PANEL I: THE STRUGGLE IN THE COURTROOM

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W. MICHAEL MURPHY:

Thank you very much. Chief Justice Zazzali, who is a dear friend, introduced me briefly. I will introduce myself, also somewhat briefly.

In my past, I have been a public defender. I started out here with Dale Jones, who is our panelist seated in the middle, although he really should be on the extreme left. Dale Jones and I started in Newark municipal court in 1975. We spent a long, hot summer trying cases together as public defenders. He stayed. I wandered away. I then became an assistant prosecutor in Morris County, then I was the head of the Public Defender's Office in Morris County, then I went into private practice as defense counsel for a number of years, and then I became the county prosecutor. So I suppose one of the reasons that George [Conk] asked me to serve is that we have a private defense attorney, a public defender, and a deputy first assistant prosecutor here. I have been all three of those at one time or another.

Also, earlier in my career, in 1997 when I ran for governor against Mr. Jim McGreevey—that, by the way, is a lesson in humility; I ran against McGreevey and lost[1]—I called up Dave Ruhnke and asked him if he would support and contribute to my campaign and he said not until I come out for the abolition of the

[1] *See* NationMaster.com, Encyclopedia: Michael Murphy (politician), http://www.nationmaster.com/encyclopedia/Michael-Murphy-(politician) (last visited Jan. 22, 2009).

death penalty. That is not the reason for my conversion, however.

I started out, not as one who was a proponent of the death penalty, but I suppose one who acquiesced into it. My late stepfather, Chief Justice Richard J. Hughes, when he was Governor in 1963,[2] presided over the Ralph Hudson execution. It was the last execution in the State of New Jersey[3] and hopefully the last one forever in the state.

I evolved, not like Senator Lesniak in a road to Damascus conversion that was epiphanal, but as a result of all the years I spent considering the issue and realized that it was a waste of time, a waste of effort, and an inappropriate punishment in the State of New Jersey and, I believe, in society in general. So I suppose as a prosecutor, as a public defender, as formally a proponent of the death penalty, and now as an "abolitionist"—supporting the repeal of the death penalty makes one an abolitionist; it is probably better than calling one's self a "repealant."

When I was preparing for this [panel], it occurred to me that David Ruhnke, who is one of the most distinguished trial attorneys probably in the country, certainly in the state and the region, Bill Zarling, an assistant prosecutor in Mercer County, and Dale Jones are among the trial lawyers, the unsung heroes in what has happened with the death penalty in New Jersey. The foot soldiers, the trial lawyers, are the ones who create the record. These lawyers are the unsung heroes of the movement because without those records, we would never have had the court cases that considered them. When I was preparing to moderate today, a friend of mine asked what I was going to say. I said that we have fifty minutes and I have three trial lawyers. So pretty much, I am going to say nothing. The individuals who George [Conk] has assembled today, each in their own right are heroes who have spent their lives in courtrooms and have given themselves to create the dynamic in which the death penalty became the subject of

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[2] NNDB.com, Richard J. Hughes, http://www.nndb.com/people/564/000122198/ (last visited Jan. 23, 2009). Richard Hughes served as Governor of New Jersey from 1962-1970. He served as Chief Justice of the New Jersey Supreme Court from 1973-1979. *Id.*

[3] The State's last execution was that of Ralph Hudson in 1963. Hudson was sentenced to death by electrocution for the murder of his estranged wife. Jeremy W. Peters, *New Jersey Keeps Its Execution Chamber 'on Standby'*, N.Y. TIMES, Dec. 10, 2007, at B6.

consideration and ultimately was repealed in New Jersey.

The legislators, as Professor and Senator Bob Martin mentioned, had great courage, but with political cover, scheduled the vote or tried to schedule the vote so that it took place during lame duck.[4] So there were heroic legislators, especially Senator Robert Martin, Assemblyman Wilfredo Caraballo and Senator Ray Lesniak, who were really the point people in this effort.[5] But some of the great and unsung, courageous heroes are the individuals who I am about to introduce one-by-one.

Our first speaker is my dear friend of over thirty years, Dale Jones, who has been with the Public Defender's Office and still serves with the Public Defender's Office as the chief of death penalty defense work. Dale has spent most of his lifetime in the courtroom. He never shied away from a controversial case, never turned down an assignment, and he is one of the true heroes of the movement.

DALE JONES:

Thanks, Mike. I also wanted to thank George [Conk], who was a classmate of mine. We all went to that "other" law school in New Jersey. Also, I want to thank Chief Justice Zazzali for the kind words that he had to say about myself and Jim Smith, but not just for us, but also on behalf of the Office of the Public Defender. I say that because when we first began working on these cases, we decided that the work that we would do would be a team effort.

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[4] *See* Editorial, *Time to Abolish the Death Penalty*, NEW JERSEY LAW.: THE WKLY. NEWSP., Nov. 12, 2007, at 6.

> After the November biannual legislative election, legislators of the 212th legislature convene to address unfinished business before a new legislature is seated in January. This two-month period is known as a lame-duck session. Historically, during this time significant yet controversial public policy issues are considered by legislators perhaps too timid to act prior to Election Day.

Id.; *see also* Jeremy W. Peters, *With Senate Vote, New Jersey Nears Historic Repeal of the Death Penalty*, N.Y. TIMES, Dec. 11, 2007, at B1 ("Because the Senate voted during a lame-duck legislative session, legislators who might otherwise have voted against the bill were afforded some political cover—a factor that may have tipped the balance.").

[5] Senator Martin, Assemblyman Caraballo, and Senator Lesniak were primary sponsors of the reform bill. S. 171, 212th Leg., 2nd Sess. (N.J. 2007), *available at* http://www.njleg.state.nj.us/bills/BillView.asp (last visited Jan. 15, 2009).

And it began that way and it stayed that way until it got us to where we are today. So my thanks for your kind words, but the thanks goes to the Office of the Public Defender and the team approach.

My thesis today is a simple one: There would not have been a death penalty commission, there would not have been a death penalty moratorium, and there would not have been a repeal of the death penalty statute without the work that was done by the Public Defender's Office. Because, in my view, we created a unique landscape without which none of these events would have taken place.

Before I explain to you precisely what I mean by that, let me tell you how it got there. In 1981, I was the first assistant in the Essex office in charge of homicide. And it became clear when both the candidates for governor, Florio and Kean, indicated that they would sign death penalty bills if they were elected, that we were going to have a death penalty some time in 1982.[6]

Our office began to plan in the summer of 1981 for a death penalty the following year. And, of course, we had it by August 6, 1982.[7] Our thinking was because anywhere between one-fourth and one-third of all the murders in New Jersey happened in Essex County that more likely than not the first one would happen in Essex County and it did. Seventeen days after reenactment there was the case of Thomas Ramseur.[8] A commitment was made by Public Defender management to devote as many resources as we could muster into these cases. We could think of no type of case that deserved more attention.

