

PANEL III—LEGISLATIVE MORATORIUM AND THE NEW JERSEY DEATH PENALTY STUDY COMMISSION

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ASSOCIATE DEAN LILLQUIST:

As you all know, Celeste is the program director for New Jerseyans for Alternatives to the Death Penalty¹—a position she has had since 2004. She was chairperson of NJADP before that and has been involved in this issue for a long time. So without any further ado, Celeste.

CELESTE FITZGERALD:

What I would like to do is talk about the evolution of our grassroots campaign in New Jersey, how our messages changed over time, and how these interjected with political and legislative developments. NJADP started in 1999. It was started by Lorry Post who had lost a daughter to murder.² Our organization's

¹ New Jerseyans for Alternatives to the Death Penalty, <http://www.njadp.org/> (last visited Jan. 25, 2008). NJADP was founded in 1999 with the objective of “winning public and political support for the elimination of execution as a form of punishment in New Jersey.” NJADP believes that “the death penalty is by its nature unjust in application and immoral in principle.” *Id.*

² Lorry Post founded NJADP in 1999 in honor of his daughter Lisa, who was murdered in Georgia in 1988. Mr. Post has served as director of NJADP and is a retired Legal Aid attorney. Mr. Post also coordinates the New Jersey chapter of Murder Victims Families for Reconciliation. New Jersey for Alternatives to the Death Penalty, Who's Who at NJADP, <http://www.njadp.org/gdexecom&what=staff> (last visited Feb. 7, 2009).

name at that time was New Jerseyans for a Death Penalty Moratorium. We were a church basement group and there were five of us in the beginning. Our mission was to win a suspension of executions and ultimately abolish the death penalty through grassroots organizing. Our organizational philosophy was very simple; we knew we needed to create the critical mass necessary to thrust the issue onto the legislative agenda. The Legislature was not wholly interested in addressing this issue. We had to help them along and we knew we had to create enough power to bring about change. So we chose to organize a round table because it allowed death penalty supporters to join our conversation. We wanted as many people involved in this as possible. We knew that we had to change death penalty supporters' minds and we brought them into the conversation. We never denied we were opposed to the death penalty; that was very important because later we changed our name. We always talked of ourselves as a group that was opposed to the death penalty, but we wanted a statewide dialogue to include as many people as possible. Nationally, there was a lot going on—in 2000 Governor Ryan declared a moratorium in Illinois, and it really impacted what we were doing.³ People started asking us about innocence, whether New Jersey would be at risk of executing an innocent person.

In 1999, Pope John Paul II came to the United States and called for abolition of the death penalty,⁴ a big moment for a state

³ Press Release, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>; *see also* Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIBUNE, Jan. 31, 2000, at 1. The New Jersey Death Penalty Study Commission considered the Illinois moratorium, among other events, as suggesting a trend towards consensus against the death penalty. N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 40 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf [hereinafter DEATH PENALTY REPORT].

⁴ The Pope's trip to North America began in Mexico City on Jan. 20 and concluded in St. Louis, Missouri, on Jan. 27, where he called on Catholics to advocate an end to the death penalty. *See* Vatican: The Holy See, John Paul II: Travels, http://www.vatican.va/holy_father/john_paul_ii/travels/sub_index/trav_mexico-st-louis-1999.htm (last visited Feb. 7, 2009); Alessandra Stanley, *Pope, in St. Louis Mass, Urges U.S. Catholics to Oppose Death Penalty*, N.Y. TIMES, Jan. 28, 1999, at A16.

The Pope preached:

The new evangelization calls for followers of Christ who are

like New Jersey in which such a large percentage of our citizenry is Catholic.⁵ There had been no executions since 1963.⁶ We had a low death-sentencing rate and very high reversal rate⁷ thanks to the good work of the lawyers I acknowledged earlier, but there was not much of a statewide public dialogue going on in the early years. From 1999 to 2003, we averaged about fifty to a hundred attendees in the church basement, but there were also community centers, coffee shops—wherever anybody would talk about the death penalty. We emphasized the death penalty's flaws. Our events featured ex-honorees and murder victims' family members. Our membership very quickly expanded, which gave us an indication that this really was an issue whose time had come, particularly here in New Jersey. So our membership soared to thousands. I described our membership earlier; they quickly became the go-to group in the media and that was important. We developed a key message point that gave death penalty supporters room to move. We knew we had to get a message out there that would allow them to come to where we were on our position, and that message was pretty simple: we could not have known in 1982 what we know now about the death penalty; we could not have known the actual risk of executing an innocent person; we could not have known about the reversal rates; and we could not have

unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitively denying criminals the chance to reform (cf. *Evangelium Vitae*, 27). I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary.

Pope John Paul II, Homily at Trans World Dome, St. Louis, Missouri (Jan. 27, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_27011999_stlouis_en.html.

⁵ Approximately forty-one percent of New Jersey residents are Catholic. The New Jersey Provincial, <http://njprovincial.org/> (last visited Feb. 7, 2009).

⁶ 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.

⁷ See DEATH PENALTY REPORT, *supra* note 3, at 7 ("Since the enactment of the death penalty statute in 1982, there have been 228 capital murder trials. Juries have returned death sentences in 60 cases. The Court has overturned 57 of those death sentences.").

known about the impact of the longer process on the victims' families members. So with the focus on innocence and victims' families, we created that message, which happened to have the benefit of being the absolute truth in 2002.

