

State of New Hampshire

GENERAL COURT

CONCORD

MEMORANDUM

DATE: December 1, 2010

TO: Honorable John H. Lynch, Governor
Speaker of the House
President of the Senate
House Clerk
Senate Clerk
Michael York, State Librarian

FROM: Hon. Walter L. Murphy, Chair

SUBJECT: Final Report on HB 520, Chapter 284, Laws of 2009

Pursuant to HB 520, Chapter 284, Laws of 2009, please find attached the Final Report of the Commission to Study the Death Penalty in New Hampshire.

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MESSAGE FROM THE CHAIR

There are few issues which have aroused as much controversy and as much spirited and impassioned debate as the Death Penalty. Many well-intentioned and principled citizens support it while others, equally well-intentioned and principled, urge its abolition. The legislature, in 2009, had a number of bills relative to the Death Penalty under consideration as a result of which this Commission was created to conduct a study of its practical implications and to make recommendations to the legislature based upon our conclusions.

In accordance with the legislative mandate, the Commission, since its inception in October, 2009, has conducted meetings on a more or less monthly basis at which over 70 witnesses have appeared to give their views, both pro and con. The Commission has also held a series of public meetings at various sites in the State at which members of the general public appeared and expressed their opinions, again, both in favor of, and opposed to, the Death Penalty. The Commission members have also toured the New Hampshire State Prison, thanks to the cooperation of officials of the Department of Corrections. We also received a voluminous amount of materials from other jurisdictions and from outside sources, including scholarly treatises on both sides of the issue.

Just as it appears to be with the general public, the members of the Commission, as reflected in this report, are more or less equally divided on the issue. We recognize that the content of our report is complicated—but so, too, is the issue—more complicated the more intensely the question is considered. As H. L. Mencken once observed: “For every complicated question, there is an answer that is short, simple, and WRONG!” In this case, the correct solution is elusive, but not because the members of the Commission failed to take their responsibilities seriously and conscientiously.

It has been a great privilege to work with the outstanding men and women on the Commission, and I am personally grateful for all those who have participated in the process as witnesses and otherwise. A special mention is due to James Cianci, Esquire, a member of the House staff assigned to assist the Commission and whose thoughtful insight and wise counsel are greatly appreciated.

Each member has been given the opportunity to express his or her views on the subject and has done so in a respectful way toward those with an opposing opinion. While the discussion has been lively, it should be noted that it was always a civil discourse, for which we are all grateful, as should be the citizens of the State of New Hampshire.

Respectfully,

Walter L. Murphy, Chair

December 1, 2010

Introduction

The Commission to Study the Death Penalty in New Hampshire was established by HB 520, Chapter 284, Laws of 2009. Pursuant to the bill, the commission's duties were to study the following issues:

- Whether the death penalty in New Hampshire rationally serves a legitimate public interest such as general deterrence, specific deterrence, punishment, or instilling confidence in the criminal justice system.
- Whether the death penalty in New Hampshire is consistent with evolving societal standards of decency.
- Whether the decision to seek the death penalty through the penalty phase of trial for defendants who are eligible to receive the death penalty in New Hampshire is arbitrary, unfair, or discriminatory.
- Whether the current capital murder statute in New Hampshire properly encompasses the types of murder which should be eligible for the death penalty or whether the scope of the current capital murder statute should be expanded, narrowed, or otherwise altered, including an analysis of the types of murder covered by the current capital murder statute and any aggravating and mitigating circumstances listed in the statute.
- Whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penal interests, and the interests of families of victims of crime.
- Whether, in New Hampshire, there is a significant difference in the cost of prosecution and incarceration of a first degree murder case where the penalty is life without parole as compared with the cost of a death penalty case from prosecution to execution.
- Any other issues relevant to the death penalty in New Hampshire.

For the text of New Hampshire's death penalty statute, RSA 630:1 and RSA 630:5, please see the Appendix to this report.

The commission was composed of 22 members appointed as follows:

Hon. Walter Murphy, Chair	Speaker of the House
Rep. Stephen Shurtleff, Vice-Chair	Speaker of the House
Rep. Robert "Renny" Cushing	Speaker of the House
Sen. Amanda Merrill, Vice-Chair	President of the Senate
Philip McLaughlin, Esq.	President of the Senate
Charles Putnam, Esq.	President of the Senate
Robert Charron	Governor
John Jaskolka	Governor

John Kissinger, Esq.	Governor
Daniel St. Hilaire, Esq.	Governor
Hon. Jackie Weatherspoon	Governor
Bradley Whitney	Governor
Sherry Young, Esq.	Governor
Randy Hawkes, Esq.	NH Public Defender
Larry Vogelmann, Esq.	NH Bar Association
James Reams, Esq.	NH Association of Counties
Michael Iacopino, Esq.	NH Association of Criminal Defense Lawyers
Ted Smith	NH Association of Chiefs of Police
Orville “Bud” Fitch II, Esq.	Attorney General
Hon. Jim MacKay	NH Mental Health Council
Stephen Arnold	NH Police Association
Phillip Gaiser	NH Trooper’s Association

The commission members appointed by the House, Senate and Governor were specifically appointed to represent “families of murder victims and associations or organizations with concerns and goals related to the death penalty,” *see* HB 520, Chapter 284:2, Laws of 2009. For individual biographies of the members of the commission, please see the Appendix to this report.

The commission met on 19 occasions beginning in October of 2009. In addition to the commission’s regular schedule of meetings, the commission held a total of 4 public hearings in Concord, Plymouth, Keene and Durham where members of the public were invited to voice their views concerning the death penalty; members of the public were also permitted to speak at the commission’s regular work sessions. The commission initially reviewed the history of the death penalty in New Hampshire (*see* Appendix) and heard from representatives of state government and other organizations with specific knowledge of New Hampshire’s capital murder statute, including the Attorney General’s Office, the Department of Corrections, the Judicial Council and the New Hampshire Public Defender’s Office. The commission also conducted an overview of capital punishment in the United States and received expert testimony from many national authorities representing both sides of the death penalty debate. The commission heard from legal experts, corrections authorities, representatives of law enforcement, religious leaders of various denominations and faiths, families of murder victims, victim’s rights advocates and former death row inmates whose sentences had been overturned and released from prison. For a complete list of witnesses who appeared before the commission, please see the Appendix to this report. The commission also reviewed the reports from other state commissions which have examined the death penalty and numerous studies representing every aspect of the death penalty. Members of the commission also participated in a tour of the New Hampshire State Prison in Concord.

A record of the commission’s work, including transcripts and audio recordings of the commission’s meetings, may be accessed at the commission’s website:

<http://gencourt.state.nh.us/statstudcomm/committees/2009/>

Majority Report

Stephen Arnold
Robert Charron
Orville “Bud” Fitch
Philip Gaiser
John Jaskolka
John Kissinger
Charles Putnam
Stephen Shurtleff
Theodore Smith
Daniel St. Hilaire
James Reams
Bradley Whitney

Majority Report of the Commission to Study the Death Penalty in New Hampshire

Executive Summary: New Hampshire Should Retain The Death Penalty

On July 29, 2009, HB 520 was enacted into law creating a commission to study the death penalty in New Hampshire. The Commission was composed of 22 members from a broad range of backgrounds and experiences. HB 520 broadly required the Commission to study the death penalty and issue a report and recommendation by December 1, 2010. HB 520 also outlined seven specific topics that the Commission was obligated to consider in the course of its analysis of the death penalty.

This report represents the collective findings and conclusions of the undersigned members. Individual members who have signed this report may also have filed separate opinions elaborating on their individual views on different aspects of capital punishment or the issues outlined in HB 520.

In summary, the undersigned members recommend to the General Court and the Governor that New Hampshire retain the death penalty.

- Capital punishment serves several important and legitimate social interests, including instilling confidence in the criminal justice system and acting as a deterrent.
- The death penalty is consistent with evolving standards of societal decency.
- As used in New Hampshire, capital punishment is not applied in an arbitrary, unfair, or discriminatory manner.
- No alternative to the death penalty is sufficient to address legitimate social or penal interests for the narrow categories of capital murder for which the death penalty may be imposed in New Hampshire.

- While the costs of pursuing the death penalty exceed the expenses in a typical first degree murder case, the death penalty is pursued sparingly in this state and those costs are necessary to provide both a high quality of prosecution and a vigorous defense.

Each of these findings is explained in detail below.

Background: New Hampshire's Death Penalty Statute

New Hampshire implements the death penalty primarily through two statutes, RSA 630:1 (Capital Murder) and RSA 630:5 (Procedure in Capital Murder). For ease of reference we shall refer to the statutes collectively as “death penalty” or “the death penalty statutes” as context requires. These statutes were enacted in New Hampshire in 1977 following the United States Supreme Court decision in Gregg v. Georgia, 428 U.S. 153 (1976). The Gregg decision outlined the requirements which are necessary for a state to constitutionally impose the death penalty. The New Hampshire statutes were designed to comply with those constitutional mandates.

RSA 630:1 establishes that the crime of “capital murder” is committed when a defendant knowingly causes the death of another in six specific circumstances: (i) the murder of a law enforcement officer or judicial officer acting in his or her official capacity; (ii) murder for hire; (iii) murder committed in connection with a rape; (iv) murder committed in connection with a kidnapping; (v) murder committed during certain drug offenses; and (vi) murder committed while the defendant is already serving a sentence of life without parole.

RSA 630:5 establishes the judicial process that must be followed if a person has been charged with capital murder. The death penalty may only be sought by the prosecution if two aggravating factors established by statute exist. First, there must be evidence that the defendant acted intentionally in connection the victim's death, either by purposely killing the victim or by purposely engaging in some other action such as inflicting serious bodily injury on the victim that resulted in the victim's death. Second, the prosecution must also be able to prove at least one of nine other aggravating factors beyond a

reasonable doubt. Collectively these requirements are called “statutory aggravating factors.”

The grand jury must find probable cause of both statutory aggravating factors before it can return an indictment which would authorize the prosecution to seek the death penalty. Even after the indictment is returned, the prosecution must provide the defense and court notice that it intends to seek the death penalty, and provide specific notice of each of the aggravating factors it intends to prove at trial. The prosecution may not rely on any aggravating factors which it does not include in this notice.

Before a defendant may be sentenced to death, the jury must first unanimously find beyond a reasonable doubt that he committed one of the six categories of capital murder. Then a separate sentencing phase begins in which the jury considers the punishment. The jury must again unanimously agree that the prosecution has proven beyond a reasonable doubt two of the statutory aggravating factors described above. If the prosecution fails to meet this burden of proof, the jury may not consider the death penalty. If the jury finds that the defendant is eligible for the death penalty because two statutory aggravating factors have been proven, then the jury is required to consider mitigating evidence presented by the defendant. The jury is required to weigh the mitigating evidence against the aggravating evidence and determine if the aggravating factors adequately outweigh the mitigating factors. Again, the jury must unanimously agree that the aggravating factors outweigh the mitigating evidence before they can go to the final step in the process.

The jury is instructed that they are never required to return a death sentence even if they find that the aggravating evidence outweighs the mitigating evidence. In order for a defendant to be sentenced to death, all twelve jurors must agree that the death penalty is the appropriate punishment in the case. If the prosecution fails to meet its burden of proof at any stage in the sentencing hearing, the case ends and the defendant will be sentenced to life without parole. Unlike other contexts where a defendant may be retried if there is a “hung jury,” in a death penalty case if the jury is not unanimous at each stage of the sentencing hearing, the case concludes with a life

sentence. If even a single juror has qualms about imposing the death penalty, the defendant cannot be sentenced to death.

Finally, if the jury does return a sentence of death, under RSA 630:5, X, the defendant is guaranteed a mandatory appeal to the New Hampshire Supreme Court. The Supreme Court must consider three factors: (i) whether there was sufficient evidence to prove the statutory aggravating factors; (ii) whether the death sentence was the result of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence was disproportionate to sentences imposed in other similar capital murder cases.

New Hampshire's capital murder statutes are the narrowest and provide some of the greatest protections for the defendant of any capital sentencing under similar statutes in the United States. RSA 630:1 covers the fewest categories of capital murder of any state in the country. RSA 630:5 contains among the fewest statutory aggravating factors of any state. Finally, by requiring the prosecution to prove two aggravating factors beyond a reasonable doubt, the statute imposes a higher burden than is mandated by the United States Constitution. The New Hampshire Constitution and state statutes also provide many greater safeguards than are guaranteed to capital defendants in other states.

Unlike the other states that the Commission heard about, New Hampshire has only had two death penalty trials in the last 50 years. The first recent New Hampshire death penalty trial was State v. John "Jay" Brooks, which occurred in Candia and was pursued under the "murder for hire" provision of the statute. The other case was State v. Michael Addison, which was the murder of a police officer in Manchester. Both cases went to trial in 2008. The jury imposed a life sentence in the Brooks case. The Addison jury returned a death sentence in the Addison case. The mandatory appeals in both cases are still pending as the Commission took testimony.

Death Penalty Commission Disclaimer

The Commission did not conduct any in-depth analysis of either of the two recent death penalty cases, State v. John Brooks or State v. Michael Addison, with the exception of analyzing the costs incurred

on those cases to date. None of the Commission members watched all of the testimony in either of these trials, nor did the Commission review the transcripts of the testimony in those cases. As a result, the Commission does not have the knowledge base that the jurors in either trial possessed.

The Commission members were aware of the basic facts of these two cases and used their understanding when arguing their positions during commission deliberations. The public also used their understanding of the cases during public testimony. Nonetheless, because both cases are currently under judicial review, the Commission felt that it would be inappropriate to rely on either of those cases as a basis for its conclusions in this report. The Commission believed that its mandate was to take a more general look at the death penalty rather than look at the specific facts and circumstances which were involved in the two pending capital cases.

1. WHETHER THE DEATH PENALTY IN NEW HAMPSHIRE RATIONALLY SERVES A LEGITIMATE PUBLIC INTEREST SUCH AS GENERAL DETERRENCE, SPECIFIC DETERRENCE, PUNISHMENT, OR INSTILLING CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

The death penalty serves a legitimate public interest by instilling confidence in the criminal justice system, serving the public interest in punishment, and by acting as both a specific and general deterrent.

A. The Death Penalty Instills Confidence in the Criminal Justice System and a Public Interest in Punishment

The Commission members believe that retention of the death penalty serves several important public policy considerations, including instilling confidence in the criminal justice system. The fact that the most serious types of murder can result in the most severe punishment authorized by law provides a sense of security to society by emphasizing that there are certain barriers that should not be crossed in orderly society without paying the ultimate price. Retaining the death penalty also sends the message that society is willing to stand behind its law enforcement

officers and other public servants who risk their lives by meting out the ultimate punishment who anyone who kills these public servants.

The Commission heard testimony and received evidence from many members of the law enforcement community. The law enforcement community is frequently on the front lines of the criminal justice system exposed to potential danger in life threatening situations. All members of the Commission recognize and appreciate the important contributions, dedication, and service rendered by law enforcement in this state. Most of the law enforcement witnesses testified concerning their beliefs on the importance of retaining the death penalty as a means of promoting public safety. They expressed in strong terms the sentiment that the absence of a capital murder statute would make them more vulnerable as they perform their work.

In their protection of some public officials, the New Hampshire capital murder statutes protect the morally innocent lives of public servants who fulfill socially important roles for the benefit of the public at large. The laws also protect communities against the sense of disruption and vulnerability that follow the murder of persons engaged in these socially indispensable jobs. In their protection of persons before, during and after a sexual assault or kidnapping, or of a victim of a murder for hire, the statutes protect morally innocent lives.

Many family members of victims came before the Commission. A number were opposed to the death penalty. Other family members expressed their support for retaining the death penalty. All members of the Commission appreciate the willingness of all of these extraordinary people to discuss in moving terms the circumstances they confronted and to assist in a broader understanding of the consequences to them of losing a family member to the crime of murder. It is apparent from all of this testimony that the lives of all family members of victims are dramatically altered from the losses they suffered.

Among many people who support retaining the death penalty there is the deeply held conviction that a life without possibility of parole sentence is quite simply inadequate punishment for certain offenses. To many people who favor retention of the death penalty, there is an added sense of security in the community which results from the existence of capital punishment in this state. The fact that the death

penalty is available as an option serves as a means of addressing those concerns. The existence of the death penalty helps instill confidence among the public that there remains the ultimate punishment for the perpetrators of some offenses.

B. The Death Penalty Serves A Legitimate Public Interest in Deterrence

The concept of deterrence plays a central role in all criminal sentencing in New Hampshire's criminal justice system. Judges in New Hampshire are required to consider three goals of sentencing in every criminal case: deterrence, rehabilitation, and punishment. "Specific deterrence" is a concept whereby a sentence is imposed on a particular offender in order to prevent him from engaging in criminal activity in the future. The concept of "general deterrence" is designed to send a message to members of the general public that if they engage in criminal conduct their actions will be met with punishment. In this way, others are deterred from committing crimes for fear of the consequences meted out by the criminal justice system. The Commission finds that the death penalty serves both the goals of specific and general deterrence.

There is no dispute that the death penalty accomplishes the goal of specific deterrence. It goes without saying that the death of a defendant who has committed capital murder ensures that he will not kill again. For some capital defendants the specific deterrence rationale is particularly appropriate. For example, defendants who have committed murder while already serving a sentence of life without parole or who have killed a prison guard while incarcerated or while attempting to escape from custody have clearly demonstrated that incarceration alone is inadequate to prevent them from killing again. Thus, specific deterrence is particularly necessary for these categories of capital murder.