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[6] *See* Peter Kerr, *Courter and Florio Favor the Death Penalty, but Differ*, N.Y. TIMES, Sept. 28, 1989, at B1; Joseph F. Sullivan, *Death Penalty Bill Signed by Kean; He Calls for Execution by Injection*, N.Y. TIMES, Aug. 7, 1982, at 1.

[7] Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555, *amended by* Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427 (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

[8] State v. Ramseur, 106 N.J. 123, 154 (1987). Ramseur was convicted of killing his ex-girlfriend, Asaline Stokes. Stokes was in front of her house talking with a mechanic when Ramseur walked up to her and fatally stabbed her multiple times in the chest and face. *Id.* at 160-62. A jury convicted Ramseur and he was sentenced to death. *Id.* at 165-66. On appeal, Ramseur argued that the Capital Punishment Act was unconstitutional under both the Federal and State Constitutions. *Id.* at 166. The New Jersey Supreme Court held that the Act was constitutional under both constitutions and "in all respects." *Id.* at 154. However, Ramseur's sentence was reversed on the basis of improper jury instructions. *Id.*

I will tell you this, after having testified before various legislators and legislative committees throughout the United States, prevailing in capital litigation has to do with dollars. It is as simple as that. It has to do with dollars. The Public Defender's Office in New Jersey was blessed with many outstanding lawyers, many of whom are in this room, but there are a lot of good lawyers in this country. We were not really that much smarter. We did not work that much harder. We did not have that many more bright ideas, but we did have the dollars.[9] Along with the reenactment was an additional appropriation for our office, a base appropriation of $2.5 million each year.[10] And when we had the dollars, we knew what to do with them.[11]

We knew what to do with them because we went to Montgomery, Alabama in 1981. We went to the Southern Poverty Law Center. We went to the people who were trying capital cases in the South and asked them to teach us how to do this and they did.[12] They taught us basically three things. They taught us about the team approach to capital litigation. They taught us that what we needed to do was to have attorney-conducted voir dire that was sequestered because these cases were going to be lost and won in jury selection. And they taught us to focus on saving lives—that the guilt phases of capital trials were essentially meaningless exercises and to essentially abandon worries about the guilt or innocence and save lives.[13]

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9 *See* Barbara Stewart, *Life and Death. It's a Living,* N.Y. TIMES, May 5, 1996, at NJ4 (stating that in contrast to many states, in New Jersey, "the process of learning and practicing death-penalty law is relatively well financed," and that public defenders receive reasonable compensation and assistants and social workers to aid them).

10 *See* MARY E. FORSBERG, N.J. POLICY PERSPECTIVE, MONEY FOR NOTHING: THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 8 (2005), *available at* http://www.njpp.org/rpt_moneyfornothing.html ("Since 1985, the budget of the Office of the Public Defender has included a special appropriation for death penalty work . . . The sum has ranged between $2.3 million and $2.6 million.").

11 *See* Stewart, *supra* note 9; Joseph F. Sullivan, *New Jersey Defenders Battle Death Law,* N.Y. TIMES, Feb. 26, 1991, at B1 ("Because they are publicly financed, the public defenders can try things that some private lawyers cannot or will not do."); N.J. POLICY PERSPECTIVE, *supra* note 10, at 4-17.

12 *See* Sullivan, *supra* note 11.

13 *See* Jan Hoffman, *Lawyers Scrambling to Prepare for Capital Cases,* N.Y. TIMES, Mar. 12, 1995, at 42 (in which Mr. Jones recounted being told that the first rule in defending a death penalty case was: "Forget what you learned about determining guilt or innocence. Your goal is to save your client's life.").

We focused on these three things. We focused on the team approach to the extent that of the forty attorneys that were working in the Essex office, we took one-fourth of them from their regular assignments and we had them handle capital cases and capital cases only. So ten of the attorneys, which made up a group that we called the "Death Squad"—which was headed by me at the time—devoted themselves solely and only to capital cases.[14] The other thirty attorneys in the office, and to their credit, carried the weight of running the rest of the Essex Office of the Public Defender. We tried cases as a team. We had at least two attorneys assigned to each case.[15] So we began with a team approach.

Interestingly and ironically, to me, that approach was not copied by our adversaries, at least in most counties. I would say Mercer County was an exception. I think Bill Zarling of Mercer County saw the wisdom of trying cases by team. We fought early and hard to get attorney conducted voir dire. I remember clearly in trying the *Ramseur* case,[16] we had hired jury selection experts[17] and we were going through the death-qualification process.[18] I can remember Judge Baime at one point going through the process, just throwing up his hands and being frustrated, asking, "How we do this?" Our jury selection expert suggested asking potential jurors how they feel about the death penalty.[19] And from then on, things changed enormously and dramatically. We were ultimately successful because we devoted so much to jury selection in these cases.[20] From my point of view, capital cases are won in jury

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[14] Sullivan, *supra* note 11.

[15] N.J. POLICY PERSPECTIVE, *supra* note 10, at 9; N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 31 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf (last visited Jan. 13, 2009) [hereinafter DEATH PENALTY REPORT].

[16] State v. Ramseur, 106 N.J. 123 (1987); *see also supra* note 8.

[17] The Office of the Public Defender employed a "jurist psychologist" in every capital trial to aid in jury selection. Sullivan, *supra* note 11.

[18] *See generally* Hoffman, *supra* note 13 (discussing the steps that must be taken to assemble a panel of "death-qualified jurors").

[19] *See generally id.* (discussing the questioning of jurors regarding their willingness to impose the death penalty).

[20] *See, e.g.*, DEATH PENALTY REPORT, *supra* note 15, at 31 (noting that jury selection in capital cases takes four to six weeks as apposed to one or two days in non-capital cases); Sullivan, *supra* note 11 (noting that the Public Defender spent more than $75,000 to successfully attack the makeup of grand juries and trial jury panels in Atlantic County, in which African-Americans were underrepresented).

selection. It is all about jury selection.[21] We paid our jury selection experts $1,000 a day to tell us how to pick juries in capital cases. In capital cases, as far as I am concerned, attorneys were important, but jury selection experts were more important. You know how trial attorneys feel about themselves—we think we walk on water, that sort of thing—but not in capital cases; in capital cases we do not. Capital cases are won by jury selection. The other thing was to abandon worrying about winning and losing the guilt phase and focus on saving folks' lives.

When we did all these things, we established a record of capital litigation that is unmatched anywhere in the United States. We won eight out of ten times.[22] And when I say "win," that means we saved lives eight out of ten times that we tried capital cases.[23] There were about 228 capital cases tried,[24] most of which were tried by the Public Defender's Office,[25] our trial teams. We won eighty percent of the time.[26] What I want to suggest to you is that things would have looked very different if we did not prevail eighty percent of the time in these capital cases. What would have happened if we lost half of the time? What would have happened if there were 114 cases that the New Jersey Supreme Court would have had to review over the course of twenty-five years? What would have happened if there were, say, 114 people on death row on December 3, 2007, even though there were lame-duck legislators sitting and a governor who was anti-death penalty?[27]

In my view, the Public Defender's Office, with its success in capital litigation, created a unique landscape that is not likely to happen again in New Jersey and is not likely to occur anywhere else in the United States. We went twenty-five years without an execution.[28] We came damn close because there were individuals

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21 *See* Hoffman, *supra* note 13 (in which Mr. Jones described jury selection as one of the two "great battles" of a capital case).

