State of New Jersey
STUDY COMMISSION ON THE
IMPLEMENTATION OF THE DEATH PENALTY
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CHRISTINE TODD WHITMAN
Governor

DICK ZIMMER
Chair

August 6, 1998

The Honorable Christine Todd Whitman
Governor of New Jersey
State House
CN 001
Trenton, New Jersey 08625

Dear Governor Whitman:

The Study Commission on the Implementation of the Death Penalty is pleased to submit our final report, fulfilling the charge of Executive Order No. 72. The Executive Order directed us to examine the death penalty in New Jersey and to identify areas in which the death penalty process can be improved. As required by the Executive Order, this report offers recommendations and constitutional and statutory proposals designed to expedite the death penalty process in this State which also ensure that the death penalty is administered in a just manner.

On behalf of the citizens of our State, we appreciate your leadership and support in these important matters and thank you for the opportunity to provide you with our recommendations.

Respectfully submitted,

STUDY COMMISSION ON THE
IMPLEMENTATION OF THE DEATH
PENALTY

Dick Zimmer, Chair

c. The Honorable Donald T. DiFrancesco
Senate President
The Honorable Jack Collins
Speaker of the General Assembly

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ACKNOWLEDGMENTS

The Study Commission appreciates the assistance it has received from staff and from those who appeared at its public hearings. It is especially grateful for the assistance of Deputy Attorneys General Robert Bonpietro and Mark Paul Cronin in the drafting of this report and Assistant Attorney General Brian J. Litten for his role in coordinating the production of this report.

EXECUTIVE SUMMARY

New Jersey's death penalty law has existed for sixteen years. Since its adoption, not a single murderer has been executed. Therefore, one year ago Governor Whitman established the Study Commission on the Implementation of the Death Penalty to examine the death penalty laws and procedures in New Jersey and to make recommendations to improve the process.

In its examination of New Jersey's death penalty, the Commission held several public meetings throughout the State and heard the testimony of numerous witnesses, including victims' family members and legal experts. A summary of witness testimony is attached to the report as Appendix A. The Commission also received written reports and testimony concerning the death penalty and toured "death row" at New Jersey State Prison in Trenton.

The Commission has concluded that the death penalty system, as currently implemented, allows some murderers who deserve capital punishment to avoid the death penalty altogether and permits inexcusable delays in the execution of those who are sentenced to death, even after taking into account the panoply of rights that should be accorded all criminal defendants and the special care that must be taken when a human life is at stake. The Commission believes that the amount of time consumed by death penalty cases is excessive and undermines the deterrent effect of capital punishment, promotes disrespect for the criminal justice system and prolongs the suffering of victims' families. As Professor Barry Latzer testified before the Commission, there is far greater incentive to engage in dilatory

defense tactics in capital cases than in other criminal cases, because "normally a man in prison wants to get out as quickly as he can. Someone sentenced to death wants to stay in as long as he can." A flow chart that sets forth the trial and appellate levels of a capital case is attached to the report as Appendix B.

The Commission has endeavored to be fair as well as practical, and to recommend only those changes in the law that will enhance public confidence that the death penalty is imposed in a just manner. The Commission's recommendations address issues relevant to the pre-trial, trial, appeal and execution stages of death penalty cases. On July 14, 1998, the County Prosecutors Association voted unanimously to support all of the Commission's recommendations. A brief summary of the Commission's final recommendations follows:

A. Pre-trial

A1. The Chief Justice should designate judges in each county or vicinage to specialize in the handling of capital cases. *See Recommendation A1, page 11.* Currently, it takes approximately 18 months to two years after an indictment in a capital case before the trial begins. Delay reduces the ability of the State to prosecute cases effectively, undermines the deterrent effect of the death penalty and causes unnecessary additional pain to victims' families. In many cases, part of the delay can be attributed to the extensive period of time necessary for a judge who is inexperienced in capital litigation to master the unique complexities of a death penalty case.

A2. The number of peremptory challenges of jurors in criminal cases, including capital cases, should be equalized at 8 for both the defense and the State. *See Recommendation A2, page 14, and Proposal I, page 41.* It takes six to ten weeks to select a jury in the average death

penalty case. Reducing the number of peremptory challenges will reduce the time needed to select a jury. Additionally, because the number of challenges available to the defense and the State is unequal, it enhances the ability of the defense to find a single juror whose vote could hang the jury and thereby spare a defendant from a death sentence. Equalizing and reducing the number of peremptory challenges has been recommended to the Supreme Court of New Jersey by the Conference of Assignment Judges and the Court's Criminal Practice Committee.

A3. The State should receive notice of and discovery related to mitigating factors within 30 days of arraignment. *See Recommendation A3, page 16, and Proposal II, page 45, line 12, through page 46, line 6.* Court rules generally require a prosecutor in a capital case to provide the defense, at the time of arraignment, with a list of the aggravating factors that may be proved at the penalty phase and any discovery in the prosecutor's possession relevant to the existence of any mitigating factors. In contrast, the court rules also permit the defense in a capital trial to withhold its list of mitigating factors, and the discovery bearing on those factors, until after a guilty verdict or plea. The late disclosure and discovery of mitigating evidence severely limits the ability of the State to prepare to rebut it.

A4. The aggravating factors should be amended to include defendants who have previously been convicted of crimes of violence. *See Recommendation A4, page 19, and Proposal II, page 47, lines 5 through 9.* The information currently available to a sentencing jury pertaining to the criminal background of a capital defendant is unreasonably limited. The only information from the defendant's prior criminal record which the jury may currently consider is a prior conviction for another murder. Prior convictions for other violent crimes ought to be taken into account when deciding whether a murderer should be sentenced to death.

A5. The defendant's awareness that a victim is vulnerable due to a physical or mental impairment should be an aggravating factor. *See Recommendation A5, page 22, and Proposal II, page 48, lines 12 through 15.* Under current law, the murder of a child younger than 14 is an aggravating factor. A defendant who is aware that his or her victim is particularly vulnerable, even if the victim is 14 or older, should also be eligible for capital punishment.

B. Trial

B1. The victim-impact statement elicited by the prosecution and the allocution statement of the defendant in the penalty phase should be presented in a similar manner. *See Recommendation B1, page 23, and Proposal II, page 49, line 18 through page 51, line 13.* The Supreme Court has established procedural guidelines to minimize the possibility that victim-impact statements may inflame the jury and prevent the jury from deciding punishment on the basis of relevant evidence. The defendant, however, is permitted to make an unsworn allocution statement appealing to the jury's emotion and literally begging the jury to spare his life. The Commission recommends codifying procedures with respect to the admission of the defendant's allocution statement so that they are similar to procedures for the introduction of victim-impact evidence. Thus, a defendant should be required to submit any allocution statement in writing to the trial court for review at a hearing outside the presence of the jury. Also, at the hearing, the defendant should be instructed with respect to the limitations of his allocution and the potential remedial action the court may take if the defendant violates those restrictions. The defendant should further be instructed that his reading of his statement should not be emotional. This provision will ensure that a defendant is not able to inject improper emotionalism into a case and prevent the jury from deciding the punishment impartially on the basis of the evidence.

B2. The State should be given the option to retry the penalty phase of a capital trial if the jury is unable to reach a unanimous verdict on punishment after finding the defendant guilty. *See Recommendation B2, page 26, and Proposal II, page 46, line 22 through page 47, line 3.* The inability of the jury to reach a unanimous verdict on punishment results automatically in a sentence of imprisonment. In cases where a jury is unable to agree on a penalty phase verdict, the Commission recommends that the law be amended to provide the State with the option of either conducting a new sentencing proceeding before a new jury or accepting a term of imprisonment.

C. Appeal

C1. The Administrative Office of the Courts should expedite preparation of transcripts for appeals in capital cases in order to enable the Supreme

Court Clerk to schedule the appeal management conference more expeditiously following the verdict. *See Recommendation C1, page 29.* The Commission has learned that the appeal management conference may be held as late as four months after the verdict. A significant portion of this time is consumed by delay in the preparation of the trial transcripts. In order to reduce this delay and enable the appellate process to commence more expeditiously, the Commission recommends that the Administrative Office of the Courts seek to improve efficiency in the preparation of the trial transcripts.

C2. Competent capital defendants should be permitted to waive all review after direct appeal. *See Recommendation C2, page 30, Proposal II, page 51, lines 25 through 28, and Proposal III, page 53.* It is manifest that the prosecution of an unwanted post-conviction relief application delays the imposition of the death sentence. No other jurisdiction requires that these hearings be conducted against the defendant's wishes.

C3. Proportionality review should be eliminated. *See Recommendation C3, page 31, Proposal II, page 51, lines 18 through 25, and Proposal IV, page 54.* The most significant factor to delay the appellate process of a capital case is proportionality review. The elimination of proportionality review will substantially reduce the time period between imposition of a death sentence and actual execution without reducing fairness or denying due process to a capital defendant. It is noted that the elimination of proportionality review will not inhibit a capital defendant's ability to raise any constitutional issues on his direct appeal or on post-conviction review. Thus, a defendant will still be able to make a claim, for example, that his death sentence was imposed in an arbitrary manner or on the basis of any invidious factor. New Jersey's death penalty laws are designed, in their entirety, to ensure that the death penalty is imposed in a just and even-handed fashion. Nevertheless, as an additional safeguard, the Attorney General has agreed to consider the adoption of guidelines to further ensure the uniform application of the death penalty law.

C4. The Supreme Court of New Jersey should adopt the recommendations of the Division of Criminal Justice regarding post-conviction review procedures and stays of execution. *See Recommendation C4, page 34.* These recommendations provide for specified time limitations for certain review proceedings, including for the filing of post-conviction

relief applications. The Commission recommends that the Supreme Court of New Jersey adopt these rule change proposals.

C5. A statute should be enacted to enable New Jersey to utilize the limitation periods for determining applications and motions in habeas cases under the Anti-terrorism and Effective Death Penalty Act of 1996. *See Recommendation C5, page 36, and Proposal V, page 55.* A recent federal law provides for expedited time limits for the filing of habeas applications by capital defendants, as well as time requirements for the district court and circuit court of appeals to render decisions. The benefits of the federal law are available to states which establish, by statute or rule, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been affirmed on direct appeal. The statute or court rule must also provide standards of competency for the appointment of such counsel. The Commission thus recommends the adoption of a statute to enable New Jersey to take advantage of these new habeas provisions.

D. Execution

D1. The victim's and defendant's immediate families should be permitted to attend the execution. *See Recommendation D1, page 38, and Proposal VI, page 58.* Under present law, the victim's family is not permitted to attend the execution of the person convicted of the victim's murder. N.J.S.A. 2C:49-7. As a matter of fairness, compassion and respect for the victim's family, the Commission believes that the law should be amended to permit the victim's family to attend the execution if they so desire. The Commission also recognizes that an execution results in a loss for the condemned's family. Thus, the Commission recommends that family members of the person sentenced to death be permitted, at the Commissioner's discretion, to attend the execution.

INTRODUCTION

A. The Study Commission

On August 6, 1997, precisely fifteen years after Governor Kean signed the New Jersey Death Penalty Act into law, Governor Whitman issued Executive Order No. 72, establishing the Study Commission on the Implementation of the Death Penalty. Governor Whitman charged the Commission to evaluate ways to improve the death penalty process because, in the fifteen years that had passed since the adoption of the Death Penalty Act, the State had yet to carry out a sentence of capital punishment. Accordingly, Executive Order No. 72 directed the Commission to "identify areas in which the death penalty process in our State can be improved, and . . . make specific recommendations for change that would expedite the death penalty process while ensuring that the death penalty is administered in a just manner." A copy of the Governor's Executive Order is attached to this report as Appendix C.

The Executive Order directed the Commission to examine a number of specific issues, including:

> (a) Whether, and if so, in what manner, the appellate and post-conviction relief process can be streamlined;
>
> (b) Whether, and if so, in what manner, the rules of evidence applicable to the death penalty phase of a capital trial should be modified;
>
> (c) Whether a death penalty jury should be allowed to consider additional aggravating factors, such as whether the victim

was physically or mentally impaired and whether the defendant has prior violent convictions other than murder. Under current law, a jury making a death penalty decision is not permitted to consider these factors; and

(d) Any other issues the Commission finds to be relevant to improving the death penalty process in our State.

The Commission held a number of public meetings throughout the State and heard from many witnesses, including victims' families, legal scholars, a representative of the judiciary, prosecutors and defense attorneys. The views of those witnesses, and especially of the victims who testified before us, played a vital part in helping to reach a consensus on specific recommendations. We have endeavored to be fair as well as practical, and to recommend only those changes in the law that will enhance public confidence that the death penalty is imposed in a just manner.

The Commission met in Trenton on July 10, 1998, to adopt the recommendations contained in this report. Because the Commission included members from diverse backgrounds and with different interests, it was not possible for the Commission to support each of the recommendations unanimously. Where a Commission member expressed a desire to abstain or oppose a recommendation that a majority of the Commission voted to support, that Commission member's abstention or opposition is so noted. Additionally, each Commission member was afforded the opportunity to comment with respect to positions taken. The Public Defender submitted written commentary in response to this report which is attached to this report as Appendix D.

B. History of New Jersey's Death Penalty

In 1972, the United States Supreme Court issued a decision, Furman v. Georgia, 408 U.S. 238 (1972), which resulted in the invalidation of numerous states' death penalty laws. Following the United States Supreme Court precedent, the Supreme Court of New Jersey declared New Jersey's death penalty law unconstitutional. State v. Funicello, 60 N.J. 123 (1972). There followed ten years of debate over the reenactment of a death penalty that would meet federal and State constitutional standards. In 1982, the State enacted a law reinstating the death penalty. P.L.1982, c.111, effective August 6, 1982.

The first person sentenced to die under the new law was Thomas Ramseur, on May 17, 1983. The State Supreme Court overturned Ramseur's death sentence based on an error in the jury instructions, and he was resentenced to life imprisonment. State v. Ramseur, 106 N.J. 123 (1987).

The State Supreme Court reversed the first 28 death sentences it reviewed. On January 24, 1991, the Court upheld the death sentence of Robert Marshall, who was convicted on March 5, 1986. Marshall exhausted his state appeals on March 5, 1997. He is now awaiting habeas corpus review in federal district court. At this date, no other death row defendant has exhausted state appeals.

Since 1982, prosecutors have filed a notice of aggravating factors, the first step in identifying a case as a capital murder proceeding, in 384 cases. Of these cases, 355 have been tried (excluding retrials), and juries have returned verdicts of death-eligible murder in 162 cases. Of these 162 cases, a death verdict was

subsequently imposed upon 48 defendants. In many of these 48 cases, death verdicts were later reversed.

In 1988, the Supreme Court of New Jersey decided State v. Gerald, 113 N.J. 40 (1988). In that case, the Supreme Court held, as a matter of State constitutional law, that only those defendants who intended to cause death, and did not intend merely to cause serious bodily injury, were eligible for the death penalty. Public reaction to the Gerald decision was strong -- the people of the State voted to amend Article I, paragraph 12 of the State Constitution, effective December 3, 1992, to provide that a person who purposely or knowingly causes serious bodily injury resulting in death may be subject to the death penalty.

Since 1991, only 16 defendants have received death sentences. Of those, one defendant's sentence was reversed, and another defendant died in prison awaiting execution. Accordingly, there are 14 inmates presently on death row. Their cases are in various stages of direct appellate review, proportionality review, or post-conviction review in State courts, or in the federal district court on habeas corpus review.

RECOMMENDATIONS

A. Pre-trial

A1. The Chief Justice should designate judges in each county or vicinage to specialize in capital cases. For counties or vicinages with limited numbers of judges who handle criminal trials, the Chief Justice should assign specialized judges from outside the region to preside over capital trials in these areas as the need arises. Alternatively, the Chief Justice should designate for capital cases judges who would be based in Trenton, but would travel to other parts of the State to handle capital cases on an as-needed basis.

One of the most significant factors of delay in the ultimate imposition of a death sentence occurs early in the process -- before the trial even commences. Currently, it takes approximately 18 months to two years after an indictment in a capital case before the trial begins. In his testimony before the Commission, Monmouth County First Assistant Prosecutor Alton Kenney cited one example from Monmouth County in which his office was trying to bring a case to trial that was more than four years old. John Redden, former Deputy First Assistant Prosecutor in Essex County, confirmed that the period of pretrial delay in his county was similar -- about two years between indictment and trial.

Pretrial delay is undesirable from the perspective of all concerned, with the possible exception of the capital defendant. From the prosecutor's perspective, delay reduces the ability of the State to prosecute its case effectively. As time goes on, memories of witnesses fade and the possibility that evidence may deteriorate

or be lost increases. For the families of the victims of these crimes, the feelings of frustration and uncertainty increase with each passing day.

First Assistant Prosecutor Kenney observed that part of the delay can be attributed to the complexity of capital litigation and the relative inexperience of some of the judges assigned to preside over death penalty cases. Former Deputy First Assistant Prosecutor Redden, too, noted the lack of experience of the judges in his county in handling capital cases. The need for expertise in death penalty trials is self-evident; the sheer volume of the 300-page Trial Judges' Bench Manual for Capital Cases confirms this conclusion. Therefore, the Commission recommends that the Chief Justice designate judges in each county or vicinage who will specialize in capital cases.

These judges who handle death penalty cases should be selected to do so based on prior experience in presiding over death penalty cases or a significant number of other criminal cases, particularly homicide cases, with due consideration of their willingness to serve as designated capital judges. Specialized judges will reduce pretrial delay in a number of ways -- they will be experienced in the mechanics of bringing a death penalty case to trial, from scheduling to motion practice to presiding over discovery. Also, many of the motions submitted in various capital cases are similar, if not identical; a judge with the requisite expertise will not have to devote substantial time to learning the law in a particular area if the judge has handled similar motions in the past.

