
Public Hearing

before

NEW JERSEY DEATH PENALTY STUDY COMMISSION

"Testimony concerning whether the selection of defendants for capital trials is arbitrary, unfair, or discriminatory; whether there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process; and whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison"

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: September 27, 2006
1:00 p.m.

MEMBERS OF COMMISSION PRESENT:

Reverend M. William Howard Jr., Chair
James P. Abbott
James H. Coleman Jr.
Edward J. DeFazio
Kathleen Garcia
Kevin Haverty
Eddie Hicks
Thomas F. Kelaher
Boris Moczula
Senator John F. Russo
Rabbi Robert Scheinberg
Yvonne Smith Segars
Miles S. Winder III



ALSO PRESENT:

Gabriel R. Neville
Commission Aide
Miriam Bavati
Counsel

Hearing Recorded and Transcribed by
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REVEREND M. WILLIAM HOWARD JR. (Chair): Good afternoon, good afternoon.

We're calling, now, the third public session -- third public hearing-- This is the opening of the third public hearing of the New Jersey Death Penalty Study Commission. On behalf of my colleagues-- I'm Bill Howard, Chair of the Commission; and on behalf of my colleagues, I'd like to welcome you and thank you for coming.

For those of you who will bring testimony today, we especially appreciate the time that you're taking for preparing your remarks and for addressing us. We are going to try-- We have a number of persons coming to testify today. So with your forbearance, we're going to have each person come and address us for 10 minutes. And as a Pastor, I reserve the right to allow a little grace. But don't take advantage of me, now.

But because we do have some time limitations, we'd like to try and hear the testimony of persons within the 10-minute frame. And then we'll invite members of the Commission to pose questions for a brief period.

I'm going to announce the first two persons -- I think we can accommodate two persons -- who will testify here, today: Mr. James Wells and Mr. Nate Walker. You are urged to come swiftly to the table and take your seat.

And let me just--

Are you Mr. Wells?

J A M E S W E L L S: Yes, I am.

REVEREND HOWARD: Mr. Walker is coming.

Let me ask you, when you speak, to please kindly touch the red button. This is being recorded. And, also, we want to make sure that persons in the audience can hear well.

Persons in the back, are you able to hear what is being said? (negative responses) Oh, my. Can you hear now? (negative responses) So it doesn't matter how loudly I speak. Somehow--

MS. SMITH SEGARS: No, go closer to your mike.

REVEREND HOWARD: Oh, okay.

MS. SMITH SEGARS: You have to lean into your mike.

REVEREND HOWARD: Now, can you hear me? Can you hear me there now? (affirmative responses) There is a problem here with the system, because I'm almost shouting.

And the gentleman standing-- You can't hear me very well, can you?

UNIDENTIFIED SPEAKER FROM AUDIENCE: No.

REVEREND HOWARD: So I don't know what to say.

SENATOR RUSSO: Bill, get real close.

REVEREND HOWARD: Very close?

SENATOR RUSSO: Yes, real close.

REVEREND HOWARD: Can you hear me now? (negative responses) Wow.

I will certainly do that. It doesn't hurt.

You can hear me now? (affirmative responses) Better.

Okay. Mr. Wells, we're going to start with you. Remember now, 10 minutes. And you can say a lot in 10 minutes. Please.

MR. WELLS: Good afternoon, everyone.

My name is James Wells. I am the National Chairman of the National Association of Black Law Enforcement Officers. I recently retired from the Port Authority of New York-New Jersey, a month ago.

This is a statement I have prepared.

Dear Reverend Howard and members of the Commission: I am the President of the New Jersey Chapter of the National Association of Black Law Enforcement Officers, which I will refer to as NABLEO -- also known as NABLEO. I am here to share with you NABLEO's position on the death penalty.

I am also the father of a murder victim. My son, Jafari, was shot and killed only months ago. I share my painful reality with you, because I want you to know that I speak with the knowledge of what it is like to experience the most terrible of losses, the death of a child to senseless murder. I believe my personal experience more fully informs this testimony.

NABLEO's mission is to establish and secure the enhancement and promotion of ideals and goals of the black law enforcement officers throughout the country for education, political advancement, and charitable endeavors. As part of that goal, we advocate on issues that directly impact the services of the men and women of color in the communities that they serve.

As law enforcement officers, our primary goal is to protect the public. We all agree that convicting and punishing offenders is critical to achieving that goal. But on one extreme form of punishment, the death penalty, we have different views. Some of us have no moral opposition to the death penalty and believe that it may have a place in society. Others

oppose it for sincere ethical or moral reasons. We share, however, great concern about the way in which the death penalty is actually applied. After careful consideration, NABLEO members have concluded that it should replace -- it should be replaced with the sentence of life without parole.

The death penalty is an exorbitantly expensive punishment that saps financial and human resources. Countless millions of dollars have been spent since New Jersey reinstated the death penalty in 1982. One estimate places that figure at more than \$250 million in the pursuit of the death penalty for a handful of murderers. These resources could have been used to hire more police officers or to fund other critical needs such as gun violence prevention programs, drug and mental health programs, youth and family services, and education.

The death penalty has been applied in an arbitrary and unfair manner, resulting in disparate and uneven results across geographic, and racial, and economic lines. Its unfair application is of great concern, because disparity in sentencing, especially in death sentencing, undermines the public's confidence in the criminal justice system.

Finally, we acknowledge that innocent people have been sentenced to death in our nation. Here in New Jersey, there have been recent cases of wrongful convictions for serious crimes, such as murder. These serious mistakes underscore the risk of someday executing an innocent person.

We are deeply concerned about violent, crime and are committed to the goals of protecting the public and bringing offenders to justice. But the death penalty is not an effective law enforcement tool in

practice. It is a distraction from justice. Life without parole is a serious punishment that will keep our citizens safe from violent offenders.

Thank you.

REVEREND HOWARD: Thank you very much.

And would you just remain there in your seat? And when we've heard the testimony from Mr. Walker, we might entertain questions from the Commission.

MR. WELLS: Yes, sir.

REVEREND HOWARD: And would you join me in turning off your mike? Thank you.

Mr. Walker, you're going to have to, now, put on your mike.

N A T E W A L K E R: Okay.

Yes, thank you, Chairman Howard and the honorable members of this committee.

My name is Nate Walker. I am an innocent man who spent years of my life in prison for something I didn't do.

In 1974, a woman picked me out of a lineup as the man who had raped her. I had been at work at the time. I had evidence that I had been at work, but no one believed me. I had a car theft on my record. I had stolen an old car for racing. So I became a suspect right away. But I never hurt anyone.

I hired an attorney -- a black attorney from Plainfield, New Jersey. I don't know why, but I thought that that would be best. I thought he would be better than a public defender, since the person who testified against me was white. But it didn't do anything for me. He could have asked for a blood test, but he didn't. They didn't have DNA back at that

time. But they could have ruled me out through a simple blood test. The prosecution thought that they had the right person, so they didn't order one, since the woman said I was the man. I don't know why my lawyer didn't order a blood test. He just didn't. I don't know enough -- I didn't know enough to insist on one.

I thought I would never be convicted. I knew I hadn't raped that woman. I had my time cards to prove that I had been -- wait one second -- I had my time cards to prove that I had been at work at the time. The personnel manager for Phillips Dodge (phonetic spelling) company, for which I worked, also testified. I expected the system to work for me. I expected people to believe the truth.

But the system failed me. I was innocent, but I was convicted. I was sentenced to life plus 50 years in prison. And I spent the next 10 years of my life in prison. I missed a lot while I was in prison. I missed family birthdays, holidays. I missed my wife and my son. But my family stayed with me. It was really hard for me, but they stayed with me. So did a lot of my friends. I was a very lucky person.

I was freed in 1986. I am happy to be free. I don't have any grudges against anyone. In fact, I was very lucky that I met Jim McCloskey, a Centurion Minister. He believed in my innocence. He got the court to allow blood tests for me, which should have been done from the beginning.

I was very lucky, because the evidence wasn't destroyed while I was in prison. I was lucky that the blood tests came back. The prosecutor joined with my lawyer to ask the judge for my freedom. I was grateful for that, and for him and Jim's help.

I was lucky that when the evidence that showed my innocence came back, I was still alive to be released. I wonder sometimes what would have happened if I had the death penalty -- if they had had the death penalty back in New Jersey at that time. I think about that a lot of times. If the evidence had been lost-- I think about all that. I have a hard time when I think about that, but I can't help it. I still have nightmares thinking about what happened to me.

I am here to tell you what happened here. I am living proof that New Jersey can send an innocent person to death row. An eyewitness picked me out of a lineup, and that was good enough to send me to prison for the rest of my life. I am here to tell you that I am lucky, but I worry about others who are innocent. We all are only human, and we make mistakes. I think the death penalty is very risky. We can't count on every innocent person having the good luck like I had.

Thank you.

REVEREND HOWARD: Thank you very much.

Now, the Chair would like members of the Commission-- If you have questions of these persons, please raise them now. (no response)

Hearing none, then I'd like to thank you for coming.

MS. SMITH SEGARS: Excuse me, Reverend Howard.

REVEREND HOWARD: Yes.

MS. SMITH SEGARS: I'm sorry.

Sir, how many years were you in custody in total? I'm sorry, I wasn't clear.

MR. WALKER: Twelve years.

MS. SMITH SEGARS: Twelve years.

MR. WALKER: Yes, ma'am.

MS. SMITH SEGARS: And when were you released?

MR. WALKER: In 1986.

MS. SMITH SEGARS: In 1986.

MR. WALKER: Yes, ma'am.

MS. SMITH SEGARS: Thank you.

MR. WALKER: You're welcome.

REVEREND HOWARD: Are there other questions? (no response)

If not, again, thank you very much.

MR. WELLS: Thank you.

MR. WALKER: Thank you.

REVEREND HOWARD: Now the Chair would like to invite forward Ms. Jennifer Thompson and Mr. David Kaczynski.

Ms. Thompson, we invite you to speak first. Thank you.

JENNIFER THOMPSON: Thank you.

I'd first like to thank the New Jersey Death Penalty Study Commission for having me here.

My name is Jennifer Thompson, and I am from Winston Salem, North Carolina. You may be wondering, what's a woman from Winston Salem, North Carolina, doing in New Jersey. I'm here because I believe my experience, my one-time certainty in a situation, is uniquely relevant if this Commission, and any of its members, are certain that New Jersey is incapable of executing an innocent person. I would gladly travel to dispel that myth. Allow me to explain.

In 1984, I was raped at knifepoint. I did not know whether I would live or die that night. I have always been a determined person, and so I decided that if God should be so kind as to let me live, I would do everything in my power to memorize my attacker's face. Throughout the course of the rape, I struggled to look into the face of the person who was destroying my life. I needed to know what his hair looked like. Was his skin dark or light? Did he have any scars, tattoos, piercings, things he could not alter later? His voice, his age, weight, and height all mattered -- information the police would need.

I survived that night, as did his second victim, who he raped one hour later less than a mile from my house. My hate for him was secondary to my need to find him and to get him off the streets.

Ronald Cotton became the primary suspect. And in January of 1985, the state of North Carolina convicted him of first degree rape, first degree sexual offense, and first degree breaking and entering. He received life and 50 years. It was an amazing moment for me. It was the criminal justice system at its best. The good guy gets justice, the bad guy gets punished. This is the way it is supposed to work. Ronald Cotton would never touch his mother again. He would never find love. He would never get married. He would not know the joy of parenthood or the taste of freedom again. I hated him with a blind hate. I prayed daily to my God to please have Ronald Cotton killed in prison, but before he dies, let him know the incredible fear of being raped, to have your soul and your spirit from you taken and crushed before your eyes. This all but consumed me.

As the years went by, my life took on a steadiness. I graduated college and fell in love, got married, and gave birth to triplets in the Spring

of 1990. Life was good, and I was busy. By the Spring of 1995, I was informed that Ronald Cotton was requesting a DNA test to be performed. My blood sample from 1984 had disintegrated. Would I give a new blood sample? I did not hesitate, as I knew what the test was going to show. It would show what I knew all along: Ronald Cotton was the monster who had raped me. I went that day to the lab, and I had a blood test drawn.