22 Editorial, *The Difference*, N.J. LAW., Jan. 14, 2008, at 6.

23 *Id.*

24 DEATH PENALTY REPORT, *supra* note 15, at 7.

25 N.J. PERSPECTIVE, *supra* note 10, at 7 (stating that the Office of the Public Defender defends ninety percent of defendants charged with a capital offense).

26 *The Difference*, *supra* note 22.

27 *See generally Panel IV: The Final Act—Repeal: Marshaling the Votes*, 33 SETON HALL LEGIS. J. 161 (2008) (discussing the factors that combined to allow for the death penalty's repeal).

28 The State's last execution was in 1963. New Jersey Executions,

who had exhausted every legal step that we could take on their behalf. And as has been pointed out, for whatever reason—I will not speculate—regulations could not be gotten together to execute anybody in New Jersey, but there was nothing standing between John Martini and execution,[29] but the lack of Department of Corrections (DOC) regulations.[30]

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http://users.bestweb.net/~rg/execution/NEW%20JERSEY.htm (last visited Oct. 20, 2008). The death penalty was repealed in 2007. Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

[29] *See* State v. Martini (I), 131 N.J. 176 (1993). Martini was convicted of the 1989 murder of Irving Flax, a Fair Lawn businessman. *Id.* at 191-92. Martini's friend John Doorhy suggested that Martini kidnap Flax, whom both men were acquainted with, and provided him with Flax's address and a gun in exchange for a percentage of the proceeds. *Id.* at 192-93. After successfully kidnapping Flax, Martini contacted Flax's wife Marilyn demanding a large sum of money, which Marilyn provided *Id.* at 194-95. Martini subsequently had Flax drive to a parking lot and shot him three times, claiming that he did so because he thought Flax was trying to escape. *Id.* at 196. Martini was found guilty of purposeful or knowing murder, felony murder, kidnapping, and two weapons offenses and was sentenced to death. *Id.* at 191. The supreme court affirmed Martini's murder conviction and sentence. *Id.* at 324. In 1994, Martini requested proportionality review of his sentence; the court found no disproportionality. State v. Martini, 149 N.J. 3, 15 (1994). By 1996, Martini had exhausted all of his regular appeals and actively sought a speedy execution. However, the supreme court denied the request and ordered that appeals be filed against his wishes by the Public Defender's Office. Those appeals were exhausted in 1999 and Martini's execution was scheduled for September. In August 1999, Martini changed his mind and instructed his attorneys to take whatever legal action was possible to stay his execution, which the supreme court granted. In July 2006, Martini exhausted what was considered to be his final appeal; however, the death penalty moratorium had already been in place since January. *See* Robert Hanley, *New Jersey Supreme Court Rejects Convicted Murderer's Request for Execution*, N.Y. TIMES, June 29, 1996, at 9; Associated Press, *Metro News Briefs: New Jersey; Execution Date Canceled for Convicted Killer*, N.Y. TIMES, Aug. 26, 1999, at B8; Associated Press, *Metro Briefing New Jersey: Newark: Court Upholds Death Sentence*, N.Y. TIMES, July 26, 2006, at B7.

[30] *See In re* Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10a:23 , 367 N.J. Super. 61 (App. Div. 2004), *cert. denied* 182 N.J. 149 (2004).

In *In re Readoption*, NJADP challenged changes made in 2001 to New Jersey Department of Corrections ("NJDOC") regulations for carrying out the death penalty as constituting cruel and unusual punishment in violation of the Federal and State Constitutions. *Id.* at 65. Of particular consequence was the NJADP's challenge to the elimination of a NJDOC lethal injection regulation that required executioners to have access to emergency equipment sufficient to revive an inmate in the event that a last minute stay of execution was imposed *Id.* at 65, 68. The appellate division held that unless the NJDOC came forth with medical evidence that there was no possible chance of reversibility, the death penalty could not be carried out under current NJDOC regulations. *Id.* at 69. However, no new regulations were enacted. Thus, prior to the legislative moratorium imposed in 2006, a de facto moratorium was already in effect, as New Jersey had no lawful execution method. Jessica Henry,

We had two counties in New Jersey, two very large counties, Hudson and Union County, that never imposed the death sentence. That is mind boggling. In twenty-five years of capital litigation, there were two very large counties, with large populations, where juries never returned a death sentence. And we never had a death row population, I think, that ever exceeded sixteen. I could be wrong on the numbers. It has been awhile since I paid very close attention to that. But I do not think we ever had a death row population larger than sixteen.

On December 17, 2007, that number was down to eight.[31] In my view, the team approach of the Public Defender's Office, the commitment of resources, the incredible work that was done over a quarter of a century created a landscape and the only landscape under which the death penalty commission could be created, a moratorium could be created, and repeal could take place. So we have had acknowledgment from George Conk and from Chief Justice Zazzali for the work that we did, but I think a full appreciation of what was accomplished by the Public Defender's Office really has not happened. I want to express that today. This is my two cents' worth on this struggle in the courtroom and what it ultimately produced.

W. MICHAEL MURPHY:

I am going to switch over to Bill Zarling, who I indicated earlier spent a lifetime of his adult career in the Prosecutor's Office.

WILLIAM ZARLING:

Thank you, Mike. I am one of those evil prosecutors who actually was in the courtroom for some of these cases. I tried three of them: James Zola in 1984,[32] John Carroll in 1987,[33] and Ambrose

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New Jersey's Road to Abolition, 29 JUST. SYS. J. 408, 411 (2008).

[31] The eight men on death row as of the death penalty's repeal on Dec. 17, 2007, were: Marco Bey, John Martini, Nathaniel Harvey, David Cooper, Ambrose Harris, Sean Kenney (former known as Richard Feaster), Jesse Timmendequas, and Brian Wakefield. *See* Death Penalty Information Center, Clemency, http://deathpenalty info.org/clemency (last visited Feb. 28, 2009).

[32] State v. Zola, 112 N.J. 384 (1988). Zola was charged with the brutal murder of a 75-year-old woman who had been burned, strangled, stabbed, strapped to a bed,

Harris in 1996.[34] Ambrose Harris was still on death row at the time of the repeal in December 2007.[35]

Let me start by agreeing with what everyone has said about the work of the Public Defender because I got a chance to see it up close and personal and it is necessary for people to understand how difficult a job it is to ask people to defend people who have committed some of the most heinous crimes and yet defend them with all of their heart and their soul in regard to the death penalty. Public defenders did that, they did that on a regular basis and they are to be saluted for it.