The use of designated capital judges will also reduce delays in jury selection and trial. Their experience in the comprehensive and painstaking requisite questioning of potential jurors on pretrial publicity, views on the death penalty, and other matters will facilitate and expedite the selection of juries. Their expertise in issues that typically arise in both the guilt and the penalty phases of a capital trial with respect to motions, admissibility of evidence, instructions to the jury, and other areas will ensure that the trial proceeds relatively expeditiously.

Another benefit of a specialized capital judiciary will be the increased likelihood that more death-sentenced defendants will ultimately receive the punishment their juries have unanimously determined that they deserve. Judges who are experienced in death penalty jurisprudence will be less prone to making inadvertent mistakes which might constitute reversible error. This result will immeasurably enhance the confidence of the people of the State of New Jersey in the efficacy of capital punishment.

It is recognized that some counties do not have sufficient judicial resources to devote designated judges to capital cases. Indeed, Thomas Critchley, an Assistant Prosecutor in Morris County with substantial experience in litigating capital cases, observed that in smaller counties, a capital case can effectively cripple a courthouse. Assistant Prosecutor Critchley cited an example from his county where, due to a dearth of other criminal trial judges during the trial of a capital case, the death penalty trial created a substantial backlog. Essentially, no

other criminal trial could proceed during the three to four month period of the capital case.

Therefore, the Commission also recommends, with the Public Defender and Ms. Brown abstaining, that the Chief Justice assign specialized capital judges from outside these smaller counties to preside over death penalty trials therein as the need arises. This will allow the regular business of the courthouse to continue, ensuring speedier trials not only in capital cases, but in all other criminal cases as well. Alternatively, the Commission recommends that the Chief Justice designate a judge or judges to handle capital cases on an as-needed basis. The Commission also recommends that the Legislature appropriate sufficient funding to the judiciary to implement these recommendations.

A2. The number of peremptory challenges of jurors in criminal cases, including capital cases, should be equalized at 8 for both the defense and the State. *See Proposal I, p. 41.*

Another significant contributing factor to delay in the progress of a capital trial is jury selection. R. 1:8-3(d) and N.J.S.A. 2B:23-13b allow for 20 peremptory challenges for the defense in a capital case (as well as certain other types of criminal trials), and only 12 for the State. Generally, in death penalty trials, jury selection occurs under the "struck jury" system. In this system, a large number of potential jurors are questioned and qualified before the exercise of peremptory challenges. In the typical capital case, at least 48 jurors will be qualified -- the 12 who will ultimately decide the case, four who will later be selected as alternates,

20 to account for the number of peremptory challenges available to the defense, and 12 to account for the State's peremptories.

First Assistant Prosecutor Kenney testified that, in recent years, the time needed to select a jury in a capital trial has increased dramatically. Mr. Kenney estimated that it takes six to ten weeks to select a jury in the average death penalty case. Mr. Kenney also observed that, because the number of challenges available to the defense and the State is unequal, the defense has a greater ability to find the one juror whose vote could hang the jury and thereby spare a defendant from a death sentence. (*See Recommendation B2, page 26.*) Assistant Prosecutor Thomas Critchley also believed that the disparity in the number of peremptory challenges gave the defense a huge tactical advantage in jury selection. Equalizing and reducing the number of peremptory challenges has also been recommended to the Supreme Court of New Jersey by the Conference of Assignment Judges and the Supreme Court's Criminal Practice Committee. The Conference of Assignment Judges recommended reducing the number of peremptory challenges to 8 each in all criminal cases covered by N.J.S.A. 2B:23-13b. The Court's Criminal Practice Committee limited its recommendation to noncapital trials. See 152 N.J.L.J. 956 (June 8, 1998); 151 N.J.L.J. 709-10 (February 16, 1998).

The Commission therefore recommends that parity in the number of peremptory challenges be established for both the defense and the State in death penalty cases. It is further recommended that each party receive 8 challenges.

In addition to leveling the tactical playing field for the State and the defense, this proposal will also increase the likelihood that juries selected in capital cases are impartial while reducing the likelihood that a jury will be selected that is biased against the imposition of a death sentence. The impartiality of a jury is an important factor in ensuring that those capital defendants deserving of the ultimate punishment actually receive it. Although the mission of this Commission is to recommend changes with respect to capital punishment practice and procedure, it is understood that this proposal will apply to all criminal trials in general.

The Public Defender dissents from this proposal. Three members of the Commission do not agree with the recommended number of challenges. One of those members, retired Superior Court Judge Daniel R. Coburn, stated his belief that reducing the number of peremptory challenges would lead to more challenges of jurors for cause.

A3. The State should receive notice of and discovery of mitigating factors within 30 days of arraignment. ***See Proposal II, page 45, line 12 to page 46, line 6.***

R. 3:13-4(a) provides that the prosecutor in a capital case must provide to the defendant at arraignment, unless the time is enlarged for good cause, a list of the aggravating factors that may be proved at the penalty phase. The rule further requires the prosecutor to provide to the defendant, at the same time, any discovery in his or her possession relevant to the existence of any mitigating

factors. Anomalously, R. 3:13-4(b) allows the defense in a capital trial to withhold its list of mitigating factors, and the discovery bearing on those factors, until after a guilty verdict or plea.

The disparity in the timing of the disclosure of aggravating and mitigating factors is a problem for several reasons. As First Assistant Prosecutor Kenney stated in his testimony, prospective jurors are questioned with respect to their reactions to specific aggravating factors. Those jurors who would automatically impose the death penalty when confronted with a particular aggravating factor are removed for cause. Yet, jurors are not questioned about mitigation evidence except in the most general terms; there is no way to determine if a potential juror confronted with specific types of mitigating evidence would consider voting for the death penalty.

In addition to skewing the fairness of jury selection, the late disclosure and discovery of mitigating evidence severely limits the ability of the State to investigate and prepare any rebuttal. The penalty portion of a capital trial may commence within days of the guilty verdict. Former Deputy First Assistant Prosecutor Redden observed that the State would be fortunate to have weeks, rather than days, to react to evidence of which the defense has long been aware. Assistant Prosecutor Critchley noted that, while the prosecution may have some awareness of the general nature of the defense's case in mitigation, the specifics were "always . . . a complete shock and surprise." Consequently, the prosecution

is handicapped in its investigation of this mitigating evidence and often is unable to thoroughly prepare its case.

Thus, the Commission recommends that the defense be required to provide notice of mitigating factors and the evidence bearing on the mitigating factors within 30 days of arraignment. This will provide the defense with one month to respond after its receipt of discovery. Providing for reciprocity in discovery for the penalty phase will enhance the likelihood of selection of an impartial jury and enable the prosecution to investigate the proposed mitigating evidence more comprehensively. Mitigating evidence which is developed later should be provided to the prosecutor as soon as the defense discovers it.

The Commission recommends that the Legislature enact a statute amending N.J.S.A. 2C:11-3c(2)(e) to address the issue. In addition to providing for parity in discovery, the statute should permit defense counsel to move for a protective order pursuant to R. 3:13-3(f) to defer the discovery required by the rule if the court finds that early disclosure will unduly prejudice the defense during the guilt phase. The ability to seek a protective order will allay the concerns expressed in the Committee Comment to R. 3:13-4, made when the rule was enacted in 1982, that post-guilt phase discovery of mitigating evidence was necessary so that the defendant would not be required to disclose information that might prejudice the defendant in the guilt phase. See Pressler, Current N.J. Court Rules, Comment, R. 3:13-4 at 809.

The Public Defender is opposed to this proposal, believing that the current discovery rules should not be altered.

A4. The aggravating factors should be amended to include defendants who have previously been convicted of crimes of violence. *See Proposal II, p. 47, lines 5 to 9.*

Traditionally, the extent of a defendant's prior criminal record is an important consideration at sentencing upon conviction of another offense. N.J.S.A. 2C:44-1a(6) requires a sentencing judge to consider "the extent of the defendant's prior record and the seriousness of the offenses of which he has been convicted."

In contrast, the amount of information available to a sentencing jury on the criminal background of a capital defendant is quite limited. Currently, the only information from the defendant's prior criminal record which the jury would ever consider concerns evidence of a prior conviction for another murder. N.J.S.A. 2C:11-3c(4)(a).

Hence, the violent background of a capital defendant will play no role in sentencing unless that defendant has previously been convicted of murder. A murderer, perhaps deserving of the death penalty because of an escalating pattern of violent crime, may escape such punishment because knowledge of the defendant's prior violent offenses is almost completely withheld from the judge or jury.

Therefore, in accordance with the charge contained in paragraph 2(c) of Executive Order No. 72, the Commission recommends amending N.J.S.A. 2C:11-3c(4)(a) to include as an aggravating factor, in addition to a conviction at any time for another murder, a conviction at any time of any other violent crime, similar to the definition of that term as provided in N.J.S.A. 2C:43-7.2d. Specifically, the Commission recommends that the term "violent crime" include every aggravated sexual assault and sexual assault, as well as every violent crime included in the No Early Release Act, with the exception of vehicular homicide. The No Early Release Act defines a "violent crime" as "any crime in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S.2C:11-1, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:11-1 defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." The amended statute should include convictions in other jurisdictions which meet the proposed statutory definition.

In addition to making eligible for the death penalty those killers with no other applicable aggravating factors but with violent criminal records, this provision will ensure that evidence of a violent prior record will be admissible as any other aggravating factor in the penalty phase of capital trials. It is consistent with the fundamental principle that the defendant's "whole person" should be considered in sentencing. It will enhance the reliability of the sentencing

proceeding by providing relevant information about the defendant to the judge or jury which is charged with determining the defendant's fate.

With respect to this particular recommendation, the Commission notes that the use of this additional aggravating factor will improve the fairness of the overall system but as a matter of law may require two juries. In State v. Biegenwald, 126 N.J. 1 (1991), the Supreme Court held that when a prior murder is alleged as an aggravating factor, two juries will generally be needed because questioning of potential jurors on the possible "blinding impact" of the prior murder is necessary, but the prior murder is not usually admissible in the guilt phase. The Public Defender and Ms. Brown oppose expanding N.J.S.A. 2C:11-3c(4)(a) to include other violent crimes.

One Commission member proposed that an aggravating factor be added for cases in which the defendant has been adjudicated to have committed an act of physical, indictable domestic violence against the murder victim in the past. Other members of the Commission strongly opposed this proposal as overly broad, in that it would make death-eligible defendants who have been adjudicated at a standard less than beyond a reasonable doubt. It was also suggested that the crime of "vehicular homicide" be included as a violent crime. At one of the Commission's meetings, Chairman Zimmer asked the Commission members for a straw vote to gauge general support for these proposals, which resulted in the Commission's rejection of these suggested recommendations.

A5. The defendant's awareness that a victim is vulnerable due to a physical or mental impairment should be an aggravating factor. *See Proposal II, page 48, lines 12 through 15.*

A defendant's awareness of the vulnerability of his or her victim is a traditional factor in sentencing. N.J.S.A. 2C:44-1a(2) requires a sentencing court to consider, as part of the gravity and seriousness of the harm inflicted on the victim, whether the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of exercising normal physical or mental powers of resistance.

Currently, the only aggravating factor involving the special vulnerability of a particular murder victim is N.J.S.A. 2C:11-3c(4)(k), added in 1994, that the victim was less than 14 years old. Children, however, are not the only victims who are vulnerable. There are adults as well who are defenseless due to a physical or mental impairment.

A defendant's awareness that his or her victim was so impaired should be taken into consideration in determining whether capital punishment is appropriate. Thus, consistent with the charge of paragraph 2(c) in Executive Order No. 72, the Commission recommends that the list of aggravating factors in N.J.S.A. 2C:11-3c(4) be amended to include as an aggravating circumstance that the defendant knew or reasonably should have known that the victim was particularly vulnerable due to a physical or mental impairment.

The Public Defender is opposed to adding this proposed aggravating factor to the statute.

B. Trial

B1. The victim-impact statement elicited by the prosecution and the allocution of the defendant in the penalty phase should be presented in a similar manner. *See Proposal II, page 49, lines 18 through page 51, line 13.*

N.J.S.A. 2C:11-3c(6) permits the presentation of evidence by the prosecution regarding the murder victim's character and background and the impact of the murder on the victim's survivors. This evidence may be offered only when the defendant presents evidence of the defendant's character or record pursuant to N.J.S.A. 2C:11-3c(5)(h) in the penalty phase of a capital trial. The Supreme Court of New Jersey, in a 4-3 vote, upheld the victim-impact evidence statute in the face of a challenge to its validity under the federal and State Constitutions. State v. Muhammad, 145 N.J. 23 (1996). In doing so, the Court set forth procedural guidelines to minimize the possibility that victim-impact statements would inflame the jury and prevent it from deciding punishment solely on the basis of relevant evidence. Id. at 54-55. Among these guidelines, the Court directed that, prior to the admission of victim-impact testimony, the trial court should hold a hearing out of the presence of the jury to make a preliminary determination on admissibility of the testimony, which should be reduced to writing to allow the court to review it for prejudicial content. The Court determined that the testimony should be factual, not emotional, and free of inflammatory comments or references. In fact, the trial court is to inform the victim's family that it will not allow the testimony if the witness is unable to control his or her emotions, as well

as to remind the family that it will not permit testimony concerning characterizations and opinions about the defendant, the crime, or the appropriate sentence.

Prosecutors are concerned that these limitations on victim-impact testimony lead to an imbalance between that evidence and the defendant's allocution statement. In an allocution, the defendant is permitted to make an unsworn statement literally begging the jury to spare his life. While the allocution is designed to evoke sympathy, it was never intended to inject emotionalism into the jury's deliberations. The defendant's allocution as currently implemented may have strayed from the Supreme Court of New Jersey's initial conception, which was simply the right of a capital defendant "to stand before the jury and ask in his own voice that he be spared." State v. Zola, 112 N.J. 384, 430 (1988), cert. denied, 489 U.S. 1022 (1989). In Zola, the Court stated that the defendant in his or her allocution is not permitted to rebut any facts in evidence, deny his or her guilt, or voice an expression of remorse that contradicts evidentiary facts. As with victim-impact testimony, the Court enunciated guidelines for allocution -- the defendant is to be instructed by the trial court outside the presence of the jury regarding the limited scope of allocution; the statement is subject to the court's supervision; and, should the allocution go beyond the boundaries permitted, the impropriety will be subject to corrective action, including comment by the court or prosecutor or possibly the reopening of the case for cross-examination. The

court also suggested that it might be useful for a written outline of the statement to be examined by the court in advance. Id. at 432.

Despite the Court's pronouncements in Zola, it is possible that capital defendants may stray over the boundaries of allocution and attempt to introduce improper emotion or other impermissible factors into his statement. See State v. Loftin, 146 N.J. 295, 361 (1996) (defendant blamed his conduct on racial inequities, discussed the adverse impact execution would have on his family, and commented on the mitigating evidence). The Commission therefore recommends that N.J.S.A. 2C:11-3 be amended to add a new subsection addressing a capital defendant's allocution, codifying procedures with respect to the admission of an allocution statement. These procedures should be similar to procedures for the introduction of victim-impact evidence. The defendant should be required to submit his allocution statement in writing to the trial court for review at a hearing outside the jury's presence. At the hearing, the defendant should be instructed with respect to the limitations of his allocution and the potential remedial action the court may take if the defendant violates those restrictions. The defendant should further be instructed that his reading of his statement should not be emotional. This provision, consistent with how victim-impact testimony is presented, will ensure that the defendant is not able to inject improper emotionalism into the case and prevent the jury from deciding the punishment impartially on the basis of the evidence.

The Public Defender opposes this proposal, based upon her belief that there is no undue imbalance in the presentation of victim-impact testimony and a capital defendant's allocution and thus no need for an amendment to the statute. Ms. Brown abstains.

B2. The State should be given the option to retry a penalty trial if the jury is unable to reach a unanimous verdict. *See Proposal II, page 46, line 22 through page 47, line 3.*

N.J.S.A. 2C:11-3f provides that a penalty phase jury be instructed that, if it is unable to reach a unanimous verdict on the existence of an aggravating factor or on whether the aggravating factor or factors outweigh all of the mitigating factors beyond a reasonable doubt, the defendant will be sentenced as provided in N.J.S.A. 2C:11-3b. Essentially, the inability of the jury to reach a verdict on punishment is itself transformed into a sentence of imprisonment. As of March 3, 1998, of 174 penalty trials since the reinstatement of the death penalty in 1982, at least 48 have resulted in life verdicts due to the inability of the jury to reach a unanimous verdict on the weighing of the factors.

Although the evidence is anecdotal, the prosecutors who testified at the Commission's hearings believe that, in many cases resulting in hung juries in the penalty phase, the jurors had voted 11-1 or 10-2 in favor of the death penalty. Thus, the defense, which already has the tactical advantage of extra peremptory challenges (*see Recommendation A2, page 14*), is looking for the one juror in jury selection who, although initially stating that he or she could vote for a death

sentence, might actually be unwilling or unable to do so. Assistant Prosecutor Critchley noted that in the Koedatich case, which he tried and which resulted in a hung jury, one juror reported after the trial that another juror had defiantly refused, very early in deliberations, to even consider voting for a death sentence. Victim advocate Richard Pompelio testified that the lone dissenting juror in that case admitted to the other jurors that he had lied to the judge when he had said that he could vote for the death penalty. Former Deputy First Assistant Prosecutor Redden observed that because jurors are instructed that a hung jury is itself a verdict, unlike in a non-capital trial, it discourages them from actually deliberating and reaching a consensus. First Assistant Prosecutor Alton Kenney testified to the Commission that in the Biegenwald case, after two unanimous death verdicts were overturned on appeal, a single juror blocked a third death verdict after a decade of trials and appeals.

The determination of whether a violent killer should receive the death penalty should represent the conscience of the community as a whole, rather than the view of one or two jurors. Therefore, the Commission recommends that N.J.S.A. 2C:11-3c(3)(c) be amended to provide that, if the jury is unable to reach a penalty phase verdict after a reasonable period of time, the State be given the option of conducting a new sentencing proceeding before a new jury or accepting a term of imprisonment. This will prompt jurors to more conscientiously deliberate toward the goal of reaching a consensus.

