PANEL II: THE DEATH PENALTY ON APPEAL: CONSTITUTIONALITY, EQUALITY, AND PROPORTIONALITY REVIEW

Hon. James R. Zazzali
Hon. Deborah T. Poritz
James K. Smith, Esq.
Hon. Alan B. Handler
Hon. Peter G. Verniero
Lawrence S. Lustberg, Esq.

CHIEF JUSTICE ZAZZALI:

This is a distinguished panel, a great panel. I will simply introduce our panelists now rather than going through that exercise individually. We have Alan Handler, a former Senior Associate Justice. He will talk about some of the constitutional issues. Chief Justice Poritz will guide us through that labyrinthine nightmare called proportionality, which I mentioned before. Jim Smith is brilliant—as was well said at the very outset this morning when others mentioned his leading the fight for defendants on both a trial and appellate level. Justice Peter Verniero, my former colleague and great friend, who can speak to these issues from two perspectives: one as former Attorney General, perhaps commenting on some of Jim Smith's thoughts and, second, speaking to some issues concerning his experience as an Associate Justice. Then, of course, Larry Lustberg, my present colleague. Larry was a great advocate before our Court. He was just extraordinary in the cases that he presented and how he presented them.

With that, I will sit down and Justice Handler can start us off.

JUSTICE HANDLER:

Good morning. This panel is a tremendously stimulating and provocative occasion. It gives us a timely and exciting opportunity to engage in a retrospective on our involvement here in New Jersey with capital punishment. It is an experience that has been intense, somewhat agonizing to go through, and its impact and effect, I think, are going to be long in resolving in our minds. I have asked myself the broad question. In terms of the relatively sudden demise of capital punishment, the questions are what impact did this have on our laws and on our jurisprudence, on our constitutional doctrines and philosophy, and on the administration of criminal justice? Those are questions that are going to be answered over years to come. I considered them and come to some tentative conclusions.

Another related question that I think has been of interest to the people who have put together this panel and will, I am sure, be of interest to the audience is whether in retrospect we can have any better sense of the role and the responsibility and the influence of the court in bringing about the demise of capital punishment.

My conclusions basically are that I think we, as a justice system, we, as a state, are well rid of capital punishment. Regardless of whether this inheres in the fundamental doctrines of capital punishment or in the policies and politics that surround it, we could all, I think, feel relieved that we are rid of its acrimony, its controversy, its extraordinary diversion of resources and focus.

I think we can also conclude that while the court's decisional results have certainly become a part of the ingredients that have brought about the opposition to capital punishment and the decision to abandon it, I think it would be wrong to think the court in any actual or supplemental way had any mindset or agenda or sense that their opposition to capital punishment influenced their decisions or brought about its ultimate demise.[1]

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[1] Some felt that the New Jersey Supreme Court had played an obstructionist role in the implementation of the death penalty after it was restored in 1982. *See* Peter Kerr, *Courter and Florio Favor the Death Penalty, but Differ*, N.Y. TIMES, Sept. 28, 1989, at B1 (commenting that: "Many proponents of the death penalty argue that the court has tried to express a sentiment against execution by granting unnecessary

What we can see in terms of the extraordinary complication that capital punishment jurisprudence has generated is, what I think, is the unique constitutional framework in which capital punishment cases have been tried and have been decided. You see almost uniquely in this class of cases a fusion or accretion of three fundamental constitutional rights or constitutional interests. They are broadly: equal protection,[2] due process,[3] and what I would call the constitutional imperative of humane punishment;[4] or as it is stated in the Constitution, the avoidance of cruel and unusual punishment.[5] To those would be added the common-law principle which has constitutional dimension—namely, the principle of

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appeals and new trials" and quoting statement of U.S. Congressman Jim Courter that "the New Jersey Supreme Court [is] actively circumventing the death-penalty statute."); 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."); *Public Hearing Before New Jersey Death Penalty Study Commission* 39 (Sept. 13, 2006) [hereinafter *Commission Hearings*] ("The New Jersey Supreme Court will never, at least in my lifetime and any of yours, allow an execution to take place. That's the reality of it." (testimony of Richard Pompielo, founder of the Crime Victims Law Center)).

[2] U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also* State v. Marshall (II), 130 N.J. 109, 207, 214, 240 (1992); State v. Loftin (II), 157 N.J. 253, 298, 374 (1999) (citation omitted).

[3] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV; *see also Marshall II*, 130 N.J. at 214, 223; *Loftin II*, 157 N.J. at 374 (citation omitted).

[4] *See Marshall II*, 130 N.J. at 288 (Handler, J., dissenting) ("We have in our society a constitution that places a moral value on human life and a jurisprudence that accommodates decency as a component of justice. . . . Capital punishment understandably may be thought to be responsive to a public need for retribution and deterrence. That need, however, is not repudiated or denigrated if it must yield to, because it cannot be reconciled with, a much stronger need on the part of a civilized society for a criminal justice system that recognizes both a core morality that values life and a basic common decency that insists on fair and humane punishments.").

[5] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); N.J. CONST. art. I, ¶ 12 ("Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.").

fundamental fairness.[6] And there is no class of cases in which the court has felt more compelled to honor and deal with those constitutional principles with the intensity and the depth that has been occasioned by capital murder prosecutions. In terms of the jurisprudence, it accounts for the court's approach to capital punishment and it explains its decisional process and the extraordinary depth and length of capital punishment decisions.[7]

It has resulted in certain characteristics of a capital punishment prosecution and a capital punishment disposition. It has resulted, for example, in what some have described as "super due process."[8] It has resulted as well in a strong impulse to construe criminal statutes' penalties to extraordinary lengths in dealing with the notion, that we have heard before, that requires consistency and uniformity in the imposition of the death penalty,[9] coupled with the notion that—consistent with conventional sentencing jurisprudence—sentences have to be individualized.[10] So you have in these cases a recognition by the court that these constitutional requirements and considerations entail the most meticulous and searching kinds of analyses and applications. This approach is a small wonder.

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[6] *See* State v. Papasavvas (I), 163 N.J. 565, 584 (2000) ("This requirement of fairness—and particularly jury impartiality—is heightened in cases in which the defendant faces death."); State v. Biegenwald (II), 106 N.J. 13, 62 (1987) (holding that, as a matter of fundamental fairness, the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors); State v. Wakefield, 190 N.J. 397, 470 (2007) (quoting *Biegnewald II*, 106 N.J. at 62); *id.* at 552 n.7 (Albin, J., concurring) ("This Court also may insist that the death penalty comply with other constitutional provisions, such as the guarantees of due process and equal protection under Article I, Paragraph I of our State Constitution, and the fundamental fairness doctrine rooted in our common law.") (citation omitted).

[7] *E.g.*, *Wakefield*, 190 N.J. 397; *Marshall II*, 130 N.J. 109; State v. Ramseur, 106 N.J.1, 23 (1987).

[8] *See, e.g.*, EVAN J. MANDERY, CAPITAL PUNISHMENT: A BALANCED EXAMINATION 101, 104, 561, 570 (2005); ELIHU ROSENBLATT, CRIMINAL INJUSTICE 199, 200 (1996). Super due process refers to the additional rights afforded to defendants in a capital case, beyond those afforded to defendants in a non-capital proceeding, such as the possession of more appeal rights and the right to present unlimited mitigating evidence. *See* MANDERY, *supra*, at 101.

[9] *E.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); *Ramseur*, 106 N.J. at 331.

[10] *E.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Enmund v. Florida, 458 U.S. 782, 798 (1982); *Marshall II*, 130 N.J. at 152.