In addition, I want to talk about one key moment that has not come up yet. In 2002, Kip Bateman, now Senator Kip Bateman, joined on as the first Republican sponsor of the moratorium bill.⁸ Back then, that took a tremendous amount of courage and the whole world changed when he did that—the bill became serious, people started talking about it. By this time we had several thousand members and more than a hundred groups supporting us. In 2003, the polls shifted on the question of death penalty versus life without parole. They literally reversed. So in 1999 more people preferred the death penalty when given a choice.⁹ But by 2003, more people were supporting life without parole—and the question was by the same pollster using the same question—so it was a reversal.¹⁰ Interestingly, sixty-six percent of New Jerseyans in that poll said that they supported a moratorium, including the majority of death penalty supporters.¹¹

In December 2003, the study bill passed and Governor McGreevy vetoed it.¹² While the public was there by that point, the

⁸ Assem. 1913, 210th Leg., 1st Sess. (N.J. 2002) (vetoed Jan. 12, 2004).

⁹ Press Release, *The Star-Ledger/Eagleton-Rutgers Poll, Jump-Start the Chair: New Jersey Favors Capital Punishment* (Oct. 10, 1999), available at <http://slerp.rutgers.edu/retrieve.php?id=123-4> (When asked whether they thought that the punishment for murder should be the death penalty or life-imprisonment without the possibility of parole, forty-four percent of those polled favored the death penalty, while thirty-seven percent favored life without parole.).

¹⁰ EAGLETON INSTITUTE OF POLITICS, CENTER FOR PUBLIC INTEREST POLLING, RUTGERS UNIVERSITY, *NEW JERSEYANS' OPINIONS ON A DEATH PENALTY MORATORIUM* (2002), available at <http://www.njadp.org/forms/pollsummary.doc> (Thirty-six percent of those polled preferred the death penalty, while forty-eight percent preferred life imprisonment without the possibility of parole.).

¹¹ *Id.* (Sixty-six percent of those polled indicated that they supported a one-year moratorium on executions in order to study whether the death penalty was being administered accurately, economically, and fairly, while only twenty-five percent opposed such a measure.).

¹² See Assem. 1913; Gov. James E. McGreevy, *Absolute Veto of A1913*, available at http://www.njleg.state.nj.us/2002/Bills/A2000/1913_V1.PDF. In his veto, Governor McGreevy stated that he was vetoing the bill because he believed that a state-sponsored commission would be unlikely to yield significant new information since the statute had continuously been studied in painstaking detail by the courts, scholars, attorneys, and interest groups since its enactment in 1982. He also stressed

Legislature was a little bit behind the people at that time. This was an unbelievably important moment. It put the issue on the map and we made a key strategic decision that will probably forever be one of our smartest decisions: We did not focus on McGreevy and his veto; we thanked the legislators who voted yes. We allowed them to continue to move in the right direction. It was front page of almost every paper in the state. At this point, the moratorium was mainstream.¹³ We changed our name at that time. We actually changed it in part because we knew we had to talk about the alternative to the death penalty—life without parole. We knew that there was a lot of confusion between life sentences and life without parole sentences and we had to clear up that confusion. In 2005, with the litigation campaign in full swing, we decided to call off our legal injection litigation¹⁴ knowing frankly that we were probably going to get a moratorium out of the Legislature. We used grass roots lobbying by sending thousands of letters and calls to legislators. Our membership at this point was 10,000 strong. The message now emphasized the consequences of the failed policy, including that it hurt the victims' families and drained law enforcement resources that could be spent in better ways.

In 2006 when the Study Commission began, NJADP monitored the hearings, arranged for witnesses, and hundreds of people turned out for those hearings.¹⁵ Blue Jersey [online news

that the constitutionality of the statute had repeatedly been upheld by the supreme court, and that the New Jersey statute and the court's review methodology provided capital defendants with safeguards neither mandated by the Federal Constitution nor afforded by many other states. Finally, Governor McGreevy opined that "a temporary study commission, regardless of how erudite and diligent its members, is not likely to advance the perennial, intrinsic issues continually debated in regard to the death penalty. These questions simply do not lend themselves to being conclusively determined through an empirical study." *Id.*

¹³ See *supra* notes 10-11.

¹⁴ See *In re* Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23, 367 N.J. Super. 61, 65-66 (App. Div. 2004); see also *infra* notes 16-29 and accompanying remarks of Kevin D. Walsh.

¹⁵ Approximately seventy-five individuals testified before the Commission during the five public hearings held on July 19, September 13, September 27, October 11, and October 27, 2006, and working session of August 16, 2006. These witnesses ranged from family members of murder victims to attorneys to religious leaders. See DEATH PENALTY REPORT, *supra* note 3, at 12, 126-127. The transcripts of these hearings can be accessed online at <http://www.njleg.state.nj.us/legislative/pub/pubhearings2006.asp>.

outlet] said that it had never seen the State House so packed. We presented research and testimony. The victims' family member testimony was incredibly powerful. I will just end by saying that our message was that we asked the Study Commission to replace the death penalty with life without parole. We also asked them to think about what they had heard from victims' family members—both those who were opposed to death penalty and those who were in favor of the death penalty—and to consider the harm that the death penalty caused. We asked them to replace the false promise of healing through execution with concrete assistance for these families by recommending that some of the savings from eliminating death penalty be used for services to help homicide survivors.

ASSOCIATE DEAN LILLQUIST:

Thank you very much Celeste. Our next speaker is Kevin Walsh, who is or was the chair of the legal committee for NJADP and the associate director of the Fair Share Housing Center. He was intimately involved in the litigation effort leading up to the moratorium.