By June the results were in. And standing in my kitchen, the news was delivered. We had been wrong. Ronald Cotton was innocent. A man named Bobby Poole was the rapist -- a serial rapist. The shame was oppressive. The guilt was heavy. I was afraid of revenge, retaliation, and vengeance.

A full two years later, and after intense suffering, I met with Ronald Cotton to ask for forgiveness. Without hesitation, he gracefully forgave me. With mercy, he held my hand, and he told me not to be afraid of him. He gave me healing that night. He is now my friend. And without him, I would still be broken and fractured. He taught me that I should not allow that one terrible act to control my life. Bobby Poole does not deserve that kind of power or control.

Three years later, in the year of 2000, I was invited to speak at a press conference on behalf of a man named Gary Graham, who was to be executed by the state of Texas. Graham's lawyers said he was innocent.

My immediate response to the request was, "No, of course I cannot come. I am an ardent supporter of the death penalty. After all, this is America. We do not execute our fellow citizens unless we know, not beyond a shadow of a doubt, but without any doubt, that they are guilty. I believe that if you take a life, you should be prepared to give up your own."

I was assured that I was entitled to my opinion and all that was needed from me was to tell my story. The following day, I boarded a plane to Houston and began to read about the Graham case. And I was immediately alarmed at the description of the eyewitness evidence. There were some serious red flags in this case. Fear shot through me like a bolt of lightning. This could be an innocent man. I was challenged for the first time in my life about my belief in the death penalty. I began to wonder how many other cases might involve human error, as mine did. Certainly, it seemed wrong to execute this man if the account I was reading was accurate, and I believe that it was.

In Texas, I met 12 others there on Gary Graham's behalf, men and women, black and white. They had been wrongfully convicted. One man was Kirk Bloodsworth, here today. I urge you to read his book, or at least a summary of his case, which is a stunning example of how the system can get it wrong.

Some say that death row exonerations are rare enough that we should not end the death penalty because of innocence. Some say that with the proper procedures for eyewitness lineups and other precautions against wrongful convictions, you can reduce the risk to an acceptable rate. But I ask you: What is acceptable? I cannot look at Kirk Bloodsworth and support the death penalty. I just can't. His life is too valuable.

Please allow me a word on eyewitness identification procedures. They are critically important to the criminal justice system. And I know that New Jersey is a leader in that regard, and you should feel very proud of that. I wish every state was like New Jersey. The fact that you are here today examining an issue that many states won't examine because of

politics or indifference speaks to this State's desire for justice. I know that law enforcement here embraced the new lineup procedures. I know you have an excellent and well-funded Public Defender's office. I know that your courts carefully review death cases. But I am here to tell you what I know is true. You can reduce, but you cannot eliminate, the risk of error in the death penalty system. No set of procedures can completely guard against human error. Believe me, I was certain Ronald Cotton was the man who raped me -- certain.

I have thought about this issue more than most. I could have been murdered that night I was raped. Here is what I have concluded. I believe, as I have always believed, we should reserve no sympathy for killers. None. They choose to kill and should be held responsible for their choice. But this is not 1960, or even 1990, this is 2006. In 2006, we know that innocent people are sometimes sentenced to death. In 2006, we know of at least four cases of executed persons who might have been innocent. In 2006, we know of several state scandals involving crime labs.

And I ask you: How can you know that no one in a New Jersey lab will ever act with sinister intentions or do sloppy work? You can't know, of course. We are not perfect. We are human, we make mistakes. And some of us even act with malice. To deny that would be criminal.

This Commission should find that human error is inevitable in all criminal justice systems, and that the execution of an innocent person is also inevitable if the death penalty continues as a policy.

Thank you for your time.

REVEREND HOWARD: Thank you very much.

And, please, if you don't mind, remain there and allow us an opportunity to talk with you.

Let me say, it might be useful if I tap on the -- with the gavel -- it means you have two minutes left; just to give you a clue.

Thank you.

Mr. Kaczynski.

DAVID KACZYNSKI: I have always been opposed to the death penalty.

REVEREND HOWARD: Excuse me, sir. Would you join me in turning off (*sic*) your mike? That's good. That helps the amplification, we've learned.

MR. KACZYNSKI: I have always been opposed to the death penalty. Although I do not believe that killing a human being is inherently immoral, I do believe that taking a human life can only be justified by necessity -- self defense, a just war, or the use of lethal force by police to stop a violent criminal. If we can protect society by incarcerating murderers, including life imprisonment without the possibility of parole, then we should not use the legal system to carry out a program of unnecessary killing.

My view is consistent with the faith-based positions against capital punishment adopted by most American religious denominations. The Roman Catholic Church, for one, has articulated a clear link between its moral and practical reasons for opposing the death penalty. It teaches that the death penalty is fundamentally wrong whenever non-lethal means, such as long-term incarceration, are available to protect society. On his visit to the United States, Pope John Paul II pleaded for the elimination of

capital punishment, calling the death penalty, and I quote, “cruel and unnecessary.” He expressed concern not only that it inflicts damage on the condemned person but, more importantly, that it causes moral damage to society.

Up until 1995, my views on capital punishment were purely theoretical. I never imagined that one day I’d have a personal confrontation with the capital punishment system. But that fateful day came in September of 1995, when my wife Linda suggested that my estranged older brother, Ted, might be the notorious Unabomber.

At first, I simply couldn’t believe that Ted was capable of harming anyone. Although I believed that he was disturbed, and he was eventually diagnosed with schizophrenia, I’d never seen any signs of violence in him. However, as Linda and I poured over the Unabomber’s published manifesto, I began to confront the reality that my brother, Ted Kaczynski, might be the Unabomber.

We soon found ourselves facing a terrible dilemma where any choice we made could easily result in someone’s death. If we did nothing, Ted might kill again. On the other hand, if we handed my brother over to the FBI, he could be executed. I had to ask myself what it would be like to go through life with my own brother’s blood on my hands.

At the time, it disturbed me greatly that the price of doing the right thing might be my brother’s execution. I wanted to make a life-affirming choice, but the death penalty put me in a position where any choice I made could lead to someone’s death. In order to protect innocent life, I had to potentially sacrifice the life of my mentally ill brother. I also had to grapple with the effect of the death penalty on someone else I loved

very much, our elderly mother, Wanda. I experienced firsthand what the murderer and the executioner both fail to see, that the person who is killed is usually survived by family members who suffer much, much more. I feel deeply grateful, and almost tremendously lucky, that Ted did not get the death penalty. But I can tell you with absolute certainty that if he had been executed, he would not have been the person who suffered the greatest agony. That person would have been our mother, Wanda.

Our decision to turn in Ted was based on the belief that we were morally obliged to do whatever we could to stop the violence. We held onto a desperate hope that Ted might be exonerated by the FBI's investigation. But we were resolved to stop the violence no matter what.

Ten years later, we stand by our decision. It brought an end to the Unabomber's 17-year reign of terror which left three people dead and many others injured. We probably saved lives. We would also like to believe that we set a positive example for other families who might face similar dilemmas in the future.

Over the next two years, I witnessed firsthand how the criminal justice system actually works. The U.S. Justice Department promised to protect our privacy. Instead, we were swamped with media attention on the day of Ted's arrest and for months afterwards. And personal information we shared in strict confidence with the FBI ended up in the *New York Times*. Prosecutors solemnly promised to make a -- and I quote -- "fair and impartial" evaluation of my brother's mental condition. Instead, they used a notorious "hired gun" legal expert to provide psychiatric testimony in my brother's case. Fortunately, my brother will spend the rest of his natural life in prison. But Ted's life was not spared because he's any sicker than 100 or

so seriously mentally ill people that our government has executed since 1992. His life was spared because he had great lawyers.

I began to see the criminal justice system for what it is: an imperfect system run by fallible human beings. From the moment of a suspect's arrest, to the condemned man's final breath, the process is influenced by so many variables and so many subjective judgements that inconsistent results are practically guaranteed. The entire judicial system presumes a level playing field but, too often, justice gets lost in the shuffle. As a result, we have a death penalty that disproportionately impacts the poor, the black, and the mentally challenged.

For me, it is a real honor to testify with my dear friend Bill Babbitt, whose testimony you will hear later. His story will open your ears and, I hope, your eyes as well. Our personal experiences are practically identical, except for one thing: the outcome of that long and agonizing judicial process. My brother is alive, and Bill's brother was executed.

It's probably an empty exercise to debate whether capital punishment is ever justified. I do believe that reasonable people can disagree about this philosophical question. But no reasonable person who truly understands how the current system works can, in my opinion, claim that it represents justice. Who lives and who dies should not depend on one's wealth, one's given mental ability, one's ethnicity or race, or anyone's personal whim or bias.

Do we want a death penalty that is applied unfairly and risks executing the innocent? A perfect system is unattainable. But a marginally better system would cost much more and execute fewer people. Doesn't it make more sense to put our limited resources into effective law

enforcement? Do we want more lawyers arguing in court, or more cops on the street? Do we want longer trials, or better victim services? Do we want to kill an unlucky few -- not necessarily the worst -- or do we want to help troubled kids before they end up hurting someone? In the real world, these are the choices we must make. These are the choices you, as members of this Commission, face through your long and careful deliberations.

Bill Babbitt and I made our choices when we turned in our brothers to the authorities. In doing so, we made difficult yet responsible, life-affirming choices. The same deeply held ethical values that guided those choices now prompt us to speak against the death penalty. We made sacrifices to protect people we didn't know. In doing so, we also made a statement about the kind of world we want to leave to future generations, a world where violence is truly a last resort, a world where decency and humanity come first.

REVEREND HOWARD: Thank you very much.

Now I'm going to invite members of the Commission to raise whatever questions they may have.

Yes, Mr. Hicks.

MR. HICKS: Ms. Thompson, first of all, I really feel sorry for the horrible crime that was committed against you. And I thank you very much for making the long trip up here today.

But I actually have two questions for you. The first question is: How did they identify Ronald Cotton? How did you identify Ronald Cotton? Was it through a lineup, was it through photographs? How did you determine -- or assume that he was the person?

The second question is: How did the police officers or the system determine that it was actually Bobby Poole? Was it run through CODIS or some other means?

MS. THOMPSON: Thank you for asking that question.

What led to my determination that it was Ronald Cotton was through a series of what I call -- and I lot of experts on eyewitness identification call -- *contamination of memory*. And it began through doing something called a *composite sketch*, where you look through different ears, and noses, and eyes, and you try to put together a face that resembles the person who attacked you. And when I did that, immediately, subconsciously, my memory becomes contaminated. Because in actuality, Ronald Cotton's, or my rapist's, eyes, ears, nose, hairline were not in the availability of choices. So once I did the composite sketch, the composite sketch ran through the newspaper. And a phone call came in that it resembled a man named Ronald Cotton.

When they brought me into the police department to do a photo lineup using simultaneous lineups -- which I know that you all have gotten away from-- It was eight photographs. Subconsciously, what you do is natural selection. You discount four of them. You limit it down to another four. You come up with your best choice. And the best choice became Ronald Cotton -- choosing a photograph that had been taken in 1981.

And my actual perpetrators face was not in the lineup. I was given instructions not to feel compelled to choose anyone. But I felt in my heart that I wouldn't be there unless the police had a suspect.

When I picked out the photograph of Ronald Cotton, several days later I was taken to do a physical lineup. And, of course, Ronald Cotton was in the physical lineup. And, again, I did the same process. You choose someone who most closely resembles the photograph, who most closely resembled the composite sketch, most closely resembled my memory.

By the time I went to trial in 1985, my memory now had made Ronald Cotton my rapist. Ronald Cotton was then convicted in 1985.

