producing evidence."

Judge Baime suggests that it may be of Constitutional demand or Constitutional requirement that the beyond a reasonable doubt standard continue. I would most respectfully disagree. I would suggest to you, as I suggested to the jury, that once the State proves the existence of an aggravating factor by the rules of evidence and beyond a reasonable doubt, that they define them as the same standards that they use in the guilt phase. Then, only they, as the collective voice of the State and the community, can assign a value to what that aggravating factor means and what that mitigating factor means.

We had people who took the view that once the prosecutor produced existence of a purposeful and knowing murder, no matter what the defendant's background was, they would not even consider those mitigating factors. Those people were excused for cause.

But, no one can assign a value to what those factors shall mean -- his age, lack of prior or lack of substantial prior record, or what we call the imperfect defenses of insanity, intoxication, and others. So, to continue through in the vain of beyond a reasonable doubt, I would suggest engrafts a standard that does not apply there. It is a balancing test. It is an assignment of values of what those mitigating and aggravating factors mean, and I don't think you can continue, in light of the statute-- I don't think you can continue a beyond a reasonable doubt standard.

SENATOR RUSSO: Let me see if I understand that. The aggravating factor-- You don't quarrel with, or do you, with the fact that the burden is on the State to prove that the aggravating factor is beyond a reasonable doubt?

MR. KENNEY: Not at all.

SENATOR RUSSO: No quarrel with that. Now, the mitigating factors-- The statute, you say, says that the defendant has the burden of production--

MR. KENNEY: Solely of production, and I think that is for good reasons because the defendant cannot later complain and say, "The State knew something about my background that was good and didn't bring it forward."

SENATOR RUSSO: Right, okay. You say though that the statute is silent on the burden of proof on the mitigating factors.

MR. KENNEY: That is correct. The statute really is silent, at least in my opinion, and as I argued before Judge Arnone, the statute does not say to the jury, "How do you weigh these?" I would submit to you that there cannot be a weight value.

SENATOR RUSSO: Well, I think that is the next step -- weighing aggravating versus mitigating. Let's stay with mitigating just for a moment. The defendant has the burden of production for his coming forward. You say though that the statute is silent as to what the burden of proof is on those mitigating factors? Forget the weighing against--

MR. KENNEY: No, all the defendant must do is bring forth that evidence, and any of it shall be considered. What I am saying then, in the next process, is that the jury must then be charged by the court. The court is not given a guideline to say, "How do you weigh these?" Nor should they.

SENATOR RUSSO: All right. After that mitigating evidence is presented, then the jury has to make a decision. We'll assume for the moment that they have found at least one aggravating factor.

MR. KENNEY: Beyond a reasonable doubt.

SENATOR RUSSO: Beyond a reasonable doubt. Now, they have found some evidence of a mitigating factor.

MR. KENNEY: The interrogatory, as I understand it, that has been prepared, first they must find beyond a reasonable doubt the existence of an aggravataing factor.

SENATOR RUSSO: Right.

MR. KENNEY: If they find that, and they find no proof of any mitigating factor, then the sentence shall be death. If they find some proof of any mitigating factor, then they must decide whether the mitigating factor outweighs the aggravating factor.

SENATOR RUSSO: Right.

MR. KENNEY: I have no quarrel with that; I think it works well, and I thought it worked well in the case that was tried in Monmouth County.

What I am saying is, there is a suggestion that the beyond a reasonable doubt standard shall be engrafted for that weighing, and I don't think it belongs there, because again, to decide whether death shall be imposed or not, and it must be unanimous, and the jury, in my opinion, must know that it is life with at least thirty years, again, in my opinion, they should know the result of a failure to reach a decision.

How do you put into existence the beyond a reasonable doubt standard? The statute, as it says now, says that mitigating must outweigh aggravating or the sentence shall be death. You are shifting the burden back, I think.

SENATOR RUSSO: Why don't we say aggravating must outweigh mitigating, number one? Then say that the jury must make the determination that aggravating outweighs mitigating beyond a reasonable doubt.

MR. KENNEY: Because you are dealing with punishment, all be it the most severe form of punishment we can extract from an individual. We do not deal in any other area of the criminal law in that manner. All of our sentencing schemes now that we deal with under aggravating and mitigating factors are presumptive sentences, and with those factors, we would go down through a standard sentencing in any other crime. We do deal with the beyond a reasonable doubt standard.

Again, I suggest to you, it is not appropriate here because of what value is it of the defendant's age? Or of what value is it that it was a felony murder, picking one aggravating and one mitigating?

Only twelve people who ultimately decide put those values on it.

SENATOR RUSSO: I'm still puzzled by, you know, I understand you say it has never been done in sentencing, and you made a very logical argument. But, I guess, as we have talked about this today, if there is any doubt about it, let's go the way that the it would be--

MR. KENNEY: But, the statute is clear, and the jury is told. First, the State must prove guilt beyond a reasonable doubt; then they must prove the aggravating factor beyond a reasonable doubt; then any evidence, in any way, which bears upon the defendant's sentence shall be introduced or can be introduced.

Punishment, and again, recognizing it is the most severe punishment you can extract, there is nothing else in our entire statutory scheme that suggests that should be so, and what value shall those twelve people place upon those mitigating or aggravating factors? You've given them a guideline to work with.

What I am suggesting in my experience with the case that I tried, is the statute works extremely well -- that good and responsible people chose to face all of the necessary decisions. In my case, the jury could have come back on guilt or innocence and simply decided, "We do not face the death penalty issue." Without going into the facts of it, they were consciencious people who took a great deal of time and were unanimous, and I am suggesting that it is a statute that had a great amount of time spent on it, that the study of the statute, when twenty or thirty cases are tried, and remembering there is the provision that the Supreme Court could set aside any verdict that is not in conformity with what was the expectation of the Legislature -- that, I think, has to be done over a period of time.

SENATOR RUSSO: I think it is interesting. You're telling me what a good statute it is the way it is, and I'm telling you that maybe it needs--

MR. KENNEY: I am suggesting there are people who are trying to engraft upon an additional burden that I don't think was anticipated at the time it was enacted.

SENATOR RUSSO: John, I would like you to focus on or perhaps draw it in the manner, and then we can discuss it -- whether or not we leave that part of it the way it is, or more specifically, put a provision in that the jury would be required to find that the aggravating outweighs the mitigating beyond a reasonable doubt. The difficulty is, I'm not sure, I think you've got a point as to how you apply a reasonable doubt to that type of an issue. Maybe you're right.

MR. LEHRER: Senator, if I may address that issue, in my interpretation of the legislation and my conversations with you prior to its being passed and subsequent to its being passed, I think we all have a lot of faith in the jury system. Basically what we have said, or what you have said, and the State has said, and what we have followed up on, is that we are going to leave that ultimate decision up to a jury and try to give them as many factors as we can in determining that ultimate issue of life or death. I think what Al was saying has some very significant impact, and I would ask you to consider it.

SENATOR RUSSO: I think so, too. Okay, anything else?

MR. KENNEY: I believe that was all that we found which occurred in the case and that we followed through on in terms of that. Again, I do believe that the jury should be told that the alternative is life with at least thirty years, or in a case of a hung jury or inability to reach a verdict, that the sentence shall be life, because we are going to take a person's life in the extreme circumstance and they should know what the alternatives are.

SENATOR RUSSO: Okay. The other proposals or suggestions by Judge Baime, I gather, are those that you commented on. Otherwise--

MR. KENNEY: There are others, and we'll review those. We will submit to you in writing any further thoughts we have.

SENATOR RUSSO: I would very much like to have that.

MR. LEHRER: We'll have it to you within a week, sir.

MR. KENNEY: We would be glad to.

SENATOR RUSSO: Great. Are there any questions from the Committee? Senator Gallagher.

SENATOR GALLAGHER: I have just one, and I don't know whether the prosecutor wants to comment on it, but Judge Baime mentioned something about age. In the statute, of course, it is to be taken into consideration as one of the factors at the time that he commits the crime.