It is noted that N.J.S.A. 2C:11-3d provides that the prosecutor cannot waive a sentencing proceeding. Since the amended N.J.S.A. 2C:11-3c(3)(c) would permit the prosecutor to forego a penalty phase in the case of a hung jury, the latter should further provide that nothing in subsection d of N.J.S.A. 2C:11-3 shall be construed to require the prosecutor to apply for a new sentencing proceeding. In order to assist prosecutors in deciding whether to retry the penalty phase, the Commission recommends that the Chief Justice develop a standard verdict sheet to record the jury vote in cases where a jury fails to reach a unanimous verdict.

Attorney General Verniero and First Assistant Prosecutor Moczula support this recommendation based on favorable input they received from the County Prosecutors Association. The Public Defender opposes this recommendation, asserting that more verdicts are split evenly than prosecutors believe, and that the non-unanimous option does not diminish the seriousness of jury deliberations in the penalty phase.

C. Appeal

C1. The Administrative Office of the Courts should expedite preparation of transcripts for appeals in capital cases in order to enable the Supreme Court Clerk to schedule the appeal management conference more expeditiously following the verdict.

Pursuant to the Supreme Court Directive on Capital Cause Appeal Procedures, following the verdict of death in a capital case, an appeal management conference is held between the attorneys and a Court representative, after which a final appeal calendar is entered establishing a peremptory briefing schedule and oral argument date. The Commission has learned that the appeal management conference may be held as late as four months after the verdict. A significant portion of this time is consumed by delay in the preparation of the transcripts of the trial.

In order to reduce this delay and enable the appellate process to commence more expeditiously, the Commission recommends that the Administrative Office of the Courts seek to improve efficiency in the preparation of the trial transcripts. The Administrative Office of the Courts should consider directing court reporters to make the preparation of the transcripts in capital cases their first priority, and temporarily remove the court reporter from other assignments if necessary. The AOC should also explore the use of advanced technology, such as computer-assisted court reporters that generate transcripts simultaneously with the proceedings. It is expected that quicker preparation of the trial transcripts will

enable the appeal management conference to take place much closer to the date of the verdict and reduce delay in the litigation of the appeal.

The Commission also recommends that the Legislature appropriate sufficient funding to implement this recommendation.

C2. Competent capital defendants should be permitted to waive all review after direct appeal. *See Proposal II, page 51, lines 25 through 28, and Proposal III, page 53.*

In State v. Martini, 144 N.J. 603 (1996), the Supreme Court of New Jersey ruled that because of its "constitutional responsibility to ensure reliability in the implementation of the death penalty," a defendant, despite the finding of a trial court that he was competent, could not be permitted to waive post-conviction review. Despite the Supreme Court envisioning an "abbreviated" post-conviction relief proceeding, id. at 615, more than two years later, this defendant, who has admitted his guilt and seeks to waive any further court review, remains on death row, as the Public Defender continues to litigate a case her "client" does not want to pursue because she believes that she is proceeding within the ambit of her duty as delineated in Martini.

Obviously, the prosecution of an unwanted post-conviction relief application substantially delays the imposition of the death sentence. No other jurisdiction requires this. Therefore, the Commission recommends that the State Constitution be amended to provide that a competent defendant be permitted to waive all review after direct appeal. The Public Defender opposes this proposal, believing

that a post-conviction relief application is necessary to ensure that the imposition of a death sentence is fair and without mistake.

C3. Proportionality review should be eliminated. *See Proposal II, page 51, lines 18 through 25, and Proposal IV, page 54.*

The most significant contributing factor to delay in the appellate process of a capital case is proportionality review. On average, proportionality review consumes about 18 months after the affirmance of direct appeal of a capital conviction and death sentence.

As Passaic County First Assistant Prosecutor Boris Moczula explained to the Commission, the death penalty statute, when initially adopted in 1982, provided for mandatory proportionality review in N.J.S.A. 2C:11-3e. This was done under the belief that the United States Supreme Court would mandate such review as an essential component of a constitutional capital punishment system. In 1984, the United States Supreme Court rejected the notion that the federal constitution requires comparative proportionality review. Pulley v. Harris, 465 U.S. 37 (1984). In the wake of Pulley, the Legislature amended N.J.S.A. 2C:11-3e to require proportionality review only at the request of the defendant; to date, every defendant whose death sentence has been affirmed, including John Martini, who now wants to be executed, has asked for proportionality review.

First Assistant Prosecutor Moczula quoted a concurrence in an Arizona Supreme Court opinion, State v. White, 815 P.2d 869, 890 (Ariz. 1991), which stated, "comparative proportionality review serves little, if any, purpose that is not

already accomplished by way of Arizona's narrowly construed death statute and our independent review of the statutory aggravating and mitigating circumstances in each case." Indeed, First Assistant Prosecutor Moczula believed that the frequency of reversal nationally on proportionality grounds was extremely low. There is a national trend away from requiring proportionality review; a recent Tennessee case, State v. Bland, 958 S.W.2d 651, 663 n.11 (Tenn. 1997), noted that, since Pulley, nine of 29 other states which had conducted comparative proportionality review have either repealed the statutory provisions or overruled court decisions which mandate such review.

It is time that New Jersey joined these states. Proportionality review as it is conducted here simply does not work. The frequency approach, which depends on complex statistical analyses that even the Administrative Office of the Courts acknowledges are difficult to prepare and understand and that will not be reliable for years to come, if ever, has been described by the Connecticut Supreme Court as an attempt "to quantify the unquantifiable." State v. Webb, 680 A.2d 147, 209-10 (Conn. 1996). The precedent-seeking approach, where the facts of cases are compared, also serves no function; other procedural safeguards in New Jersey law ensure that death sentences will not be imposed in an arbitrary or capricious manner. In light of the safeguards in our current system and the Supreme Court's painstaking review of each case, even if proportionality review functioned as intended, it would add nothing to the reliability and integrity of the capital punishment process. As an additional safeguard, the Attorney General has

agreed, at the suggestion of a Commission member, to consider the adoption of guidelines to further ensure the uniform application of the death penalty law.

The elimination of proportionality review will substantially reduce the time between imposition of a death sentence and actual execution without reducing fairness and due process to a capital defendant. It is therefore recommended that N.J.S.A. 2C:11-3e be amended to delete the provision requiring proportionality review at the request of a defendant. In order to ensure that this amendment passes muster under the State Constitution, it is further proposed that Article I, section 12 of the State Constitution be amended to provide that no sentence of death shall be reversed, vacated or modified on the ground that the sentence of death is disproportionate to a sentence imposed on another defendant or in another case.

The Commission determined that the elimination of proportionality review will not inhibit a capital defendant's ability to raise any constitutional issues on direct appeal or on post-conviction review. Thus, a defendant will still be able to make a claim, for example, that his death sentence was imposed in an arbitrary manner or on the basis of an invidious factor. Additionally, it must be noted that New Jersey's death penalty laws are designed, in their entirety, to ensure that the death penalty is imposed in a just and even-handed fashion.

The Public Defender and Ms. Brown are opposed to this proposal. The Public Defender endorses the testimony of Lawrence S. Lustberg, Esq., that proportionality review serves an important function in evaluating the fairness of

a death sentence in particular cases, monitoring prosecutorial discretion, and ensuring that invidious factors are not being considered in the imposition of capital punishment.

C4. The Supreme Court of New Jersey should adopt the recommendations of the Division of Criminal Justice regarding post-conviction review procedures and stays of execution.

At the request of the Trial Judges Committee on Capital Causes, the Division of Criminal Justice recommended several rule changes with respect to post-conviction review applications and stays of execution. These recommendations, submitted in two letters dated July 23 and December 29, 1997 (*attached as Appendix E*), to Judge Isaiah Steinberg, the chairman of the committee, provide for certain time limitations for the filing of post-conviction relief applications. The proposals also recommend that following the affirmance of the denial of a first petition for post-conviction relief, a stay of execution pending federal review should be accompanied by strict time limits for the filing of a certiorari petition in the United States Supreme Court, as well as for the filing of a petition for a writ of habeas corpus in the United States District Court. Once the habeas petition is filed, whether a stay is granted should be determined by the federal courts. Finally, the Division recommended that stays pending second or subsequent post-conviction applications be permitted only in the rarest of circumstances, with the burden of demonstrating the necessity for such a stay being explicitly placed on the defendant.

Specifically, the recommendations of the Division of Criminal Justice include the following suggestions:

- The defendant must file a petition for post-conviction relief in a capital case within 90 days of the denial of a petition for certiorari by the United States Supreme Court on the direct appeal.

- There must be strict time limits for the filing of a petition for certiorari in the United States Supreme Court and a petition for habeas corpus in the United States District Court after affirmance by the Supreme Court of New Jersey of the denial of a first petition for post-conviction relief. A stay of execution in this situation will require the defendant to file a certiorari petition within 30 days of the decision of the Supreme Court of New Jersey, and will require the filing of the habeas petition within 30 days of the denial of certiorari by the United States Supreme Court.

- Once the defendant has filed the habeas petition, State courts can no longer stay the execution. The matter of a stay will be determined by the federal courts which have jurisdiction over the case.

- The defendant will receive an automatic stay of execution for only one post-conviction review in state court. The execution may be stayed upon a second or subsequent filing only in the rarest of circumstances, and the burden of establishing entitlement to a stay is placed squarely on the defendant.

The Commission recommends that the Supreme Court of New Jersey adopt these rule change proposals. These amendments will allow capital defendants the opportunity to present fully all claims in each judicial forum, while preventing undue delay in the filing of these applications. These amendments will also ensure that once all these appeals are exhausted, the execution of the sentence will not be delayed further by the filing of frivolous post-conviction relief petitions.

The Commission understands that the Public Defender has submitted to the Trial Judges Committee on Capital Causes her own proposals on post-

conviction review procedures and stays. (*See Appendix D - Public Defender's Commentary, Exhibit B.*) The Commission believes, however, that the Public Defender's recommendations are insufficient to ensure that post-conviction litigation will occur in an expeditious manner in capital cases.

C5. A statute should be enacted to enable New Jersey to utilize the limitation periods for determining applications and motions in habeas cases under the Anti-terrorism and Effective Death Penalty Act of 1996. *See Proposal V, p. 55.*

On April 24, 1996, the federal Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. Among the sweeping changes in habeas corpus practice and procedure wrought by the AEDPA was a provision, 28 U.S.C. § 2261 et seq., for limitation periods for determining applications and motions in certain habeas cases. Essentially, the new law provides for expedited time requirements for the filing of habeas applications by capital defendants, as well as time requirements for the adjudication of petitions by the district courts and the adjudication of appeals by the circuit courts of appeals.

28 U.S.C. § 2261 provides that the time limits are applicable only if a State establishes a statute or court rule providing a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been affirmed on direct appeal. Further, the statute or court rule must provide standards of competency for the appointment of such counsel.

The Commission thus recommends the adoption of a statute to enable New Jersey to take advantage of these new habeas provisions. The statute should include, as 28 U.S.C. § 2261(b) requires, standards of competency for the appointment of counsel for indigent prisoners under a sentence of death. Although this State's experience with habeas litigation in capital cases is limited (the first habeas case since the reinstitution of capital punishment since 1982 is currently pending in the district court), it is hoped that the time limitations under the AEDPA will assist in minimizing delay once New Jersey capital cases reach the federal level.

The Public Defender opposes this recommendation. Ms. Brown abstains.

D. Execution

D1. The victim's and defendant's immediate families should be permitted to attend the execution. *See Proposal VI, page 58.*

Recently, there has been a trend in the legal and legislative processes toward acknowledging the significant role of victims. The recognition of this important role resulted in a 1991 State constitutional amendment providing for victims' rights. This constitutional provision requires that the victim's family "be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. Art. I, Par. 22. This amendment also specifically prohibits denying the victim's family the right to be present at public judicial proceedings. Under present law, however, the victim's family is not permitted to attend the execution. N.J.S.A. 2C:49-7. As a matter of fairness, compassion and respect for the victim's family, the Commission believes that the law should be amended to permit the victim's family to attend the execution if they so desire. The Commission also recognizes that an execution results in a loss for the condemned's family. Thus, the Commission recommends that family members of the person sentenced to death be permitted, at the Commissioner's discretion, to attend the execution.

CONSTITUTIONAL AND STATUTORY PROPOSALS

Our objective in preparing this final report has been to propose a set of recommendations that are both specific and pragmatic. Too often, the initial release of reports by special commissions and blue ribbon panels is accompanied by much attention, only to result in little or no real change in the law or the manner in which the public business of the State is accomplished. For this reason, we have focused our efforts on developing recommendations that realistically can be implemented in the near future by the Legislature, the Chief Justice and the Attorney General, as well as all of those who currently are involved in the litigation of capital cases. Where appropriate, we have suggested specific language for constitutional amendments and statutory reform.

Although this final report contains numerous proposals covering a wide range of subjects and addressing many different issues, all of our recommendations can be said to fall into five general categories:

- Recommendations that call for amendments to the State Constitution in order to ensure that changes recommended by the Commission survive legal challenge.
- Recommendations that call for amendments to N.J.S.A. 2C:11-3, the murder statute, regarding the list of aggravating factors that may be alleged by the prosecution.
- Recommendations that call for amendment to N.J.S.A. 2C:11-3 regarding the manner in which the penalty phase of a capital case is tried in order to enhance the likelihood that the penalty will be imposed in appropriate cases.

- Recommendations that call for amendments to N.J.S.A. 2C:49-7 regarding persons authorized to be present at execution.

- Recommendations that call upon the Chief Justice to effect changes in the court rules and the procedures by which capital cases are heard, at all stages of the proceedings.

We note that we do not write on a clean slate -- many of the proposals contained in our final report have been put forth in the Legislature and in other forums. Although we have reviewed pending legislation, the Commission does not endorse or oppose any specific bills. Some of our proposals are similar, although in most instances not identical, to bills that have been introduced in the Legislature. We strongly believe that any legislative reform should be achieved in a coherent and comprehensive fashion. Thus, consistent with our mission, we recommend a series of constitutional, statutory and court rule reforms, suggesting specific language that, in our view, would best serve the interests of public protection and confidence in the fair administration of the death penalty.

Proposal I - Peremptory Challenges

(Corresponds with Recommendation A2)

Amend N.J.S.A. 2B:23-13 to read as follows:

2B:23-13. Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. In any civil action, each party, 6.

b. Upon an indictment for [kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury,] **any crime, including any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized,** the defendant, [20] **8** peremptory challenges if tried alone and [10] **6** challenges if tried jointly and the State, [12] **8** peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each [10] **6** afforded defendants if tried jointly. [The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.]

EXPLANATION - Matter enclosed in bold-faced brackets [thus] is intended to be omitted in the law. Matter underlined thus is new matter.

Proposal II - Murder Statute

(Corresponds with Recommendations A3, A4, A5, B1, B2, C2 and C3)

Amend N.J.S.A. 2C:11-3 to read as follows:

2C:11-3. Murder.

a. Except as provided in N.J.S.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, carjacking 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

EXPLANATION - Matter enclosed in bold-faced brackets **[thus]** is intended to be omitted in the law. Matter underlined thus is new matter.

(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. (1) 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 be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced, except as otherwise provided in subsection c. of this section, by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder and who is not sentenced to death under this section shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

The defendant shall not be entitled to a deduction of commutation and work credits from that sentence.

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.] **The prosecutor shall provide the defense with a list of the aggravating factors that may be proved at the sentencing hearing together with all discovery bearing on these factors. This list and the related discovery shall be transmitted by the prosecutor to the defense attorney at the time of the arraignment unless the time to do so is enlarged for good cause. The defendant shall provide the prosecutor with a list of mitigating factors which the defendant intends to prove at the sentencing hearing together with all discovery bearing on these factors not later than thirty days after the arraignment unless the time to do so is enlarged for good cause or the defendant obtains a protective order as permitted by court rule. In determining whether good cause has been shown to permit an enlargement of time under this subsection, a court shall consider when the party seeking to enlarge the time under this subsection learned of the existence of the information which must be disclosed; whether the information could have been acquired in a timely fashion so as to comply**

with the time limitations of this subsection; whether allowing an enlargement of time would prejudice the other party; whether such failure to provide notice of the factor or related discovery was the result of a decision not to rely on such factor; and whether the party seeking an enlargement of time has acted in good faith or is seeking to receive an improper tactical advantage.

(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 **after a reasonable time for deliberation has been allowed**, the court shall [sentence the defendant pursuant to subsection b.] **dismiss the jury and no sentence shall be imposed. Upon dismissal of the jury, the court shall, upon application of the prosecuting attorney, impanel another jury for the purpose of conducting a new sentencing proceeding pursuant to subsection c. of this section. In the event that the prosecuting attorney does not apply for a new sentencing proceeding within fourteen days of the date of the jury's dismissal, the court**

shall sentence the defendant pursuant to subsection b. of this section. Nothing in this section shall be construed to require a prosecuting attorney to apply for a new sentencing proceeding under this subsection.

(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**, or of an aggravated sexual assault or sexual assault, or of any offense, except vehicular homicide, that would constitute a crime of violence as defined in N.J.S.2C:43-7.2d, whether such offense is defined in this Title, in any other law of this State, or in any statute of the United States or of another state**. 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 carjacking**[*];

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[*] N.B.: Carjacking was added as to the enumerated offenses under "felony-murder" on June 12, 1998. N.J.S.A. 2C:2C:11-3(a)(3). This proposed

(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;

(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;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2; [or]

(k) The victim was less than 14 years old**; or**

(l) The defendant knew or reasonably should have known that the victim was particularly vulnerable or incapable of exercising normal physical or mental powers of resistance.

