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

before

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

"To conduct an examination of various aspects of the death penalty statute, N.J.S.A. 2C:11-3"

January 31, 1991
Room 418
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblywoman Marlene Lynch Ford, Chairman
Assemblyman Frank M. Pelly, Vice Chairman
Assemblyman Joseph Charles, Jr.
Assemblyman Gary W. Stuhltrager

ALSO PRESENT:

Patricia K. Nagle
Office of Legislative Services
Aide, Assembly Judiciary, Law
and Public Safety Committee

* * * * * * * * * * *

Hearing Recorded and Transcribed by
Office of Legislative Services
Public Information Office
Hearing Unit
State House Annex
CN 068
Trenton, New Jersey 08625

New Jersey State Legislature
ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-5526

NOTICE OF PUBLIC HEARING

The Assembly Judiciary, Law and Public Safety Committee will hold a public hearing:

To conduct an examination of various aspects of the death penalty statute, N.J.S.A. 2C:11-3.

The hearing will be held **Thursday, January 31, 1991 at 10:00 a.m.** in Room 418, State House Annex, Trenton.

The public may address comments and questions to Patricia K. Nagle, Committee Aide and persons wishing to testify should contact Miriam Torres or Helen Rouze, secretaries at (609) 292-5526. Those persons presenting written testimony should provide 10 copies to the committee on the day of the hearing.

Issued 1/17/91

New Jersey State Legislature
ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE
STATE HOUSE ANNEX, CN-068
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REVISED NOTICE OF PUBLIC HEARING

The Assembly Judiciary, Law and Public Safety Committee will hold a public hearing:

To conduct an examination of various aspects of the death penalty statute, N.J.S.A. 2C:11-3.

The hearing will be held **Thursday, January 31, 1991 at 10:00 a.m. in Room 418, State House Annex, Trenton.**

The committee is interested particularly in hearing testimony on the following bills:

A-4316 Ford/Doyle	Clarifies that proportionality review of death sentences involves the comparison of a death sentence only with other death sentence cases, not with all other homicide cases.
A-4453 Scerni/Salmon	Makes leaders of narcotics trafficking network eligible for death penalty; adds aggravating factor concerning one acting as or at the direction of leader of narcotics trafficking network.
ACR-76 Hardwick/Shusted	Amends the State Constitution to provide that it is not cruel and unusual punishment to make certain defendants eligible for the death penalty.

The public may address comments and questions to Patricia K. Nagle, Committee Aide and persons wishing to testify should contact Miriam Torres or Helen Rouze, secretaries at (609) 292-5526. Those persons presenting written testimony should provide 10 copies to the committee on the day of the hearing.

Issued 1/17/91
Revised 1/29/91

ASSEMBLY, No. 4316

STATE OF NEW JERSEY

INTRODUCED JANUARY 8, 1991

By Assemblywoman FORD, Assemblymen DOYLE, Villapiano, Duch, Gill and Salmon

AN ACT concerning proportionality review in death penalty cases and amending N.J.S.2C:11-3.

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

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

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

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

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

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

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

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of

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

Matter underlined thus is new matter.

which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

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

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

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

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

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

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

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

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

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

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

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

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

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

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

e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the

defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

(cf: P.L.1985, c.478, s.1)

2. This act shall take effect immediately.

STATEMENT

Presently, under New Jersey's capital punishment statute, the Supreme Court, if requested by the defendant, is required to review a case in which the death penalty is imposed in order to determine whether the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. This requirement is commonly referred to as "proportionality review." In Pulley v. Harris, 463 U.S. 1248 (1984), the United States Supreme Court ruled that proportionality review is not constitutionally required.

This bill clarifies the parameters of proportionality review to be conducted under the death penalty statute. Specifically, this bill provides that the Supreme Court should compare the death sentence being reviewed by the Court only to other similar death sentences, and not to any case in which a death sentence was not imposed.

This bill clarifies the statutory language to express what has always been the intent of the Legislature regarding the nature and scope of proportionality review.

CRIMINAL JUSTICE

Clarifies that proportionality review of death sentences involves the comparison of a death sentence only with other death sentence cases, not with all other homicide cases.

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JU 054
SR xxx 77
TR xxx/05
FN N/

House Copy OLS Copy Public Copy

For Official House Use

BILL NO. A-4453

Date of Intro. 1/29/91

Ref. AJU

NOTE TO SPONSOR: Notify OLS if you require changes in this document. A revised copy for introduction will be prepared on the legislative computer system. Hand-written changes will not appear in the printed bill.

AN ACT concerning murders commmitted by or at the direction of leaders of narcotics trafficking networks, and amending N.J.S.2C:11-3.

CRIMINAL JUSTICE

Makes leaders of narcotics trafficking network eligible for death penalty; adds aggravating factor concerning one acting as or at direction of leader of narcotics trafficking network.

PRIME Sponsor

CO-Sponsors

Same as _____ 88/89

_____ 90/91

AN ACT concerning murders commmitted by, or at the direction of, leaders of narcotics trafficking networks, and amending N.J.S. 2C:11-3.

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

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

2C:11-3.

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

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

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

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

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

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

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

Matter underlined <u>thus</u> is new matter.

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S. 2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S. 2C:35-3, commanded or by threat or promise solicited the commission of the offense, shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

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

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

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; [or]

(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant; or

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S. 2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S. 2C:35-3, committed, commanded or by threat or promise solicited the commission of the offense or (ii) committed the offense at the direction of a leader of a narcotics trafficking network as defined in N.J.S. 2C:35-3 in furtherance of a conspiracy enumerated in N.J.S. 2C:35-3.

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

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

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

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

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

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

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

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

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

e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

(cf: P.L.1985, c.478, s.1)

2. This act shall take effect immediately.

STATEMENT

This bill adds to the class of defendants eligible for the death penalty those defendants who, as leaders of narcotics trafficking networks under the "Comprehensive Drug Reform Act of 1986," order or otherwise direct the murder of another. It is not necessary that the leader actually paid, or promised payment to, another for the commission of murder in order for the leader to be "death eligible." All that is required is that the leader commanded or by threat or promise solicited the commission of the murder and that the murder actually occurred. The purpose of this bill is to further the goal of enhanced punishment for upper echelon members of narcotics trafficking networks who pose the greatest danger to society. See N.J.S. 2C:35-1.1c.

To enhance the capital prosecution of leaders of narcotics trafficking networks involved in murder, as well as of those individuals who murder at the leaders' direction, this bill also creates a new aggravating factor within the death penalty statute. This aggravating factor would be applicable to: 1) leaders of narcotics trafficking networks who commit murder, 2) leaders of narcotics trafficking networks who command or direct the commission of murder, or 3) individuals who commit murder at the command or direction of leaders of narcotics trafficking networks. The new aggravating factor addresses the violence typically associated with the illicit drug trade.

CRIMINAL JUSTICE

Makes leaders of narcotics trafficking network eligible for death penalty; adds aggravating factor concerning one acting as, or at direction of, leader of narcotics trafficking network.

ASSEMBLY CONCURRENT RESOLUTION No. 76

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1990 SESSION

By Assemblymen HARDWICK and SHUSTED

A CONCURRENT RESOLUTION proposing to amend Article I, paragraph 12 of the Constitution of the State of New Jersey.

BE IT RESOLVED *by the General Assembly of the State of New Jersey (the Senate concurring):*

1. The following proposed amendment to the Constitution of the State of New Jersey is hereby agreed to:

PROPOSED AMENDMENT

Amend Article I, paragraph 12 to read as follows:

12. Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. <u>It shall not be cruel and unusual punishment to make eligible for the death penalty a defendant convicted of purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.</u>

(cf: Art. 1, para. 12)

2. When this proposed amendment to the Constitution is finally agreed to pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election occurring more than three months after the final agreement and shall be published at least once in at least one newspaper of each county designated by the President of the Senate, the Speaker of the General Assembly and the Secretary of State, not less than three months prior to the general election.

3. This proposed amendment to the Constitution shall be submitted to the people at that election in the following manner and form:

There shall be printed on each official ballot to be used at the general election, the following:

a. In every municipality in which voting machines are not used, a legend which shall immediately precede the question, as follows:

If you favor the proposition printed below make a cross (x), plus (+) or check (✓) in the square opposite the word "Yes." If you are opposed thereto make a cross (x), plus (+) or check (✓) in the

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

Matter underlined <u>thus</u> is new matter.

square opposite the word "No."

b. In every municipality the following question:

. . .

MAKING ELIGIBLE FOR THE DEATH PENALTY PERSONS WHO PURPOSELY OR KNOWINGLY CAUSE SERIOUS BODILY INJURY RESULTING IN DEATH

YES. Shall the amendment to Article I, paragraph 12 of the Constitution providing that it is not cruel and unusual punishment to make eligible for the death penalty a defendant who is convicted of purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value be approved?

. . .

INTERPRETIVE STATEMENT

NO. This constitutional amendment would provide that it is not cruel and unusual punishment under our State Constitution to make eligible for the death penalty a defendant who is convicted of purposely or knowingly causing serious bodily injury resulting in death if that defendant committed the act himself or paid for another to commit the act.

. . .

STATEMENT

The proposed constitutional amendment provides that it is not cruel and unusual punishment to make a defendant eligible for the death penalty who has purposely or knowingly caused serious bodily injury resulting in death if he committed the act himself or paid another to do it. Presently the New Jersey murder statute, N.J.S.A.2C:11-3 provides that criminal homicide constitutes murder if:

(1) the actor purposely causes death or serious bodily injury resulting in death or (2) the actor knowingly causes death or serious bodily injury resulting in death or (3) the homicide was committed in the attempt or commission of enumerated crimes, the so-called "felony murder rule." Under the terms of the statute only a defendant who falls into categories (1) or (2) as listed who is convicted and who committed the act himself or paid another to do it may be eligible for the death penalty

sentencing phase in which the judge or jury weighs aggravating and mitigating factors. This statutory scheme was called into question by the New Jersey Supreme Court in the decision of State v. Gerald, 113 N.J. 40 (1988) in which the court differentiated between "causing death" and "causing serious bodily injury resulting in death."

The court stated: "We hold, on state constitutional grounds, that a defendant who is convicted of purposely or knowingly causing 'serious bodily injury resulting in death' under N.J.S.A.2C:11-3(a)(1) and (2), or either of them - as opposed to one who is convicted of purposely or knowingly causing death under those same provisions - may not be subjected to the death penalty." 113 N.J. at 69.

This proposed constitutional amendment is intended to overturn this portion of the court's decision in the Gerald case and establish that it is not violative of the State Constitution to make these defendants eligible for the death penalty sentencing process.

CRIMINAL JUSTICE

Amends the State Constitution to provide that it is not cruel and unusual punishment to make certain defendants eligible for the death penalty.

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APPENDIX (continued):

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ASSEMBLYWOMAN MARLENE LYNCH FORD (Chairman): I think we will get started. This is a public hearing of the Assembly Judiciary, Law and Public Safety Committee to discuss an issue that I think is of great concern to the people of the State of New Jersey, as well as to the legislators. We have a number of bills before us. We are going to focus today on a couple of bills dealing with revisions to our current death penalty law.

I am pleased that we have the Attorney General of the State of New Jersey here. General Del Tufo, would you like to join us at the table and perhaps give us your comments and your insight on this?

A T T O R N E Y G E N. R O B E R T J. D E L T U F O: Thank you very much. Boris Moczula, from the Division of Criminal Justice, who has labored long in this field, will join me, if he may.

ASSEMBLYWOMAN FORD: I think those of us who followed the decisions know his name well. I have never had the opportunity to meet him face to face before. I guess all you do is write briefs, and--

ATTORNEY GENERAL DEL TUFO: I think I will ask Boris, if and when there are questions, to jump in and supplement any responses I might have.

I also might say that Prosecutor Rockoff is here. He will, I imagine, be testifying sometime this morning. I have discussed what I am going to say with him and vice versa.

I also submitted to the Committee statements dealing with the proportionality statute -- your bill, Assemblywoman Ford, A-4316 -- and also a statement with respect to amending the statute to provide a death penalty for drug kingpins and for people who commit homicides at the direction or solicitation of drug kingpins, which is A-4453.

With respect to that, the statement is brief. I would just add that the Supreme Court's recent affirmation of the death sentence in the murder-for-hire case suggests that

these kinds of solicited or commanded killings will be upheld if there is a conviction by the Supreme Court, and that with respect to the drug menace which confronts us, that anyone who would initiate this kind of pattern of violence by issuing a death warrant asking lower level personnel to carry it out, should be subjected to this ultimate penalty, as should anyone who, in fact, implements such a command.

If I may, I would like to turn to the proportionality statute, to A-4316. I would, first of all, state again that Governor Florio has indicated his strong support for A-4316, and I am here this morning to endorse the Governor's support to add the support of my office -- the Attorney General's Office -- and of the county prosecutors -- and Prosecutor Rockoff will do that as well -- and of law enforcement generally in the State of New Jersey for the adoption of A-4316.

As a threshold matter, before getting into the details or some of the policy considerations, the scope of proportionality review and, indeed, the question of whether there should be proportionality review at all, are legislative/executive branch responsibilities. This question of proportionality is not of constitutional dimensions. It is a matter of legislative initiative and legislative definition of what it means and what the field is.

We are in a situation at the present time in which, because of the lack of a specific definition as to the universe and as to how this proportionality should operate, a vacuum has occurred. Just about three years ago, the New Jersey Supreme Court occupied that field, and appointed a Special Master to undertake a study. Now, with no disrespect to the Court, I would suggest that that is not the proper forum for developing a record in order to determine what proportionality should mean and what the scope of it should mean. It is a very narrow record. I, personally, and others, have a problem with the

Special Master himself, a person who seems to be somewhat predisposed and whose work has been questioned -- whose work in this field has been questioned by at least one other court.

But beyond that, this is really a matter for other branches of government. In that three-year period of time, the universe of cases to be assessed in determining proportionality has not been defined. There has been a considerable amount of money, especially in these hard times, spent as the Court has occupied this field. Every indication is that there is going to be an enormous amount of money spent in the future, both in defining proportionality and in implementing it, if the expert hired by the Supreme Court has his way. I will get into that a little bit more, but certainly in these -- especially in these times of economic crisis and economic threat, that, quite apart from the merits of the matter-- Those kinds of adventures should be deterred and not embarked upon.

So I think the important point -- an important point that I would like to make to you is, whatever it is that you decide to do with proportionality in terms of review -- and as you know, Assemblywoman, we do support A-4316 -- I urge you to do it. I think it is a legislative role. It is a legislative responsibility. It is an executive responsibility then to sign and enforce the legislation. But I don't think this is a judicial function. I think it is something that ought to be considered here.

Since its enactment, the New Jersey Death Penalty Law has had a provision commonly known as a "proportionality review" provision, which requires the Supreme Court to determine whether a death sentence "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." When this was first passed, this type of review was mandatory and, as evidenced in statements by the Legislature at the time, and also in 1985 when the law was amended, the proportionality provision was placed into the

statute because there was a concern that without it the United States Supreme Court would declare the death penalty statute unconstitutional. There was a feeling then that proportionality was something of constitutional dimension.

Well, in 1984, in the Pulley v. Harris decision, the United States Supreme Court held that it was not a matter of constitutional dimension; that a death penalty statute did not have to have a proportionality provision in it. And, if it did have a proportionality provision in it, it was for the legislators themselves to decide what that proportionality statute should contain, and what cases should be compared.

In response to that, in 1985, the Legislature amended the statute and provided that proportionality review would not be automatic, but would only be conducted by the Supreme Court when the defendant in a case requested it. However, that amendment, and the statute to date, contain no legislative guidance whatsoever as to the intended scope of proportionality review in New Jersey. Specifically, the law does not define the universe of cases which is to be used for the purpose of comparison. At the risk of being redundant and overbearing, I think the time is right for the Legislature to make that type of definition.

As I mentioned, the Supreme Court entered the field back in 1987, after upholding the constitutionality of the capital punishment statute in New Jersey. On August 1, 1988, the Court appointed David Baldus, a professor at the University of Iowa College of Law, as a Special Master to design and recommend a system of review to the Court. The procedure envisioned by the Court known as the "Proportionality Review Project," was to have the Special Master meet with prosecutors and the defense bar and try to put a system together.

The Attorney General's Office and the Division of Criminal Justice and the prosecutors had no advance notice of this appointment and protested it to the Court due to Professor

Baldus' prior experience in the proportionality review field, which, at least from a prosecutor's standpoint, suggested that he had fixed views which would make him unable to impartially conduct this kind of a study and put things together.

Professor Baldus is perhaps best known for his studies of an unsuccessful defense effort in McCleskey v. Kemp in 1987 to overthrow Georgia's capital punishment system. The U.S. Supreme Court assumed the validity of his study for the purposes of ruling against his efforts, but the District Court was not quite so indulgent and labeled the study as incomplete and methodologically questionable. I think it also questioned the data.

In any event, Professor Baldus was designated by the Court to conduct this study of proportionality review, in essence filling the vacuum created by the fact that the comparison of the cases to be compared in conducting this review had not been defined by the other branches of government, whose responsibility, really, is to do so.

Now, my office and the county prosecutors have consistently urged that the appropriate universe of cases in proportionality review should be those cases in which a death sentence has actually been imposed. This is consistent with Governor Florio's position and the position taken in Assembly Bill No. 4316.

In contrast, the Baldus approach, while no report, as I understand it, has been received-- His approach from the inception accords with the idea of utilizing a far vaster and broader universe; namely, all homicide cases which could have been prosecuted as death penalty cases under our current law, regardless of whether they were so prosecuted.

The expansive review system envisioned by this universe of cases would add an unnecessary, complex, second stage to judicial review of death sentences, which would further delay an interminably long and oft-criticized appellate

procedure. Once an additional appeal to the New Jersey Supreme Court is exhausted, assuming that the death sentence withstands the Court's scrutiny, the review process would then begin anew with wholesale reevaluation and veto power over the prior decisions of prosecutors, judges, and juries. Such a back-to-square-one revisitation of capital prosecutions could further frustrate enforcement of the death penalty, but beyond that would require the devotion of enormous resources in order to try to get the job done.

The process of identifying, were we to go in this direction, all homicide cases that could have been prosecuted as death penalty cases will, as I have said, be extremely expensive and time-consuming, and will put a great burden upon the resources of law enforcement in this State. At a minimum, this approach seemingly would have us evaluate every homicide committed in the State since 1982 in which the offender is known to law enforcement officials. There are hundreds and hundreds of these cases every year. Professor Baldus has developed a questionnaire with hundreds and hundreds of questions that would have to be responded to with respect to every such homicide. The records of these cases would be examined to determine whether there was evidence that a capital prosecution could have been initiated; whether there was evidence that could support the finding that the defendant purposefully or knowingly caused the death of another by either his own conduct or by paying for the killing.

Each of these cases would then have to be screened to determine whether the evidence could support a finding of one of the aggravating factors enumerated in the death penalty statute. I don't believe it takes a lot of reflection to see how time-consuming and difficult and practically impossible this task would be. And with the Baldus approach the task would be never-ending, because it would have to be accomplished for every homicide, again whether or not prosecuted as a

capital case, that occurred in the future, and to add these cases to the universe of possible comparison.

Beyond the cost, such an approach will assuredly be uncertain, unreliable, and ultimately futile. Decisions made on how a case can be prosecuted are, of necessity, subjective and speculative.

Consider a case, if you will, in which a prosecutor determines that the suppression of some critical evidence will preclude prosecution as a death penalty case: Is this one of the cases that fall within the universe of cases that could have been prosecuted as death penalty cases? Then, of course, one can second-guess the prosecutor's judgment. Was the prosecutor correct in saying that the evidence would be suppressed when he or she evaluated the strength of his case?

If the Court follows the advice of its Special Master we will, without question, see new rounds of expensive litigation on top of this review of cases that I mentioned, dealing with collateral issues even at the very earliest stages of proportionality review, namely case selection, which cases should have gone into the data base and which did not.

I suggest to you that use of this broad universe will not really advance the purpose served by proportionality review at all, because once we have the data, I am not sure what it is we are comparing or what it is we are going to find out. Even assuming that we could fairly identify all cases that could have been prosecuted as death penalty cases, the idea that we can gain significant insight by attempting to quantify and compare cases that necessarily involved both the stark and subtle differences that lead prosecutors, grand juries, and trial juries to reach different results in different cases, is unrealistic and misguided. Reasons for these kinds of actions lie buried in particular factual mixes, and even in people's minds.

The purpose of proportionality review is to identify that rare aboriginal case where all of the other safeguards the Legislature and, after 27 cases, the Supreme Court have built into our capital punishment system, have failed. The purpose is to identify that unimaginable case where despite proper and constitutional application of New Jersey's death penalty law, the prosecutor, the grand jury, and the trial jury have all reached an unfair result.

I submit to you that this purpose is best served by starting the comparison efficiently with only those cases that are truly relevant. Those are the cases in which a sentence of death has been imposed. A comparison of the crimes and defendants in cases in which the death penalty was imposed will be sufficient to reveal the anomalous case in which the system worked unfairly.

In closing, one other thing, if I may: I just want to emphasize that latter point again. The Supreme Court in the Koedatich case acknowledged that the death penalty law in New Jersey, as interpreted by the Court in its decisions, "provides extensive safeguards against unfair and arbitrary imposition of the death penalty." In State v. Jackson, the Court also acknowledged, "that the public has a right to have its capital punishment law administered with all due diligence."

For the reasons that I have stated here this morning, and as set forth in the statement which we have prepared, I am suggesting to you that the Proportionality Review Project which the Supreme Court embarked upon almost three years ago, and the form which it has taken, and the very narrow record upon which it has been based, and the personnel that has been hired to undertake that task, all constitute the antithesis of these kinds of expressed concerns.

We have a fair statute. The law is there, regardless of one's personal opinion about the death penalty, and I have been on record during my career as to my views on that penalty,

as you probably all know. The law is there, and the public has the right to have it administered with due diligence and sensibly. I am suggesting to you that the situation we have now is absolutely untenable and intolerable, and that it will persist if not checked; that it will undermine enforcement of the law; that it will lead to prosecutors not seeking death penalties in appropriate cases or going into some speculative statistical guessing game as to what factors are going to move a court somewhere down the line, after you go through the first review as to whether the sentence should be upheld. Then you get into this proportionality with an enormous universe of irrelevant facts that took time and money and effort to assemble, and from which one can draw no really legitimate comparisons.

So, if I may, I will come back to where I started. We should conserve our resources. What is going on now is expensive. It promises to be even more expensive. It should not occur. Secondly, we should, as a society, as a Legislature, as an executive branch, provide for the fair enforcement of this statute which is on the books. It should be accomplished by those branches of government that have the responsibility to undertake the task, which is the Legislature, in the first instance, and the executive. Assuredly it should be undertaken; however you come out on the universe of cases, it should be undertaken by a deliberative legislative body that can hear from a wide variety of people and secure a wide variety of opinions, and come to a concrete solution.

However, on behalf of the Governor, on behalf of my office, on behalf of the county prosecutors, and on behalf of law enforcement, I suggest to you that the sensible universe, the one that protects against that unimaginable event, is the universe contained in Assembly Bill No. 4316.

Thank you very much.

ASSEMBLYWOMAN FORD: Thank you, General. I just have a question for you, maybe just a reaction. There is a tremendous amount of frustration by the public as to the number of cases that have been reversed, with the exception last week of one case that was affirmed and which is now going on to the next step in requesting a proportionality review. Could you, or could Mr. Moczula explain to us -- just at this point in time, because we have never gotten to this point before -- what procedurally we can expect in terms of the death penalty at this point, either in terms of potential appeals or rights of appeal or how you get to the point to do the proportionality review?

ATTORNEY GENERAL DEL TUFO: Well, the proportionality review -- and, Boris, please comment after I have finished -- you are really where we have been with the cases that have not been upheld -- I think that was 26 cases -- so we never got to proportionality. That kind of-- Listen, I realize it takes a long time and it's laborious and people can be frustrated. I have criticized the Court for some of its decisions, particularly the most recent case out of Middlesex County, that I am sure Prosecutor Rockoff will talk about, drawing fine distinctions between intentions to kill and to do bodily harm, where a person was hit 13 times with -- 16 times with a hatchet. But, on the other hand, I think we ought, as a State and as a society, to be appreciative that there is at least this kind of intense interest by a judicial body, and there is this kind of oversight, so that we don't make any mistakes.

That is the first review. Those reviews will continue. But then we are going to get into the second phase, if and when death penalties are upheld, and there was just one -- the first one -- recently upheld. That gets you to this proportionality review. What I am suggesting to you is, if we go the way the Proportionality Review Project now seems to be going, we are going into a morass of hearings and contests

which could last for an extraordinarily long period of time and take an enormous amount of resources, after an enormous amount of resources and a considerable amount of money and a considerable amount of time has been spent in assembling the data which somehow is going to be reviewed in this proportionality context.

I think that unless the Legislature acts to limit the scope of that review to a manageable, practicable, reasonable, rational level, the enforcement of the dealth penalty statute in New Jersey is gone. Boris?

DEPUTY ATTY. GEN. BORIS MOCZULA: There are really two stages that we are approaching now in light of the affirmance last week of Mr. Marshall's death sentence. The first is really still to determine what proportionality review is all about. We don't know that at this point. The Special Master has not issued his final report.

Once we do know that, and once the system is in place, then the second question -- the more important question -- is, how does Mr. Marshall's sentence fare under that review system? At this point, we are not sure if the Supreme Court is going to use the Marshall case, although evidence shows that it probably will, to both decide the general question of proportionality review and then compare it. That could take place in two separate stages, or it could all be done together. Once we get some more guidance from the Court as to briefing and argument we will be able to tell.

But as the project has been set up -- the Proportionality Review Project -- we are waiting for the Special Master's final report, and the parties will be given an opportunity to comment and then argue before the Court, who will then make the ultimate decision.

With respect to generally where appeals are going now, I think we are arriving at a point where the older cases -- for lack of a better word -- the cases that occurred before the

Biegenwald decision, before Ramseur, before the Gerald decision, have essentially been weeded from the system. They have been reversed largely on the basis of those two opinions, and we are arriving at a position where the trials that are occurring now have all the new rules in place. Therefore, the Court's review will be somewhat different, in that they will not be relying necessarily on old law or old deficiencies in the previous trials for purposes of reversal. We will get more of an idea of the Court's feelings on the appeals, because those two fundamental issues will most likely be complied with by prosecutors.

I would also like to fill in a little factually on the Baldus study. We know that currently the Special Master is being paid at a fee of $100 an hour. We don't know what the figure is in terms of the total figure, but the project originally was supposed to last a year to a year-and-a-half. We are now at two-and-a-half years and counting. I would anticipate that it is in the thousands of dollars easily, just in terms of payment to the Special Master. There is also a staff in the Administrative Office of the Courts that works along with the Special Master. The Public Defender's Office, our Office, has been actively involved in hearings that the Special Master has called. That takes considerable time and resources just at that level, let alone data collection.

Throughout the course of the project, the prosecutorial community has been politely, but nevertheless consistently ignored. We raised some questions about Professor Baldus' impartiality back when he was first appointed. There has been nothing in the course of the study that has led us to believe that he can impartially decide this case. For whatever reasons -- and they may be totally legitimate reasons, as far as he is concerned -- he has a very fixed view of what proportionality review should be, and it is evident in the papers he has filed with both the project and the Court.

ASSEMBLYWOMAN FORD: I noticed on the General's statement-- I don't think he referred to this, but in the footnote he indicated that only one state of all the states which have adopted a proportionality review have adopted Professor Baldus' view of the scope of this review. All -- I think 23 or 24 -- states that have adopted the proportionality review have otherwise embraced a more narrow scope of review at this stage.

DEPUTY ATTORNEY GENERAL MOCZULA: That is correct. In fact, there is one more even narrower universe of cases which we are not advocating, and that is cases which have both received a death sentence and been affirmed on appeal. We are taking a step back from that and saying, "Just cases where death sentences have been imposed."

Professor Baldus also testified in support of the Racial Justice Act which, from a prosecutorial standpoint, would have practically eliminated the death penalty throughout the country. It is a similar type of system as the proportionality system he is trying to devise for New Jersey. It will eventually get to a statistical comparison, and our point, from the inception of this project, has been that you cannot numerically quantify essentially qualitative judgments, the decisions of prosecutors, of juries, of judges in the system. There is really no way of comparing various trials, various verdicts. Two different juries can hear essentially the same case. In this fictional world, if you could run the same case twice, use the same players, the same evidence, if you picked two juries they could very well come to different results. There could be no other reason than jury sympathy, and how do you quantify that type of sympathy or nullification?

Professor Baldus submitted a letter to the Supreme Court just as a backup. We did move before the Supreme Court for a definition of the universe of cases. We asked the Court to define that universe, so that everybody in the project would

be aware of what exactly the pool of cases we are dealing with is. The Court asked for briefs, asked for oral argument. We met with the Court and Professor Baldus, and ultimately the Court abstained from deciding.