As I understand from the Judge's comments, he felt that the jury should be apprised of the fact that he be a certain age if he was in there for thirty years instead of giving him the death penalty. Are we saying that someone who is twenty-four years old, because he is going to be fifty-four years old, and come out and be active, as opposed to someone who is forty-five years old and is going to be seventy-five years old when he comes out-- There ought to be two different measurements as far as the penalty for the particular crime?

MR. LEHRER: Well, Senator, I learned a long time ago that you never speak for a judge, and I don't intend to do that now.

SENATOR GALLAGHER: No, I'm not asking you to speak for the judge, but--

MR. LEHRER: No, but age, under the bill as I understand it, is a legitimate factor to be considered.

SENATOR GALLAGHER: At the time of the commission of the crime, but is it really relevant as to the age he is going to be when he comes out? If he went in for thirty, is he going to be marvelous at seventy-years old, but he may not be marvelous at fifty-four years old?

MR. LEHRER: I understand your point, sir, but I think that is the beauty of this bill, because it lets the jury make those determinations, given all those factors.

SENATOR GALLAGHER: Right, and you feel that they should be made aware of the age situation under any circumstances.

MR. LEHRER: I feel that they should have as much information as possible in order to reach that ultimate decision, which they are charged with the responsibility of doing.

As a prosecutor, I have no qualms of letting them have any information which is relevant and proper under the act.

SENATOR GALLAGHER: Okay, thank you.

SENATOR RUSSO: Are there any other questions? Senator O'Connor.

SENATOR O'CONNER: Prosecutor Lehrer, I wrote down that you concluded, as does Senator Russo, that capital punishment will only be applied in extreme cases. Is that what you said?

MR. LEHRER: Well, that is my hope certainly, and also it is the experience that we had in Monmouth County with the verdict of the jury.

SENATOR O'CONNER: Right. By that, did you mean that the jury will only come up with the verdict in favor of death in extreme cases, or do you mean by that that your decision to seek capital punishment would only be made in extreme cases?

MR. LEHRER: Under this bill, we have no decision making -- the prosecutors have no real decision-making process. We investigate a murder, we charge it, and if there are aggravating circumstances, we charge those. If the jury comes back in the first phase with a knowing and purposeful murder, then the second phase automatically comes in. A prosecutor has no discretion, and I orginally thought, and I've discussed it with the Senator, that a prosecutor should have discretion. I have rethought that, and I think the bill is fine on that issue.

SENATOR O'CONNER: Thank you.

SENATOR RUSSO: That is it? Are there any other questions or comments? (no response) Prosecutors, thank you very much. It was very much appreciated, and I hope you will stick around in case something new develops.

With that, I would like to hear from Prosecutor Schneider from Essex County. Good morning again, George.

P R O S E C U T O R G E O R G E S C H N E I D E R: Good morning, Senator.

SENATOR RUSSO: Thanks for taking the time to be with us today.

MR. SCHNEIDER: There is nothing else to do up there in Essex anyway.

SENATOR RUSSO: I'm sure there is not. I guess, Prosecutor, if we could ask you to present your thoughts in whatever way you like -- your comments of the suggestions of Judge Baime and with the specific reference to your cringing at that suggestion. Just let us have whatever help you can give us.

MR. SCHNEIDER: I'll address first, if I may, the question of jury selection. I don't personally consider that to be a serious problem in my own personal opinion. My three years as a public defender, my five years as a Deputy Attorney General, just trying cases -- over 200 jury trials -- jury selection, I have found from my experience, to be somewhat of a rolling of the dice game to a certain extent. You really are accepting uncertainties. You can't read the person's mind; you have to look at his background and get as much as you can without personally offending the person, and you end up obviously with a jury which the defense thinks is going to be favorable to them to a certain point, and the State feels is going to be favorable to them, especially in cases where you did not exhaust your preemptories, as was the case in the Essex County capital punishment case. Neither side exhausted their preemptory challenges, so both sides, you would have to say, were satisfied. We were pleased with the jury that sat and deliberated the case.

I have had cases in the past, jury trials, that have lasted-- I can think of one that lasted about eight weeks when the jury came back. I thought it was going to be a conviction. This happened when I was a prosecutor for the Attorney General's Office. The jury came back in forty-five minutes and acquitted the man. I've had cases which I thought were going to be just the opposite, or I thought I did not have that strong a case, and I was anticipating an acquittal. The opposite came about. So, I think expanding on the number of preemptories is unnecessary. I don't think you need them, because if you have legitimate reasons for excusing, such as feelings for or against the death penalty, you are going to get those people excused for cause anyway. If you have anything of real significance in jury selection as far as a reason is concerned, you are going to get them excused for cause.

Most of the preemptory challenges are just gut challenges, gut feelings that the attorney has, I have found in my experience. I would say that after trying 200 jury trials, I have had sufficient experience to get a feeling about how jurors react, and most of the cases, maybe 1,000 of preemptory challenges that I might have exercised were gut feelings. I just didn't feel right; I just didn't feel comfortable with that person. I don't think you need that many.

It took us three weeks to select a jury in this case. I don't think it should have taken that long. Of course, it was the first, and maybe that is why, or the second since Monmouth was there. But, it is early in the game and people are overcautious, I think, justifiably so. I tried the case myself, so I was very aware of the significance of the case, the ramifications of the case, both to the State and obviously to the defendant who ultimately did receive the death penalty.

So, for that reason, the jury selection process was protracted. I don't think it will be such in the future. To add any more preemptories, I feel, is unnecessary, and it is going to cause an undo consumption of time.

Perhaps the courts can get the message that if they were a little more lenient, a little more easy, if you will, on granting challenges for cause, the necessity for further preemptories would cease, I feel. That is my feeling on jury selection.

Another thing which protracts the jury selection, at least it did in this case, is the fact that in many of these death penalty cases, I think we are going to see a lot of psychiatric testimony and also neurological testimony. We had that in our case, because four of the mitigating factors

invited and encouraged psychiatric evidence. So, you are going to see that. I believe you are going to see it at both the guilt phase and at the penalty phase, and if you don't see it in the guilt phase, you are certainly going to see it in the penalty phase, because it is a definite mitigating factor.

Some defense attorneys, I would anticipate, will want to run it through the jury twice. They will want to take a shot at it at the guilt phase to see whether nor not the jury would actually acquit or convict of a lesser included offense because of some psychiatric or neurological problems, and then take a second shot at the penalty phase. "Well, if they don't believe that it is a legitimate defense to acquit the defendant, maybe they'll accept the fact that it is such a mitigating factor that they'll weigh that against aggravating, and not vote in favor of the death penalty."

You are going to see a lot of psychiatric testimony. That is something which I don't think the Senate or the Assembly, the Legislature has to do anything about. It is just the nature of the beast. It is going to happen.

What I would like to see happen, and right now our court rules provide that the State must advise the defense of all aggravating factors that it intends to prove at a trial at the time of the arraignment, which is very early in the game, as you know. But, the defense need not advise the prosecution of the mitigating factors, any of them, which they intend to present at the penalty phase, if the case reaches that stage. What this does, I think -- it didn't so much in my case, but I can anticipate that in many cases, it is going to cause a delay in the proceedings, and it is going to cause, again, an unusual amount of time -- unnecessarily tying up the courts, counsel, jurors, and so forth. If they do, in fact, decide at the penalty phase to advise of mitigating factors, such as psychiatric testimony, or any kind of medical testimony, which as I said, falls within four of the eight mitigating factors, they are going to have doctors, examinations of the defendant, and the State would have no reason or cause to examine the defendant if it is not an issue. So we would have to wait. If it is not a part of the defense in the guilt phase, we would have to wait to examine the defendant until it is established by way of notice that the defense is going to claim any of the four factors that invite psychiatric defense as a mitigating factor.

What I would suggest is that they give early notice when they know it to be so, but not preclude them from bringing in other factors later, as the last mitigating factor is anything at all that they can bring in.

SENATOR RUSSO: Prosecutor, there is nothing in the bill that requires the aggravating factors to be noticed of the defendant at the time of arraignment.

MR. SCHNEIDER: That is right. That is the court rule, but there is in--

SENATOR RUSSO: Court rule?