I want to add a personal note, and that is that trying death penalty cases was hard even for prosecutors. Regardless of one's views of the individual case, the individual defendant, or the death penalty itself, standing up in front of a jury and asking that jury to return a verdict of death was a sobering, emotion-laden experience and was never an easy thing to do, at least for me.

One of the things I want to talk to you about is how the death penalty was looked at by one prosecutor's office because I was there for the entire time. I started in the prosecutor's office in 1971. I was there when the death penalty came in and I retired just before the death penalty was repealed. I think it is important for people to understand that, at least in our office and I suspect in many prosecutor's offices, we had a very simple philosophy with

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and assaulted. He was convicted of knowing or purposeful murder, burglary, aggravated sexual assault, kidnapping, and robbery and sentenced to death. *Id.* 391-94. The New Jersey Supreme Court affirmed Zola's convictions but reversed his death sentence because of an improper jury instruction and remanded for resentencing. *Id.* at 390-91, 440.

[33] State v. Carroll, 242 N.J. Super. 549 (App. Div. 1990). Carroll had assaulted his thirteen year-old stepdaughter, hitting her over the head with a scale and stabbing her multiple times, after getting into an argument with his estranged wife. *Id.* at 553-54. He was convicted of purposeful or knowing murder and possession of a weapon with the purpose of using it unlawfully against another and was sentenced to life imprisonment with a fifty-year period of parole ineligibility. *Id.* at 554. The appellate division affirmed Carroll's conviction but modified his period of parole ineligibility to thirty years. *Id.* at 554.

[34] State v. Harris, 156 N.J. 122 (1998). Harris had carjacked, raped, and shot a young woman twice in the head and then buried her in a shallow grave. *Id.* at 137-38. He was convicted of purposeful or knowing murder, felony murder, kidnapping, robbery, aggravated sexual assault, possession of a handgun for an unlawful purpose, and theft and sentenced to death. *Id.* at 135, 140-41. The supreme court affirmed Harris's conviction and sentence. *Id.* at 201.

[35] Death Penalty Information Center, *supra* note 31.

respect to the death penalty. It was not necessary to be a champion of the death penalty. If you were a prosecutor, the death penalty was the law and as long as the death penalty was the law, it was our obligation to enforce it, to enforce it properly, to enforce it soberly, but to enforce it.

But in my office, from the very time that the death penalty was reinstated in 1982, the death penalty was never a goal of our office.[36] Murder convictions were. Once we had managed to get the murder conviction, we presented the death penalty phase as we thought it should be, but we never lost any sleep over what the jury was going to do in regard to the death penalty because we believed that that was a very personal decision that a jury had to make. And I for one was never going to argue with a jury if it decided for whatever reason not to impose a death sentence. While we did our job, it was not necessary to go into the death penalty phase feeling that winning or losing somehow hinged upon getting a death sentence because that was not the view of our office.

Let me talk to you about the metamorphosis of a prosecutor's office. At the time the death penalty was reinstated and ever since the Mercer County Prosecutor's Office examined every death-eligible case on its facts and its death-penalty merits, there still was a general philosophy that we began with in 1982, that if a statutory-aggravating factor could be proved beyond a reasonable doubt, then the case should be prosecuted as a death penalty case.[37] And so that is the way we began to analyze cases. If we believed that a statutory-aggravating factor could be proved

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[36] *C.f.* DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2004-2005 TERM 3 (2005), *available at* http://www.judiciary.state.nj.us/pressrel/Baime2005Report12-16-05.pdf (noting that there had been a marked decline in capital prosecutions since 1988 and that this decline had accelerated in recent years); Joseph F. Sullivan, *Constitutionality of Death Penalty Argued Before Top Jersey Court*, N.Y. TIMES, Feb. 6, 1985, at B2 (quoting statement of Essex County Prosecutor George L. Schneider in 1985 that of the 300 murders investigated in his office since capital punishment was reintroduced in 1982, the death penalty was sought in "less than 20 cases").

[37] N.J. STAT. ANN. § 2C:11-3c(3)(a) provided: "If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death." N.J. STAT. ANN. § 2C:11-3c(3)(a) (West 2005) (deleted by amendment, 2007).

beyond a reasonable doubt, then we prosecuted the case as a death penalty case. That was not the situation everywhere in New Jersey, however.

The then-Bergen County Prosecutor had religious objections to the death penalty and made it clear that there would be no death penalty prosecutions on his watch. The Essex County Prosecutor's Office tried *State v. Ramseur*.[38] After that case had been resolved, it publicly took the position that death-penalty prosecutions were too expensive for that office to deal with and they would not generally be prosecuted thereafter. When *State v. Koedatich* went up on appeal, the Public Defender raised the county disparity issue.[39] The supreme court never directly resolved that county disparity issue.[40] Our office noted that and recognized the clear potential that the supreme court might at any time hold the death penalty statute unconstitutional as applied based upon county disparity.

In addition to that legal problem, we began to analyze the verdicts of our own death penalty cases. As a result of that development, certain categories of death-eligible cases tended to drop out of death penalty committee approvals. For instance, we learned fairly early on in the process that felony murder, with certain exceptions, were simply not worth prosecuting as death penalty cases because juries did not believe that a death that occurred in the course of a robbery, for instance, was death worthy and so we began to leave those aside. The exceptions included felony murders that involved sexual assault, to which juries seemed to respond very strongly, and felony murders, that had extreme circumstances, like the execution-style slaying in *Loftin*.[41]

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[38] 106 N.J. 123 (1987); *see also supra* note 8.

[39] 112 N.J. 225 , 253 (1988).

[40] *See* State v. Wakefield, 190 N.J. 397, 535-36 (2007) ("[W]e cannot escape the responsibility to review any effects of race in capital sentencing. . . . We have not yet been presented with persuasive evidence of such disparity.") (citation omitted); *Id.* at 541, 542 & n.2 (Albin, J., concurring) (quoting report of Special Master David Baime that "inter-county disparity may be one of the most significant variables in terms of death sentencing" and noting that the court has heard oral arguments on the county-disparity issue and "eventually will have to decide to what degree it is present and whether any significant disparity is constitutionally tolerable") (citation omitted).

[41] State v. Loftin (II), 157 N.J. 253 (1999). Loftin was convicted of the 1992

We found out that family crime was not a very wise candidate for the death penalty because every juror had a family. Every juror recognized that somewhere in their family there were problems and that those problems might explain erratic behavior, it might explain violent behavior. So, family crime began to drop out of the Mercer County death penalty cases. We found this out partially as a result of one of the cases that I tried, John Carroll, which resulted in a death penalty hung jury. John Carroll had smashed in the skull of his thirteen-year-old stepdaughter.[42] The jury could not reach a verdict on death.[43]

I was never a death penalty opponent, but I was never an advocate either. My objections to the death penalty were both legal and practical and developed over time. One of the legal issues that always bothered me was that a simple execution murder was not death eligible. If I walked up to my friend Dale Jones and for no reason, saying nothing, not knowing Dale, just pulled out a gun and shot him in the head and killed him, that was not death eligible because there was no aggravating factor that would make that death eligible; that always seemed to me to be very strange.[44] And so I had that legal problem with the death penalty statute.