There was a second trial in '87. In those two years, Ronald was serving time in Central Prison, in Raleigh. And another man, by the name of Bobby Poole, was brought in -- a convicted rapist. And Ronald recognized his face from the composite sketch. And Bobby Poole became someone he felt convinced was the actual rapist. And in 1987, when they brought-- The second trial came in '87. They brought Bobby Poole in to me, under a voir dire, in the trial, and I had absolutely no recognition of him whatsoever. Because that's the way your memory works. And my memory had cemented Ronald Cotton's face in my memory, and there was no way you were ever going to convince me it was Bobby Poole. And if it hadn't been for the fact that DNA had survived -- not because of the system, but because the detective in my case felt this was a case that was going to haunt him forever. Those were his words. And the state of North Carolina only required you to keep DNA for six years. Eleven years later he had kept it. And a fragment of a sperm had survived.

So it was not necessarily the system working, it is what I like to consider serendipity at its very best. And that's how the process worked for me.

MR. HICKS: Thank you.

MS. SMITH SEGARS: Thank you, Ms. Thompson, for coming.

I had the benefit of seeing the film *After Innocence*. In fact, it was shown to my Public Defender's Office at our conference. *After Innocence* -- you're depicted in the film, along with Mr. Cotton -- and the picture of Bobby Poole. And I should say they eerily look alike.

But I, one, would ask--

Chairman Howard, it might be a good idea if we can get copies of the film *After Innocence*, and share those DVDs with members of the Commission. I think it would be useful. And if members of the public get the opportunity-- I know that it's going to be airing for the first time on HBO in the near future.

But I ask you a question: In your travels -- because I've seen the two of you on film, and I know that you toured. Are you inundated with people that come to you and say, "This was my experience," or, "I made that mistake," or, "I was"-- Just share with us your experience, and how that happens to you -- or what people have shared with you in your travels.

MS. THOMPSON: One of the alarming things that I find in my travels is, first of all, the incredible number of rape victims that are out there. I never, ever leave a conference without several women coming up to me and saying, "I was raped when I was 15, and we never caught the guy," or, "I was raped when I was 17, and I've never told anybody." And that, to me, is alarming, it's startling.

But I often have people come up to me, also, to talk to me about being a victim of a mugging, or being a victim of a robbery, or something to that effect. And they always say to me, “You know, I don’t think I could pick someone out of a lineup. I don’t think that I could do that.” And what I often try to illustrate to people is-- I’m sure all of you have mothers. You could not sit down and do a composite sketch of your mothers’ faces, because memory doesn’t compartmentalize our features on our faces.

So why I try to illustrate that is, when you try to do something like a physical lineup or a photo lineup, the memory doesn’t work the way we think it works. And so therefore, contamination -- or making erroneous eyewitness identifications -- is so prevalent, it’s so easy. And I consider myself well above average in intelligence. And I got a very good look at my perpetrator’s face that night. I spent a great deal of time memorizing those features, and I still got it wrong.

And my case highlights one of the cases where, even given the very best intentions -- having a detective who was trying to do the right thing, a prosecutor who had no malice, a great defender for Ronald Cotton’s case -- we still messed it up. And 11 years of a man’s life was gone. And I can’t give it back, no matter how hard I try.

MS. SMITH SEGARS: Thank you.

REVEREND HOWARD: Justice Coleman.

JUSTICE COLEMAN: Mine is simple comment.

We appreciate your presence today. And if you have not already read the New Jersey Supreme Court decision in *State v. Cromedy*, because many of the facts that you referred to seem almost identical to

what happened there. That has occurred in New Jersey and led the Court to write an opinion creating a new rule of law on cross-racial identification, for many of the reasons you've indicated. It's C-R-O-M-E-D-Y, if you have not read it.

MS. THOMPSON: Thank you very much.

Just to highlight, it will be-- The movie you're talking about is highlighting -- premiering on Showtime--

MS. SMITH SEGARS: On Showtime. I said HBO.

MS. THOMPSON: --on October 19. And it's a phenomenal film that highlights six exonerees and their aftermath. And it's compelling.

MS. SMITH SEGARS: It's powerful.

REVEREND HOWARD: Rabbi Scheinberg.

RABBI SCHEINBERG: A question for Mr. Kaczynski: Since New Jersey, like a number of states, has a system of proportionality review, -- whose objective is to eliminate capriciousness in the avocation of the death penalty-- And I take it from your testimony that you feel like such a system would not be adequate to eliminate capriciousness in the death penalty. Why?

MR. KACZYNSKI: Again, I think it's the issue of a system that's so complicated, that has so many moving parts. We can see that inconsistency is apparent in the results. Nationally, and in New York State -- where I live -- we have had a tremendous correlation between the race of the victim and who gets the death penalty. If your victim is a white person, nationally you're four times more likely to get the death penalty than if your victim is a person of color.

I think you also have to do an analysis proportionality that looks at key decision makers within the system. I know in New York we have had a serious problem with the lack of representation of people of color on juries throughout the state, among the ranks of district attorneys, prosecutors, and defense attorneys. We're expecting the system to work perfectly, and yet it's apparent it's not. It's almost as if you've got--

I'm sure you may be aware of the U.S. Supreme Court case of *McCleskey v. Kemp*, which basically stated that bias and discrimination are realities in society. And they felt that the court system could not eliminate-- It should not be the role of the court system to try to eliminate bias. But it charged legislators with trying to do that. I think proportionality review is a first step. But I think it needs to be very, very carefully done; and look at all of the variables, which are many.

I think there is also a number of issues. We've noticed, for example, in New York, a tremendous problem with geographic disparity -- that who gets the death penalty depends on what county you're from, much more so than on the gravity of the crime that you've committed. And so there are elements of disparity that involve race, but there are elements of disparity that involve social class, that involve geography, jury pools.

If you're going to have an ultimate punishment, and you're going to call it ultimate justice, I think it has to be applied in a way that's ultimately fair. I think that means it has to be evenly applied. And I don't think anybody has found a way to evenly apply the death penalty anywhere in America. And until we do, I think it's unjust.

REVEREND HOWARD: Are there further questions from members of the Commission? (no response)

If not, we'd like to thank you once again for your excellent testimony and for the time you've taken.

Thank you very much.

The Chair would now like to invite Mr. Bill Babbitt and Mr. Jack Callahan.

And I'm going to ask, Mr. Callahan, if you would begin. Because I understand you are under some time constraints. We invite you to speak to us first; followed by Mr. Babbitt, who we're happy to welcome, as well.

J O H N C A L L A H A N: Thank you, Reverend Chairman and members of this Commission.

It's nice to be home again. I spent many years in this Legislature, and I retired 10 years ago from it.

I'm currently Chair of the New Jersey Governor's Advisory Council on Volunteerism and Community Service. But I'm coming here as an individual based on my personal journey with the death penalty, which began just prior to my retirement from the Legislature in 1996.

At that time, I was requested by a Senator to provide the cost of the death penalty process in New Jersey. I really was having ambivalent feelings on the death penalty, seeing individuals being released from prison and killing once again. I also saw the grief of loved ones with the loss of a family member. And in the early 1980s, I stood intently in the Senate Chamber, listening to Senator Russo describe his own grief and personal loss due to the murder of a family member on New Year's Eve.

When we began the research and study of the issue, I expected to see that the costs of incarceration of 30, 40, or 50 years would be much

greater than putting someone to death. However, when my intern gave me some initial findings, I was astounded to see the amount of money being spent on the entire death penalty process, and additional research only confirmed these findings.

Although our own judiciary was not able to provide any cost data before the completion of the study, I was able to find -- from an Illinois State University study in 1996 -- that New Jersey's death penalty process annually costs the State an additional \$22.8 million over and above the costs of life imprisonment. Very sobering statistics on the use of taxpayer dollars. I am sure that figure is much higher with more recent studies.

After retirement from the Senate, I began to study other factors than costs in my role as Chairman of New Jersey's Justice Fellowship, and prepared a white paper on the subject, which I presented in 1997 to the National Task Force of Justice Fellowship, in Washington.

Some of these facts included the issue of deterrence, randomness, and inconsistency in the application of the death penalty; innocence and the inevitability of error, arbitrariness, representation, current public opinion, and effect on victims' families.

I am sure that you have had, or will have, individuals more expert than me on each of these subjects -- and we've already heard some aspects of that today -- so I will not bore you with my findings over the period of my research and involvement from 1996 through 2003.

However, there is one finding which has changed my mind on the effect of victims' families, and much of that has to do with my meeting Lorry and June Post, whose daughter was stabbed when she was 29 years of age. There are numerous family members of victims who say that you

cannot really have closure until one can walk on the grave of the killer after an execution. However, Lorry said it best, and I'm quoting him, "I do not wish to dishonor the memory of my daughter by killing another person in her name." Let's face it, there is really never any closure on the loss of a loved one, especially for a family who must continue to return to court and revisit the circumstances each time there is a new hearing or appeal based on new evidence.

Now, a student and a researcher in public policy-- All the studies led me to one conclusion: that there is no rational basis for the death penalty as a matter of public policy. I repeat that. There is no rational basis for the death penalty as a matter of public policy, I found.

Therefore, based on all of the above factors, I came to the conclusion, in 1999, that we must, as a state and as a people, come up with an alternative to the death penalty. And I believe it was, and still is, life imprisonment without any possibility of parole -- and let me repeat, no possibility of parole. This is truly a relational intervention, based on factors taken as a whole. You can take one factor and chew it apart a little bit. But when you take all these factors, they lead to but one rational conclusion, and that is: there is a viable alternative.

So in my concluding remarks today, I would ask you to consider the following three points as you deliberate this vital matter: First, the application of the death penalty seems to be an emotional response, adding to the violence in our society. We know, from the movie *Munich*, violence begets violence, begets more violence. And I believe we need an intervention into the violence in our society. I believe that is the reason almost all countries have done away with its application.

Further, those who argue that the death penalty is supported by the Bible have only read half of the Bible, namely the Old Testament. And in no way is it supported by the other half of the Bible, or the New Testament, in my opinion.

Secondly, there are many instances where one has been taken off of death row, or prior to their execution, has helped others to turn their lives around, such as Karla Faye Tucker, in Texas, who, before her execution, was making tapes to the outside world for young people to view; and the man from San Quentin, who was nominated for the Nobel Peace Prize for his writings and efforts to gang members to change their lives.

I've had two such personal experiences. One was having the opportunity of spending an afternoon on death row, here at New Jersey State Prison, and listening to each individual through a small opening, finding some who were writing letters to their outside relatives and friends attempting to influence young people to turn their lives from bad to good.

The second was a weekend in Illinois, as part of a prison ministry group, meeting two men whose crimes were so outrageous I will not describe here -- in Chicago. I found these two men had undergone a spiritual regeneration, where their heart was changed from evil. The two had no ulterior motive, for their terms were fixed by law and neither would ever see the outside world again. But these two men spent their time with younger men who would, someday, be paroled, helping them to turn their lives around. By restoring the death penalty, we are taking away those opportunities for individuals to remain in prison -- but to change not only their lives, but also, importantly, other lives. And there are many examples, which I will not go into.

The third and final point is best described by an illustration. And it's a very practical point. If you were driving down the road, and saw in front of you that the road ahead had many obstacles on it, and there were people rioting and laying in the middle of the street-- And just say you saw an alternative bypass to that road. You would undoubtedly take the bypass.

I believe we are at the same juncture with the return of the death penalty. You have probably already observed and had legislators tell you that their faxes are being jammed and have phone calls galore by one or more of the lobbying groups. Imagine, if you will, the human outcry if a date were announced for the first execution in New Jersey over 40 years, and imagine the hysteria and media attention on the day of the execution. Frankly, New Jersey has enough problems without having to undergo all of that pain and disruption, especially when we have a very rational alternative, which is less costly and provides all the protections to those on both sides of the issue.

I truly thank you for your time and participation on this panel, and for the work of staff -- especially Miriam Bavati, who I've known for over 10 -- 11 years, in working on this. And I would ask each of you to thoughtfully and prayerfully consider these thoughts in your deliberations in the coming weeks. And I certainly will join you in prayer.