The members of the Commission also find that the death penalty serves the goal of general deterrence. In recent years, increasingly sophisticated economic models have been developed to study the deterrent effect, if any, of the death penalty on future crime. The studies

are hotly debated in the academic world. As of now, there is no universally accepted conclusion to this debate. While members of the Commission were selected to represent a broad spectrum of backgrounds and experience, none of the Commission members are experienced statisticians. Moreover, the Commission did not have funds to hire someone schooled in statistics to aid in the analysis of the varying studies on deterrence. Thus, the Commission members were unable to fully evaluate the scientific data supporting or refuting the conclusion that the death penalty has a general deterrent effect. Moreover, as a practical matter it seems that it is difficult to measure, with any degree of accuracy, murders which were prevented as a result of the death penalty. It is difficult to comprehend how one could count the non-occurrence of a murder.

Nonetheless, fundamental concepts in sentencing in New Hampshire, common sense, and practical experience support the conclusion that the death penalty must deter some defendants from committing murder. The sentencing structure for most crimes in New Hampshire is premised on the concept that more severe punishments have a greater deterrent effect. Sentencing for crimes in New Hampshire ranges from fines and probation through incarceration and even the death penalty. Those penalties are calibrated, at least in part, to ensure greater deterrence for more serious crime. Part I, article 18 of the New Hampshire Constitution recognizes this rationale of general deterrence by noting unless sentences are proportional to the crime, “the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses.” Within most categories of misdemeanors and felonies, the judge is given broad discretion to impose an appropriate sentence to accomplish the three goals of sentencing mentioned above. For example, a judge may impose a sentence from no incarceration to up to 15 years in New Hampshire State Prison for a Class A Felony depending on the particular circumstances of both the offender and the crime itself. As a result, decisions by the New Hampshire Supreme Court recognize that even where a sentence is not necessary to rehabilitate the offender or provide specific deterrence, a harsher punishment may still be justified on the grounds that the sentence acts as a general deterrent. The belief is that others will be deterred from committing crime by the consequences for their actions. In fact, the very existence of a criminal

penalty if a person is caught and convicted is intended to deter others from committing crime even before someone is caught and punished.

There is no reason to believe that the deterrent rationale is different for capital murder than it is for other lesser crimes. In fact, under New Hampshire law a defendant is only eligible for the death penalty if he is aware his actions will cause the death of another person and he acts purposely in some manner to cause the victim's death. Since capital murder requires at least some degree of forethought on the part of the offender, it is likely to have a deterrent effect on at least some murderers. In holding the death penalty is constitutional in the seminal case of Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court recognized that capital murders which are committed with specific intent are the most likely type of crime to be deterred by the existence of the death penalty.

Anecdotal evidence also supports the conclusion that the death penalty has a deterrent effect. As County Attorney Peter Heed has detailed in his email to the Commission, in at least one case that he handled as a defense attorney, his client indicated that the only reason that he did not shoot a police officer was his awareness, and fear, of the death penalty.

Some members of the Commission, including some members who would retain the New Hampshire death penalty statute, are not convinced that the death penalty deters all kinds of homicides. As the New Hampshire statutes are drafted and as they are applied, they are not intended to deter all kinds of homicide, because they do not apply to all kinds of homicide. Indeed it is not possible to develop a system of punishment that would deter every criminal act; otherwise it would be possible to calibrate the criminal justice system in such a way to eliminate all crime. Despite these difficulties, we find that deterrence theory provides a compelling rationale for retaining the New Hampshire death penalty statutes.

In this regard, if New Hampshire's capital murder statutes save even one innocent life by deterring even one capital murder, it should be an acceptable choice for the State to maintain these statutes. The State shoulders obligations to protect innocent lives in many other contexts. Laws against drunk driving, for instance, are intended to deter risky behavior that endangers innocent third persons as well as

drunks and their passengers (some of whom are entirely innocent, like children, and some who are not, like social guests). Drunken driving laws do not, of course, deter all drunk driving, but that's not the test for legislation in a democratic society – the legislature deems the trade offs between imperfect protection, imperfect deterrence and imperfect punishment to be worth the cost of maintaining these laws.

Moreover, with the caveats about the academic studies discussed above, it is still worth noting that there is a substantial body of scientific literature that supports the deterrent effect of the death penalty. While the Commission members believe it is difficult, if not impossible, to measure with any precision the deterrent effect of the death penalty, the academic studies showing a deterrent effect support the practical observations and common sense experience discussed above.

The groundbreaking study on this path was the development of a sophisticated econometric model by Isaac Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 *American Economic Review* 397 (1975). Ehrlich concluded that there was a deterrent effect caused by the presence of capital punishment.

Many authors have continued the work of Ehrlich and developed even more sophisticated measurement models based upon criticism of Ehrlich's work. An extremely significant work was published by Dezhbakhsh, Rubin, and Shepard entitled *Does Capital Punishment have a Deterrent Effect: New Evidence from Post-Moratorium Panel Data*, 5 *American Law and Economic Review* (Fall 2003).

Dezhbakhsh, *et al.* used panel data from 3,054 counties across the country covering the period from 1977-1996 to look at a deterrent effect of capital punishment. The time period covers the resumption of the death penalty through the most recent data available in 2003.

Dezhbakhsh, *et al.* concluded that the data showed that there was “a significant deterrent effect” from the use of capital punishment. Dezhbakhsh, *supra* at 25. They further calculated that an average of 18 murders were not committed as a result of capital punishment. Dezhbakhsh, *supra* 21-22.

“Our results suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide” Dezhbakhsh, *supra* at 25.

In fact, when Texas had an unofficial moratorium on executions, Cloninger and Marchesini reported that the stay “appears to have contributed to additional homicides.” Cited in Dezhbakhsh, *supra* at 7.

Other studies resulting in similar conclusions are Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States*, Am. J. Econ. & Soc. (death penalty prevents an average of 14 murders); Mocian and Gittings, *Getting off of Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L and Econ 453 (2003) (death penalty prevents an average of 5 murders); and Shepard, *Murders of Passion, Execution Delays and the Deterrence of Capital Punishment*, 33 J L. Stud. 284 (2004) (death penalty prevents 4.5 murders).

Shepard also states that “it is evident that the murder rates in death penalty states have been declining since 1977, while murder rates in non-death-penalty states have been increasing. . . [and that] the difference in the trends of states with capital punishment and states without capital punishment widens as the number of executions increases.” Shepard, *supra* at 4.

The Shepard study also analyzed data to determine if all types of murders are deterred by the death penalty and if the length of time on “death row” affected the murder rate. Shepard found that “of all of the measured murders—whether committed by intimates, acquaintance or strangers; whether a crime of passion or consequence of another felony; whether a crime against whites or African Americans—are deterred both by death penalty sentences and by executions.” Shepard, *supra* at 9.

Not surprising, the data documenting a deterrent effect for the death penalty has resulted in calls for the use of the death penalty to save lives. See Sunstein and Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs*, U. of Chicago Law School (Mar. 2005).

Sunstein and Vermeule’s argument essentially is that saving the lives of unidentified, but quantifiable, victims mandates the use of the death penalty to protect those innocent lives. They further argued that if there

is a possibility that the death penalty will save one innocent, but unidentified, life the state is obligated to take the steps needed to protect that life.

Despite the scientific literature tending to show that the death penalty has a deterrent effect, there is also a significant body of literature that comes to the opposite conclusion. As noted above, the Commission members do not have the particular skills or academic knowledge required to resolve that scientific debate. Nonetheless, the Commission members believe, for the reasons articulated above, that common sense and experience support the conclusion that the deterrent effect of the death penalty still exists even if the deterrent effect is not precisely quantifiable.

New Hampshire's death penalty statutes are narrow in scope and rare in application. In this regard, the death penalty in New Hampshire's capital punishment system sends a message that the death penalty is reserved as an exemplary punishment for particularly egregious homicides. The Commission members feel that because the death penalty is applied only for a select group of the worst crimes and the worst criminals, the deterrent effect is heightened. In this regard, that effect may not be entirely lost even when a jury finds that mitigating factors outweigh aggravating factors and votes not to impose the ultimate punishment.

2. WHETHER THE DEATH PENALTY IN NEW HAMPSHIRE IS CONSISTENT WITH EVOLVING SOCIETAL STANDARDS OF DECENCY.

The New Hampshire Death Penalty, as applied, is consistent with evolving standards of decency.

The Commission has heard extensive testimony, and received numerous documents in support of the testimony. Many witnesses testified both for and against the death penalty in general, fewer persons testified specifically about evolving standards of decency in society as they apply to the death penalty, and fewer still on that issue as they apply in New Hampshire. Many religious leaders and private citizens testified about their personal moral convictions as applied to the death penalty. This report and the recommendations

are not in any way intended to denigrate sincerely-held moral beliefs. The witnesses who testified demonstrated significant courage to share their personal opinions in a public forum. The Commission is grateful for the assistance of the many persons who gave of their time to assist it with its study, and will not exhaustively recount all the testimony received in its report, though the testimony will be included in the record of the Commission's proceedings. It will, however, draw upon that testimony where useful to highlight the reasons for its conclusions.

In summary the Commission members find that New Hampshire's capital murder statutes are consistent with evolving standards of decency because, in this state, the death penalty has consistently been accepted by the democratic process, the statutes are written to cover only a narrow category of murders, the procedures are designed to provide the defendant the most protection from a wrongful conviction or death sentence, and the penalty is applied sparingly to only the most clear cases where the defendant is eligible for the death penalty.

A. The History of the Death Penalty in New Hampshire and the Democratic Process in this State Support the Conclusion that the Death Penalty is Consistent With Evolving Standards of Decency.

The fact that New Hampshire's capital murder statutes continue to be consistent with evolving standards of decency is reflected in the legislative history of those statutes. As an initial matter, the death penalty is explicitly recognized in several provisions of the New Hampshire Constitution as a punishment authorized by law in this state. See, e.g., N.H. Const. pt. I, arts. 15, 16; pt. II, art. 4. Although it has been used sparingly over the years, the death penalty has consistently and without interruption been authorized by statute as a punishment for capital murder since the beginning of this state's history.

In modern times, the Legislature has reaffirmed its commitment to capital punishment as an authorized penalty. As mentioned above in the background section, soon after the United States Supreme Court

lifted the nation-wide moratorium on the death penalty in 1976, New Hampshire quickly enacted capital sentencing statutes that were designed to comply with the constitutional mandates laid down by the Supreme Court. In the intervening 33 years, New Hampshire's capital murder statutes have been amended by the Legislature on several occasions. In 1986, the statute was amended to change the method of execution from hanging to lethal injection. 1986 N.H. Laws 82:1. In 1988, the capital murder statute was expanded to include the crimes of the murder of a parole or probation officer and murder committed by someone who is already serving a sentence of life without parole. 1988 N.H. Laws 69:1. In 1990, the statute was again expanded to include the crimes of murder in connection with aggravated felonious sexual assault and murder committed during certain drug offenses. 1990 N.H. Laws 199:1. In that year, the capital sentencing procedures were also substantially revised to provide greater protections for a defendant facing the death penalty. 1990 N.H. Laws 199:1. In 1994, the statute was again expanded to include the killing of a judicial officer as a crime for which the death penalty could be imposed. 1994 N.H. 128:1,2. Most recently in 2005, the statute was amended to exclude defendants who were under 18 years of age when they committed capital murder from receiving the death penalty. This was the same year the United States Supreme Court held it was unconstitutional to execute a defendant under 18 years of age. See Roper v. Simmonds, 543 U.S. 551 (2005). Thus, this legislative change simply ensured that New Hampshire's capital murder statutes could be applied constitutionally.

While a bill to repeal the death penalty passed both houses of the legislature in 2000, as part of the legislative process, the Governor vetoed that bill. N.H.H.R. Jour. 948-49 (2000). The very next legislative session in 2001, an effort to repeal the death penalty failed to garner a majority vote in the House of Representatives. N.H.H.R. Jour. 329-30 (Apr. 5, 2001). More recent efforts to repeal the death penalty have similarly failed to gain a majority vote in both houses of the legislature. N.H.H.R. Jour. Vol. 29, No. 30A (Mar. 27, 2007) (voting HB607 inexpedient to legislate); N.H.S. Jour. 260 (Apr. 29, 2009) (HB556, amended by the Senate Judiciary Committee to remove the repeal provisions, and then the bill was laid on the table in the Senate).

While the sheer volume of testimony before this Commission would suggest that a majority of people oppose the death penalty, the Commission did not have the resources to conduct a public opinion poll on the issue of the death penalty. Rather, the people who testified were the ones who were motivated to appear and voice their opinion on this subject. As mentioned above, the Commission respects and appreciates the witnesses for sharing their views with the Commission. However, the Commission finds that the democratic process in this state, as described above, more accurately represents the consensus of citizens of this state regarding the moral decency of these statutes. That democratic process has consistently maintained the death penalty as an approved penalty of capital murder. This provides the Commission evidence that evolving standards of decency continue to support the death penalty in this state.

While as previously noted, while the Commission cannot conduct a referendum on the death penalty in New Hampshire, there is strong evidence from polling data that the vast majority of the American public still supports the use of the death penalty as a punishment for a limited number of the most serious types of murder.

Polling shows that the overwhelming majority of Americans favor the death penalty when asked in the proper context. For example, polls after the execution of Timothy McVeigh for his killing of 168 people at the Murrah Building in Oklahoma City showed that support for his execution exceeded 80%.

If Khalid Sheikh Mohammed, the self-proclaimed mastermind of the attacks on the World Trade Center in 2001 was to be executed, the approval ratings for that execution would be at least as high as the McVeigh figures. The populace inherently knows when a crime is so abhorrent that the imposition of the death penalty is warranted and just.

Indeed, the federal government has obtained capital murder convictions and death sentences in federal cases in some surrounding New England states that do not have the death penalty as a state option. See United States v. Gary Sampson, 486 F.3d 13, 17 (1st Cir. 2007) (Massachusetts jury sentenced defendant to death for murder during a car-jacking); United States v. Fell, 2005 WL

4021147 (D. Vt. July 14, 2005) (special verdict form sentencing defendant in Vermont to death). A jury in Connecticut, another New England state which retains the death penalty as a state option, also recently sentenced a defendant to death. See William Glaberson, Death Penalty for Killer of 3 in Connecticut, <http://www.nytimes.com/2010/11/09/nyregion/09cheshire.html> (N.Y. Times, Nov. 8, 2010). Connecticut has also executed a defendant as recently as 2005. See William Yardley and Stacey Stowe, Connecticut Carries Out Its First Execution in 45 Years, <http://www.nytimes.com/2005/05/13/nyregion/13cnd-death.html> (N.Y. Times May 13, 2005).

As noted in the American Law Institute (ALI) *Report of the Council to the Membership of the American Law Institute on the matter of the Death Penalty*, dated April 15, 2009, the death penalty “has substantial support among U.S. citizens at least for certain crimes.” Page 4. Later that same report states “popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%)...” Annex B, Page 1.

B. The State Can Administer Capital Punishment in a Standard Consistent with Evolving Standards of Decency.

Some witnesses testified before the Commission that they felt that the capital murder statutes are merely vindictive, reflect “eye for an eye” justice, or are enforced for the sadistic ends of prosecutors, courts staff and correctional officers or the public at large. Again, with all due respect to the personal opinions of the witnesses who testified, the Commission does not find that these conclusions are supported by the application of the death penalty in New Hampshire. Over the last 70 years the capital punishment has been pursued in this state in only a very small number of egregious cases after a careful deliberative process.

The capital murder statutes are not merely vindictive in nature. Instead, they establish a category of more blameworthy homicides and establish a proportional, severe punishment for that narrow category of homicide. Common sense and a casual acquaintance

with the news media confirm that not all murders are the same. New Hampshire homicide law in general, and its capital murder statutes in particular, attempt to create reasonable, enforceable, just distinctions among kinds of homicides. The death penalty exists in a spectrum of punishment designed to represent a proportional sanction to the severity of the crime committed.

Severe punishment for egregious homicides is not reflexively vindictive; rather, it reflects a community judgment that this narrow category of homicides threatens the community and its way of life in a manner that calls for an exemplary category of punishment. It is not repugnant for a decent, organized society to make this kind of judgment. In fact, as discussed above, it is well-settled law in this state that all criminal sentencing is based on three considerations: deterrence (both general and specific), punishment, and rehabilitation. It is appropriate under New Hampshire law to sentence someone to a more severe sentence even if that sentence would not serve a rehabilitative effect. The severe sentence can be justified on either deterrence or punishment rationales. It is, therefore, generally accepted that punishment plays a vital and central role in our system of criminal justice, and does not offend evolving moral standards.

New Hampshire's capital murder statutes also do not reflect simple or reflexive "eye for an eye" (sometimes called "lex talionis") principles. First, although they undoubtedly serve to punish a category of egregious offenses, the New Hampshire capital murder statutes do not sweep broadly, do not apply to the vast majority of homicides committed in the state, and so do not reflect the kind of reflexive "eye for an eye" rationale, which excludes all other considerations, that some persons find to be morally repugnant.

Second, the processes associated with these statutes are by no means reflexive – prosecutors, defense lawyers, judges, juries and appellate courts all weigh these processes and the requirements of the law with exceeding care over a course of time measured in many years, if not decades. The sentencing procedure is carefully calibrated to require the jury to first find that the defendant is eligible to receive the death penalty because he has committed capital murder with two statutory aggravating factors.