(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;

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amendment, which is technical in nature, would make the treatment of carjacking consistent with the treatment of other "felony murder" offenses, such as robbery, sexual assault, arson, burglary or kidnapping.

(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.

(6) When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection.

(7) The defendant, whether or not he testifies at the sentencing proceeding, shall be permitted to read a brief unsworn statement to the jury or, in matters proceeding without a jury, to the court before the close of the sentencing hearing.

(a) This statement only may include the following: a statement asking that defendant's life be spared; a statement that defendant is capable of feeling and expressing remorse; and an expression of remorse. This statement shall not include a denial of guilt or a denial of any of the evidence presented; any comment on the aggravating and mitigating factors, whether or not evidence of such factors was presented; any comment on the evidence presented or the conduct of the proceedings; any comment on the impact that a death verdict would have on defendant's family or anyone else;

or any comment on the legality or morality of the proceedings or of capital punishment.

(b) At the close of the State's case-in-chief in the sentencing proceeding, defendant shall be instructed by the court, outside of the presence of the jury, of his right to make a limited statement in accordance with this paragraph.

(c) Prior to a defendant's reading of a statement pursuant to this paragraph, the court shall advise defendant that defendant's reading of the statement will be subject to the court's supervision. It shall further advise the defendant that should the statement go beyond the boundaries permitted by the court, the court shall take corrective action, which may include but not be limited to the following actions: precluding the defendant from completing the reading of the statement; instructing the jury to disregard the statement in whole or in part; limiting the jury's consideration of the statement; permitting the prosecutor to address the jury regarding the statement prior to his closing argument; or, in the discretion of the court, reopening of the case for cross-examination of the defendant by the prosecutor, regardless of whether defendant has testified at the guilt or penalty phase proceedings. Defendant shall further be instructed by the court that his reading of the statement may not be emotional.

(d) In matters proceeding before a jury, prior to a defendant's reading of a statement pursuant to this paragraph, defendant shall submit a written version of the statement to the court and the prosecutor. The court shall review this written version of the statement and determine at a hearing outside the presence of the jury whether the statement complies with this paragraph and may be read to the jury in whole or in part. At the hearing, the prosecutor and defense counsel shall have the opportunity to be heard. In matters proceeding without a jury, the court may require defendant to submit a written version of the statement, prior to defendant reading such

statement to the court. Whether or not the court requires a defendant to submit a written version of the statement in matters proceeding without a jury, the court shall take corrective action in accordance with this paragraph if the defendant's reading of the statement does not comply with this paragraph and shall consider only statements or portions thereof which comply with this paragraph.

(e) In regard to all statements made pursuant to this paragraph, the court shall supervise the defendant's reading of the statement to ensure that it complies with the requirements of this paragraph. Nothing in this paragraph shall be construed to limit the court's authority to otherwise supervise the proceedings before it. If a defendant's reading of the statement does not comply with the requirements of this paragraph in any respect, the court shall take corrective action as set forth in subparagraph (c) of this paragraph.

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 a 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.] **A mentally competent defendant whose death sentence has been affirmed by the Supreme Court may voluntarily and knowingly waive any further judicial proceedings on his or her behalf, including post-conviction relief.**

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.

h. In a sentencing proceeding conducted pursuant to this section, no evidence shall be admissible concerning the method or manner of execution which would be imposed on a defendant sentenced to death.

i. For purposes of this section the term "homicidal act" shall mean conduct that causes death or serious bodily injury resulting in death.

Proposal III - Waiver of Review

(Corresponds with Recommendation C2)

Amend N.J. Const., Article VI, Section V, paragraph 1 to read as follows:

1. Appeals may be taken to the Supreme Court:

(a) In cases determined by the appellate division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) In capital causes**, provided, however, that a defendant who has been convicted of murder and sentenced to death and whose death sentence has been affirmed by the Supreme Court shall have the right to waive any further judicial proceedings on the defendant's behalf, including post-conviction relief, and such waiver, if made knowingly and voluntarily by a mentally competent defendant, shall have the effect of terminating any further judicial proceedings**;

(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the inferior courts; and

(e) In such causes as may be provided by law.

EXPLANATION - Matter enclosed in bold-faced brackets **[thus]** is intended to be omitted in the law. Matter underlined thus is new matter.

Proposal IV - Elimination of Proportionality Review

(Corresponds with Recommendation C3)

Amend N.J. Const., 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. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or 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. **No sentence of death shall be reversed, vacated or modified on the ground that the death sentence is disproportionate to a sentence imposed upon another defendant or defendants or in another case or cases.**

EXPLANATION - Matter enclosed in bold-faced brackets [thus] is intended to be omitted in the law. Matter underlined thus is new matter.

Proposal V - Competent Counsel*

(Corresponds with Recommendation C5)

Supplement P.L.1973, c.43 (C.2A:158A-1 et seq.) as follows:

1. (New section) a. In every case in which the defendant has been convicted and sentenced to death, and that conviction and sentence have been upheld by the Supreme Court on direct appeal, the Public Defender shall offer counsel to represent the defendant in all State post-conviction proceedings.

b. Upon a finding that the defendant is indigent, and if the defendant accepts the offer of counsel or is incompetent to decide whether to accept or reject the offer of counsel, one or more counsel who meet the standards specified in subsection d. shall be appointed to represent the defendant.

c. The court, upon the filing of a petition for post-conviction relief or other post-conviction proceeding, shall enter an order on the record (1) appointing the counsel designated by the Public Defender pursuant to this section, or (2) finding that the defendant rejected the offer of counsel after having been advised of his right to representation pursuant to this section, and that the rejection was made knowingly and voluntarily, and with an understanding of the legal consequences, or (3) denying the appointment of counsel upon the basis that the defendant is not indigent.

d. Counsel appointed pursuant to this section shall meet the following minimum standards of competency:

(1) not less than three years of experience in the litigation of criminal trials;

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* The legislative statement to this proposal should specify that this provision is not intended to establish standards of competence for effective assistance of counsel.

EXPLANATION - Matter enclosed in bold-faced brackets [thus] is intended to be omitted in the law. Matter underlined thus is new matter.

(2) prior experience as lead counsel in trying to completion no fewer than five jury or bench trials in the Superior Court. In addition to the five jury or bench trials which the attorney tried to completion as lead counsel, the attorney shall have participated as lead counsel or co-counsel in the trial of at least one case in which the charge was murder and the defendant faced the possible imposition of the death penalty;

(3) prior experience as counsel in at least five direct appeals of criminal cases in State or federal court;

(4) prior experience as lead counsel or co-counsel in post-conviction relief proceedings at the trial or appellate level;

(5) demonstrated familiarity with the practice and procedure of the trial and appellate courts of this jurisdiction, including the law governing petitions for post-conviction relief;

(6) successful completion of a training or educational program on the criminal law or the litigation of criminal cases; and

(7) demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

If the Public Defender certifies that there is not an attorney available who meets all of the standards of competency set forth in this subsection regarding past professional experience, the Public Defender may designate more than one attorney to represent the defendant, provided that at least one of the attorneys shall have satisfied the requirements of paragraphs (1) and (2) and one attorney shall have satisfied the requirements of paragraph (3). One of the attorneys shall also have satisfied the requirements of paragraph (4). Every attorney so appointed shall satisfy the requirements of paragraphs (5), (6) and (7).

e. No attorney appointed pursuant to this section shall have previously represented the defendant at trial or on direct appeal, unless the defendant and the attorney expressly request continued representation during the post-conviction proceedings.

f. An attorney designated by the Public Defender pursuant to this section shall be appointed pursuant to section 6 of P.L.1973, c.43 (C.2A:158A-6) or section 7 of P.L.1973, c.43 (C.2A:158A-7). The Public Defender shall pay for all necessary services and facilities, including reasonable litigation expenses.

g. To the extent that this section is inconsistent with any other provision of P.L.1973, c.43, this section shall be given full force and effect. To the extent that any other provision of P.L.1973, c.43 is not inconsistent with this section, it shall continue in full force and effect.

2. This act shall take effect immediately and shall apply to any case pending on or after the effective date. A defendant under sentence of death, whose petition for post-conviction relief is pending upon the effective date of this act, shall be afforded an opportunity to have counsel appointed pursuant to this act.

Proposal VI - Attendance at Execution

(*Corresponds with Recommendation D1*)

Amend N.J.S.A. 2C:49-7 to read as follows:

2C:49-7. Persons authorized to be present at execution.

a. The commissioner, the persons designated by the commissioner to act as execution technicians, and [two] **one** licensed [physicians] **physician** shall be present at the execution. The commissioner shall also select and invite the presence of, by at least three days' prior notice, six adult citizens. The names of the execution technicians shall not be disclosed, and the names of the six adult citizens who witnessed the execution shall not be disclosed until after the execution.

b. The commissioner shall, at the request of the person sentenced to death, authorize and permit no more than two clergymen, who are not related to the inmate, to be present at the execution. **The commissioner may, at the request of the person sentenced to death, authorize and permit no more than two adult members of the person's immediate family to be present at the execution.**

c. The commissioner shall permit [eight] **four** representatives of the news media to be present at the execution, for the purpose of giving their respective newspapers and associations accounts of the execution. The [eight] **four** representatives shall be composed of [two representatives] **one representative** of the major wire services, [two representatives] **one representative** of television news services, [two representatives] **one representative** of newspapers, and [two representatives] **one representative** of radio news services. Immediately following the execution, the [eight] **four** representatives of the news media may hold a press

EXPLANATION - Matter enclosed in bold-faced brackets [thus] is intended to be omitted in the law. Matter underlined thus is new matter.

conference for the purpose of giving other news representatives an account of the execution.

d. The commissioner shall not authorize or permit any person [who is related by either blood or marriage to the sentenced person or to the victim to be present at the execution, nor shall the commissioner authorize or permit any other person] to be present, except those authorized by this section.

e. The commissioner shall authorize and permit no more than four adult members of the victim's immediate family to be present at the execution. The names of the members of the victim's immediate family who witnessed the execution shall not be disclosed.

f. For purposes of this section, "immediate family" means a spouse, parent, stepparent, legal guardian, grandparent, child, or sibling.

g. Nothing in this section shall be construed to give a right to any person to delay or prevent the execution of a sentence of death on the date appointed in the warrant pursuant to N.J.S.2C:49-5.

APPENDIX A

SUMMARIES OF WITNESS TESTIMONY

Numerous witnesses, including legal experts, prosecutors, defense attorneys, surviving members of victim's families and members of the public, appeared before the Commission to offer testimony on issues related to the implementation of the death penalty.

The Commission heard testimony from some surviving family members of victims, who testified as to their personal experiences both as victims and with respect to the process they and their families endured in capital cases.

Marilyn Flax testified before the commission concerning the murder of her husband, expressing her fears that his killer, John Martini, though now on death row, will send someone to kill her, as he vowed to do. Ms. Flax recounted the words of her husband's killer, that no one gets death under the New Jersey death penalty. Ms. Flax explained that, although it has been nine years since the crime was committed and Martini now wants his sentence carried out, it still has not been executed.

Maria Kuo Eck testified about the devastating impact the murder of her husband has had upon her family, and urged that greater consideration be given to the survivors rather than the criminals. Her husband's killer, Robert Morton, is now on death row.

Richard Pompelio, whose oldest child was murdered, has become an advocate who helps the surviving members of other murder victims. Mr. Pompelio recommended that the Commission reevaluate the unanimity requirement, and place greater focus on the impact that extreme delay has on the victim's family.

Andrew Voto offered testimony concerning the murder of his brother by an offender who was on death row, but had his sentence commuted to life imprisonment. He described the effects the appellate and parole processes have had on himself and his family.

The following witnesses, each of whom has dealt with death penalty cases on a professional level, offered expert testimony on the implementation of the death penalty.

Thomas Critchley, Assistant Prosecutor in the Morris County Prosecutor's Office, testified primarily on issues relating to hung juries in capital cases. Mr. Critchley offered his view that, in the penalty phase of a capital trial, a hung jury verdict should not necessarily be viewed as a final judgment by the community that the defendant should not receive the death penalty. Mr. Critchley also recommended eliminating the disparity in peremptory challenges by reducing the number available to defendants, and suggested that the Attorney General's Office assist certain counties in case load management.

Donald R. Curry, Senior Assistant Attorney General from the Virginia Attorney General's Office, explained to the Commission the different ways the Commonwealth of Virginia has combated delay in that State's death penalty system. Mr. Curry suggested that statutory mandates placing strict time limits on appellate and post-conviction procedures in capital matters, along with the fact that each side has only four peremptory challenges, leads to a more efficient system.

Alton Kenney, First Assistant Prosecutor of the Monmouth County Prosecutor's Office, focused on judicial specialization and jury selection issues in identifying ways to expedite the handling of capital cases. Mr. Kenney suggested assignment of only judges with special expertise in handling capital cases to eliminate the lengthy preparation time otherwise required by a judge inexperienced in dealing with such cases. Mr. Kenney also recommended equalizing the number of peremptory challenges available to defendants and the prosecutor.

Joseph Krakora, former Essex County Public Defender, addressed the issue of unanimity for death penalty cases, expressing opposition to any proposed modification of the unanimous verdict requirement.

Barry Latzer, a professor at the John Jay College of Criminal Justice, testified concerning societal implications of the delays in capital cases, such as a disrespect for both state government and the criminal justice system. Professor Latzer identified proportionality review as a substantial reason for the delay in the implementation of the death penalty and recommended its elimination.

Lawrence S. Lustberg, Esq., a partner in the Newark law firm of Gibbons, Del Deo, Griffin, & Vecchione, testified in favor of proportionality review, opposing its elimination for policy and legal reasons. According to Mr. Lustberg, the interests protected by proportionality review would not otherwise be protected in the direct appeal process or some other area of State judicial review.

John McCarthy, Jr., Director of the Office of Trial Court Services of the Administrative Office of the Courts, offered comments on the issue of proportionality review. Mr. McCarthy provided background on the development of proportionality review, noting that it is not required as a matter of federal constitutional law.

Boris Moczula, First Assistant Prosecutor in the Passaic County Prosecutor's Office, also addressed the issue of proportionality review, explaining that the mechanical, statistical process required by proportionality review is incompatible with the singular nature of each capital case. Observing that no case has ever been set aside on proportionality review in New Jersey and noting the national trend not to require the process, he recommended its elimination in New Jersey, commenting that defendants would not lose the opportunity to raise arguments alleging bias, prejudice or a miscarriage of justice.

John Redden, former Deputy First Assistant Prosecutor in the Essex County Prosecutor's Office, expressed his concerns regarding judicial management of capital cases and his opposition to the current law that accepts a hung jury verdict. According to Mr. Redden, the system should be modified to encourage meaningful deliberations among jurors. If a non-unanimous decision from the jury is interpreted as a valid verdict, jurors have less reason to discuss and entertain opposing arguments. Mr. Redden also recommended the assignment of judges specially designated to handle death penalty cases.

Mark Stalford, Assistant Prosecutor in the Monmouth County Prosecutor's Office, offered an overview of the appellate process of a capital case, identifying areas in which case management and judicial scheduling could be improved to reduce delay.

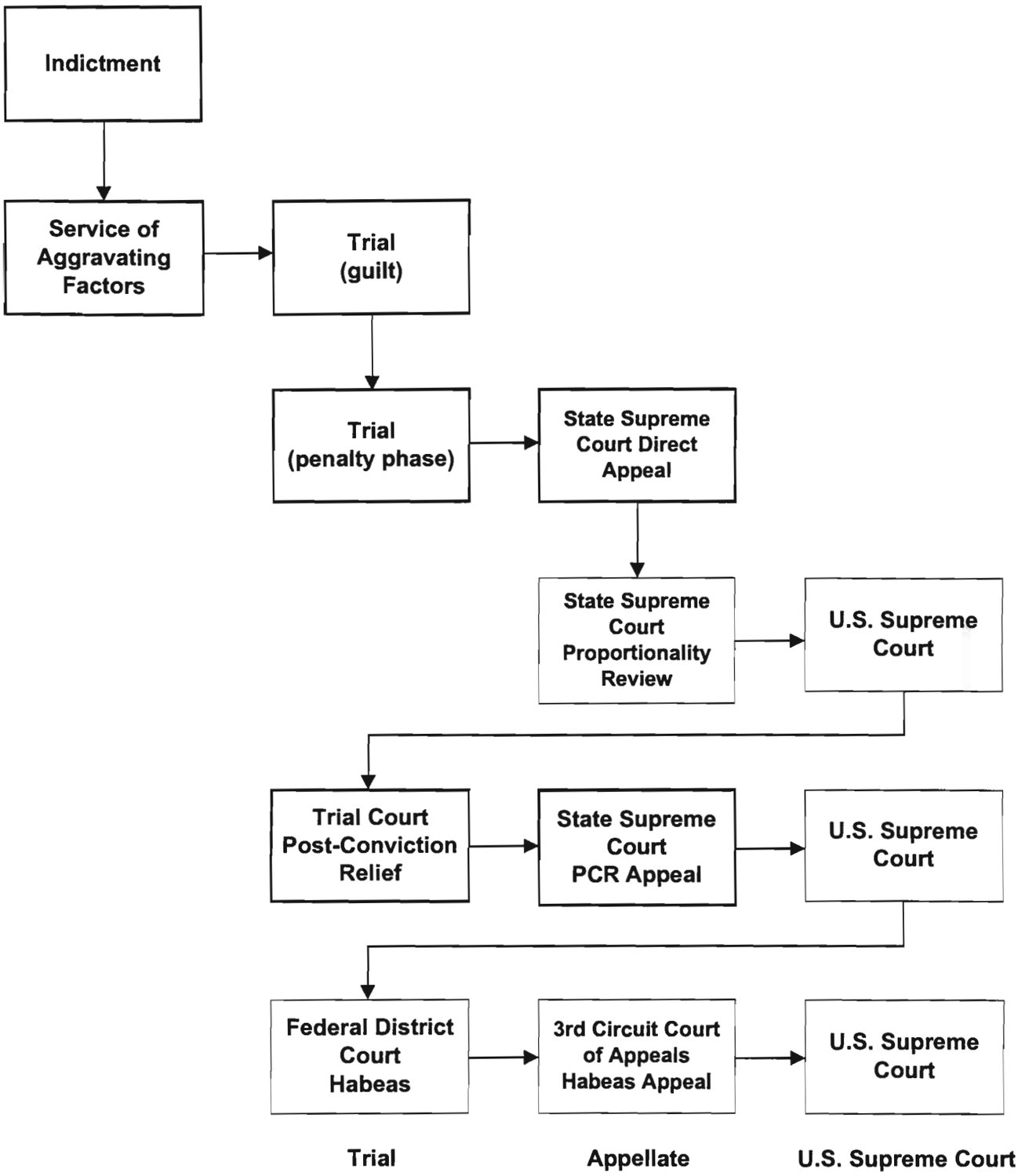
Andrew N. Yurick, the Gloucester County Prosecutor, testified about the Supreme Court's role in the process. Prosecutor Yurick expressed his view that for the system to work effectively, the Supreme Court must be dedicated to finding ways to expedite review of capital cases.