KEVIN WALSH:

Hello and thank you for having me today. I am a housing lawyer and it is somewhat strange to be up here speaking about the death penalty but it was actually the intersection of my primary area of law, which is administrative law. Oftentimes housing and administrative law intersects with criminal law and interestingly with politics. It was a job I enjoyed tremendously and I am going to talk a little bit about how they intersect.

Now did you ever notice some of the Verizon commercials where there is one person standing there and, all of a sudden, the whole Verizon network is behind the guy? That is how I felt like as a lawyer, when I would go into court representing an organization with 10,000 members. It was normally only one or two other people there, with a few exceptions, but it was a great experience as a lawyer to really be in there representing so many people who were opposed to the death penalty. One of the things that was great about it was that it served as a way for cases to generate a forum in which the grassroots folks could show up and

have their voices heard. The primary work that I did was to challenge the New Jersey Department of Corrections' lethal injection regulations.¹⁶ I went to the NJADP Executive Committee with this crazy idea of bringing such a lawsuit against the Department of Corrections, and they retained another lawyer who could look over my shoulder to make sure that I knew what I was doing—they were right to do that, because it was a somewhat crazy idea at the time and I had only been a lawyer for a couple of years. We argued that the exact method of how we execute people is something we should be informed of in order to determine whether the punishment is cruel and unusual.¹⁷ If we did not know what was going on how could we possibly enforce it? As a result, we filed a lengthy brief in addition to side litigation under the Open Public Records Act that itself went up to the New Jersey Supreme Court on the fees issues and on the issue of how much we succeeded.¹⁸ There were a few reported discussions just on that alone and when Judge Pressler issued her decision in February 2004, it was a great victory.¹⁹ About eighty-five percent of the issues we raised were rejected—we raised a lot of issues. But the two or three issues that won the case for us were sufficient and as somebody mentioned earlier,²⁰ the Department of Corrections

¹⁶ See *In re Readoption*, 367 N.J. Super. 61. 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 note, NJADP challenged the elimination of a NJDOC 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, new regulations were never 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, *New Jersey’s Road to Abolition*, 29 JUST. SYS. J. 408, 411 (2008).

¹⁷ *In re Readoption*, 367 N.J. Super. at 65-66.

¹⁸ *New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep’t of Corr.*, 185 N.J. 137 (2005).

¹⁹ *In re Readoption*, 367 N.J. Super. 61. NJADP hoped that the temporary ruling would provide time to change public opinion against capital punishment. Robert Schwaneberg, *Appeals Court Stays State Executions-‘Arbitrary’ Procedures on Secrecy and Medical Reversal Cited*, THE STAR-LEDGER (Newark, N.J.), Feb. 21, 2004, at 1.

²⁰ See *Panel I: The Struggle in the Courtroom*, 33 SETON HALL LEGIS. J. 69, 76 & n.30 (2008) (remarks of Dale Jones).

never previously tried to get out from underneath the moratorium and if it had, I believe it would have been pretty difficult to do so.

As to the February 2004 decision, there were two principal issues. The first was that the Department of Corrections did not understand its own medical processes on how to execute someone.²¹ And unlike criminal law, here when you go into court to challenge a method of execution, the burden is on you.²² The great thing here is that although the state agency gets an awful lot of deference, it must earn that deference.²³ So it only gets it once it has shown that it knows what it is doing, but it could not do that here because it did not have a doctor.²⁴ There were no reports that detailed how the drugs work.²⁵ The Department of Corrections did not have any of that, so on the drug issue, the appellate division said that it did not have a basic understanding of how this science works.²⁶ The second issue they ruled on was that the inmate who was about to be executed could not have his or her free speech rights restrained without a good reason to do so.²⁷ There is a general effort to make it seem like a very clinical, sanitized process—this not just unique to New Jersey, but throughout the country. The Department of Corrections said they needed for the inmate's media contact to end seventy-two

²¹ *In re Readoption*, 367 N.J. Super. at 68-69.

It appears . . . DOC was relying on its assumption that once the lethal injection has been administered, its effects are irreversible. . . . Our concern is that DOC itself does not have medical expertise, and nothing on the record suggests medical consultation and opinion on the reversibility issue or, indeed, whether there are any appropriate lethal drugs whose effects might be reversible.

Id.

²² *Id.* at 66 (“Our consideration is guided by the general proposition that rules and regulations adopted by an administrative agency are presumed reasonable and required to be sustained if neither arbitrary nor unreasonable to the end that the agency’s statutory grant be liberally construed to effectuate the legislative purpose.”).

²³ *Id.* at 66 (“Accordingly, judicial review is limited to these three inquiries: (1) whether the administrative action violates express or implied legislative policies, (2) whether there is substantial evidence in the record to support the agency’s actions, and (3) whether the agency clearly erred in reaching a conclusion unsupported by relevant factors.”)(citations omitted).

²⁴ *See supra* note 21.

²⁵ *Id.*

²⁶ *In re Readoption*, 367 N.J. Super. at 69.