I think the court would have been less than vigilant if it had treated capital punishment cases any differently. In my view, what we have witnessed is that the Constitution basically has set an impossible standard. And so we were faced with the ironic dilemma of what happens when the court is enjoined to achieve a constitutional impossibility. It is most evident, in the demands of proportionality,[11] that New Jersey is one of the last, or was one of the last, and most vigilant states in terms of insisting that the promise of proportionality in some way, shape or form be fulfilled.[12]

In my own view, I think the inherent tensions that you see in

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[11] Proportionality review stemmed from the United States Supreme Court's decisions in *Furman v. Georgia*, 408 U.S. 238, (in which the Court, in a per curiam opinion, found that the death penalty as then administered by the states violated the Eighth and Fourteenth Amendments, engendering a de facto nationwide moratorium on executions) and *Gregg v. Georgia*, 428 U.S. 153 (upholding the constitutionality of Georgia's revised statute, which contained a proportionality review provision). *Gregg* was read as a "how to manual for constructing a constitutional capital punishment statute" by the states, which included proportionality review procedures mirroring those in *Gregg* in their revised statutes. Leigh B. Bienen, *The Proportionality Review of Capital Cases After* Gregg: *Only the Appearance of Justice*, 87 J. CRIM. L. & CRIMINOLOGY, 130, 140 (1996). New Jersey was no exception. As originally enacted, the Capital Punishment Act required the New Jersey Supreme Court to conduct proportionality review to determine whether the death sentence imposed on a defendant was "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555 (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)). After *Pully v. Harris*, 465 U.S. 37 (1984), in which the United States Supreme Court held that proportionality review was not required by the Federal Constitution, the Legislature amended the statute to provide for proportionality review only upon a defendant's request but continued to require that in such cases, the court engage in such review. Act of June 10, 1985, ch. 178, 1985 N.J. LAWS 536 (codified at N.J. STAT. ANN. § 2C:11-3e (West 2005)) (deleted by amendment, 2007). In addition, in *Marshall II*, the New Jersey Supreme Court held that proportionality review was also independently required under the State Constitution, in order to ensure equal protection and due process of law. 130 N.J. at 214-15.

[12] *See* David Weisburd, *Good for What Purpose?: Social Science, Race and Proportionality Review in New Jersey*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 258, 261 (Patricia Ewick et. al. eds., 1999) ("[T]he supreme court in New Jersey took a broader and more empirically based approach to proportionality review than most other state courts. In good part, what sets the New Jersey apart from others is its reliance on sophisticated social science methods in the proportionality review process." (citation omitted)); Bienen, *supra* note 11, at 134 (examining how state high courts in capital punishment jurisdictions have approached proportionality review and concluding that the "Supreme Court of New Jersey is the exception" to a general failure among these states to implement satisfactory review).

proportionality review really disclose its unattainablility. It is one thing to say that the death penalty must be meted out in some kind of consistent or uniform way, that is a tenet that has been recognized by the court in sentencing in general—consistency and uniformity. When you apply this requirement to the death penalty, the extreme penalty, it ratchets up the analysis. It ratchets up the demands in terms of trying to achieve some kind of consistency and uniformity. We have heard from other panelists how murderers, who would be by any reference regarded as heinous, wanton, depraved individuals in the commission of their crimes, and in some sense certainly deserving of the death penalty, but by another standard—proportionality—could be deemed to be arbitrarily and unfairly visited with the death penalty.[13]

The process, which purports to be rational and manageable, involving the weighing of aggravating and mitigating factors and then subjecting these results to some sort of proportionality review[14] has revealed, in case after case, not necessarily the fallacy of the approach, but simply its unattainability.

When a criminal justice system insists on individualizing sentences,[15] and this is distilled in the course of developing, for example, the mitigating factors,[16] and then the court is impelled to compare individuals, as well as the crimes that they commit; it is a small wonder that the court can say: we cannot account for or explain fully why some murderers are not visited with the death penalty and others are. In the most recent case involving this process, the *Wakefield* case,[17] the court went on for some 170 pages

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[13] *Panel I: The Struggle in the Courtroom,* 33 SETON HALL LEGIS. J. 69, 90 (2008) (remarks of David A. Ruhnke); *c.f. id.* at 79-81 (remarks of William A. Zarling).

[14] For an outline of the court's original proportionality review methodology, see *Marshall II,* 130 N.J. 109. For an outline of this methodology at the close of the court's death penalty jurisprudence, see State v. Wakefield, 190 N.J. 397 (2007).

[15] *See, e.g.,* Enmund v. Florida, 458 U.S. 782, 798 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *Marshall II,* 130 N.J. at 152.

[16] *See Lockett,* 438 U.S. at 604-05 (holding that individualized sentencing is essential in capital cases and that the sentencer may normally not be precluded from considering as a mitigating factor "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

[17] 190 N.J. 397 (2007). *Wakefield* was decided on May 7, 2007, subsequent to the Legislature imposing a moratorium on executions in 2006 and seven months before

describing why Wakefield's death penalty was proportionate.[18] The court sustained that death penalty and its proportionality four to two.[19]

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the repeal of the death penalty in New Jersey on Dec. 17, 2007. Act of Jan. 12, 2006, ch. 321, 2006 N.J. LAWS 2165 (imposing a moratorium on all executions in the state and creating a study commission to examine the flaws in New Jersey's current death penalty system); Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)) (repealing the death penalty in New Jersey). *Wakefield* involved the 2001 murder of Richard and Shirley Hazard in their home during a burglary. After entering the home, Wakefield first assaulted and killed Richard, who was in the residence by himself at the time. *Id.* at 420. When Shirley returned home, Wakefield then assaulted and killed her. *Id.* Wakefield then ransacked the home for money and jewelry, set fire to the bodies and other places in the home in order to disguise his crimes, stole the Hazard's car, and embarked upon a shopping and partying spree with the proceeds of the burglary. *Id.* He was arrested the following morning, confessed, and pled guilty to all counts of the indictment. *Id.* at 420, 422. During the penalty stage of the proceedings, the State alleged the presence of two aggravating factors: (1) the murders were committed while the defendant was engaged in the commission of, or the attempt to commit, or flight after committing or attempting to commit, robbery and/or burglary, as provided in N.J. STAT. ANN. § 2C:11-3c(4)(g) (West 2005) (current version at § 2C:11-3b(4)(g)(West Supp. 2008)); and (2) the murders were committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense, as provided in N.J. STAT. ANN. § 2C:11-3c(4)(f) (West 2005) (current version at § 2C:11-3b(4)(f) (West Supp. 2008)). *Wakefield*, 190 N.J. at 421. Wakefield presented seventeen mitigating factors to the jury. *Id.* at 423-24. The jury unanimously found beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, and Wakefield was sentenced to death. *Id.* Wakefield filed a direct appeal of his sentence to the supreme court. *Id.* at 423-25.

[18] *Id.* at 498-534 (addressing the proportionality issue). Numerous other issues were also raised by Wakefield on appeal, including the admission of certain "highly inflammatory" evidence by the State, alleged prosecutorial misconduct, improper jury instructions, the constitutionality of the escape-detection aggravating factor and of the death penalty generally, and the effect of race on the imposition of the death penalty. *Id.* at 426-98, 535-38.

[19] *Id.* at 538.

> Given Defendant's high degree of culpability . . . as well as the results of the frequency analysis, we hold that defendant has failed to establish that his death sentence is disproportionate. We do so recognizing that no other member of defendant's statistical cohort—Category E1—is presently on death row. However, our task in proportionality review is not to slavishly adhere to blind statistical analyses.

Id.

Justice Long and Justice Wallace dissented. Justice Long contended that no meaningful difference could be made between Wakefield's crime and those to whom his conduct was being compared—who had ultimately received life-sentences—and that Wakefield's sentence was therefore disproportionate. Justice Long further noted the decline in support for the death penalty in recent years and suggested that the time had come for the court to reevaluate the constitutionality of

The dissenting opinion pointed out the fallacy in that result.[20] According to Justice Long's dissent, Wakefield was the only person in the particular category of crime he committed who had gotten the death penalty.[21] Other individuals in that category committing heinous crimes had not.[22]

Well, Justice Poritz is going to talk to you in somewhat more detail and more expansive terms with respect to the court's jurisprudence involving proportionality,[23] but, to my way of thinking, I believe it really has been the Achilles' heel of the death penalty.[24] When one reads the court's opinions in capital cases, as I said earlier, one comes away with the understanding of a court that is conscientious and scrupulous in terms of attempting to understand and apply capital punishment strictures in a way that really fulfills the basic legislative purpose of having a death penalty statute. You cannot read those cases, I suggest, without sensing not only the court's struggle to achieve sensible results, but the court's inability to reach results that in the final analysis indicate that capital punishment in any sensible, fair, or principled way could be applied.[25] I think it would be wrong, as I said early on, I know there is some speculation to this effect—that the court was hostile to capital punishment; in a sense, may have had some kind of agenda seeking its demise. I do not think anything could be further from the truth. I think the seeds of its demise inhered in the statute itself.

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the death penalty statute in a meaningful way. *Id.* at 553-68 (Long, J., dissenting). Justice Wallace, in a separate dissenting opinion in which Justice Long joined, thought that Wakefield's death sentence should be vacated and the case remanded for imposition of a life sentence because the errors below deprived Wakefield of his right to a fair trial. *Id.* at 568-77 (Wallace, J., dissenting).

[20] *Id.* at 553-58 (Long, J., dissenting)

[21] *Id.* at 553.