In addition to the foregoing witness testimony, Chairman Zimmer opened the floor for public comment at each Commission meeting. Several members of the public, including Barry Desau, Lorry Post, Reverend Gillette, Pat Clarke, Susan Adams, and Lillian Willoughby, expressed their opposition to the death penalty, based primarily on ethical or philosophical grounds. William F. Bolan, Jr., Executive Director of the New Jersey Catholic Conference, also testified before the Commission to express the Catholic Conference's opposition to the death penalty. Although the Study Commission accepted such testimony into the record, Chairman Zimmer made clear that the mission of the Study Commission is not to reevaluate the wisdom of the death penalty sanction, but rather to consider issues related to the implementation of the penalty. Additionally, Ed Martone of the American Civil Liberties Union of New Jersey advocated the establishment of an exception to the death penalty for the developmentally

disabled. Police Chief Richard Sibinski voiced his position as a proponent of the death penalty, supporting the need to expedite the process.

Some witnesses submitted written statements to the Commission. These written statements are available through the Commission. Additionally, the Commission utilized a court reporter to transcribe each public hearing. The transcripts are available through the Commission as well.

CAPITAL CASE



APPENDIX C

EXECUTIVE ORDER NO. 72

STUDY COMMISSION ON THE IMPLEMENTATION OF THE DEATH PENALTY

WHEREAS, the New Jersey Death Penalty Act was signed into law by then Governor Thomas H. Kean and became effective on August 6, 1982, fifteen years ago; and

WHEREAS, in the case of The State of New Jersey v. Thomas C. Ramseur, decided March 5, 1987, the New Jersey State Supreme Court found that capital punishment as set forth in the Death Penalty Act is constitutional; and

WHEREAS, since the time that the Death Penalty Act became effective forty-six murderers have been sentenced to receive capital punishment; thirty have had their convictions and/or their death sentences overturned by the State courts; fourteen remain on death row at various stages of the appellate process; and two have died while on death row; and

WHEREAS, the State has yet to implement a sentence of capital punishment as imposed by the jury system under the Death Penalty Act;

NOW, THEREFORE, I, CHRISTINE TODD WHITMAN, by virtue of the authority vested in me by the Constitution and the Statutes of this State, do hereby ORDER and DIRECT:

1. There is hereby established a commission to be known as the Study Commission on the Implementation of the Death Penalty (the "Commission") to examine the death penalty process in New Jersey.

2. The Commission shall identify areas in which the death penalty process in our State can be improved, and shall, where appropriate, make specific recommendations for change that would expedite the death penalty process while ensuring that the death penalty is administered in a just manner.

Among the issues that the Commission shall address are:

(a) Whether, and if so, in what manner, the appellate and post-conviction relief process can be streamlined;

(b) Whether, and if so, in what manner, the rules of evidence applicable to the death penalty phase of a capital trial should be modified;

(c) Whether a death penalty jury should be allowed to consider additional aggravating factors, such as whether the victim was physically or mentally

impaired and whether the defendant has prior violent convictions other than murder. Under current law, a jury making a death penalty decision is not permitted to consider these factors; and

(d) Any other issues the Commission finds to be relevant to improving the death penalty process in our State.

3. The Commission shall consist of up to fifteen members including the Attorney General or his designee; the Public Defender or her designee; one Senator to be appointed by the Senate President; one Assemblymember to be appointed by the Assembly Speaker; one public member to be appointed by the Senate President; one public member to be appointed by the Assembly Speaker; a county or assistant county prosecutor to be appointed by the Governor; a crime victims' advocate to be appointed by the Governor; a retired State judge to be appointed by the Governor; and up to six members of the public, also to be appointed by the Governor. The Governor shall designate a chair from among the members of the Commission. The members shall serve without compensation, but shall be reimbursed for necessary expenses incurred in the performance of their duties subject to the availability of funds therefor.

4. The Commission shall organize and meet as soon as possible after the appointment of its members. The chair shall appoint a secretary who need not be a member of the Commission. Vacancies on the Commission shall be filled in the same manner as the original appointment.

5. The Commission is authorized to call upon any department, offices or agency of State government to provide such information, resources or other assistance deemed necessary to discharge its responsibilities under this Order. Each department, officer, division and agency of this State is hereby required to cooperate with the Commission and to respond to such requests for information, personnel and assistance as is necessary to accomplish the purposes of this Order.

6. The Commission shall file a report with the Governor and the Legislature with its recommendations within six months after the first meeting of the Commission.

7. This Order shall take effect immediately.

GIVEN, under my hand and seal this 6th day of August in the Year of Our Lord, One Thousand Nine Hundred and Ninety-Seven, and of the Independence of the United

States, the Two Hundred and Twenty-First.

/s/ Christine Todd Whitman
Governor

Attest:

/s/ Michael P. Torpey
Chief Counsel to the Governor

Issued: August 6, 1997
Effective: August 6, 1997
Expiration: Indefinite
Published: September 2, 1997 in the New Jersey Register at 3757(a)

APPENDIX D

OFFICE OF THE PUBLIC DEFENDER COMMENTARY ON THE REPORT OF THE DEATH PENALTY COMMISSION

The Office of the Public Defender would like to take this opportunity to comment on the recommendations of this Commission. We trust that it will be borne in mind that our office is the attorney of record for all capitally sentenced defendants and, as such, stands in a unique position with respect to this Commission and its work. Moreover, we have provided representation to the vast majority of capitally charged defendants since reenactment of the death penalty in 1982 and believe that we can shed additional light on the capital litigation process.

Of primary concern to us is that the Commission has not identified a base-line by which the value of its recommendations can be measured. There is no guidance as to what an appropriate time frame is for a capital case.

We are also concerned that the recommendations of the Commission may be the product of several questionable assumptions: that the criminal justice system can absorb additional capital prosecutions and appeals, that prosecutors want to prosecute more cases capitally but are unable to do so because the law is too restrictive, that New Jersey juries are incapable of returning death

verdicts or that there are sufficient fiscal resources available to the Judiciary and the parties to prosecute, defend and adjudicate more capital cases than they are presently doing.

Also lacking in the Commission's analysis is an assessment of the fiscal impact of recommendations which will lead to more capital prosecutions and, in turn, increase the number of persons sentenced to death. Such an assessment would enable the ultimate policy and decision makers to evaluate the burdens its recommendations will impose on the criminal justice system; it is our sense that the New Jersey criminal justice system (and this holds true for the processing of appeals) is already unduly taxed by capital prosecutions and that any significant expansion of such prosecutions will need to be accompanied by concomitantly sufficient appropriations to avoid unnecessary and unwanted delay.

To the extent that county prosecutors have advised the Commission that they are unable to prosecute a greater number of cases capitally because the law is unduly restrictive, that assertion ought to be more fully scrutinized by the Commission. County prosecutors already have a facile mechanism to greatly increase the number of capital prosecutions. New Jersey averages about 400 murders per year. This number has remained fairly stable for the last two decades. Of those murders, approximately one-

fourth to one-third (100 to 133) involve an underlying felony yet the vast majority of those cases, even though eligible to be prosecuted as death penalty cases, are not selected for capital prosecution. If one of the Commission's goals is to increase the number of cases in which county prosecutors seek the death penalty, a ready method is at hand.

Some of the Commission's recommendations suggest that New Jersey juries have been unduly constrained by our laws from returning death verdicts. Since reenactment in New Jersey in 1982, 48 individuals have received 53 death sentences, an average of more than one every 4 months. **All these verdicts were unanimous.** If one death verdict every 4 months does not demonstrate a diligent application of our death penalty law, the Commission ought to set forth an appropriate standard and, more importantly, set forth the principle(s) that inform its development of that standard.

One of the primary reasons for convening the Commission is the belief that it has taken too long to execute anyone in New Jersey. An overview of the time consumed by capital litigation throughout the United States serves to put that issue in perspective and provides an edifying background in addressing the question of whether or not there has been undue delay in New Jersey capital litigation or in staging an execution.

Attachment A is a table of the States which have capital punishment showing the date of reenactment, the date of first capital affirmance, the date of first execution and time periods between, as set forth in *The Proportionality Review of Capital Cases by State High Courts After **Gregg**: Only "The Appearance of Justice"?* 87 J. Crim.L. & Criminology 130 (1996). As is demonstrated by this table, the time between reenactment of the death penalty and a state's first execution is often lengthy--on **average** that time is approximately 14 years. In the states in our region of the country, the national average has been exceeded: Pennsylvania--21.4 years; Maryland--19.2 years; Delaware--18.2 years; Connecticut--now in its 25th year after reenactment without an execution. Also instructive is the time period in these states between re-enactment and the first affirmance of a death sentence: Pennsylvania--8.9; Maryland--8.5; Delaware--10.6; Connecticut--now in its 25th year of the reenactment without an affirmance. New Jersey's first affirmance came after 10.1 years. It should also be noted that in New York, 2.8 years passed prior to the completion of its first capital prosecution; New Jersey prosecuted two capital cases less than a year after reenactment. In addition to providing the proper perspective, the fact that most jurisdictions have experienced long periods of time without affirmances or without carrying out an

execution ought to put to rest the canard that the New Jersey Supreme Court (or anyone else)has been an impediment to speedy executions.

To the extent that one can claim delay, New Jersey does not appear to have delays that are demonstrably different than its neighbors. Our criminal appellate process is similar (if not identical) to that in most jurisdictions in the United States. That process is available in all criminal cases not just cases where the death penalty has been imposed; moreover, there are few steps which the New Jersey legislature can take which are capable of altering the pace and progress of capital litigation which takes place in the Federal courts and, given the experience in other States, little, if anything, which can significantly alter the pace and progress of State litigation.

The steps in the New Jersey process are as follows: 1)Trial; 2)Direct appeal to the New Jersey Supreme Court--**N.B. unlike non-capital criminal cases, the Appellate Division is bypassed thereby saving several months of litigation;** 3)Proportionality Review; 4) Cert. Petition to the U.S. Supreme Court; 5)State Petition for Post-Conviction Relief; 6)Direct appeal to the New Jersey Supreme Court--**again, saving several months of litigation by bypassing the Appellate Division;** 7)Cert. Petition to the U.S. Supreme Court;

8) Federal Dist. Court habeas; 9) Appeal to the 3rd Circuit Court of Appeals; 10) Cert. Petition to the U.S. Supreme Court; 11) Executive Clemency. With the exception of proportionality review (which we estimate presently consumes about 7% of the time taken by the entire process), **all of these measures are available to anyone convicted of a felony in the United States. Most prisoners, however, do not avail themselves of these remedies or are released prior to exhausting them.**

It must also be remembered that should a defendant succeed in his appeal at any level (except for executive clemency) the process returns to the first step. What often happens, particularly in the southern United States, is that federal courts will set aside convictions and death verdicts because state due process protections are inadequate and violate the federal constitution; the entire process must then begin anew from the first step. It is for this reason that the New Jersey Supreme Court's meticulous review of capital cases may ultimately result in speedier case processing--fewer of their affirmances will result in reversals when reviewed by federal courts.

The Commission's Executive Summary suggests (based on Professor Latzer's testimony that there is a "far greater incentive to engage in dilatory defense tactics in capital cases than in other criminal

cases") that dilatory tactics on the part of the defense is a reason for delay in the processing of capital cases in New Jersey. **Not a single witness who appeared before the Commission, including the prosecutors who tried death penalty cases, cited a single example of the defense engaging in such tactics in any of the capital prosecutions which have taken place during the past 15 years.**

PRE-TRIAL RECOMMENDATIONS

1. Designating judges to specialize in capital cases

This recommendation has the potential to realize the Commission's goals and merits exploration in the context of a pilot project. We believe, however, it would be sufficient and more effective for this Commission to urge the Chief Justice and Assignment Judges to assign experienced criminal trial judges to capital cases; indeed, we believe that the judiciary has consistently made a good faith effort to bring about that result.

That capital cases are complex is indisputable; that that factor will not change ought also be recognized as indisputable. The premises on which this recommendation is based assumes that resources are, or will be, made available to support the recommendation. Moreover, the recommendation also assumes that capital prosecutions deserve priority over all other types of

litigation.

Implementation of this recommendation may have a deleterious impact on the judiciary and the litigants. Judicial resources, already sorely taxed in every vicinage by vacancies as well as by caseload, would be further strapped by the reassignment of judges to hear only capital cases. An initiative such as this would compete for resources with other highly worthy judiciary programs, for example, the effort to add resources to the Family Division to address the needs of abused and neglected children.

2. **Reduction in the number of peremptory challenges**

Reducing the number of peremptory challenges to shorten the jury selection process (which currently takes 4 to 6 weeks or about ½ of 1% of the average 14 year capital litigation process) would have virtually no impact on expediting litigation.

What does consume time in capital jury selection is the process known as "death qualification". This is the part of *voir dire* where a juror's views on the death penalty must be ascertained. This is done to ensure that the **prosecution** has a jury comprised of citizens, all of whom are willing to impose the death penalty. As might be expected, many jurors do not have readily ascertainable views on the death penalty and it takes a significant amount of time

to determine what those views are. Reducing the number of peremptory challenges will not compress the time it takes to "death qualify" a jury other than to the extent that a handful less jurors would have to be qualified overall.

More importantly, however, there is a likelihood that the jury *voir dire* may be lengthened because more intense battles will be fought by the parties over "for cause" challenges since they will not have peremptory challenges at their disposal. Such disputes will be more intense because the stakes will be higher--the trial judge's failure to rule correctly on a "for cause" challenge may result not only in the reversal of a death sentence but the underlying conviction as well. In a very real sense, peremptory challenges serve as a "safety valve" for the trial judge and the parties to avoid reversible error. Even if the trial judge rules incorrectly on a "for cause" challenge, a party may excuse that juror with a peremptory challenge thereby eliminating legal error and a potentially successful appeal.

The value of peremptory challenges was succinctly set forth by Justice White in Swain v. Alabama, 85 S.Ct. 824,835: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed

before them, and not otherwise...Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

The suggestion that the number of challenges is tilted in favor of the defense is to ignore the origin of disparately apportioned peremptory challenges and stands the historical reason for providing more challenges to the defense (the overwhelmingly pro-State bias of jurors) on its head. This recommendation may result in juries that are even more prosecution prone by stripping away protections afforded litigants for hundreds of years and, therefore, is unfair to capitally charged defendants.

The value of peremptory challenges and the importance of **not** reducing their number in **capital cases** was recently reiterated by the Supreme Court Committee On Criminal Practice in their 1996-1998 biennial report to the Court (p.65) which recommended that in capital cases "...the present number [of peremptory challenges] allowable should not be changed." It is important to note that the large majority of voting members of that committee are either experienced judges or members of the law enforcement community.

3. **Early provision of mitigation discovery**

We believe that the factual basis which supports this recommendation is incomplete. The recommendation gives insufficient consideration to the entire scope of capital practice and disregards the need to provide a defendant with a fair trial on the issue of guilt or innocence. As with the preceding recommendation, the Supreme Court's Criminal Practice Committee has previously considered this recommendation and rejected it.

The Report suggests that the State is disadvantaged because defendants are not required to disclose their mitigating evidence unless and until they are convicted of capital murder. This ignores the fact that prosecutors take months and months investigating their cases without having to disclose the results of that investigation until 14 days after the return of an indictment. From that point on, a defendant has to conduct not only a guilt-phase investigation but a penalty-phase investigation as well. Because the defense investigation can only begin after the prosecution's investigation, the defense is necessarily developing information at a far later stage in the process. This information is rarely, if ever, in the hands of the defense within the 30 days of arraignment as required by the recommendation. There is no parity in the amount of available investigative time and resources between the prosecution and the

defense. No defendant can match the panoply of investigative resources of the prosecution. Prosecutors can and do call on local police agencies, their own investigators, Sheriff's officers, the State police and their forensic scientists and laboratories, federal law enforcement agencies such as the FBI, the DEA, the INS, the IRS, etc. for assistance in preparing their cases. All these investigative resources are arrayed against the handful of investigative resources a defendant can muster. The prosecution can and does investigate the same areas the defense does. They are rarely unprepared to meet the defense's evidence. Under these circumstances, the claim of discovery disparity in favor of the defendant does not withstand scrutiny.

4. **Aggravating Factor for Prior Crimes of Violence**

Adding this or any other aggravating factor will clearly increase the likelihood of a defendant being sentenced to death; it is also clear that so doing will increase the length of time it takes to process capital cases by a substantial amount. As the Commission candidly acknowledges, the use of this factor may require two juries. In our experience, the vast majority of capitally charged defendants have criminal records for violent crimes. The use of this factor will, therefore, add significantly to the amount of

time it will take to try capital cases to say nothing of the additional burdens it will place on the criminal justice system to provide for and select two juries in most capital cases. This recommendation will require additional resources to implement.