MR. SCHNEIDER: It is a court rule, but there is a paragraph in here in the bill-- I can't put my finger on it right now -- which states, in effect, that the defense should advise of the aggravating factors as soon as they know them, whatever. I would assume that if that be the way the courts are going to interpret this, that if we, the State, do not advise at an early stage of an aggravating factor, one which should have or could have advised early, we may be precluded from presenting evidence of that aggravating factor. Therefore, we are really bound to present them right away. That is

my interpretation of the statute, as well as the rule. I don't see why the statute cannot be amended to provide for early notice by the defense. At least it is something to think about, Senators. Maybe you should confer with the Judiciary on this to see if they can work something out. It would be in the interest of judicial economy, and I think the courts are very, very attuned to that under the Speedy Trial Act -- to move things along as quickly as they can.

SENATOR RUSSO: The statute, though, provides that you need only advise of the aggravating factors prior to the commencement of the sentencing proceedings.

MR. SCHNEIDER: Right.

SENATOR RUSSO: So, you say there is a court rule that requires you to do it?

MR. SCHNEIDER: Yes. The court rule provides us, the State, to notice them at the time of the arraignment, and that the defense need not notice until the verdict of murder has been determined.

SENATOR RUSSO: It sounds like a Winberry versus Salisbury problem, doesn't it?

MR. SCHNEIDER: That is about the first week of law school, isn't it?

SENATOR RUSSO: That is the question of whether -- I guess it is, if I remember the question, of whether they have jurisdiction or we do. On something like this, it seems to me as though they may well be changing the intent of the statute if they do that. But, in any event--

MR. SCHNEIDER: Perhaps the courts were not aware of the fact, and maybe the Legislature was at the time of the, I think, serious potential for a great amount of delay in the proceedings.

Don't forget, you have juries, and in these cases, we have eighteen jurors. If we are not ready to proceed because of a late notice of a psychiatric test, we have to now scurry around and retain a doctor to examine the defendant and to do other background on it to present to offset their mitigating. Then, these twenty jurors are going to sit around.

SENATOR RUSSO: Sure.

MR. SCHNEIDER: (continuing) As well as the court can't do anything else while the trial is on and the counsel can't do anything else.

SENATOR RUSSO: I think that is probably a subject that we ought to address in a meeting with the Chief Justice or the court, because it is really dealing with court rules more than it is the statute. But, I think you're right.

That is something, John, that I think we ought to discuss with the Chief Justice.

MR. SCHNEIDER: Now, if I may address myself to the aggravating factors. One aggravating factor which, I think, is conspicuous by its absence is the fact that the jury cannot consider, in the State's case, in the State's phase, of presenting aggravating factors, the past criminal record of the defendant. This can come into play, as I see it, only if the defense, in presenting their mitigating factors, presents evidence of good character, and then we can rebut that by way of bringing in prior criminal record. However, if the defense does not present any such mitigating factors which invites rebuttal by way of a prior criminal record, the jury will never be aware of the fact of the prior criminal record of the defendant.

SENATOR RUSSO: Let's stop there for just a moment, because I'm not sure. You say that the defendant's prior criminal record cannot be presented as an aggravating factor unless the defendant first puts his good character in evidence.

MR. SCHNEIDER: That is right.

SENATOR RUSSO: (continuing) or at the sentencing phase of that?

MR. SCHNEIDER: That is right.

SENATOR RUSSO: Let me just ask informally from here, is that the understanding of the prosecutor and the judges in the audience?

MR. LEHRER: With the exception of murder.

MR. KENNEY: With the exception of murder.

MR. SCHNEIDER: With the exception of a prior murder.

SENATOR RUSSO: With the exception of a prior murder.

MR. SCHNEIDER: That is the only aggravating factor; it is the previous conviction of murder. Other than that, the past criminal record of the defendant does not get to the jury until it is presented there by the defense by way of presenting some character testimony.

SENATOR RUSSO: And your suggestion is--

MR. SCHNEIDER: My suggestion is that you give serious thought to the fact of adding an aggravating factor which would bring the prior criminal record of the defendant to the attention of the jury, at least perhaps in cases of first and second-degree crimes or crimes of violence. A defendant who has been convicted of the murder presently and is now facing the death penalty phase of the case could have been convicted of a half dozen other serious, violent crimes which did not result in death, but could have resulted in death, but for the grace of God.

You have an aggravated assault where you almost beat the man to death-- I think the jury should be aware of that -- there but for nothing other than his good character, there might have been other victims -- aggravated sexual assaults, perhaps, aggravated assaults, armed robberies -- those types of crimes.

SENATOR RUSSO: I guess, for example, a brutal beating of a professional football player -- if that had been the same beating of a woman or a child, it would have been a murder, and so therefore, you're saying that the jury ought to know about it. The fact that it wasn't a murder is not his doing. He just happened to pick on somebody tough and strong who could withstand the blow, but who could perhaps be in an institution for the rest of his life, or brain-damaged. Nevertheless, it wasn't a murder, and you can't even get it in.

MR. SCHNEIDER: That is right. Or not even that example. Any type of serious, violent crime, I think, the jury should be aware of as an aggravating factor when they are judging this man. In my opinion, that is more relevant and material to the issue of punishment than the fact that all of these aggravating factors direct themselves immediately to the crime for which the person has just been found guilty. They have already made a judgment on that. Now they want to know what else is in this man's background, history or personality that justifies the death penalty. I think they are entitled to know more than that.

SENATOR RUSSO: It is probably one of those issues -- I speak for myself that you are absolutely correct, but I would probably be inclined not to do it.

MR. SCHNEIDER: How can you be inclined not to do something absolutely correct?

SENATOR RUSSO: I'll tell you what, George, I've always said -- this issue of the death penalty that Senator O'Connor and I disagree on -- I made no pretense to say, "Boy, I'm right, and you're wrong." I wish I knew, but I never will know.

I'm almost inclined to take any step that gives the benefit of the doubt, so to speak, for the defendant. So, when I say that you are probably -- and incidentally, I said that -- you are probably absolutely right, and I'm probably not going to go along with it only because we have a death penalty and it has only begun its operation. I think that any changes that either have to be made for procedural reasons or any changes that are suggested and make sense and would tend to make it less likely that the jury will return a death penalty, I find very acceptable myself.

Any changes that make sense and are probably absolutely correct, but would cause the return of the death penalty verdict, I probably won't go along with at this time until we see how it works. So, that is what I mean when I say that. It isn't as though I were sitting here as an Appellate Judge and somebody was absolutely correct -- well, I've got to come to that conclusion. I had, unfortunately, the privilege as a legislator of not proposing a law or a change even though it would probably be a good law.

MR. SCHNEIDER: I said that with utmost respect, Senator, of course.

SENATOR RUSSO: I understand that.

MR. SCHNEIDER: I realize the position you are in as legislators. You represent hundreds of thousands of people, and you have to get the feeling of the people. I understand that.

SENATOR RUSSO: You see, I get, for example--

MR. SCHNEIDER: I happen to be in favor of the death penalty, and I happen to believe in its deterrent value -- a general deterrent -- I happen to believe that, and I don't know if I told you this before when I was here last week, but I happen to believe in the deterrent value of the death penalty based on my prior experience in dealing with murderers, both as a public defender who represented many of them and spoke to them, and also as a prosecutor who prosecuted many of them and spoke to them, and spoke to people who were like our protected witness situation when I was in the Attorney General's Office where he told me point-blank that had the death penalty been in effect, he would have seriously reconsidered killing the twelve or fifteen people who he killed. It is because of that reason.

I'm not saying it is going to deter all murders; obviously, it is not going to deter all of them. But, if it deters 5% or 10% of them, I think the bill has served its purpose, and you have a good bill. I say, if you are going to have the death penalty, then I'm in the position of -- if you have it, then you have got to use it. You've got to use it properly, and you've got to use it effectively. To cheat the jury by holding back information, I think, is just unfair. It is unfair to the jurors who have to make the ultimate decision, which as Judge Baime charges, is probably the most serious decision they will ever make in their lives, and I agree with him. When they make that decision, I, from a professional standpoint believe that they should have just about every factor they could have. Just like a judge does in any other sentencing -- he gets a full pre-sentence investigation report -- everything about the man, where he went to grammar school, where he worked, who he played with, who he fought with -- the whole nine yards, as the saying goes.