[22] *Id.*

[23] *See* remarks of Hon. Deborah T. Poritz *infra.*

[24] *See, e.g., In re* Proportionality Review Project (I), 161 N.J. 71, 99-106 (1999) (Handler, J., concurring in part and dissenting in part); State v. Martini (II), 139 N.J. 3, 90-91 (1994) (Handler, J., dissenting).

[25] This was a position consistently taken by those on the court who felt the death penalty was unworkable. *See, e.g.,* State v. Wakefield, 190 N.J. 397, 553-55 (Long, J., dissenting); State v. Timmendequas, 168 N.J. 20, 78 (2001) (Long, J., dissenting); *Martini II,* 139 N.J. at 90-91; State v. Marshall (II), 130 N.J. 109, 249-50, 263-65 (1992) (Handler, J., dissenting).

CHIEF JUSTICE PORITZ:

When I was preparing to talk to you about proportionality review, I went back over some of the many cases the court decided, looking specifically at the proportionality review opinions and those sections of the larger opinions that dealt with this issue. It was the first time I really focused on this as getting an overview, a sense of where the court had started and what finally happened. I am going to differ a little bit with some of what has been said here.

What started out in New Jersey was, in some sense, an amazing experiment. There was an attempt to do something that I think had not been done successfully before; to use social science, the statistical methodologies, and models to gain a better understanding of whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. And it was a monumental undertaking. I think the court initially understood, as did its first Special Master who put this system together initially, Professor Baldus,[26] that this was a difficult undertaking, that there were statistical problems and methodology that had to be overcome. The court kept this in mind. You will see over and over in the opinions—not something as, I almost want to say trivial—as [that] this is a work in progress; but more, we are gaining understanding. We are learning more about how to make this system better and we are hoping that we will learn something from it. And that continued over time.

When I came to the court, I realized, I think for the first time—I had argued appellate arguments many times and understood, I thought—the difference between what an appellate judge does and what a trial court judge does. I was struck before,

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[26] Professor Baldus was appointed by the New Jersey Supreme Court as its first Special Master on July 29, 1988, to assist the court in developing a system for proportionality review. Order, New Jersey Supreme Court, July 29, 1988, *reprinted in* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, app. E at 371-72 (1988); *Marshall II*, 130 N.J. at 117. Professor Baldus issued his report to the court four years later, on September 24, 1991. DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT (1991) [hereinafter BALDUS REPORT I]. Professor Baldus's recommendations, which heavily concentrated on statistical analysis, were largely adopted by the court. *See Marshall II*, 130 N.J. 109 (in which the court set forth the methodology it would thereafter utilize in proportionality review).

listening to the trial court judges here, how very different it is. And I thought of it then, the appellate judge who looks at a cold record who tries to get a sense of the case; hence a lot of our rules, deferring to the trial court on credibility, etc. Imagine that though, in the context of proportionality review. Statistical models are extremely difficult to understand, which was a lesson I learned while acclimating to the social science methodologies [then] being applied. We hoped that the information would help us understand on a larger scale whether there was, for an example, a race effect.

I want to say, however, because I think this is important, that I believe that Justice Handler put his finger on the crux of the issue, as he so often does. Proportionality review, at the same time that it was an extraordinary experiment[27] in trying to understand the death penalty both from a societal and an individual perspective, was the key to understanding how difficult it was to make the death penalty work in any sensible way. And I will say to you that as a justice on the New Jersey Supreme Court over the course of the ten years I was there, I became very involved in the writing of proportionality review opinions, writing *Proportionality Review I*[28] and [*Proportionality Review*] *II*[29] and *Loftin*,[30] and I began to feel, as Justice Handler has indicated,[31] this system is, and I wrote it down before he spoke, impossible. We really can find no way to do this that will take the arbitrariness out of the system. That said, I do want to contradict Justice Handler in one respect and other speakers who came before me.

There was, as most of you know, systematic proportionality review and individual proportionality review.[32] Systematic

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[27] *See supra* note 12 and accompanying text.

[28] *In Re* Proportionality Review Project (I), 161 N.J. 71 (1999).

[29] *In Re* Proportionality Review Project (II), 165 N.J. 206 (2000).

[30] State v. Loftin (II), 157 N.J. 253 (1999).

[31] *See* remarks of Hon. Alan B. Handler *supra*.

[32] *See* N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 41-42 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf [hereinafter DEATH PENALTY REPORT]; *In re Proportionality I*, 161 N.J. at 78 (Systemic proportionality review focuses on "whether a defendant's race or the race of the victim possibly affected prosecutorial decisions to seek, and jury decisions to impose, the death penalty."); State v. Timmendequas, 168 N.J. 20, 34 (2001) ("[Individual] proportionality review focuses on whether a specific defendant's death sentence is inconsistent with the penalty imposed in comparable

proportionality review attempted to understand broad societal effects focusing on race.[33] Is there a race effect? Can we determine that through the statistical models? And we went through, as many of you know, evolutions of thought and got thoughtful advice from some of the foremost statisticians in the country. Professor Tukey at Princeton University, told us that our models were not sufficiently parsimonious.[34]

[Special Master] Baldus said to us at the beginning: "You cannot do this without all the variables. You need the statutory-aggravating factors. You need other factors that we know that juries take into account."[35] The tension between the need to have models that would be stable, that would tell us something that was statistically viable, and the inability to work all of what we knew about the system into those models—that is a long story in itself.

As you go through the opinions, you see the court struggling—with the assistance of special masters and statisticians—with the questions: "Can we continue to do this test?" "Can we revise this test so that we can get more information?" I took down some of the language that was used by one of our special masters because I thought it was so interesting. I am not going to go into what the index-of-outcomes test[36] is, but these words are Special Master [David] Baime's[37]: "The index of

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cases.").

33 DEATH PENALTY REPORT, *supra* note 32, at 42; *In re Proportionality I*, 161 N.J. at 78.

34 *See Loftin II*, 157 N.J. at 311; *see also* Weisburd, *supra* note 12, at 280-83.

35 BALDUS REPORT I, *supra* note 26.

36 The index of outcomes test was one of the three tests originally used by the court in engaging in the frequency-analysis component of proportionality review. *See* State v. Martini (II), 139 N.J. 3, 41 (1994) ("Through this approach we attempt to identify those characteristics that establish the degree of a defendant's blameworthiness. We consider both statutory and non-statutory factors, but, as in all areas of frequency analysis, the factors that we consider are only those that the jury found to be relevant to the imposition of the death penalty."). It was abandoned at the recommendation of Special Master David Baime in 1999. *In re* Proportionality Review Project (I), 161 N.J. 71, 91-96 (1999).

37 Judge Baime was appointed Special Master by the court in 1999 to evaluate the proportionality review methodology that the court had adopted in 1992 upon the recommendations of the first Special Master, David Baldus. *Loftin II*, 157 N.J. at 454-55. Judge Baime's report was to address four discrete areas of concern: "the size of the universe of comparison cases; particular issues in respect of individual proportionality review; questions relating to the statistical models used in both individual and systemic proportionality review; and the status of proportionality

outcomes test has created a prison without exit, diverting the court's attention and confining its inquiry to a set of arcane principals of doubtful utility."[38]

How did this come to pass? It came to pass because the court was seeking some means of understanding the arbitrariness of the death penalty in both an individual and a societal context. And I continue to believe that it was an extraordinary attempt to try to reach that understanding. I will say further that I think in the end, we did learn something. We were never able to, with the statistical models that were developed, determine that there was a race effect.[39]

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review as a separate proceeding in death penalty appeals." *In re* Proportionality Review Project (II), 165 N.J. 206, 208-09 (1999) (citation omitted).

Judge Baime's initial report was submitted to the court on April 28, 1999. DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: PROPORTIONALITY REVIEW PROJECT 10 (Apr. 28, 1999) [hereinafter BAIME REPORT I]; *In re Proportionality II*, 165 N.J. at 209. Among Judge Baime's initial recommendations was that in conducting proportionality review, the court should continue to compare the defendant's sentence to similar cases in which the defendant was death eligible (rather than only to those cases in which the death penalty had actually been imposed, as a 1992 legislative amendment to the Capital Punishment Act had provided), abandon the index-of-outcomes component of frequency analysis, and eventually consolidate direct death penalty appeals with proportionality review. *In re Proportionality I*, 161 N.J. at 82 (quoting BAIME REPORT I, *supra*, at 6-7). In *In re Proportionality I*, the court adopted BAIME REPORT I with modifications. *Id.* at 84-97.