In the course of that motion, Professor Baldus was asked to submit a paper on the advantages and disadvantages of the various universes. He did so. We felt it was not impartial. We responded, and that response has been provided to the Committee also -- it is on record with the Court; it is public record -- for further reference in terms of our views as to Professor Baldus' approach.

ATTORNEY GENERAL DEL TUFO: It is among the papers we delivered this morning?

DEPUTY ATTORNEY GENERAL MOCZULA: Yes.

ASSEMBLYWOMAN FORD: Okay, thank you. Assemblyman Pelly, I think you had a question.

ASSEMBLYMAN PELLY: Yes, I did, Madam Chairman. Mr. Attorney General, I wonder if this is an appropriate question: In your opinion, what impact, if any, would the enactment of this legislation -- A-4316 -- have on the 26 or so cases which had been in the process of decision?

ATTORNEY GENERAL DEL TUFO: Again, Boris, jump in. Those cases have been-- You don't get to proportionality until the death sentence is upheld. Those cases have been largely sent back for further hearings. If they come up again and the death sentence is upheld, then one would get into proportionality. Isn't that correct?

DEPUTY ATTORNEY GENERAL MOCZULA: Yes. Proportionality assumes that every other aspect of a defendant's challenge to his sentence and conviction has been rejected, as the case was in Mr. Marshall's case. Then, and only then, do you move to the second stage of assuming a valid death sentence on all other grounds. Is that sentence proportional to other cases? That is what we are trying to define: What are those other cases?

ASSEMBLYMAN PELLY: You do see some retroactive impact?

DEPUTY ATTORNEY GENERAL MOCZULA: No, because it would not apply to those other cases. It would start with Mr. Marshall's case.

ATTORNEY GENERAL DEL TUFO: Well, if those cases came back and then you were doing a proportionality review, it conceivably-- The universe would then be defined. We haven't gotten to that phase yet, so it is really not even retroactive, in that sense.

DEPUTY ATTORNEY GENERAL MOCZULA: In our proposed definition of the universe, and the bill's proposed definition of the universe, those prior cases could be utilized for the purposes of comparison with a valid death sentence, because a sentence of death was imposed in those cases.

ASSEMBLYWOMAN FORD: I think one of the concerns that people have expressed -- not a concern, but a question people have expressed to me is: Would this bill apply to those cases that are currently, so to speak, in the pipeline being prosecuted or whatever? Because if we were to make a substantive change in the criminal law, it would obviously only apply to criminal acts that took place once that criminal law was enacted.

As I view this legislation, it really is clarifying the intent of the Legislature with regard to the scope of the review, and therefore could apply to some of the cases that are now in the appeal process. Assuming that the Marshall case, or some other case, is before the Supreme Court, this law could basically clarify the intent of the Legislature in establishing a proportionality review. Do you disagree or agree with that?

ATTORNEY GENERAL DEL TUFO: Proportionality has been there from the inception.

ASSEMBLYWOMAN FORD: Right.

ATTORNEY GENERAL DEL TUFO: So, if someone claims they have that kind of right to that review, no one is changing that.

ASSEMBLYWOMAN FORD: Right.

ATTORNEY GENERAL DEL TUFO: No one is advocating that it be eliminated.

DEPUTY ATTORNEY GENERAL MOCZULA: The actual comparison, the scope of the comparison that has to be made has never been defined. Everyone is groping around for that. So you are really defining what the legislative intent was in enacting the proportionality in the first place by defining what the universe of cases to be reviewed will be.

ASSEMBLYWOMAN FORD: That ultimately would be subject to some -- I imagine some interpretation by the Supreme Court anyway on that.

DEPUTY ATTORNEY GENERAL MOCZULA: I think it is critical to note that the bill does point out that this is the intent of the Legislature from day one, from the enactment of the death penalty statute back in 1982. It is not to be considered as a substantive change in the law, and we fully agree with that. Based on the legislative history and the approach to proportionality review, as the Attorney General has spoken about today, it is our position that this is what the legislative intent was from the enactment of the death penalty statute. We would emphasize that it should be made very clear that if this legislation should pass, this is the intent. This is not a substantive change in the law. This is really what the law has always been. This is simply a clarification of that intent.

ASSEMBLYWOMAN FORD: Assemblyman Stuhltrager?

ASSEMBLYMAN STUHLTRAGER: General, you have described two potential universes, cases where capital punishment has been imposed, and Professor Baldus is talking about all potential cases where it could have been sought. I take it from some other comments, though, that there is a recognition that there are other potential universes. One that occurs to me would be, what about all cases where capital punishment was

sought, the thinking being that in this particular situation-- For instance, who are you going to compare Mr. Marshall's sentence to? He is the first one. There is nothing to compare it to. Even if you assume that you are going to compare it to other cases where it is imposed, to get a true proportionality, shouldn't you also be comparing it to other cases where it was sought, but it was decided that the facts and circumstances were not such as to justify capital punishment?

ATTORNEY GENERAL DEL TUFO: I am going to comment on that, and then I am also going to ask Boris to because he has been living with it for a long time.

The answer to your question is: There are other bases of comparison. The totally unacceptable one is, every homicide that could have been-- I mean, my God, if it takes you back into-- I don't know that I need to comment about that anymore.

All cases that were prosecuted as death penalty cases is an alternative.

ASSEMBLYMAN STUHLTRAGER: That would significantly narrow it, I think.

ATTORNEY GENERAL DEL TUFO: It would. All cases in which the death penalty was imposed. As Boris mentioned before, all cases in which the death penalty has been imposed and affirmed on appeal. That is really narrow. So you've got all kinds of combinations and permutations.

I guess the idea with cases in which it was actually imposed is, it tends to get you away from a lot of intangibles and subjective considerations: Why did the jury in this case not impose it? Does that make it a legitimate basis for comparison? Since we are only dealing with the extreme unimaginable case that gets through all the other safeguards in our laws, shouldn't we then only be looking at cases in which the jury imposed the death penalty, and therefore we don't have to get into a lot of subjective reaction?

Frankly, all cases that are prosecuted as death penalty cases would be a manageable, workable approach to it. The prosecutors and my office favor where it was actually imposed, but I think that that would work as well.

DEPUTY ATTORNEY GENERAL MOCZULA: I think anytime you move away from a pool where the death sentence was imposed, you are introducing those intangibles. Consider, for instance, that mitigating factors under the current law do not have to be found unanimously by juries. You may have one case where two jurors find the mitigating factors and it is considered another case where all 12 jurors find mitigating factors. That could affect it somehow. You are getting into areas where you can't really explain. There are just too many different types of variables why different decisions have been reached.

With respect to the question of-- Let's say there is a murder-for-hire case, and it is the first case and there is no one else on death row, or that has ever been on death row that is a murder-for-hire situation. There are different ways of comparing cases. From a very fundamental level you compare a murder-for-hire case with another murder-for-hire case. However, you could also compare cases regardless of the way the murder was committed by looking at which aggravating and mitigating factors were charged, or which aggravating and mitigating factors were actually found by the jury. There may be other ways of comparison. We don't know at this point. But my point simply is, it is not necessarily mutually exclusive to have one murder-for-hire case versus all other cases where the person actually committed the murder by their own hand.

The first case scenario is something that is going to be dealt with in the project. Professor Baldus, in one of his suggestions, has recommended -- possibly, not finally -- that we go to cases -- homicides under our former death penalty statute back in the '60s and use those homicides for the purposes of comparing the first few death sentences under our

current law. Frankly, we think that is totally unworkable. It is a totally different system, frankly. It was struck down as unconstitutional, and to try to compare cases under the current system with the old system will not provide any meaningful result.

But that is something the project will consider in terms of, here we are early in the process. There might not be enough cases in the pool. When will there be enough cases in the pool? We are looking for guidance from the Court for that.

ASSEMBLYWOMAN FORD: Assemblyman Charles?

ASSEMBLYMAN CHARLES: Madam Chairman, I would like to follow up on the question -- the line that was opened up by Assemblyman Stuhltrager. It just seems to me that what we are effectively doing right now is just writing out the proportionality section of the current law. I mean, this amendment purports to define what was the original intent of the Legislature, or to give some kind of guidance as to what we mean by this proportionality review. But it just seems to me that in light of the facts that are before us, namely that we have just had one death penalty that has been affirmed, we effectively have no universe to compare it to. So we don't have a proportionality -- another set of things with which to compare it. There is no basis for making any kind of proportionate analysis.

I think the arguments that are being raised for limiting the universe by which we are to make our proportionality comparisons is an argument that suggests that to inconvenience us, or to embark upon a pursuit that may be difficult and may not admit an easy resolution, is not worth it in this case. My own feeling about it is that in light of the finality of a death sentence, of the death of somebody who has been found guilty under our criminal laws, extra effort, even if it is inconvenient effort, even if it is major effort, is not too much for us to expend.

I just don't agree that we ought to allow this proportionality thing to be so limited. For all intents and purposes, there is no proportionality under what we are now setting up here. I wonder when we are going to have a universe from which we can effectively make a proportionality study. It is going to be 50 years from now -- or 100 years -- before we finally have a universe that is convenient to making this proportionality review.

ATTORNEY GENERAL DEL TUFO: I am not opposed to extra work and to conscientious work and to having things take a lot of time when they should. But I am opposed to stupid work and unreasonable work and work which makes absolutely no sense; which takes all kinds of resources and which prevents the enforcement of the law that I imagine the Legislature and the people of the State of New Jersey want to have enforced.

The proposals that are on the table here are not writing proportionality out of the statute -- proportionality has been in the statute since the beginning -- and it is not limiting proportionality. It is trying to define what it is the Legislature is talking about when it wants cases compared. What is the universe of cases, and what is rational, and what is important?

There is something, Assemblyman, in the statement that we have presented that deals with the study that is ongoing in the Supreme Court. During my testimony -- I think maybe you came in a little after I had finished -- the suggestion that one go back through every homicide that has occurred since 1982, and as Mr. Moczula just said, perhaps even going back to 1972, and delving into each of those cases intensely with questionnaires and hundreds of pages of questions to find out whether they could have been prosecuted as homicide cases or not-- What was the prosecutor's mind-set? How did he feel about this? What was the evidence? And were there mitigating circumstances? Were there aggravating circumstances? Then,

taking this mixed collage of data, which is all very subjective and very speculative, and trying to crunch it into some statistical base upon which you can make some kind of proportionality review, is absolsute nonsense, as far as I am concerned. I don't think it makes common sense. I am just talking about on a rational enforcement basis now. I am not even talking about-- It is a very important subject matter. We are talking about life and death, and we should be concerned, and we should put extra effort into it. But we can't do that.

The product that comes out of it is useless, I think. The work that goes into it is enormous. The cost is enormous. The struggle is enormous. You can't really identify all the things you are talking about.

So, I don't think we should do that. Now, I understand, and I appreciate your concern. We have so many safeguards in the statute now. There are lots of safeguards up-front to protect defendants. Nonetheless, proportionality should be there as a final measure of protecting.

My point, I guess-- We can get into a debate that won't serve any purpose, but let me--

ASSEMBLYMAN CHARLES: I have two more questions to ask that might illustrate my point.

ATTORNEY GENERAL DEL TUFO: --just say this to you: My point is, the questions you are raising, and that have been raised here today, are legitimate questions and ones that should be explored. And this is the forum in which to explore them. I mean, you have the mechanism for hearing from people and getting opinions and assessing these things. This should not be tightly held together in an inappropriate branch of government and controlled by one person. However it comes out, I think it is the legislative function to define what it means by cases, and to define that -- however you end up defining it -- in a way which is workable and manageable and makes common

sense, and yet protects criminal defendants from that one possibility that something untold is going to happen.

If you don't do that, I suggest to you that not only will it dramatically affect the enforcement of the death penalty, but once you get into that second wave of hearings, you will go on forever because the first line of attack will be what cases are in the data base and what cases are not. You will be going back and essentially re-litigating all of those cases that have occurred -- homicide cases -- whether prosecuted as capital cases or not; litigating the judgments that went into those cases, all kinds of collateral trials. I mean, it just does not make any sense.

ASSEMBLYMAN CHARLES: Under your reading of the statute as it is now worded -- as it is now proposed -- how many cases are in that universe?

ATTORNEY GENERAL DEL TUFO: It doesn't define it.

ASSEMBLYMAN CHARLES: It does not define it?

ATTORNEY GENERAL DEL TUFO: No. That's why--

ASSEMBLYWOMAN FORD: As proposed, you said.

ASSEMBLYMAN CHARLES: As proposed -- the bill.

ATTORNEY GENERAL DEL TUFO: Oh, as proposed. It deals with cases in which the death penalty has actually been imposed.

ASSEMBLYMAN CHARLES: All right. How many cases right now, if this bill were enacted into law-- How many cases then would be in that universe?

ATTORNEY GENERAL DEL TUFO: Twenty-seven.

ASSEMBLYMAN CHARLES: Twenty-seven?

ASSEMBLYWOMAN FORD: I think it's 37.

ATTORNEY GENERAL DEL TUFO: Thirty-seven, I'm sorry. Go ahead, Boris.

DEPUTY ATTORNEY GENERAL MOCZULA: It's 37.

ASSEMBLYMAN CHARLES: There would be 37 cases in it. If we were talking about-- If we expanded that universe to-- Strike that. Let me just clarify this. We are talking about

those 37 cases where the capital punishment has been imposed and upheld after final review?

ATTORNEY GENERAL DEL TUFO: No.

ASSEMBLYMAN CHARLES: So, really, we are talking about cases, under this definition, that deal with -- capital cases that have gone through the act stage, the penalty phase, and which have been upheld on the final review?

ATTORNEY GENERAL DEL TUFO: No.

ASSEMBLYMAN CHARLES: That's what we're talking about, aren't we? We're not talking about--

DEPUTY ATTORNEY GENERAL MOCZULA: No, because only one has been upheld on final review by the Supreme Court. We are talking about cases that went through to a verdict of a jury.

ASSEMBLYWOMAN FORD: We're talking, Joe, about cases in which a jury, in the penalty phase, determined that the death penalty was appropriate. They might be at every stage in the appeal process. They might be remanded back for a retrial. Currently there are about 37 of those cases.

ASSEMBLYMAN CHARLES: There are 37 cases under it. So we are not just talking about the case that was decided last week.

ASSEMBLYWOMAN FORD: Right.

ASSEMBLYMAN CHARLES: We're talking about 37 cases, all right. So that's the universe we use to make the proportionality study.

ASSEMBLYWOMAN FORD: These are cases in which the death penalty was imposed under our current statute in New Jersey -- the 37 cases.

ASSEMBLYMAN CHARLES: What problems, extraordinary or otherwise, result from using as a universe those cases which were prosecuted as death penalty cases? How would that change this number 37? What would it then be?

ATTORNEY GENERAL DEL TUFO: We can get the answer for you. I just don't know.

ASSEMBLYMAN CHARLES: That couldn't be any more than another 30-some cases, right?

ATTORNEY GENERAL DEL TUFO: I have no idea.

DEPUTY ATTORNEY GENERAL MOCZULA: I think we're over 100. I am not sure at this point, but I think there have been over 100 death penalty prosecutions in the State since 1982. I may stand corrected on that, but that is my most recent impression.

ASSEMBLYMAN CHARLES: In terms of the number of capital cases, or cases that are prosecuted as capital cases in a one-year period-- That is approximately how many in New Jersey? What has been the experience?

ATTORNEY GENERAL DEL TUFO: That would certainly vary by how many people and how the cases moved along.

ASSEMBLYMAN CHARLES: Obviously. But just look back from '82 to '90 right now. How many have you had per year? We could use that as some way of looking at the numbers.

DEPUTY ATTORNEY GENERAL MOCZULA: It's hard to give an-- Obviously if you take the numbers you can give an average, but there was a marked decrease after some of the Supreme Court's opinions clarified to prosecutors what type of cases were death eligible. So there is a variance. In the early years, there were more cases; in the later years there were less. I think now it has moved up a little.

ASSEMBLYMAN CHARLES: And what is that number?

DEPUTY ATTORNEY GENERAL MOCZULA: I do not know. We can get that for you.

ASSEMBLYMAN CHARLES: What would be the range, in your estimation -- the range between 10 and 20 from the high to the low, or would it be less than that? I am just trying to get some notion of how many cases we are dealing with, so that we can maybe make some kind of judgment based upon numbers as to how much work goes into expanding this universe that we do the proportionality review from.

DEPUTY ATTORNEY GENERAL MOCZULA: I think we are dealing with between 20 and 30.

ASSEMBLYMAN CHARLES: A year?

DEPUTY ATTORNEY GENERAL MOCZULA: Yes.

ASSEMBLYMAN CHARLES: And is it your opinion that to include that 20 or 30 a year in this analysis-- That would not be sensible or not productive, or wouldn't contribute any kind of insight as to what we ought to do?

DEPUTY ATTORNEY GENERAL MOCZULA: On two grounds: One is simply that outside of the number involved, when you move away from the universe that simply has cases where the death sentence is imposed, you introduce all those variables that cannot, in our opinion, be quantified; cannot be sufficiently evaluated to have someone many years after the fact, or even a few months after the fact determine exactly why a jury or a judge or a prosecutor made the decision they did.

So, outside of the numbers, we're talking about the purpose of proportionality review and what does the broader universe introduce. If a prosecutor chose a case, or didn't choose a case for capital prosecution and then you have a result further on down the process, there is a variety of reasons to explain or not explain why those decisions were reached.

ASSEMBLYMAN CHARLES: That may be the problem, the variety of the decisions that go into -- the variety of factors and considerations that go into the decision as to whether or not to bring a capital case. I mean, that is what people are concerned about. What are those decisions? Isn't that something that maybe in that process which you would make unreviewable now-- Isn't there the potential that some harm and some unreviewable damage and other kinds of things are occurring in that process?

DEPUTY ATTORNEY GENERAL MOCZULA: No, because we have never argued that if it is not included in the proportionality

review it is not available to a defendant through another forum. If there is any evidence of an inpermissible motive for prosecution, a defendant has a full right to challenge even his indictment or conviction or sentence based on that ground by presenting specific evidence of that type of discrimination or inpermissible motive. Whatever the inpermissible motive may be, if there is evidence of it they have a full right to challenge it.

ASSEMBLYMAN CHARLES: In the universe of cases where that has been done, and done successfully, probably it is zero over the history of criminal administration -- criminal justice administration, isn't it?

DEPUTY ATTORNEY GENERAL MOCZULA: All we're saying is, it is not part of the proportionality review.

ASSEMBLYMAN CHARLES: Just one final question: Is it your opinion that these things involve unquantifiable things, things that are just too varying and too -- well, I wouldn't say esoteric, but too varying to admit quantification? That is your opinion? Is there any school of thought that differs from your opinion? Is there a contrary opinion which says that taking all of those considerations into account, we can still come up with something that is quantifiable?

DEPUTY ATTORNEY GENERAL MOCZULA: Professor Baldus' studies, the same studies which have been rejected by the courts.

ASSEMBLYMAN CHARLES: Thank you.

ATTORNEY GENERAL DEL TUFO: Thank you very much.

ASSEMBLYWOMAN FORD: Thank you, General. Thank you, Mr. Moczula.

Prosecutor Rockoff and Mr. Lamb?

A L A N A. R O C K O F F: Assemblywoman Ford, members of the Committee: Thank you very much for inviting myself and my first assistant, William Lamb, from the Middlesex County Prosecutor's Office, to testify at this hearing on a specific area of your concern.

I am not going to go into proportionality or into the drug kingpin legislation that is pending. We are going to confine our remarks to the proposal that has been placed in your hands for review by the sponsors of Assembly Concurrent Resolution No. 76. I am going to give you some background, or history concerning the reason why we are supporting this resolution and why the Prosecutors' Association adopted a resolution this past week at our regular monthly meeting supporting this resolution. Then we are going to get into the real work of prosecutors.

I am going to have Mr. Lamb give you the factual distinctions that have been created by the New Jersey Supreme Court in 13 various cases, where the problem of trying to distinguish between what cases should be the subject of imposition of capital punishment for the killing of another person intentionally, and what cases should not be, or were not given the imposition of capital punishment as a result of the finding by the New Jersey Supreme Court, where the actor may have been only intending to do serious bodily harm that resulted in death, and the judge failed to give the jury the opportunity to make that discretionary optional decision.

ACR-76 proposes to amend the State Constitution. It is necessary to use a vehicle such as an amendment to the State Constitution rather than through legislation because of the language in some of the cases by the New Jersey Supreme Court, particularly in the State v. Gerald case that was decided in October 1988, when the Court struck down a portion of the statute by saying that it was in violation of the Constitution in that it allowed for cruel and inhumane punishment.

In Gerald, the Supreme Court construed our State Constitution as prohibiting the imposition of capital punishment in cases where an individual is convicted of purposely or knowingly causing serious bodily injury resulting in death, as opposed to purposely or knowingly causing death

which would render the defendant death eligible. In doing that, the Court acknowledged that our statute, as presently written, clearly provides that capital punishment may be imposed in situations where there is purposeful or knowing infliction of serious bodily injury resulting in death, but they indicated that the Constitution of our State would be violated if that were done.

Our current death penalty statute was passed in 1982, after a lengthy debate by this Legislature. Thereafter, it was amended in some respects in 1985 and 1986. The reading of the law leaves no dispute that this Legislature intended that those who purposely and knowingly caused serious bodily injury resulting in death ought to be subject to the death penalty, provided that the other criteria of the statute are met; that the actor commits the homicidal act by his or her own conduct, or hires another to commit the act, and that at least one of the aggravating factors triggering a capital case is proven by the State beyond a reasonable doubt; and that such aggravating factors outweigh any mitigating factors beyond a reasonable doubt.

So, for example, under the statute as enacted by the Legislature, an individual who by his own hand, or through the hiring of another person, purposely or knowingly causes serious bodily injury resulting in the death of a law enforcement officer, would be eligible for capital punishment. The Supreme Court in the Gerald decision, however, by utilizing our State Constitution, narrowed the class of individuals eligible for the death penalty by finding that our Constitution precludes the death eligibility in cases where the actor did not, in fact, purposely or knowingly intend to cause death, even though the serious bodily injury inflicted resulted in death and an aggravating factor was proven beyond a reasonable doubt.

Now, ACR-76, which is before you today, provides specifically that it shall not be deemed to be cruel or unusual

punishment to make eligible for the death penalty a defendant convicted of purposely and knowingly causing serious bodily injury resulting in death, provided the actor committed the act by his own conduct, or procured the commission of the offense by hire. So, in short, this bill establishes that which the Legislature and the executive branch has always intended, and which the prosecuting community in this State has always relied upon regarding the class of individuals eligible for the death penalty.

It should also be emphasized that as a matter of Federal constitutional law, capital punishment may be imposed on one who commits a homicide without the purpose or knowledge that death will actually result. I call your attention to Tyson v. Arizona, which is a 1987 United States Supreme Court case. In its Gerald opinion, the Supreme Court expressly rejected Tyson's construction of the Federal Constitution, that prohibition against cruel and inhumane punishment, and they opted in favor of reliance upon our State Constitution.

This result was premised upon the Court's belief that capital punishment should be reserved for those who intended that death result from their actions. However, there is fault in that logic, and it is this: There is a fine line between proving whether an individual purposely or knowingly caused serious bodily injury which resulted in death, and whether that individual intended to cause death all along. In many cases it is impossible to establish this arbitrary line, and that is precisely why the Legislature drafted the code's murder statute to provide that the offensive murder is committed regardless of whether the defendant causes serious bodily injury resulting in death or, in fact, intended death in the first instance.

It is the consequence of the loss of life which should be dispositive. Moreover, as a matter of public policy, and in contrast to Gerald, the United States Supreme Court rationale in the Tyson case is worthy of note in the context of the

proposed amendment. Now, I would like you to listen to this because this is going to be illustrated by Mr. Lamb's presentation, when he gives you the synopsis of the differences in the 13 cases. The United States Supreme Court, though they didn't know about our cases, was saying this in the Tyson decision. The Court said:

"A narrow focus on the question of whether a given defendant intended to kill, however, is a highly unsatisfactory means of definitely distinguishing the most culpable and dangerous of murderers. Some non-intentional murders may be among the most dangerous, cruel, and inhumane of all; the person who tortures another, not caring whether that victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim, as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as the intent to kill. We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activity known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account when making a capital sentencing judgment, when that conduct causes its natural, though not inevitable lethal result."

Therefore, ACR-76 is consistent with that United States Supreme Court rationale, and the cases -- these 13 cases that Mr. Lamb will now show you in chart form and by explanation -- are inconsistent with that rationale. If we are talking about proportionality, this is an area where there is so much subjectivity that has been used by the Supreme Court, that it is almost impossible to eradicate a comparison between what they want to do with proportionality with respect to those cases where the death penalty has been given, and those cases where they have decided, on both sides of the ledger, whether a

very two cases which followed, however, one which involved a victim who was strangled with an electrical cord and whose body was mutilated after her death, and the other one in which the victim was stabbed 53 times, including 18 stab wounds to her genitals-- In these cases, a death penalty could not be sustained because the trial judge had failed to elicit from the defendants who pled guilty to these murders that they actually intended death, instead of serious bodily injury.

I would invite anyone to tell me what the difference is between 24 stab wounds and 53 stab wounds, and how you can rationally distinguish why these cases did not require instruction, but these did.

This same illustration applies in the Rose case, where a single shotgun blast to the chest was deemed to require no Gerald type instruction because it was obvious that the killer intended death; where in Pennington and Long, bullet wounds to the chest or heart from fairly close range required such an instruction, under the notion that perhaps the defendant intended something less than death.

In the Bryan Coyle case, the victim was shot several times and was lying prostrate on the ground when the defendant placed a nine millimeter close behind his ear and pulled the trigger. In this case, the jury was obliged, according to the Supreme Court, to determine whether or not Coyle intended death. However, in Hightower, where a convenience store clerk was shot three times, including a wound to the neck, such an instruction was not required.

In Biegenwald, one of the original cases decided by the Supreme Court, the Court noted and reaffirmed in Gerald, when obliged to distinguish Biegenwald, that a shot to the head clearly demonstrates an intent to cause death. I ask you, if that is so, then how was Bryan Coyle possibly prejudiced by the absence of such an instruction? And how could one possibly rationalize the Supreme Court's opinion in the Hightower and Coyle cases?

Last, Nathaniel Harvey administered 15 hatchet blows to the head of his victim. The jury was able to see autopsy photographs which showed her brain exposed. Her head looked something like a crushed walnut. Yet, the Court determined that this death penalty could not stand because the jury was not instructed that perhaps Harvey intended something else.

Yet, in McDougald, with egregious injuries of a similar nature, including one victim getting a cinder block dropped on her head, such an instruction did not invalidate the death penalty.

I submit to you that there is no way these cases can be rationally distinguished. The Supreme Court's Gerald principle has been erratically applied in a totally unpredictable nature, and without any semblance of an intellectual, logical explanation.

Let me just say one last thing before the Prosecutor takes the floor back. I want to say one thing for those of us who work in the trenches: You will hear, or may have heard -- and it may be repeated today -- that the problem doesn't lie in the death penalty statute or with the Supreme Court's interpretation of it. The problem is inept -- I believe that is the word -- prosecutors and trial judges who simply can't get it right.

Well, I would like publicly to put the lie to that canard. Anyone who is familiar with death penalty litigation knows that we don't send any second-stringers into a death penalty case. It is only the very best prosecutors and the most experienced and able trial judges who are assigned to those matters.

The jury selection process is so involved and so selective, that only the most attentive and intelligent jurors sit on death penalty cases. The trial itself is conducted with the utmost caution. Trial judges and prosecutors know how antagonistic the Supreme Court is to the death penalty. That

results in prosecutors sometimes not using evidence, as we didn't use evidence in the Harvey case, because we are afraid of what the Supreme Court will do on review. And trial judges routinely in deciding a close call favor the defense.

Lastly, the penalty phase itself is heavily weighted in favor of a non-death verdict. Now, the result is, the only people who get the death penalty are the worst of the worst. I can't tell you how demoralizing it is to put several years of work -- and that's what we do -- into trying a death penalty case, to try it according to the rules as written, to do the best you can to try the case fairly and receive the death penalty verdict, and then to find out a couple of years later that there is some new rule the Court has just invented which now makes the whole process a nullity. It makes you heartsick. It makes you wonder why you made public service a career.

If there is anything you can do to restore the balance which is sorely lacking at this point, I would respectfully urge you to adopt any legislation such as the bill in front of you, which would do that.

MR. ROCKOFF: Just one more comment concerning this Gerald rationale: The Supreme Court itself said, at one point: "A person firing a sawed-off shotgun into the abdomen of another person at point blank range necessarily is aware that it is practically certain that such conduct will cause the victim's death." Now, they said that in a decision that they wrote, or decided on September 22, 1988. We argued the Coyle case about June 11, 1990, but Coyle was a matter that had been tried back in 1988.