All the Commission's recommendations designed to expedite the processing of capital cases may be frustrated by the addition of this aggravating factor.

TRIAL

1. Delivery of Victim Impact Statement

The Commission's proposal merely restates what it concedes is already the law with the exception that it would seek to bar a defendant from being emotional when pleading with a jury to spare his life. This recommendation may have the result of unduly restricting a capitally charged defendant's ability to present mitigating evidence.

2. Prosecution's Option to Retry Penalty Phase

This recommendation will not expedite the resolution of capital cases but it will extend their life. It will also secure more sentences of death, however, the recommendation does not mirror the manner in which county prosecutors have litigated capital cases during the past fifteen years. The way that county prosecutors have

actually treated capital cases stands in stark contrast to the testimony proffered in support of this recommendation. In nearly half of the death-sentenced cases remanded by the New Jersey Supreme Court, county prosecutors entered into life-saving plea bargains with defendants who had been previously sentenced to death by a jury. It may well be that these plea agreements were a result of conscientious county prosecutors being informed and guided by the inability of jurors to reach a unanimous verdict in the penalty phase. No purpose is served by "second guessing" the efforts of jurors who have, in good faith, struggled with the enormously difficult question of whether or not it is appropriate to sentence someone to death. Moreover, a retrial of the case, in effect, imposes further delay on the prosecution of other capital cases pending trial. This delay may jeopardize the imposition of the death penalty in other more appropriate cases which now will be brought to trial with stale evidence.

Additionally, this recommendation may place undue pressure upon prosecutors to pursue cases more appropriately disposed of by a plea agreement.

In addition to further prolonging the litigation process, there can also be no question that the retrial of penalty phases will place yet another costly burden on the resources of the litigants. Prior

to any legislative consideration of this recommendation, it would be appropriate to have a fiscal note prepared by OMB and/or OLS.

APPEAL

1. Expedite Preparation of Trial Transcripts

The Clerk's office of the New Jersey Supreme Court, not the litigants, sets the briefing schedule in every capital appeal. The ability of court reporters to produce the transcripts is one factor considered when deadlines are set. In recent years, the Court has significantly reduced the time allowed to file capital appeal briefs. It should be remembered that appellate attorneys for **both** the defense and the State require time to read the record and prepare their briefs. Their work starts immediately upon the entry of a death sentence.

2. Permit Defendants Right to Waive Post-Conviction Relief

The Commission has recommended that a competent defendant be able to waive post-conviction relief (New Jersey's equivalent of state-level habeas corpus). This recommendation places a higher value on the judgment of a death-sentenced defendant whose initial decision may have been the product of despair at being sentenced to death than

on the ability of the judiciary to ensure reliability in the implementation of the death penalty. The recommendation does not consider the real possibility that a death sentenced defendant may change his or her mind as to whether or not to pursue post-conviction relief. While the recommendation may serve to expedite the handful of cases where a death-sentenced defendant makes a reasoned, irrevocable decision not to pursue relief (in New Jersey, only one person in fifteen+ years arguably has fallen into this category), the adoption of this recommendation has the potential of injecting chaos and uncertainty (and, therefore, greater delay) into what is now the orderly and predictable processing of capital cases.

3. Elimination of Proportionality Review

Although there is no federal constitutional right to proportionality review on appeal, Pulley v. Harris, 104 S.Ct. 871 (1984), our statute provides that "upon request of the defendant, the Supreme Court shall...determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." NJSA 2C: 11-3e. Our Supreme Court has held that the framers of our law intended "...that statutory proportionality review should seek to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded

manner, fairly and with reasonable consistency." State v. Marshall, 130 N.J. 109,131 (1992). Unlike many jurisdictions which have the death penalty, New Jersey has no statutory **"safety net"** which permits appellate review for the purpose of correcting aberrational verdicts or for verdicts which may be the product of passion or prejudice. Proportionality review has served that purpose in New Jersey and has also provided a mechanism to ensure that death verdicts are not the result of racial or other pernicious biases.

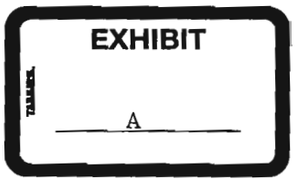
The New Jersey Supreme Court has rendered proportionality review decisions in the cases of four persons who have been sentenced to death: Robert Marshall, Marko Bey, John Martini and Anthony DiFrisco. **In every case where proportionality review has been performed, the New Jersey Supreme Court has affirmed the sentence of death.** On average, the Court has taken slightly less than 19 months to decide the issue of proportionality review, however, in the most recent case the time frame was reduced to 12 months. As methodological and other technical issues have been resolved, this time frame has, and will, continue to shrink.

4. **Adopt Division of Criminal Justice's Recommendations Concerning Stays**

The Commission proposes the adoption of the Division of Criminal Justice's suggested procedures for post-conviction review and stays

of execution with virtually no analysis as to why those procedures are, for example, more prudent than those offered by the Office of the Public Defender. This issue is currently under review by the New Jersey Supreme Court's Capital Cause Committee, a committee established to guide the judiciary in managing capital litigation. It is more appropriately addressed there.

The Office of the Public Defender respectfully requests that its proposal be clearly referenced with the proposal of the Division of Criminal Justice so that a thoughtful reader may consider the arguments on both sides when evaluating the merit of the recommendation. It is Attachment B to this document.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ATTACHMENT A

TABLE 1

DATE OF REENACTMENT, DATE OF FIRST CAPITAL AFFIRMANCE, DATE OF FIRST EXECUTION, AND TIME PERIODS BETWEEN, BY STATE

State	Date Death Penalty Reenacted Col. 1	Date First Death Sentence Affirmed Col. 2	Date of First Execution Col. 3	Years from Reenactment to First Death Sentence Affirmed (col. 2-col. 1) Col. 4	Years from Reenactment to First Execution (col. 3-col. 1) Col. 5	Years from First Death Sentence Affirmed to First Execution (col. 3-col. 2) Col. 6	Death Row Population as of 1996 Col. 7	Executions Since 1976 as of 1996 Col. 8
Alabama	5/ 5/76	9/ 9/77	4/22/83	1.5	7.2	5.7	144	13
Arizona	8/ 8/73	12/20/76	4/ 6/92	3.4	18.9	15.5	121	4
Arkansas	3/23/73	12/22/75	6/18/90	2.8	17.5	14.7	37	11
California	1/ 1/74	10/12/80	4/21/92	6.9	18.6	11.7	444	3
Colorado	1/ 1/75	5/14/90		15.6			4	
Connecticut	10/ 1/73						5	
Delaware	5/29/74	9/20/84	5/14/92	10.6	18.2	7.6	11	8
Florida	12/ 8/72	11/27/74	5/25/79	2.0	6.5	4.6	351	36
Georgia	5/28/73	4/ 4/74	12/15/83	1.0	10.9	9.8	108	20
Idaho	7/ 1/73	5/23/83	1/ 6/94	10.0	20.8	10.8	19	1
Illinois	7/ 1/74	11/13/81	9/12/90	7.5	16.4	9.0	164	7
Indiana	5/ 1/73	1/30/81	3/ 9/81	7.9	8.0	0.1	50	3
Kansas	4/22/94							
Kentucky	1/ 1/75	11/ 2/80		5.9			38	
Louisiana	7/ 2/73	10/11/74	12/14/83	1.3	10.5	9.3	53	23
Maryland	7/ 1/75	11/ 3/83	5/15/94	8.5	19.2	10.7	17	1
Mississippi	4/23/74	5/24/78	9/ 2/83	4.1	9.5	5.4	54	4
Missouri	9/28/75	5/11/81	1/ 6/89	5.7	13.5	7.8	92	19
Montana	5/11/74	11/12/76	5/10/95	2.7	21.5	18.8	6	1
Nebraska	4/20/73	2/ 2/77	9/ 2/94	3.8	21.7	17.8	10	1
Nevada	7/ 1/73	5/17/78	10/22/79	4.9	6.4	1.5	85	6
New Hampshire	1/ 1/91							
New Jersey	8/ 6/82	7/23/92		10.1			12	
New Mexico	7/ 1/79	1/20/83		3.6			3	
New York	9/ 1/95							
North Carolina	6/ 1/77	11/ 3/81	5/16/84	4.5	6.9	2.4	154	8
Ohio	1/ 1/74	11/24/76		2.9			150	
Oklahoma	5/17/73	5/21/80	9/10/90	6.9	17.6	10.6	119	7
Oregon	12/ 7/78	2/25/88		9.4			22	
Pennsylvania	5/26/74	12/30/82	5/ 2/95	8.9	21.4	12.5	200	2
South Carolina	7/ 2/74	2/11/76	1/11/85	1.6	10.7	9.0	71	5
South Dakota	1/ 1/79						2	
Tennessee	2/27/74	1/ 7/80		5.9			102	
Texas	1/ 1/74	4/16/75	12/ 7/82	1.3	9.1	7.8	394	106
Utah+	7/ 1/73	11/25/77	1/17/77	4.5	3.6	-0.9	10	5
Virginia	10/ 1/75	9/ 5/75	8/10/82	-0.1	7.0	7.0	54	31
Washington	11/ 4/75	11/ 6/84	1/ 5/93	9.1	17.4	8.3	13	2
Wyoming	2/28/77	5/27/83	1/22/92	6.3	15.1	8.8		1

Source: For date of reenactment, individual state statutes and session laws. Date of reenactment is the effective date of the statute. For date of affirmance, individual state high court opinions. Date of affirmance is the date the state high court upheld the first post-Furman death sentence on appeal, including proportionality review. Source for death row population and executions (as of April 30, 1996): NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, USA, Spring 1996. Source for New Jersey death row population, Administrative Office of the Courts, New Jersey, as of August 1, 1996.

+ Utah executed Gary Gilmore when he withdrew his appeals, before his conviction and death sentence were affirmed.

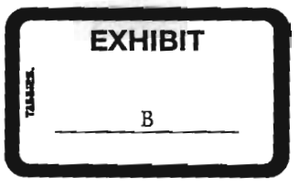
EXHIBIT
B

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February 3, 1998

Hon. Isaiah Steinberg, Chairman
Trial Judges Committee for Capital Causes
Camden County Hall of Justice
101 South Fifth Street
Camden, New Jersey 08103-4001

Re: Post-Conviction Applications, Stays and Federal Review in Capital Cases

Dear Judge Steinberg:

The Public Defender submits the following response to the Attorney General's letter and proposal of December 29, 1997. A synopsis of our position, which is fully explained below, is that we disagree with the Attorney General's proposed time limits, we are opposed to limiting the automatic stay after post-conviction review to the filing of the habeas petition, and we object to the creation of a standard for a stay pending a second or subsequent PCR application that so limits the availability of such relief as to prohibit it altogether. Finally, by eliminating any general provision for a discretionary stay, the Attorney General's proposal does not authorize the granting of a stay to permit the Parole Board or Governor to act on a clemency petition, or to permit the trial court to conduct a hearing into the competency of a defendant to be executed, or for other unforeseen situations. The final section of this letter contains slight modifications of our previous proposal.

I. ATTORNEY GENERAL'S PROPOSED AMENDMENT TO R.2:9-3(a) (STAYS)

As to how long the automatic stay should remain in effect, we have proposed that it remain in effect throughout the first full round of federal review, that is, through resolution of any certiorari proceedings on a first habeas petition. The Attorney General [hereinafter, "AG"] proposes that the stay expire upon the filing of the habeas petition. We urge the Committee to adopt our proposal for the following reasons:

• Comity, practicality and the desirability of uniformity all weigh in favor of a stay that remains in effect throughout the first round of federal review. The AG's proposal means that the state trial judge is going to issue an order setting a

date of execution regarding a matter that is pending before a federal district judge. In all probability, some state trial judges may not feel comfortable doing that, and the practice is likely to vary depending on the individual judge and the desire of the local prosecutor or AG. Indeed, our experience in Marshall illustrates the uncertainty in procedure created by a stay that expires upon the filing of the habeas petition. The Supreme Court granted such a stay, and the habeas petition was filed by the date specified. Although there was nothing to stay, we filed a stay motion with the habeas petition. The U.S. District Court Judge will not rule on the motion unless the trial judge issues a warrant (the federal judge has stated he would grant the stay motion), and the Deputy Attorney General has acknowledged the awkwardness of asking the trial judge to issue a warrant at this point, and has refrained from doing so. Whether and when an execution warrant will be sought and issued in the Marshall case if the case moves on to the Third Circuit Court of Appeals and U.S. Supreme Court is thus subject to the predilections of the individual State's attorney and individual trial judge, a situation sought to be eliminated by the adoption of these rules. In another county, the trial judge may issue a warrant, requiring the filing, answering and resolving of a stay motion in federal court during the time that the State has to answer the petition, causing delay.

• Habeas review of state judgments involves a unique interplay between the two court systems. In both Preciose and Marshall (III), our Supreme Court has flatly rejected the notion that the state courts have no interest in what happens on habeas review of New Jersey's death sentences. Indeed, the Court has gone further than that, in acknowledging that habeas review is not an undesirable intrusion on our state adjudications. Given our Court's uniquely respectful view of federal review, New Jersey should be among the states such as Illinois, North Carolina, Florida, Georgia, Alabama, and Indiana, which provide for a stay to permit the federal judiciary to complete its review, or do not issue execution warrants until that time. The capital murder conviction and death sentence are state judgments, and the state courts thus retain an interest in their status. Principles of comity dictate that the state courts not issue dispositive orders in matters pending in federal courts. Any response that an execution order is not dispositive because it will not be carried out is of course the reason why it should not be issued in the first place, and why an automatic stay pending the first full round of federal review should be provided for in our court rules.

• The federal bench, which will likely not consider itself deprived by not having to deal with stay litigation but instead will appreciate its absence, can be expected to resolve swiftly any habeas petition that warrants quick resolution.

Regarding the imposition of time limitations, there are a few general considerations the

Committee should keep in mind:

• In our Appellate Section, most of the attorneys who handle capital cases carry a full caseload, and in recent months, several attorneys have been assigned to more than one capital case at the same time. The assumption underlying the AG's proposal to impose further limits, that our attorneys do not have other responsibilities that require their attention during the various stages of their capital cases, and that they have the luxury to start preparing filings in anticipation of a future adverse ruling in a capital case, is completely unwarranted.

• The amount of time it takes attorneys representing clients under sentences of death to prepare a petition or brief cannot be calculated by multiplying the number of legal issues raised on appeal by some magic number. Both post-conviction review (at which stage more and more of our clients are going to have new counsel) and federal habeas review require a different focus and a reworking of issues in light of what is not in the trial record, different procedural requirements, and federal law. For most attorneys representing New Jersey clients, all of these areas are new. PCR and habeas are not appellate proceedings, and involve investigation and presentation of facts. Death Row clients require more attention from their attorneys than other clients, and have many issues related to their incarceration, often with potential direct impact on their cases, that must be dealt with. These are circumstances which, in addition to the amount of time it takes to research, formulate, write, edit and assemble documents, add unquantifiable and unpredictable numbers of hours to the time it takes to represent clients under sentences of death. Finally, the AG's proposals regarding time limits which we address below, will not significantly reduce the time these cases are undergoing review, while rejecting them will go a long way toward making sure that death-sentenced individuals receive adequate representation and due process.

• Both potential conflicts of interest and lack of Public Defender [hereinafter, "PD"] personnel are going to affect the assignment of counsel at the PCR stage. Unfortunately, the "pool" of attorneys experienced in advanced capital litigation[1] within the private bar who can accept an assignment is small, and includes attorneys who are also handling capital trials. Shortening the deadlines imposed by the federal system may make it more difficult to find available counsel and/or to permit new counsel to effectively represent their capital clients.

• The AG's proposals presume that the defendants will have been represented on direct appeal by our office. It is always possible that a defendant

[1] We attempt to comply with ABA Guidelines and maintain an assignment of two capitally competent attorneys to each capital case.

will have retained counsel and seek the services of our office at a later stage. A case in this posture will take additional time to assemble and investigate.

In the first sentence of the AG's proposed R. 2:9-3(a), we object to inclusion of the word "only" prior to the enumeration of the 5 review proceedings during which a death sentence shall be stayed. Use of "only" may be read to be in conflict with both parties' proposed provision in R. 3:22-13 that a sentence of death also "shall" be stayed pending a first petition for post-conviction relief, and may also be viewed as inconsistent with a provision for the discretionary granting of a stay pending a second or subsequent petition for post-conviction relief.

AG's Proposed R.2:9-3(a)(4) [time for filing certiorari petition after PCR]:

The PD objects to reduction of the 90 days provided by the United States Supreme Court rules for filing a petition for certiorari after denial of a timely filed motion for reconsideration of the New Jersey Supreme Court's affirmance of the denial of post-conviction relief. It is not clear whether the AG proposes that the 30 days run from the denial of a motion for reconsideration, or from the issuance of the opinion, thus requiring the reconsideration motion to be filed within the 30 days that the defendant would have to file a certiorari petition. We urge that any time limitation run from the date of the denial of a motion for reconsideration, in conformance with standard practice. In either case, reduction of the time to file a petition for certiorari from 90 to 30 days at the PCR stage is unreasonable for the following reasons:

- The United States Supreme Court rules provide that all petitions for certiorari are due 90 days from the disposition of a timely filed motion for reconsideration. A capital case at this final stage of state review is no simpler to prepare than a non-capital or civil case. An attorney's familiarity with the case does not include the New Jersey Supreme Court's treatment of the issues in the decision that must be challenged on certiorari. Furthermore, preparation of a petition for certiorari requires up-to-the-minute familiarity with the United States Supreme Court's docket, and the state of the law in all the federal circuits on each issue to be included. Thus, considerable research is required, in addition to the tasks of formulating issues, writing, editing (to 40 pages), undergoing review, and assembling an appendix.