I could address myself to the age factor. I wonder, and when I studied this statute in preparation for presenting this case myself, I wondered what they meant; that is, they being you people, the Legislature -- when you say the age of the defendant. Does that mean that, and this is my interpretation -- that if he is so young, that if he is so old, if he is eighteen or younger, that that should be a consideration of the jury that he is really not the type of guy you want to kill? I think Senator Gallagher hit it on the head when he spoke about it. I was assenting with you mentally, Senator, when you said that. Or, is the man so old or that maybe his situation is such that he doesn't deserve the death penalty?

It shouldn't be a situation, I feel, that ties itself into the ultimate sentencing -- that is, the thirty-year ultimate sentencing. You shouldn't be in a position where you add thirty years on and say that is a factor -- how old will he be when he gets out? A man can get out at seventy-four years old and commit a murder with a weapon -- what we call the equalizer. He can be a football player, he can be anybody. He could be Herschel Walker, and I could take Herschel Walker if I had a gun or a knife. So, whether I'm seventy-four or whether I'm eighteen, that equalizer makes the difference.

I suggest to you that maybe that ought to be made clear, and that it not be tied into it, so we get a numbers game being calculated by the jury where they may be saying, "Well, this guy is forty-four and he'll be out at seventy-four, so that is enough." I don't know -- maybe that is what you wanted, but my opinion is that it shouldn't be that way. It should simply be, is he too young, is he a kid, or is he an old man who deserves a break? A kid who deserves another chance in life to move on like the Monmouth County man who was only twenty years old? I would speculate that the jury gave that a lot of consideration in determining that the mitigating factor outweighed the aggravating factor -- that he was a young kid with no criminal record, and they probably said, "Let's give him another shot at it." I don't think they added thirty years on, and that would be my opinion.

What else? The mentioning to the jury of the thirty-year alternate sentence -- I disagree with advising the jury of that, and I respectfully disagree with Prosecutor Lehrer that the jurors are acting as a sentencing judge. The jurors are not acting as a sentencing judge in my opinion. They are acting as fact-finders and only fact-finders. I feel that that is an important argument that I had to make to the jury at the time because the defense in the case argued, "Don't kill this man. Don't make him die. Don't be a killer." My argument in response to that was, "You're not killing anybody. You're following the law." That is just what I said to the jury. I said, "just find facts, and the law will take its course. The law falls into place. When you find certain facts, you're not killing anybody." I said, "there is only one killer in the room."

So, I don't think that the alternative sentence should be given to them. I believe that it is really irrelevant. The only reason why we tell them ahead of time about the death penalty is so that we can, what we call, "Witherspoon" the jurors. That is the name of the case -- Witherspoon, which states that anyone who has a preconceived opinion or notion or feeling about the death penalty, either for or against it, should not sit on the jury. That is why we let them know ahead of time.

Other than that, the jury should not concern themselves with what is going to be the result of their fact-finding, other than to say, "Do you

have the ability, either intellectually, morally or whatever to follow the law when that law is going to result in the death penalty?" Other than that, I don't think they should be put in the role of a sentencing judge. They should not have that additional pressure of saying that you're -- like one lady said, "Well, I don't want to have to pull the switch," to use her phrase. She said, "I believe in the death penalty, but I wouldn't want to pull the switch." Well, I wouldn't either, and that is what I said to the juror. "I don't want to do this. Nobody -- I don't think the Legislature that enacted it wants to do it. We would hope that there will never be an occasion where you have to impose the death penalty."

But, sadly, this is not a camelot; we have to live with it. For those reasons, I don't believe that the jury should be concerned with, "what is the alternate, or what happens if we find these facts or we don't find these facts?" They are fact-finders, and that is how the legislation was drawn, and that is the way the Constitutional issues have been addressed by our United States Supreme Court and by our State Supreme Court -- that they are fact-finders, and they are not supposed to get involved with something like that.

Also, I think it gives them, and again I'm going contrary to your position somewhat, Senator Russo, and that is, I think it is a cop-out. I think it gives them an opportunity to say, "When you get right down to it, listen, here is a way that we don't have to get involved in the death penalty. Thirty years is enough." A lot of people can be convinced of that. A lot of people who believe in the death penalty as a deterrent or for whatever reason believe that, "Hey, thirty years imprisonment is probably enough." I think it is going to give the jurors a sense of a cop-out, because you'll find that when we are sitting around having a beer in some saloon, or sitting around and having coffee in the cafeteria, there are a lot more people for the death penalty than are willing to say, "As a juror, I vote for the death penalty." When it gets right down to it, it is a difficult decision. Why make it any more difficult for them? By the same token, if they are going to assume that responsibility by reason of their oath as jurors, why not let them carry it out all the way? Why give them a cop-out?

As far as anything else at the trial, I tried the case myself. Jury selection was protracted because of, as I said, the death penalty being the issue, and psychiatric defenses were brought out right from day one, which dragged it on, because the jurors were questioned about their opinion on psychiatry and psychomotor seizures and epilepsy and everything else, and whether or not they believed in psychiatrists. Some people do not believe in them. One woman said, "I think they are crazier than we are." So, that took awhile to question all of the jurors about their preconceived notions about psychiatric and medical testimony. Other than that, I think it went quite smoothly.

There is no alternative to individual voir dire to be fair to the defendant. The reason for that, as you probably know, is if you have everbody in the room at once, and someone makes an absurd comment that would be prejudicial to the defendant, it infects the entire jury panel. In many cases that I've been on, we have had to excuse the entire jury panel and start all over again. So, that is why you have individual voir dire, and I think that is the only way to go.

The rules of evidence were strictly adhered to. I think Judge Baime, who I considered to be the most, if not one of the most, knowledgeable men in the law who I have run into in my sixteen years of trying cases -- He is a master of the law and the rules, and he gave the defense everything they were entitled to, but no more and no less. I think that is the way these cases should be tried. The judge should not be, as I perhaps unjustly accused the judge of once putting the back of his head to the back of his heels, I don't think they should bend over that far. They should give him -- and that is what I said to the jury at the end of the trial, "Give him what he deserves and nothing more and nothing less."

I don't think there needs to be any changes in the rules of evidence or the procedure as to how the case is tried. The difficulty is going to come up in the penalty phase as to the burden of proof. and how much rebuttal can you come back with, how much can be brought in, and how much-- What did the Judge say I cringed at?

SENATOR RUSSO: Telling the jury about the life of thirty years.

MR. SCHNEIDER: Oh, the thirty years, yes. I lost that argument, and I guess I lost it here, too, but in any event, that is my position.

But, Judge Baime did charge that to the jury.

SENATOR RUSSO: Are there any questions from any member of the Committee? Senator Gallagher.

SENATOR GALLAGHER: George, I was pleased to see how you explained in your judgment what the role of the jury was. Hopefully, society was such that the death penalty was not necessary. I know when I voted for it, I think most people recognized that society was not, so therefore, something was necessary. We did put it in, and I'm not looking for reasons as to why not at this point. I think we've got to recognize when it is necessary and when it is not. Through your type of experience and others here, we can probably iron out some of the problems to make sure it is fair, just, etc.

Your suggestion relative to the aggravating situation, when you say past criminal record, are you talking about the total past criminal record, or are you talking about areas of certain classes, or just violent crimes, etc?

MR. SCHNEIDER: Well, my position is, at the very least, the jury should be aware of prior convictions of first and second-degree crimes of violence, perhaps more. That is something that we have to give a lot more thought to, but as we started the penalty phase, I was thinking, "What do I do now? What do I present? What do I tell this jury under the law that justifies the ultimate punishment? That is, the death penalty." I couldn't bring in other prior bad acts or other kinds of violence. The man had a previous conviction for a weapons offense, which comes in. That was under different circumstances. We got that in through the psychiatric testimony.

Because of the case being under appeal right now, I can't address myself to the facts of the case, but there are a lot of factors in any man's background or in some peoples' background, let's say, that would be relevant and material to the issue of whether or not there are aggravating factors, as you people have classified them. There are a lot of aggravating factors about a person that the jury is never aware of. Then, on the other hand, the defense is entitled to bring forth anything -- anything at all -- any other factor which is relevant to the defendant's character or record. Off the bat, in the affirmative sense, the State is precluded from doing that.