During the second phase of the project, Judge Baime investigated the issue of bias in the administration of New Jersey's capital sentence laws. DAVID S. BLAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT (Dec. 1, 1999) [hereinafter BAIME REPORT II]. In *In re Proportionality II*, the court adopted BAIME REPORT II with modifications. 165 N.J. at 209. As Special Master, Judge Baime also submitted monitoring reports to the court each term. *See* DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000-2001 TERM (2001); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2001-2002 TERM (2002); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2002-2003 TERM (2003); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2003-2004 TERM (2004); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2004-2005 TERM (2005), *available at* http://www.judiciary.state.nj.us/pressrel/PR101306a.pdf [hereinafter BAIME SYSTEMIC REPORT 2005].

[38] BAIME REPORT I, *supra* note 37.

[39] *See* State v. Wakefield, 190 N.J. 397, 535-37 (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); BAIME SYSTEMIC REPORT 2005, *supra* note 37, at 1, 59 ("Our most recent conclusions mirror those articulated in prior reports. More specifically, we find no consistent significant statistical evidence of unlawful discrimination.").

A number of people who have spoken earlier have said that we all know that the death penalty is infected with racial prejudice.[40] I cannot answer that question. I can only say to you that from the models we had, we could not answer that question yay or nay. I will add something else, that in the end, after the models were revised and some models were thrown out and new techniques that had been developed in statistics—case-sorting techniques that were developed to look at disparities in sentencing, culpability issues, race effect and systemic proportionality review—when those new models were put to use, we started to see in case after case county variables of statistical significance.[41]

And so I believe that in New Jersey, ultimately, the experiment led us to something valid, to a valid understanding of a difficulty in the system that had to be dealt with. The death penalty was abolished and the court never dealt with that difficulty, but I know that when I left, that was on the court's plate and it was looming as an issue raised through the statistical models of proportionality review. It was an issue that the Special Master and the statisticians were, in each report on systemic proportionality review, bringing to the court's attention again and again.[42]

I could go on and speak in great detail about this. I do want to mention the non-statistical precedent-seeking proportionality review, the review of the court, as I have just said, the statistical methodologies that we use to look at systemic problems in the system and individual issues, blameworthiness, culpability, that side of the system.

The other side of the system was precedent-seeking review.[43] And, as most of you know, that was an individual exercise by the court for each defendant, using cases that have been categorized into cases appropriate for comparison purposes because they shared certain characteristics and so forth.[44] Then the court would

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[40] *Panel I*, *supra* note 13, at 84 (remarks of David A. Ruhnke).

[41] BAIME SYSTEMIC REPORT 2005, *supra* note 37, at 58-59.

[42] *See generally supra* note 37.

[43] DEATH PENALTY REPORT, *supra* note 32, at 47 (quoting *In re* Proportionality Review Project (I), 161 N.J. 71, 77 (1999)); *see also, e.g.*, State v. Papasavvas (II), 170 N.J. 462, 477 (2002).

[44] *See, e.g.*, *Wakefield*, 190 N.J. at 520-34; DEATH PENALTY REPORT, *supra* note 32, at

individually go through comparisons with other individuals who had been sentenced to death or not sentenced to death or moved on to a penalty phase trial.[45] And what I can say to you about that is that the exercise itself was, for me, again, another example of what we talked about in the context of the statistical review; that is, that after awhile, you were splitting so many fine hairs, you were finding so many different distinctions, that one wondered whether this exercise was really uncovering anything that was informative.

I will say further that the court said over and over again (and when I first came I wrote opinions that had lines like this in the opinion): "We, as judges, may not know a great deal about statistical proportionality review." "We have to be very careful." "We cannot rely on those results." "We have to watch the system mature." As to precedent-seeking review, we know how to compare things; that is what judges do. We can do this. And then, as we did it, and as I did it over the years, it seemed less able to produce the kind of information, real comparisons that the court, I think, was trying to develop.

CHIEF JUSTICE ZAZZALI:

Chief Justice, thank you. Now you know why Chief Justice Deborah Poritz was not only a great Chief Justice, but a provocative one. With that, Jim, do you want to tell us why and how you confused us over the years when you argued before the Court?

JAMES SMITH:

Well, first of all, I feel a little uncomfortable today because I am used to facing these Justices head on and not sitting side by side on this side of the table. In any event, when the Legislature first passed the death penalty statute in 1982,[46] there were a whole lot of people who thought that the New Jersey Supreme Court was

47 (quoting *In re Proportionality I*, 161 N.J. at 77).

[45] *See, e.g., Wakefield*, 190 N.J. at 520-34; *Papasavvas II*, 170 N.J. at 477-95.

[46] Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555, (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)).

going to hold the statute unconstitutional.[47] And most of those people were writing letters to the editor. The people in my office, the appellate section of the Public Defender's Office, I do not think any of us felt that way.

In our minds, really the issue was: were we going to have a death row with twelve people on it or were we going to have a death row with 150 people on it? I think all of us expected there would be some executions at some point in the future. None of us expected to go twenty-five years without an execution,[48] but we wanted to narrow the statute as much as possible.

In one of our first death penalty arguments, I remember telling the court that we already have as many people on death row in New Jersey as there are on death row in South Carolina. And, obviously, the issue was how much further we were going to go with this. In our office, I think we really concentrated on doing two things: first, narrowing the capital murder statute; and second, upgrading the procedures that were used in these cases. Now, in terms of the procedures—for example jury selection, in a non-capital murder case, jury selection might last half a day. We obviously wanted a lot more thorough jury selection in a capital case. If you asked people what their attitudes are and if they can follow the law as it relates to the death penalty, then everybody is going to say yes.

If you ask them what their attitudes are about the death penalty, how they feel about it, you are going to get every conceivable answer that you could think of. So it was very important to us that we have very thorough questioning. We wanted individual, sequestered questioning of a potential jury. And in that regard, I thought we were very successful. The court gave us that. We had individual questioning. We had very thorough questioning. I thought that that was, as one of the prior speakers said, one of the keys to the fact that we did not have a lot of people sentenced to death.[49]

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[47] *C.f.*, Joseph F. Sullivan, *Constitutionality of Death Penalty Argued Before Top Jersey Court*, N.Y. TIMES, Feb. 6, 1985, at B2.

[48] 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.

[49] *Panel I*, *supra* note 13, at 75 (remarks of Dale E. Jones).

In some of the other areas, we were not as successful. One of the things that we were concerned about was the under-representation of African-Americans on jury panels, especially in counties like Monmouth County, Atlantic County, and even here in Essex County.[50] We lost that argument both in the state court and also in the Third Circuit.[51] However, the statute was later changed to our benefit. I do not think it was changed because of anything that we did, but because the Legislature really saw a problem.

Another area that we lost that we tried hard to win was to maintain sequestration of juries during capital cases; that had been the tradition in New Jersey for many, many years. However, that was done away with by a number of trial judges. And we were not even able to convince the court to have sequestration during deliberations in capital trials. In terms of the second part, narrowing the statute, when the statute was first enacted, even juveniles could get the death penalty and one did, Marko Bey.[52] That was an issue that we fought very hard on, in fact, the Legislature eventually realized the error of its ways and changed the statute to require that for anybody to be eligible for the death penalty, they had to be over eighteen years[53] and then the court

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[50] *See* State v. Ramseur, 106 N.J. 123, 212-14 (1987); Ramseur v. Beyer, 983 F.2d 1215, 1229-30, 1236-37 (3d. Cir. 1992).

[51] *See Ramseur*, 106 N.J. at 214-47; *Ramseur*, 983 F.2d 1215 at 1230-39.

[52] Bey was tried in separate trials for the murders of two women, Cheryl Aston and Carol Peniston. In *State v. Bey (I)*, 112 N.J. 45 (1988), the court vacated Bey's conviction for the Aston murder and held that Bey was not death eligible because he was under the age of eighteen at the time of the murder. *Id.* at 55 n.2, 103. On remand, the jury found Bey guilty of purposeful murder and aggravated sexual assault and he was sentenced to life imprisonment. In *State v. Bey (II)*, 112 N.J. 123 (1988), decided the same day as *Bey I*, the court addressed Bey's conviction and sentencing for the murder of Peniston, which Bey had committed shortly after his eighteenth birthday. *Id.* at 130-35. While affirming the murder conviction, the court reversed Bey's death sentence due to an incorrect jury charge and remanded for resentencing. *Id.* at 184. The jury again returned a death sentence for the Peniston murder, which the court affirmed in *State v. Bey (III)*, 129 N.J. 557 (1992). In *State v. Bey (IV)*, the court reviewed the proportionality of that sentence, finding no disproportionality. 137 N.J. 334 (1994).