²⁷ *Id.* at 69-71.

hours before the execution, and we argued that that was too long. The other thing was that an inmate could not even contact the media prior to his execution on the phone.²⁸ It was a total blackout. Also, the second thing [the court said] was that the public should have some ability to see it, although not necessarily by televising an execution. But [the court said it was not going to simply accept a claim by the Department of Correction that a form of public access violated security concerns] and required the Department of Corrections to even address within whatever security parameters they felt were appropriate how open the execution could be.²⁹

The Department of Corrections tried to enact new regulations in September 2004 but these regulations were very narrow, so we saw this as an opportunity to turn this into a forum in which the public could have its say on the death penalty. About two to three hundred people showed up at a small conference room in Trenton and the NJADP put up witness after witness.³⁰ One woman, Felicia Floyd, testified that how you see the execution is very important because she saw it from a personal standpoint since her father was executed for murdering her mother. Every witness had a compelling story to tell, and we also directly addressed the issues on how the drugs would be used. We turned the hearing into a place where we presented evidence, but it was also a grassroots forum where people could show up and argue in force against the death penalty. So the whole thing was reframed as whether we should have a death penalty. I am proud

²⁸ See *id.* at 69-71 (citing N.J.A.C. 10A:23-2.2(b)(3)(iv) (forbidding “contact of any kind . . . between the person sentenced to death and any member of the news media.”) and N.J.A.C. 10A:23-2.5 (imposing blanket prohibition on the filming of an execution, regardless of whether the film is ever displayed)).

²⁹ *C.f. id.* at 71.

We therefore conclude that before DOC can deprive the inmate of his right to be heard, and before it can deprive the press of the right to report in detail on the execution process, and before it can deprive the public of the right to know how the process is actually carried out and what its implications are, it must show with some degree of specificity how its legitimate concerns for institutional safety and security and penological objectives are advanced by the restrictions of the regulations.

Id.

³⁰ See New Jerseyans for Alternatives to the Death Penalty, Death Penalty Foes Assail New Jersey Department of Corrections, <http://www.njadp.org/forms/DOCfur.html> (last visited Feb. 26, 2009).

to say that the regulations were never adopted and the moratorium that was in place in February 2004 in some sense was still in effect.³¹ If the Legislature ten years from now decided to put the death penalty back in place, it would still have to address these somewhat thorny issues. It would still have to find a doctor in New Jersey who was willing to endorse the regulations. It would still have to address the issue of whether we as a society are entitled to see how our state executes people. Also, a couple other states have followed suit by using their Administrative Procedure Acts to either challenge the regulations or to require that the regulations be adopted.³²

I will just add on a personal note, as much as I have enjoyed working with NJADP and as much as it is great to be that Verizon guy with the people behind you, for all the lawyers and students here, I must say that one of the great things was that I was a young lawyer who was trusted by a great group of people to help them and to work with them, and whenever they would refer to it as “Kevin’s lawsuit,” I would say, “No, it is not Kevin’s lawsuit, it is our lawsuit.” What was great about it is that I started out as a volunteer and it was a great place to cut my teeth and learn politics, learn how some case law works, but really to learn how to become a lawyer working with a grassroots group. I know that there are probably a dozen people in Trenton right now that could benefit from any lawyers who have time to give. So with that, I say thank you and thank you again for having me.

ASSOCIATE DEAN LILLQUIST:

Turning now to the Death Penalty Study Commission, our next panelist is the man who surely needs no introduction, the former Associate Justice James Coleman, who was on the New

³¹ See Henry, *supra* note 16 (“[At the time of the December 2007 repeal of the death penalty in the state] a de facto moratorium was already in effect, as New Jersey had no lawful execution method.”).

³² See *generally* National Coalition to Abolish the Death Penalty, Problems Associated with Lethal Injection, <http://www.ncadp.org/index.cfm?content=46> (last visited Feb. 26, 2009) (discussing constitutional concerns surrounding the use of lethal injection and stating that challenges have resulted in executions effectively being halted in Arkansas, California, Delaware, Florida, Maryland, Missouri, and North Carolina, with legislation pending in other states to change or study the lethal injection procedure).

Jersey Supreme Court from 1994 to 2003 and before that was in the trial court and appellate division for sixteen years and now is Of Counsel to Porzio, Bromberg and Newman.

JUSTICE COLEMAN:

When Kevin called me asking if I would be willing to serve on the Commission, the first question I had for him was: "Why choose me?" I reminded him that the most impressive question on the horizon in 1994 when Governor Whitman nominated me was, "What are my feelings about the death penalty?" and I studiously and judiciously avoided giving a direct answer.³³ Kevin was aware of that and suggested that my so-called neutrality may very well be one of the reasons why he wanted me to serve on the Commission. Recognizing that the make-up of the Commission represented a very broad cross-section of New Jersey, I would be remiss not to acknowledge that some members on the Commission, or at least some of their organizational backgrounds, may have revered the New Jersey Supreme Court while others may have reviled it because of the successions of reversal;³⁴ I think twenty-eight out of twenty-nine of the first cases heard by the court. So having looked at the make-up of the Commission on the first day we were to organize, I did a little homework and decided to ask the question, "What would my attitude be if someone were to suggest that I chair the Commission?" and my immediate response to myself was to decline. Why? Because I suspected that one or more persons on the Commission felt as though the New Jersey Supreme Court is primarily responsible for the lack of any executions. Now, I have never been involved in politics, but Politics 101 suggested that it would be better for the Commission if someone else chaired it and I did just that. I removed my name.

When we had our first meeting interestingly, no one knew this at the time, five of the thirteen members had a very close relative murdered in New Jersey or in another state and those

³³ See *Text of News Conference on Coleman's Nomination*, N.J.L.J., Oct. 10, 1994, at 40; Michael Booth, *Coleman: Courts Must Sometimes Demand Action*, N.J.L.J., Oct. 24, 1994, at 1.