SENATOR GALLAGHER: Thank you very much.

SENATOR RUSSO: Prosecutor, I think you've made a good point. I think it is accurate. It is a a cop-out. I can only tell you or to respond in general that I just don't have that certainty. I don't think it will ever really be possible for me to have it about something like this. Some people say, "Well, if you're not certain, why are you voting for it? Why are you sponsoring it?" Well, that is nonsense. I am not certain about anything we do down here. So, you do what you think is right, but because it involves such an extreme penalty, you have that in the back of your mind -- "Am I doing right?"

As a result, maybe we -- like the judge touching his head to his heels -- we lean over backwards, and yes, it is probably a cop-out. And, I accept that, and I think you are probably, again, correct. Maybe I should hear it a little more often, because some people have critized. You know, "well, why aren't you certain? Why aren't you more emphatic about it?" Well, I would like to be, because it makes it easier, but if we don't do some of these things that you've suggested, as I indicated (inaudible). It probably is because we are copping out because we are dealing with this issue.

MR. SCHNEIDER: It is a tough issue.

SENATOR RUSSO: It is.

MR. SCHNEIDER: I should note that it is not easy for the prosecution either, you know. People, after the death penalty verdict was returned, you immediately heard, "Well, are you satisfied with the verdict? Are you happy about it?" I can only reply, "who is happy with something like this?" You are not satisfied. You have professional satisfaction in maybe that you presented the case which was consistent with the law and evidence, and it resulted in what the grand jurors thought it should result in and what the Legislature had in mind. But, it is not a cheerful task. It stays with you. That was on my mind thoughout the entire trial, that someday, as a result of my presentation of this case, somebody is going to die. As bad and evil as I may feel the defendant may be in some cases, it is still not easy. It is not fun. We don't like it, but as we have all said, it is something which I believe is a deterrent. I just believe it is necessary and good legislation. It is going to serve its purpose.

SENATOR RUSSO: I will never forget as long as I live the tremendous emotional feeling that came over me after the guilty verdict of the death penalty in the Lynch case I tried. It was the only death penalty case (inaudible).

And, right away, as soon as the judge said those words that they pronounce -- I don't know if they still do now. "I command that on such and such a day you be taken before the warden and executed." Then you realize, which you never forgot from the beginning, this is not a game. So, I know what you mean. It is something that we have to live with and hope we do the right thing.

Okay. Well, thank you very much, prosecutor. Again, you did an outstanding job at the trial, and we commend you for it.

MR. SCHNEIDER: Thank you, sir.

SENATOR ORECHIO: Mr. Chairman, may I ask a question?

SENATOR RUSSO: Yes.

SENATOR ORECHIO: Based on your feelings, your reactions and your concerns, do I detect from your attitude that in the foreseeable future, you may lead a movement to repeal this act?

SENATOR RUSSO: I wouldn't bet on that at all, no. So that there is no misunderstanding, let me just tell you what I'm saying. You know, we have had people come before this Committee and the Legislature, and boy, they are absolutely sure that passing the death penalty will solve all of our problems of crime and so forth. I envy that. I wish I could believe that; it would make it a lot easier. I think it is nonsense.

Then, of course, we have had people on the other side just as emphatically sure that the death penalty is wrong and so on. I envied them, or maybe I pitied them for kidding themselves for being so absolutely sure about it. All I am saying is, when you are dealing with a subject such as this, I don't think you ever can really know. However, that is no reason not to do what you have to do. You make your decision as we do in all legislation. You believe in the position you take, and you stick by it.

Well, in most of them, we can sort of forget about them, because that was the end of it. If we were wrong, we were wrong. If we were right, we were right. This one never leaves you because everyday, every trial that comes up, and then someday every execution, you know, you go through the same sweat. Did I do right? The prosecutors are going to go through it. "That man is being executed. Did I give him a fair trail? Did I present my case fairly, or did I overreach?"

You see, they are always going to wonder and be concerned about it. And, they should be if they are human beings. The judges: "Did I rule properly? Did the defendant really get a fair trial?"

So, you always concern yourself with it. No, don't interpret that as a sign -- I felt that way from day one. I feel the same way today. In fact, I always will, but I don't expect I'll ever lead a movement to repeal it, no.

SENATOR ORECHIO: I would imagine with the constitutionality of the death penalty and your persistence in moving it to get it enacted into law, with the way we have it structured now with two trials, if the death penalty is invoked and the jury decides, through the findings and the determinations made, that the defendant will be given the death penalty, that once that decision has been made, wouldn't you be satisfied that that is final, or would you have a reservation of whether or not the person who has been condemned to death may be innocent?

SENATOR RUSSO: I think the way this bill is drawn, and that is what I was talking about with Prosecutor Schneider -- I'm even thinking of making a few more provisions, or to propose a few more provisions, that will make it more favorable to a defendant. I would rather go that way, because I think anybody who is convicted under this legislation is -- you know, I can live with that, because the legislation is so tightly drawn, and favorably to the defendant.

Can it ever be drawn so tightly that I'll never have any concerns or doubts? I don't think that is humanly possible, to answer your question. I don't think it is humanly possible, unless it is drawn to the extent that it says, "unless we have motion pictures of the murder, it can never be." You are dealing with events, and you do the best you can. I think we have done the best we can with this one, but I don't think it can ever be done so that you won't have a slight concern or doubt or apprehension. You always will.

SENATOR ORECHIO: You have rested any fears I had about you leading a repeal.

SENATOR RUSSO: Okay. John Ford? John Ford was the defense counsel in the Monmouth County matter, and he is the last witness we will hear. We will be finished by lunchtime, and this Committee does have lunch provided for them in Room 114 downstairs.

Mr. Ford, thanks again. I thanked you before, but thanks for coming. I would like you to sort of follow the same procedure we have been doing. As you begin, I'm going to step out for just a moment. Senator Orechio will chair the meeting, and I'll be back in less than two minutes.

J O H N F O R D: Senator, I think initially it is important to understand that my perspectives are going to be significantly different, both professionally and personally, from the judges and the prosecutors we have heard. Professionally, it is because I am a defense attorney, and my job and my function is not to look at the statute in a broad public interest sense. My job and my function is to look at the statute and decide how this statute is going to affect my particular case.

Personally, my perspectives are different because I don't happen to believe in the propriety of the death penalty, and I don't mention that to reargue that. I'm sure each and everyone of you has heard all of the arguments for and against the death penalty prior to this time. I mentioned it simply in response to Senator Gallagher's question, which was how the personal philosophical concepts of the participants affected their involvement, and also to highlight an interesting factor, a curious fact, that upon reflection, having finished the trial of what was the first case, and having sat back and looked at it from a distance, I find that, strangely enough, I was reasonably satisfied with the statute, reasonably satisfied with the content of it, and reasonably satisfied with the operation of it.

There are some factors that still trouble me, and I think they are factors, many of which have been mentioned by the other people who have testified this morning, and there are some that have not been mentioned. I think I would like to mention them, if I could. They are both substantive factors and procedural factors.

There has been mentioned by earlier participants here this morning of the concept of the balancing procedures that are called for in the statute -- the weighing of aggravating factors as opposed to mitigating factors.

If there is to be a legal defect in the statute that would result in its being overturned on appeal, my feeling is that that will lie in the concept of the aggravating factors being weighed against the mitigating factors and in the language that is being utilized in the statute.

My feeling is this: If you are going to be consistent with the theory that Senator Russo mentioned, which is if we are going to err, we are going to err on the side of the defendant and on the side of caution. If we are also going to accept the concept that in order for society to justify the taking of a life through the direction of its government, there has to be as close to an absolute certainty as we can possibly reach with regard to the defendant's responsibility and the fact that he should be the person who would receive this penalty. I think it would be more appropriate to structure the balancing test by saying that it is the aggravating factors that should outweigh the mitigating factors, and in addition, if there is an equality in these balancing procedures that that equality should result in the defendant not receiving the death penalty.