[53] As originally enacted, the statute was silent on the application of its death penalty provisions to juveniles tried and convicted as adults. Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555, (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)). In 1986, the Act was amended to provide that juveniles could only be sentenced to a term of imprisonment ranging from thirty years to life with thirty years of parole ineligibility. Act of Jan. 17, 1986, ch. 478, 1985 N.J. LAWS 1935

vacated Mr. Bey's death sentence.[54]

As it was originally enacted, capital murder in New Jersey was a "purposeful or knowing murder," a killing of a person or infliction of serious bodily injury which later resulted in death where the killing was done by one's own conduct.[55] We started out by taking basically an Eighth Amendment approach to the problem. We argued [that] under *Enmund v. Florida*[56] that the jury must determine whether there was an intent or attempt to kill under the Eighth Amendment. The supreme court, of course, went even further. Under the State Constitution, in *State v. Gerald*,[57] they said that the jury by its verdict had to find intent to kill and not merely intent to inflict serious bodily injury.[58] There was an area where I thought a lot of progress was made toward

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(original version at N.J. STAT. ANN. § 2C: 11-3g) (current version at N.J. STAT. ANN. § 2C:11-3 b5 (West Supp. 2008)).

[54] *See Bey* I, 112 N.J. 103; *see also supra* note 52.

[55] Capital Punishment Act, 1982 N.J. LAWS 555.

[56] 458 U.S. 782, 797 (1982) (holding that the Eighth and Fourteenth Amendments do not permit imposition of the death sentence on a defendant who "aids and abets a felony in the course of which a murder is committed by others, where the defendant himself does not kill, attempt to kill, or intend that a killing take place or lethal force employed").

[57] 113 N.J. 40 (1988), *superseded by constitutional amendment*, N.J. CONST. art. I, ¶ 12.

[58] *Gerald*, 113 N.J. at 92. In *Gerald*, the defendant and two other intruders had broken into the home of John and Paul Matusz, both of whom were disabled and lived with John's daughter, Lottie. Lottie and John were severely beaten by the intruders. John had a television thrown at his head and died from the blunt force of the impact. *Id.* at 48-49. Gerald was convicted of conspiracy to commit burglary, burglary, conspiracy to commit robbery, robbery, aggravated assault, felony murder, and purposeful or knowing murder. *Id.* at 61. The court reversed Gerald's sentence because it was unable to determine whether he was "convicted of purposefully or knowingly causing death or knowingly causing serious bodily injury resulting in death." *Id.* at 92. The court stated:

> It is thus apparent that the actor's intention to cause the victim's death was a significant factor in determining whether a murderer could be executed. When the defendant possessed only the intent to do serious bodily harm, however, he or she could be convicted only of second-degree murder and was subject only to a term of imprisonment.

Id. at 78.

This distinction was eliminated by a 1992 constitutional amendment, which provided: "It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of . . . knowingly causing serious bodily injury resulting in death." N.J. CONST. art. I, ¶ 12; DEATH PENALTY REPORT, *supra* note 32, at 7.

making the statute more rational.

Once again, we tried to narrow the scope of aggravating factors[59] as much as possible with mixed results. Take, for example, the outrageously and wantonly vile factor.[60] We argued the Eighth Amendment law under *Godfrey v. Georgia*,[61] and the court narrowed the definition of that factor. I mean, almost anybody that is guilty of killing is outrageously and wantonly vile.

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[59] If the jury reached a unanimous verdict beyond a reasonable doubt as to the defendant's guilt, the court conducted a second, separate, penalty proceeding to determine whether the defendant would be sentenced do death. During this proceeding, the jury weighed any existing statutory aggravating factors against any mitigating ones presented by the defendant. In order for the defendant to be sentenced to death, the jury was required to reach a unanimous verdict beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors. *See* N.J. STAT. ANN. § 2C:11-3c(4)-(5) (West 2005) (deleted by amendment, 2007); DEATH PENALTY REPORT, *supra* note 32, at 6.

[60] N.J. STAT. ANN. § 2C:11-3c(4)(c) (West 2005) (current version at N.J. STAT. ANN. § 2C:11-3b(4)(c) (West Supp. 2008))("The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim.").

[61] 446 U.S. 420 (1980). *Godfrey* involved the constitutionality as applied of a provision in Georgia's death penalty statute that permitted a defendant to be sentenced to death if it was found beyond a reasonable doubt that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 423 (The provision had been held to be constitutional on its face in *Gregg v. Georgia*, 428 U.S. 153 (1976). *Godfrey*, 446 U.S. at 422.). After repeated efforts at reconciliation with his estranged wife, who was living with her mother, Godfrey shot and killed both his wife and his mother-in-law. *Id.* at 424-25. Immediately afterwards, he turned himself into law enforcement and confessed. *Id.* at 425-26. He was convicted of two counts of murder and one count of aggravated assault, and was sentenced to death on the basis of the "outrageously or wantonly vile" factor. *Id.* at 426. On appeal to the Georgia Supreme Court, Godfrey argued that this aggravating factor was unconstitutionally vague, which the court rejected. *Id.* at 426-27. The United States Supreme Court granted Godfrey's petition for certification and reversed the state supreme court. Returning to the language of *Gregg*, the Court stressed:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion."

Id. at 428 (citing *Gregg*, 428 U.S. at 196 n.47). As the statutory provision at issue in *Godfrey* did not accomplish this, nor were instructions given to the jury such as to restrain the unbridled discretion which the provision allowed, the Court concluded that "there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not" and reversed Godfrey's death sentence. *Id.* at 433.

The court narrowed that factor basically to just include killings where there was an intent to inflict pain or torture in addition to killing the victim.[62]

On the other hand, we attacked the escape-apprehension factor or detection-aggravating factor[63] a number of times. We argued that it simply duplicated the felony aggravating factor because anybody that commits a robbery, a sexual assault, or a kidnapping, if they are in their right mind, is going to want to escape apprehension or detection. We were not able to do that.[64] In fact, there are continued duplicating charges. We were not able to get a narrow instruction of the escape-apprehension factor. Therefore, we had rather inconsistent results from this factor. For example, there was at least one case where the court found that [factor to exist] because the defendant had worn a mask during the killing and another case where the court found this factor to exist because the defendant was not wearing a mask and the victim had an opportunity to see his face.[65]

Now, why am I saying all this? I am not doing it as a sort of post-hoc critique of the court's decisions, although, quite frankly, I would love to sit down with the Justices myself and do that one at a time. The fact of the matter is, during this procedure, as we continued to win these cases and I think it turned out that the court vacated twenty-seven cases,[66] there was a lot of public

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[62] *See* State v. Moore, 122 N.J. 420, 475 (1991); State v. Erazo, 126 N.J. 112, 137-39 (1991).

[63] *See* N.J. STAT. ANN. § 2C:11-3c(4)(f) (West 2005) (current version at § 2C:11-3b(4)(f) (West Supp. 2008)) ("The murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another.").

[64] *See* State v. Harvey, 151 N.J. 117, 224-26 (1997); State v. Loftin (II), 146 N.J. 295, 376-78 (1996); State v. Harris, 141 N.J. 525, 560, 573 (1995); *Moore*, 122 N.J. at 468-74.

[65] *Compare Loftin II*, 146 N.J. at 376-78 (finding that the State did present sufficient evidence from which a jury could infer that defendant's intention to avoid apprehension for the robbery preceding the murder was a motivating factor for the latter, despite the fact that the defendant wore a mask during the robbery) *and Harvey*, 151 N.J. at 225-26 (same) *with Harris*, 141 N.J. at 560, 573 (finding that the State did present sufficient evidence from which a jury could find the avoid apprehension/detection factor where defendant had removed his mask prior to killing the victim).

[66] The court reversed twenty-seven death sentences before upholding the sentence of Robert Marshall on direct appeal in 1991. State v. Marshall (I), 123 N.J. 1 (1991); Bienen, *supra* note 11, at 209; Barry Latzer, *The Failure of Comparative*

opinion feeling that the court was going out of its way to somehow find some excuse so it could knock out each of these death sentences.[67] This was not the impression that I was getting or that of the people I worked with.

From my perspective, I think the court was working hard on very tough cases that had a whole bunch of issues and it wanted to be fair and to develop a system that was rational. I think, nevertheless, that if the death penalty had continued and we had to take these cases into the federal courts, we would have done fairly well. But only two cases got as far as the Third Circuit and we won one, the *Marshall* case,[68] so we ended up with a fifty percent batting average.[69]

I would like to say one final thing. Since I am sitting here with four retired Justices, during this time, especially the time of the initial death penalty statute, there was a question of whether my office or defense attorneys in general were somehow trying to sabotage the statute by sitting on these cases, not filing the briefs, and then filing what some people might view as ridiculously long briefs. I think we filed one brief that was 714 pages long that got bounced back on us. For the record, that, in fact, was not our purpose at all. I know that I spent a lot of time talking to people, encouraging them to get cases done and briefed well because we did not want a situation where the court might feel that it had to do something drastic and fortunately it never came to that.