³⁴ See generally DEATH PENALTY REPORT, *supra* note 3, at 113-16 (providing background information on the members of the Commission).

close relatives included a father, a daughter, two siblings, and one niece or nephew. So you would think that there would likely be a strong voice in opposition to abolishing the death penalty, but there was not. The other thing that I noticed very early on in our arrangement of witnesses to appear was that it was important to use the old [Justice] Brandeis concept of a socialized brief that he had wrote about in the 1930s and that is to use the social sciences to help shape the rule of law. The make-up of the Commission consisted of lawyers, ordinary citizens, victims' rights groups, as well as theologians, social scientists and so forth. This mixture and cross-section of persons presented diverse testimony and helped make the work of the Commission much easier, and I have a feeling that that type of evidence helped to make the work of the Legislature easier in trying to persuade others to join in the vote.

We took an initial vote just to see how much work we really had to do and, much to my surprise, we were almost unanimous in the vote to abolish the death penalty. But there were some strings attached to some of the votes, such as if we were to substitute life without parole for the death penalty, what would that mean? What is truly meant by life without parole? So we brought in the experts from the State Board of Control of Institutions and Agencies to give testimony and the testimony was that it would mean just what it says, that in some context, if a judge imposed a twenty-five year term with twelve-and-a-half years of parole ineligibility, that person would serve twelve-and-a-half years before first becoming eligible for parole and in that context some members were concerned. But after hearing from the Board of Control, I think that those of us from the legal judicial side could be more persuasive with those who had some reservations in convincing them that there can be such a thing as life without one day of parole eligibility.³⁵ Indeed, that was also provided for in at least two instances in New Jersey,³⁶ so we used

³⁵ *Public Hearings Before New Jersey Death Penalty Study Commission* 55-77 (Oct. 25, 2006), available at <http://www.njleg.state.nj.us/legislativepub/pubhearings2006.asp> [hereinafter *Commission Hearings*] (testimony of Jim Barbo, Director of Operations, N.J. Dep't of Corrections; testimony of Gary J. Hilton, former Superintendent of Trenton State Prison and Former Assistant Commissioner of the N.J. Dep't of Corrections).

³⁶ See Act of Sept. 11, 1996, ch. 115, 1996 N.J. LAWS 812 (codified at N.J. STAT.

that as the paradigm to help guide those who had some concern.

Now, as we were involved in this process of hearing live oral testimony, as well as reviewing numerous documents including large textbooks that have been marked into evidence, we were always mindful to tread lightly on the feelings of members of the Commission who may not yet be of the mind to vote to abolish. There were times when many people did not know how I felt and wanted to know and I deliberately withheld expressing myself at times because I wanted those persons to vote with their own consciences while at the same time doing everything in my power to help raise their moral consciousness to the point that they would almost feel compelled to cast that deciding vote to abolish the death penalty.

That is the context, I think, that caused some legislators in the final analysis before the final vote was cast to call some of us and ask us to explain what certain things meant, because they were concerned about their constituency. And I say that in the context of reminding you, if you ever do move to another state, do not to ignore the political angle—while the New Jersey Judiciary is very independent, as expressed in so many instances, including all of those early reversals, not every state in the union has such independent judiciaries. So you will have many people who will be very reluctant, both on the judicial side and on the political side as well. We heard the argument, for example, that: “Why should we abolish the death penalty in New Jersey when no one on death row has ever been found to be innocent?” Barry Scheck testified before us and made it very clear—as some of us knew—that the advent of DNA testing had been perfected well after some of the people who were then on death row and while it is true that after reviewing all of those cases, for the most part, there was no doubt that the person in prison had perpetrated the crime, that looking forward, New Jersey would be no different than some

ANN. § 2C:11-3b(2) (West 2005 & Supp. 2008)) (requiring defendants convicted of the murder of a law-enforcement officer who do not receive the death penalty to be sentenced to life imprisonment without the possibility of parole); Act of Apr. 3, 1997, ch. 60, 1997 N.J. LAWS 243 (codified at N.J. STAT. ANN. § 2C:11-3b(3) (West 2005 & Supp. 2008)) (requiring defendants convicted of capital murder to be sentenced to life imprisonment without parole if not sentenced to death if the victim was less than fourteen years old and the homicide was committed during the commission of a sexual offense).

of the other states.³⁷

Let me share with you what a prosecutor from Texas stated to us.³⁸ He said he had prosecuted individuals and sought and obtained the death penalty and now years after those prosecutions, he had this lingering feeling that he may have contributed to the execution of an innocent person.³⁹ So at the end of his testimony, I felt compelled to just test him to see where his morality stood. My question was: "Tell me, how do you feel believing that you may have contributed to the execution of an innocent person?"⁴⁰ He paused and almost cried, but his response was one that I guess you might expect—a protective device—which was: "I was only doing my job."⁴¹ I did not follow-up with the next question, which would have been: "That is what the Duke prosecutor in North Carolina said too." That is also what the prosecutor in Union County said when the individual tried for a capital crime for the murder of his girlfriend's children by driving spikes into their brains, who the jury spared the death sentence, but was given life, years later was exonerated.⁴² There was another

³⁷ *Commission Hearings, supra* note 35, at 17-24 (July 19, 2006) (testimony of Barry C. Scheck, Esq., founder of the Innocence Project in New York City).

³⁸ *Commission Hearings, supra* note 35, at 15-27 (Oct. 25, 2006) (testimony of Sam Millsap, Jr., Esq.).