In the Coyle case they had a situation where an individual by the name of Coyle, who we considered to be a sociopath who had no compunctions about killing, because he had already killed before-- He was having a love affair with a woman whose husband objected to it. As a result of this

triangle, one night during the course of one of their arguments, he took a gun and he shot the victim running away -- shot him in the leg. Then, when the victim was on the ground, he shot him in the back. And then, in execution style, he stood over him and shot him in the head.

In that case, in the Coyle decision, they indicated that there was a mistake made by the judge because he refused to do what I thought the Supreme Court said in State v. Rose he didn't have to do; that it was practically certain that such conduct would cause the victim's death, with a person firing a sawed-off shotgun into the abdomen of another person. Well, here he fired it into the head of another person, and yet the Supreme Court, in that case, wanting to reverse that case, used the Gerald rationale they had developed out of whole cloth, saying that the Constitution of our State required that it would be cruel and inhumane punishment for somebody who did not intend that, to be given the death penalty.

If anybody can make any sense out of the distinctions they drew in the five cases, where they -- and you have it in the handout -- did not employ this rationale, and comparing it to those eight cases, just like we want to do in proportionality review-- If they want to compare the imposition of the death penalty and proportionality review to cases, well let them also subjectively compare these cases under the general rationale to each other, and see if they can find any logical, rational explanation for making these distinctions.

Thank you very much for allowing us to speak to you.

ASSEMBLYWOMAN FORD: Thank you, Mr. Prosecutor and Mr. Lamb. Any questions?

ASSEMBLYMAN CHARLES: I have a couple of questions. It seems that the two parts of your presentation, obviously from your office-- Number one had to do with the Gerald principle, what it does or does not do. The second part had to

do with the application of that principle by the Supreme Court, and whether it has been consistent or not in these cases that you charted before us.

I think the second part, what the Supreme Court does or does not do, and how consistent it is or is not in terms of its application of its Gerald principle, is something that is important, but I don't believe that that is something that is before us right now. I think we are talking about the Gerald principle and what it means, and whether it is a good principle or a bad principle. Do you agree? You made those two points.

MR. ROCKOFF: You're absolutely right.

ASSEMBLYMAN CHARLES: They are two issues that we should be talking about. I am not here to defend the Supreme Court. They will deal with whatever defense they think is necessary, if it is needed at all.

On the Gerald principle itself-- It seems to me that the thing that is driving your position on the Gerald principle is the fact that there has been a death as the consequence of the act of the accused, and that, obviously, is very, very important. I abhor it, and I think that those who would cause a death should be looked at very closely from the point of view of what type of punishment should be in order. But the fact of the death itself-- It is important, but it is not all important. We take that into account.

For example, in automobile accident cases where a death has resulted, there is not capital punishment because there wasn't the requisite kind of intent that went along with it. There was this horrible thing of a death and it may be the subject of a third or second degree offense even -- vehicular homicide. That is something that causes families anguish and everything else. It's a horrible, horrible thing. It's a death when it is like that, and it is a death again if it is pursuant to some deranged person's activities.

So, death by itself is not the driving factor. The one thing we are concerned about in criminal law is the intent with which some person acted. It seems to me that that is one thing that is principal and fundamental. The other thing is our dependence and reliance upon the jury system we have. It just seems to me that the Gerald principle does not take the jury out of the determination as to whether or not a person should be subjected to capital punishment. The issue under Gerald is whether or not the person intended to cause death, or whether or not the person intended -- the accused -- to cause grievous or serious bodily injury.

When the jury gets that question, the jury is told, "You decide whether these stabbings, whether these batterings, whether all these things were acts intended to cause serious injury, grievous injury, or whether they were acts intended to cause death." That is a jury question. Gerald does not take away the jury function. It seems to me that the jury represents the sense of the community, and we employ them in our system to deal with the question of how we sanction, how we punish people who have violated our social laws. It doesn't seem to me that Gerald is in any kind of derogation of that principle, but is perfectly consistent with that.

A jury will tell the prosecutor, will tell the Legislature, will tell everybody whether that person intended to kill, or whether or not that person intended to do something else. We should be prepared, shouldn't we, under a system that says the jury makes these determinations-- Shouldn't we be prepared to accept the decisions of a jury?

MR. ROCKOFF: With all due respect, Assemblyman, your argument would be absolutely logical and appropriate and we would probably agree with you, if we were not a country of law and order. This is a country of laws, and this Legislature passed a law. Part of that capital punishment law says that a person is subject to capital punishment if he commits an act of

creating serious bodily injury resulting in death, if he commits that act purposely or knowingly. In other words, if he has that mens rea, that culpable state in which he performs that act.

Now, once that is said, then that is the instruction that goes out to, not only the prosecution community, but to the citizens of this State: Beware that if you commit an act where you cause serious bodily injury-- If you take a car, even a car, and you are driving this car and you have that two tons of metal behind you, and you see a man that you want to destroy, or want to cripple or maim for the rest of his life in front of you, and you use that car as you would use a gun, or as you would use a knife, and you hit that man with that car, that's murder. That is not aggravated-- That is not death by auto. That is not an assault by auto. That's murder. That is what the statute says it is.

Now, all we want to do is bring the Supreme Court's thinking back to the same law and order that we are obligated to be under. The only way to do that, after they have used the New Jersey State Constitution by indicating that, "Well, that's cruel and inhuman punishment," is for this Legislature to say to the people of this State, "You decide whether that is cruel and inhuman punishment; you put that on the ballot and decide whether or not what we said, you want. If we said serious bodily injury resulting in death caused by purposely and knowing acts of an individual who does it with his own hand is murder, you tell us whether that is cruel and inhuman punishment."

Let the people of this State decide. That is why this is a country of law and order and of checks and balances, and that's all we are asking for. If you tell us that the Supreme Court is proper in the Gerald decision and you don't want to put this on the ballot and let the people of this State decide, we are bound by it. But we ask you for the opportunity.

MR. LAMB: May I say one thing? (no response) To take up your point, Assemblyman, not all killings are murders and not all murders are death penalty cases. I am sure you know that there has to be an aggravating factor. The statute, however, makes no distinction between a person who intends death and a person who intends serious bodily injury which leads to death. The Supreme Court had to invent that principle on its own and say the death penalty cannot be given to the latter. This would result in a situation where a person who was kidnapped and held for ransom and slowly dismembered so that the persons who might respond to a kidnap demand would appreciate the gravity of the kidnappers' purpose, that a person who was slowly being dismembered who died inadvertently, or before he was supposed to, the people who committed such a crime would not, in fact, be subject to the death penalty because it wasn't the purpose of the kidnappers to kill him, at least not yet.

I would suggest to you that that result is morally absurd, and I find no constitutional office for it either. But what I do say to you is, in cases like Harvey in the real world, when jurors were asked to respond by the media to the Supreme Court's distinction between a person who got hit in the head 15 times by a hatchet, they are the ones who described it as "absurd" and a travesty, not just the prosecutors.

Unfortunately, however, the Supreme Court is the only one that said what our State Constitution requires. And the only way that you can counteract the result of the Gerald decision, is not through statutory amendment, because they say that this holding has constitutional significance, but through the adoption of a constitutional amendment. The prosecutor's point is well taken. If this is really an infringement upon jury prerogatives, then let the jurors -- let the voters who serve as our jurors decide. That's all we ask for, and I don't think it unreasonable.

ASSEMBLYMAN CHARLES: I said I wouldn't defend the Court. That's not my job. We are here talking about legislative enactments and things that we, as public policymakers, as legislators, do. You take the position that the Court has misinterpreted the law. But you stated before, at the outset, that we are a system of laws and institutions, and a part of that system involves a review of laws by the Supreme Court. One of the principles of statutory construction that moves the Supreme Court, as it does everybody else, especially when you are talking about criminal laws, is a strict interpretation of these statutes where there is some ambiguity. Obviously the Court found that there was some ambiguity and interpreted it in such a way as to come out with the Gerald principle.

I don't believe that is something that is necessarily to be criticized. It may be criticized, but I think that is something that is consistent with, or part of this system of law and order that we operate under. To the extent we want to place criticism, it ought to be-- Well, let me put it this way: If we are going to criticize one aspect of that system, we ought to criticize all aspects of that system.

MR. ROCKOFF: In 1972, we had a death penalty in this State that was proven to be unconstitutional. As a result of that decision, what was done, Assemblyman, was that we went back to the Legislature, went back to the drawing board and created--

ASSEMBLYMAN CHARLES: I know what we did, I was here.

MR. ROCKOFF: --a constitutional death penalty. That is exactly what we are looking for.

MR. LAMB: One other point I would like to make is, the Supreme--

ASSEMBLYWOMAN FORD: Excuse me. I believe we created a statutory death penalty that was signed into law--

MR. ROCKOFF: That's right.

ASSEMBLYWOMAN FORD: --in response to that in 1982.

MR. LAMB: If this were a statutory ruling, and only that, then it could be amended by statutory change, which would be much easier to effect. But the Supreme Court has put a constitutional gloss on its ruling which allows you only constitutional recourse. The proposition we are here to support is the notion that before Gerald, I think the average person would have been surprised to know that our State Constitution would not permit the execution of a person who committed a horrible crime, but somehow intended something slightly short of death and yet the person died. That person could not be exposed to the death penalty under our State Constitution. I think the average person would have found that very surprising.

ASSEMBLYWOMAN FORD: Which is inconsistent with what the Federal Constitution--

MR. LAMB: Exactly the point.

MR. ROCKOFF: That's what I was going to say.

ASSEMBLYMAN CHARLES: We have the system of a State Constitution and a Federal Constitution.

MR. ROCKOFF: That's a very interesting proposition. Hopefully we will not get into that today, but eventually you are going to tackle that problem. Should there be consistency in areas where the Federal Constitution may very well be preempted, because we want to have universality in the manner in which we deal in New Jersey, in Georgia, in California, with the death penalty?

ASSEMBLYWOMAN FORD: Except that it is a principle of constitutional construction that our State Constitution can expose our citizens to greater rights than those that are afforded under the Federal Constitution. We can build upon those rights, but we can't diminish them. I guess it is a matter of perspective when you start saying, "Well, are we building on the rights of the defendant, or are we building on the rights of the victim?"

ASSEMBLYMAN CHARLES: We aren't even talking about that. We are just talking about the broader principle of whether we are talking about eliminating the State Constitution and letting the Federal Constitution govern us. I think that is the most fundamental issue. I am not prepared to say that we in the State of New Jersey are just going to let our rights be determined in any of its provisions by some Federal judge. I think we should reserve the right. We should be jealous of that right and protective of that right to maintain our Constitution and whatever distinctions we want to make between our Constitution and the Federal Constitution.

MR. LAMB: That's true, Assemblyman, but the question then becomes: If it is the people's Constitution, who is to decide how they want their cruel and unusual provision of the State Constitution to be interpreted? And how can one, now that the issue has been drawn into such stark relief, deprive them of the opportunity to have their say-so? After all, they are the ones who have to live under this Constitution.

ASSEMBLYWOMAN FORD: I recall back when-- Unfortunately, I appeared, during my campaign, before a group of high school students. Someone had obviously been given a question to ask me from the other side, and the question was, from a 16-year-old high school student-- He said: "Assemblywoman Ford, do you support or oppose the weighing of mitigating--" and what followed was a string of legalese. When I realized that the poor kid didn't know what he was asking, and much less did I know what he was asking me at that point in time-- I think that underscores that when we get into some very fine legalistic distinctions of criminal law, you know, the average person says, "If someone is stabbed 53 times, obviously somebody had the intent to kill." But you and I both know that intent, as we might use the term on the street, is a different concept from intent in terms of what has to be proven at various stages of criminal prosecution.

In many of the cases, as I read them, that were reversed on Gerald-- By the way, as far as I am concerned I support extending the death penalty to felony murder situations. I support this constitutional amendment. Notwithstanding that, in many of the cases it was not so much a question of whether the Court must make a ruling and whether or not the intent was there. What they were saying was that the record didn't show that the intent was there. Go back and reestablish the record and tell us-- Deal with that issue of whether or not there was intent.

So I don't know -- and I guess I am just really thinking out loud -- sometimes whether or not changing the Constitution is going to make it any easier to get convictions or to avoid that problem of what occurred in many of these cases, or the public frustration.

Thirdly, submitting it to the public, you know, in all reality-- It has taken people who practice and who do death penalty cases and who are lawyers and who are schooled in this, many years to comprehend the fine distinctions with intent and what the real meaning of the State v. Gerald case is. Is the general public going to be able to appreciate and comprehend the difference when they are asked to make a decision on what is a very legalistic issue at the New Jersey constitutional level?

MR. ROCKOFF: Taking that reasoning of the Supreme Court and saying, "Well, we don't have enough record to make a determination as to whether or not there was intent to kill--" They are, in essence, concluding the argument, at that point, because they are saying that that is all that the New Jersey Constitution would permit, the intent to kill, not the intent to do serious bodily injury resulting in death. So, by sending it back to the jury, or to the judge for a redetermination as to whether there was the distinction, is, in essence, supporting themselves by their own bootstraps. Do you see what I'm saying?

ASSEMBLYWOMAN FORD: I see we have the sponsor here of that constitutional amendment. Before I conclude, I would like to give Assemblyman Hardwick an opportunity to address the Committee. Thank you.

MR. ROCKOFF: Thank you very much.

ASSEMBLYWOMAN FORD: Assemblyman Hardwick?

A S S E M B L Y M A N C H U C K H A R D W I C K. Thank you, Madam Chairman. There has been so much said here this morning about the need for the ACR that I will try not to be duplicative. I appreciate your scheduling this public hearing. I was even moved by the presentation of the prosecutors.

Intent is so crucial to the application of a fair capital punishment law. What this ACR does is try to come to grips with the problem we are seeing here today, not doing away with any constitutional protections, but recognizing that we can't look into someone's heart. We can't know in someone's heart what they were intending to do. All we can really judge are their actions, and we know what actions they intended to commit.

So, as I tried to come to grips with this issue a couple of years ago, with a lot of conversation with a lot of people, I found that the best we can do is to say that if a reasonable person would know that an action is going to cause a death, if a reasonable person would believe that an action is going to cause a death, then what you should have to prove is that they intended to take the action. If you prove they intended to take the action that a reasonable person would know would cause death, that would meet the intent provision of this capital punishment law.

I am not trying to be flippant when I say that without it you either need a case like Marshall, where the case was based on hiring someone else to commit the murder, or--

ASSEMBLYWOMAN FORD: There is no question of intent there, when somebody goes out and negotiates the price and plans it over six months.

ASSEMBLYMAN HARDWICK: There's no question of intent. Proportionality is another issue, but there is no question of intent, or a notarized statement from the person in advance: "I intend to commit this act and take your life." We are not going to get that.

So, if we are going to have a capital punishment law in the State of New Jersey, with the mind-set of our current Supreme Court, then we need this constitutional amendment, because we go around to the people to say, "If a reasonable person would know that someone intended to take this action, and that it would likely result in death, then he would meet the intent provision."

I really urge your prompt consideration of this constitutional amendment. It is the right thing to do. It shouldn't be necessary, really. If you read the statute, as sponsored by Senator Russo, it should not have been necessary. But because of the weird interpretations on the intent provision by our State Supreme Court, it is turning out to be necessary. If this Legislature only deals with proportionality, then we really haven't done the job.

I support your proportionality bill. I support my proportionality bill; I have for a long time. But if that is all we do, then we can't go back to the people of the State and say, "Don't worry, we have straightened out the capital punishment law, and now things are done." We haven't. We have really kind of fooled the people. That is why we need a constitutional amendment that will really deal with the intent issue.

On the Marshall case, knowing the history of our Supreme Court, they have given everyone the impression that capital punishment will apply. But if you read the fine print,

they said, "Of course, there will be proportionality review." So, I won't believe it until I see it that capital punishment will actually be Mr. Marshall's fate -- until it actually happens in this State -- because they have not done the proportionality. How, after you have heard these heinous crimes described and depicted by the prosecutors, can you say that Marshall's proportionality-- I don't know. I am not a constitutional lawyer. But how would proportionality hold up in the Marshall case, when capital punishment was not applied to so many other cases? I don't know; I simply don't know.

Thank you very much.

ASSEMBLYWOMAN FORD: The answer to that question is, it will be weighed against circumstances and the state of mind of the defendants in all the cases where the death penalty was imposed. I think there is a misconception that you have to have the same set of facts and circumstances in order to conduct a proportionality review. If that were the case, if somebody had a very unusual set of facts and circumstances, they would always be insulated from imposition of the death penalty because they would not be able to match or identify those circumstances. Obviously, that is not what the law intends.

There is a mechanism for evaluating the state of mind of the defendant, the heinousness of the act, the state of culpability, and so forth in determining whether or not the jury reached a reasonable decision based upon the circumstances, as opposed to perhaps based upon other extraneous factors, i.e., race or some other type of bias or prejudice.

ASSEMBLYMAN HARDWICK: I agree with you, except that, as the AG said this morning, the way the State Supreme Court is going about the setting up of its proportionality review, we don't know what they are going to do. I don't have the confidence that the proportionality review will be what this Legislature ever really intended.

ASSEMBLYWOMAN FORD: That's right. Assemblyman Stuhltrager?

ASSEMBLYMAN STUHLTRAGER: Thank you, Chairwoman. Subjectivity seems to creep into this whole discussion, no matter what you try to do. They talk about the universe, Chuck, just cases where the death penalty has been imposed. We talked a little bit about, how about cases where it has been sought but not imposed. Professor Baldus obviously has even a broader universe of situations.

Since the Supreme Court of the United States does not require proportionality at all, and we can't eliminate subjectivity, why don't we -- if we are going to do anything -- just take out proportionality here, and we will be consistent with the Federal Constitution, and we will have eliminated completely this subjectivity from this particular question. Any reason why we shouldn't do that?

ASSEMBLYMAN HARDWICK: That would certainly be fine from my standpoint. My recollection is, proportionality was put in because the sponsors felt it was necessary in order to be found constitutional at the Federal level. Subsequently that turned out not to be the case at all. But if this Legislature voted to remove proportionality, you wouldn't find me objecting to that.

ASSEMBLYWOMAN FORD: The problem is, then there would be no safeguards against possible bias. The second thing is, we have no guarantee that our Supreme Court isn't going to determine, as it has determined in other cases, that proportionality review is required under our State Constitution, notwithstanding what is mandated under the Federal Constitution.

ASSEMBLYMAN STUHLTRAGER: I think the speaker who was here with the Attorney General indicated that there are other avenues to ferret out bias that can take place. I think what we are saying here, and again we are all giving due respect to

the Supreme Court-- I guess a definition of that is always in question. But they are imposing their own particular bias, in the sense that in my opinion they are against the death penalty and they are finding ways -- some very creative ways -- of avoiding doing what this Legislature intended.

Until you change appointees over the course of a number of years, just like people are dissatisfied with, say, the conservative bent of the U.S. Supreme Court, others are dissatisfied perhaps with this Court's interpretation. That you never reach until people ultimately change. The bias-- Since you can't ferret out that bias, at least you can eliminate one avenue of inquiry for the Court by eliminating the proportionality, if you so choose. And for the bias you mention, in particular, there are other avenues -- whether it be racial, ethnic type bias -- of pursuit that would still be there, even without proportionality review.

ASSEMBLYWOMAN FORD: Any other questions? (no response) Thank you, Assemblyman.

ASSEMBLYMAN HARDWICK: Thank you.

ASSEMBLYWOMAN FORD: Ed Martone, American Civil Liberties Union, and Andrea Harren-Dechenne. Are you going to testify together? (no response)

ASSEMBLYMAN STUHLTRAGER: Hi, Ed. I'm sure you liked those last remarks. (laughter)

E D W A R D M A R T O N E: One of these days we are going to agree on something.

A N D R E A H A R R E N - D E C H E N N E: My name is Andrea Harren-Dechenne. I am here to testify on behalf of the American Civil Liberties Union of New Jersey. As you have copies of our testimony, I would like simply and very briefly to emphasize a few points.

There are currently 22 bills dealing with the death penalty before the Legislature. With the exception of two -- Assembly Bill No. 3024 and Assembly Bill No. 1061 -- the ACLU

opposes all of these proposals as each would either facilitate implementation or expand the use of the death penalty.

In today's hearing I understand the Committee is most interested in Assembly Bill Nos. 4453 and 4316 and ACR-76. We strongly oppose them all. A-4453, which allows the execution of drug kingpins, expands the use of what we believe to be an unconstitutional practice to still another offense. A-4316, which deals with proportionality review of death penalty cases, we believe should be withheld pending the proportionality review study about to be completed for the State Supreme Court. Lastly, ACR-76: Both the U.S. and the New Jersey Supreme Courts have already found death sentences to not be violative of cruel and unusual punishment procedures -- or, rather, protections. It also expands the death penalty to include those who did not intend to kill. Therefore, we are opposed to that.

The ACLU strongly supports Assembly Bill No. 3024, which prohibits execution of mentally retarded persons who have been convicted of murder. The death penalty is especially unfair when inflicted on one who does not have a full understanding of the crime, and who cannot fully participate in his or her defense because he or she can't comprehend the circumstances in which they find themselves.

New Jersey should join Kentucky, Georgia, Tennessee, and Maryland in exempting mentally retarded persons convicted of murder from capital punishment.

Lastly, of course, we wholeheartedly support Assembly Bill No. 1061, which would abolish the death penalty for the crime of murder. We believe that in all circumstances it is unconstitutional under the Eighth Amendment, which prohibits cruel and unusual punishment, and that a discriminatory application violates the Fourteenth Amendment of equal protection and due process of law.

MR. MARTONE: Thank you very much.

ASSEMBLYWOMAN FORD: Thank you. Assemblyman Catania? Is he still here? (no response) Leigh Bienen, Association of Criminal Defense Attorneys of New Jersey?

L E I G H B. B I E N E N, ESQ.: Chairman Ford, members of the Committee, members of the public: I have submitted written testimony to the Committee, and I will be glad to make that written testimony available to anybody who is interested to have it. My written testimony summarizes the purpose behind proportionality review generally, the history of proportionality review, including a citation to New Jersey Supreme Court opinions which have addressed the issue, and also the present status of the Proportionality Review Project in New Jersey under the direction of the Special Master, David C. Baldus. I have also submitted to the Committee for its information an article published in the "Rutgers Law Review" on "The Reimposition of Capital Punishment: The Role of Prosecutorial Discretion." For the past several years, I have been working on an empirical study of homicide in New Jersey since the reimposition of capital punishment.

I would just like to add a few brief remarks to my testimony today, and then I would be glad to answer questions from members of the Assembly. I would also like to say that I am now working on a "Law Journal" article which summarizes the state of the law concerning proportionality review in all other capital punishment jurisdictions. I will be glad to make that research available to the Committee and/or to any members of the Legislature who would be interested in seeing it prior to its being published later this year.

First, the vast majority of capital punishment states have proportionality review, and that is over 30 of the 38 states. They don't all enact it by statute. Most states leave the matter entirely to the Supreme Court, with the legislature not specified at all on how proportionality review is to be conducted. If you look at how states conduct proportionality

review generally, the rule is proportionality review rarely invalidates death sentences. Of all the states which have proportionality review, very few death sentences have actually been overturned under the rubric of proportionality review. Ironically, it is the states which have the largest numbers of people on death row which are inclined to invalidate death sentences based on proportionality review. Of course, our Supreme Court has not yet conducted proportionality review. They will conduct proportionality review, presumably, in the Marshall case. That will be the first time they will have conducted proportionality review. Proportionality review has not been responsible for "slowing up" death penalty appeals, because our Court has never conducted proportionality review.

With regard to the report of the Special Master, the recommendation of the Association of Criminal Defense Attorneys is that the Legislature postpone taking action on the bill concerning the universe of cases until the final report of the Special Master is submitted to the Court. We are talking about a report being months away, a report that has been two years in preparation. When the Court and the Legislature have the benefit of that report, they will be in a better position to make an informed judgment.

There were also references earlier this morning to vast numbers of resources and the amount of money it cost to support the Proportionality Review Project. In point of fact, the work of that project is almost finished. They have already developed a substantial factual record, which has been presented to this Committee in the Proportionality Review Project's interim report. That includes noting how many cases were prosecuted as capital cases, the question that was concerning Assemblyman Charles. That data and information, in a precise and accurate form, will be found in the interim report.

One of the most valuable functions the Proportionality Review Project has performed already was the gathering together of accurate facts and data on the incidence of homicide in New Jersey. Indeed, the mandate of the Proportionality Review Project was to assemble facts and make recommended findings of fact and recommended conclusions of law to the Court. None of the findings of fact or conclusions of law are binding on the Court. The factual record, however, will be a very important source of information.

With regard to the reference to the universe of cases if it were narrowed by the bill to only other death cases, my understanding is if the universe were defined to be all other death cases, there would be a serious problem with including all 37 death sentences already imposed in that universe, the reason being that some of those death sentences, for example, were found to have been imposed improperly. So how can you compare a death sentence which was not imposed according to constitutional principles with a death sentence which is going to be upheld?

I think there would be something less than that universe of 37 cases if this piece of legislation were passed. But there would be nothing to stop the Supreme Court from saying, "Well, we are going to wait for a particular period of time until there are more death sentences." Indeed, other Supreme Courts have done that.

With regard to the reference to the fact that the Proportionality Review Project wants to go back to cases in the '60s and prior to the former death penalty legislation, my understanding is that is not what has been recommended in the interim report. My understanding is that this Committee has the interim report before it. The results of that report and its recommendations are also summarized in my testimony on pages 17 through 24.

With regard to the ex post facto issue, it is my understanding that if the piece of legislation changing the proportionality review requirement were, indeed, passed by the Legislature, it would not be exempt from consideration of ex post facto. And if it were held to be subject to ex post facto principles, it would be the date of the crime after the effective date of the legislation, which would be the line in terms of ex post facto.

Just to respond again to Assemblyman Charles' request for specific information, I believe something on the order of 230 penalty phase cases altogether up to the present time have been tried in this State. Again, the more exact figure is in the interim report which has been submitted to this Committee. The level of prosecutions per year of capital cases is in the neighborhood of 20, 24, 30 -- as high as 30, I believe, in one year. Again, that is spelled out very accurately in the interim report.

Since mention has been made of the burden to the taxpayers and the burden of collecting data, of course, that is a mere fraction of the taxpayers' burden if prosecuting capital cases generally. It is well known that it costs a great deal more money -- hundreds of thousands of dollars more -- to prosecute a case as a capital case than as an ordinary murder case. The taxpayers are sensitive on that issue as well.

I would be glad to respond to questions from the Committee.

ASSEMBLYWOMAN FORD: Any questions? (no response) Thank you very much.

Is Karen Spinner still here?

K A R E N S P I N N E R: Good morning, and thank you for allowing me to testify on the issue of the death penalty in New Jersey. My name is Karen Spinner. I am Director of Public Education and Policy for the New Jersey Association on Correction.

It is the Association's position -- a long-standing position -- that we do not need a death penalty in the State of New Jersey. We are opposed to it in all of its forms. From our perspective there can be no rationale for the implementation of the death penalty. It neither deters others from killing nor is it fairly applied so that those who do kill in similar situations receive the same penalty.

We feel very strongly that there is a need for proportionality review and that it should not be limited to a very small universe of cases. We strongly concur with the previous speaker that the study that is currently being conducted for the Supreme Court be finished before the Legislature takes any additional steps to either limit or do away -- as the Assemblyman suggested -- with the whole issue of proportionality review.

We are concerned with a couple of the bills. We oppose most of them, with the exception of Assemblyman Brown's, which would abolish the death penalty. We also strongly support the proposed bill that would exempt the mentally retarded from this final sanction. It is extremely difficult to understand or comprehend how we can choose to kill those who don't truly understand the grievous nature of the deed they may have committed.

I apologize for not having written testimony. I would appreciate the opportunity to submit it at a later date. If you have any questions, I would be pleased to answer them.

ASSEMBLYWOMAN FORD: We will provide the opportunity for any type of written testimony you want to submit to supplement what you had to say.

Are there any questions? (no response) Thank you, Ms. Spinner. The only other person I have is Assemblyman Catania, but I don't think he came back.

In light of the late hour, I do have some written comments, and I will make them part of the record. Is there anyone else here who wishes to testify whom I haven't called? (no response) Hearing none, I adjourn this public hearing.