Another question was whether we could somehow reenact the death penalty and have more efficient procedures and streamlining and so forth. My answer to that is: it is not going to work. As long as you have a state where the defendants are represented by good lawyers, those lawyers are going to use any means available to them. They were going to use any legal issue that could conceivably work and maybe a few that might not work at all, but they were going to give it their very best effort. I think that is what separates states like New Jersey from states where, at

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Proportionality Review of Capital Cases (With Lessons from New Jersey), 64 ALB. L. REV. 1161, 1197 (2001).

67 *See supra* note 1; *see also* DEATH PENALTY REPORT, *supra* note 32, at 82.

68 Marshall v. Cathel ("Marshall VII"), 428 F.3d 452 (3d Cir. 2005).

69 The other case that went before the Third Circuit was Ramseur v. Beyer, 983 F.2d 1215 (3d. Cir. 1992).

least in the past, such as Texas, the death penalty went right through. Now, Texas is starting to get some good lawyers doing their cases. Pennsylvania has some terrific lawyers. In states where the death penalty used to work because defendants did not get adequate representation, the whole process slowed down. Again, I do not think a death penalty ever worked in a state where people got adequate legal representation.

CHIEF JUSTICE ZAZZALI:

Jim, that was terrific and we thank you. As for our next speaker, all I can say is that, leaving the Court, as difficult as it is for me, has its compensation. For me, it has been great to get back together again with a former colleague, a wonderful Justice and a good friend, Peter Verniero.

JUSTICE VERNIERO:

As Jim [Chief Justice James Zazzali] said at the outset, I am going to speak a little bit about the role of the Attorney General's office in these cases and then close with a few personal observations. For those who are not residents of New Jersey, who are not intimately familiar with our Attorney General's office here, you might be interested to know that New Jersey is one of the few states in the country that does not elect its Attorney General.[70] Our Attorneys General are appointed by the Governor with the advice and consent of the Senate.[71]

Once appointed, they are instantly given tenure for a term of office that runs concurrent with the Governor's own term. [72] I say that because it is a basic fact that, as a result of that process, the Attorney General does not arrive in office having made any detailed platform or offered any detailed views on the death penalty, unless perhaps there is some discussion of it at a confirmation hearing, or on any other issue for that matter. And I think if you were to survey all the modern Attorneys General in New Jersey, three of whom are sitting before you, you would find that some AGs were probably personally opposed to the death

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[70] N.J. CONST. art. V, § 4.

[71] *Id.*

[72] *Id.*

penalty but felt it was their duty to enforce the penalty that was on the books within the then-prevailing constitutional standards.

You probably would find some Attorneys General who were personally in favor of the death penalty, but would not have applied it in any individual case if he or she felt that those constitutional standards had been breached. I think that pretty much reflects the role that the Attorney General has played over the past number of years.

The Attorney General has many roles, wears many hats, but as it relates to this issue, like any other prosecutor in the state, the Attorney General has a duty to see that justice is done even at the risk of losing a case. But at the same time, the Attorney General has a duty to enforce all constitutional laws. I think that has played out in reality, in the appellate process at least, where you would see the Attorney General's office on more than one occasion concede a point in an appellate argument; or, if a case was remanded, [it] would concede a point in terms of how the local prosecutor would handle the case, particularly, if the New Jersey Supreme Court had issued a ruling or made an interpretation. I saw that when I was Attorney General. And I would hazard to say that every Attorney General on the panel has seen that, all the while, of course, doing his or her job to enforce the law within constitutional boundaries. I think then Attorney General, now current Chief Justice Stuart Rabner was saying basically the same thing when he issued a brief statement when the Death Penalty Commission's report came out recommending repeal of the death penalty. Attorney General Rabner was on that commission. He did not vote one way or the other to repeal the death penalty because he felt that given his unique role in the system, he should not take a public position.[73] He did, however, offer his view that the death penalty had not been effective in this state.[74] I recall him saying that beyond the role of the Office of the Attorney General, our collective experience in prosecuting capital cases over the course of nearly a quarter century leads us to conclude that New Jersey's death penalty has not achieved its objectives. And that is basically where I came out in this debate.

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[73] Robert Schwaneberg, *Panel Calls for a Ban on New Jersey Executions: Corzine, Top Legislators Back Life Without Parole,* THE STAR-LEDGER (Newark, N.J.), Jan. 3, 2007, at 1.

[74] *Id.*

When the commission had issued its report, I had publicly said that I supported its recommendation.[75] I would not object to repeal of the death penalty. As a member of the court, I voted in favor of death sentences in certain cases[76] and I wrote opinions really sweating over the details, so to speak. They are difficult cases. They are always complicated. My prior colleagues have offered some of the more intricate details of that system and I will not repeat them here. While I was impressed with the professionalism in the bar, I was not at all averse to repealing the death penalty based on my view and the view of others that it had become ineffective. [77]

The last point, and I will just echo what my former colleagues have said, I did not experience, at least in my tenure, any grand design by the New Jersey Supreme Court to inflict or impose a particular agenda on the system. The members of the court were working very hard within constitutional parameters to do what they thought was right. The court upheld the death penalty many times.[78] When it came to actual, individual cases, it employed an exacting standard,[79] which I think you would expect in a decent society.

I had reached the conclusion, as a matter of public policy, that the system had grown ineffective and therefore I did not object to its repeal.[80]

In terms of my work on the court and observing appellant arguments, I can say without hesitation, each side was always prepared. There was a level of professionalism that was very heartening to see as a member of the bar of this state. I congratulate and commend both the prosecutors who argued such cases and the many fine defense counsel who did the same.

One of the earlier panelists, I think it was the prosecutor, said that these cases are very stressful on the prosecutors and on

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75 Peter G. Verniero, Op-Ed., *Appealed to Death*, N.Y. TIMES, Jan. 14, 2007, at 14NJ.

76 *See* State v. Chew, 179 N.J. 186, 220-24 (2005) (Verniero, J., concurring in part and dissenting in part); State v. Papasavvas (II), 170 N.J. 462, 515-35 (2002) (Coleman, J., dissenting); State v. DiFrisco, 174 N.J. 195, 202-246 (2002).

77 *See* Verniero, *supra* note 75.

78 *E.g.*, State v. Wakefield, 190 N.J. 397 (2007); State v. Biegenwald (II), 106 N.J. 13 (1987); State v. Ramseur, 106 N.J. 123 (1987).

79 *See* State v. DiFrisco, 187 N.J. 156 (2006); *Papasavvas II*, 170 N.J. 462.

80 *See* Verniero, *supra* note 75.

defense counsel.[81] I can assure you they are also very stressful on judges. I can only speak from the perspective of an appellate judge, but I can remember many long hours in chambers writing death penalty opinions, whether they were to reverse a sentence or to affirm one, and what I would have done had the death penalty not been abolished.

There were many inmates, at least, two that I can recall, that came very close to having the sentence carried out; but at the end of the day, none of us can predict with any sort of certainty what the court would have done, other than [that] it would have done what it believed was the right course within its role in the system.

CHIEF JUSTICE ZAZZALI:

Thank you, Justice. Now, finally, my new colleague in private practice, Larry Lustberg, will give us another perspective from the defense.

LAWRENCE LUSTBERG:

I am not one of the three former attorneys general who are sitting here on this panel. I am very comfortable here today because so many of the people here are people I have spent a lot of time with over the years whether as adversaries or in the courtroom. In fact, I have probably spent more time with them, than I have with my parents; but to rectify that situation my parents have come today, which I think is very cool.

You know, I have become pretty close with Chief Justice Zazzali and he makes me go last before lunch. The reasoning, I think, is to try to get you used to hearing from somebody who is bearded and bald before you get to the Governor. I want to talk a little bit about the type of advocacy that we all did before the New Jersey Supreme Court.

And there are a lot of people here who know more about it than I do and I will talk more about them later. That type of advocacy, in my view, portended the end of the death penalty. It predicted it. It was not because the court was complicit in it. It was not because we knew for sure that the end was in sight, but because the types of arguments that we made made the end of the

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[81] *Panel I, supra* note 13, at 78 (remarks of William A. Zarling).

death penalty, in my opinion, inevitable. I think the only person who had any real confidence in that was Celeste [Fitzgerald] and that allowed her to do the work that she and all the other great people here did.