³⁹ Mr. Millsap was referring to Ruben Cantu, who was arrested for a neighborhood felony murder and convicted of first-degree murder. He was seventeen at the time of the murder and was executed in August 1993. Mr. Millsap was involved in the prosecution. In 2005, Cantu's co-defendant, David Gaza, signed a sworn affidavit stating that he allowed Cantu to be falsely accused and that Cantu was not with him the night of the shootings. Juan Moreno, the only victim to survive and the sole witness in the case, also recanted, telling the *Houston Chronicle* that he was sure that Cantu was not the person who had shot him but had felt pressured by police to identify Cantu as the killer and had been fearful of authorities because he was an illegal immigrant. *See id.* at 15-27; Lise Olsen, *The Cantu Case: Death and Doubt—Did Texas Execute an Innocent Man?*, HOUS. CHRON., Nov. 21, 2005, at A1; Lise Olsen, *The Cantu Case: Death and Doubt—Executed Man's Co-Defendant Says Years of Guilt Have Led Him to Try to Clear His Friend's Name*, HOUS. CHRON., Nov. 21, 2005, at A1.

⁴⁰ *Commission Hearings, supra* note 35, at 21 (Oct. 25, 2006) (testimony of Sam Millsap, Jr., Esq.).

⁴¹ *C.f. id.* at 21-22.

⁴² *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 immediately considered a prime suspect, along with Clifton Hall, and was interrogated for thirty hours during a forty-hour period. The Innocence

defendant by the name of Peterson from South Jersey who was tried capitally, but the jury spared his life and gave him a life sentence and DNA evidence ultimately led the prosecutor to decide not to prosecute another time because of that.⁴³

In conclusion, I want to applaud all of you who have worked

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.*

⁴³ See *State v. Peterson*, 364 N.J. Super. 387 (App. Div. 2003); The Innocence Project: Know the Cases: Larry Peterson, <http://www.innocenceproject.org/Content/148.php> (last visited Feb. 22, 2009). In 1989, Peterson was found guilty of felony murder and aggravated sexual assault and was sentenced to life imprisonment. *Peterson*, 364 N.J. at 390. The appellate division affirmed Peterson’s conviction and sentence, and the supreme court denied his petition for certification. *Id.* In 1994, Peterson filed for post-conviction relief seeking, among other things, an order for DNA testing of evidence the State had introduced at trial. *Id.* at 390-91. The superior court denied the petition, and the appellate division affirmed. In 2001, Peterson brought an action in the federal district court to compel this testing. *Id.* at 391. In 2002, with the enactment of § 2A:84A-32a, Peterson again filed a motion in the superior court to obtain such testing; however, his request was denied on the basis that he did not make the requisite statutory showings that: (i) identity was a “significant issue” at trial; and (ii) if the DNA test results were “favorable” to the defendant, there would be “reasonable probability” that a motion for a new trial would be granted. *Id.* at 391. Peterson appealed. *Id.* The appellate division reversed the superior court and remanded for entry of an order for DNA testing. *Id.* at 399. The results of the DNA testing showed that Peterson was not the perpetrator, and the witnesses who had testified against him recanted their testimony. Peterson’s conviction was vacated in July 2005. While initially indicating that it would retry Peterson, the State eventually decided to dismiss all charges. Peterson was released from prison in May 2006. The Innocence Project, *supra*; see also Editorial, *Every Last Chance*, N.J.L.J., July 3, 2006, at 22; Editorial, *Confession*, N.J.L.J., July 24, 2006, at 22.

so hard for so long to help bring about what was one of the most just results of any matter I have ever worked on in my lifetime. I was a judge for thirty-nine years, but I have derived no greater pleasure than is derived from having been part of the Death Penalty Study Commission and I applaud the Legislature, the Governor and all of you who have contributed so much.

ASSOCIATE DEAN LILLQUIST:

Finally, our last speaker on this panel is Miles Winter. Miles is a member of the New Jersey Death Penalty Study Commission. He is the chair of the Real Property Probate and Trust Law Section of the New Jersey State Bar Association and was the State Bar Association's designee on the Death Penalty Study Commission. He is also an adjunct faculty member at Raritan Valley Community College.

MILES WINDER:

Thank you, Erik. I want to recognize Kip Bateman—without Kip I do not think we would have gone very far with this process. Certainly, I agree with Celeste on that point. As you might expect, from another person who was there, my perspective is slightly different than Justice Coleman's. I walked into the organizational meeting and felt that he would be the best person to lead the Commission. He withdrew his name almost immediately and I recognize now that that was certainly the right thing to do. I felt early on that there were a lot of people on the Death Penalty Study Commission who were neutral and that came to the Commission without any preordained agenda of any kind. In fact, I recognized that there were several who were pro-death penalty or, at least by what they did for a living, led me to believe that they should be pro-death penalty.

The most surprising thing to me during my tenure on the Commission was the fact that we were virtually unanimous—everybody was convinced by the testimony, by the letters, by all the good work that you did, [Associate Dean] Lillquist, by Judge John Gibbons' testimony, that to repeal the death penalty was the right thing to do. I believe in my heart that it was the right thing to do. There were two poignant pieces of information for me. The first, a letter that I received from Reverend Carl Pickett from

Montgomery, Texas.⁴⁴ He had been the minister to death row inmates in Texas and his letter made it seem he was leading sheep to their ultimate death, trying to keep the inmates calm and focused when they knew they had a very short period of time left. The other part of his letter that really struck me was just how many people that had been involved as guards or otherwise involved in the death process in Texas who had very serious health problems. This whole generation of people who were assisting putting people to death in Texas was seriously ill in one form or another.