(HEARING CONCLUDED)

APPENDIX

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY

ROBERT J. DEL TUFO
ATTORNEY GENERAL

STATEMENT OF

ATTORNEY GENERAL ROBERT J. DEL TUFO

ON A.4453 (DEATH PENALTY FOR DRUG KINGPINS)

ASSEMBLY JUDICIARY, LAW & PUBLIC SAFETY COMMITTEE

JANUARY 31, 1991

A.4453 amends the death penalty statute to establish "death-eligibility" for leaders of narcotics trafficking networks who direct the commission of murder in the course of their illegal narcotics activities. The Supreme Court's recent affirmation of a death sentence in a murder-for-hire scenario indicates that death eligibility is not necessarily exclusively reserved for those who commit murder by their own hand. The bill also establishes a new aggravating factor applicable to both leaders who order killings and persons who kill at the leaders' direction.

The Governor has previously decried the menace of drug kingpins who attack our communities through their henchmen. Whether or not these kingpins are personally involved in street-level drug activities, the impact of their decisionmaking is nevertheless strongly felt by the innocent

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citizens of our State. In no area is that impact felt more than in the violence which is part and parcel of the narcotics trade.

This legislation targets drug kingpins who initiate the pattern of violence by issuance of "death warrants" to lower-level personnel as well as those who carry out executions at their leaders' command.

Consistent with the views expressed by the Governor, I support this bill.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY

ROBERT J. DEL TUFO
ATTORNEY GENERAL

STATEMENT OF

ATTORNEY GENERAL ROBERT J. DEL TUFO

ON A.4316 (PROPORTIONALITY REVIEW)

BEFORE THE

ASSEMBLY JUDICIARY, LAW & PUBLIC SAFETY COMMITTEE

JANUARY 31, 1991

Governor Florio has indicated his strong support of Assemblywoman Ford's bill which would define the scope of death penalty proportionality review in New Jersey. I take this opportunity to add the unqualified collective endorsement of my office and the County Prosecutors for this proposed legislation. I urge swift passage of A.4316 through the legislative process in order that the Governor can sign this bill into law.

A. Proportionality Review - Legislative Intent

New Jersey's death penalty law (N.J.S.A. 2C:11-3c; L. 1983, c. 111, § 1, eff. August 6, 1982) has since its enactment contained what is commonly known as a "proportionality review" provision, requiring the Supreme Court to determine whether a death sentence "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

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N.J.S.A. 2C:11-3e. At first, the law required mandatory proportionality review of all death sentences. In response to the United States Supreme Court's decision in Pulley v. Harris, 465 U.S. 37 (1984), the statute was ultimately amended to provide for discretionary proportionality review, i.e., only when requested by the defendant. (L. 1985, c. 478). The reason for this modification and the underlying rationale for originally including proportionality review in New Jersey's statute are contained in available legislative history:

> When the original death penalty statute was passed, it was thought that the United States Supreme Court would not uphold a capital punishment law that did not contain such a "proportionality review." In Pulley v. Harris, decided on January 23, 1984, the Supreme Court ruled, contrary to expectation, that proportionality review is not a constitutionally required element of a death penalty statute. A floor amendment to Senate Bill No. 950 eliminating "proportionality review" was adopted on May 14, 1984. The committee amendments would add language indicating that "proportionality review" is available upon the request of the defendant.
>
> [Senate Judiciary Committee Statement to S.950 (L. 1985, c. 178)]

Thus, proportionality review was included exclusively as a precautionary measure against the potential for invalidation of New Jersey's capital punishment scheme by the United States Supreme Court, and there was no perceived independent need for

its existence. The swiftness of the move to, first, eliminate proportionality review and, subsequently, to make this review merely discretionary is the strongest testament to the argument that this process is not an essential component of the statutory framework.

Legislative intent in this area is significant because, as the Pulley decision made clear, proportionality review is not of constitutional dimension. To the extent that a proportionality review provision exists in the statute, it is purely a legislative requirement, the parameters of which are within the authority of the legislative branch of government to define. However, to date, no explicit legislative guidance has been provided as to the intended scope of proportionality review in New Jersey. Specifically, the law does not define the universe of cases which is to be used for purposes of comparison. The time is therefore ripe for this Legislature to act and provide both the Supreme Court and interested parties with direction in the area of proportionality review. Passage of A.4316 is the appropriate vehicle for such action.

B. The Proportionality Review Project

Subsequent to upholding the constitutionality of New Jersey's capital punishment statute in State v. Ramseur, 106 N.J. 123 (1987) and State v. Biegenwald, 106 N.J. 13 (1987), the New Jersey Supreme Court turned its attention to

effectuating the law's proportionality review provision. On August 1, 1988, the Court appointed David C. Baldus, a professor at the University of Iowa College of Law, as Special Master to design and recommend a system of review to the Court. The procedure envisioned by the Court and known as the "proportionality review project" was to have the Special Master conduct meetings with representatives of the prosecutorial and defense bars in order to collectively implement a proportionality review system for use in New Jersey.

Having had no advance notice of, or input into, the Supreme Court's appointment of a Special Master, my office and the County Prosecutors wrote to the Supreme Court in September of 1988 to protest the retention of Professor Baldus for the proportionality review project. In particular, we sought Professor Baldus' removal as Special Master due to his prior experience in the proportionality review field which, from the prosecutorial community's perspective, created fixed views which would make him unable to impartially conduct this project. Professor Baldus is perhaps best known for his studies in support of unsuccessful defense efforts to overthrow Georgia's capital punishment system in McCleskey v. Kemp, 107 S.Ct. 1756 (1987). While the United States Supreme Court assumed the validity of Professor Baldus's study for purposes of the Court's legal analysis, the federal District Court,

which held a hearing on the study, was not so indulgent, labeling the study as "incomplete," methodologically "questionable" and finding that it ultimately failed to establish the trustworthiness of its data. McCleskey, 107 S.Ct. at 1765 n.6. On the heels of this prominent judicial rejection of his method of analysis, Professor Baldus has come to New Jersey to apply the same faulty reasoning to develop a proportionality review system.

My office and the County Prosecutors have urged that the appropriate universe of cases in proportionality review should be limited to cases in which a death sentence has actually been imposed. Our view is consistent with Governor Florio's position and with the definition of the universe contained in Assemblywoman Ford's bill. In contrast, Professor Baldus has approached the project from its inception with the idea of utilizing the broadest universe possible, i.e., all homicide cases which could have been prosecuted as death penalty cases under our current law, regardless of whether they actually were so prosecuted.[1]

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[1] My office had previously conducted national research on the universe issue and discovered that of the approximately twenty-four jurisdictions which have defined their proportionality universe, only one has adopted a field of cases as broad as that contemplated by the Special Master. Simply put, the approach of the Special Master is an anomaly in that it is largely inconsistent with nationwide judicial definition of the proportionality review universe.

The expansive proportionality review system envisioned by Professor Baldus would add an unnecessary and complex second stage to judicial review of death sentences, further delaying an already interminable and oft-criticized appellate procedure. Once an initial appeal to the New Jersey Supreme Court is exhausted, and assuming that the death sentence withstands the Court's exacting scrutiny, the review process would begin anew, with wholesale reevaluation and veto power over the prior decisions of prosecutors, judges and juries. Such a "back to square one" revisitation of capital prosecutions would further frustrate enforcement of the death penalty law.

Unrestricted proportionality review also imposes a formidable burden on the resources of my office and the County Prosecutors and impedes the prompt administration of justice. Development of a factual and legal context for the hundreds of homicide cases to be considered will involve an enormous amount of work on the part of all participants in the project. In order to review homicide cases, Professor Baldus has developed a standard questionnaire containing literally hundreds of questions. Processing all homicides through this questionnaire is a monumental task which may very well prove impossible to perform. Prosecutors' offices will be forced to rummage through many-year-old files in an attempt to recreate decisionmaking at concluded trials by personnel who may no

longer even be part of the prosecutor's staff. Such an endeavor would waste considerable time and resources in an attempt to accommodate an extremely speculative method of comparison. In these times of fiscal scarcity, embarking upon a project of such questionable value is wholly unjustified.

C. The Appropriate Universe

As noted previously, my office and the County Prosecutors have consistently voiced our strong conviction that the only appropriate universe of cases to be considered for purposes of proportionality review is one exclusively comprised of those cases in which a death sentence has been imposed under New Jersey's current capital punishment statute. To expand the notion of the appropriate universe outside of these parameters would entail intolerable speculation involving attempts to compare and contrast death sentence cases with cases involving e.g., sentences of life imprisonment, acquittals, reversals and even mere indictments. Judgments regarding which homicide defendants "could have been" death-eligible are highly subjective. The highly discretionary nature of the death sentence selection process itself, involving a large number of tangible and intangible factors which may legitimately influence every stage of that process, makes it virtually impossible to collect all the necessary information required for a reliable analysis. Restricting the universe to cases in

which the death sentence has been imposed will provide for the requisite degree of uniformity in proportionality review to enable the Court to conduct a meaningful determination of the "appropriateness" of a death sentence before it.

The Baldus approach is fundamentally infirm. Among other things, it seeks to deduce some state "policy" by studying not the decisions made by a single or handful of policymakers, but rather by studying the combined effects of the separate decisions of hundreds of separate juries, each unique in their composition and completely isolated from the decisions made by other juries. Prosecutors would have no practical opportunity to rebut such an analysis. They would be required to do the impossible, that is, to document and explain with empirical precision how and why a jury decided to impose a death sentence, often years after these decisions were made. See McCleskey, supra at 1768 n.17. Whether the focus is on prosecutors' reasons for their own decisions in the exercise of prosecutorial capital charging discretion or on an explanation of those factors which influence juries, given the innumerable aggravating and mitigating factors which are unique to each individual case, the futility of this exercise is clear.

Most significantly, the current proportionality study's predilection toward statistical evaluation will create an artificial method of prosecutorial selection of future capital

cases. Instead of evaluating the particular merits of each homicide case, a prosecutor will be forced to choose death penalty prosecutions based upon percentages and statistical breakdowns of prior capital case selection. Prosecutorial discretion will quickly erode into a guessing game as to what "numbers" the Supreme Court will deem sufficient in order to validate a death sentence which a particular prosecution might generate. Such circumstances will greatly escalate the growing cynicism in the area of capital punishment and ultimately result in the complete abandonment of the death penalty by the law enforcement community.

D. Conclusion

Adoption of the universe proposed by A.4316 would be entirely consistent with the clear legislative intent in mandating proportionality review, that is, to add a final limited remedy designed to correct the extremely rare instance where all other safeguards in the system have failed and a death sentence is wrongfully imposed. This remedy is most effectively and realistically implemented through a universe restricted to cases in which a sentence of death has been imposed.

The New Jersey Supreme Court has recently acknowledged that New Jersey's death penalty law, as interpreted by the Court, "provides extensive safeguards against unfair and

arbitrary imposition of the death penalty." State v. Koedatich, 118 N.J. 513, 531 (1990). The Court has also recently indicated its agreement that "the public has a right to have its capital punishment law administered with all due diligence." State v. Jackson, 118 N.J. 484, 492 (1990). The proportionality review project in its current form is the antithesis of these expressed concerns. Unless severely limited in scope, the project will foster delay in the administration of the death penalty statute and waste considerable time and precious resources for no legitimate purpose. The proposed legislation before this committee enhances the efficient implementation of the capital punishment law. It also forecloses the ongoing saga featuring David Baldus in a multi-year, imprecise and impractical marathon using New Jersey as a test-tube State to define his grand illusion of the proportionality review function.

For the foregoing reasons, I join with Governor Florio and strongly support the pending proportionality review bill.

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
25 MARKET STREET
CN 085
TRENTON, NEW JERSEY 08625-0085
TELEPHONE 609-984-6500

ROBERT J. DEL TUFO
ATTORNEY GENERAL

ROBERT T. WINTER
DIRECTOR

February 13, 1990

Honorable Chief Justice
and Associate Justices
New Jersey Supreme Court
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: Proportionality Review Project
Docket No. 30,547

Your Honors:

In accordance with the Court's request, the Attorney General submits this letter addressing Special Master David Baldus' December 6, 1989 letter to the Court regarding alternative universes for proportionality review.

At the outset, we reaffirm our position that the Legislature intended proportionality review to be a narrowly circumscribed final safeguard designed to correct the rare aberrant capital case and that the only appropriate universe is one consisting of cases in which a death sentence was actually imposed. We rely upon the arguments presented in our April 6, 1989 letter brief and September 11, 1989 oral argument in furtherance of our currently pending motion. Professor Baldus' December 6, 1989 letter presents no

persuasive legal or practical reason for modification of our position.

We part ways with Professor Baldus at his "starting point," where he identifies proportionality review as a partial response to the concerns raised in Furman v. Georgia, 408 U.S. 238 (1972), and sets forth the "goals" of this process. (Baldus letter at 1). Professor Baldus' discussion fails to consider that the issues in Furman were systemic in magnitude, that is, the deficiencies noted constituted inherent problems with the entire primitive statutory scheme of administering capital punishment and had nothing to do with establishing or calling for a proportionality review system. The lack of this critical distinction undercuts Professor Baldus' analysis of the purpose of proportionality review and taints the remainder of his presentation in his letter to the Court. This taint arises from creation of a scenario in which proportionality review is misleadingly categorized as a fundamental component of any state's effort to create a valid death penalty system. While such an evaluation may be Professor Baldus' personal view on the subject, he is wrong to suggest to this Court that proportionality review has generally been considered in this fashion and, consequently, ascribes an overly broad purpose to the proportionality review process.

The shortcomings of then-existing capital statutory schemes as addressed in Furman were subsequently overcome by the

promulgation of major systemic revisions designed to eliminate the arbitrariness identified under the old system. Implementation of safeguards such as a bifurcated (guilt/penalty) proceeding, the use in a sentencing proceeding of aggravating and mitigating factors, a sufficient statutory narrowing of the class of death-eligible defendants, a provision for direct appellate review, etc., led the United States Supreme Court to validate the capital statutory schemes of Georgia, Texas and Florida only four years after Furman's release. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). See also Pulley v. Harris, 456 U.S. 46, 104 S.Ct. 871, 876-877 (1984).

Professor Baldus' expansive depiction of the goals of proportionality review omits the legal-historical development of the United States Supreme Court's review of death penalty systems since Furman and, instead, identifies proportionality review as the primary intended vehicle by which the constitutional maladies targeted in Furman are to be corrected. Most indicative of this skewed approach is Professor Baldus' complete disregard of the highly relevant ruling of Pulley v. Harris, supra. In holding that proportionality review is not constitutionally required, the Pulley decision directly contradicts Professor Baldus' broad characterization of the purported importance and goals of this process. Indeed, Pulley emphasizes that the mere existence of a bifurcated capital proceeding goes a long way in meeting the

concerns expressed in Furman. Pulley, supra, 104 S.Ct. at 877 (quoting Gregg).

Even more significantly, the Baldus letter makes no effort to confront Pulley's definition of proportionality review. The United States Supreme Court states that proportionality review "purports to inquire . . . whether the [death] penalty is . . . unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." Id., 104 S.Ct. at 876 (emphasis added).[1] A search for "disproportionality" among defendants convicted of the "same crime" - - capital murder - - implicates a universe of cases no greater than those that have reached a capital sentencing phase and does not contemplate the expansive universe to which the Special Master is predisposed.

Using Pulley's definition of proportionality review as a starting point, adoption of a universe restricted to death sentenced cases (as urged by the Attorney General) is validated by Pulley's discussion of the Texas capital-sentencing procedures reviewed in Jurek v. Texas, supra. The United States Supreme

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1 Ironically, Justice Brennan's dissent in Pulley interprets the majority's definition even more restrictively. Pulley, 104 S.Ct. at 890 ("And the most logical way to identify . . . sentencing disparities is for a court of statewide jurisdiction to conduct comparisons between death sentences imposed by different judges or juries within the State. This is what the Court labels comparative proportionality review." (emphasis added)).

Court upheld Texas' capital procedures despite the fact that neither the statute nor caselaw provided for comparative proportionality review. Pulley, 104 S.Ct. at 878.[2] Critically, the Court voiced the sentiment that, in light of the other safeguards in the Texas statute, proportionality review "would have been considered constitutionally superfluous." Id., 104 S.Ct. at 879. New Jersey's capital procedures, as defined by the statute and the opinions of this Court, also contain various protections, both constitutionally mandated and otherwise, which render a "death sentence only" universe completely legitimate for implementation of the limited additional safeguard of proportionality review. The fact that no jury has returned an original death sentence in over two years in New Jersey is strong testament to the statute's proper functioning in limiting the imposition of the death penalty to a small class of cases.[3]

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2 Also noteworthy is the Florida system considered by the Court in Proffitt, supra, which contained a proportionality review provision but limited comparisons to other death sentenced cases. Proffitt, 96 S.Ct. at 2969. And see Garcia v. State, 492 So.2d 360 (Fla. 1986), cert. den 107 S.Ct. 680 (1986).

3 Since, ultimately, we are concerned with the Legislature's intent in enacting proportionality review, the Legislature's quick move to first eliminate, then leave as discretionary, proportionality review after the Pulley decision indicates that this process was perceived as an extremely limited, if not wholly unnecessary, safeguard. See Statements to November 29, 1984 Senate Judiciary Committee amendments to S 950, L. 1985, c. 178 (reprinted in pocket part annotations to N.J.S.A. 2A:78-7).

Finally, Pulley expressly sets forth the essential distinction which the Attorney General has advocated and the Baldus letter either overlooks or ignores:

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman.
> [Pulley, 104 S.Ct. at 881]

It is precisely this rare "aberrational outcome" that proportionality review is designed to target and correct, rather than functioning as a wholesale review of the entire capital punishment system. This view comports with the predominant judicial and legislative treatment of this subject, a fact which Professor Baldus' letter has failed to recognize.

In short, Professor Baldus offers little reference or support for his version of what proportionality review was intended to be or what purpose it was designed to serve. While purporting to ground his perceptions in the concerns of some of the justices of the United States Supreme Court, he ultimately presents an incomplete picture of the development of the concept of proportionality review as viewed by that Court and other tribunals.

Since Professor Baldus' opinion as to the appropriate reach of the proportionality universe is so inextricably a product of

his belief as to the scope and purpose of proportionality review, and since his discussion of this scope and purpose rests on fundamentally erroneous premises, his evaluation of alternative universes is completely suspect and of limited usefulness. However, outside of this basic general criticism of the substantive structure of Professor Baldus' presentation to this Court, we deem it necessary to address other more particular aspects of his letter at this time.

1. In advocating the adoption of an expanded universe, Professor Baldus asserts that New Jersey's system of proportionality review is modeled upon the Georgia statute and that Georgia allows for a broader universe than death-sentenced cases (Baldus letter at 3n.3), the implication being that New Jersey should adopt a universe in lockstep with Georgia's conclusions. This attempt at justification of a greater universe is wholly invalid. There is no evidence that New Jersey consciously modeled its proportionality review provision after that of Georgia. Even if this statutory language was copied from Georgia's law, it was apparently done for no other reason than to obtain the benefits of the United States Supreme Court's constitutional validation of the substantially identical Georgia statute and was not in any way premised upon Georgia's construction of this provision. See State v. Ramseur, 106 N.J. 123, 203-205 (1987); Statements to Senate Judiciary Committee's November 29, 1984 amendments to S 950 (L. 1985, c. 178), supra

(explaining that the only reason for insertion of proportionality review into statute was the ultimately mistaken belief that the United States Supreme Court would constitutionally mandate such review).

2. While not directly related to the universe issue, the Baldus letter's discussion of different evidentiary standards and outcome predictions to be applied in case selection within the universe bears mention at this time. (Baldus letter at 4-7). Professor Baldus candidly concedes that identification of cases that could have been processed and, presumably, sentenced capitally "calls for a certain degree of speculation or estimation about their outcome." (Baldus letter at 4).

In the context of applying this predictive process to jury decisions, it is apparent that Professor Baldus intends to make the very inquiry which this Court has so often stated is not possible: What would the jury have decided if the circumstances were different (e.g., if the jury had been charged differently, if certain evidence was not presented, etc.)?

As stressed by this Court in State v. Crisantos, 102 N.J. 265, 272 (1986):

> We have noted that the jury serves as "the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole." A jury may acquit or convict on a lesser charge although satisfied that the

> state has proven its case on the greater charge beyond a reasonable doubt. A criminal jury may return "a verdict of innocence in the face of overwhelming evidence of guilt," or it may return illogical or inconsistent verdicts that would not be tolerated in civil trials. [Id.; citations omitted; emphasis added].

See also State v. Ragland, 105 N.J. 189, 203-205 (1986) (acknowledging that juries have the power to nullify the law by acquitting those believed by the jury to be guilty); State v. Grunow, 102 N.J. 133, 148 (1986) ("The tradition of the common law does not permit us to speculate upon the foundations of a jury verdict.")

In the face of this admonition not to speculate as to the deliberative process and, in particular, not to assume the existence of a correlation between the strength of the evidence and a jury's decision, Professor Baldus' project anticipates an almost mechanical prediction of case outcomes based upon an evaluation of evidence under some chosen standard of proof. See e.g., Baldus letter at 12 ("[E]arlier cases in which the evidence clearly satisfies the requirements of the new system are much less problematical since it is plausible to assume the jury would have reached the same results under the new rules.") The problem with such an approach is that "[a] jury's verdict of ultimate criminal liability can never be equated simply with its determination of underlying facts; the determination of guilt or

innocence transcends the facts on which it is based, no matter how compelling or inexorable those facts may be." State v. Odom, 116 N.J. 65, 77 (1989). This basic principle should preclude the type of speculation which Professor Baldus anticipates his methods will engender.[4]

3. Professor Baldus' letter contains acknowledgements that his proposed study entails speculation and the risk of incorrect determinations. Baldus letter at 4 ("certain degree of speculation or estimation about their outcome," "risk of error"); Baldus letter at 5 ("outcome would be far from certain", "risk of erroneous classification"). We suggest that this degree of speculation is of a sufficient degree to irreparably infect the legitimacy of any final outcome produced by the Special Master's project in its current form. We also note Professor Baldus' failure to acknowledge another obvious benefit of adopting the universe urged by the Attorney General: all speculation of the nature described by Professor Baldus would disappear.

4. In paragraph 10 of his memorandum, Professor Baldus raises the related issue of whether the proportionality universe

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4 An additional complication not addressed by Professor Baldus at this point is the question of whether all the evidence available in a case file was admissible or actually presented to the jury. If the evidence was not presented to the jury, for any reason, it could not have been considered by that jury in rendering its decision. Consequently, use of such evidence for purposes of proportionality review would be inappropriate.

should be prospective, limited to cases ensuing after certain decisions of this Court which have significantly impacted upon death eligibility under New Jersey's capital punishment act. (Baldus letter at 13-14). We urge that such a prospective universe is essential if proportionality review is to be conducted with any meaningful sense of consistency and uniformity.

We consider the following to be rulings of the Court which have fundamentally altered defendants' death-eligibility and, consequently, prosecutors' and juries' decisions as to death worthiness in New Jersey murder cases:

State v. Ramseur, 106 N.J. 123 (1987) (definition of aggravating factor c(4)(c));

State v. Biegenwald, 106 N.J. 13 (1987) (weighing of aggravating and mitigating factors; definition of aggravating factor c(4)(c));

State v. Bey (I), 112 N.J. 45 (1988) (exempting juvenile offenders from death eligibility);

State v. Gerald, 113 N.J. 40 (1988) (distinction between intent to cause death and intent to cause serious bodily injury resulting in death as it relates to death eligibility; definition of "own conduct" statutory requirement);

State v. Moore, 113 N.J. 239 (1988) (definition of "own conduct" statutory requirement).

In addition, the following decisions have the capacity to significantly impact upon a jury's decision at the penalty phase of a capital proceeding:

State v. Bey (II), 112 N.J. 123 (1988) (jury need not be unanimous in finding existence of mitigating factor);

State v. Zola, 112 N.J. 384 (1988) (establishing defendant's right to make a brief unsworn statement in mitigation at the close of presentation of penalty phase evidence).

No valid comparison can be made between cases occurring prior to these court decisions and cases taking place subsequent to these rulings. For example, it would be entirely unfair to compare a pre - Gerald and Moore homicide where the "own conduct" issue is still open to interpretation with a post - Gerald and Moore homicide for which capital prosecution is prohibited under the rules set forth in these cases. Furthermore, decisions as to applicability of aggravating factor c(4)(c) would be markedly different in cases occurring prior to the definitional context established in Ramseur and Biegenwald. Similarly, one cannot legitimately treat as identical the decision-making process of a jury instructed to find mitigating factors unanimously as opposed to a jury informed that non-unanimous findings are sufficient. These circumstances present a sufficiently high risk of inconsistent analysis to militate that the universe be limited to cases conducted after the above decisions of this Court. The

integrity of the entire proportionality review process demands this result.

5. Professor Baldus simultaneously posits and answers the question of whether the Court should exclude from the universe death sentenced cases which it has reversed, arguing that absolute exclusion would "create obvious problems with the interpretation of pre - Biegenwald cases that resulted in sentences less than death." (Baldus letter at 12-13). Professor Baldus' analysis not only begs the question of what is the appropriate universe for proportionality review (clearly, if the universe is restricted to cases where the death penalty was imposed, there is no "problem" of interpreting lesser-sentenced cases), but is also contrary to the position taken by the National Center of State Courts' 1984 Proportionality Review Project, to which Professor Baldus served as a consultant. One of the final guidelines of the Project was that "cases in which the conviction or sentence is reversed should be dropped from the [universe], regardless of the grounds for reversal." Van Duizend, R., "Comparative Proportionality Review in Death Sentence Cases. What? How? Why?" State Court Journal (Summer 1984) at 11. The rationale for such a conclusion was that it would be difficult to discern what effect a trial error may have had on a sentencing decision and, therefore, the "safer and wiser course" would be to exclude any case in which the conviction or

sentence is overturned on direct appeal or habeas corpus review. Id. at 11-12.

6. Professor Baldus argues that anything short of an expansive universe would result in the Court's losing "a major source of evidence on societal values - - the decisions of prosecutors." (Baldus letter at 9). We have previously emphasized our firm belief that prosecutorial decision-making is an inappropriate subject to consider in the context of proportionality review. This Court has previously fashioned a limited review, at the pretrial stage, of prosecutorial capital charging decisions. State v. McCrary, 97 N.J. 132 (1984). Application of this review has already resulted in the nullification of defendant's capital exposure in a case originally charged as a death penalty prosecution. State v. Matulewicz, 115 N.J. 191 (1989). Thus, current remedies available to defendants provide a sufficient check on prosecutorial discretion in capital decision-making. The recent promulgation of prosecutorial Guidelines for Designation of Homicide Cases for Capital Prosecution provides an additional safeguard in this area.

Moreover, the practical difficulties of reviewing prosecutor's decisions, a factor which Professor Baldus does not appear to fully appreciate, militate against such an expansive review process. Professor Baldus appears to assume that, with

the cooperation of the Attorney General and County Prosecutors, sufficient information regarding cases in his broad universe could be readily collected and analyzed. The Special Master underestimates the complexity and difficulty of such an information gathering process, particularly if it is to involve a search as to the reasons why different prosecutors at different times made certain decisions. Professor Baldus' proposed inquiry presents a formidable task fraught with complications and unreliability, and raises legal questions concerning the separation of powers between the executive and judicial branches of government.

7. The most troubling justification offered by Professor Baldus for use of an expanded universe is that such a universe "will enable the parties to litigate the issue of whether there is a risk of discrimination in the New Jersey capital punishment system." (Baldus letter at 11). Professor Baldus acknowledges, but is undeterred by, the fact that he has not been requested by the Court to conduct such an analysis. The Special Master's admission of purpose confirms the suspicions first raised in Former First Assistant Attorney General Belsole's September 21, 1988 letter objecting to Professor Baldus' appointment - - that the Special Master is using the New Jersey project to perform what is essentially a sequel to his McCleskey study under the guise of creating a proportionality review system for the Court.

We consider Professor Baldus' unsolicited venture into this area to be completely inappropriate and indicative of a need for the Court to specifically define the contours of the proportionality project in order that the Special Master keep to his appointed task.

8. Professor Baldus' eagerness to create a data base which would facilitate a challenge to New Jersey's death penalty act on grounds of discriminatory application raises another concern first mentioned in Mr. Belsole's letter - - Professor Baldus' inability to impartially conduct this project. Indeed, the December 6, 1989 letter, rather than an objective review of the advantages and disadvantages of each universe, reads more as an argument in support of adoption of an expanded universe. Professor Baldus makes short shrift of the universe issue, particularly of the possibility that the universe can be limited to cases where a death sentence was imposed, and spends most of his letter addressing other areas which do not directly respond to the inquiry posed to him by the Court. This manifested inclination toward a broad universe is disconcerting, but not surprising; we have already voiced our opinion that Professor Baldus' conclusions are a fait accompli in light of his previous writings on the subject.