The jury is also required to consider all of the mitigation evidence presented by the defendant. They are then required to carefully weigh all of the mitigation evidence against the aggravating factors the jury found the prosecution proved beyond a reasonable doubt. Only then may the jury go on to consider whether to recommend a death sentence. As noted above, in this state the jury is never required to impose a sentence of death. Rather, it must be the considered judgment of all twelve jurors that death is the appropriate punishment considering both the nature of the crime and the defendant's character. This kind of careful, deliberative process can hardly be characterized as reflexively vindictive.

In fact, the procedures enacted following the Supreme Court's decision in Gregg were specifically designed to prevent this kind of reflexively vindictive application of the death penalty by requiring the jury to focus on the particular circumstances of the crime and the defendant's character.

In fact, the very procedures, like the administrative procedures for carrying out the death penalty, that some say reflect a sadistic mindset actually are there to prevent needless humiliation and stigma and to reflect in the taking of life in the name of the law the same reverence that the law attaches to life itself. Here again, to say that this argument will not persuade those who are inalterably opposed to the death penalty does not diminish the fact that the penalty is not repugnant to many equally moral members of the society.

The Commission heard testimony from those who oppose the New Hampshire capital murder statutes, arguing that it is wrong to protect some morally innocent lives and not other morally innocent lives. The capital murder statutes, for instance, protect police officers and judges in the performance of their duties, but not bailiffs, court staff and firefighters. While the death penalty may, in part, be designed to provide some protection for public servants who risk their lives every day ensuring the safety of the general public, that is not the only rationale for this category of capital murder. Application of the death penalty to the killing of a law enforcement officer or judge is based on similar concepts as the justification for killing in self-defense or war. A person who intentionally kills a law enforcement officer or judge has

not only taken the life of an innocent public servant, but that defendant has engaged in an attack on the rule-of-law as personified by these officials. The killing of a public servant is not unlike an act of war on civilized society, and society, consistent with morality, asserts the right to protect itself from such attacks to preserve the rule of law.

Reasonable people can disagree on whether to expand or contract the laws against capital murder to protect the lives of additional innocent public servants, like court staff, witnesses or firefighters, or to punish persons who wrongly take those lives, but the law's lack of precision in this respect is not a compelling reason to repeal it entirely or a compelling argument that the legislative judgment reflected in the statute is repugnant to evolving standards of decency.

C. Comparative Law Does Not Provide a Compelling Basis to Repeal RSA 630:1 and RSA 630:5

A number of witnesses argued in testimony that the repeal of capital punishment in many countries and its retention in China and Saudi Arabia provide strong evidence that the death penalty is morally repugnant in a modern society.

Some witnesses argued that the use of the death penalty in the United States aligns us with countries that would otherwise repulse us. But the vast majority of the countries around the world are not, in fact, democracies. Most of the world governments do not allow freedom of speech or other basic human rights, yet we do not abandon those aspects of our political and justice systems because other countries do not support such rights.

Some of the witnesses who testified before the Commission in opposition to the death penalty pointed to the European abolition of the death penalty as evidence of an evolving moral standard. The Commission, however, does not believe that comparative international law is an effective way to assess whether universal notions of decency and morality require New Hampshire to abolish its death penalty. Social and legal cultures are simply too diverse, the mechanisms for expressing moral notions through law are too indirect, and death penalty laws themselves are too different, to casually conclude that our state is obliged to repeal its very narrow

death penalty law because of the state of the law in one country of another or even in many other countries. For instance, it is true that most western European nations have abolished the death penalty, but it is less clear that universally accepted notions of decency and morality drove those decisions or that those decisions reflect popular notions of morality in those countries. For the 10 countries that have joined the European Union since 1992, and “candidate” countries seeking admission to the union, accession to the EU, which carries with a host of economic and other incentives, EU law requires the transfer of national sovereignty to the EU for all of EU laws that have “direct effect” on member states, including its prohibition on the death penalty. In addition, countries that are candidates for admission to the EU are expected to “conform” their national laws to EU law in a variety of respects before they are admitted to the union. What this means is that countries seeking to join the EU accept its prohibition on the death penalty as part of a much broader political process that includes the weighing of a host of other factors like economic incentives, prestige and access to markets. Moreover, although the EU legislates in a parliamentary fashion, there is a significant dispute about the extent to which it is responsive to popular notions of decency and morality. In fact, even among long-established members of the EU, public support for the death penalty, at least in some circumstances, remains significant. One author reports that 65-70% of Britons, a majority of Austrians, around 50% of Italians, and 49% of the Swedes favor its reinstatement. See A. Moravcsik, *The New Abolitionism: Why does the U.S. Practice the death penalty while Europe Does Not?*, printed in Council for European Studies at Columbia University (retrieved Nov. 15, 2010, from: http://www.ces.columbia.edu/pub/Moravcsik_sep01.html). Under these circumstances, regardless of how one feels about the trends of international law, it appears unwise to conclude that most people in the world oppose the death penalty in all circumstances, or would oppose New Hampshire’s narrow implementation of capital punishment. The death penalty still retains positive popular approval in Europe when polling is done, as it does in Japan, India and other non-western democracies. See Cassell, *The Prosecutor* at 18 (Oct. 2008); Institute for the Advancement of Criminal Justice Journal (Summer 2008).

Moreover, it can be difficult, if not impossible, to try to reach conclusions by comparing criminal justice systems internationally. For example, some countries do not have criminal justice systems that even have the trust of their own citizens. Thus, many crimes in those countries are not reported. Other nations have dismal records even investigating, let alone solving, crimes that are reported to them. Other nations do not have the procedural safeguards that make the American system so protective of the rights of criminal defendants.

Other nations, including some that have eliminated the death penalty, do not accept concepts that are basic to our society, such as freedom of speech, universal suffrage and the protection of minority rights. It seems illogical to compare the American criminal justice system using the example of nations that are so far behind in their own recognition of human rights.

A few witnesses expressly compared retention of the death penalty in the United States with its application in China and Saudi Arabia or other countries, which are viewed as having a less “enlightened” respect for human rights. It is inaccurate to compare RSA 630:1 and RSA 630:5 to the substantive law and procedures governing capital punishment in those countries. New Hampshire imposes the death penalty on a different and much smaller range of crimes, and it has far more robust procedures for protecting the rights of defendants than either of those countries. To equate our laws with either country disservices both our lawmakers and our citizens.

Other countries, even in Europe and other western democracies, have enacted various laws, which substantially distinguish their criminal justice systems from that in New Hampshire. Many of those countries have largely dispensed with juries and use inquisitorial methods instead of the adversarial process applied in the American system of justice. There is nothing inherently wrong with that process for citizens in civil law countries, but it would be inaccurate to casually compare one legal policy from those countries and assume that it should apply with equal force in New Hampshire. Thus, comparative law from other countries does not provide a sound basis for concluding that evolving standards of decency no longer support the death penalty in New Hampshire.

D. The Infinitesimal Risk of Executing a Factually Innocent Person Does Not Provide a Compelling Basis to Repeal RSA 630:1 and RSA 630:5

A number of witnesses asserted that “innocent” people are regularly convicted of capital murder and it is morally unacceptable to maintain the capital murder statute in the face of even the possibility of executing an innocent person. This argument overlooks or dismisses contrary evidence and argument.

As a threshold matter, it is important to carefully consider the claims that large numbers of innocent defendants have been convicted and executed. There is a substantial difference between a case where the charges have been dismissed against a defendant years after the original conviction because of a technical defect in the case and the conclusion that a defendant is actually innocent of the murder. In many instances, government could simply not retry the defendant because witnesses have died or evidence has been lost so many years after the original conviction. However, even in those situations where a defect in the original trial and conviction results in a reversal of the conviction or death sentence, that error is corrected through the judicial process. Thus, the substantial cost and effort that is made to ensure a correct outcome is actually a testament to a system that is designed to protect the rights of a defendant and minimize the risk of error.

Whether or not there have been miscarriages of justice in other states, the Commission’s task was to evaluate the death penalty as it applies in New Hampshire. New Hampshire takes a restrictive approach to defining and implementing its capital murder statutes. It provides extraordinary procedural protections to defendants charged with capital murder before, during and after the initial trial. These procedural protections go beyond the rights afforded capital defendants in many other states with the death penalty. There was no evidence that a factually innocent defendant in this state has even been convicted of murder, much less capital murder.¹

¹ In fact, the defendant in the New Hampshire case that implements the constitutional protections inherent in the *Brady* decision and established the proposition that a conviction will be reversed if the prosecution withholds exculpatory evidence, later plead guilty to second degree murder.

A few witnesses and members of the Commission objected to evidence and argument indicating that New Hampshire takes a different approach to defining and implementing its capital murder statutes than many states do. Though it is easy to impugn New Hampshire's "exceptionalism," the fact remains that for over 70 years its prosecutors, judges, and juries have rarely sought or imposed the ultimate sanction, and its legislature has resisted efforts to drastically expand the statute. This cautious approach to the application of the death penalty in this state minimizes the risk of error.

Nonetheless, human beings investigate, prosecute and adjudicate all crimes. Human beings are capable of error. There is, in fact, a slight risk that an innocent person could be convicted of capital murder in New Hampshire and that the error would go undetected by the prosecutor, jury, trial judge and appellate judges in the state and federal system. The standard of perfection is never required in any other endeavor. However, given the steps New Hampshire has taken, it is an extremely small risk that does not outweigh the other compelling public policy reasons for maintaining the death penalty in this state.

3. WHETHER THE DECISION TO SEEK THE DEATH PENALTY THROUGH THE PENALTY PHASE OF THE TRIAL FOR DEFENDANTS WHO ARE ELIGIBLE TO RECEIVE THE DEATH PENALTY IN NEW HAMPSHIRE IS ARBITRARY, UNFAIR OR DISCRIMINATORY?

The New Hampshire Death Penalty, as applied, is not arbitrary, unfair or discriminatory.

A. RSA 630:1 and RSA 630:5 are not Arbitrary as Currently Applied

Arbitrary is defined by Black's Law Dictionary as follows: "In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; . . . nonrational; not done or acting according to reason or judgment . . . Without fair, solid, and substantial cause; that is, without cause based upon law; not governed by any fixed rules or standards." Black's Law Dictionary 104 (6th ed. 1990) (citation omitted). The capital punishment system in place in New Hampshire prior to the Gregg case was arbitrary because a court could

find that there were no guiding principles, laws, or rules to establish when a person could face the death penalty or under what circumstances the jury could impose it.

That changed completely with the elaborate statutory system enacted by RSA 630:1 and 630:5, which meet the constitutional requirements of the Gregg case and cases decided later. Under these statutes, New Hampshire prosecutors, like their counterparts in other states, cannot simply charge a person with capital murder unless the statutory mandates are met.

Even if the prosecution chooses to pursue and a grand jury returns an indictment of capital murder in a weak or marginal case, the prosecution does not decide whether the death penalty is imposed. The jury is carefully instructed about the law. It is required to make four decisions (all unanimously and beyond a reasonable doubt): whether to convict of capital murder, whether the defendant is eligible for the death penalty, whether the aggravating factors outweigh the mitigating factors, and whether the defendant should be sentenced to death. This is a careful process based on the deliberation of twelve jurors. Members of this society have entrusted our lives, freedom, and livelihood to juries since before the founding of this country. Jury verdicts are not arbitrary when they are guided by this kind of detailed legal rules.

The process for bringing and adjudicating a capital murder charge in this state is painstaking. The New Hampshire Attorney General's Office is responsible for initiating and conducting prosecutions for capital murder. The Commission heard testimony from members the Attorney General's Office, who provided detailed testimony, supplemented by documents, describing the numerous procedural protections established by the office's own procedures, the capital murder statutes, New Hampshire state court decisions and federal court decisions. In summary, those protections include:

- a broad consultative process for determining whether the criteria for initiating a capital murder prosecution are met;
- special training for prosecutors handling capital cases;
- access to qualified counsel and expert resources to vigorously defend capital cases;

- special training for public defenders representing defendants charged with capital murder;
- special training for judges who handle capital murder cases;
- special procedures for qualifying jurors to sit on capital cases; and
- special appeal rights through multiple courts for persons convicted of capital murder.

The prosecutors testified, and their testimony was unrebutted, that New Hampshire provides significantly higher levels of procedural protections for persons charged with capital murder than are afforded in other states. A small sampling of the greater protections afforded to capital defendant's in New Hampshire illustrates how capital murder cases, as applied in New Hampshire, are fair.

- A defendant may only be charged with capital murder after a majority of the grand jury, but not less than 12 members, find probable cause that the defendant committed one of the categories of capital murder;
- The grand jury must also find probable cause that the defendant committed at least two of the statutory aggravating factors described above;
- After indictment, the defendant is entitled to appointment of counsel if he cannot afford a lawyer.
- New Hampshire's public defender program has committed to providing effective assistance of counsel in capital cases;
- In addition to constitutionally mandated discovery, a defendant in New Hampshire receives "open-file" discovery from the prosecution;
- The prosecution is required to provide the defendant and the court with notice of the aggravating factors it intends to prove at trial to justify the death penalty;
- The defendant's rights to exclude all evidence which was unconstitutionally obtained is, in many respects, more protective

under the New Hampshire Constitution than its federal counterpart;

- The defendant is entitled to a fair and impartial judge;
- The defendant is entitled to individual sequestered voir dire of jurors in a capital case to ensure a fair and impartial jury;
- During jury selection in a capital case, a defendant is entitled to 20 peremptory challenges to jurors, while the prosecution only is allowed 10 challenges;
- The defendant is entitled to compulsory process to guarantee that “all proofs favorable” will be available for trial;
- The defendant cannot be compelled to testify against himself at any stage of the trial, including the sentencing phase;
- The jury must make unanimous findings at four separate stages of the process: whether the defendant is guilty of capital murder; whether he is eligible for the death penalty based on two statutory aggravating factors; whether the aggravating factors sufficiently outweigh the mitigating evidence; and whether the death penalty is the appropriate punishment;
- The jury is specifically instructed that it is never required to return a sentence of death no matter what its findings are with respect to aggravating and mitigating evidence;
- The defendant is entitled to a mandatory appeal to the New Hampshire Supreme Court;
- The Supreme Court must consider three factors on appeal, including whether the death sentence is disproportionate to sentences imposed by jurors in other similar capital murder cases.

At all times, it is the Grand Jury, representing the community at large, who makes the ultimate charging decision. The Attorney General’s Office may make recommendations to the Grand Jury and draft proposed indictments, it is the Grand Jury that makes the decision whether or not to charge capital murder.

Under these circumstances, the Commission cannot find that the process for initiating, litigating and appealing capital cases in this state is “arbitrary,” as that term is normally understood by laypersons or lawyers.

A further buttress against arbitrary state action in New Hampshire is the fact that the New Hampshire Legislature has wisely chosen to reserve capital murder for the worst kinds of homicides. There are relatively few homicides committed in New Hampshire, and even fewer homicides that qualify for a capital murder charge. There was testimony provided to the Commission pointing out that a few persons who commit murder face a capital murder charge and some persons who also commit murder do not. This testimony might be understood to argue that the capital murder statute is arbitrary in a less legal, more informal, sense. In other words, the thrust of this argument is that it is arbitrary for one defendant to face a capital murder charge for a crime that is similar to another defendant who does not face the charge. This argument does not justify a finding that the New Hampshire statute is arbitrary, because it fails to account for how most crimes are charged both in New Hampshire and elsewhere.

First, the argument overlooks the fact that New Hampshire criminal law stratifies homicides, including homicides that meet common law definitions of murder. The New Hampshire Constitution requires that punishment be tailored to fit the severity of the crime. NH Const. pt. I, art. 18. There are different charges for purposeful, knowing, reckless and other kinds of homicides in New Hampshire, and different sentences that attach to those charges. Prosecutors and juries regularly have to choose between higher and lower charges, with the result that arguably similar homicides receive different penalties. There was no testimony, and the Legislature did not instruct the Commission to consider, whether the typology of homicide established by New Hampshire law is itself arbitrary. The legislature has reasonably determined that just six categories of capital murder, coupled with a purposeful mental state and one other statutory aggravating factor, is the most serious crime a person can commit in this state.

Reasonable people may differ about the judgment as to what crimes are more heinous or serious. Nevertheless, the categorization of crime is a public policy determination made by the legislature. Disagreement about which categories of murder are more or less deserving of the ultimate punishment of death does not support the abolition of the death

penalty. It only means that the categories of capital murder should be adjusted (either by expanding or contracting them) to capture the most truly serious offenses. A murder may be considered the most serious for different reasons: it might strike at the heart of a civilized society based on the rule of law (the murder of a judge or law enforcement officer) or it may exhibit such a severe disregard for the value of human life (torture or murder before, during or after a sexual assault) that it warrants a capital murder charge.

There is a “flip side” to this argument that should be considered as well. A few witnesses testified that some persons commit murders that arguably meet the requirements for a capital murder charge, but prosecutors do not exercise their discretion to bring a capital murder charge forward, choosing instead to “only” seek conviction on a first degree murder charge. In the view of these witnesses it is “arbitrary” for some persons to face capital murder charges when another person who has committed a similar crime does not. This testimony, however, does not justify a finding that the New Hampshire capital murder statute is arbitrary.