The other person whose testimony was extremely poignant for me was the live testimony referred to be Justice Coleman—that of Sam Millsap, who was the former prosecutor from Bexar County, Texas.⁴⁵ I have never shared the fact that that was poignant for me until Justice Coleman said it to me today, but Justice Coleman's questioning of the prosecutor⁴⁶ was probably one of the key turning points in my view that the death penalty needed to be repealed and replaced with life in prison without possibility of parole.

I do not have much more to add other than there are two people here whom without them none of this would have been done and they are the staff of the Commission—Gabrielle Neville and Miriam Bavati. They kept us on time, they essentially would do virtually anything we asked them to do, even if it required superhuman efforts, and they managed to make sure that we heard everybody that wanted to be heard in a relatively timely fashion. [Serving on the Commission and recommending the repeal of the death penalty] was perhaps the greatest thing I will ever do in my life, but I have to say one last thing: It was the right thing to do.

ASSOCIATE DEAN LILLQUIST:

Before I open it up to questions, I am going to take the moderator's privilege here and ask perhaps a slightly different question. One way of viewing the recommendations of the Death

⁴⁴ See DEATH PENALTY REPORT, *supra* note 3, at 103 (citing July 2006 letter of Rev. Carroll L. Pickett as a source studied by the Commission).

⁴⁵ See *supra* notes 38-41 and accompanying remarks of Hon. James H. Coleman.

⁴⁶ See *id.*

Penalty Study Commission is that they really did not go far enough. I have heard everyone here time and time again say: "Well, it is being replaced by life without possibility for parole and in a sense life without possibility of parole is just a very slow death in prison, with no shot of redemption or release at any time."⁴⁷ Do any of you feel—and I know I am putting you on the spot in asking a question that all politicians would avoid answering—but did any of you give any thought to a proposal that would go beyond reducing the penalty of life without parole to life with parole?

JUSTICE COLEMAN:

Indeed, the Report reflects that one of the members of the Commission wrote separately expressing the view that life without parole eligibility served in a maximum security was too harsh.⁴⁸ For those who may not have read the report, the current Public Defender took that position⁴⁹ and my response was that we needed to address what the Legislature had asked us to do and there is already in existence a well-established sentence review commission. I will not give the person's name now, but I consulted with someone whom I think everyone in this audience knows and trusts and my question to him was: "If you were on the Commission, what would you do?" And he gave a very succinct answer: "Abolish the death penalty today and fight the other battles tomorrow."

ASSOCIATE DEAN LILLQUIST:

Let us open it up to the floor for questions.

RONALD TABAK:

My question is for Celeste. Since, as you say, an important part of the advocacy was that some of the money that would be saved would be used for victims' survivors, and since Governor

⁴⁷ See generally Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1.

⁴⁸ DEATH PENALTY REPORT, *supra* note 3, at 81-92 ("Statement of the Public Defender [Yvonne Smith Segars] on the Issue of Mandatory Life Without Parole").

⁴⁹ *Id.*

Corzine has urged us at lunch to carry this elsewhere, I can assure you that the credibility everywhere else in the country of these efforts will depend on whether you actually do spend some of the money you save on victims' survivors. So where does that stand?

CELESTE FITZGERALD:

Leave it to Ron Tabak to ask a great question. Well, first of all, we are hoping to soon introduce legislation that would provide greater funding to the nonprofit groups that do the tremendously hard work of counseling survivors in the aftermath of murder. So NJADP has not gone away and will continue to try to make into a reality the second recommendation of the Study Commission.⁵⁰ I am glad you raised it because I do want to encourage everyone here who is interested—in both what we can do for murder victims' families in the wake of murder and also what we can do to help other states take this tremendous step that we took—to see Abe Bonowitz. Abe is now the Director of Affiliate Support for the National Coalition to Abolish the Death Penalty.⁵¹ I always like to say I stole Abe from the national movement but now they stole him back and I am left alone here at NJADP, but Abe will let you know how you can help the national movement. For those of you who know the Governor, for those of you who may have an ear of a legislator, we really do need to move forward with that second recommendation and we hope to have legislation introduced soon to make that happen.

ABE BONOWITZ:

Abe Bonowitz with National Coalition to Abolish the Death Penalty, previously the field manager for NJADP. Ron asked part of the question I had in mind, which to back up for everybody, the Commission was charged with answering seven questions and it

⁵⁰ The Commission's second recommendation was that "any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide. DEATH PENALTY REPORT, *supra* note 3, at 67.

⁵¹ The National Coalition to Abolish the Death Penalty ("NCADP") was founded in 1976 in response to *Gregg v. Georgia*. It has a network of over 100 state and national affiliates, which the NCADP assists in devising public campaigns to end or limit the death penalty, state-by-state. National Coalition to Abolish the Death Penalty, Learn More, <http://www.ncadp.org/index.cfm?content=2> (last visited Feb. 26, 2009).

chose to answer eight.⁵² The eighth one was about recommending to take the savings and put it to the murder victims' family⁵³ and I have two questions really: [First], could you discuss a little bit more about your process of coming to that eighth conclusion and what the discussion was like for the Commission? [Second], the Commission hearings for the most part were public. Did you hear much from members of the public who were not in the room, and also what was your impression of the people who did come? Did it make a difference that the room often had so many people in it?

MILES WINDER:

I do not think it made a lot of difference to me personally that there were a lot of people there. The people who testified were sincere in their testimony. The people who had lost loved ones who were on the Death Penalty Study Commission were the people who were the greatest champions of the eighth question and they did the most in my mind to persuade the rest of us to vote in favor of the eighth question.