Thank you for the opportunity of speaking before you today.

REVEREND HOWARD: Thank you very much.

And I'd like to invite-- Since you have the time constraints, we might ask questions of you so you might be able to be excused.

Are there questions of Mr. Callahan?

MR. MOCZULA: Mr. Callahan, as I understand your remarks, you had mentioned something about going -- doing cost studies or evaluation, and that you could find no information in New Jersey, but you found an Illinois study which estimated that the cost was--

MR. CALLAHAN: Yes.

MR. MOCZULA: --approximately \$22 million over and above life imprisonment.

MR. CALLAHAN: Yes, that's correct.

MR. MOCZULA: Was there then some attempt made to gather the information that was referred to in the Illinois that apparently existed in New Jersey?

MR. CALLAHAN: I tried, at that time, to get information from our judiciary. I was not able to get any information. And I'm not sure of the reasons. But they-- Each time I called, they said they did not have the information, or they were developing it. And we were against a time line -- not only because of the Senator's schedule, but because of my impending retirement. So we were not able to get the cost from the judiciary.

Now, I understand that there are costs that have been developed that could be available to this committee -- or may have been presented to this committee. But at that time, the only thing I had was a very short study from Illinois State University, which was very brief.

MR. MOCZULA: And do you know what they relied on, what type of numbers or of information for New Jersey?

MR. CALLAHAN: No, they did not-- It was a study in which I was told they did not save the raw data on it. And I tried to do a good deal

of research on that but could not find that, unfortunately. So we had to just go with that particular statement.

MR. MOCZULA: Okay. And just one more question in regard to that study.

MR. CALLAHAN: Sure.

MR. MOCZULA: Your comments mentioned that it's \$22.8 million over and above the cost of life imprisonment.

MR. CALLAHAN: Right.

MR. MOCZULA: Does that mean life imprisonment without parole or-- What specifically are you referring to?

MR. CALLAHAN: They took the average of the people that were in prison -- how old they were, how many years they lived, and whatnot, and took the aggregate and said this figure was \$22.8 million over the aggregate of years of that sample that they took.

MR. MOCZULA: So we're not talking about, necessarily, life without parole.

MR. CALLAHAN: No.

MR. MOCZULA: You're talking just general prison population.

MR. CALLAHAN: Right.

MR. MOCZULA: Whether it's three years or--

MR. CALLAHAN: Right.

MR. MOCZULA: --or five years--

MR. CALLAHAN: That's correct.

MR. MOCZULA: --or 10 years.

MR. CALLAHAN: It's not life without parole.

MR. MOCZULA: Thank you.

REVEREND HOWARD: Hearing no further questions from the Commission, then you may be excused.

Thank you very much.

MR. CALLAHAN: Thank you very much.

REVEREND HOWARD: Now the Commission invites Mr. Bill Babbitt to bring his testimony before us at this time.

B I L L B A B B I T T: My name is Bill Babbitt. I'm on the Board of Directors of Murder Victims' Families for Human Rights.

Thank you, Chairman Howard and members of the Commission.

I'm here to tell the story of my younger brother, Manny Babbitt. When he was 17 years old, Manny decided to join the Marine Corps to serve his country. He could not pass the Marine Corps entry exam, but the Marines needed gung-ho kids like him, so they gave him the answers to the test. Manny would go to war.

After boot camp, Manny was sent to Khe Sanh Combat Base. During the 77-day siege of Khe Sanh, Manny was credited with saving a life, was wounded, and mistaken for dead. He was thrown into a helicopter and awoke on a pile of dead Marines. Manny was patched up and returned to the war. He signed up for a second tour in Vietnam and fought in five major campaigns. He was awarded the Vietnamese Cross of Gallantry and the Presidential Unit Citation by President Johnson.

Upon returning from the war, his wife could not deal with his war demons, and his marriage fell apart. Not able to hold onto a job, he

became homeless, living in a cardboard box on the streets of Providence, Rhode Island, and on the roads of Cape Cod, Massachusetts.

Manny soon found himself on the wrong side of the law. His apparent mental condition was noticed, and he ended up in a mental hospital. And it became Manny's home for the next three years. Ask me about that hospital. He was eventually released, despite several suicide attempts and the protest of his doctors. His three years was up. The psychiatrists diagnosed him with paranoid schizophrenia and post-traumatic stress disorder.

I was 4,000 miles away, making a life for myself in California. One day I got a telephone call from my brother Charlie, in Providence. He said that Manny needed a change, and could he come to California and live with me and my wife until he got on his feet. I was delighted. Now I'll have a brother in Sacramento.

In October 1980, Manny showed up at my job at the railroad. After several weeks, my wife Linda and I noticed his strange side. "Why does he keep talking about the war? Where does he go at night?" He alarmed our mother. "Why does he act that way," she would ask.

One day the newspaper reported the murder of an elderly woman not far from our home. An intruder had broken into the apartment of Leah Schendel, and had severely beaten her. Manny had smoked PCP-laced marijuana and had a flashback. She would have survived her wounds, but she had a weak heart and died. The cause of death was listed as a heart attack. Still, after reading about it in the *Sacramento Bee*, I certainly hoped they would apprehend the perpetrator. I was worried for my mother's safety, who lived not too far away.

It was not until a few days later that something woke me in the middle of the night. The news reports of Leah Schendel's murder had planted seeds of another worry in my mind. "Where's Manny?" I wondered. I got out of bed, and went to the family room, and turned on the light where Manny slept. No Manny. The next day, while dusting in the family room, I picked up my choo-choo piggy bank off the TV and discovered it was jammed full of nickels. I'd read that Leah Schendel had been to Reno the day before her murder, playing the nickel slots. Next, I went to the hallway closet where Manny kept his sea bag, seeking answers to this horrible riddle. An old cigarette lighter fell out of an old coat that bore the engraved initials "L.S." After checking the old newspaper, the terrible truth hit me. Manny had blood on his hands. "Where's Manny now," I thought. I was very scared.

I immediately woke Linda and told her of my terrible discovery. We prayed about it. If we gave him a bus ticket and sent him away, we would have blood on our hands. We did what we felt we had to do: We called the police. If Manny was responsible for Leah Schendel's death, I had to get him off the streets.

The police came and picked me up, and brought me to the police station where I sat down with investigators. I cried a lot. I cried for the poor woman, I cried for Manny, I cried for my family. I told the police about Manny's war record, and that he had brought Vietnam back with him. Could Manny get the help -- mental treatment that he needed? Was the death penalty in his future? The Sacramento Police promised me Manny would not get the death penalty. It was a promise made and a promise broken.

Although I felt badly about turning Manny in, I really thought it would be great if I could protect society and at the same time get my brother the help he so desperately needed. I asked the officers to let me help them arrest Manny. "Please don't kill him if he runs," I begged. I did not want Manny to die that day. I watched as they loaded their guns. But I helped, and in the end the cops didn't even have to draw their guns. They kept their word.

I didn't know what was going -- that it was going to be a capital case until I went to Manny's arraignment. There I heard the district attorney say that she was seeking the death penalty against my brother.

You've already heard about the wonderful attorneys who defended my brother David Kaczynski's brother Ted, and saved his life. I prayed that Manny would get the same consideration. You see, I still thought it couldn't really happen. My mentally ill brother would not get the death penalty. Not in America, not after I had helped authorities solve the crime, not when he was so ill. This was the land of liberty and justice for all. I trusted that the system would work. Maybe I trusted the system too much.

There were definitely some glimmers of hope. I rejoiced when a great attorney named Chuck Patterson -- himself a Khe Sanh veteran -- took on Manny's appeal. I rejoiced again when David Kaczynski and his wife stood side-by-side with me and my wife to call attention to the injustice in Manny's case. I was overjoyed when the country's foremost expert on post-traumatic stress disorder filmed a deposition to explain that Manny, in all likelihood, was in a disassociated state when he attacked Leah Schendel. I was deeply touched when so many Marines and Vietnam vets spoke on

Manny's behalf. They understood only too well what Manny had endured during the war.

There was another Vietnam vet who didn't understand, and that was California Governor Gray Davis. He had had a desk job in Vietnam. He carried a brief case, not a M16. He had a promising political career, not a cardboard box, waiting for him upon his return from Vietnam. He campaigned for governor by promising to speed up the pace of executions in California. He rejected Manny's clemency.

In closing, on May 3, 1999 -- ironically, the date of Manny's 50th birthday -- I went to San Quentin prison to attend my brother's execution. My mother and sisters joined a prayer vigil outside, Ma wrapped up in a thick blanket to keep her warm in the chilly San Quentin night. At 37 minutes after midnight, I watched as the state of California put my brother to death by lethal injection, several weeks after he received his Purple Heart medal for wounds he suffered in 1980. Until that moment, I could not bring myself to believe that that execution would actually take place. I watched them kill Manny. I have to live with that memory.

I don't think I'm going to be able to get through this.

My family was devastated. They became a new set of victims that night. I'll never forget Ma's stricken face and my sister throwing up on the side of the road as we left San Quentin Prison. If you want to reflect on what an execution means in human terms, please hold that image in your mind.

Thank you, sir. Thank you, kindly.

REVEREND HOWARD: Thank you very much for that very compelling story.

I would like for you to be available now for the Commission to ask questions, if you're agreeable.

MR. BABBITT: Yes, sir.

REVEREND HOWARD: You've been perfectly clear.

I think Rabbi Scheinberg does have a question.

RABBI SCHEINBERG: Can you speak to some of what you believe makes the story of your brother different from the story of Mr. Kaczynski's brother?

MR. BABBITT: Yes.

Am I on here? (referring to PA microphone)

REVEREND HOWARD: Press your red-- Yes.

MR. BABBITT: Up until 1980-- I came to California in 1966. They had just executed an African-American by the name of Aaron Mitchell for killing a police officer in Sacramento. That was in 1966, when I moved to California from Cape Cod, Massachusetts.

The next person to die in Sacramento County -- from Sacramento County -- was Manny Babbitt, who had just moved there in 1999. My math tells me that's 33 years. Sacramento County has a larger population than Providence, Rhode Island.

Up until 1980, I believed in the death penalty. I supported the politicians who promised that -- "Vote for me, and I'll speed up executions." So I believed in the death penalty, as long as it was somebody else's brother. I didn't think twice if the death penalty came knocking on somebody else's door. But when it came knocking on my door, I got an education on the death penalty. And I got to feel what it feels like to be a family member of the executed.

I had in my mind-- I thought about Leah Schendel's family and how they must have been suffering. They needed to know who it was. And I thought about it. "Send Manny back East. Send him back to Massachusetts. And bring him back to the Bridgewater State Hospital for the Mentally Ill," where Manny served his three years. That's the home of the "Titicut Follies" documentary. If I had brought Manny back to Massachusetts and somehow got him into Bridgewater, then probably Massachusetts would not have extradited Manny to California. And maybe he would be alive today. But if I had sent Manny back East, maybe he would have killed someone else's grandmother, and I'd have blood on my hands.

Yes, sir.

REVEREND HOWARD: Please.

MR. HICKS: A couple questions, Mr. Babbitt.

Do you blame yourself for, maybe, partially being responsible for your brother's execution? And, also, how has this affected the rest of your family -- your mother, your sisters, and whoever else may be surviving?

MR. BABBITT: Thank you, sir.

Am I on? (referring to PA microphone)

MS. SMITH SEGARS: There you go.

MR. BABBITT: When Manny was placed in the automobile -- in the police cruiser-- I tricked him into coming out of my sister's house. I said, "Come on, let's go play some pool." And the cops were waiting outside. Because Manny was at my sister's house, and she had several young children; and I didn't want anybody else to die that day. And they arrested Manny without incident.

I started my crying then. It was already raining outside, cats and dogs that day. Two detectives -- two automobiles full of detectives, and they never pulled their guns. And when they put Manny in the car, I said, "Brother, you're going to be all right now. You're going to get the help you need. We're going to chase away the demons." And I asked Manny-- They asked me if I wanted to sit in the car with Manny. I couldn't. I didn't have control over myself, and I didn't want to upset Manny and make it more difficult for the officers. And I went back to the police station in a separate automobile.