First, the argument that it is “arbitrary” for some persons to face a higher charge and some persons to face a lower charge in somewhat similar circumstances proves too much. For instance, the New Hampshire Criminal Code also has laws against theft and sexual assault that stratify charges and penalties. Prosecutors in those cases also exercise discretion, based on a number of factors like the strength of their evidence, their observations of juror reactions to similar cases and the strength of the forensic and other evidence available to corroborate the charge. As a result, some offenders face more serious charges than others. The same logic that would require New Hampshire to repeal its capital murder statutes because a few offenders who truly merit that penalty do not face the higher charge, would also require it to repeal similar statutes that stratify punishments for other crimes based on the severity of the offending behavior.

It is worth noting that the Commission heard extensive testimony about the process that New Hampshire prosecutors go through to evaluate all homicides cases, and that process is more extensive in capital murder cases. It includes a review of the available evidence (evidence adverse to the prosecution, not just evidence favorable to the State), consideration of alternative legal theories and consultation within the

office on what charge to seek. The process actually used by New Hampshire prosecutors to decide whether or not to bring an indictment for capital murder to a grand jury cannot fairly be called “arbitrary.” In fact, those judgments made by prosecutors at the charging stage about the strength of the case, the likelihood of conviction, and the egregiousness of the conduct minimize the risk of error by ensuring that capital murder is not charged too frequently or based on weak or marginal evidence.

Finally, some witnesses asserted that the severity and finality of the punishment itself is what causes capital punishment to be arbitrary. The severity of a punishment is not, in and of itself, what makes the punishment arbitrary. In fact, New Hampshire’s capital murder statute is congruent with its constitution, which requires punishments to be “proportional.” As noted above, New Hampshire law already does a good job of limiting the capital murder charge to the worst kinds of homicide. Thus, while there is no doubt that the death penalty is a severe punishment; the fact that New Hampshire reserves it for the worst kinds of homicides actually supports the conclusion that the punishment is not “arbitrary.”

It is a position of some on the Commission and the public that similar crimes should be compared according to the “intrinsic nature” of the crimes. If the outcome of cases where the “intrinsic nature” of the crimes is similar and the outcomes of the charging decisions are different, then the system is arbitrary. Thus, if the Attorney General does not charge every “murder for hire” case as a Capital Murder charge, the decision to do so is arbitrary.

However, the “intrinsic nature” argument misses the essence of death penalty law, which has developed since Gregg v. Georgia. After the Gregg decision, death penalty litigation is constitutionally required to go beyond the “intrinsic nature” of the crime and the jury must weigh the evidence, and determine the existence of mitigating and aggravating factors of the crime and the defendant. The decision of whether a particular defendant should receive the death penalty cannot be intrinsic to the crime alone. Rather, the jury must take into account both the particular factual circumstances of the crime before it and the unique character of the defendant before it can sense a defendant to death. Therefore, it is predictable that cases where the

“intrinsic nature” of the crimes appear superficially to be similar will, in fact, have different outcomes.

When making charging decisions, prosecutors every day weigh the provable facts, as well as the intangibles of witness issues, legal issues and likely outcome of a trial. The decision is complicated in death penalty litigation because of the mitigating and aggravating factors of the crime and defendant added to the mix of intangibles by the U.S. Supreme Court.

Jurors, likewise, are required to weigh and ultimately decide the same issues when convicting a defendant of a capital crime and then rendering a sentence.

These factors alone should presumptively explain why crimes that appear to be similar end up with different outcomes. The Commission was presented with no evidence that capital charging and sentencing decisions in New Hampshire operated in a manner that did not take these factors into account. Therefore, the Commission is left to conclude that everyone in the system from prosecutors, judges and jurors are doing what is constitutionally required.

B. RSA 630:1 and RSA 630:5 are not Unfair as Currently Applied

As discussed above, homicides that arguably meet the criteria for indictment as capital murder are rare in New Hampshire. It is even rarer for such cases to actually be brought. In the last 30 years there have only been four capital murder cases brought in New Hampshire. Only two of those cases went to juries. Only one of those cases resulted in the imposition of the death penalty, and that case is currently on appeal. Although the Commission heard testimony regarding alleged unfair practices in other states, there was very little, if any evidence or argument that New Hampshire prosecutors have behaved unfairly and no testimony at all that New Hampshire judges, juries, or defense counsel have behaved unfairly toward defendants in adjudicating or defending these cases.

C. RSA 630:1 and RSA 630:5 are not Discriminatory as Currently Applied

The Commission has not found any evidence of discriminatory prosecution under New Hampshire's capital murder statutes. There are a number of protected categories (usually related to a person's immutable personal characteristics, like race, ethnicity, religious affiliation, sexual orientation, gender) and protected behaviors (like the exercise of First Amendment rights) that cannot legitimately form the basis for a decision to prosecute. There was no evidence and no argument that New Hampshire prosecutors base decisions to seek the death penalty on such factors.

There was no evidence, either anecdotal or quantitative, that New Hampshire juries regularly return racially discriminatory verdicts in other kinds of cases. On this factual record it would be extremely unjust to repeal the New Hampshire capital murder statutes based on an assumption that New Hampshire jurors are racist and do not follow the facts and the law in capital murder cases.

4. WHETHER THE CURRENT CAPITAL MURDER STATUTE IN NEW HAMPSHIRE PROPERLY ENCOMPASSES THE TYPES OF MURDER WHICH SHOULD BE ELIGIBLE FOR THE DEATH PENALTY OR WHETHER THE SCOPE OF THE CURRENT CAPITAL MURDER STATUTE SHOULD BE EXPANDED, NARROWED, OR OTHERWISE ALTERED, INCLUDING AN ANALYSIS OF THE TYPES OF MURDER COVERED BY THE CURRENT CAPITAL MURDER STATUTE AND ANY AGGRAVATING AND MITIGATING CIRCUMSTANCES LISTED IN THE STATUTE.

The New Hampshire statute is very narrowly drawn and the extra procedural protections written into the statute help ensure the defendant a fair trial. This Report does not take a position or make any specific recommendations regarding potential expansions or alterations to the current capital murder statute. Some Commission members have expressed individual views regarding the potential applicability of the capital murder statute to home invasions, purposeful terrorist attacks, serial killings and/or acts of torture. Other Commission members support retaining the capital murder statute in its current form. Finally,

other Commission members would narrow the capital murder statute by eliminating certain categories of capital murder. In the absence of any consensus view, no recommendation is made.

5. WHETHER THE ALTERNATIVES TO THE DEATH PENALTY EXIST THAT WOULD SUFFICIENTLY ENSURE PUBLIC SAFETY AND ADDRESS THE LEGITIMATE SOCIAL AND PENAL INTERESTS AND THE INTERESTS OF THE FAMILIES OF VICTIMS OF CRIME.

The Commission does not find that alternatives to the death penalty adequately address legitimate social and penal interests. The only evidence of an alternative to the death penalty heard by the Commission was the penalty of life without parole (LWOP). LWOP may adequately ensure public safety for many capital murder defendants by isolating them from society. Nonetheless, for at least some categories of capital murder LWOP does not guarantee public safety or support appropriate penal interests. For example, a defendant already serving a sentence of life without parole who kills a prison guard, volunteer instructor at the prison, or even another inmate would be eligible for the death penalty under New Hampshire law. Imposing a second LWOP sentence for this crime would result no additional penalty for this murder. The death penalty is the only proportional penalty for this crime that would ensure public safety, instill confidence in the criminal justice system, and reflect an appropriate punishment for the murder of an innocent person.

In some situations LWOP is not an adequate response even for those defendants who are not currently serving a life sentence. For example, without the death penalty a defendant who has committed a series of very serious felonies has little or no disincentive to kill a police officer who attempts to arrest him because there is a substantial likelihood that the defendant would be sentenced to a lengthy prison sentence if he was captured. Similarly, an inmate facing decades of incarceration in prison has little disincentive to avoid killing a corrections officer during an escape without the death penalty. Moreover, even if the death penalty does not deter these particular defendants, imposing a life sentence on top of the already lengthy prison term which the defendant faces does not adequately reflect the severity of the defendant's conduct.

Moreover, LWOP does not adequately reflect the interests of all families of murder victims. The Commission received testimony from several family members of murder victims. The Commission members are deeply indebted to these witnesses for sharing their personal views. Some family members felt very strongly that the death penalty should be repealed. Victim's families who feel that LWOP is a just and appropriate outcome for a particular case already have some recourse under the law. The Victim's Rights Law in New Hampshire guarantees those family members of a murder victim the right to be informed of all stages of the criminal process and to express their views of the appropriate punishment to the prosecutor. While the victims do not have an ultimate veto right over prosecutorial decisions, in the experience of the Commission members, prosecutors seriously weigh and consider the views of family members about the just outcome of a case when making charging and sentencing decisions.

Other family members of murder victims felt equally strongly that the death penalty should be retained. Clearly for those family members who feel that the death penalty must be retained, LWOP does not provide an adequate alternative. It would simply be unfair to those family members who believe that the death penalty is the only just punishment to prevent that punishment from being pursued in all circumstances. The elimination of the death penalty in New Hampshire would leave those victim's family members who support the death penalty feeling that the law did not provide a just resolution of their case.

6. WHETHER IN NEW HAMPSHIRE, THERE IS A SIGNIFICANT DIFFERENCE IN THE COST OF PROSECUTION AND INCARCERATION OF A FIRST DEGREE MURDER CASE WHERE LIFE WITHOUT PAROLE AS COMPARED TO THE COSTS OF THE DEATH PENALTY FROM PROSECUTION TO EXECUTION.

The Commission heard testimony and received evidence from the Attorney General's office, the Public Defender Program, the Department of Corrections, and the Court system. Upon consideration of that testimony and evidence, there was nearly unanimous consensus among the members of the Commission (by a vote of 14-1), that the question can be answered in the affirmative. There is a significant difference in the cost of prosecution and incarceration of a first degree murder case where the penalty is life

without parole as compared with the cost of a death penalty case from prosecution to execution. The Commission members believe that the greater cost associated with capital murder cases is essential to guarantee a vigorous defense, a thorough investigation and prosecution of the case, and careful adjudication of the case.

A. Analysis of the Prosecution Costs of Capital Murder Cases.

In looking at the costs of prosecuting death penalty cases as compared to first degree murder cases, the Commission asked for data from the Attorney General's office, the public defender program, and the court system. The members of the Commission recognize that the costs associated with certain first degree murder prosecutions or other criminal cases can be very expensive. Further, it is hard to categorize any case as being a "typical" first degree murder.

According to estimates recently provided by the Attorney General's office, the costs through November 4, 2010, for legal work associated with the investigation and prosecution of the Addison case are \$1,729,161.78, comprised of \$503,821.99 in litigation expenses and \$1,225,339.79 in human resource costs. For the Brooks case, the costs through November 4, 2010 are \$2,356,253.01, comprised of \$377,528.95 in litigation expenses and \$1,978,724.06 in human resource costs.

According to figures from the Public Defender program, which has provided counsel to Mr. Addison, the costs attributable to the defense of the Addison case were \$1,137,000 through December, 2009. The Public Defender program anticipates that appeal costs for the Addison case will be \$375,328 in calendar year 2010 and \$450,726 in calendar year 2011. The Judicial Council estimated it has spent \$348,036.33 on expert witnesses, investigative services, and forensic work for the Addison case. By contrast, the Judicial Council said the range of such expenses in non-capital murder cases was typically between \$70,000 and \$100,000. Figures for the defense costs incurred in the Brooks case were not available as he was represented by private counsel.

The Commission also heard testimony from representatives of the court system. Specifically, the Hillsborough Superior Court clerk and a representative from the Administrative Office of the Courts testified regarding increased costs associated with the jury selection process, security, and the hiring of an additional law clerk for the Addison case.

In weighing the relative costs, the Commission was mindful of the experience in cases throughout the country involving death sentences. Specifically, in such cases, the costs of prosecution and defense do not end with trial or with the direct appeal to the state's highest court. Rather, the litigation of death sentences continues for a length of time, frequently several years, following conviction. This factor alone results in a significant disparity in the costs associated with death penalty cases as opposed to other murder prosecutions.

The figures that the Commission has been provided by the Attorney General's Office are valid attempts to comply with Commission requests, but both are hampered by complications that undermine an accurate understanding of the prosecution costs of the recent capital murder trials and the expected costs of substituting LWOP sentences for the death penalty in cases of capital murder.

For example, the Attorney General's Office is challenged when providing figures about the costs of litigating the two recent death penalty cases. In the Brooks case, the defendant was a retired multi-millionaire with virtually unlimited resources to pour into his defense. It was also complicated by the fact that multiple trips had to be made to Las Vegas, the defendant's home, to interview, depose and prepare witness for both phases of the case.

In State v. Addison, the Attorney General's Office assisted the Hillsborough County Attorneys office in the preparation and trial of the underlying armed robberies cases, which became factors in the death penalty case. In a bid to be entirely transparent and complete, the Attorney General's Office included all costs associated with Addison case. Thus, the Addison figures overstate the actual costs of the prosecution of the death penalty case.

B. Analysis of the Incarceration Costs of a Capital Murder Inmate

There are also difficulties in precisely comparing the costs of incarcerating an inmate sentence. The Commission heard testimony from the Department of Corrections regarding the costs of incarceration of inmates in New Hampshire. The Department of Corrections indicated the average length of incarceration of an inmate serving a life without parole sentence is 16.4 years. If the costs of incarceration of inmates are averaged across the system, the cost comes to approximately \$33,100 per year. The costs associated with housing inmates in the Secured Housing Unit, where Mr. Addison is presently housed, are higher because of the nature of confinement and the increased security in that unit.

First, when talking about costs the Department of Corrections uses an *average* cost of housing an inmate in New Hampshire prisons, which takes the total costs of the system and divides those costs by the number of inmates. This method skews the actual costs of life sentences downward. Clearly, it is more expensive to house an inmate sentenced to LWOP than an inmate serving a 3 to 6 year sentence, which is the average sentence to the NH State Prison. See N.H. Department of Corrections Annual Report at 3 (2006).

The reason for this inaccuracy is that it is axiomatic that the prisoners who are serving LWOP sentences have much higher total costs, such as medical costs associated with geriatric care, medical care for chronic health issues and “end of life” care. It is well documented that most Americans spend most of their lifetime health care dollars during their “end of life” phase. Therefore, there is no reason to doubt that the lifetime costs of average LWOP sentences will be higher than average costs of persons serving shorter sentences. Since there is little data about the real cost of an LWOP sentence, the Commission can only reach general conclusions based upon general facts about end of life issues.

Members of the commission have varying perspectives on the degree to which cost should play any role in the debate concerning the death penalty. Some members feel that cost should not be any factor. Others feel that the funds allocated to death penalty cases could be better allocated to other significant needs, such as victim support or

the continued funding of a cold case unit at the Attorney General's office. This debate is more fully addressed in other parts of the Commission report.

C. The Higher Costs of a Capital Murder Case do not Justify the Repeal of the Death Penalty in Light of other Important Public Policy Considerations.

The Commission is left to conclude that the prosecution, including appeals, of a capital murder case is significantly higher than First Degree Murder prosecution, but cannot draw precise, or even entirely meaningful, conclusions about the relationship between the “life of case, life of sentence” costs of death penalty and LWOP cases.

Despite the imprecision with which prosecution and incarceration costs are calculated, given all of the considerations, the Commission has concluded that the costs associated with death penalty prosecutions and incarceration significantly exceed the costs associated with First Degree Murder cases.

For the reasons discussed elsewhere in this report, the Commission members feel that the higher costs for capital murder cases are a necessary component to maintain confidence in the system. Those costs ensure a thorough investigation and prosecution, a vigorous defense, and a careful adjudication of the case. Moreover, the higher costs do not outweigh other important public policy considerations discussed in other parts of this report. This is especially true in view of the infrequent application of the death penalty in New Hampshire.

7. OTHER ISSUES RELEVANT TO THE DEATH PENALTY IN NEW HAMPSHIRE

There are four additional relevant observations that Commission wishes to offer the members of the Legislature.

First, despite strong and sharp disagreements between those favoring retention and repeal of New Hampshire's capital murder statutes, there seemed to be little or no disagreement that the state has been well served by its tradition of defining capital murder

narrowly. The reports from other state death penalty study commissions indicates that capital murder law in some states has suffered a kind of “mission creep,” resulting in larger numbers of homicides in those states qualifying for death penalty prosecution. In a number of respects, New Hampshire might find itself challenged to effectively investigate, prosecute, defend and adjudicate much larger numbers of capital murder cases, and the Commission finds that New Hampshire has been well-served by reserving the ultimate penalty for only the very worst kinds of homicides.

Second, the State currently provides extensive resources to law enforcement, prosecutors and defense counsel to investigate and litigate capital murder at all phases of the case--from the initial investigation through aggravating and mitigating factors. Many of those resources are required as a practical necessity for the State to meet requirements of federal constitutional law, but they also distinguish New Hampshire’s legal culture in important ways from practices in other states that were described to the Commission, and greatly reduce the risk of wrongful application of the capital murder statute.

Third, current statutes and court rules establish extensive procedural protections for defendants in capital murder cases. Though most of those are constitutionally required, the Commission also finds that our state’s commitment to providing capital murder defendants with adequate procedural protections serves the interests of justice well. Those protections also distinguish the practices in this State from the practices described to the Commission by witnesses from some other states.

Finally, the State has a commendable record of providing exceptionally robust and capable defense, at taxpayer expense, for indigent persons charged with capital murder. To the extent that New Hampshire’s traditions and culture surpass the constitutional minimum in such cases, the Commission finds that they serve the public and the interests of justice well by reducing further the chance of factual or procedural error and distinguish the current practices in our State from the practices that some witnesses before the Commission described occurring in other states at other times.