A particularly blatant example of the Special Master's proclivity toward defense efforts in capital litigation is his

advocating the inclusion into the proportionality universe cases decided under the "earlier system" simply because "we can reasonably expect that the Public Advocate will invoke New Jersey cases decided under the earlier system." (Baldus letter at 14).[5] This reasoning creates the impression that Professor Baldus is working to create a proportionality system which will assist the Public Defender in attacking various components of this State's capital punishment scheme. The Attorney General suggests that Professor Baldus' role is to define and explore alternative methods of proportionality review, not to accommodate the Public Defender's interests. The perceived bias in the Special Master's approach may prove to be hindrance to his efforts to solicit the cooperation of the prosecutorial community in this project.

CONCLUSION

This letter has sought to address some of the more pressing concerns of the Attorney General in light of Professor Baldus' December 6, 1989 letter to the Court. We have consistently

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5 Outside of its inappropriate accommodation of the Public Defender's position, the reasoning employed by Professor Baldus again merely begs the question of which universe will be used for proportionality review. Obviously, if this Court rules, as a matter of law, that "earlier system" cases are not to be included in the proportionality universe, then there is no need to collect data for these cases, regardless of the Public Defender's belief to the contrary.

raised these and other objections to the course the proportionality project has taken thus far and we invite the Court to carefully review the transcripts of our meetings with the Special Master to familiarize itself with the arguments raised therein. We continue to view proportionality review as a limited remedy contemplating a limited universe of cases for review. We find it curious, indeed, ironic, that in an area of the law the high stakes of which have always required a substantial degree of reliability, accuracy and consistency in its implementation, Professor Baldus is apparently content to recommend a proportionality review system premised on a universe containing a large measure of speculation and risk of error.

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

BY: Boris Moczula
Deputy Attorney General

1ST A.P. LAMB - LEGAL BASIS FOR SUPREME COURT'S DECISION - THE GERALD ISSUE

Following the March 1987 Ramseur decision and for about 18 months thereafter, the New Jersey Supreme Court vacated every death sentence to come before it on the basis of failure to anticipate and apply the Ramseur principles. As subsequent death penalty cases began to conform to Ramseur and that case began to lose its applicability, the Supreme Court began to overturn death sentences on other grounds. Among these new death penalty impediments was a never before discovered distinction between murders where the accused intended the death of his victim and murders where the accused only intended serious bodily injury to his victim but the victim died anyway. According to the October 1988 case [State v. Walter Gerald] that created this distinction, only murderers who actually intend the death of their victims commit a death penalty eligible form of murder.

As with the Ramseur principles before it, this new or Gerald principle immediately jeopardized a host of death penalty verdicts rendered before the Gerald principle was announced. In reviewing these cases, however, the Supreme Court did not apply Gerald across the board. Rather, it found that in some cases the manner in which the victim was killed so obviously demonstrated an intent to kill that no jury could have rationally concluded that the killer only intended serious bodily injury. In such cases, any violation of the Gerald principle was harmless [and the Court would then invalidate the death penalty on some still other ground].

In the Harvey case, the Supreme Court decided that Harvey's claim that he only struck Irene Schnaps one time with a blunt instrument permitted a jury finding that he had not intended death, but only serious bodily injury. In taking this position, the Court explained that the jury was at liberty to disregard the expert testimony of the medical examiner who found that Schnaps' head had been struck approximately fifteen times. The Court, however, did not explain how a jury accepting Harvey's one blow claim could have found such a single blow to have caused the numerous skull fractures, deep lacerations and the broken jaw suffered by the victim and plainly evident in the autopsy photographs admitted in evidence. Nor did the Court explain how its application of the Gerald principle to the Harvey case could be rationalized with its dispensation of the Gerald principle in death penalty cases much akin to the Harvey case.

An outline of Gerald and its progeny follows:

1. KILLER: WALTER GERALD (and accomplices)

   VICTIM: PAUL MATUSZ, 59 year old man killed at home by intruders

   DATE OF DECISION: October 25, 1988

   CIRCUMSTANCES OF CRIME: Victim beaten and stomped to death in own home by intruders. Sneaker prints still visible on face and forehead at time of autopsy. TV set dropped on head.

DOES GERALD APPLY: Yes. Gerald and accomplices could have only intended serious bodily injury.

2. KILLER: JAMES HUNT

VICTIM: EDWARD LAWSON, acquaintance of Hunt

DATE OF DECISION: June 9, 1989

CIRCUMSTANCES OF CRIME: Victim stabbed 24 times.

DOES GERALD APPLY: No, no rational jury could have concluded that Hunt intended anything less than Lawson's death.

3. KILLER: DARRYL PITTS

VICTIM: STACEY ELIZARDO, former paramour [Pitts also killed rival Paul Reynolds at same time he killed Elizardo, but Reynolds murder deemed a non-death penalty murder.]

DATE OF DECISION: June 24, 1989

CIRCUMSTANCES OF CRIME: Pitts stabs Reynolds 7 times and stabs Elizardo 23 times, killing both. Asserts "Vietnam syndrome" defense at trial.

DOES GERALD APPLY: No, assault on Elizardo so violent that death was inevitable.

4. KILLER: STEVEN DAVIS

VICTIM: BARBARA BLOMBERG, the girlfriend of a friend of Davis.

DATE OF DECISION: August 3, 1989

CIRCUMSTANCES OF CRIME: Victim strangled to death with electrical cord. After victim dead, Davis stabs and mutilates her body. Davis waives trial; pleads guilty to murder of Blomberg; sentenced to death by judge.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Davis intended to kill victim, rather than just inflict serious bodily injury on her.

5. KILLER: KEVIN JACKSON

VICTIM: Female but name unmentioned in Supreme Court opinion.

DATE OF DECISION: April 18, 1990

CIRCUMSTANCES OF CRIME: Sadistic murder. Victim stabbed 53 times including 18 stab wounds to the genital area. Jackson waives trial; pleads guilty to murder of victim; sentenced to death.

DOES GERALD APPLY: Yes, judge at guilty plea faulted for failure to establish that Jackson intended to kill victim, rather than just inflict serious bodily injury on her.

6. KILLER: BRYAN COYLE

VICTIM: SETH LEMBERG, husband of Coyle's paramour

DATE OF DECISION: June 11, 1990

CIRCUMSTANCES OF CRIME: Victim demands wife return from Coyle house. Coyle chases victim firing handgun. Victim shot in leg on street, attempts to crawl away. Coyle shouts "Yahoo," follows crawling victim and shoots in back. Victim then killed by shot to back of head fired from point blank range.

DOES GERALD APPLY: Yes, if instructed on Gerald principles jury might have concluded Coyle intended less than death.

7. KILLER: FRANK PENNINGTON

VICTIM: ARLENE CONNORS, mother of barmaid who came to tavern to help daughter close up.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Victim shot in heart from close range. Pennington defense: did not mean to shoot [notwithstanding release of three separate safeties on handgun.]

DOES GERALD APPLY: Yes, jury could have concluded Pennington only intended serious bodily injury.

8. KILLER: RUSSELL LONG

VICTIM: ALBERT COMPTON, night manager of liquor store.

DATE OF DECISION: June 21, 1990

CIRCUMSTANCES OF CRIME: Compton shot in chest from close range by Long when no other customers in store. After arrest, Long tells fellow prison inmate that he "did not want to leave any witnesses behind."

DOES GERALD APPLY: Yes, jury could have concluded Long only intended serious bodily injury.

9. KILLER: TEDDY ROSE

VICTIM: PATROLMAN VINCENT GARAFFA, Irvington Police Department

DATE OF DECISION: May 23, 1990

*DATE DECISION FILED: July 12, 1990

CIRCUMSTANCES OF CRIME: Patrolman Garaffa killed by single blast of shotgun pressed to stomach.

DOES GERALD APPLY: No, "It is inconceivable that defendant was not 'practically certain' that his action would kill the officer "[notwithstanding defense claim that Rose was in panic and did not intend weapon to go off.]

10. KILLER: JACINTO HIGHTOWER

VICTIM: CYNTHIA BARLIEB, convenience store clerk

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Convenience store clerk first shot in chest, falls but rises again. Then shot in neck and falls to floor again. When touches Hightower's leg as he rifles register, shot in left side of head.

DOES GERALD APPLY: No, "it is virtually inconceivable that defendant intended serious bodily injury but not death."

11. KILLER: JAMES CLAUSELL

VICTIM: EDWARD ATWOOD, filed a complaint against a drug dealer.

DATE OF DECISION: August 30, 1990

CIRCUMSTANCES OF CRIME: Contract killing. Clausell paid $2000 to kill Atwood. Fires two shots through door as Atwood tries to close it, killing Atwood.

DOES GERALD APPLY: Yes, jury could have concluded that "hit" paid for by drug dealer was only to have Atwood seriously injured, not killed.

12. KILLER: NATHANIEL HARVEY

VICTIM: IRENE SCHNAPS, recently widowed secretary living alone.

DATE OF DECISION: October 18, 1990

CIRCUMSTANCES OF CRIME: Victim attacked by burglar entering her apartment. Victim's skull cleaved by hatchet leaving brain exposed. Suffered numerous skull fractures, fractured jaw, multiple lacerations and massive loss of blood.

DOES GERALD APPLY: Yes, jury could have concluded Harvey did not intend to kill victim, only to injure her.

13. KILLER: ANTHONY MC DOUGALD

VICTIMS: WALTER & MARIA BASS

DATE OF DECISION: July 12, 1990

CIRCUMSTANCES OF CRIME: Walter Bass slashed across throat, stabbed in chest and beaten about head with baseball bat. Cinderblock dropped on head of Maria Bass, also beaten about head by baseball bat and throat cut.

DOES GERALD APPLY: No, no realistic likelihood of prejudice from absence of Gerald charge. Inconceivable that a jury could have concluded that McDougald intended to cause serious bodily injury but not death.

American Civil Liberties Union of New Jersey

2 Washington Place
Newark, New Jersey 07102
(201) 642-2084
Fax (201) 642-6523

Edward Martone	Deborah A. Ellis	Annamay Sheppard	Ruth E. Harlow
Executive Director	Legal Director	President	Staff Attorney

Death Penalty Testimony
before the
Assembly Judiciary Committee - January 31, 1991

Gentlemen/women:

The ACLU opposes any application of the death penalty. We believe that, in all circumstances, it is unconstitutional under the Eighth Amendment which prohibits cruel and unusual punishment, and that its discriminatory application violates the Fourteenth Amendment protection of equal protection and due process of law.

There is no credible evidence that the death penalty deters crime. States that have death penalty laws do not have lower crime rates or murder rates than states without such laws. And states that have abolished capital punishment, or instituted it, show no significant changes in either crime or murder rates.

Claims that each execution deters a certain number of murders have been discredited by social science research. The death penalty has no deterrent effect on most murders because people commit murders largely in the heat of passion and/or under the influence of alcohol or drugs, giving little thought to the possible consequences of their acts. The few murderers who plan their crimes beforehand -- for example, professional executioners -- intend and expect to avoid punishment altogether by not getting caught. Some self-destructive individuals may even hope they will be caught and executed.

Death penalty laws falsely convince the public that government has taken effective measure to combat crime and homicide. In reality, such laws do nothing to protect us or our communities from the acts of dangerous criminals.

A 1990 Government Accounting Office (GAO) report summarizing several capital punishment studies confirmed "A consistent pattern of evidence indicating racial disparities in charging, sentencing and the imposition of the death penalty...." Eighty-two percent of the studies the GAO reviewed revealed that those who murdered whites were more likely to be sentenced to death than those who murdered blacks." In addition the GAO uncovered evidence (though less consistent) that a convict's race, as well as the race of the victim, also influences imposition of the death penalty.

African Americans are approximately 12 percent of the U.S. population, yet of the 3,859 persons executed for a range of crimes since 1930, more than 50 percent have been black. Other minorities are also death-sentenced disproportionate to their numbers in the population. This is not primarily because minorities commit more murders, but because they are more often sentenced to death when they do.

Poor people are also far more likely to be death-sentenced than those who can afford the high costs of private investigators, psychiatrists and expert criminal lawyers.

Some observers have pointed out that the term "capital punishment" is ironic because only those without capital get the punishment.

A study published in the Stanford Law Review documents 350 capital convictions in this century, in which is was later proven that the convict had not committed the crime. Of those, 25 convicts were executed while others spent decades of their lives in prison. Fifty-five of the 350 cases took place in the 1970s, and another 20 of them between 1980 and 1985.

Our criminal justice system cannot be made fail-safe because it is run by human beings, who are fallible. Execution of innocent persons is bound to occur.

The death penalty is like a lottery, in which fairness always loses.

Lethal injection is the technique of choice in New Jersey.

Although this method is defended as more humane, efficient and inexpensive than others, one federal judge observed that even "a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation." In Texas, there have been three botched injections executions since 1985. In one, it took 24 minutes to kill an individual, after the tube attached to the needle in his arm leaked and sprayed noxious chemicals toward witnesses. Another in 1989, caused Stephen McCoy to choke and heave for several minutes before dying because the dosage of lethal drugs was too weak.

The following twenty two bills dealing with the death penalty are currently before the Legislature. The ones with an asterisk are in the Assembly Judiciary Committee. With the exception of A.3024 and A.1061, the ACLU opposes all of these proposals as each would either facilitate implementation or expand the use of the death penalty.

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S.3246 (Bassano) - Adds "terrorism" to the list of aggravating factors that juries must weigh in capital cases.

*A.4420 - (Catania, Haytaian) - Same as S.3246.

S.1862 - (Dumont) - Authorizes death penalty for any defendant convicted of murder.

SCR77 - (Dorsey) - Provides that the NJ Constitution may not be interpreted as rendering a capital punishment statute unconstitutional.

*A2575 - (Hardwick) - Makes those convicted of murder under felony murder doctrine eligible for capital punishment.

*A.2587 - (Hardwick/Shusted) - Clarifies that Supreme Court conduct proportionality review of a death penalty case is compared only to other death penalty cases.

A.40 - (Haytaian/Shusted) - Adds murder in connection with drug trafficking as aggravating factor in death penalty cases.

*A.241 - (Naples) - Provides that a juvenile tried as an adult and convicted of murder is eligible for capital punishment.

*A.1061 (Brown, W) - Abolishes death penalty for crime of murder.

*A.1491 - (Stuhltrager) - Prohibits the introduction of testimony concerning the method of execution in a capital punishment case.

AR35 (Shusted) - Memorializes Congress to vote for death penalty for drug dealers, commends Senator Bradley for voting for same.

S9 - (Russo) - Clarifies procedures to determine whether a death sentence should have been imposed.

S.104 - (Zimmer/Bubba) - Adds murder by drug kingpin in connection with narcotics trafficking as aggravating factor in death penalty cases.

A.750 - (Bubba) - Provides that a juvenile tried as an adult and convicted of murder shall be sentenced pursuant to the provisions of the capital punishment statute.

A.2350 - (Franks/Crecco) - Provides that drug related murders are subject to capital punishment and increases penalty for drug related assaults against law enforcement officers.

*A3024 - (Mazur/Bush) - Prohibits execution of mentally retarded persons convicted of murder.

*A.3463 - (De Croce) - Adds murder of a child as a factor in determining death sentence imposition.

*A.4453 - (Scerni) - Executes drug kingpins.

*A.4275 - (McGreevey/Menendez/Cimino) - Revises aggravating factors a jury considers for imposing death penalty.

*A.4316 - (Ford, Doyle, Villapiano, Duch, Gill, Salmon) - Concerns proportionality review in death penalty cases.

* ACR76 - (Hardwick/Shusted/Felice) - Death penalty is not cruel and unusual punishment.

*ACR131 - (McGreevey/Mendendez) - provides time limits for death penalty appeals.

I understand the Committee is most interested in today's hearing in A.4453, A.4316, and ACR76.

A.4453 expands the use of what we believe to be an unconstitutional practice to still another offense.

A.4316 should be withheld pending the proportionality review study about to be completed for the State Supreme Court.

ACR76 appears to be irrelevant as both the U.S. and the N.J. Supreme Courts have already found the death sentence to not be violative of cruel and unusual punishment protections.

The ACLU strongly supports A.3024. The death penalty is especially unfair when inflicted on one who does not have a full understanding of the crime and when one who cannot fully participate in his or her defense because s/he can't comprehend the circumstances is which they find themselves.

New Jersey should join Kentucky, Georgia, Tennessee, and Maryland in exempting mentally retarded persons convicted of murder from capital punishment.

Public opinion polls have shown that, even though a majority support the death penalty, a similar majority oppose execution of the mentally retarded.

In summary, the ACLU believes strongly, and for all of the above reasons, that capital punishment has no place in a civilized society.

TESTIMONY OF

LEIGH B. BIENEN, Esq.

on behalf of the

ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

before the

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

of the

NEW JERSEY LEGISLATURE

concerning

PROPORTIONALITY REVIEW IN CAPITAL CASES

N.J.Assembly Bill No. 4316

January 31, 1991

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I am presenting testimony on behalf of the Association of Criminal Defense Attorneys of New Jersey. For the past five years I have been working in collaboration with experts from the University of Pennsylvania and Princeton University on an empirical study of the reimposition of capital punishment in New Jersey. The results of this study were presented to the New Jersey Supreme Court in two reports: "The Reimposition of Capital Punishment in New Jersey: Preliminary Report (1987)" and "The Reimposition of Capital Punishment in New Jersey: Interim Report, Vol. I and II (1988)." The findings of the Interim Report were published as L. Bienen, D. Denno, N. Weiner, P. Allison and D. Mills, "The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion," 41 Rutgers L. Rev. 27 (1988). A copy of that article is presented to the Committee with this testimony. I am in the process of preparing an article on proportionality review which includes a summary of the relevant law in all other capital punishment states. That article will be published as L. Bienen, "Proportionality Review in Capital Cases: The Responsibility Rests with the State Supreme Court," N.Y.U. Rev. of L. and Soc. Ch., forthcoming, 1991.

For the past two years I have participated in the open, public meetings of the Proportionality Review Project called by the New Jersey Supreme Court's Special Master, Professor David C. Baldus.

I am here to recommend that the legislature postpone action upon A. 4316, pending the submission of the Final Report of the

Proportionality Review Project to the New Jersey Supreme Court and that court's forthcoming decision on proportionality in the case of Robert O. Marshall.

My testimony includes a brief description of the purpose behind proportionality review, a summary of the existing New Jersey law on proportionality review, and a comparison between the recommendations of the Proportionality Review Project's Interim Report on the universe of cases and the universe of cases proposed by legislative amendment in A. 4316.

The Purpose of Proportionality Review

When the United States Supreme Court upheld the new capital punishment statutes in Gregg v. Georgia, it did so on the premise that the procedures and safeguards introduced since 1972 addressed the fundamental inequities which had resulted in the court declaring all state capital punishment schemes unconstitutional in Furman v. Georgia.[1] Although there was no majority opinion in Furman, the consensus of the court was that the imposition of capital punishment under the then existing schemes violated the principles underlying the fundamental rights guaranteed by the constitution of the United States. The perceived infirmity of the then existing capital statutes was that they provided capital sentencers with unbridled discretion, producing death sentencing patterns that could only be described as "wanton" or "freakish."[2]

The revised capital punishment statutes upheld in Gregg introduced a structure of statutory aggravating and mitigating factors which was intended to guide the discretion of the

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[1] 408. U.S. 238 (1972). These opinions have generated a very large literature. M. Radelet and M. Vandiver, "Capital Punishment: An Annotated Bibliography," (Garland Publishing Co. Ny 1988) lists 971 books and articles as of June 1, 1988. See, e.g.. Weisberg, "Deregulating Death," 1983 Sup. Ct. Rev. 314 (1984). The nature of the topic is such that commentary has not been confined solely to professional legal publications.

[2] Furman v. Georgia, 408 U.S. 238, 240-257 (1972)(Douglas, J. , concurring); Id. at 306-310 (Stewart, J., concurring); Id. at 310-413 (White, J., concurring).

sentencer so that it woud no longer be the case that "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[3] A cornerstone of the court's holding in Gregg was the shared opinion of three justices that "the punishment of death is inflicted in a trivial number of the cases which it is legally available."[4]

This recognition became the bedrock of proportionality review. Although many defendants were eligible to be prosecuted under capital statutes, few cases resulted in a death sentence. There was, therefore, no meaningful basis for distinguishing the cases of those who were executed from those who were not executed, although they committed crimes which were as offensive to society. It was the number of cases which could have resulted in the death sentence but didn't, in comparison to the death sentences actually imposed, which forced the conclusion that being executed by the State was analogous to being struck by lightning.

In Gregg the court found that what was wrong with the former capital punishment schemes had been addressed by the revised Georgia statute, with its procedures instituting disaggregated

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[3] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

[4] Gregg v. Georgia, 428 U.S. 153, 293 (1976) (Brennan, J. concurring) Id. at 309-310 (Stewart, J. concurring) Id. at 313 (White, J. concurring). This consensus arises directly out of Furman, where the court concluded: The relative infrequency with which the death penalty is imposed is such that "there is no meaningful basis for distinguishing the gew cases in which is is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

decision making by capital jurors.[5] Not only was the decision on guilt and penalty now divided into two distinct and separate decision making events during capital trial, but the decision to impose the death sentence in the newly insulated penalty phase proceeding was also restructured around specific factual findings as to the presence or absence of defined statutory aggravating and mitigating factors.[6]

As yet an additional safeguard, Gregg endorsed the Georgia Supreme Court's introduction of proportionality review,[7] another procedure to assure that the imposition of the death sentence under the revised statutes would not be characterized by the fundamental flaws which made the former system unjust.[8]

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[5] Justice White's expectation was that the ennumeration of statutory aggravating and mitigating circumstances for the jurors would sufficiently guide their discretion so that it could "no longer be said that the peanlty [of death] is being imposed wantonly and freakishly." Gregg v. Georgia, 428 U.S. 153, 222 (1976) (White, J., concurring).

[6] Ga. Code Ann. sec. 27-2534.1 ( ).

[7] The state supreme court was required to review each death sentence to determine (3) if the sentence imposed is excessive compared with the sentence imposed in similar cases. Ga. Code Ann. sec. 27-2537 (c)(3) (1983). Or, as the provision was rephrased by Justice White (3) "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Gregg v. Georgia, 428 U.S. 153, 212 (1972) (White, J., concurring). It is the later formulation which has typically be adopted by the states.

[8] The Georgia statute with its structure of guiding discretion by the introduction of aggravating and mitigating factors was upheld in Gregg while the statutes which attempted to eliminate arbitrariness by introducing a mandatory system for imposing capital punishment were struck down. Cf. Gregg v. Georgia, 428 U.S. 153 (1976) upholding Georgia Code Ann. sec. 27-2534.1 et seq. with Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), in which mandatory statutes totally

In Gregg the court concluded that the caprice and arbitrariness of the former system would be safeguarded against by the multi layered expanded appellate review established by the revised Georgia statute. The Georgia statute required the state's highest court to review the operation of the system as a whole, placing on top of the refashioned trial court procedures a newly created system for comparing the appealed death sentence with similar cases throughout the the state. Indeed the need for heightened judicial scrutiny at the appellate level has subsequently been seen by some justices as fundamental to the constitutionality of the death penalty.[9]

Gregg and its companion cases sent a clear signal to the state legislatures: If you enact a capital punishment statute which resembles the Georgia statute, including a provision for proportionality review, the federal supreme court will uphold that statutory scheme.[10] Most state legislatures, including the

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removing jury discretion were struck down.

[9] "[S]ome form of a meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges....[M]eaningful appellate review is an indespensable component of the Court's determination that the States capital sentencing procedure is valid." Pulley v. Harris, 465 U.S. 37, 59 (1984) (Stevens, J. concurring) See also the view expressed often by Justice Handler of the New Jersey Supreme Court...

[10] The majority of the twevle states whose mandatory capital punishment schemes were declared unconstitutional in 1976 responded by enacting statutes similar to the Georgia statute upheld in Gregg. See, e.g. South Carolina: "The statutory death penalty complex adopted by the Gnereal Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in Gregg." State v. Shaw, 255 S.E. 2d 799, 803-4 (1979) referring to S.C. Code Ann. sec.16-251 (Law. Co-op.

New Jersey legislature, correctly read Gregg as a how to manual for constructing a constitutional capital punishment statute. As the court itself noted, over thirty states enacted comparative review procedures similar to those upheld in Gregg.[11]

Although the United States Supreme Court declared in 1984 that proportionality review was not mandated under the federal constitution, over twenty states continue to require some form of proportionality review as part of the appellate review of capital cases.[12] Empirical evidence in a number of jurisidictions indicates that the risk of arbitrariness in the application of capital punishment schemes continues to exist and that this risk is greatest is the so called middle range, or low visibility cases. The purpose of proportionality review is to minimize or

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1985). This statute replaced the former S.C. Code Ann. sec. 16-52, repealed ? . The post Gregg South Carolina statute includes a proportionality review provision virtually identical to the Georgia provision. S.C. code Ann. sec. 16-3-25 (c) (Law. Co-op. 1985). For an analysis of this provision, see R. Paternoster, "An Examination of Comparative Excessive Death Sentences in South CArolina, 1979-1987" This issue, N.Y.U. Rev. of L. & Soc. Ch.

[11] "Indeed, despite the Court's insistence that such review is not compelled by the Federal Constitution, over 30 States now require, either by statute or judicial decision, some form of comparative proportionality review before any death sentence may be carried out." Pulley v. Harris, 465 U.S. 37, 70 (1984) (Stevens, J. concurring) (citation to Respondent's Brief omitted.) The exact count as to how many states had provisions identical to or similar to the Georgia statutory provision is discussed in n. infra.

[12] Pulley v. Harris, 465 U.S. 37 (1984) held that proportionality review was not required by the federal constitution. The states which continue to require proportionality review include: Alabama, Connecticut, Delaware, Georgia, Idaho, Kentucky, Lousiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Virginia, and Washington.

eliminate systematic bias in the application of the capital punishment system as a whole. The procedure involves the comparison of each death sentence under review with other cases which the appellate court considers to be equivalent or similar in terms of the culpability and blameworthiness of the defendant and the circumstances of the offense. The reason for proportionality review is to ensure that death sentences are imposed in an even handed, nondiscriminatory manner.

Proportionality Review in New Jersey: Legal Background

Not all murders are eligible for capital prosecution in New Jersey. Only eligible are those where there is both a factual basis for one of the eight enumerated statutory aggravating factors and the defendant either committed the homicidal act by his own conduct purposely or knowingly with the specific intent to kill or paid another to commit the homicidal act.[13] Under the New Jersey capital punishment scheme the individual county prosecutor in each of the twenty one separate county jurisdictions designates which cases will be subject to capital prosecution through a procedure called the serving of a notice of factors.

As of January 31,1991, a total of 37 death sentences had

[13] The New Jersey capital punishment statute was drafted to comport with the federal constitutional requirements specified in Gregg v. Georgia, 428 U.S. 153 (1976) and cases subsequent to Furman v. Georgia, 408 U.S. 238 (1972). The language creating proportionality review in New Jersey was taken directly from Gregg.

been imposed since reenactment, including two death sentences imposed after a penalty phase retrial. Of those 37 death sentences, twenty seven death sentences have been reversed on direct appeal by the New Jersey Supreme Court and one death sentence has been upheld.[14]

In 1982 the New Jersey State legislature reinstated capital punishment a decade after the former capital punishment statute had been declared unconstitutional by the United States Supreme Court and the New Jersey Supreme Court and almost two decades after the last execution in New Jersey. The New Jersey capital punishment scheme, like the majority of those in effect in the 37 jurisdictions which have reinstated capital punishment in the United States, is based upon a structure of statutory aggravating and mitigating factors which are found and weighed at the second stage of a capital trial.

A potentially large number of death eligible cases are

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[14] Robert O. Marshall's death sentence was upheld on direct appeal by the New Jersey Supreme Court on January 24, 1991, with the court reserving decision on the issue of proportionality review.

The 37 death sentences imposed include the 33 sentences enumerated in Appendix C of 41 Rutgers L. Rev. at 363, the death sentence imposed upon Richard Biegenwald (Monmouth County) in February of 1989 at the first penalty phase retrial in the state, a new death sentence imposed upon Braynard Purnell in Camden County on February 21, 1990, a death sentence imposed upon Marco Bey (Monmouth County) at a penalty phase retrial in September of 1990, and a new death sentence imposed upon John Martini (Bergen County) on December 12, 1990. As of January 31, 1991 there are eight people remaining with death sentences. The sentence of death imposed in February of 1990 was the first new death sentence imposed in over two years.

created by the very broad definition of the felony aggravating factor.[15] The character of evidence and the quantum of evidence supporting the statutory aggravating factors and the statutory mitigating factors, as well as their respective definitions, are the critical determination at penalty phase. The penalty phase jury does not have to explain or give reasons for their verdict, the judge of the penalty phase jury must simply find present or return the designated statutory aggravating and mitigating factors which are presented to them.[16]

A provision for mandatory proportionality review was incorporated within the original statute reenacting capital punishment in New Jersey. The capital punishment statute provides that the Court shall determine whether the death sentence is disproportionate in comparison to "the penalty in similar cases, considering both the crime and the defendant."[17] A 1985 amendment to the capital punishment statute retained the requirement but removed the provision making such review

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[15] 4(g):that the murder was committed while the defendant was engaged in committing, or attempting to commit, or flight after committing murder, arson, burglary, sexual assault, robbery or (put in precise language)

[16] Under the New Jersey capital punishment scheme the prosecutor must declare at arraignment what statutory aggravating factors he intends to prove at penalty phase. The defense attorney does not have to state prior to penalty phase which statutory mitigating factors she intends to present to the penalty phase jury.