But I looked at Manny. I said, "Manny, I'm sorry. I love you. Please forgive me, brother." He said, "Brother Billy, I've already forgiven you. You're doing the right thing." Now, as far as my family is concerned, I have had two nephews that have cursed me. I have had family members who have turned their backs to me when I attended funerals for two other brothers -- whose funerals took place in Providence, Rhode Island -- including Manny's funeral, that took place in Cape Cod, Massachusetts. They let me know that they hate me. I'm not saying that my sisters hate me in Sacramento. My mother told me-- She tells me she loves me.

But I see David Kaczynski, who lives in Schenectady, New York, more than I see my sisters. I'm the oldest brother now. Besides Manny, I lost two other brothers. And I miss them. I miss my cousins in Oakland. I have five cousins in Oakland who have the name Babbitt, B-A-B-B-I-T-T. They don't call me anymore, because the newspapers were writing stories about my father, about him being an alcoholic and worthless, about my mother talking to pear trees. Those were all lies. But I had to

permit those stories to go forth, because we were appealing to the people to save Manny. But guess what? I miss the love and respect of my family.

I'm honored to come here today, all the way from California, to be a part of New Jersey's history. Let me tell you about California folks, sir, ladies and gentlemen. California does not primarily try to execute the worst of the worst. On my birthday, I was there at Tookie's funeral. You might as well say-- It was on my birthday, December 12 -- his execution. I've attended every vigil execution since.

So now, what started as a mission to save Manny's life, has turned into a commission from on high. I am convinced, any time a backsliding Christian -- and you'll pardon me for this -- anytime a backsliding Christian falls to his knees and prays to Jesus for help -- "Help me save Manny" -- and I get a Buddhist -- David Kaczynski -- who comes out of a hole in the desert, where he had his tent pitched, to stand by my side, that has to be a commission from on high.

Thank you.

REVEREND HOWARD: Thank you very much.

And thank you for coming.

SENATOR RUSSO: Bill.

REVEREND HOWARD: Yes. I'm sorry, Senator.

SENATOR RUSSO: Just one question.

MR. BABBITT: Yes, sir.

SENATOR RUSSO: You tell a really compelling story about the treatment by the Sacramento Police -- and if those facts are true -- and I accept them. You say they are. It's a horrible thing and shouldn't be tolerated.

But aside from that, are you aware, Mr. Babbitt, that the condition of your brother, as you described it -- if that was his condition -- his mental illness and so forth -- he would not have been the subject of the death penalty in New Jersey, where you are testifying? Are you aware of that?

MR. BABBITT: No, I'm not aware of that. The thing about it is, I didn't live in New Jersey, sir. And they didn't have the death penalty in Massachusetts or Providence, Rhode Island. I had the opportunity to go back to my home state of Massachusetts and twice speak out against the death penalty in Massachusetts. We kicked it in the mud. This is my second time in New Jersey speaking. I spoke before the Department of Corrections hearing on lethal injection.

Let me tell you this. Manny was ill. And the police did make that promise, because the cassette tapes were available by the state public defender's office in Sacramento County. They tried to deny it. But maybe I was naïve. And maybe I should have realized it wasn't the cops determination to send Manny to the gas chamber or not. And I do say this: I believed them. I had every reason to believe, because knowing my brother Manny and his history at Bridgewater State Hospital, that he was mentally ill. And I never thought, up until the last half-hour, that they would actually execute Manny. I never thought it would happen.

RABBI SCHEINBERG: I'd just like to ask a clarification on Senator Russo's question.

Was your brother found-- Was there a determination that your brother was not mentally ill and that's the reason why he was executed, or

was there agreement that he was mentally ill, and nevertheless, he was executed.

MR. BABBITT: Well, I know my brother was ill.

But let me tell you this. Manny's attorney-- The first attorney that my wife and I went and put a-- We went and borrowed some money against our home. And I think we scraped up about \$1,500. And we went and got a private attorney. And we gave him \$1,500. He sat us in his office for about an hour. He said, "Well, they did get some palm prints. And this is a capital case." And then, when we went to the arraignment, he begged out. He asked the judge to excuse him, because he had other commitments. And he took our \$1,500 and ran.

The next attorney we got was a court-appointed attorney. And this court-appointed attorney had never tried a death penalty case before. He drank repeatedly -- and from testimony from his own staff. He used the *N* word around an African-American woman who was a member of his staff -- and that's part of the information that was presented to the courts. And he told me himself, when I asked him-- I said, "Where are the -- how come no African-Americans or black people are being on Manny's trial?" He said, "Because I don't really trust them. I've had bad experiences with black jurors. I want somebody who shows up, who understands the complexities of this case." And he admitted -- that he submitted to the courts that he did a poor job. He was later--

REVEREND HOWARD: Mr. Babbitt, would you speak to the issue of whether there was any kind of evaluation of your brother's mental state? I think that's--

MR. BABBITT: Yes. I'm sorry. I apologize.

Yes, there was. Manny was examined. But the prosecution said that the man who examined Manny was just prostituting a bag of tricks. In other words, they downplayed the mental problem with Manny. And they said it was just poppycock, and that-- As a matter of fact, at one point, the prosecutor said -- and this is a matter of record -- "Why don't we just find him innocent -- not guilty by reason of insanity -- and send him home." And I think that was inappropriate.

So there was evidence that Manny was ill. But Manny's lawyer did not bring forth adequate evidence. And the prosecution downgraded this evidence.

REVEREND HOWARD: Thank you.

Are there further questions from the Commission?

Yes.

MR. MOCZULA: Mr. Babbitt, you have the unique experience of having been on both sides of the issue. You testified that you were in favor of the death penalty for a while, and then your opinion changed.

I'm not clear exactly on when you were in California. But were you in California at the time that the California Supreme Court reversed close to 60 death sentences in a row, and the public outcry that occurred which resulted in a change of the membership of the Court?

MR. BABBITT: Yes, I was, sir.

MR. MOCZULA: Could you give us a sense of what the mood was at the time in response of the Court's actions?

MR. BABBITT: Yes, that was during the tenure of Rose Bird. And what happened was, Rose Bird was looking at these cases that came in front of her. She actually reviewed Manny's case. But the politicians-- It

had become a political act to get rid of Rose Bird. And they were trying to tell the people in California that, "We need to execute these people to make the community safer." So when Manny's-- By the time Manny's case came up, Rose Bird had been removed.

A family member of the victim compared Manny -- she urged Governor Gray Davis to execute Manny so that they could -- as a deterrent -- to people like Sirhan Sirhan, Charles Manson, and John Hinckley. Well, all those people, currently, are alive today. So Manny died as a result. And I feel that it became a political issue. It wasn't a-- They were not looking at the case as it was.

MR. MOCZULA: Was the Rose Bird court's decision -- that period of time -- perceived as political agenda, as well?

MR. BABBITT: Well, I think Rose Bird did what she was supposed to do, as a public servant -- and then look at the truth and make a determination of the truth, not based on her political aspirations, but just do what is right. And she looked at a lot of things.

What my understanding is, she looked it over, and she saw too many mistakes. And she saw too many errors being committed. And that's why she overturned it, I believe.

MR. MOCZULA: And in California, the justices are, I believe, elected as opposed to appointed. Is that correct?

MR. BABBITT: Repeat, please.

MR. MOCZULA: In California, the justices are elected as opposed to appointed. So she was not elected until--

MR. BABBITT: Well, I believe this. I believe that the justices are appointed.

MR. MOCZULA: Appointed.

MR. BABBITT: They're appointed by the governor. And if I'm the governor, and I have an agenda to speed up executions, and you're one of the judges that I put on that supreme court-- Well, guess what? I'm going to replace you with somebody who's going to perform in a manner that I see fit.

MR. MOCZULA: Thank you.

MR. BABBITT: That's if I was governor.

REVEREND HOWARD: Again, allow me to thank you for being with us today, for taking the time, and for offering your personal account -- your own family experience.

Thank you very much.

MR. BABBITT: This is a great honor.

Thank you, sir.

REVEREND HOWARD: The Chair would like to then invite to testify Mr. Kirk Bloodsworth and Ms. Wanda Foglia.

Let me remind you that as you approach the two-minute limit of your testimony -- I mean 10-minute limit, I will give you a two-minute warning. But we hope you're able to complete testimony in the allotted time.

Thank you.

KIRK BLOODSWORTH: Ladies first.

REVEREND HOWARD: If you say so.

Thank you.

WANDA D. FOGLIA, Ph.D.: Good afternoon.

My name is Wanda Foglia, and I'm a Professor of Law and Justice Studies and Coordinator of the Master's Program in Criminal Justice at Rowan University. I am a former prosecutor and police academy instructor. And I currently teach students who will be working in the criminal justice system.

And as I tell my students, I believe it is crucial that the system provide justice for the victims of crime and their families. I also believe that the system itself must be just and operate in accordance with the law. The Capital Jury Project research my colleagues and I have done, on the way jurors make their decisions in death penalty cases, shows that in practice, jurors are not following the law. This research helps explain why mistakes are made at the trial and sentencing phase of the process.

The law says that the death penalty is only constitutional if the jury's sentencing decision is guided by certain legal standards. The Capital Jury Project, or CJP, is a study funded by the National Science Foundation that looks at whether jurors are following these standards. The research involved interviewing 1,198 jurors, from 353 trials, in 14 states. Jurors were questioned by trained interviewers who followed a script of neutrally worded questions.

Over 40 different articles have been published using this data, and this research has been cited by courts throughout the country, including the U.S. Supreme Court. I will talk mostly about the seven different problems which are summarized in the article we submitted, that I wrote with Dr. Bowers. I also will mention the results described in another article that we submitted, which shows that serving as a capital juror is traumatic for many jurors.

Our results are consistent with findings from prior research that show premature decision making, bias in jury selection, failure to comprehend instructions, erroneous beliefs that death is required, evasion of responsibility for the punishment decision, the influence of race on the process, and underestimation of the non-death penalty alternative.

I want to emphasize at the outset that the vast majority of the jurors took their responsibility very seriously and tried hard to do what they thought was right. However, it is a complicated process and an extremely difficult decision. And many, sometimes most, did not understand or follow the rules that are supposed to make sure the process is not arbitrary.

Premature decision making was the most obvious problem. We asked our jurors if they thought they knew what the punishment should be at four different points in the process. Close to half the jurors said they knew what the punishment should be at the earliest point, after the guilt phase but before the sentencing phase had even begun. Thirty percent said they had already decided the punishment should be death. Most of these jurors said they were absolutely convinced about the punishment. Most of the early pro-death jurors never wavered from this position. So nearly one out of three jurors are deciding the sentence should be death before they have heard the sentencing instructions or the sentencing evidence. So the statutes are not guiding their discretion, and they cannot be giving meaningful consideration to the mitigating evidence presented during the sentencing phase.

The second problem, or more accurately set of problems, involves the selection of the jury. Here we are focusing on the beginning of a capital proceeding, commonly called *death qualification*, when jurors are

asked a series of questions to make sure they are willing to impose the death penalty. There are really three distinct problems here.

First, the death qualification process eliminates potential jurors who do not believe in the death penalty, so the resulting jury is composed of people that are more conviction-prone and punishment-prone than the general population.

The second problem is called a *process effect*, because it identifies the biasing effect of going through the process itself. Approximately one in 10 jurors were conscious of and willing to admit that the questions during jury selection made them think the defendant must be, or probably was, guilty; and that the most appropriate punishment must be, or probably was, death.

Finally, the jury selection process is not very effective at eliminating jurors who believe so strongly in the death penalty that they are unwilling to consider mitigation, as the law requires. A substantial number -- for some crimes, over half -- of the jurors say they consider death the only acceptable punishment for six different types of murder that would cover nearly all capital cases. They cannot give meaningful consideration to mitigating evidence if they believe that death is the only acceptable punishment.