Minority Report

Robert “Renny” Cushing

Randy Hawkes

Michael Iacopino

James MacKay

Philip McLaughlin

Amanda Merrill

Walter Murphy

Larry Vogelmann

Jackie Weatherspoon

Sherilyn Young

**MINORITY REPORT
OF THE COMMISSION TO STUDY THE DEATH PENALTY
IN NEW HAMPSHIRE**

NEW HAMPSHIRE SHOULD ABOLISH THE DEATH PENALTY

Introduction

The issue of capital punishment raises profound political, philosophical, and moral issues. The fact that the commission was divided nearly evenly should come as a surprise to no one. As we listened to the testimony of witnesses and as we participated in the commission's deliberations, it was evident that the views of proponents and opponents alike were based upon deep personal convictions. We acknowledge our inability to resolve the question of whether capital punishment is morally right or morally wrong. Such a divisive issue eludes easy reconciliation by this or any other commission. The fact that the commission failed to reach a consensus regarding the death penalty merely reflects society's own ambivalence about the death penalty.

The undersigned members are not of a single mind regarding the responses to the questions posed by the legislature; and individual members have taken the opportunity to address their particular concerns in individual statements. However, we are unanimous in our conclusion that human limitations and other real world constraints make it impossible to seek and dispense the death penalty in an evenhanded, non-selective, and non-arbitrary manner. Therefore, we recommend that the death penalty be abolished and replaced with a mandatory sentence of life without the possibility of parole in all capital cases.

The commissioners wish to express our gratitude to all the witnesses who appeared before the commission. Academicians, administrators, wardens, clerks, fiscal reporters, and statisticians were earnest in their endeavors to deliver their best assessments of the various issues and questions presented to them. Priests, ministers, and rabbis eloquently stated the positions of their religions. Former judges, prosecutors, and defense counsel recalled relevant experiences that illuminated both general and discrete issues for the commission. Members of the public including those from women's organizations, legal organizations and human rights groups also supported the work of the Commission. Former inhabitants of death row, wrongly convicted and later exonerated, offered valuable insights gleaned from their peculiar situations. Victims' family members and friends moved the commission with personal, and often heartrending, stories the commission sincerely appreciates each and every one of those who participated in our public hearings.

I. Whether the death penalty in New Hampshire rationally serves a legitimate public interest such as general deterrence, specific deterrence, punishment, or instilling confidence in the criminal justice system.

A. There Is No Reliable Evidence That the Death Penalty Serves as a General Deterrent

"We do not know whether deterrence has been shown. . . . Nor do we conclude that the evidence of deterrence has reached some threshold of reliability that permits or requires government action. In short, the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty."
Sunstein, Cass R., Wolfers, Justin, *A Death Penalty Puzzle*, WASHINGTON POST, June 30, 2008.

There is no reliable evidence that the death penalty serves as a general deterrent to crime in general or to homicide specifically. This conclusion is based on our review of the current state of the research on deterrence and the logical understanding of the nature of homicide and the behaviors of criminals.

1. General Deterrence Theory is Illogical When Applied to the Death Penalty as Compared to Life Without Parole

There is no reliable evidence that the death penalty serves as a greater deterrent than life without the possibility of parole; therefore, legislators should not retain or expand the death penalty based on a deterrence argument. Deterrence has an effect only on those who consider the potential consequences of their actions. While many homicides are impulsive, spur-of-the-moment, or unplanned acts, one must concede that some murderers consider the possible outcomes of their criminal acts. However, in order to conclude that the death penalty is a greater deterrent than life without parole for those who deliberate the consequences, one would have to believe that a potential murderer's analysis of the consequences would go something like this:

I am going to commit a murder.

I will get caught. Nonetheless, I will still commit the murder.

I will be convicted at trial. Nonetheless, I will still commit the murder.

I will be sentenced to life in prison without the possibility of parole. Nonetheless, I will still commit the murder.

There is a slight chance I will receive the death penalty (one death sentence out of the hundreds of murders committed in New Hampshire in the past seventy-five years). Therefore, I will not commit the murder.

Proponents of capital punishment who base their position on a deterrence argument must believe that there are potential murderers who would be quite happy to do life in prison, but are not willing to chance execution. Common sense tells us that those who are undaunted by the prospect of life in prison will be undeterred by the prospect of capital punishment.

2. The Research and Literature

From 1925 through the present day the vast majority of social scientists have concluded that the death penalty cannot be justified as a deterrent to crime.¹ However, in 1975 Isaac Ehrlich published an empirical study asserting the death penalty did have a deterrent effect.² The Ehrlich study was swiftly repudiated by a panel of the National Academy of Sciences led by Nobel Prize winner, Lawrence R. Klein.³ Subsequently several economists, applying

¹See, Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2009).

² See, Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975).

³ See, Lawrence R. Klein *et al.*, *The Deterrent Effect of Capital Punishment: An Assessment of Estimates*, in Panel on Research on Deterrent and Incapacitative Effects,

econometric models, have asserted that there is a measurable deterrent effect from the death penalty.⁴ On the other hand, some economists also find there is no evidence of deterrence.⁵ Likewise, social scientists continue to find no evidence of a deterrent effect of the death penalty.⁶ Scholarly reviews of these various studies demonstrate that the studies positing evidence of a deterrent effect are seriously flawed.⁷

The Commission had the benefit of hearing from Professor Tomislav Kovandzic, Associate Professor of Criminology from the University of Texas at Dallas on April 9, 2010. Professor Kovandzic explained the fundamental flaws with most of the econometric studies that claimed evidence of a deterrent effect.

Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, 336 (Alfred Blumenstein *et al.* eds., 1978).

⁴ See, Hashem Dezhbakhsh, Paul H. Rubin, & Joanna M. Sheperd, *Does Capital Punishment Have a Deterrent Effect? New Evidence From Postmortality Panel Data*, 5 *Am. L. & Econ. Rev.* 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 *J. L. & Econ.* 453 (2003); Paul R. Zimmerman, *State Executions, Deterrence and the Incidence of Murder*, 7 *J. Applied Econ.* 163 (2004).

⁵ See, Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment and Deterrence*, 5 *Am. L. & Econ. Rev.* 318 (2003).

⁶ See, William C. Bailey, *Deterrence, Brutalization and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 *Criminology* 711(1998); Jon Sorenson, Robert Wrinkle, Victoria Brewer & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 *Crime & Delinq.* 481 (1999).

⁷ See, John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *Stan. L. Rev.* 791 (2006); John J. Donohue & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 *Am. L. & Econ. Rev.* 249 (2009); Tomislav V. Kovandzic, Lynne M. Vieraitis & Denise Paquette Boots, *Does the Death Penalty Save Lives? New Evidence from State Panel Data, 1977 to 2006*, 8 *Crim. & Pub. Pol.* 801 (2009).

These flaws can generally be broken down into two categories: data reliability and analytical process flaws. Professor Kovandzic explained that the following issues plague the studies:

Some of the studies are based upon unreliable data sets. *New Hampshire Legislative Study Commission on the Death Penalty*, 2010, (statement of Tomislav Kovandzic at 93).

- The studies that show evidence of deterrence are based upon dubious measures of execution risk that are highly unlikely to mirror the actual consideration of criminal decision making. *Id.* at 94.
- All of the studies that claim evidence of deterrence overestimate precision estimates. *Id.* at 95.
- All of the studies finding evidence of deterrence failed to correct for the statistical phenomenon of auto-correlation - that is, the tendency of one year's homicide rate to be highly correlated to the homicide rate of the previous year thus demonstrating the lack of statistical independence. In fact when the Dezhbakhsh study is corrected for auto-regression all evidence of deterrence washes out. *Id.* at 95 - 96.

Professor Kovandzic also testified about the methodology and analysis that he used in his own study. He used FBI state panel data from a long period of time - 1977 through 2006. He used a sophisticated multiple time series research design. He identified all important homicide correlatives and crime policy initiatives so that he could best isolate the effect of the death penalty as opposed to other correlatives. Finally, the study corrected for standard errors. The Kovandzic study concluded:

By collectively ignoring the advances made in criminological theory on deterrence and offenders, econometric models lack critical empirical grounding and ignore key variables that may play into the death penalty-deterrence equation. Although claims of absolute and

consistent deterrent effects might make for a great sound bite and fit nicely into the political agendas of lawmakers who endorse punitive crime-control policies and claim to be “tough on crime” (Blumstein, 1997; Currie, 2004; Lab, 2004), our research suggests that homicide rates are not influenced by any number of death penalty measures (i.e., the presence of a statute, the risk of execution, and the numbers of executions) or policy-related variables (i.e., 3X statutes, right-to-carry laws, crack index, or worsening prison conditions).⁸

The Kovandzic study demonstrated that neither execution risk nor existence of the death penalty affected the homicide rate.

Reviews of the empirical studies by other state death penalty commissions reveal findings that are similar this report.

In 2002, the Illinois Commission on Capital Punishment issued a final report which, in pertinent part, addressed deterrence as a rationale for the death penalty. In finding that general deterrence does not justify the use of the death penalty the commission stated:

There are various policy rationales which are advanced in support of the death penalty. One rationale that is frequently mentioned is that the death penalty operates as a general deterrent to murder. The merits of this proposition have been debated for decades now. Clear statistical evidence that would support capital sentencing on this basis is lacking; indeed, many academics suggest that existing studies tend to show that capital punishment is *not* a general deterrent to murder. While there have been some studies which claim to have found a deterrent effect the greater weight of the research finds no evidence that the death penalty is a measurable general deterrent to murder. It is the view of those commission members in the majority on this point a general deterrence cannot be used to justify the death penalty.⁹

⁸ Kovandzic, Vieraitis, Boots, *Does the Death Penalty Save Lives? New Evidence from State Panel Data, 1977 - 2006*, 8 *Criminology & Pub. Pol'y* 803, 836 (2009).

⁹ *Report of Governor's Commission on Capital Punishment (Illinois)* (2002), 68 (emphasis in original).

In 2004, the Kansas Judicial Council Death Penalty Advisory Committee issued a report that addressed several issues surrounding the death penalty including the issue of the deterrent effect. In its report the Kansas Commission recognized that “the overwhelming mass of research on the subject concludes that the death penalty has no deterrent effect.” The report concludes with the following:

On deterrence theory, some noteworthy social researchers recently concluded,” based on our assessment of the literature, we feel quite confident in concluding that in the United States a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist.”¹⁰

The New Jersey Death Penalty Study Commission found no compelling evidence that the death penalty serves a legitimate penological interest. In reaching this conclusion the New Jersey Commission reviewed published studies on whether the death penalty functions as a deterrent. The Commission concluded that the studies were conflicting and inconclusive. The New Jersey Commission relied heavily on the testimony of Professor Jeffrey Fagan of Columbia University Law School and Professor Erik Lillquist of Seton Hall University Law School. Professor Fagan explained that many of the econometric studies rely on flawed or incomplete databases and include all types of murders including impulsive murder that is highly unlikely to be deterred by a threat of punishment. Professor Fagan also explained to the New Jersey Commission that most of the econometric studies suffer from various statistical flaws, many of which are due to the relatively small number of executions that occur in any given

¹⁰ *Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty*, 23 (Kansas) (2004).

year. While Professor Lillquist accepted that the econometric studies revealed a deterrent effect he pointed out that they also demonstrated a “brutalization effect” - in other words an increase in the murder rate based on the increase in executions. Professor Lillquist opined to the New Jersey Commission that confounding variables and limited data base sizes undermine the prospect of ever reaching a firm conclusion as to whether or not a deterrent effect is attributable to capital punishment¹¹.

In 2008, the Maryland Commission on Capital Punishment found no persuasive evidence that the death penalty deters homicides in Maryland. Like New Jersey, the Maryland Commission took testimony from Professor Fagan and also from Professor Brian Forst from American University. Both Professors Forst and Fagan explained the serious statistical and logical flaws that underlie the econometric studies and also addressed his own research demonstrating that while conviction rates may have a deterrent effect there is no systemic effect associated with the death penalty. Maryland Report at 100. The final conclusion shared by Professors Fagan and Forst was that it is impossible to determine from the literature whether there is or is not a deterrent effect from the death penalty.

3. The Vast Majority of Social Scientists Opine that the Death Penalty Has No Effect on Murder Rates

Social scientists with expertise in the measurement of crime and punishment have weighed in on the question of whether the death penalty serves as a deterrent to homicide. In 1996, Michael L. Radelet and Ronald L. Akers

¹¹*New Jersey Death Penalty Study Commission Report*, 24 (2007)

conducted a study surveying a large group of the foremost criminologists in America. Their study found that an overwhelming majority of criminologists agreed that the death penalty did not have a deterrent effect. In 1996, 84% of the experts felt that the death penalty did not act as a deterrent to the crime of murder.¹² Michael L. Radelet and Traci L. Laycock replicated the 1996 study in 2008 and found that a similar majority of the experts continue to believe that the death penalty did not serve as a deterrent to the crime of murder.¹³ The Radelet studies demonstrate that the various econometric studies are not persuasive among social scientists.

Social scientists are not the only group that does not find the death penalty to have a deterrent effect on crime. A recent poll of 500 randomly selected police chiefs in the United States revealed that 57% of the police chiefs polled agreed that the death penalty does not work as a deterrent.¹⁴

4. Crime Statistics Do Not Support the Deterrence Theory

Recent crime statistics do not support claims that the death penalty acts as a deterrent. Murder rates tend to be higher in states that use the death penalty and have high execution rates. In fact, according to the latest FBI Uniform Crime

¹² Michael L. Radelet and Ronald L. Akers, *Deterrence and the Death Penalty: the Views of the Experts*, 87 J. Crim. L. & Criminology 1 (1996).

¹³ Michael L. Radelet and Traci L. Laycock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2009).

¹⁴ Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, Death Penalty Information Center (October 2009).

Report¹⁵ released on September 13, 2010, the national murder rate has dropped from 5.4 (per 100,000 of population) in 2008 to 5.0 in 2009, an 8.1% decrease. Each region of the country experienced a decrease in its murder rate, with the Northeast experiencing the most significant drop of 9%, from 4.2 to 3.8. As in the past, the Northeast continued to have the lowest murder rate in the country, while the South continued to have the highest (6.0, the only region above the national average). In 2009, the South accounted for about 87% of the executions in the country. The other 13% of executions came from the Midwest, the region with the second-highest murder rate (4.6). These new crime statistics tend to support the view that the death penalty has not been a deterrent in those places where it is used the most.

This observation does not appear to change over time. Ten years ago similar observations were made.¹⁶

5. The Anecdote

Proponents of the death penalty offer an apocryphal anecdote in support of the death penalty. In the majority report they write: “. . . as County Attorney Peter Heed *detailed* in his email to the commission, in at least one case that he handled as a defense attorney, his client indicated that the only reason he did not shoot the police officer that stopped him was his awareness, and fear, of the death penalty.” That type of anecdote has no place in this report to the legislature. First of all,

¹⁵ See, Jennifer L. Truman and Michael R. Rand, *National Crime Victimization Survey, Criminal Victimization 2009*, Bureau of Justice Statistics Bulletin, NCJ 231327 (October 2010).

¹⁶ See, Bonner and Fessenden, *Absence of Executions: a Special Report, States with No Death Penalty Share Lower Homicide Rates*, N.Y. Times, September 22, 2000, at A1.

Attorney Heed's email provides virtually *no detail* regarding the purported encounter. Who was the person who allegedly made the statement? How can we ascertain whether his statement was true? How serious was the charge against him? Would it enhance the credibility of his claim if he were facing a long prison sentence? Perhaps, but we don't know whether he was charged with armed robbery or the theft of a six-pack. County Attorney Heed can recall neither the details of the arrest nor how the case was eventually resolved. He offered no insight as to whether the client was a desperate man who actually and seriously considered shooting a police officer. He simply recalls the client making the statement. Without more information, we don't know whether the client's story is believable or if he was simply a blowhard. We don't know if he even had a gun in his car when he was stopped. Therefore, we should give no credence to a claim that the death penalty deterred *at least one murder* based on an anecdote of such suspect quality.

6. Conclusion Regarding General Deterrence

While some commentators claim that it would be irresponsible for the government to eschew the death penalty if the studies demonstrated a deterrent effect¹⁷ the evidence simply does not support the claim that the death penalty acts as a deterrent. At least one of those commentators¹⁸ has since recognized this fact.¹⁹ Without evidence based on solid research, the case for deterrence

¹⁸ Cass R. Sunstein, & Justin, *A Death Penalty Puzzle*, Wash. Post, June 30, 2008.

¹⁹It should also be noted that during the Commission's proceedings certain Commission members have misunderstood the conclusion of the Sunstein and Vermeule article claiming that the if there is a possibility that the death penalty will save one innocent, but unidentified life the state is morally obligated to take the steps needed to protect that life.

presented in the majority report relies on a single anecdote that completely lacks detail and context. There is no valid argument that the death penalty serves the penological interest of general deterrence. Nor is there a valid argument that the death penalty provides a deterrent effect above and beyond the deterrent effect of life without parole.