In addition to that, there were several things that developed over time. One was the likelihood that the supreme court would

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murder of Gary Marsh. Marsh had been fatally shot in the head while working the overnight shift at a gas station. *Id.* at 317-18. He was arrested four days after the shooting when he attempted to make a purchase with one of Marsh's credit cards. *Id.* at 318. He was found guilty of purposeful or knowing murder and sentenced to death. *Id.* at 318, 321. The supreme court affirmed Loftin's conviction and death sentence and also found that his death sentence was not disproportionate. *Id.* at 321, 346.

[42] State v. Carroll, 242 N.J. Super. at 549, 555 (App. Div. 1990); *see also supra* note 33.

[43] *C.f. Carroll,* 242 N.J. Super. at 553 (stating that the trial court sentenced Carroll to life imprisonment rather than to death).

[44] The death penalty statute allowed for the imposition of the death penalty only if the jury found one or more statutorily defined aggravating factors to exist, and that these aggravating factors outweighed the mitigating factors beyond a reasonable doubt. If the jury found none of these aggravating factors to exist, or that aggravating factors did exist but did not outweigh mitigating factors, the statute required the court to sentence to minimum sentence of thirty years without parole. N.J. STAT. ANN. § 2C:11-3b(1), -3c(3)(a) (West 2005), *amended by* Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427.

never allow the death penalty to actually be used in New Jersey.[45] If you were a prosecutor, you couldn't help but get the message over time that the supreme court was not anxious to see anybody die. It seemed to color one's judgment as to whether one wanted to go through the entire process if you did not believe that the process was going to end up with a death result at the end anyway.

Then, there was the issue of whether the heightened scrutiny that the supreme court was giving to death cases would have an adverse effect on the law that applied to non-death penalty murder cases. I, for one, was always very concerned about that. There was also the issue that Mike Murphy referred to before which is the simple issue of manpower, time and money.[46] We always assigned two prosecutors. Our Public Defender's Office assigned two public defenders,[47] and each office assigned two detectives and investigators to the case. Thus, both offices were affected dramatically in terms of their regular workload.

In Mercer County, jury selection for death penalty cases averaged approximately six weeks and then you had the trial on top of that.[48] Plus, there was time that was devoted to the more significant motion practice in death penalty cases.[49] As a result, one court devoted almost its entire attention to one case per month and, as a result, backlogs in other cases grew. So gradually, over the course of time, the Mercer County Prosecutor's Office altered the original philosophy that it began with and the death penalty became reserved for only the most extreme cases. That is why, in my personal judgment, when repeal came around, New

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[45] *See* Peter Kerr, *Proponents of Death Penalty Seek to Limit Appeals,* N.Y. TIMES, Feb. 17, 1989, at B1; Stewart, *supra* note 9 (quoting statement of Republican Assemblyman Gary W. Stuhtrager that: "It's almost a running joke at this point. You have the statute—it's there—but the appeals process, the numerous decisions have prolonged this situation interminably."); Dana Sullivan, *Five Justices Refute Court Sandbagged Executions; How Will Historians See It?,* N.J. LAW., Apr. 21, 2008, at 1 ("In the nooks and crannies and gossipy corridors of the Statehouse in Trenton, virtually any conversation about the death penalty for years usually came around to someone saying that the New Jersey Supreme Court, one way or another, would never allow anyone to be executed.").

[46] *See* remarks of W. Michael Murphy, *supra*; *see also* DEATH PENALTY REPORT, *supra* note 15, at 31; N.J. POLICY PERSPECTIVE, *supra* note 10, at 8-19.

[47] *See* DEATH PENALTY REPORT, *supra* note 15, at 31; N.J. POLICY PERSPECTIVE, *supra* note 10, at 9.

[48] *See* DEATH PENALTY REPORT, *supra* note 15, at 31.

[49] *Id.*

Jersey prosecutors did not fight it because the battles had been fought and no one cared that much anymore and so the death penalty went out with a whimper.

W. MICHAEL MURPHY:

Thank you, Bill. Our next speaker is David Ruhnke. David has tried dozens of capital cases. The question often asked rhetorically is: "Can you put a price tag on life?" The answer to that is really you can. And very rarely, only the wealthiest of our citizens, who usually do not get charged with capital crimes, can afford a defense in a capital case. In fact, David has been and is on trial right now in a federal capital case and he has just two days off. I think he is back on trial tomorrow up in White Plains, New York in the Southern District. David has spent an enormous amount of time, energy, and effort and given so much of himself to defending capital cases. We look forward to hearing from him.

DAVID RUHNKE:

Beating the New Jersey death penalty one case at a time was our goal. I do want to start off by making three basic points about the death penalty. I have been doing this since 1983, I have tried fifteen of these cases to a verdict, six of them in New Jersey. I try the cases whenever I can with my favorite trial partner, Jean Barrett, who is also my wife of twenty-eight years. We also managed to have time to have children along the way. And while I do not recommend trying capital cases with your wife generally as a lifestyle, it seems to have worked out okay for us.

Three points about the death penalty. One: it is arbitrary. There is no rhyme or reason in hell why Defendant X gets the death penalty and Defendant Y does not. Why does somebody who blew up an American Embassy in Nairobi killing 224 people including twelve Americans not get the death penalty[50] while

[50] The two defendants who were convicted of playing direct roles in the bombings were eligible for the death penalty but because the juries failed to reach a unanimous verdict, the defendants were sentenced to life imprisonment without parole rather than the death penalty, as federal law requires. The other two defendants involved in the conspiracy were not death-eligible; they also received life imprisonment without parole, the maximum punishment allowed by law. It is worth noting that the judge who preceded over the trials revealed that the jury split with

someone who kills a gas station attendant in Burlington County, like Robert Morton,[51] gets the death penalty? It is arbitrary. It makes no sense. I am with Justice Stewart.[52] If there is any basis that you can discern for what goes on in the death penalty, it is race.

The second truth about the death penalty is that it is racist to its core. It always has been. It always will be; whenever someone enacts the death penalty in a state or the federal death penalty—the federal death penalty right now targets seventy percent minority defendants.[53] Everyone looks around and asks how this happened. We are not racist. We did not set out to be racist. And all of a sudden after, almost twenty years with a federal death penalty, there is a seventy percent target rate. The answer is that it reflects larger values in society and we cannot do anything about it. That is another reason to say to the death penalty: "Good riddance."

The third truth about the death penalty is that it is inherently political. What does that mean? It means that right now we are one election and one shocking crime away from the death penalty being brought back or being put back on the table in New Jersey. The price you have to pay and the exercise is one of vigilance.