JUSTICE COLEMAN:

Consistent with what I said before about the importance of using social sciences to help shape the rule of law, I viewed the

⁵² The issues the Commission was charged with answering were: (1) Whether the death penalty rationally serves a legitimate penological intent such as deterrence; (2) Whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole; (3) Whether the death penalty is consistent with evolving standards of decency; (4) Whether the selection of defendants in New Jersey for capital trials is arbitrary, unfair, or discriminatory in any way and [whether] there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process; (5) Whether there is a significant difference in the crime of those selected for the punishment of death as opposed to those who receive life in prison; (6) Whether the penological interest in executing some of those guilty of murder is sufficiently compelling that the risk of an irreversible mistake is acceptable; and (7) Whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penological interests, including the interest of families of victims. DEATH PENALTY REPORT, *supra* note 3, at 4. The Commission also considered an additional issue, dedicating funding to ensure adequate services and advocacy for the families of murder victims. *Id.* at 62.

⁵³ *Id.* at 62. The Commission concluded that "sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims." *Id.*

testimony and written material from everyone as being extremely important because, in a democracy, it works better when you can hear from more. It makes my job as hearing officer more difficult because I have to read more, but that is my obligation; that is the commitment one takes on when you assume certain responsibilities. I liked to hear from as many as possible, and I can assure you I had no doubt that everyone who appeared or wrote letters or submitted written publications did it with the greatest of sincerity. This was an issue of which they wanted to be heard. They traveled from all across America to express themselves and I did not dare inquire how they got the financial wherewithal to make some of the long trips. I thought that if they traveled from all over, at the very least, we could hear them and, I assure you, we considered their testimony and all other evidence.

JANE HENDERSON:

I am curious about how you felt when you talked about the inter-dynamic within the Commission—how you all came to relate to each other, particularly the varying views on the issue, and how it started out, and how you came to such unanimity at the end.

JUSTICE COLEMAN:

Well, I suppose for me it was easy; because I have been a judge for so long, I am used to listening to all sides of a controversy and not taking sides. I want everybody to feel that he or she will have a fair opportunity to be heard. Now, when the deliberation process began, that is when we began to focus on what some people have said or have not said, and that is where we began to share our ideas, but it was all done in a highly professional manner. Simply because you disagree does not mean you need be disagreeable.

MILES WINDER:

I think that is exactly right. As a lawyer, we were trained to try and see all viewpoints and craft an argument in favor of our particular client's viewpoint. I do not have a judge's perspective, but it was amazing how collegial this diverse group of people was. We understood what was going on, what we were about, what our charge was, and we understood that there was going to be a lot of

work to be done. Again I am thankful for the help of the Commission staff because they essentially streamlined it so that when we got the piles of paper that we had to read, it was not that onerous. It was a diverse group of people and I continue to be surprised at the unanimity that we came to in the final result.

JUSTICE COLEMAN:

Not to make a joke of it, but if we were able to get a unanimous opinion from the New Jersey Supreme Court, surely we should be able to come close to getting a unanimous opinion from eleven voting persons; [there was] one abstention and one [person] voted no.⁵⁴

CELESTE FITZGERALD:

I want to add that the Police Chief who served on the Commission [James P. Abbott] has spoken a great deal since the end of the study and he has noted over and over again the impact of Kathy Garcia on the Commission and her work in the trenches on helping the survivors of homicide heal through counseling. She founded the Center for Traumatic Grief, so I think as our message for NJADP evolved; we had to go further and start stating that not all victims' family members support the death penalty. Family members of murder victims are split on this issue as is the general public but, beyond that, we had to start talking about the trauma that comes with being connected to the criminal justice system for decades, and that is what I think Kathy was able to teach the Police Chief—what the trauma of the connection to the killer actually does to the victims' family members.

ASSOCIATE DEAN LILLQUIST:

I have one last question, to either Kevin or Celeste. When NJADP was thinking about bringing the lethal injection

⁵⁴ Attorney General Stuart Rabner abstained, concluding that his role as the State's chief law enforcement officer made taking a position inappropriate. John Russo, author of the 1982 statute that reimposed the death penalty in New Jersey, dissented, advocating that the Legislature fix the problems with capital punishment in New Jersey rather than abolish it. See Mary Pat Gallagher, *N.J. Commission Calls for Abolition of Death Penalty*, N.J.L.J., Jan. 8, 2007, at 1.

litigation,⁵⁵ did you have any concerns or worries that the ultimate result of the litigation might end up legitimizing the death penalty process? In other words, if the State was able to come up successful, what you would get is essentially a sign-off by the judiciary on the death penalty that would actually make abolition harder in the long-run and was that a concern?

CELESTE FITZGERALD:

It was a strategic decision on our part to have a legal strategy to back up a political strategy, and we had to halt decisions since there was an execution around the corner. We had to do what we actually always called “Kevin’s moratorium.” We had to do that.

KEVIN WALSH:

Our moratorium.

CELESTE FITZGERALD:

Our moratorium. I think legislators around the country should not be afraid to ask for a moratorium bill at all. I think the public is there, but it took a little longer for the Legislature to get there. But ultimately they did and we are going to hear from our heroes in a moment about how they took it all the way to repeal.

ASSOCIATE DEAN LILLQUIST:

With that, I would like to thank all members of the panel. Thank you.

⁵⁵ 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); see also *supra* notes 16-29 and accompanying text.