B. Rehabilitation and Specific Deterrence

Two additional purposes of sentencing are rehabilitation and specific deterrence or incapacitation. The very concept of capital punishment extinguishes any chance of rehabilitation. Likewise, someone who has been executed cannot commit another crime. However, developments in modern corrections provide the means for a less restrictive (and less final) remedy. Evidence received by the Commission from the New Hampshire Department of Corrections tends to demonstrate that individuals serving a sentence of life without parole are, on average, less violent and more prone to maintaining a stable and uneventful existence in prison.²⁰

C. The Death Penalty As “Punishment” Does Not Serve A Legitimate Penological Interest

“The true design of all punishments being to reform, not to exterminate mankind.”

The death penalty is intended to punish the offender. Punishment is often

In fact, the Sunstein and Vermuille article never makes such an argument. The argument posited by the commentators is that if “each execution *saves many innocent lives*, the harms of capital punishment would have to be very great to justify its abolition.” Sunstein & Vermuille, *supra* at 750 (emphasis added).

²⁰See, Minutes of Commission Meeting, March 12, 2010, p. 5.

perceived as a reason in and of itself that supports criminal sentencing. It is sometimes referred to as “punishment for the sake of punishment.” However, this perception ignores the reality that there are reasons why society “punishes” offenders. These theories include deterrence, incapacitation, rehabilitation and retribution. With the exception of retribution all of the theories are designed to make our society safer.

The New Hampshire Constitution prohibits “cruel or unusual” punishment.² The state constitutional ban on cruel or unusual punishment must also be read in conjunction with Part I, Article 18 of the New Hampshire Constitution:

All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. *The true design of all punishments being to reform, not to exterminate mankind.* (Emphasis added.)

While the New Hampshire Supreme Court has not recently addressed whether this section of the state Bill of Rights prohibits capital punishment the Court has recognized that the purpose underlying criminal sentencing is to reduce crime. The Court has recognized that this may be accomplished through the deterrent and rehabilitative effects of punishment. The New Hampshire Supreme Court in construing our state constitution has stated:

² N.H. Const., pt. I, art. 33 states in pertinent part: "no magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

Sentencing has two purposes. Its immediate goal is the protection of society against the commission of future crimes, whether by the particular defendant being sentenced or by others whom the sentence is supposed to deter. *Compare State v. Streeter*, 113 N.H. 402, 308 A.2d 535 (1973) and Pilot Institute on Sentencing, 26 F.R.D. 231, 380 (1959). The ultimate goal of sentencing is to rehabilitate the offender—a goal as important to society as it is in the individual. *State v. Burroughs*, 113 N.H. 21, 300 A.2d 315 (1973); N.H. Const. pt. I, art. 18.³

It has been said that rehabilitation carries a “constitutional imprimatur” under the New Hampshire Constitution.⁴ The Court has never determined that retribution (or punishment for the sake of punishment) is a justifiable basis for any criminal sentence – let alone the ultimate sanction of death. Because the death penalty is not a deterrent and does not rehabilitate the offender, it is not consistent with the purposes of sentencing recognized under our State Constitution.

It is fundamental that punishment should be commensurate with the crime and should achieve justice for the victim. However, achieving justice can prove to be an elusive ideal, perhaps never more so than in the context of a homicide.

Some members of the commission feel certain that, in limited instances, effective punishment of a murderer can be achieved only by executing the murderer. Others are equally certain that society should never utilize the death penalty as punishment, regardless of the crime. The certitude of the absolutist is generally grounded in moral intuition. The commission should recognize its inability to resolve the question of whether capital punishment is “morally right” or “morally wrong,” as neither answer is capable of objective confirmation.

As a society we have agreed that effective punishment need not be

³ *State v. Belanger*, 114 N.H. 616, 619 (1974).

⁴ *See, State v. Evans*, 127 N.H. 501, 505 (1985).

exacted via *lex talionis* (i.e. “an eye for an eye”). As a society we do not sentence rapists to be raped; nor do we sentence those convicted of assault to be beaten. In those situations we attempt to achieve some semblance of justice by exacting something from the offender. As a society we have determined that depriving an offender of his liberty in lieu of extracting “an eye for an eye” does not do an injustice to the victims.

Sentencing a murderer to spend the rest of his life in prison without the possibility of parole does not trivialize the crime he committed. Such a sentence, at the penultimate point on the sentencing continuum, is severe. The offender loses his civil life as a result of taking a life, and is essentially sentenced to death by incarceration.

Among other things, the point of punishment is to *force* upon a criminal the recognition of his wrongdoing. In that sense, life without parole is arguably more punitive than a death sentence. The Commission heard from several people who had been serving prison sentences for crimes they did not commit. Each of them expressed that it was harder to serve the life without parole sentence than the death sentence because the death sentence provided a termination to the relentless days of boredom and misery. The murderer doing life without the possibility of parole must acknowledge every day that his circumstances are the direct result of his own wrongdoing.

D. The Death Penalty Does Nothing to Instill Confidence in the Criminal Justice System

The evidence before the Commission does not reveal that the death

penalty serves to instill confidence in the criminal justice system. If anything it erodes confidence.

There has not been an execution in this state since 1939. Nevertheless, our state's criminal justice system enjoys high regard. Despite the lack of executions, New Hampshire consistently ranks as a state with one of the lowest violent crime rates and one of the lowest murder rates in the nation.

1. The Death Penalty Injects Politics into the Criminal Justice System

By its nature, a decision to seek the death penalty appears to inject a political element into the criminal justice system. Concerns have arisen regarding the possible effect of politics on the charging decision in the Addison case. In seeking higher office, the former Attorney General released two television commercials that heralded her decision to charge and prosecute Michael Addison for capital murder.²¹ In addition, an e-mail made public by the Justice Department caused concerns that politics influenced the Addison death penalty decision.²² Whether real or imagined, even the *appearance* of politics influencing a decision of this magnitude in the New Hampshire criminal justice system serves to diminish confidence in the integrity of the system itself.

2. The Death Penalty Imposes Enormous Pressures on the Participants.

In addition, the Committee heard testimony about the undeniable and severe pressure that capital prosecutions place on all of the participants in the

²¹ See, Ayotte for Senate Announces Two Television Ads: “Never Backed Down” and “Officer Briggs” Start Today, <http://www.ayotteforsenate.com/ayotte-senate-announces-two-television-ads>, (last visited November 20, 2010).

²² See, *Hodes Zeroes in on E-Mails: Ayotte Accused of Exploiting Case*, Concord Monitor, October 13, 2010.

process, from the attorney general down to line prosecutors and criminal defenders, corrections officer and officials and even jurors: “there’s enormous pressure in capital cases that affects the investigation and the decision to prosecute and jury selection and affects the jurors themselves. In capital cases that can often contribute to the problems in the administration, the fair administration of the death penalty.”²³ The intense media scrutiny and public pressures serve only to increase the tendency to make mistakes - mistakes that may be irreversible in the capital punishment context:

In the criminal justice system, when a heinous crime has been committed (such as one that would render the perpetrator eligible for the death penalty), the social and political climate can create undeniable and tremendous pressure on law enforcement to find the culpable. Such events can lead law enforcement to unknowingly focus on a particular conclusion or outcome and inadvertently dismiss or filter information or evidence that points to another.²⁴

This pressure was also recognized during the Commission’s proceedings by local law enforcement officials. One of the cases discussed was *State v. Buchanan*. Buchanan was charged with the rape and murder of his girlfriend's daughter based on an eye witness account. He was held for three months before DNA evidence excluded him as the rapist. The eye witness account was found to lack credibility. The State later charged and convicted another man of the rape and murder. The following discussion between Sergeant Jill Rockey of

²³*See, New Hampshire Legislative Study Commission on the Death Penalty, 2010, (statement of Professor Carol Steiker, August 12).*

²⁴*See, New Hampshire Legislative Study Commission on the Death Penalty, 2010, (statement of Barry Scheck, Director, Innocence Project at Cardozo School of Law, May 14).*

the New Hampshire State Police and Commission Member (and former NH Attorney General) Philip McLaughlin is instructive:

MR. MCLAUGHLIN: . . . I think you're correct in stating that there was this view that Mr. Buchanan was guilty and, in part, we should bear in mind if we recollect the record of that time, that's because an eyewitness said so.

MS. ROCKEY: Correct.

MR. MCLAUGHLIN: . . . I'd like you also to know . . . *that at a time when the prosecutors were extremely concerned that they made a horrific error, at a time when they were considering not only the question of did the perpetrator act or did the perpetrator act with another which would have theoretically included Mr. Buchanan even if the DNA didn't match up, that there were political leaders in this state with extraordinary levels of emotion demanding the death penalty for Mr. Buchanan when others of us were concerned about whether or not he was anymore guilty than any of us.* And that is something that should be taken into consideration . . .

When the question is: Are there political considerations that bear upon these choices? You might think that there were if you happen to be there making those choices. . . .

MS. ROCKEY: . . . I actually think that these are important discussions to have, very important; but I would also suggest to you that there have been more cases that could have been charged as capital than the Elizabeth Knapp case and they weren't. . . .²⁵

Political and situational pressures are present to an extraordinary degree in death penalty cases and those pressures can quite easily lead to mistakes in matters of life and death.

3. Death Penalty Cases Have Higher Rates of Serious Error

The error-prone nature of death penalty cases has been widely documented. In 2000, Professor James S. Liebman, Jeffrey Fagan and Valerie

²⁵See, *New Hampshire Legislative Study Commission on the Death Penalty*, 2010, (statement of Jill Rockey at 17-18, April 9).

West released a study of error rates in capital cases spanning the years 1973 through 1995.²⁶ The study revealed that 68% of the cases studied were overturned on appeal. That means that almost 7 out of every 10 cases that were studied suffered from a serious error that warranted reversal of the original conviction or sentence. It is noted that the Liebman study has been criticized because it does not distinguish between conviction errors and sentencing errors.²⁷ However, errors in conviction and errors in sentencing both undermine confidence in the criminal justice system.

4. The Vagaries of the Criminal Justice System Raise Untenable Risks that an Innocent Person Will be Wrongfully Executed

The death penalty is irreversible. The execution of an innocent person would clearly undermine confidence in the criminal justice system. While our criminal justice system, in principle, is the fairest in the world, we know that, in practice, it is not perfect. It is fraught with risk - risk that an innocent person may be wrongfully convicted. Over the past two decades advances in DNA technology have demonstrated in well over 200 cases that wrongful convictions occur and occur with frequency and without regard to geography.²⁸ Richard Dieter of the Death Penalty Information Center testified that since 1973, 138 individuals were released from death row.²⁹ In these cases the accused was exonerated and

²⁸This figure is derived from information provided at the website of the Innocence Project at Cardozo Law School. See, <http://www.innocenceproject.org/> (Last viewed on November 21, 2010.)

²⁹ See, *The Innocence List*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (Retrieved November 20, 2010.) It should be noted that this list of cases is not based solely on DNA exonerations but also includes cases where acquittal or dismissal followed a re-trial or reversal of an original conviction and death sentence.

usually released from prison. Once executed, exoneration means nothing.

The Committee was privileged to hear the stories of three men who had been wrongfully convicted and sentenced to die, Juan Melendez, Randy Steidl and Ray Krone. Each was subsequently exonerated. The Committee also heard from Barry Scheck, co-founder of the Innocence Project at Cardozo Law School. The Innocence Project along with the Center on Wrongful Convictions at the Northwestern School of Law have led the way in unveiling wrongful convictions in this country. Through the use of post-conviction DNA testing, these organizations have demonstrated the serious systemic imperfections in our criminal justice system. The Innocence Project alone identifies seventeen of its cases where a condemned defendant was exonerated by DNA evidence.³⁰ These exonerations have revealed the nature of the problems in our system that lead to wrongful convictions:

1. Juries relying on incorrect, misleading or partial information. (In many cases exculpatory evidence is not revealed by either negligent or unscrupulous prosecutors or law enforcement agents.)
2. Public and private defenders providing ineffective assistance of counsel.
3. Crime lab mishandling and contamination of evidence; the falsification of results; the misrepresentation of forensic findings on the stand; and the providing of statistical exaggerations about the results of testing.
4. Witnesses misidentifying innocent people as the actual perpetrators.
5. Innocent people confessing to crimes that they did not commit.
6. Innocent people pleading to crimes they did not commit, particularly

³⁰ Id.

when they fear the administration of the death penalty.

7. Unreliable informants acting on the basis of real or perceived incentives.

Although the Innocence Project has recommended model legislation and practices designed to limit the causes of wrongful conviction the State of New Hampshire has not adopted such legislation and practices on a state-wide basis despite the introduction of such legislation in the last three sessions of the legislature.³¹

The very same issues that caused wrongful convictions in other states continue to exist in New Hampshire and they will continue to exist in the course of capital prosecutions in this state.

Similarly a recent report commissioned by Congress and authored by the National Academy of Sciences finds that the forensic science system has substantial deficiencies and is in need of a major overhaul.³² The deficiencies were found in virtually every field where science is used as evidence in our courts. While these problems are not limited to death penalty cases, they are magnified when the ultimate punishment is at stake.

The experience of the Innocence Project and similar organizations and the NAS Report demonstrate that it is very likely that innocent people have been

³¹See, 2010 HB 1263 (Eyewitness Identification Reform); 2010 HB 1619 (Recording Confessions); 2010 HB 1650 FN (Crime Lab reform); 2006 HB 1105 (Eyewitness Identification Reform); 2006 HB 1380 (Crime Lab Reform); 2005 HB 636 (Recording Confessions).

³²See, *Strengthening Forensic Science in the United States: A Path Forward*, National Academies Press (2009).

executed in our country. Although we may enjoy the best justice system in the world, there is still an untenable degree of risk that a person can be executed for a crime that he or she did not commit. As stated in the New Jersey Death Penalty Commission Report “*The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.*”³³ Given these circumstances the death penalty does nothing to instill confidence in the criminal justice system and is more likely to undermine such confidence.

5. Leading Justice Organizations Have Found the Death Penalty to be Ineffective or Have Otherwise Lost Confidence in the Death Penalty

The death penalty’s tendency to undermine confidence in the criminal justice system can also be observed in the reaction of criminal justice institutions that have determined that the death penalty is not very effective or simply unworkable.

National surveys of police chiefs discredit the assertion that the death penalty is an important law enforcement tool. Two studies asked police chiefs to express what factors they believe help fight crime. In 1995 the studies showed that the death penalty was rated as the least cost-effective method for controlling crime and that the chiefs did not believe that the death penalty reduced the number of homicides. A 2009 study reflected similar themes. In the 2009 poll, police chiefs ranked the death penalty last among crime fighting priorities and the least effective use of taxpayer’s money.⁵

⁵ See, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, October, 2009, Death Penalty Information Center.

Since 1997 the American Bar Association (ABA) has called for a moratorium on executions.³⁴ In support of its resolution the ABA established the Death Penalty Moratorium Implementation Project. On its website the ABA Moratorium Implementation Project states:

The American system of justice cannot protect the innocent unless and until capital jurisdictions administer the death penalty in a fair and non-discriminatory manner. It can no longer be doubted that many of the 3,300 inmates on death rows across the country have not received the quality of legal representation that the severity and the finality of a death sentence demand. Restrictions on meaningful appellate review and inconsistencies in prosecutorial treatment of cases remain serious problems. Racial and ethnic bias infects the decisions as to who gets prosecuted and who gets sentenced to death. And the innocent still are not protected adequately from erroneous conviction.³⁵

The ABA recognizes that the manner in which the death penalty is presently administered in this country undermines confidence in the system.

The American Law Institute (ALI) has also raised concerns over the fair administration of the death penalty. The ALI is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The ALI is the organization that developed the Model Penal Code and numerous restatements of various areas of the law. In May 2009, after two years of consideration, the ALI voted to remove capital punishment from the Model Penal Code. The reason the ALI withdrew the model statute on capital punishment was not because its members were morally opposed to the death penalty. The Institute disavowed its model statute "in light

³⁴See, American Bar Association Report with Recommendation No. 107, Approved by the House of Delegates on February 3, 1997.

of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."³⁶ The inability of the ALI to present a model death penalty statute illustrates the lack of confidence that any such law could ultimately be administered in a fair manner that instills confidence in the criminal justice system.

6. The Death Penalty Creates a Hierarchy of Victims

The death penalty erodes public confidence in another manner as well. Because the statute specifies certain types of crimes that "qualify" for the death penalty, the statute elevates certain victims to a "higher status" in the criminal justice system. Victim family member testimony heard during the hearings highlighted the unfairness that this kind of "ranking" causes. Victim family members expressed discomfort with certain crimes being seen as "more heinous" than others. This categorization shows a lack of respect to all victims of crime. This parsing out of certain victims over others is poorly understood by the public and creates anger and frustration when different crimes are compared to one another.

II. Whether the death penalty in New Hampshire is consistent with evolving societal standards of decency.

A. Evolving Societal Standards Reflected in Supreme Court Cases And Public Opinion in New Hampshire Mitigate Against the Death Penalty

³⁵ <http://www.abanet.org/moratorium/home.html> (retrieved on November 20, 2010).

³⁶ The vote of the ALI membership occurred on May 19, 2009 and was overwhelmingly approved by the ALI Council on October 23, 2009. *See*, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=93.

Over the past 20 years the United States Supreme Court, pursuant to the Eighth Amendment, has substantially limited the application of the death penalty within broad classes of offenders and forbidden states from executing offenders in such classes. In 1986 the court restricted the ability of states to execute a prisoner who was insane.⁶ In 2002, the court overruled its prior decisions and held that the Eighth Amendment prohibited the execution of a mentally retarded individual.⁷ In so doing the court stated:

Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.⁸

The Court acknowledged that state legislatures were increasingly prohibiting execution of the mentally ill and that the traditional theories justifying capital punishment did not apply.