July 2, 1976, was the day that the United States Supreme Court announced five cases, three of which allowed the return of

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respect to the primary perpetrators came because some jurors believed that life in prison was a harsher punishment than the death penalty. *See* Alan Feuer, *A Nation Challenged: The Courts; Tight Security at Sentencing For Bombings*, N.Y. TIMES, Oct. 17, 2001, at 10; Lisa Anderson, *Four Get Life for '98 Terrorist Attacks*, CHI. TRIB., Oct. 19, 2001, at 1.

[51] State v. Morton, 165 N.J. 235 (2000). Morton and Alanzo Bryant were arrested for the murder of Michael Eck, who had been stabbed twenty-four times while on duty as a gas station attendant. *Id.* at 241. Morton was convicted of purposeful or knowing murder, robbery, and aggravated assault and was sentenced to death. *Id.* at 242-43. The supreme court affirmed Morton's convictions and sentence and found that his sentence was not disproportionate. *Id.* at 241, 243.

[52] Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Id.

[53] American Civil Liberties Union, *Race and the Death Penalty*, Feb. 26, 2003, http://www.aclu.org/capital/unequal/10389pub20030226.html.

the death penalty to this country.[54] July 2 also happens to be my birthday. On my thirty-third birthday, I was a federal public defender here in Newark, minding my own business, and I said: "Look at this, they got the death penalty going again." Little did I know that a few years later when I went into private practice and founded my own law firm, one of the first calls I would get would involve taking on one of these death penalty cases. It came from Michael Marucci, who was the officer in charge of the Essex County Public Defender's office.

Between Jean and I—we were always trial partners on these cases—we tried six of these cases. I want to talk about them briefly so we have a sense of who got brought to trial and why. If we had a death penalty strategy, it could be summed up in this phrase: One, we would always get a life verdict or we would shoot for a life verdict in every case; and second, we wanted prosecutors like Bill Zarling, George Snyder, and Barry Sodanski from Essex County to walk away shaking their head saying: "If we cannot get a death penalty in that case, when are we ever going to get it?"

We wanted to make it painful, difficult and unpleasant. If Bill Zarling was a prosecutor who was not disappointed in life verdicts, he was a rare prosecutor because the rest of them would leave the courtroom muttering to themselves and trying to think what to say

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[54] Gregg v. Georgia, 428 U.S. 153(1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976), *overruled in part by* Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

In these cases, the Court addressed the constitutionality of five states' attempts to revise their death penalty statutes to comport with the Court's decision in *Furman v. Georgia*—in which the Court, in a per curiam opinion, held that the death penalty as imposed and administered by the states constituted "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments largely because of the arbitrary and capricious manner in which death sentences were being imposed. Furman v. Georgia, 408 U.S. 238, 239-40 (1972). In *Woodson* and *Roberts*, the Court struck down the revised statutes of North Carolina and Louisiana, which provided for mandatory death sentencing, as unconstitutional under the Eighth and Fourteenth Amendments. While the mandatory sentencing scheme eliminated the unbridled discretion that had been of concern in *Furman*, the majority concluded that the rigid sentencing structure impermissibly failed to take into account the particular circumstances of the crime and of the defendant. However, in *Gregg*, *Proffitt*, and *Jurek*, the Court upheld the revised sentencing structures of Georgia, Florida, and Texas, which provided for guided discretion by adding objective criteria to inform sentencing, providing for appellate review, and allowing for individualized consideration of the defendant and the circumstances.

in the courtroom.

My first death penalty case was Eneida Berrios in Essex County in 1986.[55] I do not have a picture of her, but the crime was shocking. It was an arson/murder of a six-year-old child.[56] A family feud in downtown Newark settled by one family setting the other family's apartment building on fire. Everybody ran out of the apartment building but they left behind a six-year-old child and no one stopped to pick her up. She died in the fire.

The defendant was a battered woman. I can remember meeting her for the first time. What was remarkable about this person was the scar that ran from here to here that had cut a tear duct so that she cried all the time. She never stopped crying. Tears constantly ran down her cheek. What was also remarkable about her was that she was the mother of eleven children with an IQ of 50. An IQ of 50.

What was also remarkable about Eneida Berrios was she was not guilty. She had not participated in the crime. We went to the Essex County Prosecutor's Office and said that they had a woman who is probably innocent, with an IQ of 50, and suggested that they reconsider seeking the death penalty in this case. But, it was like talking to a wall. At the end of the day, our first death penalty case together was a not guilty verdict.[57] She was not guilty. That is when we said to ourselves: "This is pretty easy, right? I mean, you know, they are not guilty." Then came the next case, James Jerald Koedatich.[58] We were assigned Mr. Koedatich's appeal by the Public Defender's Office, who managed to win the appeal. Then we looked around and asked who was going to try this loser of a death penalty case and it fell on us.

You might remember the saga of Mr. Koedatich. And if you do not, then thank God you do not have to. He was nineteen years old. He killed somebody down in Florida and was sentenced to the state prison in Florida. He killed someone else while he was in prison and that got written off as just prison business.[59] He then he got out of prison a few weeks after the New Jersey death penalty

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55 *See Making a Career Out of Staving Off Death*, N.J.L.J., July 31, 1995, at 16.

56 *See id.*

57 *See id.*

58 State v. Koedatich, 112 N.J. 225 (1988).

59 *Id.* at 265-66.

had been resumed and killed two young women in Morris County.[60] The judge who sentenced him in the first trial, Judge Stanton, described him as an incipient serial killer who had fortunately been stopped.

In defending Jerald Koedatich, we looked at, among other things, one of the things that Dale Jones told us and the Public Defender's Office taught us: that childhood matters. Where did this person come from? This person did not arrive at age twenty-eight as a homicidal maniac. Where has he been? One place he had been at age twelve was in a mental hospital diagnosed as being homicidal. Twelve years old and diagnosed as being homicidal. So you say to yourself, that is a terrible fact. Then you turn around and ask yourself how a twelve-year-old becomes homicidal.

That is the story of digging into a life and digging into records and ultimately the jury became persuaded that death was not appropriate because of a childhood from hell. I remember jury selection and I remember telling different jurors that they were going to hear a case where somebody is charged with murder. "You are also going to hear that he has two prior murder convictions. Do you think you can be fair under those circumstances—give fair consideration to mitigating factors?" I will never forget one juror saying: "You know, one murder is bad, two is ridiculous, three, he is out of here." Fortunately, she did not make it onto our jury.

Let me talk about another case. By the way, Jerald Koedatich's case was reversed from a death verdict by the state supreme court.[61] So was the death verdict of Anthony McDougald in Essex County.[62] Mr. McDougald had a thirteen-year-old girlfriend.[63] He was twenty-seven at the time.[64] The thirteen-year-old's parents were unhappy about that, threatening to prosecute him for statutory rape.[65] He, accompanied by another thirteen-year-old girlfriend, went into the parents' home one evening and

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60 *Id.* at 237-38, 266.

61 *Id.* at 231.