But the truth of the matter was that we were all making arguments that had to be made, arguments that in their essence and in their very logic meant that the death penalty was, to use Justice Handler's words, impossible. There are three reasons for that. And I will spell those out and I will be done so you all can have lunch. The first is that there is a fundamental illogic in the way we administered the death penalty in this country. There is a fundamental inconsistency in the values that we have that make it so that we will never, as a society, be truly comfortable with the death penalty. We insist upon consistency. We insist upon a system that is not arbitrary; that is why we have had the searching, meaningful review that Chief Justice Poritz described, one that really means that people who commit similar crimes will be treated similar, one that really means that we are not going to tolerate a system that is fundamentally racist or that has disparities on a county-by-county basis. We just are not going to allow that to happen.

At the same time, we also insist upon a death penalty system that is consistent with cases like *Lockett v. Ohio*,[82] which has been adopted in New Jersey, that require us to consider each individual as an individual.[83] That we consider the full circumstances of who they are and of their offense.[84] The result is that you have a system that at once has to consider the myriad, idiosyncratic individual facts of any one case and at the same time is somehow supposed to be consistent and not arbitrary. It is impossible. It cannot be done. It never will be done. It never has been done. And so the death penalty will always be fundamentally flawed and fundamentally unappealing to us.

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[82] Lockett v. Ohio, 438 U.S. 586, 604-05 (1987) (holding that individualized sentencing is essential in capital cases and that the sentencer may normally not be precluded from considering as a mitigating factor "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

[83] *See, e.g.*, State v. Moore, 122 N.J. 420, 479 (1991); State v. Ramseur, 106 N.J. 123 at 204-05 (1987) (citing *Lockett*, 428 U.S. 604).

[84] *Lockett*, 428 U.S. at 604-05.

These arguments were not the specific arguments that we made before the court, but they were the types of arguments that were underlying everything that we were saying. And they are the types of arguments that at the end of the day, I think, resulted in the end of the death penalty.

Second, you have heard a lot about how careful our system was with respect to the death penalty and that is true. This is a system where we had always two defense attorneys in the cases,[85] where every appeal, unlike other criminal cases, went directly to the New Jersey Supreme Court,[86] where the court was painstaking in its consideration of the cases, not only of reviewing very long briefs. And I wrote—I did not write the 714-page one but I think Judy Borman[87] might have, she is here—long ones that the clerks of the courts thought were really bad and would yell at me about, but they would read them. And the court would take its time in reviewing every single claim. These were cases that were reviewed very carefully. And why was that? It was a care that was borne of making sure that we were not going to execute an innocent person, of making sure that only the most egregious murderers were sentenced to the death penalty.

Trial courts—and there are many excellent trial judges here—took special care in the way juries were instructed and in the way they considered these cases. Judge Lester[88] is here and she presided over a post conviction relief case that I did for months and months with Jean Barrett. And by the way, David may say that he would not necessarily recommend practicing with his wife, but I would recommend practicing with his wife because she is a wonderful death penalty attorney. We always argued that death is different; that argument that came through in case after case after case was about making sure, was about being extra specially

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[85] MARY E. FORSBERG, N.J. POLICY PERSPECTIVE, MONEY FOR NOTHING: THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 9 (2005), *available at* http://www.njpp.org/rpt_moneyfornothing.html.

[86] Capital Punishment Act, ch. 111, 1982 N.J. LAWS 555(codified at N.J. STAT. ANN. § 2C:11-3e (West 2005)) (deleted by amendment, 2007).

[87] Ms. Borman is an assistant public defender. Joseph F. Sullivan, *New Jersey Defenders Battle Death Law*, N.Y. TIMES, Feb. 26, 1991, at B1.

[88] Judge Lester is a Superior Court judge, Criminal Division, Essex County. New Jersey Judiciary, Essex County Directory of Judges, *available at* http://www.judiciary.state.nj.us/essex/judges.pdf (last visited Jan. 25,2008).

careful.

The result of that were two things that made the death penalty fundamentally unappealing and that foretold its demise. First of all, it meant that these cases took a long time. I mean, we have talked about the twenty-five years and that was not, as Jim says, because people were delaying. It was not because of stalling tactics. It was because we insisted that great care be taken. As a result of that, in fact, one of the roles of any punishment and capital punishment, in particular, was deterrence. The longer you get away from the crime, the less the deterrence is and the less effective the death penalty is in accomplishing its goals. This is a fundamental illogic in the death penalty. This came through in the arguments that we made on appeal and particularly that death is a different line of arguments.

Finally, all of this comes together in one factor and one factor alone; that, to me, is advocacy. There are different types of lawyers and different types of people who are doing this work. As has been said over and over today, the quality of advocacy here in New Jersey is extraordinary. And I know that because I do death penalty cases in other jurisdictions where attorneys get paid $1,200, for example, in Alabama to do a death penalty case, where lawyers sleep through the trials because they just do not care because actually they are more interested in the real estate closing that they have later in the day.[89] That is not our system of justice here.

Our system of justice here is one that is guided by extraordinarily committed lawyers, who care an amazing amount about these cases and work on them day and night. And many of them are in this room, I am not going to name them all, although I see a bunch of good friends and they are people who achieve good results at trial and spectacular results on appeal and post-conviction relief, too. These are people who I must say are the people that I think we should be, and I think we are, to a certain extent, celebrating here today. They are people who I know have taught me a great deal. I mentioned Judy and my current

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[89] *See* Adam Liptak, *In Alabama, Execution Without Representation*, N.Y. TIMES, Mar. 26, 2007, at A5; AMERICAN CIVIL LIBERTIES UNION, BROKEN JUSTICE: THE DEATH PENALTY IN ALABAMA 4-6 (2005), *available at* http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf.

colleague, Claudia Van Wyk,[90] and there are a lot of other people from the appellate section who really created a framework for wonderful appellate practice. There are others. I do not want to miss anybody, but I am not going to name everybody. These death penalty lawyers day in and day out toil in the trenches and win these cases through sheer effort, extraordinary brilliance, and great tactical decisions.

There are judges who do their job and consider these cases carefully and do not give them the back of their hand. The result is a system that has achieved results that you would expect, given the illogic of the death penalty. Those results were that death verdicts were not returned and that death sentences were reversed. All of that, I agree with prior panelists, made the repeal of the death penalty possible and indeed necessary. And I am so happy to have been part of that effort and so honored that you would agree to hear from me and all of us here today.

CHIEF JUSTICE ZAZZALI:

We have time maybe for a couple of questions. Any questions?

PROFESSOR CONK:

Here is my question to anyone who wants to answer it: What about Texas? If you felt that it was necessary that we have a consistent and coherent implementation of the death penalty within the twenty-one counties of New Jersey, how can we tolerate Texas?[91]

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[90] Ms. Van Wyk is a former New Jersey Public Defender and current Federal Community Defender in Philadelphia.

[91] Since 1976, Texas has carried out more executions than any other state. As of December 2008, 426 inmates had been executed. In comparison, Virginia, which ranks second in number of executions, has carried out 102 executions. Death Penalty Information Center, Executions in the United States, 1608 to 1976 and 1976 to Present, http://deathpenaltyinfo.org/executions-united-states-1608-1976-state (last visited Jan. 26, 2009). Moreover, many feel that the Texas capital system itself is constitutionally inadequate. *See* Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N.Y. TIMES, Dec. 5, 2004, at 1 ("No one runs for the Court of Criminal Appeals on a platform of vindicating constitutional rights."); Adam Liptak, *At 60% of Total, Texas is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1 ("The courts in Texas have generally not been very solicitous of constitutional claims."); *see also* STEPHEN P. GARVEY, BEYOND REPAIR? AMERICA'S DEATH

LAWRENCE LUSTBERG:

We do not tolerate Texas. The U.S. Supreme Court does, though.[92]

PROFESSOR CONK:

Do you know why?

LAWRENCE LUSTBERG:

You got me. You know, the history of the Texas death penalty is one in which the Supreme Court has repeatedly reviewed the Texas death penalty scheme [and] has struck it down in numerous particulars over the years;[93] nonetheless, it continues in some form or another. If you ask me, my view is that it is completely and totally unconstitutional, but I am not on the Supreme Court so I do not get to say that. Eventually they will come to their senses, but I think if we look back on who their governors have been recently, it is not necessarily surprising that things are done the way they are done.

PENALTY 112 (2003); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Judges is Indispensable to Protecting Constitutional Rights,* 78 TEXAS L. REV. 1806 (2000); Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases,* 34 AM. CRIM. L. REV. 207 (2007).