The statute, as it is currently drawn, reads that the jury has to make a determination whether or not the mitigating factors outweigh the

aggravating factors. My problem with that is, I think it creates a perception, and oftentimes the perception may well be the reality, but I think it creates a perception that you are placing a certain responsibility now on the defendant as opposed to leaving it on the State. It may well be simply a semantical problem, but I think it is a problem nonetheless. I think there should be some careful consideration given to the idea of rephrasing that to make it clear that the responsibility is going to be upon the State to show that it is the aggravating factors that undoubtedly outweigh the mitigating factors.

That leads me to an area which has been discussed by some of the other participants, and that is the question of what that balancing is going to be and the standard that should be utilized. Mr. Kenney has indicated to you what is feelings are, and he and I spoke about them a great deal during the course of our trial and in private. It is his concept that in making this decision and this determination, that the jury should simply be told that they have to find beyond a reasonable doubt the existence of an aggravating factor. If there is then some proof introduced of the existence of a mitigating factor, they make, in essence, a quantitative decision between the existence of these two items. I think there is danger there, and I think that in order to be consistent with the historical approach, to the fact-finding process, I disagree with him. I think this is nothing more than the standard fact-finding process, and by saying nothing more than the standard, I don't mean to diminish what the impact would be. But, it is nothing more than the standard fact-finding process that you ask of a jury in every case, and I don't think it should be equated with the sentencing procedure.

If you are going to assume that it is a fact-finding process, I don't see any reason why you should deviate from the traditional approach, giving them a standard to use in their balancing. The way it is set up right now, I think you could argue that it is far more roughly akin to the civil standard, which is by mere preponderance of the evidence. In other words, if you put both sides on a scale, and the scale should shift just slightly in favor of the prosecution, then the death penalty would be imposed.

Again, to be consistent with the theories and consistent with what Senator Russo has said, if we are going to err, let's err on the side of the defendant with caution, and consistent with the concept that it is our responsibility -- and I say "our" meaning certainly the trial bar, the judiciary, and the Legislature to inject this element of certainty into the proceedings. Then I think it is important that the statute should say, and it should be clear, that this balancing process has to be a beyond a reasonable doubt determination. What the jury would have to determine is that the existence of this aggravating factor far outweighs, and I think that is important -- far outweighs, using the terminology, the traditional terminology of beyond a reasonable doubt, the existence of any mitigating factors. I think if you structure it that way, it is going to protect those theories and concepts that we talked about.

SENATOR RUSSO: So, you are suggesting that the jury should be instructed that they have to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

MR. FORD: Yes, sir.

SENATOR RUSSO: That is what we were just talking about.

MR. FORD: Yes, we were talking about it. You came in a little bit after I had moved on to it.

What I am saying is this: If we want to protect the concept that I think is necessary to develop in society, which is, we are being very careful about the approach to this, and we are not going to deviate at all from our traditional approaches in the criminal law. Not only are we not going to deviate, but we might even build in some additional protections because of the magnitude of what we are doing here. If we are going to accept that as the proper approach, then I think it is important that that be reflected in the language of the statute and the charge that is given to the jury.

As I look at it now, the jury's determination is nothing more than what you have in an automobile negligence suit -- a mere preponderance, a balancing test. They take a look at it, and my first problem is with the language, which is the somewhat negative language saying, "Does the jury determine that the mitigating factor does not outweigh aggravating?" I think it should be phrased the other way.

SENATOR RUSSO: I think you're right.

MR. FORD: Does aggravating outweigh mitigating, and does it outweigh it beyond a reasonable doubt? So, there is as much of a certitude and a definiteness to what they are doing as we can possibly require according to our system.

My second concern, and again, this is somewhat procedural and somewhat substantive--

SENATOR RUSSO: If I can interrupt you, when we are through with Mr. Ford's testimony, the Committee would like to invite the prosecutors and the two judges, both Mr. Lehrer and yourself, Mr. Ford, to join us for lunch in Room 114. It is not a bad lunch. We would like to invite you just informally to have something to eat with us. We would love to have you. We won't talk business.

Go on, Mr. Ford.

MR. FORD: Thanks, Senator. The second area of concern for me deals with the sentencing realm, and part of this was discussed earlier with some of the other participants, and that was whether or not it would be appropriate to advise the jury of what the result will be if either they are not able to reach a conclusion, or that if they do not come back with the death penalty verdict, there would be a life sentence with a minimum thirty-year parole. My feeling is that, as Prosecutor Lehrer mentioned, a jury in something of this significance is entitled to know absolutely everything. I think that the objection, as I understand it has been, "Well, if you tell a jury that if you can't reach a particular determination, the court will reach it for you, and this is what that determination will be," it may well encourage them to abrogate their function and say, "Well, let's step back, let's say we can't do it, let's let the court do it, and in that way, we don't have to make the hard decision."

My feeling is, if they are of that inclination to start with, they are probably not inclined to impose the death penalty anyway. So, I don't think you are interfering at all with their deliberative process and the integrity of what it is that they are doing.

On the other hand, I think it is consistent with what you are seeing developed in the other areas of the law, which is essentially that juries are now being told that if there is an insanity defense, they are being told what the result will be if they return a not-guilty by reason of insanity verdict.

A jury in a civil case is told when they do a comparative negligence weighing process what the result will be. I certainly can see no reason not to include it here, and certainly, much more reason to include it if it is going to have some impact on their determination. I think that is something they should be told about, and I don't see any difficulty with it.

I happen to have a problem with the concept of, and this is substantive -- the concept of the alternative sentence to a death penalty being the mandatory thirty-year time period. It seems to me, and again it is a personal opinion, and it may well be some type of a reflection with my involvement with the fellow who I just defended, but it seems to me that there might be the possibility of including in the statute something that would deal with that extraordinary circumstance where an individual who truely does not have a past criminal background is young. People can look at him and say that he genuinely does have some type of prospect for being a contributor to society afterwards. I would like to see some avenue of approach in that type of situation where a parole eligibility could be considered after an extensive period of time, but certainly not as full as thirty years.

SENATOR RUSSO: The only thing is, John, we're really not getting into, as you said, the substance of the statute, which is-- I mean, I think it is good to have your comments, but it is not the subject of this hearing.

MR. FORD: I understand. That is why I just mentioned it incidentally since I'm talking in terms of the sentencing.

SENATOR RUSSO: You see, the thirty-year minimum was a proposal by the Administration, and I accepted it. It was a core part of the bill, and there were many people who felt it was essential in order for them to support the bill to have it.

I don't think we're prepared at this time to go into substantive changes to the bill. Rather what we are trying to do is to see if there are, as there have been today, some unusually good suggestions that will make the subsequent trial that will be coming up very rapidly a little, perhaps, more manageable. So, I would like to hold that one for another time.

MR. FORD: Sure. There are two other areas that I would like to mention that are procedural. The first deals with the question of the jury selection.

As the rules currently stand now, this is done by court rule, but I do feel that certainly this Committee and the Legislature could have some impact on it -- not just generally, but with regard to death penalty cases. Those of you who are attorneys know that back in about 1972 or so, the court rules were changed, essentially taking away from attorneys the ability to conduct a voir dire of the jurors.

SENATOR RUSSO: The Manley case, right?

MR. FORD: Yes, and for those of you who are not attorneys, what we are talking about is that ability to stand up and ask perspective jurors questions to get some idea as to whether or not you want them to sit as jurors. Now is it done primarily almost exclusively by judges.

SENATOR RUSSO: Right.

MR. FORD: In our case, both the prosecutor and I, Mr. Kenney and I, had made an application to allow us to conduct the jury voir dire for the simple reason that we felt that, again, because of what the Supreme Court talks about, is the qualitative difference in death penalty cases. There is a necessity to obviously know as much about your perspective jurors as you

possible can for tactical reasons obviously. But, we both felt that we would be in a much better position to learn those things and to make sure the case was tried properly by allowing us to ask the questions. There were a couple of reasons for that.

One is, I think, a natural reluctance on the part of lay people brought into a foreign atmosphere and made even more inhibitive by the fact that in a death penalty case, they are in the courtroom by themselves, under oath. There is nobody there except the attorneys, the judge, and perhaps the media, to respond in a way to a judge's questions that is going to help you learn something.