62 *See* State v. McDougald, 120 N.J. 523 (1990).

63 *Id.* at 528.

64 *Id.*

65 *Id.* at 530.

killed the father with a razor and a cinderblock dropped on his head.[66] He battered the mother to death with a baseball bat and then did something unspeakable with the baseball bat to the mother.[67]

The New Jersey Supreme Court reversed the death verdict and sent us back to the penalty phase only.[68] A jury in Essex County, hearing the facts, hearing the circumstances of his childhood, [and] hearing the circumstances of his mental illness, was persuaded that death was not an appropriate penalty and sentenced him to life imprisonment.[69] I remember during some of the commission hearings some of the senators saying that the New Jersey death penalty has done a great job putting on death row only the worst of the worst. Well, that was nonsense because a lot of the worst of the worst never got there because lawyers, primarily from the Public Defender's Office, and juries just said that they were not going to have a death penalty.[70] I agree with Dale—if we had had 125 or 150 people on death row in December 4, 2007, it never would have happened. The New Jersey Supreme Court may have been able to reverse the number of death penalty cases it did, but it never could have done all of them.

Al-damanay Kamau, you would think this case is going to be a death penalty case. It dealt with the murder of a police officer in a courthouse, in the Essex County Courthouse[71]. The defendant smuggled a gun past metal detectors by having a civilian clerk-typist for the superior court bring the weapon in through an employees' entrance.[72] They changed that procedure obviously

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66 *Cf.* at 531-32 (McDougald stabbed the girl's father and hit him with a baseball bat and hit the girl's mother with a cinderblock.).

67 *Id.* at 533.

68 *Id.* at 584.

69 *See* Lisa Brennan, *Death Be Not Proud: Ruhnke's on the Case*, N.J.L.J., July 31, 1995.

70 *C.f.* Henry, *supra* note 30, at 413 ("In 228 capital trials, jurors returned death sentences in 60 cases, or slightly more than 25 percent of all capital trials. In Maryland, by contrast, from 1976 to 2000, there were 76 capital convictions in 180 capital trials.") (citations omitted); Stewart, *supra* note 9 (quoting statement of Dale Jones that: "Support for the death penalty is one mile wide and one inch deep. It's something else to sit on a jury and say, 'Yes, I vote to kill that person.'").

71 *See* Brennan, *supra* note 69, at 1; Susan Jo Keller, *New Jersey Daily Briefing; Life Terms in Detective's Death*, N.Y. TIMES, May 10, 1995, at 1.

72 Joseph F. Sullivan, *Clerk Charged in Courthouse Killing*, N.Y. TIMES, June 5, 1993, at 28.

since then.[73] He was completely demented. He felt that he had been placed on earth to dispense justice.[74] And justice included killing a detective, a Newark narcotics detective, who was about to testify in a case involving his cousins.[75] Kamau killed the detective by walking up behind him, shooting him through the head and killing him in the Essex County courthouse.[76] He then shot another sheriff's officer who came to reply.[77] He did not kill him, though.[78] Kamau also shot at some other sheriff officers in the stairwell, shot at a civilian guard on the way out.[79]

The jury delivered a "live" verdict because he was mentally ill.[80] It was a case where the jury determined not that only was he mentally ill at the time of the crime, but they voted 12-0 on the verdict sheet that at the time of the murder, he was still mentally ill, and that as he was on trial, he was mentally ill.[81]

Another case is Dave Jones in Bergen County.[82] He killed his girlfriend. It is again another shocking crime. They are all shocking and they are all terrible, but juries had the wisdom in these cases to determine what I think in one of the early U.S. Supreme Court cases [the Court] referred to as "the diverse frailties of human kind." Things that can get people from here to there.

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[73] *See* Keller, *supra* note 71; Sullivan, *supra* note 72. .

[74] *See* Lisa Brennan, *Slain Detective's Drug-Use Report Barred,* N.J.L.J., Feb. 2, 1995, at 9 ("Kamau claims he shot [the detective] because he was on a divine mission to ferret out corrupt police officers.").

[75] The officer that Kamau shot was about to testify against Kamau's brother and cousin during a drug trial. Keller, *supra* note 71.

[76] *See* Sullivan, *supra* note 72.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Making a Career out of Staving Off Death, supra* note 55.

[81] *See id.* ("The jury rejected the death penalty, finding that [Kamau] was mentally ill at the time of the trial.").

[82] *See* State v. Jones, 308 N.J. Super 15 (App. Div. 1998). Jones had stabbed the victim multiple times with a pitchfork, hit her over the head with a heavy object, fracturing her skull, and also attacked her with a saw. *Id.* at 35-36. Immediately after the murder, Jones turned himself into the police, repeatedly telling them that he was "the bad guy," and directing them to the crime scene. *Id.* at 20-21. He was convicted of rape and purposeful or knowing murder and sentenced to life imprisonment. The appellate division affirmed both his convictions and sentence. *See* Peter Pochra, *Killer's Writings Relevant to Guilt; Conviction Upheld in Leonia Murder,* THE RECORD (Hackensack, N.J.), July 24, 2003, at L3.

The credit for these cases belongs to, if anybody, Dale Jones and his group. They relentlessly funded the defenses of these cases. If you needed an expert, you got an expert. If your expert screwed up or did not give you what you wanted to hear, you could get another expert until you were able to make a presentation to a jury in a way that resonated with life. It is the juries really who brought us, I think, to the end of this terrible era with the death penalty. Every murder is worse than every other murder and every victim suffers more than any other victim. I think what that teaches us is to not stand back and say this is not as bad as other cases. They are all horrible cases. Any murder case, by its own terms, is horrible. Any prosecutor worth his or her salt can and probably has stood up and said: "If this case does not call for the death penalty, then what case does?"

The answer is no case does because they are all horrible and they are all arbitrary. If one factor that runs through all of these cases can be discerned, it is the factor of race. I am trying a case right now in federal court in the Southern District of New York. We are back on trial tomorrow. The crime is that a drug dealer allegedly killed two other drug dealers in the course of a drug rip-off. The U.S. Attorney for the Southern District of New York did not think it was a capital offense because he did not ask for authorization to try it as one. But to Alberto Gonzalez, it sounded like a death penalty case and that is why we are on trial there.

So I am sitting in a courtroom where I know this is not really a death penalty case, where the judge knows this is not really a death penalty case, where the prosecutors know that this is not a death penalty case. Guess who does not know? The twelve people sitting on the jury. So it is arbitrary. It is scary. Let us take this victory lap as we can. It is an important victory and all power to Celeste Fitzgerald. Thank you.

W. MICHAEL MURPHY:

David, thank you for bringing death to life. We are going to just take a couple of questions because I want this to be somewhat interactive. If anybody has any please stand, identify yourself, and then ask your question.