92 *See* Jerek v. Texas, 428 U.S. 262 (1976) (holding that Texas capital sentencing procedures did not violate the Eighth or Fourteenth Amendments); *c.f.* Baze v. Rees, 2008 U.S. LEXIS 3476 (April 16, 2008) (holding that lethal injection does not violate the Eighth Amendment prohibition on cruel and unusual punishment). *But see* Liptak & Blumenthal, *supra* note 91 ("To legal experts, the Supreme Court's decision to hear [Texas death row inmate Thomas Miller-El]'s case yet again is a sign of its growing impatience with two of the courts that handle penalty cases from Texas, [Texas's highest criminal court, and the Court of Appeals for the Fifth Circuit].").

93 *See* Adams v. Texas 448 U.S. 38 (1980) (finding unconstitutional a Texas requirement that jurors swear an oath averring that knowledge that imposition of the death sentence upon the accused if found guilty was mandatory would not interfere with their fact finding as to the accused's guilt or innocence at trial); Penry v. Lynaugh ("Penry I"), 492 U.S. 302 (1989) (rejecting Texas capital sentencing process because it included no mitigation instruction); Penry v. Johnson ("Penry II"), 532 U.S. 782, 797-98 (2001) (finding Texas capital jury charge adopted in response to *Penry I* unconstitutional); Liptak & Blumenthal, *supra* note 91.

CHIEF JUSTICE ZAZZALI:

One thing about Texas, to put it in context very quickly because we just did this program on appointed judges versus elected judges. It is a matter of record. A confidential poll was done of all Texas judges in an elected system, fourty-eight percent of those judges acknowledged confidentially and anonymously that the contributions from either the litigants before them or the attorneys representing the litigants affected their judgment in making decisions;[94] that is pretty horrible so be proud of what you have here in New Jersey.

JANE HENDERSON:

I am Jane Henderson. I am with Maryland Citizens Against State Execution.[95] I am from the State of Maryland, where we actually have a much better than average public defender system. One of the things we often hear from legislators is that we are very close. We are very close. We are a vote away from the repeal in our state.[96] Well, we are not Texas and, because they are next door, we are not Virginia.[97] So I think it allows people to sleep at night. [There is a] difficulty in arguing for repeal in the context where there is this perception, and in many ways earned, that we have a good Public Defender system.

We are also the state where the *Wiggins* case came down[98]—

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94 *See* Bruce Davidson, *Show Me the Money: Candidates Tap Lawyers Who Work in Bexar's County Courts Over and Over Again for Contributions*, SAN ANTONIO EXPRESS NEWS, Mar. 11, 2001, at 1G (citing 1998 survey conducted for Texas Supreme Court, the State Bar of Texas, and the Texas Office of Court Administration, in which sixty-nine percent of court personnel and seventy-nine percent of lawyers surveyed stated they believed campaign contributions influenced judicial decisions and forty-eight percent of judges said contributions did influence decisions).

95 Maryland Citizens Against State Execution, About MD Case, http://www.mdcase.org/node/10 (last visited Jan. 25, 2009).

96 *See* Dana E. Sullivan, *All the Stars Lined Up for Appeal*, N.J. LAW., Apr. 21 2008, at 8; John Wagner, *Repeal of Md. Death Penalty Still Seems Out of Reach: Activists Encouraged by New Jersey but Key Senate Panel Remains in the Way*, WASH. POST, Dec. 26, 2007, at B1.

97 Texas and Virginia have the highest execution rates in the nation, ranking first and second respectively. Death Penalty Information Center, *supra* note 89.

98 Wiggins v. Smith, 539 U.S. 110 (2003) (holding that defense counsel's failure to investigate and present mitigating evidence of the sexual abuse the defendant had suffered as a child violated the defendant's Sixth Amendment right to effective assistance of counsel).

one of the first cases of impact to come before the Court in years. And I wonder if you could talk about the ineffectiveness of counsel that can happen even in states where there are good public defenders. I appreciate that I am putting you all on the spot, but I think those arguments sometimes go back and forth. How can a *Wiggins* case come out of a state like Maryland that has a good statewide Public Defender?

JAMES SMITH:

Well, I think that each of us, as lawyers, are only as good as their last case. You sometimes find very good lawyers and you read the transcripts of what they have done and you say, what was he or she thinking? I just do not think that one bad result in one particular case is evidence of anything in particular to tell you the truth.

LAWRENCE LUSTBERG:

Here is the truth. We have all learned here in New Jersey. There are attorneys in this room who tried cases one way at the beginning of the death penalty and would do it very differently later on down the road. Some of them have been very good witnesses in my ineffectiveness of counsel cases. And they are good witnesses because they are telling the truth. We make mistakes. I try cases as well as do appeals. I have never finished a case where I thought I had done it perfectly, whether I won it or lost. David, I am sure, feels the same way. It is important to acknowledge it when you do something wrong. In death penalty cases, there should be very little room for error. So I think that is in part the answer to your question. Very good lawyers can make mistakes under the extraordinary time pressure, the extraordinary emotional pressure, and the amount that you have to know in these death penalty cases.

JUSTICE HANDLER:

I think, also, it has a lot to do with the standard that the court is going to recognize and apply in respect to a claim that counsel may have been ineffective. It is a very difficult and problematic

issue for courts to deal with. We have, for example, our *Marshall* case,[99] in which Marshall was convicted of a murder for having killed his wife to obtain insurance proceeds.[100] Within an hour or so, he was subjected to a penalty trial. Marshall, incidentally, had to go to the hospital after the jury brought home the guilty verdict.

Within an hour or so after the penalty phase began, a jury sentenced him to death. Throughout the appeal and post-conviction proceedings, Marshall continued to raise the claim that he had been victimized by ineffective assistance of counsel in the penalty phase.[101] Our original case carried with it two dissents. One justice concluded that the penalty phase basically was a farce.[102] The other justice said that Marshall had ineffective assistance of counsel.[103] Marshall's claim was not vindicated until it went into a federal court on habeas corpus and the Third Circuit finally reversed Marshall's death penalty.[104]

Our own court, for example, when it was first confronted with the ineffective assistance claim, was constrained to determine what standard should apply in a capital case. There was one point of view saying that because a capital case is extraordinary and death is different, the Constitution would require extraordinary counsel.[105] The court opted to define counsel as counsel equal to

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99 State v. Marshall (I), 123 N.J. 1 (1991) (affirming sentence of death on direct appeal); State v. Marshall (II), 130 N.J. 109 (1992) (denying Marshall's claim that his death sentence was not proportional to his crime of conviction); State v. Marshall (III), 148 N.J. 89 (1997) (affirming denial of Marshall's petition for post-conviction relief); Marshall v. Hendricks ("Marshall IV"), 103 F.Supp. 2d 749 (D.N.J. 2000) (denying Marshall's application for writ of habeas corpus on all grounds), Marshall v. Hendricks ("Marshall V"), 307 F.3d 36 (3d. Cir. 2002) (affirming district court's denial of habeas relief as to the guilt phase of Marshall's trial and remanding for further evidentiary development as to ineffectiveness of counsel in the penalty phase); Marshall v. Hendricks ("Marshall VI"), 313 F. Supp. 2d 423 (D.N.J. 2004) (granting Marshall's petition for relief based on ineffectiveness of counsel in the penalty phase); Marshall v. Cathel ("Marshall VII"), 428 F.3d 452 (3d Cir. 2005) (affirming granting of Marshall's habeas petition and holding that counsel's failure to prepare for penalty phase constituted ineffective assistance of counsel), *cert. denied*, 547 U.S. 1035 (2006).

100 *Marshall I*, 123 N.J. at 61.

101 *See supra* note 97.

102 *See Marshall I*, 123 N.J. at 214-16 (Handler, J., dissenting).

103 *See Marshall I*, 123 N.J. at 211-12 (O'Hern, J., dissenting in part).

104 *See supra* note 99.

105 *See Marshall I*, 123 N.J. at 262 (Handler, J., dissenting); State v. Davis, 116 N.J.

the task.[106] There may not have been any fundamental difference between the two, but I think in terms of the jurisdiction in which people are struggling to assure that that aspect of the constitutional entitlement is vindicated, I am not certain that you can achieve anything, except on a case-by-case basis and critically fight to present the court with reasons why, in a given case, counsel could have made the difference and counsel was ineffective and maybe at some point that will take hold.

341, 400-13(1989) (Handler, J., dissenting in part and concurring in part).

[106] *See Marshall I,* 123 N.J. at 164 (majority opinion); *Davis,* 116 N.J. at 351-57 (majority opinion).


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