- If the 30 days include the time to prepare and file the motion for reconsideration, the time to prepare the certiorari petition is further reduced to 20 days. The motion for reconsideration is due 10 days after the decision is released. Even what may seem like a relatively uncomplicated motion to the AG generally takes the full 10 days to file because it takes time to review the Supreme Court's lengthy opinion, the briefs and the record to determine what grounds should be raised in a reconsideration motion, as well as to meet with and talk to the defendant and his/her family members and respond to multiple press inquiries.

The remaining 20 days is wholly insufficient to prepare and file a certiorari petition in a capital case. Since counsel receive only one day's notice that the Supreme Court is releasing the opinion, attorneys have other matters in other courts that may require their attention during that time as well.

• The pendency of a motion for reconsideration cannot be presumed to add significant time for preparation of a certiorari petition. The motion for reconsideration filed after the New Jersey Supreme Court's only affirmance of the denial of post-conviction relief in a capital case was denied by our Court in 12 days. The amount of time it takes the Court to rule on a reconsideration motion filed after the first phase of direct review has no bearing on the advancement of the case, because proportionality review goes forward regardless of the pendency of a reconsideration motion. These are the motions that have taken the Court longer to decide, but the time it has taken the court to rule on these 9 motions has ranged from 19 days to almost 20 weeks.[2] The 4 reconsideration motions filed after proportionality review (Marshall, Bey, Martini, and Di Frisco), were ruled on in 5 weeks, almost 11 weeks, 13 weeks and 6½ weeks.

• We note that the AG does not propose to reduce the 90 days for filing a petition for certiorari after the direct appeal/proportionality stage. Any assumption that the preparation of a certiorari petition after PCR warrants 2/3 less time than at the earlier stage in all cases is unfounded.

• Last year, in litigating Robert Marshall's stay applications in the Law Division and in the New Jersey Supreme Court, as an alternative to opposing a stay, the AG asked each court to limit Mr. Marshall's time to file his certiorari petition to 30 days from the date of any stay order, which in each case would have reduced the amount of time to file that petition as provided for by the U.S. Supreme Court rule. The New Jersey Supreme Court, without comment, rejected the State's request to limit the time to file the certiorari petition, and ultimately granted a stay pending disposition of defendant's certiorari petition and until a specified date, which turned out to be 137 days after the petition for certiorari was filed,[3] and 4 weeks after it was denied.

• There is no persuasive justification for reducing the time afforded by the United States Supreme Court's rules, and there are jurisdictions with considerable

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[2] The Court ruled on the reconsideration motions filed last year in Chew, Harvey and Cooper on the same day, November 21, 1997; the motions had been filed on July 7, August 11 and August 29, respectively.

[3] Mr. Marshall's certiorari petition was filed 3-4 days before the 90 days expired.

capital experience which, by rule or practice, support the PD's position that the time for filing a certiorari petition after PCR should not be modified by state rule.[4] As of April 1997, execution warrants were not issued in Georgia and Alabama until the end of the first full round of federal review (i.e., certiorari following habeas appeal to U.S. Court of Appeals), and because stays are not necessary, there is no state time limit superimposed on the federal rules for filing a certiorari petition (or habeas petition, for that matter). This appears to be the practice in Indiana and Maryland as well. Similarly, in Florida, warrants do not issue, or are routinely stayed, pending federal review, and the federal time limits for federal filings control. North Carolina specifically provides by statute that an execution shall not be scheduled until the end of certiorari on a habeas petition, as long as the defendant timely initiates all state and federal review proceedings, including a certiorari petition after state post-conviction review. The federal filing deadlines are not modified. N.C. Gen. Stat. § 15-194 (1996). Oklahoma has a statute that provides for an automatic stay conditioned on the filing of a certiorari petition within the 90 days prescribed by U.S. Supreme Court rule, Okla. Stat. Ann. tit. 22, §1001.1.A.3. (West 1997 Supp.), but that state has since instituted a semi-unitary procedure whereby direct appeal and post-conviction review are more-or-less simultaneously pursued. In Pennsylvania, where warrants are signed by the governor and there does not appear to be a uniform practice, the PD is aware of at least several cases in which a warrant was not signed until months after certiorari had been denied;[5] thus no shortened deadline for filing the certiorari petition was imposed by a state court.

The PD thus urges that the rule simply refer to a timely filed petition for certiorari, as we originally proposed.

AG's Proposed R.2:9-3(a)(5) [time for filing habeas petition]:

In this provision, the AG proposes a time limit for the filing of a habeas petition, in

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[4] The PD is not familiar with the practice in every jurisdiction that has the death penalty, but having examined the practices in many states in the early spring of 1997, is not aware of a single jurisdiction, among those that stay pending federal review or do not issue execution warrants before the end of federal review, that reduces the 90 days for filing a certiorari petition.

[5] Commonwealth v. Banks, 656 A.2d 467 (Pa.), cert. denied sub nom, Banks v. Pennsylvania, 113 L.Ed.2d 65 (1995), Banks v. Horn, No.4:CV-96-0294, slip op. at 1 (M.D. Pa. Feb. 22, 1996); Commonwealth v. Christy, 656 A.2d 877 (1995), Christy v. Pennsylvania, 116 S.Ct. 194 (1995); Commonwealth v. Cross, 634 A.2d 173 (1993), Cross v. Pennsylvania, 115 S.Ct. 109 (1994). Commonwealth v. Griffin, 515 A.2d 865 (Pa. 1994), Griffin v. Horn, No. CIV.A.95-2737, 1995 WL 296198 (E.D. Pa. May 12, 1995).

addition to the time limit already imposed by the federal habeas statute. Prior to April, 1996, there was no time limit to file a habeas petition, and now that Congress has set one for the first time in history, the question arises as to why New Jersey should afford its capital defendants less time than that determined appropriate by Congress. How much of the year following direct review tolled by PCR will be left to file the habeas petition in each case will vary, depending largely on how much time was spent preparing the PCR petition. Contrary to the AG's assumption, in the future, the attorneys preparing the habeas petition are likely not to be the attorneys who represented the defendant on direct review. The PD believes that the deadline set by Congress should control, and the rule should simply refer to a timely filed first petition for habeas corpus, as we originally proposed.[6]

However, if the Committee decides to superimpose a shortened time limit to file the habeas petition, the PD asks that the Committee consider the following:

- In the first part of subsection (5), the AG proposes that if a defendant does not file a certiorari petition, the habeas petition be due 120 days after the state Supreme Court disposes of the first PCR petition. It is not clear whether the AG proposes that the 120 days run from the denial of a motion for reconsideration or from the issuance of the opinion, thus requiring the reconsideration motion to be filed within the time provided for the defendant to prepare and file the habeas petition. We urge that any time limitation run from the date of the denial of a motion for reconsideration, in conformance with standard practice.

- Requiring the filing of a habeas petition 30 days after disposition of the petition for certiorari affords the defendant who seeks certiorari first considerably less time to prepare a habeas petition than the defendant who does not seek certiorari, thereby penalizing a defendant for pursuing an available avenue of relief. Once a certiorari petition is filed, the State has 30 days to respond; during those 30 days defense counsel, whether PD or private, will likely have other matters to attend to. After the State responds, any reply by the defendant is due immediately. Thereafter, it generally takes 5-6 weeks for the United States

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[6] The PD acknowledges, that unlike the time for filing the certiorari petition, at least one state supreme court -- Illinois -- imposes its own deadline of 90-120 days for the filing of the habeas petition. However, unlike the AG's proposal, the stay entered by the Supreme Court of Illinois conditioned on that 90-120 day filing, remains in effect through the end of the first full round of federal review in the United States Supreme Court. Similarly, in Oregon, where a statute provides for an automatic stay of 60 days after post-conviction review, the stay remains in effect throughout the federal proceedings on that petition, as long as the habeas petition was filed within the 60 days. As noted earlier, states that do not superimpose a state limitation on the federal statute of limitation include Alabama, Georgia, Florida, North Carolina and Maryland.

Supreme Court to dispose of the petition.[7] Requiring the habeas petition to be filed 30 days thereafter could mean that counsel have only 60-75 days to prepare it. To bring this deadline in line with the one proposed for the defendant who forgoes certiorari, it should be 60, not 30 days, after the denial of certiorari.

• As a further "counter-proposal," the PD suggests that the time limit for filing the habeas petition when no certiorari petition is filed be 150 rather than 120 days, and that the time limit when a certiorari petition is filed be 90 days from its disposition.

II. AG'S PROPOSED AMENDMENT TO R.3:22 (PCR)

AG's Proposed R.3:22-9:

Regarding this rule's reference to the AG's proposed R. 3:22-13 respecting the amendment of pleadings, see the PD's comments below on the AG's proposed R. 3:22-13.

AG's Proposed R.3:22-12:

The underlined language is identical to the language we proposed. Without explanation, the AG has deleted the excusable neglect exception to the 5-year limitation. If this was not inadvertent, we of course are opposed to the elimination of this exception, which is outside the Committee's bailiwick.

AG's Proposed R.3:22-13(a) [time for filing PCR petition]:

As we have indicated, we expect that in the future, many of our capital clients will be assigned new counsel for PCR, who will have to familiarize themselves with the entire record and direct review proceedings (including proportionality review). Whether or not new counsel have been assigned, review of trial counsel's trial file and other exhibits not in the trial record, as well as investigation of facts and witnesses is required on PCR, and is time-consuming. In addition to the development of substantive claims new procedural issues have to be dealt with. We have proposed 120 days from disposition of the previous certiorari petition, with discretion in the trial court to enlarge the time, noting that as a practical matter, because this time eats into the time for the later preparation of the habeas petition, it is not in the defendant's interest to

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[7] As the AG noted at the December 11th meeting, the majority of decisions in capital appeals have been issued by our Supreme Court in the summer. The most recent Marshall decision was released in March, and because the reconsideration motion was ruled on in only 12 days, Mr. Marshall's certiorari petition was due and filed just before the end of the U.S. Supreme Court's term. It therefore took longer than usual to be addressed by that court -- 10 weeks after the defendant filed his reply brief.

delay the filing of the PCR petition. The AG proposes 90 days that can be enlarged only upon good cause shown. For all of the reasons already stated, we urge that the defendant receive the benefit of the additional 30 days we propose, and we oppose restriction of enlargement of the time to a showing of "good cause."

AG's Proposed R.3:22-13(b) [restriction on amendment after answer]:

The AG proposes that capital defendants be required to make a showing of good cause before amendments to the petition after the filing of the answer will be allowed, a requirement not imposed on non-capital defendants. We feel this restriction is unnecessary, and may be unduly burdensome when the need to amend should arise. A defendant must present all his claims in his first PCR and his first habeas petition; it is almost impossible to satisfy the requirements for filing a second habeas petition. Capital cases often involve finding hard-to-locate witnesses from the defendant's childhood and witnesses who may be reluctant to come forward. Some capital cases are long and complex and attorneys may inadvertently overlook or miss a claim when first drafting the petition. Because the State would suffer no prejudice from a post-answer amendment, any interest in speeding up the litigation is outweighed by the defendant's interest in having all of his claims included in his only shot at collateral relief. In the civil context, R. 4:9-1 permits amendment after a responsive pleading has been filed "by leave of court which shall be freely given in the interest of justice."

AG's Proposed R.3:22-13(c) [time for State's answer]:

We note with respect to the AG's proposal that the State be afforded the same amount of time to file its answer or motion to dismiss that the defendant has to file his/her petition, that it is unusual for the respondent in a criminal action to be afforded the same amount of time as the party who frames the issues. If the Committee accepts the PD's proposal that the PCR petition be due 120 days after the disposition of certiorari, 90 days should still be sufficient for the State to file its response.

AG's Proposed R.3:22-13(f) [restrictions on stays pending subsequent PCR's]:

We acknowledged in our proposed amendment to R. 2:9-3(a) that the granting of a stay subsequent to the first full round of state and federal review is a matter of discretion, without suggesting a standard for the exercise of that discretion. The AG has proposed that an application for a stay pending a second or subsequent PCR application be made in our Supreme Court, and has offered two different standards to govern the court's decision whether to grant the stay, both of which are based on federal law. The United States Supreme Court's extremely restrictive interpretations of the various provisions in each standard are explained very briefly below. Our Supreme Court spent a good deal of time in Preciose eschewing application of the federal restrictions on habeas to state post-conviction procedures. We suggest infra that any standards be worded in state parlance, not federal. While we leave to the Committee the contemplation

hether the Supreme Court is where these stay applications should be filed, we urge, for the llowing reasons, that both standards proposed by the AG are wholly inappropriate to govern e decision whether to grant a stay pending a second or subsequent PCR application:

AG's 1st Formulation of R.3:22-13(f):

• As the AG acknowledges, its first proposed standard is the present federal standard for filing a second or successive habeas petition contained in 28 U.S.C. § 2244(b), it is not a federal standard governing a stay application. The premise underlying the strict limitations placed by Congress on the filing of a successive habeas petition in §2244(b) is that the clash between the interests in finality and due process at the core of historical jurisprudence of federal habeas review of state judgments, which is settled in favor of due process on a first round of federal habeas review, is settled in favor of finality concerns during subsequent attempts at federal review of state judgments. See McCleskev v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986); Liebman and Hertz, Federal Habeas Corpus Practice and Procedure, Chapter 28 (2d Ed. 1994), and 1996 Cumulative Supplement (1997). The justifications described in McCleskev v. Zant for severely circumscribing the availability of a second round of substantive federal review of a state judgment do not apply to whether a stay is warranted to consider a second state application.

• Section 2244(b) essentially bans the filing of a second habeas petition, and thus the proposed limitation on when a stay would be granted is a new and severe restriction on a capital defendant's right to file a meritorious second PCR. The first exception to what would amount to a prohibition against a stay -- that the claim rest on a new rule of constitutional law specifically made retroactive to cases on collateral review -- will most certainly never arise. The second exception -- that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense -- arises only when a defendant raises a claim of actual innocence, see Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992), thus precluding all other constitutional claims involving new previously undiscoverable facts but not based on new, retroactive law, as well as any claim relating to the death sentence that is not based on a new rule of constitutional law that has already been determined to be retroactive.[8] This proposal would work a very

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Prior to the enactment of §2244(b) "actual innocence" was defined as follows. "A typical example of 'actual innocence' in a colloquial sense is the case where the State has cted the wrong person of the crime." Sawyer v. Whitley, 505 U.S. at 340, 112 S.Ct. at "Actual innocence" of the death penalty means ineligibility for the death penalty -- absence

(continued...)

severe substantive limitation on subsequent PCR applications; fundamental due process claims that could not have been previously discovered would not be cognizable on a subsequent PCR application in a capital case.

AG's 2nd Formulation of R.3:22-13(f):

• This standard is based on the federal restrictions on successor habeas petitions formulated by the United States Supreme Court prior to the enactment of §2244(b). See generally Kuhlmann v. Wilson, supra; McCleskev v. Zant, supra; Sawyer v. Whitley, supra. This alternative, like the first, prohibits a stay pending a second PCR unless one of two extremely narrow exceptions can be met.

• The first exception requires the petitioner to show "cause and prejudice," as defined by federal law, for failing to raise the claim previously. We do not believe that the federal "cause and prejudice" standard is appropriate in this context. The cause standard is very difficult to satisfy. For example, under federal law, inadvertent attorney error that does not rise to the level of ineffective assistance of counsel, does not constitute cause, while our Supreme Court indicated in Preciose, 129 N.J. at 476-477, that attorney error not rising to the level of constitutional ineffectiveness is sufficient to satisfy the "could not reasonably have been raised before" requirement of R.3:22-4(a):

> ... we have generously interpreted Rule 3:22-4(a) to permit the assertion of claims that could not reasonably have been raised in earlier proceedings. For example, in State v. Nash, 64 N.J. 464, 317 A.2d 689 (1974), counsel had failed to make a claim based on a decision issued before the conclusion of defendant's appeal. There, we noted our "hesita[tion] to make the availability of a retroactive principle in a criminal context turn on whether an attorney has read recent advance sheets." Id. at 475, 317 A.2d 689. We concluded that defendant did not have a reasonable opportunity to raise his claim in an earlier proceeding. Thus, Nash suggests that defendants should not pay the exacting price for state procedural forfeitures that result from the ignorance or inadvertence of their counsel -- regardless of whether counsel's error violates constitutional standards. See Coleman [v. Thompson], supra, 501 U.S. at ___, ___, 111 S.Ct. at 2576, 2576-77, 115 L.Ed.2d at 683,

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[8](...continued)
of any applicable aggravating factors, or other condition(s) for death eligibility not met. Id. at 341-345, 112 S.Ct. at 2520-2522. It is not even clear that §2244(b) includes "innocence of the death penalty."

684 (Blackmun, J., dissenting); Meltzer, [State Court Forfeitures of Federal Rights,] 99 Harv. L. Rev. at 1216.

Contrary to the above, the federal cause standard requires the defendant to bear the risk of attorney error. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397, 408 (1986). Alternatively to a showing of ineffective assistance of counsel for failing to raise a claim previously, cause can be established by showing some objective factor external to the defense, such as interference by state officials. However, most questions of cause turn on whether constitutional ineffective assistance of counsel is demonstrated.

• The second exception under this alternative requires the defendant to show that failure to consider the claim in the subsequent PCR petition would result in a fundamental miscarriage of justice. Under federal law, "miscarriage of justice" means actual innocence or ineligibility for a death sentence (that is, no applicable aggravating factors or "by own conduct" requirement not satisfied where applicable). See note 9, supra.

• Thus this proposal works to bar sentencing claims relating to mitigating evidence unless the defendant can establish "cause," as defined by federal law.

III. PD'S REVISED PROPOSED AMENDMENTS

Revisions of our previously proposed rule amendments are set forth at the end of this section.

R. 2:9-3(a):

The revisions to our earlier proposal are renumbering of the subsections and addition of the reference to the PD's newly proposed subsection (e) of our proposed R. 3:22-13. We have indicated in a footnote that the rule's comment should indicate the expected parameters of the catch-all stay provision. We have not been able to come up with appropriate limiting language to put in the rule, but we believe that it would be a mistake to presume, in the absence of any experience, that all situations in which a stay might be necessary can be determined at this time.