The third problem is, many jurors do not understand the guidance they are supposed to be following. Nearly half the CJP jurors failed to understand they were allowed to consider any relevant mitigating evidence. Over two out of three jurors failed to understand they did not have to be unanimous on findings of mitigation. Nearly half the jurors thought they had to find mitigating evidence existed beyond a reasonable

doubt, although no state requires that. On the other hand, aggravating evidence does have to be proven beyond a reasonable doubt. And close to a third of the jurors failed to understand that part of the instructions. The statutes cannot be effectively guiding juror discretion when substantial portions of the jurors do not understand the instructions.

The fourth problem is that many jurors erroneously believe death is required once certain facts are proven. Over one out of three jurors wrongly believed death was required by the law if the defendant's conduct was heinous, vile, or depraved, or if the defendant would be dangerous in the future. This is especially troubling when one considers that most of the jurors believed that the evidence proved that the defendant's conduct was heinous, vile, or depraved, and/or that the defendant would be dangerous in the future.

A fifth problem is that jurors fail to understand their responsibility for the defendant's punishment. Less than 10 percent of the jurors said the individual juror, or the jury as a whole, were most responsible for the defendant's punishment. When asked about how responsibility was allocated among the jury, the trial judge, and the appellate judges, only 30 percent believed the jury was strictly responsible.

A sixth problem is that race influences the process, especially when the defendant is African-American and the victim is white. We looked at interracial homicides, where we had interviews from both African-American and white jurors on the same case, and found that the racial composition of the jury made a difference.

The chance of a death penalty was 30 percent when there were less than five white male jurors, but more than doubled when there were

five or more white male jurors. Having even one African-American male on the jury reduced the chances of a death sentence substantially when the defendant was African-American.

We found striking differences between the way African-American men and white men viewed the same cases. African-American males were much more likely to be affected by lingering doubt about guilt when deciding the punishment. They were much more likely to think the defendant was sorry and identify with the defendant or the defendant's family. White males were more likely to believe the defendant was dangerous, and to erroneously believe defendants not given death would be out of prison in less than 10 years.

As a 55-year-old -- excuse me, 54-year-old black man, who actually voted for death, said, "There is always racial overtones." And I'm quoting here. "Because he's black, it was 'automatic'. You got six blacks, and you got six whites out there, and somebody in authority already told you the black man has done it. So automatically he's done it. I don't think black folks think that way until they hear it. White folks have a tendency that, once the charges are read, 'he did it.'"

In another case where both the defendant and victim were African-American, the repeated references to race made by a 58-year-old white male juror suggested that he might have been influenced by racial stereotypes. Although he claimed to be objective, he admitted, "I have this thing about the black Muslim," and went on to reference innocent people being hurt at some unrelated incident. Although none of the other jurors interviewed from the case mentioned race, he mentioned it repeatedly and, at different points, compared the defendant to an animal, a gorilla, and

Rodney King. He went on to say, “It just illustrates what’s going on in this country right now. I’m not going to be racial about it, but you have to state the facts. The blacks are killing the blacks. And you don’t do it gently, it’s just brutal.”

The CJP evidence adds to the previous research evidence of how race has a biasing impact in the capital process.

The last of the constitutional problems is that capital jurors underestimate how long someone not sentenced to death would spend in prison. And the lower their wrong estimates, the more likely they were to vote for death. In every state, most of the jurors believed the defendants would be released before they were even eligible for parole, even in the states like New Jersey that had life without parole at the time of the interviews. The CJP data showed that it is difficult to convince jurors that the defendant really will not be released on parole.

One juror in a death case said he believed defendants usually get released in 15 years, even though he observed that officially they say the sentence is life imprisonment, but, “Even though now it says without possibility of parole, we were still concerned that some day he’d get out on parole. We didn’t want him out again at all.” Another juror who ultimately voted for death said, “I was undecided. I had a personal problem with the life sentence. But then the judge explained to me that if he gets a life sentence, there was absolutely no chance that he would get out. I thought he might get out. I still don’t trust anybody about it.” It is very difficult to convince jurors that life really means life, because of the widespread distrust of the criminal justice system.

In addition to the constitutional problems, we find that serving on a capital jury is traumatic for the jurors. Forty-five percent of the jurors we interviewed talked about how emotionally upsetting they found the experience. More than one in four described specific problems such as not being able to sleep, having nightmares, feeling paranoid, breaking down in tears, indigestion and vomiting, tension in their personal relationships, and feeling haunted by the experience.

As one male juror in a death case said, "I equated that decision that I was having to make with the same crime he had done. He killed someone. Just because it's legal doesn't make it right. That's the problem I had."

In summary, interviews with jurors who actually decided capital cases show that many jurors are not following the guidance that the U.S. Supreme Court says -- guidelines that the U.S. Supreme Court says are necessary to make the death penalty not arbitrary, and that the experience is emotionally traumatic for many of them.

JUSTICE COLEMAN: Ms. Foglia, in your research, did you become familiar with the percentage of cases in New Jersey in which the case goes to the jury as a death penalty case? Did you become familiar with the percentage of instances in which the jury returns the death penalty?

DR. FOGLIA: No, I did not look into that. New Jersey actually wasn't part of our national sample -- as I explain more fully in the written testimony I submitted -- because the person who was doing the research in New Jersey changed the instrument. So we didn't have answers to a lot of the questions.

JUSTICE COLEMAN: If I were to tell you that the juries returned the death penalty in fewer than 50 percent of the cases, how would that jive with your findings?

DR. FOGLIA: Unfortunately, I didn't look at the percentages in each state where the jury returns a death verdict, because we deliberately chose our cases so we would get approximately half with death verdicts and half with whatever alternative the law provided in those states. So we weren't looking for how often jurors came back with the death sentence. We were looking at how jurors in death and life cases decide the case. And I'm not familiar with the nationwide percentages for what percent of jurors come back with a death verdict.

JUSTICE COLEMAN: Are there other questions?

MR. HAVERTY: Dr. Foglia, is there any reason, based upon your research, to believe that jurors in New Jersey would be less affected by these types of problems in understanding their responsibilities, and understanding the law, and what they're supposed to do than the jurors in other states?

DR. FOGLIA: No, there's no reason to think that New Jersey jurors would be any different. In fact, in my written testimony, where we did have percentages for some of these questions in New Jersey, I included them. And they're generally very similar to what we found in the national sample.

Plus, when you look in the article at the percentages we found in different states, there's remarkable consistency in all the states. And these states were chosen to get a good geographic mix and also a good mix

of the different types of statutes out there. And we were finding the same problems in every state.

MR. HAVERTY: These problems are essentially inherent problems in the system then?

DR. FOGLIA: Yes, I think it's a very complicated process. And it's just very difficult for the jurors to follow all these rules they're supposed to be following.

MR. HAVERTY: Thank you.

MR. MOCZULA: Professor, I just wanted to clarify. Did you or did you not interview jurors who imposed the death sentence in New Jersey?

DR. FOGLIA: Yes, we did. And in my written testimony I supply some statistics from New Jersey, where we had them. But it's not included in the national sample, because we didn't have answers to a lot of the questions, because it was a different interview instrument used in New Jersey.

MR. MOCZULA: And there were-- I guess there was about three areas in your written testimony where you cite to New Jersey, as well. One of those areas is the alternative if the death sentence is not imposed. Did you factor in the peculiarities of this State's law with regard to what jurors are told, should they not return a death sentence -- what the alternate would be, which I don't believe is the case in other jurisdictions? Meaning, did you adjust any of the responses based on New Jersey-based law -- the requirements of the Supreme Court of New Jersey, as imposed on the prosecution of capital cases?

DR. FOGLIA: I'm not sure I understand.

I can say this-- I'm not sure I understand the question.

I can say this: We asked, "How long do you think somebody who doesn't receive the death penalty spends in prison?" And I'm not sure how that would relate to what they're actually told at the trial. We did have four cases in our sample that -- where the alternative was life without parole, as it is in New Jersey.

MR. MOCZULA: The alternative was life without parole?

DR. FOGLIA: Yes, four of the states in our sample had life without parole at the time we did the interviews. Now most of them do. But at that time, four of them did.

MR. MOCZULA: My question was more geared towards a specific instruction to the jury -- a requirement that jurors, at the sentencing phase, be advised of exactly what the alternative is, what will happen should the death penalty not be imposed on a particular defendant, which I think is-- I'm not sure how many other jurisdictions, if any, have it, but it is something more peculiar to New Jersey's death penalty procedures.

DR. FOGLIA: I didn't do the interviews in New Jersey, and I can't remember every question that was asked in New Jersey. But the percentage that I quoted in the written testimony was just simply the response to the question: "How long do you think they'll spend in prison if they don't get death?"

Now, of course -- as you're saying -- they heard whatever instruction you're referring to. And it was after hearing that instruction they gave these estimates.

MR. MOCZULA: Thank you.

REVEREND HOWARD: Since we've begun, we have not heard from the second witness. But since we have begun, why don't we proceed with this witness?

Mr. Haverty, yes.

MR. HAVERTY: Are you blocking me out, Reverend Howard?
(referring to PA microphone) (laughter)

REVEREND HOWARD: Pardon?

MR. HAVERTY: Are you blocking me out?

REVEREND HOWARD: Sorry. My apologies.

MR. HAVERTY: I just wanted to follow up on that. You identified there were seven areas of problems with the death penalty sentencing and the jurors' reactions to that. Are they-- In other words, if you were able to correct one of those areas, would it affect the other seven areas -- or six areas of problems that you might have?

DR. FOGLIA: No, they really are independent problems, although they exacerbate each other in some cases.

MR. HAVERTY: Thank you.

REVEREND HOWARD: Yes, Mr. Hicks.

MR. HICKS: Do I understand this right? Even when the judge gives instructions to the jury that they have the alternative of life without parole -- that some of the jurors may not either believe it, or might have a problem with understanding exactly what life without parole is?

DR. FOGLIA: Yes, that's what the quotes indicated. They came right out and said, "The judge told us it was life without parole, but we didn't believe him." And as I said, in four of the states in our sample, life without parole was the alternative. But we still had substantial--

MR. HICKS: So even a state like New Jersey, where it is beyond (indiscernible) of the choice of life without parole, some of the jurors may not even believe it anyway or understand it.

DR. FOGLIA: Yes.

MR. HICKS: I'm just putting it out there.

DR. FOGLIA: What happens is, they hear--

REVEREND HOWARD: Please press your speaker there.

DR. FOGLIA: Jurors hear media accounts of people who were released after being convicted of murder. And that's what they remember. And they just don't trust the system. And they don't realize that those people who got released -- perhaps they were sentenced under old laws, or they weren't sentenced for first degree murder or capital murder. But they trust their memory of what they saw on TV, not what the judge says, because they really don't trust the system.

REVEREND HOWARD: Ms. Garcia.

MS. GARCIA: Doctor, I've was wondering if you've conducted -- or you're aware of -- any research regarding the impact that these cases being overturned, or not -- the sentence not actually being carried out, here in New Jersey -- what impact that has on the surviving family members.

DR. FOGLIA: I haven't done any research with surviving family members.

REVEREND HOWARD: Mr. DeFazio.

MR. DeFAZIO: Professor, are you familiar, in New Jersey, with Judge Baime's report concerning the lack of racial discrimination in the imposition of the death penalty? Are you familiar with his work?

DR. FOGLIA: No, I am not. I did my research in Pennsylvania, actually.

MR. DeFAZIO: Okay. Because you-- Correct me if I'm wrong now. You are making it clear that your study has found that there is racial bias -- demonstrable racial bias in the death penalty area, correct?

DR. FOGLIA: My study has found that there is bias in interracial cases, where the defendant is African-American and the victim is white.

MR. DeFAZIO: Okay. But I--

DR. FOGLIA: And then we also see differences in the way black jurors and white jurors view the same case.

MR. DeFAZIO: But none of that work emanates from the New Jersey study, or any study in New Jersey -- is that correct? In that area.