Let me give you a quick, somewhat humorous example that happened to us during the course of the case. Now, you are trying to learn something about these people; you're trying to get inside their minds to let them speak a little bit so that you can understand them.

One of the questions that the judge asked, and we had requested that he ask it, was what the jurors feelings were with regard to crime in our society. It was a very open-ended question designed to have them articulate something to give us an opportunity to learn what their feelings were. Hopefully, we were going to get genuine responses from it so that we could learn something from them. Unfortunately, because of the court rules essentially, the question was being asked by a judge, a gentleman in a black robe elevated from this lay person, and the question was posed to a certain individual after a series of very quick biographical questions -- "Where do you live? How old are you?" -- those types of questions. Then he is asked, "What are your feelings about crime in society." The man was obviously was being asked now to answer a question that didn't have a simple answer, and you could see him rubbing his forehead and looking around. He looked up at the judge and reaching for an answer said, "Well, I'm not for crime." Everybody sort of chuckled a little, and then he turned and looked at me, and you could see in his mind that the idea was running, "But, I have to seem fair, I have to seem fair." So, he turned to me, and he said, "But, I'm not against crime either."

It was somewhat humorous, and it did inject a little bit of levity into something that was not a humorous affair, but I think it was obvious that we weren't going to learn anything from that individual.

SENATOR RUSSO: Well, seriously, This is a topical subject, because in spite of the fact that I personally thought the Manley position in taking away the right from attorneys was a terribly atrocious position. I thought it was the worst thing that ever happened, yet last week I introduced legislation that says, "The judge shall conduct the questioning, not the lawyers." The reason is to be in conformity with the court procedures.

However, I have got to tell you this. I thought it was such a terrible position because to really be honest about it, I probably won most of my cases in voir dire.

You had a tough, good prosecutor against you, and you are a good defense attorney. You are both charismatic, so it balances out.

I'm going to take another case. Let's say you have a very charismatic prosecutor and a lousy defense attorney, and the case is practically all over after the voir dire. You can really win or lose a case in voir dire.

For example, to give you an illustration -- I never forgot it. An old lady was being tried for a family embezzlement of some sort. She was a typical seventy-five year old grandmother. How could anybody convict her? You know, it was a serious crime, but by the time I asked, with the whole panel sitting in the room, a hundred jurors -- "Could you come in with a guilty verdict even though it is an elderly woman?" Well, they were so defensive that they wouldn't dare come in without a guilty verdict.

So, you have got to be careful of that. I see some of the merit behind the Supreme Court's reasoning in Manley in taking that right away from us. Yet, you bring out some darned good arguments. It really comes down to the judge. You've got lousy judges -- not in this room, of course -- and you've got excellent judges. Some couldn't care less about really getting at it. "Well, I'm supposed to do this, so let me do it and get it over with. Okay, I've asked the question, now shut up."

There was even a provision suggested to us that the supplementary questions by the attorneys be in writing. Well, that is sheer nonsense. How do you do that? The judges now ask the questions, and you don't know until he does whether he covered everything you want. Now, if he hasn't covered one, two, and three, what do you do? Do you go back to your office and type them? That is nonsense.

I think it is really a case of the court coming to the conclusion that for the orderly proceeding of trials and because of the verbosity of some us as attorneys, that it has to be done by the judge, although I think in many instances, it would be better if we did it.

MR. FORD: The difficulty with that, I think, is that right now the judges are confronted with a court rule says, for the most part, that it should be done by them. If the legislation becomes effective, they are going to be confronted with a statute that says it should be done by them.

If you are going to make an exception in any case, in any situation of a capital case, I think there should be some indication from the Legislature that it should be more readily accepted in a capital case. It would be a vast assistance, and I mention it simply because both the prosecutor and I wanted it. The judge felt somewhat constrained, but fortunately for us, I think he took a more appropriate approach, which was, he did a lot of the preliminary stuff and gave us a great deal of freedom on follow-up questions and on all the death-qualifying questions.

I don't think you are going to find that in most other courtrooms, because I think you'll find most of the other judges will feel more constrained and more reluctant to go against what is written. But, I think it is a question and a concern that should be discussed. It should be involved in whatever procedures you are going to utilize about the possible changes.

The second thing -- actually second to the last thing that I would mention is the concept of introducing testimony concerning the facts surrounding a prior murder conviction and the presence of a substantial criminal record.

SENATOR RUSSO: What is wrong with the first one?

MR. FORD: The first one, I think, and this is probably wrong with the second one also, is that from a practical point of view as a defense attorney, I think it is generally recognized that the prosecutor's office, the State Attorney General's Office, has at their command far more resources in terms of their investigative work, their ability to dig out something that

could have happened twenty years in the past than a defense attorney is going to have, privately retained as I was, or a public defender's office is going to have. I think you are going to run the possibility of injecting a serious danger of first of all, retrying that first murder case, and secondly, putting a defendant in the position where they might not be in a position where he can adequately defend himself a second time concerning the first murder case.

Also, I think, if again, you have the theory that you have mentioned and that I have subscribed to, which is, if there is a question about something in its propiety, the err, if any, should be in favor of the defendant.

SENATOR RUSSO: Yes, but that could also be worded in the defendant's favor.

MR. FORD: Well, here is the dilemma that a defense attorney finds himself in. Let's suppose you had somebody who does have a prior conviction for murder, but you can show, knowing that it is going to be introduced as an aggravating factor -- you can show that it is not as bad as it sounds. I know that may well be almost a comical thing to say about a murder, that it is not as bad as it sounds-- If you are an attorney, you understand what I am saying. There are certain murders that are going to sound worse than other murders. So, you may well find yourself in a situation where you might want to be in a position to re-litigate that first murder to show that it isn't as bad as it sounds.

I think that is going to be far the exception rather than the rule. I think the danger or the possibility of danger attendant upon a rule that would allow somebody to go into the circumstances surrounding the first murder would far, using our own standard-- far outweigh that.

SENATOR RUSSO: Let's go the other way though, John. Isn't it important that the jury in deciding whether this defendant has such a propensity for violence, he doesn't deserve to live, having done it again -- for a jury to know that in 1974, he didn't simply take a gun and shoot a shopkeeper in the head with a bullet who was resisting a robbery, but rather he took an ax and hacked and hacked seventy-six times? Isn't that important to determine whether or not this man should be given the death penalty in this present case in which he used an ice pick forty-seven times?

MR. FORD: I don't think you can argue that it isn't important, that it isn't relevant, and that it wouldn't be helpful to him. Obviously, it would. If the approach is, "Let's give them an opportunity to evaluate this on the whole man concept. Let's let them know as much about this person as possible" -- in that sense, it does become important, and it may well be one of the more important things that they could ever know about him.

My concern is the danger that could attach to that, the possibility of danger that could attach to that. So, I can't argue with you that it isn't important, and it might not be relevant to him. What I am saying is, the possibility of abuse of it, the possibility of a defendant being damaged by it. That is what concerns me.

SENATOR RUSSO: On the argument of resources available, I don't buy that argument. First of all, in his prior record-- John, just raise the red flag for me to remind me as to whether or not there might be a time limit on prior criminal offenses, say the last ten, fifteen, or twenty years, so we don't go back into a defendant who has had maybe no criminal record for twenty years, but had a crime of violence, but not murder, twenty-six years ago.

However on the other point, the resources-- If he can hire private counsel, he can hire private counsel with the resouces as they are. I think though that a good point is raised in the cases where the Public Defender's Office has been involved, and in that regard, in spite of a little bit of being annoyed at their lack of cooperation today-- If it weren't for you being here, we wouldn't have had anybody on the defense side to raise these points. In spite of that, I disagree with the Administration, which has so far sort of had an anti-budgetary attitude. I think that budget has to be substantially increased for the Public Defender's Office if they are properly going to represent these people and do a good job. We've got to do something about that. We've got the resources available in the prosecutor's office, the Attorney General's Office, and so forth, but they are faced basically with the same budget they had before they had capital cases. Something has got to be done to help them. I wish they would help themselves a little more by having appeared here today. Having said it three times, I think they will eventually get my point.

I don't think the availability of resources should be the criteria in determining whether or not something that might be important to have in this kind of case should be presented or not. But, we'll pursue that.