R.3:22-13:

The revisions to our earlier proposal are:

(1) Renumbering of the subsections
(2) Incorporation of the AG's proposal regarding time for State's answer
(3) In subsection (d), elimination of unnecessary language and clarification

that the subsection applies to a first PCR petition

(4) Addition of a subsection (e) containing a standard for a discretionary stay pending a second or subsequent PCR not linked to federal law governing successor federal habeas petitions attacking state judgments

PUBLIC DEFENDER'S REVISED PROPOSED AMENDMENT TO R. 2:9-3(a)

(a) Death Penalty.

(1) A sentence of death shall be stayed

(i) pending direct appeal;

(ii) pending proportionality review;

(iii) pending appeal from the disposition of a first petition for post-conviction relief;

(iv) pending the timely filing and disposition of a petition for certiorari following direct or proportionality review;

(v) pending the timely filing and disposition of a petition for certiorari following appeal from the disposition of a first petition for post-conviction relief; and

(vi) pending consideration in a federal district court of a timely filed first petition for habeas corpus, and timely sought review of the disposition thereof by the Third Circuit Court of Appeals and the United States Supreme Court.

(2) Any other stays, other than as provided for by R. 3:22-13(e), shall be subject to the trial court's discretion.[*] *Should the time for the initiation of any of the above-enumerated proceedings expire without application by the defendant or his representative for an enlargement of time or other relief, a warrant appointing a date of execution shall issue in accordance with N.J.S.A. 2C:49-5.*

PUBLIC DEFENDER'S REVISED PROPOSED R. 3:22-13

3:22-13. Capital Cases

(a) Time for filing. A petition under this rule challenging a conviction or death sentence in a death-sentenced case shall be filed no more than 120 days from the disposition of a timely filed petition for certiorari, or 120 days from the expiration of the time to seek such review, unless the court enlarges the time to file the post-conviction petition.

(b) Amendments of pleadings shall be liberally allowed.

(c) Within 90 days after service of a copy of the petition or amended

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[*] *The comment should indicate that this provision is intended to cover situations such as the Parole Board and/or Governor's Office need for time to act on a petition for clemency, and for any necessary hearings to determine a defendant's competency to be executed, and other unforeseen and presumably rare situations.*

petition, unless the time is enlarged by the court, the State shall serve and file an answer thereto or move for dismissal. If a motion for dismissal is denied, the State's answer shall be filed 30 days thereafter, unless the time is enlarged by the court.

(d) A sentence of death shall be stayed pending the filing of a first petition for post-conviction relief filed in accordance with the time limitation of R.3:22-13(a) and proceedings on such timely filed first petition.

(e) A sentence of death may be stayed pending the filing of a second or subsequent petition for post-conviction relief only if the petitioner shows (1) that the ground asserted for relief was not presented on direct appeal or proportionality review, or in a prior petition for post-conviction relief, (2) that the ground asserted for relief consists of the denial of a state or federal constitutional right, (3) that the ground asserted for relief could not reasonably have been raised in a prior proceeding, and (4) that the ground asserted for relief would warrant reversal of the conviction or death sentence.

Thank you for the opportunity to address these issues further.

Respectfully,

Judith L. Borman

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APPENDIX E

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July 23, 1997

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Re: Post-conviction review procedures in capital cases

Your Honor:

I have received Your Honor's letter of June 4, 1997, on behalf of the Trial Judges Committee for Capital Causes, requesting comments and suggestions regarding appropriate procedures for post-conviction relief applications and stays. The Division of Criminal Justice thanks the Committee for soliciting its views and welcomes the opportunity to participate in the development of such procedures.

Division attorneys have been involved in litigating the first capital case to be affirmed on post-conviction review, State v. Robert O. Marshall, as well as in advising and consulting with various county prosecutor's offices on other capital cases now in post-conviction review. The experience gained in these cases has given these attorneys a unique insight into the post-conviction process, from the initial filing of the petition to applications for stays pending review in federal court. The following comments are a synthesis of their experiences and suggestions.

Division attorneys believe first and foremost that public confidence in the efficacy of capital punishment demands that procedures be implemented to reduce delay in post-conviction matters. To a large extent, the Supreme Court's April 5, 1989, Directive on Capital Cause Appeal Procedures has served to streamline the appellate process in capital cases while affording defendants maximum due process. Unfortunately, no similar procedures currently exist with respect to post-conviction litigation in the Law Division. The Division believes that the promulgation of rules regarding the filing of the initial post-

conviction application will aid in preventing the long delays which are now the norm.

In the typical case, a post-conviction relief application will not be filed until the denial of a petition for a writ of certiorari by the United States Supreme Court on direct review (which includes proportionality review by the New Jersey Supreme Court). In the Marshall case, there were numerous motions and requests for discovery in the Law Division which delayed the ultimate filing an amended petition.[1] Therefore, time limits for the filing of any preliminary motions and the petition itself should be adopted. We suggest that a rule be promulgated that requires a petition to be filed no more than 90 days following the denial of certiorari, with trial judges being given the discretion to extend that time in individual cases only upon good cause shown. Within this period, the defendant should also make any appropriate discovery requests pursuant to State v. Marshall, 148 N.J. 89, 268-275 (1997). The State should likewise be given 90 days to respond to the petition. We also believe that judges should be encouraged to resolve the petition as expeditiously as possible. To that end, we suggest a rule similar to that in 28 U.S.C. § 2266, which generally provides for a 180-day period in which a federal judge is to decide a habeas corpus petition in a capital case.

No procedures currently exist with respect to stay applications in post-conviction proceedings. On a first petition, and any appeal to the New Jersey Supreme Court resulting from a denial of that petition, a request for a stay of the issuance of an execution warrant should be granted by the trial judge as a matter of course. A rule to that effect would eliminate the need for the defendant to file a motion requesting a stay, assuming the petition has been timely filed.

The Division further believes that after affirmance of the denial of a first petition for post-conviction relief by the New Jersey Supreme Court, a stay of execution pending federal review should be accompanied by strict time limits for the filing of both a petition for certiorari in the United States Supreme Court and a petition for habeas corpus in the United States District

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[1]A barebones petition had been filed while proportionality review was pending in order to meet the five-year time bar of R. 3:22-12, but was without prejudice to the filing of an amended petition. The amended petition was the actual petition on which the Marshall PCR court ruled.

Court. While the Division took the position in Marshall that the grant of a stay of execution pending federal review should be determined by the federal courts, we recognize that the New Jersey Supreme Court's grant of such a stay in Marshall and its directive to this Committee to develop procedures involving these matters indicates that the Court's view may be otherwise. However, the Court's order granting a stay in Marshall afforded the defendant not only the full 90 days allowed by the rules of the United States Supreme Court to file the certiorari petition, but also nearly eight months from the date of the Court's opinion to file the habeas petition.

The Division respectfully submits that such extensive time periods to file the federal petitions are unwarranted. We believe that 30 days following the conclusion of state court proceedings (which would include any reconsideration motion) should be sufficient to file the certiorari petition. The habeas petition should be filed within 120 days of the date of the opinion of the New Jersey Supreme Court, or within 30 days of the denial of certiorari, whichever is later. It must be remembered that, generally speaking, at least some of the attorneys working on the federal applications also will have been intimately involved in the state court proceedings and will be familiar with the issues and the records in these cases. Relief from these time limitations should be granted only under extraordinary circumstances for good cause shown, and only on application to the New Jersey Supreme Court.

Finally, the Division believes that any procedures recommended by the Committee should address an issue sure to arise in the future -- second and subsequent post-conviction applications. Whether R. 2:9-3(a), which automatically stays a sentence of death if an appeal is taken, might conceivably apply to a first post-conviction relief petition may be debatable (the Division took the position in Marshall that it did not so apply), it certainly should not be utilized to stay the issuance of a warrant of execution on appeal from the denial of a second or subsequent petition. To that extent, the Division respectfully disagrees with Judge Pressler's comment that the power to deny a stay of a sentence of death "would be presumably exercised only under extraordinary circumstances and only where there have already been multiple appeals from multiple denials of applications for post-conviction relief." Current N.J. Court Rules (1997), Comment R. 2:9-3 at 534.

We feel that in this situation, with all appeals to all courts already having been exhausted, the burden of obtaining a

stay should fall squarely on the defendant and should be countenanced only in the rarest of circumstances. Thus, the Division recommends the procedure promulgated by the Ohio Supreme Court, which recognizes that any further action in state court following the exhaustion of remedies "is likely to be interposed for purposes of delay and would constitute an abuse of the court system." State v. Steffen, 70 Ohio St.3d 399, 639 N.E.2d 67, 77 (1994). The Supreme Court in Ohio requires a defendant wishing to stay his execution in order to engage in further court proceedings to petition that Court for such a stay, and to satisfy the "cause and prejudice" standard established by the United States Supreme Court in McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), for the filing of a successive habeas petition. State v. Steffen, 639 N.E.2d at 77. The Ohio court found that this standard properly balanced the need for finality of judgments with the need for protection of defendants who could demonstrate cause for failing to previously raise an issue or circumstances constituting a fundamental miscarriage of justice. Id. Given the New Jersey Supreme Court's analogy of post-conviction proceedings to habeas matters, at least with respect to the procedural bar of R. 3:22-5, see State v. Marshall, 148 N.J. 89 (1997), the application of the McCleskey standard is especially appropriate.

This letter by no means constitutes an exhaustive list of possibilities for the Committee regarding post-conviction procedures. The Division would be happy to send a representative to meet with the Committee at its convenience to discuss the recommendations in this letter as well as other issues involving post-conviction review which might be of concern.

Respectfully,

Terrence P. Farley
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c: Anne C. Paskow, Assistant Attorney General

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101 South Fifth Street
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Re: Post-conviction review proceedings in capital cases

Your Honor:

Pursuant to the request of the Trial Judges Committee on Capital Causes at its December 11, 1997 meeting, this letter will comment on the July 31, 1997 proposals of the Public Defender with respect to post-conviction review procedures, as well as suggest alternative rule changes. Although the Division of Criminal Justice agrees with the Public Defender with respect to the need for changes to R. 2:9-3 and R. 3:22 to reflect the unique aspects of capital cases, we disagree with several of the Public Defender's specific suggestions, especially with respect to time limitations and the extent of a stay of execution on federal review.

The Division objects to several aspects of the Public Defender's proposed R. 3:22-13. First, with respect to subsection (a), as set forth in our letter of July 23, 1997 we believe that the petition for post-conviction relief should be

filed within 90 days of the denial of certiorari, and that an enlargement should only be granted upon good cause shown. The Public Defender's proposed R. 3:22-13(b) is duplicative of the first sentence of R. 3:22-9; we believe, however, that amendments sought after the answer is filed by the State should not be routinely granted. Due to the nature of capital cases, and the multitudinous issues raised therein, the 30 day time limitation for filing an answer, R. 3:22-9, should not apply; as stated in our July 23 letter, we believe the State should receive 90 days to answer the petition. It must be remembered that until the defendant files his PCR petition, the State will have no idea what specific issues will be raised, while the defendant's attorneys will be working on the petition well before certiorari is denied. A 30-day period to respond will likely be inadequate.

Finally, we agree with the Public Defender that a provision should be added automatically staying a death sentence on a first post-conviction review in the Law Division. However, we are concerned that her proposed R. 3:22-13(d) may be construed to apply to second or subsequent filings. We submit that there should be an automatic stay for a first petition only.

Thus, we propose that R. 3:22-9 and R. 3:22-12 be amended to except capital cases from their provisions, and that a new R. 3:22-13 be adopted. The Division's proposals are attached to

this letter.[1]

As set forth in our July 23 letter, the Division believes that after affirmance of the denial of a first petition for post-conviction relief by the New Jersey Supreme Court, a stay of execution pending federal review should occur only under strict time limits for the filing of both a certiorari petition in the United States Supreme Court and a petition for habeas corpus in the United States District Court. We see no reason why the 90 day period to file a certiorari petition, and the one year federal statute of limitations on the filing of the habeas petition should guide this State's consideration of how long to stay the imposition of a sentence on which the State courts have already passed judgment, and affirmed, on direct, proportionality, and post-conviction review. This is especially true given the fact that it is likely that at least some of the same attorneys will be preparing these federal applications and will be intimately familiar with the records and the issues in these cases. Once the habeas petition is filed, we believe that the matter of a stay can be addressed by the federal courts which have jurisdiction over the case. Thus, we propose the attached amendment to R. 2:9-3.

We believe that these rules will fairly permit capital

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[1] Those portions of these proposals which are underlined are new. Portions of the existing rules which are in brackets have been deleted.

defendants to present all their claims in all possible forums, while at the same time streamlining the process and preventing undue delay. The Division welcomes comment on these proposals, and thanks the committee for its consideration of them.

Respectfully,

Paul H. Zoubek
Director

c: Anne C. Paskow, Assistant Attorney General
Ivelisse Torres, Public Defender
John C. Musarra, First Assistant Prosecutor, Warren County
Joseph Barraco, Esq., Administrative Office of the Courts

2:9-3. Stay Pending Review in Criminal Actions.

(a) Death Penalty. [Unless the court otherwise orders a] A sentence of death shall be stayed [if an appeal is taken.] only:

(1) pending direct appeal;

(2) pending proportionality review if requested by a defendant;

(3) pending appeal from the disposition of a first petition for post-conviction relief;

(4) during such time as the defendant may timely file a petition for certiorari to the United States Supreme Court from the final disposition in the state Supreme Court of direct appeal and proportionality review, or for 30 days in the case of the filing of a petition for certiorari after the disposition of the appeal on a first petition for post-conviction relief, including a timely filed motion for reconsideration, and while such timely filed petition for certiorari is pending;

(5) if the defendant has not previously filed a petition for a writ of habeas corpus in the federal district court, for 120 days after the state Supreme Court's disposition of a first petition for post-conviction relief, including a timely filed motion for reconsideration, or for 30 days after the disposition by the United States Supreme Court of a petition for certiorari following disposition of a first petition for post-conviction relief, whichever is later. Relief from the time limits in R. 2:9-3(a)(4) and R. 2:9-3(a)(5) shall be granted only by the state Supreme Court and only under extraordinary circumstances for good cause shown. Should the time for the initiation of any of the above-enumerated proceedings expire without application by the

petitioner for an enlargement of time or other relief, the court shall issue a warrant appointing a date of execution in accordance with N.J.S.A. 2C:49-5.

(b) no change

(c) no change

(d) no change

(e) no change

(f) no change

3:22-9. Amendments of Pleadings; Answer or Motion by Prosecutor; Non-Capital Cases

Amendments of pleadings shall be liberally allowed. Assigned counsel may as of course serve and file an amended petition within 25 days after assignment. Within 30 days after service of a copy of the petition or amended petition, the prosecutor shall serve and file an answer thereto or move on 10 days' notice for dismissal. If a motion for dismissal is denied the State's answer shall be filed within 15 days thereafter. The court may make such other orders with respect to pleadings as it deems appropriate. Amendments of pleadings and the filing of the answer or motion by the prosecutor in cases in which a sentence of death has been imposed shall be governed solely by the provisions of R. 3:22-13.

3:22-12. Limitations; Non-Capital Cases

A petition to correct an illegal sentence may be filed at any time. No other petition, except those filed pursuant to R. 3:22-13, shall be filed pursuant to this rule more than 5 years after rendition of the judgment.

3:22-13. Capital Cases.

(a) Time for filing. A petition under this rule in a case in which a sentence of death has been imposed shall be filed no more than 90 days from the disposition of a timely filed petition for certiorari, or 90 days from the expiration of the time to seek such review. The court may enlarge the time to file the petition only upon good cause shown.

(b) Amendments of pleadings shall be liberally allowed prior to the filing of the answer. Amendments sought subsequent to the filing of the answer shall be allowed only on good cause shown.

(c) Within 90 days after service of a copy of the petition or amended petition, unless the time is enlarged by the court, the prosecutor shall serve and file an answer thereto or move for dismissal. If a motion for dismissal is denied, the State's answer shall be filed within 30 days thereafter, unless the time is enlarged by the court.

(d) The court may make such other orders with respect to pleadings as it deems appropriate.

(e) A sentence of death shall be stayed during the pendency of a first petition for post-conviction relief filed in accordance with the time limitation of R. 3:22-13(a).

(f) A sentence of death shall not be stayed upon the filing of a second or subsequent petition except upon application to the state Supreme Court. A stay on a second or subsequent post-conviction relief petition shall be granted only if the petitioner shows that the claim was not presented on direct appeal, proportionality review, or post-conviction review, and that

(1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the state Supreme Court or the United States Supreme Court, that was previously unavailable; or

(2) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

- or -

(f) A sentence of death shall not be stayed upon the filing of a second or subsequent petition except upon application to the state Supreme Court. A stay on a second or subsequent post-conviction relief petition shall be granted only if the petitioner shows that the claim was not presented on direct appeal, proportionality review, or post-conviction review, and that

(1)(i) there was cause for the failure to raise the claim previously; and (ii) there was actual prejudice to the petitioner; or

(2) that a fundamental miscarriage of justice would result from the failure to hear the claim.[1]

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[1] The first standard in proposed R. 3:22-13(f) is derived from 28 U.S.C. § 2244(b), and is the current federal standard for the filing of a second or successive habeas petition. The

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second, alternative, standard was suggested in our July 23 letter pursuant to State v. Steffen, 70 Ohio St. 3d 399, 639 N.E.2d 67, 77 (1994), i.e., that a defendant seekng a stay on a second or subsequent petition satisfy the "cause and prejudice" standard established prior to the habeas amendment by the United States Supreme Court in McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), for the filing of a successive habeas petition. Either standard would be acceptable; it is most important, however, that the burden fall squarely on the defendant.