Similarly the court has determined that the execution of persons under the age of 18 violates the Eighth and Fourteenth Amendments to the United States Constitution.⁹ In *Roper v. Simmons* the court recognized the "necessity of referring to 'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."¹⁰ The court applied evolving standards and determined that

⁶ See, *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁷ See, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁸ *Id.*

⁹ See, *Roper v. Simmons*, 543 U.S. 551 (2005)

¹⁰ *Id.*

juvenile executions, whether through established practices or statutory prohibitions, had become “exceedingly rare.”¹¹

In 2008, the court held that the death penalty was constitutionally inappropriate as punishment for the rape of a child where the crime did not result in a death.¹² In coming to this conclusion the court again measured evolving standards. The court surveyed the laws and execution statistics throughout the United States and determined that there was a national consensus against capital punishment for the crime of rape of a child.

These cases that measure the support of societal norms for various aspects of the death penalty increasingly demonstrate that, across our country, standards of decency mitigate against the death penalty. There is no reason to believe that the standards of decency in New Hampshire are any less than elsewhere in the country.

In fact, contrary to popular belief, the experience of this Commission is that a majority of New Hampshire citizens believe that the death penalty should be abolished. The Commission held numerous hearings over the past year. The regular monthly meetings were held in Concord. The vast majority of witnesses who spoke to the Commission at those hearings opposed the death penalty. Additionally, the Commission held public hearings in Plymouth, Keene, and Durham, New Hampshire. At those hearings the Commission heard from 79

¹¹ Id.

¹² *Kennedy v. Louisiana*, 129 S.Ct. 1 (2008).

members of the public. Public testimony was overwhelmingly in support of abolition of the death penalty.¹³

Death penalty proponents frequently claim that a majority of Americans support the death penalty. Indeed, a Gallup poll conducted in October of 2009 revealed that 65% of Americans "support the death penalty."¹⁴ However, the poll also demonstrates that if Americans are offered an explicit alternative of life without the possibility of parole, support for the death penalty decreased to 47% preferring the death penalty and 48% preferring life without parole.¹⁵ And, if we are to listen to the New Hampshire citizen's who cared enough about this issue to come to a hearing, the message is clear that those who care support abolition.

B. The Religious Community In New Hampshire Overwhelmingly Supports Abolition Of The Death Penalty

The Commission heard from numerous representatives of the religious community in the state. They spoke overwhelmingly, in one voice, for abolition of the death penalty. The Commission received a letter from 186 religious leaders describing the death penalty as "a gravely unjust method of protecting society, given the capacity of our modern penal system to incarcerate offenders for life."¹⁶ The Commission received similar correspondence Bishop Francis J. Christian of the Roman Catholic Diocese of Manchester, the Rev. William E. Exner, Chairman of the Episcopal Diocese of New Hampshire Outreach Mission and from Rev. Mary Higgins, District Executive Northern New England District-

¹³ At the public hearings only five people testified in favor of the death penalty.

¹⁴ See, <http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx> (Retrieved November 24, 2010.)

¹⁵ *Id.*

Unitarian Universalist Association. There is no doubt that the vast majority religious leaders in the State of New Hampshire support the abolition of the death penalty. It is these leaders upon whom the people of New Hampshire rely for their religious and moral guidance.

C. The Death Penalty Has Been Abandoned By The Majority of the Western World

Sometimes we are judged by the company that we keep. The Commission was repeatedly reminded by witnesses that the United States stands alone in the Western world in its use of the death penalty. The United Nations, European Economic Union, and numerous other nations have abolished the use of the death penalty. In maintaining the death penalty, New Hampshire will stand with Iran, Iraq, Saudi Arabia and China.

Over the years, societal standards and standards of decency have changed considerably. These changes are noted in the rulings of the United States Supreme Court, in the views of the people of the State of New Hampshire, and in the views of the religious community. The death penalty is simply not in keeping with our evolving standards of decency and therefore should be abolished.

III. Whether the decision to seek the death penalty through the penalty phase of trial for defendants who are eligible to receive the death penalty in New Hampshire is arbitrary, unfair, or discriminatory.

In New Hampshire, a defendant's eligibility to receive the death penalty is determined by two statutes: RSA 630:1 and RSA 630:5. The capital murder

¹⁶ See, *Faith Leaders Letter to Commission to Study the Death Penalty in New Hampshire*, May 14, 2010.

statute restricts the range of cases subject to the death penalty to the six sub-categories of homicide enumerated in RSA 630:1. Eligibility is further circumscribed by the necessity of finding an aggravating factor enumerated in RSA 630:5 VII (a) and at least one of the aggravating factors set forth in (b) through (j). A defendant whose crime meets the criteria of the two statutes is eligible to receive the death penalty.

A. The Authority And Power To Seek The Death Penalty Reside Exclusively With The Individual Serving As The State's Attorney General

Since the death penalty was reinstated in New Hampshire, the State has been served by eleven Attorneys General: Warren Rudman, David Souter, Tom Rath, Greg Smith, Steve Merrill, John Arnold, Jeff Howard, Philip McLaughlin, Peter Heed, Kelly Ayotte and Michael Delaney. In 1990 Attorney General John Arnold brought capital murder indictments against three defendants. Because the New Hampshire Supreme Court found Constitutional infirmities in the statute as applied to those defendants, none of the cases was tried as a capital case. In 1997, Attorney General Philip McLaughlin charged a defendant, Gordon Perry, with capital murder. He later accepted the defendant's offer to plead guilty and serve a sentence of life without parole. In October of 2006, Attorney General Kelly Ayotte announced that she would seek a death sentence for Michael Addison. Six months later, she announced that she would seek a death sentence for John Brooks. Addison and Brooks are the only cases in the modern era in which the State has sought the death penalty through the penalty phase of trial. Following conviction, Addison received the death penalty. Following conviction, Brooks received life in prison without the possibility of parole.

Because the legislature specifically asked the commission to study the decision to seek the death penalty *through the penalty phase of trial*, the commission's report necessarily comments on the cases of State v. Michael Addison and State v. John Brooks. Cognizant of the fact that both cases are under appellate review, the commission does not presume to judge the merits of those cases.

B. The Decision To Seek The Death Penalty For Eligible Defendants Is Arbitrary

Among the Black's Law Dictionary definitions of arbitrary cited by the death penalty proponents is the following definition: "not governed by fixed rules or standards." The Merriam-Webster Dictionary defines arbitrary as "depending on individual discretion and not fixed by law." The Attorney General's *decision to seek* the death penalty is not "fixed by law." Admittedly, RSA 603:1 and RSA 630:5 govern the types of murder eligible and the procedures to be followed in capital cases. However, once eligibility is established, no law or standard guides or restrains the Attorney General's *decision*. The Attorney General's discretion to seek *or not seek* the death penalty in any death-qualified case is unfettered.

Merriam-Webster also defines **arbitrary** as "based on or determined by **individual preference** or **convenience** rather than by **necessity** or the **intrinsic nature** of something." Because the Attorney General's discretion to seek or not seek the death penalty in any death-eligible case is unfettered, it is susceptible to being based on "individual preference" or "convenience." The Attorney General's decision-making process is also susceptible to being based upon non-legal

factors, including political considerations. Neither self-interest nor external political pressures should play any part in the charging decision. Under the current procedure, however, there is no way to assure that such extra-legal considerations will not insinuate themselves into the decision-making process. Given the high-profile nature of murder cases in general, and the salience of capital murder cases in particular, distorting pressures can and do come into play.

C. “Preference” and “Convenience”

Michael Addison confessed to killing a police officer. Through counsel, he offered to plead guilty to capital murder and to serve a sentence of life without the possibility of parole. The Attorney General refused this plea and opted to seek the death penalty. It is axiomatic that a prosecutor would “prefer” to prosecute a case in which the defendant has already confessed to the crime. In other words, a prosecutor would “prefer” to try a case that is easy to prove rather than a case that is difficult to prove. The facts of Addison’s case, including his confession, presented a “convenient” (Merriam-Webster: “affording an advantage”; “designed for easy preparation”) opportunity to seek the death penalty.

Merriam-Webster also defines convenient as “well-suited to a particular situation”. John Brooks was charged with capital murder for soliciting a number of men to kill a former employee. In post-Furman New Hampshire, a number of defendants solicited others to commit murder or committed murder after being

solicited to do so. Among those other murder-for-hire cases are State v. Salas-Robles and State v. Sanchez, whose crimes took place before Brooks, and State v. Diana Saunders, State v. Derek Saunders, and State v. Mazzone, whose crimes took place after Brooks. Not one of those defendants was charged with capital murder. The timing of the decision to charge Brooks with capital murder only six months after Addison is troubling. It could be inferred that the State sought to insulate itself from an eventual appellate claim of racial discrimination brought by Addison, an indigent African American, by also charging a rich, white man with capital murder.

D. “Necessity”

The death penalty is not mandated in any case. No law makes it compulsory for the Attorney General to seek the death penalty, even if sufficient aggravating factors make a defendant death penalty eligible. The New Hampshire statute governing the procedure in capital murder cases contemplates a sentence of life without the possibility of parole as an alternative to the death penalty. RSA 630:5 IV states, “The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.” RSA 630:5 VIII states, “If a person is convicted of the offense of capital murder and the court does not impose the penalty of death, the court shall impose a penalty of life imprisonment without the possibility of parole.” Because the death penalty is not mandated, and because an alternative exists, we conclude that any decision to seek the death penalty is not based on “necessity.”

E. The “Intrinsic Nature” of the Crime

Even proponents of the death penalty concede that the death penalty should be reserved for “the worst of the worst.” If we believe that the decision to seek the death penalty was based on the “intrinsic nature” of the crime, then we must assume that each crime in which the death penalty was sought was more heinous, more depraved, or more morally reprehensible than any murder in which the death penalty was available, but not sought. In no way does it diminish the gravity of the murders committed by Brooks and Addison to ask whether other homicides were as morally reprehensible, or perhaps more depraved than the murders committed by Brooks and Addison.

In the years since the death penalty was reinstated, the State of New Hampshire has NOT sought the death penalty in a number of death-eligible homicides. Included among those cases are the “murders for hire” referenced earlier, murders that followed kidnappings (State v. Bruneau, State v. Carpenter, State v. Kim, State v. O’Leary), the sexual assault and murder of a ninety-one year old woman (State v. Haskins), the sexual assault and murder of a six year old girl (State v. Dale), and the sexual assault and murder of a four-year old girl and the murder of her mother and sister (State v. Bernard). This list is not exhaustive. There are a number of arguably death-eligible cases in addition to those listed.

The fact that some death-eligible cases were not charged as capital cases begs the question: Is there something about the “intrinsic nature” of the cases in which the State sought the death penalty that distinguished them as inherently

deserving of more severe punishment than the other homicides? In other words, is there something about the shooting of a police officer by a fleeing suspect that is inherently more heinous than the rape and murder of a four year old girl, and therefore more deserving of the death penalty? Surely, no one could conclude that the former is more wicked, wanton, vicious, vile or perverted than the latter.

Assessing the comparative depravity of dissimilar cases can be problematic. Far less difficulty arises when comparing the “intrinsic natures” of similar cases. The “intrinsic nature” of the Brooks case is essentially the same as other murder-for-hire cases. Michael Addison murdered a police officer while attempting to avoid apprehension. Gordon Perry murdered a police officer while attempting to avoid apprehension. Is the “intrinsic nature” of Addison’s crime different from the “intrinsic nature” of Perry’s crime? Perry is serving life in prison without the possibility of parole. Addison is on death row, awaiting execution. Some may believe that their respective sentences are appropriate. Others may believe that they both should have received life in prison. Still others may believe that they both should have received the death penalty. No matter which view one holds regarding the sentences, the inconsistent charges and sentences are cause for concern, and do not appear to be based on the “intrinsic nature” of the crimes.

If we conclude that the intrinsic natures of other homicides are as morally reprehensible as the homicides committed by Addison and Brooks, then we must conclude that the decisions to seek the death penalty through the penalty phase in those cases were not based on the “intrinsic natures” of their crimes. In our

view, the decisions to seek the death penalty for Addison and Brooks were not based on “necessity”; nor were they based on the “intrinsic nature of the crimes.” Therefore, we conclude that the decisions were arbitrary.

We also conclude that the decision to seek the death penalty is unfair. That is not to say that it is unfair only to those who are sentenced to death. When decisions are made "arbitrarily," the result is inconsistency, as we have demonstrated by comparing cases. Seeking the death penalty in select cases creates the impression that there is a hierarchy of victims. The vagaries of charging decisions create a sense among citizens that the process is erratic and unpredictable. When the Attorney General seeks the death penalty in an inconsistent and unpredictable manner, co-victims and the public are left to wonder whether the lives of some victims are valued more highly than others. This causes societal discord grounded in issues of fairness.

The legislature also asked the commission to address the question of whether *the decision to seek the death penalty through the penalty phase* is discriminatory. While there is no evidence that racial discrimination played any role in the prosecutorial *decision to seek* the death penalty in the case of Michael Addison, we cannot ignore the fact that the verdicts in the Briggs and Addison cases reflect the historic pattern experienced throughout the United States. Addison, an indigent African-American, was sentenced to death, even though the jury found that he posed no future threat. Brooks, a wealthy white man was given a life sentence, even though the jury found that he did pose a future threat. In 1972, the United States Supreme Court was troubled by racial disparity in the

imposition of the death penalty. (Furman v. Georgia, 408 U.S. 457 (1972).

"Unfortunately, the modern (post-*Furman*) death penalty continues to be pervaded by racial discrimination based on the race of the victim and, in some places, the race of the defendant. This has been shown in numerous studies."

(*Racial Discrimination in Implementing the Death Penalty*, Ronald J. Tabak, American Bar Association, 1999). New Hampshire's recent experience provides at least anecdotal evidence of the kind of discrimination seen in the rest of the country.

IV. Whether the current capital murder statute in New Hampshire properly encompasses the types of murder which should be eligible for the death penalty or whether the scope of the current capital murder statute should be expanded, narrowed, or otherwise altered, including an analysis of the types of murder covered by the current capital murder statute and any aggravating and mitigating circumstances listed in the statute.

For the reasons described in the Introduction and responses to Questions 1, 2, and 3, the committee members whose signatures appear below recommend that the death penalty be abolished in New Hampshire. It should be noted that while the commission had extensive discussion of the question of which crimes should be death-eligible, the topic of amending the statutory language regarding aggravating and mitigating factors was not addressed specifically.

V. Whether alternatives to the death penalty exist that would sufficiently ensure public safety and address legitimate social and penal interests and the interests of the families of victims of crimes.

The New Hampshire statute provides for the alternative sentence of life in

prison without the possibility of parole (LWOP) for capital murder. Currently, approximately 75 New Hampshire inmates are serving LWOP.

Testimony from Department of Corrections personnel indicated that public safety is not threatened by the presence of these inmates. When asked about the frequency of escapes at the state prison, Assistant Commissioner William McGonagle stated that the only attempted escapes from the Secure Housing Unit (C-4/C-5,) that he could recall took place in 1982/1983 when the Unit first opened; the two escapees were apprehended. The most recent escape from C-3 (medium security) occurred in 2003.¹⁷

Mr. McGonagle also spoke to the question of whether LWOP inmates pose a greater threat of violence within the state prison walls than do other inmates. He testified that there have been three homicides at the prison, none committed by LWOP inmates.¹⁸ Upon request of the Commission, Mr. McGonagle supplied written information comparing number of assaults by LWOP inmates with those by other inmates. During the 2005-March 2010 period, 547 assaults were report at the prison; of those, five (less than 1%) were attributable to LWOP inmates.¹⁹

Extensive data from other states indicate that inmates serving LWOP are not only less violent as a group than other inmates, but indeed are often among

¹⁷ See, *New Hampshire Legislative Study Commission on the Death Penalty*, 2010, (statement of William McGonagle at 4, March 12).

¹⁸ *Id.* at 5.

¹⁹ Written communication to the Commission from Assistant Commissioner William McGonagle, March 22, 2010.

the most compliant, non-threatening members of the prison population.²⁰

Some Commission members and at least one witness²¹ suggested that NH DOC policy allowing LWOP prisoners to work their way up to the general population is inappropriate and provides insufficient punishment for the crimes committed. However, DOC testimony speaks to the positive effects of integrating those LWOP prisoners who qualify for change of classification because of their behavior records and who often help maintain a calmer, more orderly prison environment.

The Commission also heard relevant testimony from a longtime county commissioner of corrections who emphasized the role of respectful behavior on the part of well-trained correctional officers in minimizing inmate violence.²²

Testimony from relatives of murder victims indicates that for many co-victims the protracted nature of death penalty cases, with their uncertainties and repeated court appearances, causes ongoing stress and anguish.²³ In some families, tension is exacerbated by differences among relatives in their attitudes about the death penalty. Finally, the arbitrary nature of the penalty can leave some families wondering why the murder of their loved one is treated differently from other seemingly similar crimes. The Commission heard no testimony from

²⁰ See, Robert Johnson & Sandra McGunigall-Smith, *Life without Parole, America's Other Death Penalty*, 88 *The Prison Journal* 328-346 (June 2008).

²¹ See, written correspondence to the Commission from Professor Robert Blecker, August 13, 2010.

²² See, *New Hampshire Legislative Study Commission on the Death Penalty*, 2010, (statement of Richard Van Wickler, Superintendent, Department of Corrections, Cheshire County, at 15, February 5).