DR. FOGLIA: The Capital Jury Project data doesn't look at that. I'm familiar with research that Professor Baldus has done in both Pennsylvania and New Jersey; and also in the research that was quoted in the *McCleskey v. Kemp* case, where they did find evidence of bias, strongly -- most strongly when the victim was white, the defendant was more likely to get death.

But in New Jersey and Pennsylvania, they also found that when the defendant was African-American, regardless of the race of the victim, the defendant was more likely to get death.

MR. DeFAZIO: But you're not familiar with the work of Judge Baime?

DR. FOGLIA: No, I'm not familiar with his work.

MR. DeFAZIO: Thank you.

REVEREND HOWARD: I'm going to ask Commissioner DeFazio, would you elaborate a little bit on what you are trying to communicate? It might help.

MR. DeFAZIO: Judge Baime, who is the special master appointed by the New Jersey Supreme Court, has found that there is no -- not any demonstrable racial discrimination in the death penalty in the State of New Jersey.

Now, as you know, Chairman, we are going to hear from Judge Baime in closed session next month. So I don't want to speak for Judge Baime, but that's the way I understand the conclusion of his various findings over the years.

REVEREND HOWARD: Thank you.

Justice Coleman, you want to speak, right?

JUSTICE COLEMAN: Yes.

SENATOR RUSSO: Hit it hard. (referring to PA microphone)

JUSTICE COLEMAN: I'll elucidate on that just a bit further.

I'm familiar with the studies that Judge Baime has performed for each proportionality review case. The court always gets an update, meaning -- plug in all of the cases that have been heard and all of the cases that were death eligible since the prior proportionality review study was conducted.

And Professor Baldus was one of the consultants that the Supreme Court hired in helping to formulate the death penalty proportionality configuration. And before Judge Baime submits his report to the court, as the standing master, he continues to consult with Professor Baldus to deal with, as you pointed out, all of the numerous variables that

go into trying to determine those decisions. And so far, it appears, with the few cases in the universe that have been looked at, that there may not be racial discrimination. But it appears, more recently, there may be some intercounty discrimination. And that will involve other types of discussion. But that's what he means.

MR. DeFAZIO: Thank you, Justice.

REVEREND HOWARD: Thank you very much.

And let me, on behalf of the Commission, thank you for your testimony.

And you have submitted a written addition we will review. And there has been a record of the give and take.

Thank you very much.

DR. FOGLIA: Thank you.

REVEREND HOWARD: And you may be excused, because you have been questioned.

And we're going to ask Mr. Bloodsworth, if you would--

And I'm going to ask-- I'm going to alert Mr. James Harris and Mr. Lawrence Hamm to be on the alert for testimony following this witness.

Mr. Bloodsworth.

MR. BLOODSWORTH: I want to thank the New Jersey Study Commission for having me today; and the Chairman, and other members of this Commission.

I just want to first start out by saying that I am a big fan of this state. My father-- Before I get into my story, my father was, and is -- has sold seafood up and down the Jersey Shore, from Cape May to Long Beach Island. I've been coming to this state. And I'm quite fond of the people

here since I was a little boy, since 10 years old, when jitneys were going through Atlantic City, before even a casino was ever brought. So I come here as a friend from Maryland. And that is one of the biggest reasons I'm here today. My father has been selling seafood in the state for, like, 40 years. So I've been coming across on the ferry since I was 10.

But, first off, I want to tell you this story of my life. And it's detailed in a book called *Bloodsworth*, and it's written by Tim Junkin. If any members, of all of you -- I will be glad to see that each one of you get a copy. It's been out 10 years. It's out in paperback now.

As I said, my name is Kirk Bloodsworth. I am the first death row inmate to be exonerated by DNA evidence, after spending almost nine years in prison for a crime I didn't commit.

I am here to tell you my story in order to stress to you, as a human system, the death penalty will always be prone to mistake. In matters of life and death, one mistake is one too many. I could just as easily be dead today had the right set of circumstances not come about to ensure the truth to come out.

In 1984, my life changed dramatically. I was a newly discharged, honorably discharged, former Marine. And I was arrested for a brutal rape and murder of a 9-year-old little girl by the name of Dawn Hamilton. And to say that this murder was horrendous would be an understatement.

I think I should add this to the committee -- that she was found naked from the waist down, bludgeoned. And her throat was stepped on so forcefully that the imprint from the sneaker was imprinted into her throat. And the ultimate horror placed upon this child was a stick was inserted into

her body and passed through the mucosa of her rectum. That is what I was accused of.

As I said, I was a former Marine. I had no criminal record, no criminal history whatsoever. Up until this point, I had never been arrested for anything in my life. But I resembled a composite sketch that was made of the last person seen with Dawn Hamilton. The police came and interviewed me. I cooperated fully with their investigation and allowed them to take a picture of me, obtain hair samples and the like. My picture was selected by five eyewitnesses; and a lineup had proceeded, as I was picked out as the last person seen with 9-year-old Dawn Hamilton.

At trial, several witnesses against me identified me as being with her, despite testimony from family and friends that I was with them at the time of the murder. I had over 10 alibi witnesses.

Words cannot describe the emotions that I felt when the courtroom erupted in applause. Only then did I start to realize that this was not a dream, but a real-life nightmare that I was facing: execution for a crime that I did not commit.

Because the prosecution did not fully disclose exculpatory evidence to my attorneys -- evidence about other suspects, one who I would pick out as, saying, suspect number one -- being a man was 187 feet, physically, from Dawn Hamilton's body, saying he was rolling newspapers up in the car; helped in the search; and actually found her clothes, in the tree nearby her body, that were discarded. He was a newspaper man. He said he was on his lunch break rolling newspapers. And yet, when they found him, he had no ink on his hands. They searched his car. He had a pair of little girls' panties in the console of his automobile. They asked him

where he got those items -- the police did -- and he said he found them in the same woods she was murdered in two days before. And when these items were found, he vomited outside his car. This was the evidence that the state said was not exculpatory, because this individual was two inches shorter and had longer hair.

The two main witnesses in this case, Commission, were an 8- and 10-year-old boy, who-- The description is as follows: six-foot-five, curly blond hair, tan skin, and skinny. I think any of you looking at me now can honestly say that I was not skinny -- or I am not skinny. My hair is red. Certainly, I did not weigh the robust weight of 300 pounds, as I do now, then. But I weighed 230 pounds-plus, and I was a discus thrower in the Marine Corps. I had long sideburns and other issues -- a missing tooth, and things. None of these things were questioned. And the exculpatory evidence was not given to me to give to a jury.

My trial was overturned by the court of appeals of Maryland because of *Brady v. State*. At my second trial, I chose to be sentenced by the judge, who sentenced me to two consecutive life sentences. Although there was some relief that I would not be executed, the thought of spending the rest of my life in prison for a crime I didn't commit was horrific. I appealed my second conviction and lost.

I stated earlier my life had changed dramatically when I was 23. I was facing, first, execution, or then spending the rest of my life in prison. I was separated from my family and friends. And I was branded a child rapist and killer.

I have to tell each and every one of you here today, and those listening, that being accused of a child rape and murder, in any state, is one

of the most horrible things you can possibly imagine. You are branded something that you would probably scrape off the bottom of your shoe and go about your day. My life was hard. I got hit in the back of the head with a sock full of batteries so hard it split my skull open. I got stabbed in the calf with a welding rod. And I was constantly being attacked, and being yelled at, and being persecuted for a crime I did not commit. To say that it is a hard place to be-- Prison life is worse than the death penalty.

I have to tell you something now that-- I've been talking about this for over 13 years. This whole thing started in 1984. Now it's 22-years-old in my life.

My mother, before the DNA test was made, passed away. And she never got to see me when I got out. I can tell you I had to go there with handcuffs and shackles for five minutes to see her to say my goodbyes.

On April 27, 1993, I was told that my DNA test was back. I talked to my attorney on the phone, and he said, "It's not you." And I politely told him, "I knew that the whole time." I spent a total of eight years, 11 months, and 19 days behind bars. Without the DNA testing evidence in my case, I would still be behind bars.

In September of 2003, nearly 10 years later, after my release, Maryland's state attorney, Ann Brobst, and others matched, from CODIS database, a person who had committed the crime. And this person was Kimberly Shay Ruffner -- and he was not 6'5", he was 5'8" and 170 pounds -- who had been released two weeks earlier for another attempted rape and murder of two little girls in the Fell's Point area.

I am one of 123 exonerated people from death row; one of 176 who have been exonerated by DNA. Clearly, this system makes mistakes. I

am living proof of that. I was wrongly convicted not once, but twice. This system makes mistakes, and I am living proof.

And I was wrongly convicted in Maryland -- like New Jersey, is not known for having use of the death penalty.

I just have one little -- sir.

There's no state or judicial system that is above the reality that human beings are imperfect. And the risk of error never goes away. Our entire criminal justice system, prosecutors, victims, families, prisoners, and most of all the public, is poorly served by a system that not only gets it wrong, but makes mistakes that are deadly.

Thank you very much.

REVEREND HOWARD: Thank you, Mr. Bloodsworth.

Would you be willing to receive some queries from our Commission members?

MR. BLOODSWORTH: Indeed.

REVEREND HOWARD: Thank you.

Are there persons--

Yes, Chief Abbott.

MR. ABBOTT: Just out of curiosity, the DNA match -- was that the same individual that was in the car rolling the newspapers?

MR. BLOODSWORTH: No, it was not. He was an entirely different individual.

Actually, there were four suspects in this case. The idea behind *Brady* -- and I think the Justice can talk about this -- that you were entitled to that evidence. And I think we're playing gamesmanship. The judge in my case said this wasn't a game, this was about truth. And the fact that

they didn't give me that evidence, and they buried it in a file -- or actually pulled it -- for two years while I sat on death row, really attests to that.

But he was not the guy.

MR. ABBOTT: Thank you.

MR. BLOODSWORTH: Yes.

REVEREND HOWARD: Mr. Hicks.

MR. HICKS: Thank you very much for coming, Mr. Bloodsworth.

I've read your book. As a matter of fact, I know you personally. And I've heard your story before. And I heard the complete story. I know it's impossible for you to really get the whole story out in the short period of time you have here today.

But I will suggest to anybody who has an opportunity to get the book, to get the book. And you will be really amazed at some of the mistakes that were made in this case.

I already know, but just for the sake of the other people who are here, can you, maybe briefly, tell us what your family had to go through to try to get you out of death row in prison?

MR. BLOODSWORTH: Well, my father-- As I was telling you in the beginning, I do have a connection here in New Jersey. He worked very hard. He was a waterman, like myself. I'm a commercial fisherman by trade. He had made money up until this point. And we had a modest house. I would have to say, I guess we were middle-class. But he didn't have the thousands of dollars. And my first lawyer was a public defender. We actually believed that this man was going to save the day and

prove that I was innocent. But as it turned out, he was the one that didn't really do a lot of investigation.

This whole case, behind Ruffner and myself, could have been solved by a blood test. I think Nate Walker was talking about his blood test. It didn't even really need DNA. But the lawyer's ineptitude in the beginning caused me to have to spend all that time in.

They spent every money they had, Mr. Hicks. They spent every single penny, mortgaged their house. And my mother-- She was 5'3" tall, and as hard as a 10-penny nail. And it took her life, it just ate her alive.

All my friends, all my family, anybody who knew Kirk Bloodsworth at the time knew what kind of person I was. I was a good human being. I never-- I'm certainly not going to sit here and tell this committee I was an angel. My book will tell you that. But I wasn't a deviant type of person. I was a good man. And I served my country, and I wanted to do what was right in life.

And they were forfeited this, just like Dawn Hamilton was forfeited her life. And it still affects me and my father. My mother is gone. And it affects our life today -- even today -- 22 years later.

REVEREND HOWARD: If there--

Ms. Garcia, did you want to speak?