[17] N.J.S.A. 2C:11-3e.

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mandatory in all appeals of death sentences.[18] Subsequent to this amendment the New Jersey Supreme Court stated that it assumed "that almost all defendants who are sentenced to death will request such review."[19] While proportionality review was created by statute, however, it was the responsibility of the state supreme court to determine exactly how it would conduct proportionality review. [20]

In its first capital punishment decision, the case which held the New Jersey capital punishment scheme constitutional on its face, the New Jersey supreme Court expressed "some

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[18] See Act of Aug. 6, 1982, ch. 111, 1982 N.J. Laws 555. For a discussion of the legislative history of the reenactment of capital punishment in New Jersey, see "III-The Legislative History of the Death Penalty in New Jersey, 1982-1986", 41 Rutgers L. Rev. 66-70.

[19] "While proportionality review is no longer mandatory, and shall be undertaken only '[u]pon the request of the defendant,'L.1985, c,478, we assume that almost all defendants who are sentenced to death will request such review." State v. Ramseur, 106 N.J. 123, 327, 524 A.2 188, 292 (1987). The same amendment required the Supreme Court to hear an appeal in all death sentences and required the Office of the Public Defender, or other counsel appointed by the Supreme Court, to appeal all death sentences, even over the objection of the defendant. See Act of Jan. 17, 1986, ch. 478, 1985 N.J. laws 1940 (ss 2C:11-3e).

[20] This is typical of how states create proportionality review. A statute will create the procedure, and the state supreme court will enact the rules or procedures for the process. In New Jersey the Proportionality Review Project is located within the Administrative Office of the Courts (AOC). The United States Supreme Court in Gregg v. Georgia cited with approval the fact that: "In order than information regarding 'similar cases' may be before the court, the post of Assistant to the Supreme Court was created. The Assistant must 'accumulate the records of all capital felony cases in which the sentence was imposed after January 1, 1970, or such earlier data as the court may deem appropriate.'" Gregg v. Georgia, 428 U.S. 213, 96 S. Ct. 2909, 2943 (1976) [citation to Georgia statute omitted.]

preliminary views concerning this important aspect of the death-penalty review process. In doing so, we intend only to guide future parties in their exploration of some of the issues that appear essential to the development of a proportionality review process that would satisfy the requirements of the statute and any applicable constitutional obligations."[21]

Noting that appellate courts must adhere to a stricter standard of review in reviewing death sentences, the court proceeded to lay the foundation for proportionality review: Proportionality review would be statewide. Proportionality review would include data collection and statistical analysis. The court would call upon the expert advice of statisticians, criminologists, sociologists and others.[22]

At that point the court had not yet engaged in proportionality review for any death sentence. Nor has the court yet conducted proportionality review of any death sentence. In the Marshall opinion the court reserved decision on proportionality review and asked the parties to brief and argue the issue.[23] The Office of the Public Defender has raised issues of proportionality in a number of capital appeals, and several capital appeals included data from the Public Defender Homicide Study in support of arguments that the operation of the capital

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[21] State v. Ramseur, 106 N.J. 123, 325 (1987),

[22] State v. Ramseur, 106 N.J. 123, 327 (1987).

[23] State v. Robert O. Marshall, S.C. Docket No. A-3-89, decided January 24, 1991, slip opinion at p. 200.

case processing system in New Jersey violated principles of proportionality.[24]

Although proportionality review is not mandated by the federal constitution under Pulley v. Harris,[25] or by the New Jersey legislature, the court nonetheless stated its committment to a thorough and complete examination of the imposition of the death penalty under the rubric of proportionality review: "Proportionality review has a function entirely unique among the review proceedings in a capital proceeding....'It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.'" [26]

Proportionality review, said the court, is required because

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[24] These arguements were raised in some detail in the defendant's appellate briefs in State v. Koedatich, State v. Pitts, State v. Hightower, State v. Long, and State v. Rose and a number of other capital appeals. The arguments took different forms. Some focused on the abuse of prosecutorial discretion in the decision to charge capital murder (See, e.g. Appellate Brief of Defendant, State v. Koedatich, Pt II, pp. 28-56, on file at the office of the N.Y.U. Rev. of L. and Soc. Ch.) Other constitutional arguments focused on systemwide disproportionality based upon the then available findings of the Public Defender Homicide Study. (See, e.g. Appellate Brief of Defendant, State v. Koedatich, Pt. XX, pp. 178-180.) Earlier briefs relied upon data from the Preliminary Report (1986) of the Public Defender Homicide Study. Later briefs relied upon the Interim Report (1987) of the Public Defender Homicide Study or the statistical findings in the subsequent published version of the Interim Report, 41 Rutgers L. Rev. 27 (1988)

[25] 465 U.S. 37 (1984). Pulley held that proportionality review was not required under the Eighth amendment to the United States Constitution where there were other procedural safeguards against arbitrary or capricious sentencing in capital cases.

[26] State v. Ramseur, 106 N.J. 123, 326 (1987). [Internal citation to Pulley v. Harris, supra, omitted.]

the death sentence is "profoundly different" from all other penalties and consequently there is a heightened need for reliability in the imposition of that sentence. Proportionality review is to act as a check against the random and arbitrary imposition of the death penalty. In its first opinion in a capital case, the court stated its own position in categorical terms: "Discrimination on the basis of race, sex, or other suspect characteristic cannot be tolerated...."[27]

At the outset the New Jersey Supreme Court declared that it intended proportionality review to be an appropriate vehicle for examining systemwide defects in the operation of the capital case processing system: "Proportionality review therefore is a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty."[28]

In their very first capital opinion, the court asked all parties who expected to participate in the appellate review process in future capital cases to "begin gathering data necessary for proportionality review of a death penalty in comparison to similar crimes and defendants. Moreover, these statistics will be helpful in determining whether there is race and gender discrimination in the imposition of the death

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[27] Id. at 327.

[28] Id.

penalty." [29] Altough proportionality review had not yet begun, the court delineated the parameters of legal debate on the issue of the universe of cases.[30] The majority then set out the second principal issue in proportionality review, the definition of similar cases.[31] The court then indicated how it anticipated conducting proportionality review.[32] The court directly

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[29] Id. at 3287. The court cited J. Rodriguez, M. Perlin and J. Apicella, "Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process," 15 Rutgers L. J. 437 (1984).

[30] "The first question is, what will be the universe of cases against which a comparison of the imposed death sentence will be made." Id. at 328. In comparison to the practice in some other states, the court said it believed: "statewide uniformity is the more appropriate measure, and therefore [we] anticipate that comparison will be made to 'similar' cases throughout the state." Id. at 329. "But a decision to adopt statewide comparisons does not end the analysis. We must decide whether to include in the statewide universe of cases only those in which a death penalty was actually imposed, or to expand the potential cases for comparison to include all those in which the death penalty could have been requested by the State. See Sec. a(1)(2)." Id. at 328-331.

[31] "Second, we must determine what are 'similar crimes.' Sec. e. As an initial proposition, broad categories are too ambiguous and cannot limit the range of comparison necessary for substantive proportionality review. [Internal citation omitted.] Therefore, in order to narrow the scope of similar crimes to be used in the proportionality review, such categories as 'torture', 'sexual mutilation', or 'multiple victim' crimes have been suggested. But beyond these, there is the difficult question whether these are subcategories of 'murder' that can be appropriately identified and considered. 'Domestic', 'depravity of mind', and 'execution style' crimes, for example, may be too broad or ambiguous to allow any real comparison for proportionality. Id. We anticipate and welcome suggestions regarding which criminological, sociological, and statistical models are appropriate for analyzing the similarity of crimes and sentencing." Id. at 328-331.

[32] "Third, after the crimes similar to the case on review are identified, we must compare those defendants with the one before the court. Sec. e. We need to determine the relevant underlying characteristic necessary to insure consistent sentencing. The aggravating and mitigating factors set forth in Section c(4) and

addressed the question of whether it would be appropriate to review the prosecutor's discretionary selection of cases for capital prosecution within the context of proportionality.[33]

In July of 1988, a year after its decision declaring the New Jersey capital punishment statute constitutional on its face, the New Jersey Supreme Court appointed Professor David C. Baldus as a Special Master to make recommended findings of fact and recommended conclusions of law regarding proportionality in the administration of cases subject to capital punishment in New Jersey.[34]

Section c(5) are a beginning. But other factors such as race, sex, and socioeconomic status might also be appropriate considerations in reviewing proportionality. [Internal citation omitted.] Moreover, the relationship between the defendant and victim, whether defendant pleaded guilty, and the race and sex of the victim might also be appropriate factors. Id. This list is only a beginning and still other factors could be relevant to proportionality review of the defendants. Our task in this process will be to sift through these factors to determine those that have an effect on the capital sentencing decision. We must ensure that discriminatory factors are not shifting the balance between life and death." State v. Ramseur, 106 N.J. 123, 328-331.

[33] "Here we may anticipate considering whether to address concerns about possible misuse of prosecutorial discretion presented to the courts of this state, including in the review all cases in which a prosecutor had the discretion to seek the death penalty. See State v. McCrary, 97 N.J. 132, 478 A.2d 339 (1984) permitting limited judicial review of prosecutorial discretion to charge capital murder authorized under the Act. [Additional internal citations omitted.]" Id. at 328-331.

[34] The N.J. Supreme Court's Order of July 29,1988 creating the Proportionality Review Project and appointing Professor Baldus as the Special Master is printed in its entirety in Appendix E of 41 Rutgers L. Rev. 27, 371. David C. Baldus is the Joseph B. Tye Professor of Law at the University of Iowa College of Law. With his colleagues he conducted two empirical studies of the Georgia capital punishment system after Furman. These studies formed the factual basis for the statistical arguments presented to the United

The Present Status of Proportionality Review

The July 29, 1988 Order of the N.J. Supreme Court gave the Special Master the authority to collect and analyze data, produce a data base and files on individual homicide cases, invite the participation of interested parties, develop a public data file, including a record of dispositions of all relevant homicide cases, conduct hearings, procure expert technical advice, call witnesses, and request public records and any other relevant information. The Special Master is specifically mandated to consider and assess the validity and utility of the data base and analysis developed by the Office of the Public Defender.[35] As of

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States Supreme Court in McCleskey v. Kemp, 107 S. Ct. 1756 (1987). This work and that litigation is described in detail in D. Baldus, G. Woodworth, & C. Pulaski, EQUAL JUSTICE AND THE DEATH PENALTLY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern U. Press, 1990). Professor Baldus has also served as a consultant to the supreme court of South Dakota and Delaware and to the National Center for State Court's Project on Comparative Proportionality Review of Death Sentences by State Supreme Courts.

[35] The July 29, 1988 Order refers to "the report of the New Jersey Public Defender entitled "the Re-Imposition of Capital Punishment in New Jersey." This reference is to the Interim Report Parts I and II of the N.J. Public Defender Study. The terminology is confusing since both the Proportionality Review Project and the Public Defender Study use the title "Interim Report." The Interim Report of the Public Defender Study was submitted to the N.J. Supreme court in State v. Koedatich, 112 N.J. 225 (1988) before its findings were published in 41 Rutgers L. Rev. 27. The Interim Report of the Public Defender Study included data on 703 cases. A Preliminary Report of the Public Defender Study was submitted to the N.J. Supreme Court in 1987 contained data on 568 homcide cases. The majority opinion in Koedatich cites to data from the Preliminary Report of the Public Defender Study (1988), State v. Koedatich, 112 N.J. 225,254-256 (1988). Justice Handler's dissent cites to the Interim Report of the Public Defender Study (1988), State v. Koedatich, 112 N.J. 225, 377 (1988). The research reports of the Public Defender Study are detailed in 41 Rutgers L. Rev. 27,

June 11, 1990, the New Jersey Proportionality Review Project, under the auspices of the Administrative Office of the Courts, had presented to the N.J. Supreme Court an Interim Report including preliminary data on over 900 homicide cases which resulted in conviction during the period from reenactment through 1989. That Interim Report has been made available to this Committee.

During the past two years, the Proportionality Review Project, under the direction of Professor Baldus, has been meeting regularly with the same interested parties to discuss the legal and factual issues raised by the screening of all homicide cases in the jurisdiction and the identification of cases which were death eligible. On June 11, 1990 Professor Baldus presented to the New Jersey Supreme Court the Proportionality Review Project's Interim Report in a conference before the Court in the presence of interested parties, including staff members of the Administrative Office of the Court and representatives from the Office of the Attorney General, the County Prosecutors and the Office of the Public Defender.

The New Jersey Proportionality Review Project's Interim Report, is a major accomplishment of data collection and represents an advance in methodology.[36] First, and perhaps most importantly, the Project has identified and is in the process of

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n.3, 36-7.

[36] The Interim Report of the N.J. Proportionality Review Project is available upon request to the New Jersey Administrative Office of the Courts (CN 037) Justice Complex, Trenton, NJ 08625)

screening every homicide in the jurisdiction from the reimposition of capital punishment on August 6, 1982 through 1988. [37]

The initial screening removed cases involving death by auto, cases where the homicide charge was only for an attempt or conspiracy to commit homicide, cases which resulted in an acquittal or dismissal of homicide charges and cases in which the defendant was a juvenile. This reduced a data base of over 3000 cases to approximately 1300 cases. The Project's Interim Report included preliminary data on 951 homicide cases which had reached final disposition at the trial Court stage.[38] The Interim Report includes frequencies by type of conviction and capital case processing stage. The Interim Report sets out its proposed methodology for the detailed analysis of statutory aggravating factors and its proposed typology for identifying death eligible cases and grading cases by level of aggravating and defendant

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[37] The Project began with the State Police (SBI) list of 2300 persons arrested for a homicide offense between 1982-1988. This list was supplemented by an additional 500 cases identified by the Administrative Office of the Courts and by yet an additional 200 cases which were identified by the Public Defender Homicide Study. In other words, the Administrative Office of the Courts and the Public Defender together identified an additional 600 cases which were not in the official files of the State Police. The State Police files were missing almost one sixth of the cases. These were all cases which were formally charged as homicide offenses and cases which went to final disposition at the trial court stage. After removing the identifiers for some variables, the Public Defender turned over to the Proportionality Review Project its data tapes on the 703 cases analyzed in 41 Rutgers L. Rev. 27 (1988).

[38] Cases which are pending and cases on which the Project is seeking additional information will be incorporated as the data become available.

culpability. The methodology for proportionality review is already in place.

The Proportionality Review Project's Interim Report discusses the factual and legal issues raised by the definition of the universe for proportionality review. The Interim Report recommends that the Court adopt a universe comprised of all penalty phase cases and all clearly death eligible cases, even if these cases were not prosecuted as capital murder cases and did not reach penalty phase. The Interim Report does not recommend that the Court conduct proportionality review only by comparing a death sentence with other death sentences which have been imposed. The proposed legislation, A. 4316, would limit the universe of comparison cases to other death sentences. After reviewing <u>all</u> homicide cases during a six year period the Proportionality Review Project dientified only a small number as appropriate to be included in the universe of comparison cases. The Project anticipates adding a similar fractional number of cases to the universe each year.

The Interim Report includes preliminary data on 118 penalty phase cases and 833 non-penalty phase cases, of which 28 per cent (N = 233) resulted in a conviction for murder or felony murder, either at trial or by plea. (Interim Report, Table 3). Of these 233 cases, only 29 per cent (N = 67), or less than a third, were classified as clearly death eligible and another 22 per cent (N = 52) were classified as being questionable on death eligibility. The remaining 51 per cent (N = 119) of the cases which resulted

in a conviction for murder were classified as clearly not death eligible. An additional 13 cases which resulted in a conviction for aggravated manslaughter after a plea agreement were classified as clearly death eligible, and another 62 cases, which were disposed of by a plea to aggravated manslaughter, were classified as questionable on the issue of death eligibility. Other preliminary data on these breakdowns are included in the Interim Report.

The Interim Report also reports the death sentencing rate by year for 1983-1989 (Table 2) and includes a preliminary comparison of the death sentencing rate of juries with the proportion of cases which advance to penalty trial (Table 3A). The latter figures are an indication of the relative frequency with which prosecutors go forward with capital prosecutions in specific categories of cases, e.g., felony murder robbery cases vs. multiple victim cases.

The Interim Report describes its methodology for classifying cases as clearly death eligible in Table 5. Non-penalty phase cases are identified as clearly death eligible only if there is overwhelming or strong evidence for all of the elements of capital murder. This is an important methodological contribution. The strength of the evidence typology sets out what constitutes an overwhelming case, a strong case, a clearly defensible case and a clearly insufficient case on the elements of capital murder. An overwhelming case, for example, would include evidence from eyewitnesses or a full confession which

completely corroborated all of the elements of capital murder, including the by his own conduct requirement, the presence of at least one statutory aggravating factor, and the requisite mens rea under the court's most recent interpretations.

A clearly insufficient case, on the other hand, would include eyewitness evidence which only placed the defendant at the scene of the crime, or evidence which was inconclusive or unreliable. The methodology for classifying cases as death eligible, while taking into account the strength of the evidence in the case on the elements of capital murder, is fact sensitive and was developed to be responsive to the concerns of trial attorneys expressed in the proportionality review meetings. The views of both defense attorneys and prosecutors were solicited and taken into account. The private bar contributed its comments as well. This typology represents a considerable advance over previously existing methods for measuring defendant culpability and the relative aggravation level of homicide cases, especially for cases which did not go to trial as capital cases.[39]

The Interim Report proposes that proportionality review be institutionalized within the Administrative Office of the Courts, and that screening and data collection continue for the following categories of cases in the jurisdiction: all cases which went to penalty phase, all pleas to murder or felony murder, felony

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[39] See discussion of other methodologies for classifying case seriousness and strength of the evidence, especially the methodology of B. Nakell and G. Hardy, discussed in 41 Rutgers L. Rev. at 142-47.

murder trial convictions in cases indicted for felony murder and pleas to aggravated manslaughter. Cases which did not reach penalty phase would be screened to see if they were potentially death eligible, using the strength of the evidence typology developed in the Interim Report. The decisions of juries are given primacy in this methodology. A jury finding of an intent less than the requisite intent for capital murder, for example a jury verdict for manslaughter, would automatically exclude a case from the proposed universe.

On the basis of the Project's experience to date, if the Court adopted the proposed methodology, it would result in the Administrative Office of the Courts screening approximately 80-90 new cases a year and also adding to the data base any cases which went to penalty phase, irrespective of whether a death sentence was imposed. These cases would be folded into the present data base, which now includes approximately 200 death eligible cases.

The Interim Report also recommends identifying all questionable death eligible cases so that interested parties can develop evidence on additional cases which might be relevant to the proportionality review of a particular death sentence in the future. For the entire period 1982-1988, the Project has collected data on 195 clearly death eligible cases which resulted in 118 penalty trials and 33 death sentences imposed.

One of the Project's principal goals was to identify why some cases reach capital trial while others, which seem to be

similar, do not. County prosecutors who actually make decisions about whether to declare a case capital could have shed a great deal of light on that process. There was no presumption that the prosecutors were acting improperly. The prosecutors took a completely adversarial position with regard to data collection. They repeatedly stated that it would be impossible to collect reliable information, and that, in their opinion, the court had no business attempting to collect information on the operation of the state's capital punishment system. However, even the prosecutor's minimal participation at the Project's regular meetings allowed the Special Master to incorporate their suggestions concerning methodology at several points.

The Proportionality Review Project's Final Report will include additional data and recommended findings of fact and conclusions of law. With the benefit of this extensive factual record the court will be in a position to make an informed decision on the legal issues raised by proportionality review.

New Jersey State Policemen's Benevolent Association, Inc.

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President
FRANK J. GINESI

Office of the President
158 MAIN STREET
WOODBRIDGE, N.J. 07095

Telephones
636-8860-61
FAX 636-0172

Testimony of Peter J. McDonough, Jr.
Representing the New Jersey
State Policemen's Benevolent Association
Before the Assembly Judiciary, Law and Public Safety Committee
January 31, 1991

Chairman Ford, members of the committee, I am Peter J. McDonough, Jr., and I am before you today representing the New Jersey State Policemen's Benevolent Association. The New Jersey PBA is the largest organization of law enforcement personnel in New Jersey, representing nearly 30,000 men and women in law enforcement at the state, county and municipal levels.

At the outset, I would like to commend Assemblywoman Ford for holding this hearing and for her sponsorship of A-4316, which may help to make New Jersey's death penalty an effective deterrent.

The PBA is fully in support of the death penalty. Our members believe that a working death penalty can function as a deterrent for many of the most heinous crimes committed in our state.

Governor Florio took a bold and important step by publicly declaring his support for the death penalty. Equally important was his call for enactment of legislation to subject drug kingpins to the death penalty when their actions result in the murder of others.

The 30,000 members of the PBA are encouraged by the Governor's announcement.

As you all know, countless hours of debate have been waged over the death penalty. The effectiveness of the death penalty as a deterrent to murder has been central to virtually every discussion.

I can state emphatically that, in the nine years since the death penalty was reinstated in New Jersey, it has not provided an once of deterrence.

For capital punishment to have a deterrent effect, a potential murderer must consider its severity and finality. Unfortunately, while exercising this much forethought, a potential murderer is likely to also recognize that New Jersey's current death penalty has never been imposed.

Until the recent decision in the Marshall murder, the courts have rendered our death penalty impotent because it's never been imposed. Consequently, it's never met its promise as a deterrent.

A law that isn't enforced, regardless of how minor or severe it may be, is a law that has no effect. A drive along any major highway in New Jersey bears this out.

Although the speed limit is 55 mph, and exceeding it may subject violators to fines, court costs and insurance surcharges, almost every car on our highways races along at 60, 65, or faster.

Why? Because New Jersey's drivers have come to believe that Troopers simply won't issue summonses unless the speeding is excessive; certainly over 65 mph.

But, drive into a town with a reputation for strict enforcement of speed limits, and hardly a soul exceeds them.

Obviously, enforcement is a deterrent.

Law enforcement officers are only as good as their tools, their training, and the reliability of the systems that back them up.

Modern and well-maintained equipment is essential. If these tools fail, the public safety may be threatened and lives may be lost.

Training must be rigorous and thorough. Regular physical training sharpens reflexes, just like continuing education sharpens judgement. Every time that reflexes are slow, or judgement is faulty, the public is put at risk.

Law enforcement's support systems, both operational and legal, must be dependable, predictable and reliable. Officers who encounter a dangerous situation have to respond with the full

confidence that a given set of circumstances will produce a reasonably predictable outcome.

If there is a breakdown of an operational support system, for example if back-up reinforcements aren't available, someone may get hurt; maybe an officer, maybe an innocent civilian.

A failure in the legal support system is absolutely ruinous to effective law enforcement. If arrest protocols aren't followed, a criminal may be acquitted. If the courts refuse to adjudicate in accordance with the intent of the legislature and the protections of the Constitution, someone gets hurt, and a criminal gets away.

In the case of homicide, someone gets killed, and a murderer gets off.

Like a three-legged stool, law enforcement is upheld by its tools, training and support systems. And just like a three-legged stool, law enforcement officers can't do their jobs unless all three legs work with strength and unity.

Unfortunately, when it comes to murder, the judicial leg is broken.

Governor Florio has committed himself to repairing that leg, and he's called upon the legislature for help.

On behalf of the New Jersey State Policemen's Benevolent Association, I urge you to answer his call.

Thank you.

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new jersey chapter

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AMERICANS FOR DEMOCRATIC ACTION

16 Reservoir Place, Cedar Grove, New Jersey 07009 • 239-1544

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ASSY. DAVID C. SCHWARTZ

January 24, 1991

To the Judiciary, Law and Public Safety Committee
of the General Assembly

I believe I speak for the vast majority of members of my organization with respect to the death penalty.

There are a number of reasons for opposing the death penalty. In this statement I intend to address only the claim that the death penalty deters murders.

There is no reliable evidence to support the claim that the death penalty deters murders. In fact, the evidence suggests that many of those who commit murder are not concerned about their own lives. Indeed, some of them may even have the wish to die and, unconsciously, try to fulfill that wish by courting the death penalty.

Respectfully submitted

Hans H. Nord

Hans H. Nord
Representative of A. D. A.
21 Barbara Rd.
Dumont, NJ 07628
201-385-1182

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New Jersey Catholic Conference

211 North Warren Street • Trenton, New Jersey 08618-4894
(609) 599-2110

Most Rev. Theodore E. McCarrick
Archbishop of Newark
President

William F. Bolan, Jr., Esq.
Executive Director

January 31, 1991

TO: Members, Assembly Judiciary Committee

FROM: William F. Bolan, Jr., Executive Director

RE: A-3024

On behalf of the Catholic Bishops of New Jersey, the New Jersey Catholic Conference asks you to support the above bill, which would prohibit the execution of any mentally retarded person who has been convicted of murder. We think the rationale which prompted a 1985 amendment to this statute preventing a juvenile from being sentenced to death applies with equal force to a person who is mentally retarded.

Our position with respect to this bill is consistent with our long-held opposition to the imposition of the death penalty. Although the death penalty often seems to ride the wave of popular support in the aftermath of crimes that shock the sensitivity of the public, there is no way to escape the fact that the death penalty, as emotionally popular as it may sound, is a simplistic solution and an unusually cruel attempt to eradicate problems profound in their complexity.

The death penalty implies that a person shall be denied the right to rehabilitate oneself, and this raises moral and social questions not easily diminished. It raises the question whether society is really protected through a process of capital punishment that may be directed by a fallible tribunal, or is a life sentence without parole an equally effective deterrent. The death penalty acts more as an act or retribution which is incompatible with respect for human life - even to the lives of the individuals whose violent acts upset the order and harmony of society.

The New Jersey Catholic Conference endorses the statement of the National Conference of Catholic Bishops wherein it was stated, "We believe that in the conditions of contemporary American society, the legitimate purpose of punishment does not justify the imposition of the death penalty... We should acknowledge that in the public debate over capital punishment, we are dealing with values of the highest importance: respect for the sanctity of human life, the protection of human life, the preservation of order in society, and the achievement of justice through law."

In light of the foregoing, we ask that you support A-3024 by a vote to release it from committee.

WFB

cc: The Hon. D. Bennett Mazur, Sponsor

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SPEECH BY ASSEMBLYMAN FRANK CATANIA
BEFORE THE ASSEMBLY JUDICIARY COMMITTEE
JANUARY 31, 1991

GOOD MORNING: MADAM CHAIR, MEMBERS OF THE JUDICIARY COMMITTEE. MY NAME IS FRANK CATANIA, ASSEMBLYMAN FOR THE 35TH DISTRICT. TODAY WE ARE EXAMINING THE DEATH PENALTY, A VERY IMPORTANT ISSUE OF HISTORIC PRECEDENCE AND CONSEQUENCE.

I AM HERE TO TESTIFY THAT NEW JERSEY NEEDS A STRONG DEATH PENALTY LAW. THE MAJORITY OF NEW JERSEY VOTERS HAVE EXPRESSED THEIR SUPPORT FOR THE DEATH PENALTY AND I WHOLEHEARTEDLY SUPPORT STRONG DEATH PENALTY LEGISLATION.

RECENTLY, THE NEW JERSEY SUPREME COURT AFFIRMED THE DEATH PENALTY CONVICTION FOR THE FIRST TIME SINCE 1982, WHEN NEW JERSEY'S CAPITAL PUNISHMENT STATUTE BECAME LAW.

PRIOR TO THIS AFFIRMATION, THE NEW JERSEY SUPREME COURT OVERTURNED ALL PREVIOUS 27 DEATH SENTENCES. IN SEVERAL OF THESE CASES, THE COURT APPLIED STRICTER EVIDENCE RELATED RULES THAN REQUIRED BY THE UNITED STATES CONSTITUTION REGARDING THE DEATH PENALTY.

MY INTERESTS IN THIS ISSUE ARE AS A LAWYER, A FORMER PROSECUTOR AND MUNICIPAL COURT JUDGE AND AN ASSEMBLYMAN.

I AM CONCERNED WITH THE SIGNIFICANT HOMIICIDE RATE IN URBAN AREAS, ESPECIALLY IN PATERSON, WHICH IS PART OF THE DISTRICT I REPRESENT.