MR. FORD: The last item that I would mention is this, and this is a procedural one. The statute right now suggests that if a verdict of guilty is returned in the first phase, that the penalty phase should begin as soon as practicable, and that has been interpreted, I think, in the directions to the judiciary that that means, quite literally, if you get a verdict at four o'clock one afternoon, you start at nine o'clock the next morning with the trial. My problem with that is this: It is a tremendously emotional experience. I have tried murder cases as a prosecutor and as a defense attorney, obviously not with the death penalty. I haven't been practicing that long. I don't think I was fully prepared for what the emotional impact was going to be.

The jury came back at three o'clock on a Saturday afternoon with a guilty verdict. A decision was made that certainly we were not going to start right then; we were going to start on Monday morning. I don't think I slept well; I didn't eat well. As I said, I was not prepared for it, and I don't think the jurors were prepared for the emotional impact.

I think there has to be something of -- for better terminology -- a cooling off period that has to be injected into the statute. I don't think a very long period of time, but at least a number of days. I think this may well be done through, not necessarily a change in the statute, but some direction from the Committee, from the Legislature, to the Chief Justice that would eventually filter down to the judiciary saying, "Let's give a little bit of time for everybody to step back, for the jurors to recover from what was undoubtedly a difficult experience for them, for the professionals involved -- for the attorneys to have an opportunity to sit back, regroup their forces, in a sense, make some serious decisions without the pressure that would be imposed upon them by that time period."

SENATOR RUSSO: Without conceding at all the necessity for such a period, as obviously we will and cannot do because of the possibily of appeal, I think probably the suggestion ought to be that this Committee, in correspondence for the moment anyway, convey our thoughts to the Chief Justice, that because of the type of thing you are dealing with, that perhaps he give some consideration to advising the judges to be liberal in exercising

their discretion towards a short period of time for preparation or what have you.

The alternative is that you have got to prepare your whole case, a case on guilt, and even though you may never get to it, a case on sentencing in advance of the first day of the trial.

MR. FORD: Exactly.

SENATOR RUSSO: So, I don't know. I don't know how to handle that, nor am I going to try. I think that is a function for the court. The only time we would get involved is if seemed to be working out terribly and the court does nothing about it, then legislatively we would make a proposal.

At this point, I think it should be strictly in their judgment, but we will sort of convey a thought of, "Hey, for whatever it is worth, here is our suggestion." I can see it as a defense attorney, yes. Not that it can't be done, but if I've got a murder case to try-- This is now the end of May -- say July first or whatever, I've got to prepare both aspects of the case, even though I'm sure my guy is not going to be found guilty, but he might be. So, now I've got to go into all of that, because the verdict might be on Tuesday, and I've got to start the sentencing trial on Thursday. I see your point, and this is a practical matter that we ought to--

MR. FORD: I have a comment, and you weren't here when I mentioned it initially -- that is, despite my different approach, because of my function as defense attorney, and despite my personal feeling, which is that I don't happen to feel that the death penalty is appropriate, I was somewhat surprised to find that I was reasonably satisfied with the content of the statute in its operation after my involvement in the case. I feel that if we could incorporate these relatively few items that we have discussesd here, I think we-- I say we -- I think the Legislature may well be successful in creating or structuring the most civilized approach and most acceptable approach, under all the circumstances, to a very difficult problem.

SENATOR RUSSO: Thank you, John. Are there any questions? Yes, Senator Gallagher.

SENATOR GALLAGHER: Recognizing your personal feeling about the death penalty and the position that you have as defense attorney, I gather from your comments that you feel that past records or past murders shouldn't be introduced. What about the situation with a hit man who committed a crime so many years ago, went in, got out on parole, and now he's up for another one? Don't you think that the jury is entitled to know that this guy was a hired assassin?

MR. FORD: Here is the problem: First of all, if the second offense that he is being tried for is as a hired assassin, there are a couple of things they will know that are aggravating factors. One is that he has a prior murder, and the second aggravating factor is the idea that it was done for hire, money, that type of thing.

But, getting back to the essence of your question, I can't disagree with you that it is not an important factor that would not give a jury a better ability to know something more about the individual. I'm sure we could come up with any number of specific hypothetical situations where it would be an important factor.

My concern is not that it isn't important. My concern is that that approach may well give rise to some serious problems, the problems being those that I mentioned earlier, the problems being perhaps an inability to re-litigate to a certain extent what that first murder was, the problems of

whether or not a defendant might not end up being penalized, not necessarily for his first murder, but for a second murder. Now again, there is a question as to whether or not that is part of what the statute is looking for. I don't know. It is a real difficulty, but I think that if there are legitimate questions that are raised by it, and if you do have reasonably good arguments on both sides as to why it should be introduced or why it shouldn't be introduced, my feeling is that, again, using the Senator's theory, if you are not entirely sure and there is some argument against it, we are better off backing away from it and not utilizing it and letting the statute proceed in the manner in which it has been established so far.

SENATOR GALLAGHER: In my judgment, the thing was put in to protect society from some of these people. Had it been in, maybe some of these people wouldn't be before us today for this particular purpose. Certainly, a professional killer -- people should very well know what he is, if he is being charged with that at this point. I don't see any merit in not letting them know what the past has been with regard to this individual insofar as past murder charges are concerned.

MR. FORD: I really have a great deal of difficulty disagreeing with you in that particular circumstance.

SENATOR GALLAGHER: That is why I gave you that one. I could have given you an easier one, but--

MR. FORD: My concern is for some other type of situation that might exist.

SENATOR RUSSO: I think Prosecutor Lehrer wanted to comment on that point.

MR. LEHRER: I wanted to comment on-- As much as I would hate to agree with Prosecutor Schneider, I wanted to place in the record that I wholeheartedly agree with his comments about prior record. One of the things that we might want to look at and think about is the preparation of what we know to be a pre-sentence report at the very beginning of this stage. When a defendant is charged, there are bail applications. If that pre-sentence report can be prepared by the Probation Department, which would take care of the resource argument, and made available to both the defense and the prosecution, the issue as to prior criminal record and the wording of it could be settled long before the trial, so if there is that second phase, it could be handed to a jury. This would make available to the jury his background, prior criminal record, and everything. We do it in every other criminal case where there is a sentencing procedure. I don't see why we can't do it in the capital case.

SENATOR RUSSO: Sure, because there is usually a lot of nonsense in those things that are totally inadmissable, incompentent--

MR. LEHRER: That is correct.

SENATOR RUSSO: And, after whatever else, I've seen--

MR. LEHRER: That could be done at the beginnning of the proceedings, given to both the defense and the prosecution, and they could work out the wording in a proceeding before the trial. It is something to think about.

SENATOR RUSSO: I don't know. You see, I have difficulty with that, because what is a pre-sentence report? Some probation officer was sent out to do an investigation, and it usually incorporates many thoughts and opinions of his own. How thorough was that when he talked to Mr. Smith? I'm not so sure he should use them in any case, let alone a capital case. I don't know.

Is that it? Is there anything else?

Okay, first of all, lunch is in Room 114 as I mentioned; go all the way in the back of the room.

John, thank you very much.

MR. FORD: Thanks, Senator, it has been my pleasure.

SENATOR RUSSO: Let me just say one thing in conclusion. I don't know what the members of the Committee feel, but I had a lot of concern before we came here today as to whether we were just wasting a lot of time. The suggestions we have gotten here today are absolutely worth their weight in gold, frankly, and I think you are going to see many of them adopted into law.

I want to thank Chief Justice Wilentz for encouraging Judge Arnone and Judge Baime to be with us today. It really was tremendously helpful. And, to the other participants, we are very grateful.

Also, in inviting you to lunch, I forgot to add, I notice a member of the Governor's Counsel staff is here. Steve, if you would like to join us, we'd love to have you. It is down in Room 114.

Is there anything else that anyone wants to mention? If not, thank you all very much.

If you get any further thoughts after you think about it for awhile, drop us a line, please, because there will be legislation prepared shortly that will incorporate many of these suggestions, and I'm sure there is a lot more we have got to learn, so I want to encourage you to do that. Thank you very much for helping today.

(Hearing concluded)