MS. GARCIA: Just real quickly, the term *exonerated* is tossed around very loosely, unfortunately. And from what I know of your case, you're very justified in using that term. And if people aren't going to take the time to read your book, I would suggest they watch that show on HBO

(*sic*) too. It's worth seeing both sides of just this issue within the last two hearings.

And I just wanted to thank everybody for coming here today to testify.

Thank you.

MR. BLOODSWORTH: Thank you.

REVEREND HOWARD: And it is Showtime, I think.

MS. SMITH SEGARS: Showtime.

REVEREND HOWARD: Showtime, not HBO.

MS. GARCIA: Oh, sorry.

REVEREND HOWARD: I would like to ask you a question.

MR. BLOODSWORTH: Sure.

REVEREND HOWARD: And I'd like to have your brief response, if that's not an unfair request.

Having given us your personal experience, which is horrific, what-- How would you summarize, in one sentence, what you would like to leave with us? What one lesson, what one point would you like to make?

MR. BLOODSWORTH: You need to fix the mikes. (laughter)

Well, Mr. Chairman, I have to say -- and I get this all the time. That experience that I talked to you about -- in prison, and what it's like in prison, to be charged with this offense--

And I talk to Republicans-- And by the way, every member of the Senate in the U.S. Senate has a copy of my book. I passed it out personally. And I will give each and every one of you a copy to read.

Now, I have to say that that punishment, in itself, is far greater than letting them off the hook -- I think we let people off the hook with the death penalty. And I'll tell you why, briefly, as you want.

Their suffering is over. My suffering continues. Kimberly Shay Ruffner was given life imprisonment. And this was from me -- my request -- and from Dawn Hamilton's father. Because we both know what a lot of people don't know -- that that life is a far greater life -- punishment than have to be ended. We all have to stay here with what people do. So should they.

REVEREND HOWARD: Thank you.

On behalf of all of us, we thank you for your patience and for your witness.

MR. BLOODSWORTH: Thank you.

REVEREND HOWARD: Thank you.

Now, Mr. Harris and Mr. Hamm will come next.

And as they come, let me just say that Mr. Ken Wolski has submitted written testimony for the Commission. He does not request to speak. And Ms. Marilyn Zdobinski will also submit written testimony and does not desire to speak.

Again, let me remind you, we have 10 minutes of spoken testimony. At the point where you have two minutes left, the Chair will give you the gavel.

Mr. Harris.

JAMES HARRIS: Good afternoon.

Mr. Honorable Chairman and members of the Commission, my name is James Harris. I'm here today representing the New Jersey State

Conference of the National Association for the Advancement of Colored People. The National Association for the Advancement of Colored People is the oldest and largest civil rights organization in New Jersey, and I speak on behalf of 40 branches -- including a prison branch at Trenton State Prison -- 14 youth councils, and six college chapters.

Almost 20 years ago, the United States Supreme Court Justice William J. Brennan was confronted with a case -- *McCleskey v. Kemp* -- that explicitly challenged the role of race in death penalty sentencing. While the majority of the court found no constitutional error in the capital punishment system that condemned blacks who killed whites substantially more often than other race of defendant/race of the victim combination, Justice Brennan disagreed. In doing so, he theorized the painful reality of an honest conversation between a defendant attorney and his African-American, capitally charged client:

“At some point in the case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to his question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of Mr. McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged in killing white victims [are far more] likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence... Finally, the assessment would not be complete without the information that cases involving black defendants and white defendants

are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp the essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.”

Despite numerous efforts at reform, today a New Jersey capital defense attorney would be compelled to give his capitally charged African-American client virtually the same tragic assessment.

As of April 2006, there were over 3,000 people on America’s death rows. Despite comprising only 12 percent of the national population, almost half of these death sentence prisoners are African-Americans. One-third of these -- of persons executed since the death penalty’s 1976 reinstatement were African-Americans. Although it might be easy to believe that these statistics are the products of a phenomenon solely reserved to the Deep South, it is clear that our State of New Jersey fairs no better. Although African-Americans comprise 14.5 of New Jersey’s population, two-thirds of our death row prisoners are African-American.

There are many reasons for this disproportionate representation of African-Americans on our death rows. Perhaps most notably, however, are the studies that show how race subtly infects the decision making of the most critical players in the capital punish system -- jurors and prosecutors.

Scientific studies have long-documented the existence of a psychological association between race and criminality. This perceived link is nothing short of deadly in the capital punishment context. For example, a recent study in the journal of *Psychological Science* found that, in cases involving a white victim, the more stereotypically black a defendant was

perceived to look, the more likely that person was to be sentenced to death. Similarly, a six-year study of the sentencing practices of jurors in our neighboring Philadelphia, Pennsylvania, found that controlling for other factors, African-American defendants were almost four times more likely to receive the death penalty than similarly suited whites. One need look no further than our state's recent experience with racial profiling on the New Jersey Turnpike to observe the belief that skin color is an accurate indicator of criminal activity, and that guilt is not limited to capital jurors. We cannot therefore be surprised to find these same stereotypes also infect the hearts and minds of other New Jerseyans -- i.e., prosecutors, judges, defense lawyers -- who are involved in life-and-death decision making.

Prosecutors affected by such conscious or unconscious bias can be powerfully influenced -- the capital punishment system -- by controlling the racial identity of the victims for whom death is sought as punishment, and the racial makeup of the life-and-death decision makers -- i.e., the jury. It goes without saying that a racially diverse jury is substantially less likely to make a sentencing decision based on race. For this reason, it is disturbing to note that throughout the country, prosecutors have excluded otherwise qualified African-Americans from service on capital juries. Indeed, just last year, the United States Supreme Court reversed two death penalty cases because the state improperly excluded potential African-American jurors based on race.

Additionally, in nearby Philadelphia, Pennsylvania, it was recently revealed that a prosecutor was videotaped instructing young lawyers that it was imperative to keep African-Americans off of juries. In that tape, the prosecutor gave such admonitions as, "Young black women

are very bad,” “You know, in selecting blacks, you don’t want the real educated ones,” and “There are blacks from low-income areas...you don’t want those people on your jury.”

Similar biases can be found in the decisions about homicide cases that warrant death penalties. Studies throughout the country have noted that the odds of a prosecutor seeking and/or sentencer imposing a death sentence was increased where the victim was white. For example--

What is that -- two minutes? Okay.

In February of 1990, the study of the United States General Accounting Office found that, “In 80 percent of the studies reviewed, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks.” More recently, Professors Baldus and George Woodworth found that, taking into account all of the states with prisoners on death row, 93 percent of the states showed evidence that race of the victim was a predictor of whether a death sentence would be given. These statistics equate to lives, all told, of approximately 1,000 persons who have been executed since the death penalty was reinstated in 1976. Eighty percent were executed for killing white victims.

In New Jersey, only one-third of the persons on death row are there for killing black victims, notwithstanding the fact that, as of 2004, over half of the homicide victims in New Jersey were black.

These statistics, of course, do not tell the whole story. Innumerable examples, in state after state, reveal the complex ways in which race can effect the capital punishment system. In 1998, the Kentucky

Legislature was moved to pass a racial justice act after a study found that every death sentence up to March 1996 was for the murder of a white victim, despite over 1,000 black murders -- victims were -- held during the same period.

In 1999, a former Cook County, Illinois, prosecutor revealed that during his tenure in office there was an ongoing competition among prosecutors to be the first to convict defendants who weighed a total of 4,000 pounds. Because most of the defendants were African-Americans, the competition was described between the prosecutors as “Niggers by the pound.” In California, Melvin Wade was sentenced to death after being represented by an attorney who used defamatory language against African-Americans, including Mr. Wade himself, and asked in his closing to the jury that Mr. Wade be put to death.

The NAACP is opposed to the death penalty, and we believe that that is not the proper way for the State to administer the criminal justice system.

Thank you.

REVEREND HOWARD: Thank you very much, Mr. Harris.

Please, if you don't mind, I hope you will remain so that following Mr. Hamm's presentation you will be available for questions.

Mr. Hamm.

L A W R E N C E H A M M: Thank you, Mr. Chairman.

Mr. Chairman and members of the Commission, I thank you for this--

REVEREND HOWARD: Press your--

MS. SMITH SEGARS: Your mike is not on. (referring to PA microphone) Press the button.

REVEREND HOWARD: Press the red button.

MR. HAMM: Thank you very much, Mr. Chairman and members of the Commission. My name is Lawrence Hamm. I'm here today to represent People's Organization for Progress, which is a grassroots organization, an all-volunteer organization; an organization made up predominantly, but not exclusively, of African-Americans, but certainly working and poor people.

I just came today to say for the record that the People's Organization for Progress opposes the death penalty. We have basically a core set of reforms: 12 reforms that we've worked toward, and among them is the abolition of the death penalty. We oppose the death penalty because too often innocent people have died because they have been unjustly sentenced to death. We believe the price of error is too high and the price of vengeance is too high, because the imposition of the death penalty has been shown not only to be unjust, but to be unfair. And, as my colleague Mr. Harris has so ably pointed out, that there are provable racial disparities in the imposition of the death penalty.

We believe that in a criminal justice system such as our own, nationally as well as here in the state, rife with racial inequities, the imposition of the death penalty will be most likely applied in a manner that is racially unjust. In the community, the people feel that the death penalty has historically been applied in an unfair manner and that African-Americans have died at disproportionately higher rates because of the death penalty. We believe that evidence of racial discrimination in capital

punishment continues to be found. We think it is all too evident that blacks are more likely to receive the death penalty than whites.

But not only is race a factor for the defendants, more so, it also seems to be a factor for the victims of murder. Those who murdered whites are found more likely to be sentenced to death than those who murdered blacks, showing that black life -- that less value is placed on black life.

The imposition of the death penalty is racially biased. Every day when we pick up the newspapers we see example after example of black men, who were convicted on death row or sentenced to life, who have now been freed because of DNA testing. The death penalty is a failure. It has been proven not to be a deterrent to crime. In fact, murder in the United States grows at astronomical rates every year and right here in our communities in New Jersey.

The death penalty is a faulty instrument by which to achieve justice. The murder of innocent people is too high a price to pay. We believe that the death penalty should be abolished. It's interesting to note that the United States, a decade or so ago, campaigned against the country of South Africa -- the Apartheid regime -- because of its human rights policies. But today the new South Africa has no death penalty. But here in the United States, we still have a death penalty.

We support the moratorium. We support the work of this Commission, and we call for the abolition of the death penalty in our state and nation.

And let me just say, on a personal note, that I'm not a person who was always opposed to the death penalty. I grew up in a very tough community. I grew up in the Central Ward of Newark, New Jersey. And it

was our code that if anybody put their hands on you, you were to fight back. If anybody were to hurt you, you were to hurt them back. If anybody was to break in your house and hurt a member of your family, you had a right to take their life. So for years, I was not opposed to the death penalty.

But it was only in the last decade, when I began to come into contact -- not necessarily with those who were unjustly convicted of crimes they did not commit -- but when I came into contact with the family members who lost loved ones as a result of murder-- A man who had lost his wife because she was murdered by someone else. Even more recently, the situation -- the example of the family of Amiri Baraka, who lost his daughter that was murdered. And I have seen people who lost loved ones that were murdered come to a realization that they could not support the death penalty. That is, in fact, what helped me to turn my position around. If those people who lost loved ones can come to that position, then it's even easier for me, who has not lost anyone as a result of murder, to come to that position.

So we call for the abolition of the death penalty.

Thank you very much.

REVEREND HOWARD: Thank you, Mr. Hamm, Mr. Harris.

Our Commission now is cordially invited to ask questions of these witnesses in any way you see fit. Are there questions? (no response)

Well, thank you very much. Yes. Thank you for your testimony.

And that concludes this public hearing of witnesses.

And again, on behalf of all of us, we'd like to thank you for being here today, for preparing your testimony, and presenting it. We also want to thank those who have prepared written testimony for your willingness to share with us. And I assure you, it will be a part of our official record.

Thank you very much.

(HEARING CONCLUDED)