I SUPPORT THE OPINION OF THE MAJORITY IN THE STATE OF NEW

JERSEY WHO BELIEVES A STRONG AND ENFORCEFUL DEATH PENALTY IS NECESSARY TO PROTECT THEM, THEIR FAMILIES AND VICTIM'S FAMILIES FROM THESE HEINOUS ACTS OF VIOLENCE. A STRONGER DEATH LAW WOULD BE A DETERRENT TO THESE CRIMINALS FROM KILLING INNOCENT PEOPLE.

I HAVE REVIEWED ALL 27 CASES AND ONE IN PARTICULAR STANDS OUT IN MY MIND. NATHANIEL HARVEY WAS CONVICTED OF KILLING IRENE SCHNAPS WITH A HATCHET AFTER SHE AWOKE TO FIND HIM BURGLARIZING HER PLAINSBORO APARTMENT IN 1985. HARVEY STRUCK THE 37 YEAR OLD WIDOW AT LEAST 15 TIMES. HARVEY, WHO HAD A LONG FELONY RECORD, WAS SENTENCED TO DEATH FOR THE SCHNAPS MURDER. THE NEW JERSEY SUPREME COURT SET ASIDE HIS CONVICTION ON THE THEORY THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DIFFERENCES BETWEEN "INTENTIONAL MURDER AND OF KNOWINGLY OR PURPOSELY CAUSING BODILY INJURY RESULTING IN DEATH."

THE COURT FOUND THAT DESPITE MULTIPLE BLOWS THAT FRACTURED SCHNAPS SKULL IN NUMEROUS PLACES, INCLUDING A DEEP FIVE-INCH LONG CLEAVAGE EXPOSING HER BRAIN, THERE WAS NO EVIDENCE OF KNOWINGLY OR PURPOSELY CAUSING BODILY INJURY OR DEATH. IT IS BECAUSE OF THE SUPREME COURT INTERPRETATION IN THIS AND THE OTHER 27 CASES, THAT I BELIEVE A STRONGER DEATH PENALTY LAW IS NEEDED.

IN MOST OF THESE CASES, THE COURTS REASONS FOR REVERSING THE DEATH PENALTY HAS BEEN THE NEW JERSEY SUPREME COURTS LIBERAL INTERPRETATION OF THE EVIDENCE RULES RELATED TO THESE CRIMES. THAT IS WHY WE NEED A STRONGER DEATH PENALTY LAW.

UPON MY REVIEW OF THE FEDERAL AND STATE EVIDENCES RULES AS THEY

RELATE TO THE DEATH PENALTY, I ALONG WITH ASSEMBLY MINORITY LEADER CHUCK HAYATIAN HAVE INTRODUCED ACR 130 WHICH WOULD PLACE A REFERENDUM ON THE BALLOT ASKING VOTERS TO AMEND THE STATE CONSTITUTION TO BAR THE NJ SUPREME COURT FROM APPLYING STRICTER EVIDENCE RULES IN CRIMINAL CASES THAN THOSE REQUIRED UNDER THE UNITED STATES CONSTITUTION.

THE GOVERNOR HAS STATED THAT NJ NEEDS A STRONGER DEATH PENALTY LAW. I BELIEVE THAT THE CITIZENS OF NJ WILL VOTE YES ON THE REFERENDUM QUESTION, SINCE IT REFLECTS THE MAJORITY OPINION. ALTHOUGH, I FEEL VERY STRONGLY ABOUT THE LANGUAGE IN THIS RESOLUTION, I WILL ENTERTAIN SUGGESTIONS REGARDING THIS ISSUE AS IT APPLIES TO LIMIT THE NJ SUPREME COURTS DISCRETION REGARDING THE DEATH PENALTY.

I HOPE THE COMMITTEE WILL ACT FAVORABLY ON THE NEEDED CHANGES. I WOULD LIKE TO THANK THIS COMMITTEE FOR HOLDING THIS PUBLIC HEARING ON THIS VERY SERIOUS AND IMPORTANT MATTER. THANKYOU FOR THE OPPORTUNITY TO EXPRESS MY VIEWS.

AMNESTY INTERNATIONAL USA

Tim Cain
New Jersey State Death Penalty Abolition Coordinator
Box 724, Ocean City, NJ 08226 (609) 398-4350

New Jersey State Assembly
Judiciary, Law and Public Safety Committee
January 31, 1991

Testimony of Tim Cain
New Jersey State Death Penalty Abolition Coordinator
For Amnesty International U.S.A.

I represent Amnesty International, an independent, worldwide movement working impartially for the release of all prisoners of conscience, fair and prompt trials for political prisoners and an end to torture and executions.

Currently, most Americans associate Amnesty International with its recent report of human rights abuses carried out by the Iraqi government in its own country and in occupied Kuwait. Unfortunately, earlier reports by Amnesty on the ongoing tragedy in that part of the world went largely unheeded until the United States was on the brink of war.

Similar situations are common as we research, identify, and report on actions by governments considered reproachable by the world community. Such a situation exists in the United States, where the governments of the various states reserve for themselves the right to take the lives of their citizens.

It should be noted that, as with torture in many parts of the world, the representatives of those states largely rationalize this policy of executing their citizens based on the commonly shared values within those states, reinforced oftentimes by the legitimate fears of their citizens. If torture benefits the citizenry by exposing colleagues in terror among the opposition to the government, these countries often say, then this admitted evil must be accepted to bring about the greater good of social order. If the death penalty is desired by a majority of citizens, based on their belief that it deters crime, states often say, then its attendant evils are acceptable.

The world community does not agree. With the exception of Turkey, all western countries in the free world have abandoned capital punishment, Ireland being the last to do so last year. It should be further noted that one of the first acts of those countries emerging from behind the iron curtain has been to abolish the death penalty. This has been true in almost every case.

The new world order heralded by the present administration in Washington must include criteria for civilized behavior of governments that exclude political imprisonment, torture and executions. This, I believe, is the simplest way to

express Amnesty International's view.

The state of New Jersey has decided to buck the trend throughout the world toward more enlightened policies by judicial systems by clinging to the death penalty. We of Amnesty International view that decision with sorrow, not only because of our belief that capital punishment is outside the rightful powers of any state, but also because New Jersey's law is based on what we consider to be some false assumptions.

Among these are the notion that executions deter crime, that the system is practically airtight and therefore innocent people do not get executed, and that the costs of a capital system are roughly equivalent to other alternatives, such as life in prison.

Amnesty International has seen study after study demonstrate that capital punishment does not deter crime. In fact, in countries and states that abolish the death penalty, homicides tend to decrease.

Innocent people do get condemned to death, even in a relatively benign judicial system such as those that exist in most of the states in the U.S.

And, finally, the cost of the death penalty, especially in these days of recession and government deficits, is prohibitive. The enormous amount of money pumped into capital systems, we believe, would be better spent on creating substantive, rather than symbolic, systems for the public safety and the elimination of crime.

Each of these topics are thorougly considered in Amnesty International's report, "United States of America: The Death Penalty" (available from our national office at 322 Eighth Avenue, NY, NY 10001). Also, I have included among the materials herein presented, materials documenting the enormous cost of this system of justice as compared to the cost of those that substitute life in prison for executions.

At the present time, a bill has been referred to this committee which would exclude the mentally retarded from executions (A3024). Although the likelihood of abolition of the death penalty in New Jersey in the immediate future is scant, we believe that exclusion of this very small minority of persons from the ultimate sentence should be very carefully considered, this bill posted and sent to the floor of the assembly for debate.

Most of the materials I submit to you now have to do with the issue of mental retardation and the death penalty. I believe that your careful consideration of these materials will convince the members of this committee, along with the state legislature in general, that the time has come to eliminate the possibility that a person may be executed who may not have the ability either to understand the full impact of his actions or to cooperate with his legal counsel and the court system at an adequate level best to defend himself and his own life.

I ask this committee, therefore, to review this literature, to post A3024, and to bring it to the full assembly for debate and a vote.

Thank you for your kind consideration.

Respectfully submitted

Tim Cain

Tim Cain
NJ State Death Penalty Abolition Director
Amnesty International U.S.A.

FACTSHEET

WHAT DOES THE DEATH PENALTY COST TAXPAYERS?

Why should taxpayers be charged for keeping a person in prison for life; why not kill the person? This question, ethically repellent as it may be, is often posed by death penalty supporters in the United States. Notwithstanding the ethics of killing in order to save money, the cost of executing a person in the United States is far higher than the cost of imprisoning him or her for life.

The United States Supreme Court has recognized that because the death penalty is a uniquely irreversible punishment, capital cases require unique safeguards against procedural errors. The two-phased judgment and sentencing trial, automatic state review, post-conviction hearings, and Supreme Court petitions are extremely costly to the state in terms of both money and human resources. Judges, prosecutors, public defenders, and court reporters are unavailable for other assignments during these lengthy proceedings.

Jury selection and pre-trial motions are also more lengthy in capital cases, and expert consultants such as psychiatrists must often be retained. In addition, the costs of maintaining death rows in state prisons, of clemency hearings, and of the execution itself must be added to the price of executions.

The actual cost of an execution is substantially higher than the cost of imprisoning a person for life.

As early as 1971, the commutation of fifteen prisoners' death sentences to life imprisonment saved the state of Arkansas an estimated $1.5 million. An in-depth study of death penalty costs in New York, released in 1982, placed the cost of executing a prisoner at over $1.8 million. This cost includes only three stages of judicial proceedings. It does not include additional court, security, and counsel fees. Nor does it include estimated millions of dollars associated with state and federal post-conviction reviews and with the execution itself. The $1.8 million figure alone is three times the cost of imprisoning a person for life.

According to an administrator of the California correctional system, "The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top-level prison officials' time spent in administering the units, add up to a cost substantially greater than the cost to retain them in prison for the rest of their lives."

Even with the costly safeguards required by United States judicial systems, gross miscarriages of justice occur. Statistics show that several innocent people are convicted of capital crimes in the United States each year. Yet in the state of Florida, for example, taxpayers fund the irreversible punishment of death at a cost of over $3,178,000 per person killed. More than 240 years of imprisonment could be funded for that price.

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LIFE IN PRISON ONE-SIXTH AS EXPENSIVE

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs $150. Florida's budget for the last meal: $20. Executioner's fee: $150. Undertaker: $525, box included.

But the true cost of an execution is closer to $3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life without parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Jonathan Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.' "

Cases cost more

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea-bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least $36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at $116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of $34,740 each, Spangenberg computed.

Six levels of appeals

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: $137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out $1.2 million in attorney time and $173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about $3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out $12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top $30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

'Isn't good publicity'

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell nearer the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is $13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average, $108,000.

Total it up.

$57 million since 1973

Florida taxpayers have paid more than $57 million for the death penalty since 1973. This number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the $57 million by 18 executions. The bottom line: at least $3.2 million per execution. And the cost is growing.

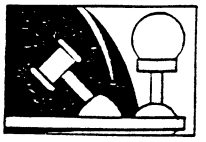
Bob Spangenberg, the bar association consultant: "The costs are going to add and add and add and add. It's going to add up until something gives."

Jonathan Gradess, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide." ■

> *'The costs are going to add and add and add and add. It's going to add up until something gives."*
>
> —BOB SPANGENBERG

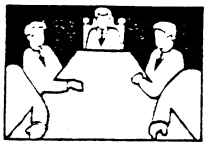
PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.



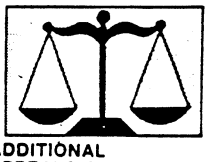
TRIAL & SENTENCING: $36,000-$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.



MANDATORY STATE REVIEW: $69,480-$160,000

Every death sentence must be reviewed by the state Supreme Court — not required in nondeath cases.

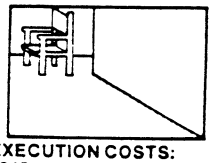


ADDITIONAL APPEALS: $274,820-$1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.

JAIL COSTS: $37,600-$312,600

Death Row requires extra guards for high security. The prison also feeds and houses inmates through their long appeals.



EXECUTION COSTS: $845

Florida pays $150 for the executioner, $150 for a death suit, $20 for the last meal and $525 for burial.

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American Bar Association calls for ban on executing the mentally retarded

The following report was presented to the American Bar Association in February, 1989. It was submitted by Terence F. McCarthy, Chairperson, Criminal Justice Section and Clifford D. Stromberg, Chairperson, Individual Rights and Responsibilities Section. It is reprinted here because it is succinct and clear. The resolution which followed was adopted by the A.B.A. House of Delegates, February 7, 1989.

Executing a person with mental retardation violates contemporary standards of decency. It is a practice opposed by professional associations in the field of mental disability and by a majority of supporters of the death penalty. It is disproportionate to the individual's level of personal culpability and serves no valid penological purpose. Regardless of the outcome of constitutional litigation on this issue, it is a practice which the American Bar Association should disapprove.

The ABA's Recommendation would bar the execution of any defendant who is mentally retarded. It parallels the position that ABA has taken for years in opposition to the execution of individuals for actions committed while they were minors.

The universally accepted definition of mental retardation is that established by the American Association on Mental Retardation (AAMR):

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.[1]

"Significantly subaverage general intellectual functioning" is defined as an IQ of 70 or below.[2] This means that to fall within the professionally accepted definition of mental retardation, an individual's intelligence quotient must be 70 or below, the mental disability must exist concurrently with behavioral difficulties, and this disability must have occurred before the age of 18.

(Persons with IQ scores between 70 and 85, who are sometimes described by laypeople as "borderline retarded," are not within the definition of mental retardation. Such individuals have a substantial mental disability that should be considered as a mitigating circumstance in capital cases, but they are not mentally retarded within the AAMR definition, and are not within the scope of the proposed ABA recommendation.)

The burden of persuasion on whether a defendant is mentally retarded should be on the defendant.

In an earlier era in our history, people with mental retardation were thought to be unusually prone to criminal acts and were believed to be responsible for the majority of crimes in our society.[3] These attitudes have long since been proven false.[4] The era of eugenic sterilization and eugenic segregation are long since past. People with mental retardation are not abnormally prone to criminality or violence.

When people with mental retardation do commit crimes, they should generally be held responsible for their conduct. But, as the Supreme Court has repeatedly observed, "death is different." The specter of a person with mental retardation on Death Row is deeply disturbing to most Americans.

As in the case of capital punishment and minors, there is widespread public sentiment for banning the execution of any person with mental retardation. Scientific polling data indicate that a majority of Americans, even in states that strongly support capital punishment, oppose its imposition on defendants with mental retardation.[5]

The current system of mitigation, (see ABA Standards for Criminal Justice 7-9.3), and competence for capital punishment, (see ABA Standards for Criminal Justice 7-5.6), are not adequate to assure that people with mental retardation will not be executed. (Cont. on page 2.)

RESOLUTION

BE IT RESOLVED, That the American Bar Association urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed; and

BE IT FURTHER RESOLVED, That the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.

Approximately five of the 101 individuals executed since Gregg v. Georgia have been mentally retarded. The only case to achieve substantial local publicity about the defendant's mental disability was the execution of Jerome Bowden in Georgia in 1986. It is significant that the Georgia legislature, at its next session, passed a new statute effectively outlawing the execution of people with mental retardation.[6]

Congress has passed a similar measure in the capital punishment provision of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690). On September 8, 1988, the house of Representatives considered an amendment by Representative Sander Levin of Michigan, which provided "A sentence of death shall not be carried out upon a person who is mentally retarded." The amendment was supported in floor speeches by Representatives George Gekas of Pennsylvania, Judd Gregg of New Hampshire, Arthur Ravenel of South Carolina, and Steve Bartlett of Texas. This represents the widest possible spectrum of political opinion in the House, from liberal Democrats to conservative Republicans. The amendment passed by a unanimous voice vote.[7] On October 14, an identically worded amendment passed unanimously in the Senate. President Reagan signed the legislation containing the amendment.

Professionals and others with direct interest in people with mental retardation have reached the same conclusion. The American Association on Mental Retardation, the oldest and largest professional organization in the field, opposes the death penalty for persons with mental retardation. AAMR's amicus brief in Penry v. Lynaugh (No. 87-6177) has been joined by ten other mental disability groups, including the American Psychological Association, the Association for Retarded Citizens of the United States, the Association for Persons with Severe Handicaps, the American Orthopsychiatric Association, the National Association of Private Residential Resources, and the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded.

There are several persuasive reasons for a ban on executing people with mental retardation. One derives from the Supreme Court's Eighth Amendment doctrine of proportionality. States may execute only those persons whose culpability and moral blameworthiness are proportional to the punishment.[8] The disabilities encountered by all persons who are mentally retarded prevent them from achieving that level of culpability. However moral blameworthiness is measured or estimated, people with mental retardation are never in the top one or two percent of defendants convicted of murder in the level of their personal culpability. This argument is made more fully in AAMR's amicus brief in Penry v. Lynaugh.

The strength of the proportionality argument is indicated by the fact that no adult with mental retardation has a mental age higher than 12.[9]

In addition, the Court has held that "[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."[10] The Court has identified two only such objectives -- retribution and deterrence. The Justices have held that retribution must be related to the individual's level of personal responsibility,[11] and thus the analysis parallels the proportionality doctrine. And the likelihood that a mentally retarded individual will be deterred from a criminal act because he knows that persons with his disability may be executed, or the possibility that a mentally typical person will be deterred by the spectacle of the execution of a mentally retarded defendant are hardly sufficiently plausible to justify the punishment.

The U.S. Supreme Court has granted certiorari in the case of Penry v. Lynaugh on the issue of whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the execution of a defendant with mental retardation. The Penry case also involves the issue of appropriate jury instructions on the issue of mitigation, and there is some likelihood, as a result, that the Court will not reach the Eighth Amendment issue in this case.

Whatever the ultimate resolution of the Eighth Amendment issue, it is important for the American Bar Association to take a policy position in support of a ban on executing mentally retarded defendants. States with capital punishment will soon face the question of executing mentally retarded individuals. Their legislatures will have before them the resolutions of the other relevant professional organizations, as well as the recent enactments by Congress and the Georgia legislature. The position of the ABA on whether such an execution is consistent with contemporary standards of justice would be most important to their deliberations.

As it did in the case of juveniles, the American Bar Association should make clear that a modern and enlightened system of justice cannot tolerate the execution of an individual with mental retardation.

1. American Association on Mental Retardation [previously "Deficiency"], Classification in Mental Retardation 1 (H. Grossman ed. 1983).

2. Id.

3. Five Justices of the U.S. Supreme Court have referred to the history of mistreatment of people with mental retardation in this country as "grotesque." City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3262 (1985) (Stevens, J., concurring), 105 S.Ct. at 3266 (Marshall, J., concurring in part and dissenting in part).

4. Ellis and Luckasson, Mentally Retarded Criminal Defendants, 53 George Washington Law Review 414, 416-21 (1985); Biklen & Mlinarcik, Criminal Justice, Mental Retardation and Criminality: A Causal Link?, 10 Mental Retardation and Developmental Disabilities 172 (1978).

5. See, e.g., Gamino, "73% in Texas Poll Oppose Executing Retarded Inmates," Austin American-Statesman, November 15, 1988; Cambridge Survey Research, Inc., Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey 7, 61 (1986); Blume and Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Arkansas Law Review 725, 759-60 (1988).

6. Ga. Code Ann. § 17-7-131 (j) (1988 Supp.). "Georgia To Bar Executions of Mentally Retarded Killers," New York Times, April 12, 1988, at A26, Col. 4.

7. Congressional Record, September 8, 1988, at H 7282 through H 7283 (daily ed.). See generally Congressional Record, August 11, 1988, at S 11606 through S 11607 (daily ed.) (Statement of Senator Paul Simon).

8. Tison v. Arizona, 107 S.CT. 1676, 1687 (1987); Booth v. Marvland, 107 S.Ct. 2529 (1987); California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring); Enmund v. Florida, 458 U.S. 782 (1982).

9. AAMR, Classification in Mental Retardation 33 (H. Grossman ed. 1983). Cf. Thompson v. Oklahoma, 108 S.Ct. 2687 (1988) (barring the execution of a defendant for an act committed before the chronological age of 16).

10. Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984).

11. Enmund v. Florida, 458 U.S. 782, 800 (1982).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-6177

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION ON MENTAL RETARDATION, *ET AL.* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are professional and voluntary associations interested in people with mental retardation. They represent a broad spectrum of viewpoints within the field of mental retardation.[1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), previously named the Amer-

[1] The Petitioner and Respondent in this case have consented to the filing of this brief.

ican Association on Mental Deficiency, is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation and has appeared before this Court as *amicus curiae* in cases such as *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Bowen v. American Hospital Association*, 476 U.S. 610 (1986).

THE AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) is a nonprofit, scientific and professional organization. With over 70,000 members, it is the major association of psychologists in the United States. This case is of special interest to the APA Division on Mental Retardation, as well as thousands of other APA members who are engaged in scholarly research and the development of people with mental retardation.

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES (ARC) is a national voluntary association of parents, families and friends of people with mental retardation, along with members who have mental retardation. ARC, which has a national membership of over 160,000 people organized in some 1,300 local and state-wide chapters, is directed and led by active volunteer parents.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000 teachers, researchers, administrators, parents, medical personnel, and other professionals dedicated to making appropriate education and services available to persons who experience severe disabilities.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of more than 10,000 mental health professionals, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes, and treatment of mental disabilities, including mental retardation.

THE NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC. (NYSARC) is a state-wide organization of 65 chapters and 53,000 members, including parents and others concerned with the needs of people who have mental retardation. NYSARC provides services to 25,000 clients on a daily basis and is also an advocacy organization. (NYSARC is not affiliated with the Association for Retarded Citizens of the United States.)

THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES represents approximately 650 agencies in 49 states and the District of Columbia that together provide residential services to more than 40,000 people with mental retardation and other developmental disabilities. Members offer a full range of residential services in a variety of settings designed to enhance the development and independence of those served.

THE NATIONAL ASSOCIATION OF SUPERINTENDENTS OF PUBLIC RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED is composed of approximately 200 directors of public facilities which serve people with mental retardation.

THE MENTAL HEALTH LAW PROJECT is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, including *Addington v. Texas*, *O'Connor v. Donaldson*, and *Bowen v. City of New York*. It has participated as *amicus curiae* in this Court in more than a dozen additional cases.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS represents Protection and Advocacy systems in 50 states and six territories, created pursuant to Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6042 (Supp. II 1982). These agencies have the statutory mandate to advocate for the rights of persons with developmental disabilities, including mental retardation.

Amici agree with Petitioner that he is entitled to a reversal on the first question on which certiorari was granted, because the Texas system does not allow jurors to give adequate consideration to mental retardation as a mitigating factor, but *amici* will limit this brief to an analysis of whether the execution of a person with mental retardation is invariably a violation of the Eighth Amendment, as applied to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Eighth Amendment limits the imposition of the death penalty to those defendants whose blameworthiness is proportional to society's most extreme and irrevocable sanction. This Court has held death to be a disproportionate punishment where the characteristics of the offense or of the offender did not match the high level of culpability required by the Constitution.

Capital defendants who have mental retardation lack this constitutionally required level of blameworthiness. The effects of their disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect, make it impossible for them to possess that level of culpability essential in capital cases.

The execution of a person with mental retardation, such as Johnny Paul Penry, cannot serve any valid penological purpose, and as a result it is "nothing more than the purposeless and needless imposition of pain and suf-

fering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Such an execution offends modern standards of decency.

ARGUMENT

I. THE DISABILITIES THAT ACCOMPANY MENTAL RETARDATION ARE DIRECTLY RELEVANT TO THE ISSUE OF CRIMINAL RESPONSIBILITY AND TO THE CHOICE OF PUNISHMENT FOR THOSE CONVICTED OF CRIMES.

A. Mental Retardation Is A Substantial Disability Which Impairs An Individual's Capacity To Understand And Control His Actions.

Every individual who has mental retardation experiences a substantial disability in cognitive ability and adaptive behavior. The universally accepted definition requires that any person who is classified as mentally retarded must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and requires that the disability must have been "manifested during the developmental period." American Association on Mental Deficiency [now Retardation], *Classification in Mental Retardation* 1 (H. Grossman ed. 1983) (hereafter cited as "AAMR, *Classification*"). This means that a mentally retarded individual's measured intelligence is at least two standard deviations below the average person's.[2]

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[2] General intellectual functioning is measured by IQ tests, and to be classified as having mental retardation, a person generally must score below 70 (depending on which test is employed). The average IQ for the overall population is 100; more than 97 percent of all persons score above 70.

Persons with IQ scores between 70 and 85 are sometimes erroneously described as having "borderline retardation," but this classification has long since been abandoned by professionals in the field. AAMR, *Classification* at 6. Individuals with IQ scores in the 70s and 80s, while not mentally retarded, do have reduced cognitive ability, although the reduction is not as severe as for those who have

People with mental retardation are capable of learning, working, and living in their communities. *See generally* J. Conroy & V. Bradley, *Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (1985); *Systematic Instruction of Persons with Severe Handicaps* (M. Snell 3d ed. 1987). Special educators and other professionals have made substantial advances in developing techniques to assist people with mental retardation, and legislatures have acted to attempt to assist such individuals. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (1985). But advances in our capacity to help people with this disability do not change the reality that mental retardation is a substantial disability and that people who have mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442.

This reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation. Among the many substantial intellectual impairments resulting from mental retardation, the most serious occur in logical reasoning, strategic thinking, and foresight. Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982). The ability to anticipate consequences is a skill requiring intellectual and developmental ability. White, *Critical Influences in the Origins of Competence*, 21 Merrill-Palmer Q. 243, 246 (1975). A defendant in a

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mental retardation. Mental disability that falls short of mental retardation should be considered as a mitigating circumstance at the penalty phase of capital trials, just as the youth of a person who is 19 or 20 should be considered. *See, e.g., Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987); *see also Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959) (chronological age of 15 not enough to preclude death penalty, but an IQ of 80 tips the balance to require life imprisonment).

capital case whose understanding of causation and ability to predict consequences are substantially limited by mental retardation lacks an essential ingredient of culpability.

The problems caused by a mentally retarded defendant's substantial intellectual deficits are aggravated by intellectual rigidity, which is often demonstrated by an impaired ability to learn from mistakes and a pattern of persisting in behaviors even after they have proven counterproductive or unsuccessful. *See generally* K. Lewin, *A Dynamic Theory of Personality* (1936); S. Sarason, *Psychological Problems in Mental Deficiency* (3d ed. 1959); Rueda & Zucker, *Persuasive Communication Among Moderately Retarded and Nonretarded Children*, 19 Educ. & Training Ment. Retarded 125 (1984). One feature of this rigidity is that a person who has mental retardation often cannot independently generate in his mind a sufficient range of behaviors from which to select an action appropriate to the situation he faces (particularly a stressful situation).

A related consequence of mental retardation is impairment in the ability to control impulsivity. *See* S. Kirk & J. Gallagher, *Educating Exceptional Children* 144 (1983); Litrownik, Freitas, & Franzini, *Self-Regulation in Mentally Retarded Children: Assessment and Training of Self-Monitoring Skills*, 82 Am. J. Ment. Defic. 499 (1978); Mahoney & Mahoney, *Self Control Techniques with the Mentally Retarded*, 42 Exceptional Children 338 (1976). This appears to be related to problems that people with mental retardation encounter in attention span, attention focus, and selectivity in the attention process. *See generally* C. Mercer & M. Snell, *Learning Theory Research in Mental Retardation* 94-141 (1977). Such an impairment in the area of impulsivity is, of course, directly relevant to the level of an individual's ability to conform his conduct to the law's requirements and therefore to the degree of a defendant's culpability.

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Moral development is also affected by mental retardation. It is widely accepted by researchers that moral reasoning ability develops in stages, incrementally over time, and is dependent on an individual's intellectual ability and developmental level. J. Piaget, *The Moral Judgment of the Child* (Free Press ed. 1965); Kohlberg, *Moral Stages and Moralization: The Cognitive Developmental Approach*, in *Moral Development and Behavior: Theory, Research and Social Issues* 31 (T. Lickona ed. 1976). Thus, mental retardation limits the ability of individuals to reach full moral reasoning ability. *See* Israely, *The Moral Development of Mentally Retarded Children: Review of the Literature*, 14 J. Moral Educ. 33 (1985); Lind & Smith, *Moral Reasoning and Social Functioning Among Educable Mentally Handicapped Children*, 10 Austl. & N. Zealand J. Developmental Disabilities 209 (1984). This does not mean, of course, that people with mental retardation are immoral or that they should escape responsibility for their actions. But it does mean that where mental retardation has placed an upper limit on a defendant's attainment of full moral reasoning ability, he cannot be held to have that level of culpability that would justify punishment by death.

Nor do *amici* contend that people with mental retardation are unusually likely to commit crimes.[3] Most people with mental retardation are law abiding. A complex mix of environmental influences and individual differences unrelated to intelligence determines whether individuals engage in criminal acts. But those individuals with mental retardation who do commit crimes do so with a limited

[3] The false belief, widely held in the early years of this century, that mental retardation was a cause of much of society's criminality is now understood to be a result of the eugenics hysteria of that era. Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978); Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 425-26 (1985).

understanding of causes and effects and a reduced ability to govern their own behavior.