DOTTIE GUTENKAUF:

I am Dottie Gutenkauf, just an ordinary person from Plainfield. I did not want to ask a question I just want to make an observation about the importance of juries. In Union County, we had a case awhile back involving a defendant named Byron Halsey,[83] who was found guilty on the basis of bad evidence of the brutal murder of two little kids. The only reason that the prosecutor who sought the death penalty did not get it was that one juror held out. And that was all it took. When talking to people about this kind of thing, I think you have to emphasize, do not ever think for a minute that one person cannot make a difference because that one juror certainly did. Thank you.

W. MICHAEL MURPHY:

Most everybody knows, for the record, that Byron Halsey was innocent.[84]

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[83] *See* State v. Halsey, 329 N.J. Super. 553 (App. Div. 2000); The Innocence Project, Know the Cases: Bryon Halsey, http://www.innocenceproject.org/Content/690.php (last visited Feb. 22, 2009).

Halsey was considered a prime suspect in the murder of his girlfriend's children, along with Clifton Hall and was interrogated for thirty hours during a forty-hour period. The Innocence Project, *supra.* Halsey had a sixth-grade education and severe learning disabilities, and the prosecutor interviewing him later admitted that many his answers were "gibberish" and that he seemed to be in a trance during much of the interview. *Id.* During the interrogation, Halsey confessed, at which point the police ceased questioning Hall; however, on every key fact of the crime—i.e. location of the bodies, manner of death—Halsey gave incorrect answers before arriving at the accurate one. *Id.* At trial, Hall testified against Halsey, and Halsey was convicted of two counts of felony murder and one count of aggravated sexual assault. *Id.* As the jury had acquitted Halsey of some of the charges brought against him, he was no longer death-eligible and was sentenced to two life sentences plus twenty years. *Id.* Beginning in 1993, Halsey sought access to post-conviction DNA testing, however his requests were repeatedly denied. In 2002, however, the New Jersey Legislature enacted a statute allowing a defendant convicted of a crime who was currently incarcerated to obtain DNA testifying of evidence prohibitive of innocence or guilt if certain requirements were met. N.J. STAT. ANN. 2A:84A-32a (West Supp. 2008); The Innocence Project, *supra.* In 2006, Halsey was able to obtain DNA testing, which not only proved his own innocence but also implicated Hall in the crime. *Id.* In May 2007, Halsey's motion to vacate his conviction was granted and in July 2007, all charges against him were dropped. *Id.*

[84] *See, e.g.*, Know the Cases: Bryon Halsey, *supra* note 83; Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, at B1; Jonathan Casiano & Mark Mueller, *Freed After 22 Years: Verdict Overturned After DNA Links Another Man to Kids' Murders*, THE STAR-LEDGER (Newark, N.J.), May 16, 2007, at 1.

DOTTIE GUTENKAUF:

That is right.

W. MICHAEL MURPHY:

DNA was subsequently submitted in that case and analyzed. Byron Halsey was released from prison; and he was not a terribly bitter man after about twenty years in custody.

AMY FUSTING:

Good morning. I am Amy Fusting. I am from Maryland Citizens Against State Execution.[85] I wonder if there is any merit to the thought that you should not bring to life people on death row, but rather bring their childhood to life. Let us not talk about the crimes that they have committed. I have been told this many times and I agree with you—and I am a former public defender—that childhood is important in how people got there. Do you think there is any merit bringing a capital defendant's childhood to light or is it too risky? I think that is everyone's fear that legislators and the public at large think it is too. They do not have sympathy.

DAVID RUHNKE:

I think it is risky because the facts are horrible. They are horrible in every case. In the voir dire we just finished in federal court, one of the questions we were asking was about childhood and evidence and about probably fifty percent of the jurors said: "Do not give me an abuse excuse. Give me something else, but do not give me that abuse-excuse stuff." Fortunately, a lot of them are not sitting on our jury now, but I think it is too risky.

STEVEN FRIER:

Steven Frier, rabid abolitionist. I will ask this question of any of you: How would you respond to an individual who would reinstate and provide the death penalty only to those where guilt is proven, not beyond a reasonable doubt, but with 100 percent

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[85] The Maryland Citizens Against State Execution ("MD CASE)" is a coalition united to end the death penalty in Maryland. Maryland Citizens Against State Execution, About MD Case, http://www.mdcase.org/ (last visited Feb. 20, 2009).

certainty?[86]

DALE JONES:

My answer would be guilt or innocence is not dispositive, quite frankly. There are horror cases, of course, and we have had several examples over the past decade of DNA exonerations; but my experience has been that the death penalty simply cannot be administered fairly for other reasons. Primarily, what David [Ruhnke] was talking about before; that is, race. Certainly that is one of the aspects of it. That simply cannot be weeded out or, at least, not in what I have seen in my experience in dealing with these cases. It is just not capable of being weeded out of this system. The other thing I would say is any value to me of the death penalty can certainly be met by life without the possibility of parole. Quite frankly, the death penalty, and it is well demonstrated here in New Jersey, absorbs so much in terms of resources out of the criminal justice system that it is simply not worth it for economic reasons.[87] So I do not know that I would meet that argument directly and say that guilt or innocence is an off-or-on switch in terms of the death penalty. There are other issues.

W. MICHAEL MURPHY:

Let me add this. Not every case has DNA. Byron Halsey had the luxury of having DNA subsequently tested and he was exonerated.[88] There are cases in which there is no absolute scientific proof. In the course of human affairs, nothing is absolutely certain; so if that were the standard, you could never actually have a conviction if you were actually honest with yourself.

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[86] This is not a novel proposal. Indeed, in 2007, New Jersey State Senator Sean Kean introduced a bill to retain the death penalty but providing that the death penalty should be imposed only if the jury found without a doubt that all the aggravating factors outweighed the mitigating ones. *See* Assem. 4443, 212th Leg., 2nd Sess. (N.J. 2007). Gov. Mitt Romney introduced a similar bill in Massachusetts in 2005. Pam Belluck, *Massachusetts Governor Urges Death Penalty*, N.Y. TIMES, Apr. 28, 2005, at 16.

[87] *See generally* DEATH PENALTY REPORT, *supra* note 15 at 31-33; N.J. POLICY PERSPECTIVE, *supra* note 10, at 8-19.

[88] *See supra* note 83.

EILEEN TULIPAN:

Eileen Tullpan. I am George's partner and I have nothing to do with the death penalty. I applaud all of you for all of the work you have done over the last fifteen years. I have a question. Is there reason to believe that with this abolition or abolishment of the death penalty that juries will be more willing to convict knowing that there will not be a death penalty? Because had that been part of the jury's thinking, while they might be willing to convict, they are not willing to go to the next stage?

DAVID RUHNKE:

Yes. It is an argument against the death penalty that jurors are more reluctant to convict because they know they are going to go on to consider the death penalty. I have not found that to be true in real life. I think in a system that separates the phases, like New Jersey does and like virtually every system does, except for the judge-run systems that survive, that juries understand that conviction is separate from guilt. I do not think they are more likely to convict now or less likely to convict now than they ever were.