A minimal level of cognitive ability and moral reasoning development are necessary for the level of culpability that will satisfy the requirements of the Eighth Amendment in capital cases. Defendants with mental retardation have serious impairments in intellectual and moral reasoning, strategic thinking, and the ability to foresee consequences. The combination of these substantial limitations is directly relevant to the degree of the disabled defendant's moral culpability for his criminal actions.

B. Mental Retardation Has Long Been Recognized As Relevant To The Choice Of Appropriate Punishment For Crime.

For centuries, Anglo-American law has accepted the principle that the degree of criminal culpability of people with mental retardation is reduced by the effect of their disability. The common law exempted "idiots" from criminal responsibility. 4 W. Blackstone, *Commentaries* *24; M. Dalton, *The Countrey Justice* 223 (1619 & photo. reprint 1973). When English law adopted the *M'Naghten* test for insanity, courts almost immediately extended its applicability to mentally retarded defendants. *Regina v. Higginson*, 174 Eng. Rep. 743 (1843). The modern American formulations of the insanity defense almost invariably speak in terms of "mental disease or defect," the latter referring to defendants with mental retardation. *See, e.g.*, 18 U.S.C. § 17(a) (Supp. IV 1986). Similarly, the weight of authority holds that even when it does not constitute a complete defense, a defendant's mental retardation should be taken into account as a mitigating factor in determining an appropriate sentence. *See, e.g., Coleman v. United States*, 357 F.2d 563, 569 (D.C. Cir. 1965); *Thomas v. State*, 97 Tex. Crim. 432, 262 S.W. 84 (1924) (evidence of "a low order of mentality"); *A.B.A. Standards for Criminal Justice* 7-9.3 (1984). *See gen-*

erally Lockett v. Ohio, 438 U.S. 586 (1978) ("mental deficiency" was one of the mitigating factors that had been prescribed by the Ohio statute). Even before this Court held that the Constitution required consideration of mitigating evidence, state appellate courts reduced sentences of death to life imprisonment on the basis of the mitigating effect of a defendant's mental retardation. *E.g. State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964). *Cf. Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977) (post-*Gregg*).

The reason that mental retardation has been so widely accepted as relevant to the degree of punishment, whether through a finding of nonresponsibility or mitigation, is that courts and legislatures have recognized the disability's relationship to the degree of a defendant's blameworthiness. For example, the Supreme Court of Pennsylvania vacated a death sentence because expert testimony showed that the defendant's subnormal intelligence produced "a smaller range of selectivity as to action than would be had by the average human being" (quoting expert testimony) and meant that the defendant lacked "the ability to think things through to a logical conclusion." *Commonwealth v. Irelan*, 341 Pa. 43, 46, 17 A.2d 897, 898 (1941) (involving a defendant whose mental disability apparently was less severe than actual mental retardation).

American law has never held, nor do *amici* contend, that people with mental retardation cannot be held responsible or punished for criminal acts they commit. Some defendants who have mental retardation are entitled to acquittal because the effect of their disability matches the jurisdiction's test for insanity or because they lack the requisite *mens rea*. Other mentally retarded defendants properly can be convicted and subject to appropriate punishment. But mental retardation always involves a substantial impairment that reduces a

defendant's level of blameworthiness and moral culpability for a capital offense.

II. THE DEGREE OF REDUCTION IN MORAL BLAMEWORTHINESS CAUSED BY A DEFENDANT'S MENTAL RETARDATION RENDERS IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL.

A. Punishment By Death Is Reserved For Those Selected On The Basis Of Their Blameworthiness And Moral Guilt.

Unique considerations attend issues that determine which defendants may be put to death. As this Court has observed, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, the flexibility that states have in devising appropriate sentences for noncapital cases is more strictly circumscribed in cases which may result in a death sentence.

Under modern capital punishment statutes, only a small minority of those individuals who commit willful criminal homicide are actually sentenced to death. *See Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (plurality opinion). This Court has made clear that States cannot select candidates for the death penalty in an arbitrary or unprincipled fashion or solely on the basis of the offense committed. *Furman v. Georgia*, 408 U.S. 238 (1972); *Sumner v. Shuman*, 107 S. Ct. 2716 (1987). "There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984).

This Court's Eighth Amendment opinions make clear that the decision to impose the death penalty must be "directly related to the personal culpability of the crimi-

nal defendant." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). The Court has reversed death sentences that were based on factors unrelated to the defendant's blameworthiness. *Booth v. Maryland*, 107 S. Ct. 2529 (1987). The degree of a defendant's blameworthiness and moral culpability are thus the key criteria for determining who may be put to death and who may not. *Enmund v. Florida*, 458 U.S. 782 (1982).[4]

A principal component of any defendant's culpability is his mental ability and state of mind at the time of the offense. This Court has observed that:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.

Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987).

The obverse is equally true; a substantial reduction in the purposefulness of a defendant's criminal acts or impairment in his comprehension of them and their consequences must surely indicate that a less severe penalty is warranted. *Cf. Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698-99 (1988) (plurality opinion). As Justice O'Connor has observed, our society long ago agreed "that defendants who commit criminal acts that are attributable to . . . mental problems[] may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected

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[4] *Tison v. Arizona*, 107 S. Ct. 1676 (1987), which distinguished *Enmund*, does not weaken its central holding that a defendant's moral culpability is the key criterion for imposing the death penalty. In *Tison*, the Court found that the defendants' conduct was "sufficient to satisfy the *Enmund* culpability requirement." 107 S. Ct. at 1688.

in Anglo-American jurisprudence." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). Mental retardation significantly affects the degree of purposefulness and impairs the comprehension of every defendant who has the disability and commits a capital offense.

B. The Death Penalty Is Disproportionate To The Degree Of Culpability Of Any Defendant With Mental Retardation.

No defendant who has mental retardation is "capable of acting with the degree of culpability that can justify the ultimate penalty." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692 (1988) (plurality opinion).

Amici acknowledge that there is substantial variation among people with mental retardation regarding the degree of their disability and its effect on their reasoning capacity and adaptive behavior. Individuals with IQs in the 50s or 60s differ substantially from persons with IQs in the range of "profound" mental retardation.[5] But this variation would be relevant to the Eighth Amendment issue only if some individuals in the "mild" mental retardation category had such minimal disabilities that they were capable of the level of culpability and moral blameworthiness required for the death penalty. This

[5] The AAMR classification system divides people with mental retardation into four categories: mild, moderate, severe and profound. "Mild" mental retardation includes individuals with IQ scores between approximately 50 or 55 and 70. "Moderate" mental retardation includes those whose IQ scores are between approximately 35 or 40 and 50 or 55. (The precise boundaries depend on the particular intelligence test that is employed.) AAMR, *Classification* at 13. "[C]riminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423 (1985). Approximately 89 percent of people who have mental retardation fall within the "mild" mental retardation category.

is not true. The highest functioning individuals in the "mild" mental retardation category have substantial cognitive and behavioral disabilities. *See* Polloway & Smith, *Changes in Mild Mental Retardation: Population, Programs, and Perspectives*, 50 Exceptional Children 149 (1983); *Lives in Process: Mildly Retarded Adults in a Large City* (R. Edgerton ed. 1984).

Comparison with nonretarded teenagers may illuminate this issue.[6] Most teenagers are of average intelligence,

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[6] The question upon which this Court granted certiorari is framed in terms of "an individual with the reasoning capacity of a seven year old." This is similar to the concept of mental age, a tool used in the field of mental retardation to describe the severity of an individual's disability. Mental age is calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation. *See* D. Wechsler, *The Measurement and Appraisal of Adult Intelligence* 24 (4th ed. 1958). The equivalence between nonretarded children and retarded adults is, of course, imprecise. An individual's mental age can simultaneously underestimate and overestimate attributes of the adult to whom it is applied. An adult will have the physical development and some of the interests and experiences of his nondisabled age peers; mental age suggests underestimation in these areas. But mental age substantially overestimates important problem-solving abilities. Mental age markedly overstates the ability of adults with mental retardation to use logic and foresight in solving problems. *See, e.g.*, Spitz & Borys, *Performance of Retarded Adolescents and Nonretarded Children on One- and Two-Bit Logical Problems*, 23 J. Exper. Child Psychol. 415, 428 (1977); Haywood & Switzky, *Intrinsic Motivation and Behavior Effectiveness in Retarded Persons*, 14 Int'l Rev. Research Mental Retard'n 1 (N. Ellis & N. Bray eds. 1986). *See generally* Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982).

Courts appear to have grasped intuitively the strengths and weaknesses of mental age as an estimation of disability. They have rejected claims that an adult with a mental age below 12 automatically lacks criminal responsibility because children of a similar chronological age are deemed incapable of criminal intent. But courts have frequently used mental age as a shorthand description of an individual's level of reasoning ability when discussing issues

and a minority (as with any age group) have superior intelligence. The common trait of teenagers is relative immaturity (although a few are unusually mature or sophisticated). *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring in the judgment). But their lives have been lived with varying degrees of mental ability, and those varying abilities produce differences in their life experiences. By contrast, people with mental retardation *never* have average, let alone superior, intelligence. The result of this impairment is that their abilities to comprehend concepts such as causation will vary but will never rise above a certain ceiling. The substantial variation among people with mental retardation always occurs below that ceiling. Thus, all persons with mental retardation lack that level of ability that would allow them to be capable of the level of culpability required for the death penalty.

The essence of *amici's* argument is not that jurors, or this Court, should feel sorry for capital defendants with mental retardation and as a result exempt them from the death penalty. Some jurors may reach that conclusion after hearing evidence about a defendant's disability in argument for mitigation. Rather, *amici's* Eighth Amendment argument is wholly different. The nature of mental retardation is sufficiently severe that any person who has that disability and commits a capital offense lacks, by definition, that level of culpability that would allow the state to take his life. Therefore, the case involving people with mental retardation bears no resemblance to hypothetical arguments that "blind people . . . or white-haired grandmothers . . . or mothers of two-year-olds" or "other appealing groups" should be spared from execution. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2721 (1988) (Scalia, J., dissenting). None of these

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such as voluntariness of confessions, competence to stand trial, mitigation, and the insanity defense. *See, e.g., Pickett v. State*, 37 Ala. App. 410, 71 So. 2d 102 (1953).

groups uniformly lacks the ability necessary to achieve the Eighth Amendment's required level of culpability. *Amici's* argument arises not from the "appeal" or sympathetic character of people with mental retardation, but rather from the real and practical effects of their disability.

III. A RULING THAT THE EIGHTH AMENDMENT BARS THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION IS APPROPRIATE AND NECESSARY.

This Court has held that the death penalty violates the Eighth Amendment if it is disproportionate to the circumstances of the case for which it is prescribed. Most frequently, this is because of characteristics of the offense. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). The death penalty may also be excessive and therefore unconstitutional because of characteristics of the defendant for whom it is proposed. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

Although the Court has repeatedly emphasized the importance of individualized determinations of culpability through the system of weighing aggravating and mitigating circumstances, each of these holdings is categorical in nature. It is significant that in each instance, the claim of disproportionality was available in individual cases as an argument for mitigation. The cases reached this Court, and merited its attention, only because the system of considering mitigating circumstances did not invariably preclude the death penalty under the circumstances at issue. Even if most jurors (or most voters or legislators) would conclude, if asked, that the death penalty was inappropriate for non-murdering rapists, peripheral participants in crimes that led to homicides, or children under the age of 16, some trials may still result in a sentence of death under those circumstances. This Court's rulings teach that a function of the Con-

stitution's ban on cruel and unusual punishment is to reflect society's "evolving standards of decency" and to impose them where the system of considering mitigating circumstances in individual cases has failed to reflect those standards by prescribing punishment that is clearly disproportionate to the defendant's culpability.[7]

The possibility that a person with mental retardation could be executed in America has only recently become apparent. The first modern case to receive any substantial publicity was Georgia's execution of Jerome Bowden in 1986, and in that case, the existence and degree of his disability (IQ 65) were not recognized widely in Georgia until after his death. In response to the outrage that many expressed at the spectacle of a person so disabled being executed, Georgia passed a statute banning the execution of people with mental disability. Ga. Code Ann. § 17-7-131(j) (1988 Supp.); *Georgia To Bar Executions of Mentally Retarded Killers*, N.Y. Times, April 12, 1988, at A26, col. 4. Legislatures in other states have not "rendered a considered judgment approving the imposition of capital punishment" on people with mental retardation because the reality of this possibility has not been apparent. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2708 (1988) (O'Connor, J., concurring in the judgment). Polling data strongly indicate that when supporters of the death penalty are asked whether they approve of the execution of people with mental retardation, they oppose

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[7] In each of these cases, the Court has banned the use of the death penalty under the circumstances in question. In his dissenting opinion in *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2712 (1988), Justice Scalia raises the possibility of a rebuttable presumption regarding a defendant's culpability that could be grounded in the Eighth Amendment. *Amici* strongly believe that the Eighth Amendment should be held to preclude any execution of a person with mental retardation, and we are unclear about how such a rebuttable presumption would be structured and implemented. The possibility of such a presumption has not been argued in this case, nor has it been considered by the courts below.

such sentences. Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark. L. Rev. 725, 759-60 (1988) (reporting results of scientific surveys).[8]

Despite the consensus that is now becoming apparent, people with mental retardation may still be sentenced to death. Just as the mitigation system was inadequate to prevent unconstitutionally disproportionate punishment of defendants in *Coker*, *Enmund*, and *Thompson*, Johnny Paul Penry's presence on Death Row demonstrates that the system of considering factors in mitigation cannot be relied upon exclusively to assure that defendants with mental retardation will not be executed.[9] Jurors in an individual case may be confused about the relevance of mental retardation to culpability and may even believe perversely that it should be considered as an aggravating circumstance. *Cf. Miller v. State*, 373 So. 2d 882 (Fla. 1979). Similarly, reviewing appellate courts may misperceive the impact of mental retardation on culpability.

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[8] The identifiable objective indicia of societal opinions on this question, while consistent, are less numerous than those available, for example, on the issue of executing minors. However, this Court has indicated that it looks to objective indicators as part of its own process of deciding whether a punishment is excessive, but that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in particular circumstances. *Enmund v. Florida*, 458 U.S. 782, 797 (1982). In the case at bar, the objective indicia are not numerous because the possibility of a person with mental retardation being executed has only recently become clear. Once the prospect becomes clear, the indicia suggest that Americans consistently reject the execution of persons with mental retardation.

[9] *Amici* acknowledge that the instant case may not be an ideal vehicle for resolving the Eighth Amendment issue, since the Texas system of jury instructions may give jurors inadequate opportunity to evaluate the relevance of mental retardation as a mitigating circumstance. *See Franklin v. Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor, J., concurring in the judgment).

IV. EXECUTION OF A PERSON WITH MENTAL RETARDATION SERVES NO VALID PENOLOGICAL PURPOSE.

The principal reason that *amici* have concluded that execution of a person with mental retardation violates the Eighth Amendment is that it is "grossly out of proportion" to such a defendant's culpability. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). But *Coker* also made clear that a punishment is unconstitutionally excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Id.* The death penalty for people with mental retardation also violates this principle.

This Court has held that retribution is a valid penological purpose, and that in proper cases it can support imposition of the death penalty. But this Court has also concluded that valid exercise of the state's interest in retribution must be related to the degree of the defendant's blameworthiness. *Enmund v. Florida*, 458 U.S. 782, 800 (1982). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. 1676, 1683 (1987).

Deterrence has also been recognized as an acceptable purpose for punishment. But the likelihood that an individual with mental retardation would be deterred from committing a capital offense by the prospect of the death penalty is even smaller than was true for teenagers, since some teenagers have above average intelligence. *Cf. Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (plurality opinion). Similarly, removing the small number of capital offenders with mental retardation from the prospect of execution "will not diminish the deterrent value of capital punishment for the vast majority of [nonretarded] potential offenders." *Id. See generally Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (citing

Sir Edward Coke for the proposition that execution of an insane person is "a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others"); *A.B.A. Standards For Criminal Justice* 7-5.6 (1987) (opposing execution of inmates whose incompetence results from either mental illness or mental retardation).

Amici believe that execution of a person with mental retardation is invariably disproportionate to the level of that individual's culpability and is "nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592. Therefore, we believe that this Court should hold that such executions violate the Eighth Amendment's ban on cruel and unusual punishments.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
RUTH LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:
BARBARA BERGMAN
DONALD N. BERSOFF

September, 1988

APPENDIX

AMERICAN ASSOCIATION ON MENTAL RETARDATION RESOLUTION ON MENTAL RETARDATION AND THE DEATH PENALTY JANUARY, 1988

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION, the nation's oldest and largest interdisciplinary organization of mental retardation professionals, has long been active in advocating the full protection of the legal rights of persons with mental retardation.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that, archaic stereotypes and prejudices to the contrary notwithstanding, the vast majority of people with mental retardation are not prone to criminal or violent behavior.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that some people with mental retardation become involved with the criminal justice system and are often treated unfairly by that system. This mistreatment often results from the unusual vulnerability of individuals with mental retardation and from the failure of many criminal justice professionals to recognize and understand the nature of mental retardation.

WHEREAS, the United States Supreme Court has made clear that in *all* capital cases the judge or jury must consider any mitigating circumstances which would indicate that the death penalty is inappropriate or unjust. Among these mitigating circumstances are any which would tend to reduce the individual offender's personal culpability and moral blameworthiness for the act he or she committed.

WHEREAS, mental retardation is a substantially disabling condition which may affect an individual's ability to appreciate and understand fully the consequences of actions, and which may impair the individual's ability to conform his or her conduct to the requirements of the law. Thus mental retardation should always be considered to be a mitigating circumstance in selecting an appropriate punishment for a serious offense.

WHEREAS, the current system of permitting judges and juries to determine the relevance of mental retardation as a mitigating circumstance on a case-by-case basis has failed to prevent the unjust sentencing of several mentally retarded persons to death.

AND WHEREAS, the competence of individuals with mental retardation to stand trial or enter a guilty plea, and to face execution are always subject to question, raising serious doubts as to the legality of an execution in any particular case.

THEREFORE the AMERICAN ASSOCIATION ON MENTAL RETARDATION resolves that *no person who is mentally retarded should be sentenced to death or executed.*

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SEPTEMBER 27, 1989

TESTIMONY OF JAMES W. ELLIS

PRESIDENT, AMERICAN ASSOCIATION ON MENTAL RETARDATION

VISITING PROFESSOR OF LAW
WASHINGTON COLLEGE OF LAW
AMERICAN UNIVERSITY

PROFESSOR OF LAW
UNIVERSITY OF NEW MEXICO

Thank you, Mr. Chairman, for the invitation and the opportunity to appear before you today to testify on the relationship between mental retardation and the death penalty.

I testify today on behalf of the American Association on Mental Retardation (AAMR). Founded in 1876, AAMR is the nation's oldest and largest interdisciplinary professional organization in the field of mental retardation. Its members include professionals in a wide variety of disciplines, including psychologists, educators, administrators, social workers, physicians, and many others. All of these professionals devote their efforts to serving people with mental retardation in a variety of residential and community settings.

AAMR has not taken any position on the death penalty itself. We are a professional organization whose public policy interests are focused on issues directly related to the rights and needs of

people with disabilities.

The professional consensus on mental retardation and the death penalty. We do oppose the death penalty for any individual with mental retardation. In January, 1988, the Board of Directors of AAMR unanimously passed a resolution declaring that "no person who is mentally retarded should be sentenced to death or executed." A full copy of this resolution is appended to the brief that is attached to this testimony.

AAMR's position in opposition to the death penalty for people with mental retardation has been joined by ten other national disability organizations in a brief to the Supreme Court of the United States. These other organizations are the Association for Retarded Citizens of the United States, the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the American Orthopsychiatric Association, the National Association of Private Residential Resources, the New York Association for Retarded Children, the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, the Mental Health Law Project, and the National Association of Protection and Advocacy Systems.

These professional and voluntary organizations represent a broad spectrum of viewpoints within the field of mental retardation.

This position was endorsed by the American Bar Association at

the meeting of its House of Delegates in February of 1989. It has also been endorsed by the National Legal Aid and Defender Association.

The national consensus. This agreement among interested organizations in the fields of mental retardation and criminal justice is reflected in the beliefs of the American people. Scientific public opinion polls have been taken in at least four states that have the death penalty and nationally. The results of these polls are consistent. In each poll, between two thirds and 80% of the respondents oppose the imposition of the death penalty for anyone with mental retardation. Even more noteworthy is the fact that a majority of those who support the death penalty oppose it for people with mental retardation. Even more people oppose the death penalty for individuals with mental retardation than oppose its imposition on children.[1]

The legislative consensus. This national consensus has also been reflected in recent legislation. Following the public outcry about the execution of Jerome Bowden, a person with mental retardation, Georgia enacted legislation forbidding the execution of mentally retarded defendants. This spring, the governor of Maryland signed similar legislation.

Most significantly, Congress has already reached the same

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[1] See, e.g., Washington Post, January 11, 1989, page A6 (reporting national poll by Louis Harris and Associates showing that 70% of all Americans oppose the execution of persons with mental retardation); "73% in Texas Poll Oppose Executing Retarded Inmates," Austin American-Statesman, November 15, 1988; Blume & Bruck, "Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis," 41 Arkansas Law Review 725, 759-60 (1988).

judgment. In 1988, Congress included a prohibition on executing any person with mental retardation in the death penalty provisions of the anti-drug abuse bill. This amendment passed by voice votes in both houses of Congress. In the House of Representatives, supporters of the amendment during the floor debate included some of the most conservative Republicans and liberal Democrats in that body.[2] Facts about mental retardation. Mental retardation is defined as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.[3]

This definition has been generally accepted by all professional organizations in the field of mental disability and has been codified in numerous statutes.

Persons with mental retardation are, by definition, in the bottom two or three percent of the population in intelligence. They are capable of living and being educated and working in their home communities. The vast majority are law-abiding citizens who can be assets to their communities. But every person with mental retardation has a substantial mental disability.

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[2] Congressional Record, September 8, 1988, H 7282-7283 (Daily ed.) (remarks of Mr. Levin of Michigan, Mr. Gekas of Pennsylvania, Mr. Bartlett of Texas, Mr. Gregg of New Hampshire, and Mr. Ravenel of South Carolina).

[3] American Association on Mental Deficiency [now Retardation], Classification in Mental Retardation 1 (H. Grossman ed. 1983).

People with mental retardation are not unusually prone to commit criminal acts. But when such individuals do violate the law, the nature of their disability is always relevant to the issue of criminal responsibility and blameworthiness. People with mental retardation typically have deficits and handicaps in the areas of communication and memory, impulsivity and attention, moral development, basic knowledge and motivation.[4] The mental age of all adults with mental retardation is always 12 or lower. This is a substantial disability.

The Supreme Court decision in Penry. The Supreme Court of the United States recently decided a case involving mental retardation and the death penalty. In Penry v. Lynaugh, 109 S.Ct. 2934 (1989), the Court reversed the defendant's death sentence because the trial jury had not been given sufficient opportunity to consider the importance of his mental retardation in the selection of an appropriate penalty for his crime. The Court held that Penry's mental retardation was relevant to the level of his personal responsibility for his acts. "Because Penry was mentally retarded, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," properly instructed jurors could "conclude that Penry was less morally culpable than defendants who have no such excuse."

Justice O'Connor wrote that the Court was ordering a new sentencing hearing to avoid the "risk that the death penalty will

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[4] Ellis & Luckasson, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review 414, 427-32 (1985).

be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

In another portion of its decision, the Court declined "at present" to rule that the execution of individuals with mental retardation is always prohibited by the Constitution. The Court noted that a national consensus about mental retardation and the death penalty would trigger Eighth Amendment protections, and noted that public opinion polls and professional organizations (including AAMR) opposed such executions. The Court left open the possibility that it would reach a different conclusion after more legislative enactments: "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely."

Therefore the Justices have clearly placed this issue on the legislative agenda of Congress and the state legislatures, both to set the rules for their respective jurisdictions, and also to reflect the national consensus in a way that will inform future judicial interpretation of the Eighth Amendment.

<u>Why should Congress ban the death penalty for people with mental retardation?</u> The American Association on Mental Retardation does not take the position that people with mental retardation can never be punished -- even punished severely -- for criminal acts they commit. Rather, it is our position that the death penalty

presents unique moral and public policy issues; as the Supreme Court has frequently said, "Death is different." We believe that punishment by death is always disproportionate to the culpability of an offender with mental retardation.

It is important to remember that only about one percent of all persons convicted of murder are sentenced to death and far fewer than that are executed. In a series of decisions over the last decade, the Supreme Court has made clear that the only criteria that may be used for selecting the "one-in-a-hundred" who may be sentenced to death are the personal culpability and moral blameworthiness of the defendant. As noted earlier, mental retardation has a substantial effect on an individual's blameworthiness for his unlawful acts.

A key element in ascertaining moral culpability is the individual defendant's state of mind and level of intellectual and moral understanding of his actions. To permit the execution of a person with mental retardation requires concluding that such an individual is both in the bottom two percent of the population in intelligence and also in the top one percent of the population in his appreciation and understanding of the wrongfulness of his actions. We strongly believe that, as a practical matter, no one can be in both categories. We therefore believe that sentencing any person with mental retardation to death represents a tragic injustice.

Why other protections in the law will not prevent the execution of persons with mental retardation. It is sometimes

suggested that legislators need not pass a specific provision exempting people with mental retardation from the death penalty because other features of the criminal law already accomplish the same result. Provisions that are mentioned in this regard include incompetence to stand trial, the insanity defense, mitigation considerations, and competence to be executed.

Extensive experience in the thirty-seven states that currently provide for the death penalty makes absolutely clear that these provisions, although valuable and essential for their own purposes, will not prevent the execution of people with mental retardation. Of the 118 people executed since 1976, at least seven have had mental retardation. All seven of these executions took place in states that had in their laws all of the protections listed above. Congress was correct when it concluded in 1988 that a separate and explicit provision prohibiting the execution of people with mental retardation is necessary.

No public policy objective is served by executing people with mental retardation. Supporters of capital punishment point to two purposes they believe it serves: retribution and deterrence. Regardless of whether or not the penalty serves these purposes in other cases, it does not do so for defendants with mental retardation.

The Supreme Court has made clear that for the state to use retribution as a justification for imposing the death penalty, the penalty must be commensurate with the level of the individual's personal blameworthiness. But as indicated earlier, a person with

mental retardation by definition has a reduced level of culpability resulting from the effect of his mental handicap.

Similarly, a deterrence theory will not justify executing a person with mental retardation. The notion that a person disabled by mental retardation will refrain from a course of conduct because Congress has declined to enact the prohibition requested here is implausible. Similarly, removing the small number of capital offenders who have mental retardation from the prospect of execution cannot diminish the deterrent value of the penalty for nonretarded potential offenders. Executing a person with mental retardation will deter no one.

Centuries ago, Sir Edward Coke explained the law's prohibition on executing an insane person by describing it as "a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others." The execution of a person with mental retardation in modern times matches that description as well. As with any capital punishment that is unsupported by valid public purpose, it is "nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, 433 U.S. 584, 592 (1977).

Conclusion. We believe, as does the vast majority of the American people, that it is inhumane and unjust to subject a person with mental retardation to the death penalty. Any Federal legislation providing for capital punishment must include a provision baring the execution of persons with mental retardation. Congress took this step in enacting the drug bill last year. The

proposed legislation you are currently considering should be amended with an identical provision.

The Association for Retarded Citizens of the United States passed a strong resolution in 1985 opposing the application of the death penalty to offenders with mental retardation:

"WHEREAS, The Association for Retarded Citizens has traditionally defended the rights and interests of vulnerable citizens with mental retardation and has shown particular concern that such citizens be treated fairly in the criminal justice law process and in all of its stages; and

" WHEREAS, To execute someone who lacks these basic mental capacities offends not only our notions of justice, but of ethical conduct of civilized people; and

" WHEREAS, Although these positions are well-founded in the common law, they are frequently breached in the rough and tumble of the adversarial justice system; and

" WHEREAS, We recognize that protection of society is a paramount value, and that persons with mental retardation who commit crimes, when they could have conformed their conduct to the requirements of law, should suffer some punishment; and

"WHEREAS, Recognition of those principals is not, however, inconsistent with the ARC taking a position that society should spare the lives of persons with mental retardation who lack the mental ability to be deterred by capital punishment; and

"WHEREAS, Unless we adopt this position, the legitimate ends of the criminal justice system will not be met; therefore be it

"Resolved, That the Legal Advocacy Committee of the Association for Retarded Citizens of the United States be empowered to present this position that the state not exact capital punishment upon a person when he is unable to comprehend the seriousness of the crime, or even the concept of death, to relevant correctional boards and judicial authorities."