²³ See, e.g., written testimony to the Commission from Laura Bonk, August 12, 2010.

co-victims indicating that the imposition of the death penalty brought closure or comfort to their lives.

In sum, the testimony and research materials received by the Commission support the proposition that the sentence of life without the possibility of parole is an alternative to the death penalty that satisfies the goals of maintaining public and intra-prison safety and that for many co-victims is an outcome more satisfactory than the imposition of the death penalty.

It should also be noted that the Commission heard compelling testimony from two veteran correction officials about the enduring and deleterious psychological effects of participating in the administration of the death penalty.²⁴

²⁴ See, *New Hampshire Legislative Study Commission on the Death Penalty*, 2010, (statement of Richard Van Wickler, Superintendent, Department of Corrections, Cheshire County, February 5 and Statement of Ronald McAndrew August 12.)

Individual Commission Member Statements

Walter Murphy
Philip Gaiser
James MacKay
Sherilyn Young
John Kissinger
John Jaskolka
Randy Hawkes
Amanda Merrill
James Reams & Charles Putnam
Theodore Smith
Philip McLaughlin
Bradley Whitney
Robert Cushing

Statement of Walter L. Murphy

For a number of years, the State of New Hampshire has been recognized as the safest state in the United States, most recently in April, 2010. Statistically, it has, per capita, the second lowest homicide rate in the country. (North Dakota is the lowest). During the time these statistics have been compiled, while the State of New Hampshire has had the Death Penalty for certain kinds of homicides “on the books,” it has not executed anyone for over seventy years, the most recent execution being the 1939 hanging of a convicted defendant who had raped and murdered his minor victim.

Since that time, the Death Penalty has remained dormant until the Death Penalty verdict entered in 2008 in the case involving the October, 2006 shooting death of a Manchester police officer, Michael Briggs. At the same time the case was pending, the State sought the Death Penalty in a case involving a Murder for Hire, which resulted in the defendant’s conviction of Capital Murder and the jury rejecting the Death Penalty, resulting in the defendant’s being sentenced to Life Without the Possibility of Parole. Those cases are both in the process of appeal; the results of the Commission’s study will have no effect on the ultimate outcome of those appeals, nor is there any intent on the part of the Commission to influence their outcome, although reference is made to them to place the overall issue in context without commenting on their merits.

Other cases of “Murder for Hire” and the killing of law enforcement officers have been prosecuted in the days since the ban on Capital Punishment resulting from the decision of the Supreme Court of the United States in 1972 (*Furman v. Georgia*) and the subsequent amendment to the N.H. Death Penalty statute resulting from the case of *Gregg v. Georgia* decided in 1976. None of the cases went to the jury on Capital Murder charges, but rather for First Degree Murder, resulting in the minimum mandatory sentence of Life Without the Possibility of Parole. There are currently over 75 individuals serving that sentence in our State Prison system.

It is within the sole province of the Attorney General utilizing unfettered discretion whether or not to seek the Death Penalty in any eligible case as provided in the Death Penalty Statute (RSA 630:1 and RSA 630:5). At the same time, the law requires that the decision to pursue it not be arbitrary or discriminatory. It is this issue, resulting from the inevitable tension between arbitrariness and unfettered discretion which causes much of the debate and disagreement. As Justice Blackmun put it in his dissenting opinion in the case of *Callins v. Collins, Director*, 114 S.Ct. 1127, 1129 (1994): The law requires that the Death Penalty be imposed “fairly, and with consistency, or not at all,” citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). He expressed “hope that the prosecution, in urging the penalty of death, will have exercised its discretion

wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.”

There are strong feelings on the part of both sides of the issue as to whether the Death Penalty should remain “on the books.” Those who favor its retention, with some amendments to either expand its scope or to place further limitations, for the most part, contend that the nature of the crimes defined in the statute are so heinous that anything less than the Death Penalty minimizes their gravity and that it is the sole manner to communicate society’s revulsion at the enormity of the criminal offense. Those who argue for its abolition rely upon a moral reluctance to engage in the killing of another human being, that mistakes are made for which no restitution can be made to an executed defendant and that the costs, both monetary and otherwise, outweigh its benefit to society.

Both sides of the issue bring a great deal of passion to the table and it goes without saying that both its advocates and opponents debate the issue in good faith. In short, both sides have valid arguments on their side and it does nothing to clarify the issue to resort to name-calling or lack of civil discourse.

The future of the Death Penalty in this State requires an examination of its purpose: To protect society from the “Worst of the Worst” murderers. The popular suggestion that all murderers should face the Death Penalty is not an option as the Supreme Court of the United States has made clear in numerous appeals resulting in such cases being set aside. It is the prerogative of the state legislature to enumerate what cases are the “Worst of the Worst,” and ultimately up to the jury after trial to determine whether to impose the Death Penalty.

The current statute enumerates those crimes which are “Death Eligible.” Among the crimes which purport to constitute the “Worst of the Worst” is the murder of a law enforcement officer or judge. Opponents of the Death Penalty point out that it is difficult, if not impossible, for a family member of a murder victim, not a police officer, to accept the fact that, while the murderer in one case can be charged with Capital Murder, the murderer in his case is not. To be viable the Death Penalty requires that it be applied fairly and that the public perceives it to be fairly applied.

Likewise with respect to those victims who may have been murdered in the course of an Armed Robbery; is the life of that victim worth any less than one who is killed during the course of a drug sale, the murderer in the latter case being eligible for the Death Penalty, while the murderer in the former is not?

During the course of our meetings, many family members of victims provided the Commission with their views toward the Death Penalty. Among them were family members of victims killed on September 11, 2001 at the World Trade Center, at the Federal Building in Oklahoma City, and of the young boy killed in Massachusetts after having been brutally assaulted by two adults who

lured him to their lair by offering him a bicycle. The vast majority of those who testified were in agreement: Abolish the Death Penalty. As for the argument made by its advocates that “closure” to the family victims is unavailable absent the defendant paying the ultimate penalty for his crimes, those witnesses rejected the concept that anything would bring closure to the victim’s family.

The very nature of a Death Penalty case requires a rigorous defense and, in the event of a guilty verdict, a long and arduous appellate process. It avails nothing if a vigorous defense is not mounted as the Supreme Court is likely to set aside a Death sentence if the defendant is not afforded competent counsel, both on the trial and appellate level. Thus, it becomes an extraordinarily expensive and time-consuming process, resulting in even further frustration on the part of the family of the victim. In some instances in other states which have rigorously pursued Death Penalties, the defendants have remained on “Death Row” for decades while they exhaust their appellate rights in both State and Federal courts.

All one must do to understand the complexity of the issues is to become acquainted with the wording of the statute, the myriad of cases which are reported in the media and official decisions of the various States’ Appellate Courts and the United States Supreme Court, resulting in a virtual legal maze. Also to be considered is the extent to which the debate continues nationally as well as within the State. Those who suggest there is a simple answer are ill-informed.

Besides the time expended to resolve the appellate issues arising from the complexity of the issue, there is also the question of the availability of State monetary resources. The Commission has been furnished with an accounting of the costs to date for the trial and appellate process in both cases in which the State sought the Death Penalty. Those costs do not include the expenses of the Superior Court nor for the preparation of the trial transcript. In any event, the expense to the State for both the prosecution and defense of the case involving the murder of the Manchester police officer is significantly more than it would cost the State to house the defendant at the State Prison facility for the rest of his life. While the expense to the state for the prosecution of the “Murder for Hire” case is significantly less because the defendant had self-retained private counsel, the costs to the state still far exceed what the costs would have been had it been prosecuted as a First Degree Murder case, including the cost of life-time incarceration.

Currently, our state courts are required to balance their budget allowed by the legislative branch by employees taking unpaid furlough days and by the cancellation of jury trials, making the courts unavailable despite the state constitution’s requirement of full access to the courts. It appears ironic that the state should be willing to expend over \$4,000,000, to date, for the prosecution of one criminal case. (Extensive additional costs are anticipated until the appellate issues have been exhausted which is likely to be years in the future). There is absolutely no justification for the claims made by some that it would save the State money to put the

defendant to death rather than incarcerate him for life. It should also be noted that at present the State has no facility to conduct an execution, the projected cost of which is estimated by the Corrections authorities to be over \$1.5 million.

It is not as if there aren't other uses to which the moneys saved could be put to good use for the benefit of those most directly affected by murder: the funding of social services for the surviving family members of victims; the funding for more extensive training for law enforcement for the prevention and detection of crime; the funding of the "Cold Case Unit" which currently relies on Federal Funds which are unlikely to be renewed (there are currently in excess of 125 unsolved murders in the State). How can the State justify such an expense for the prosecution of one case while leaving so many cases unsolved for lack of sufficient resources? Does not the family of a victim of an unsolved murder deserve some consideration?

There are numerous other considerations which must be taken into account as well: If one of the purposes of the Death Penalty is to provide for general deterrence as its advocates contend, there should be some persuasive evidence that general deterrence is its effect. The Commission was exposed to numerous studies on both sides of the issue. There is no persuasive evidence to establish the advocates' contention that the Death Penalty deters others from committing crimes that are currently eligible for the Death Penalty. Nor is there any evidence establishing that the Death Penalty deters any more than Life Without the Possibility of Parole.

Additionally, it continues to be the experience in other States where the Death Penalty remains in effect that mistakes are made and that some defendants have been wrongfully convicted and executed. While it is undoubtedly true that New Hampshire is "different", it is equally true that there remains the potential for similar results for which there is no possible restitution; because we are dealing with a human institution, there is no guaranty that the process will be error-free.

Basically, there is no assurance that the Death Penalty does what its advocates claim is its purpose; nor is there any reason to believe it is necessary for public safety. The alternative, that is, Life Without the Possibility of Parole, offers the same protection without the attendant risks of mistakes and without the vast expense both monetary and otherwise. Nor is there any rational justification for the view expressed by some that the abolition of the death Penalty insults the memory of murder victims or demonstrates a lack of respect or support for law enforcement, the judiciary, or the judicial process.

For those who insist that Justice can only be obtained in the "worst of the worst" murders by executing a defendant, it is pointed out that fewer and fewer defendants charged with Capital Murder are actually executed in the United States. In New Jersey, for instance, prior to its legislature pulling the plug on its Death Penalty statute in 2002, of 228 Capital Murder trials, 60 resulted in verdicts condemning the defendants to death; of the 60, 57 were overturned on appeal. Faced with these facts, the New Jersey Commission studying the Death Penalty recommended its demise.

It is readily understandable that as a result of the brutal and inhumane nature of some crimes, the public becomes justifiably outraged to the extent that it demands the re-implementation of the Death Penalty. Those who contend the Death Penalty is required to bring about Justice are confusing Justice with retribution which the State of New Hampshire does not recognize as a legitimate purpose of sentencing. (See, New Hampshire Constitution, Part 1, Article 18).

To establish that the Death Penalty is consistent with evolving society standards, it is necessary to ignore, or at least trivialize, the overwhelming evidence adduced before the Commission: there is virtual unanimity among church leaders in New Hampshire in opposing the Death Penalty for moral reasons; a vast majority of those who spoke out at our public hearings expressed strong views opposing the Death Penalty; those who had the responsibility of participating in actual executions from other States spoke about the devastating impact the process had on them and others involved in taking the lives of the condemned; the testimony of victims' family members recounting the unspeakable pain of reliving the events which resulted in their relative's death; and the public spectacle that occurs when an execution takes place.

In evaluating current societal standards, for the same reasons cited in the minority portion of this Report, fifteen states and the District of Columbia have given up trying to retain the Death Penalty, most recently New York and New Jersey in 2007 and New Mexico in 2009. No state which has voted to abandon the Death Penalty has reversed its decision although there have been legislative attempts in some states to do so.

The United States remains the only country in the Western Hemisphere to retain the Death Penalty and is the only industrialized country to do so with the exception of Japan. In 2009, the nations which have carried out the highest rate of executions were Iran, Iraq, Saudi Arabia, China (It will come as no surprise that actual figures are not available from China) and the United States.

During the course of the Commission's meetings and deliberations, it has become apparent to me that the Death Penalty presents an almost unanswerable question and I personally do not envy the task of the legislature in attempting to "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express those characteristics in language which can be fairly understood and applied by the sentencing authority..., " a task which Justice Harlan, writing for the Supreme Court of the United States in *McGautha v. California*, 402 U.S. 204,208 (1971), described as "beyond present human ability."

There can be no argument that the issues involved are complicated; there is no easily ascertainable answer. What is clear, however, is that those who seek to, in effect, reinstitute the death Penalty which has remained dormant for over 70 years, should have the burden to establish, by means of convincing, reliable evidence, that the Death Penalty is fair, necessary, and effective. In my view, they have not done so.

As Mr. Justice Blackmun stated in his afore-mentioned dissent in Collins, “...Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experience has failed...”

For all of these reasons, I have joined the minority of the Commission in urging the abolition of the Death Penalty.

PERSONAL STATEMENT OF SGT. PHILLIP B. GAISER, NHSP,
REPRESENTING THE NH TROOPERS ASSOCIATION

I represent the New Hampshire Troopers Association, and accordingly support the retention of the death penalty in New Hampshire. My support is not based solely on my position as a law enforcement officer, but also as that of a survivor of an attempted homicide. In July of 2008 I was shot three times while carrying out my duties. The man who shot me had a criminal record stretching back into the 1970's. This man had no regard for my life and lost his in the process of trying to take mine. Morally I have no issue with taking this man's life. Had I not survived and he did, it would have been my desire to see him put to death. This man was not trying to kill an individual that night; he was trying to kill a police officer.

Under the current capital murder statute the killing of a police officer qualifies for the death penalty. This should remain, not only for the protection of the individual police officer, but for the protection of society in general. Police officers are the only people who swear to uphold the laws of the state and provide the citizens with the protections they deserve. No one else willingly goes into unknown and dangerous situations for no other reason than a citizen has asked that they do so. The question was posed to the Commission as to whether the death penalty is a general deterrent. This question could never be answered scientifically. My personal opinion is that even among the criminal element, killing a police officer is a crime most are not willing to commit. I can only think that this is because it is universally known that killing an officer carries with it the penalty of death. The message that the State of New Hampshire needs to send is, if you kill the ones who protect us, we will certainly put you to death as well. To some this may seem barbaric and overly simple. Though New Hampshire is certainly a safe place to live it is not immune to violent and heinous crimes.

It is my personal opinion that the current death penalty statute needs to be expanded to include First Degree Murder. The recent events in the Town of Mont Vernon come to mind. Numerous people approached me after those killings stating that they hoped the suspects received the death penalty. All were shocked when I explained to them that under the circumstances they would not be eligible to receive such a sentence. The Zantop murders in Hanover several years ago were similar in their horrific nature. The people responsible for these crimes butchered these people without feeling. The people responsible for these crimes deserve the death penalty as far as I am concerned.

The Commission heard and discussed the huge sums of money spent prosecuting death penalty cases. I am not an attorney, and therefore will render just an average person opinion here. The appeals process is fair to no one. The amount of time it takes is ridiculous and would appear to serve more as a stalling tactic than an appeals process. I think that my opinion is reflective of that of the average citizen of New Hampshire. I do not have an answer to how this problem can be overcome, however the cost of true justice should never be said to be too much.

This is just my personal opinion as a member of the Commission who voted for retention of the death penalty in New Hampshire.

Phillip B. Gaiser
NH Troopers Association

Statement of James R. MacKay, PhD, MSW

The presentation on August 12, 2010 before the Commission by two former prison wardens, Ron McAndrew and Dr. Allen Ault brought attention to the psychological impact on correctional staff who participate in death row executions. This is an important and often overlooked concern about the trauma many experience in their work. A related concept, Compassion Fatigue, was discussed by Donna White, RN, PhD (1) at a November 2010 conference of the NH Suicide Prevention Council. She is a Board Certified Fellow of the American Academy of Experts in Traumatic Stress. The general public have become aware of the posttraumatic stress conditions suffered by those serving in the military that require significant psychological intervention. It is less well understood that health care and other professionals are also subject to emotional trauma experienced as a result of work experience. A particularly painful loss is the death of a patient by suicide or a murder followed by suicide. This can lead to Compassion Fatigue, a healthcare profession stressor. As a clinical entity it is closely related to Posttraumatic Stress Disorder.

The powerful statement by Ron McAndrew included significant detail that it allows for clinical consideration. The Diagnostic and Statistical Manual of Mental Disorders DSM(3) published by the American Psychiatric Association is the recognized authority in this country in the definition of mental illness. The diagnostic criteria for Posttraumatic Stress Disorder (309.81) states that for a person to qualify for the that diagnosis they will have experienced a traumatic event that included: "the person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury ----- and the person's response involved intense fear, helplessness, or horror.

Ron McAndrew presided over three electrocutions and five lethal injections. "One of the men whose execution I oversaw was cooked to death in a botched electrocution. I stood there just four feet away watching flames rise out of his head, smelling burning flesh, terrified."

A second DSM requirement is the re-experience of the traumatic event.

McAndrew continues, "I myself was haunted by the men I was asked to execute in the name of the State of Florida. I would wake up in the middle of the night to find them lurking at the foot of my bed."

A third DSM requirement is the avoidance of emotion involved in the trauma and a numbing of emotions.

McAndrew: "I wasn't the only one who was affected by the executions. In both Florida and Texas, I saw staff traumatized by the duties they were asked to perform. Officers who had never even met the inmates fought tears, cowering in corners so as not to be seen. Some of my colleagues turned to drugs and alcohol to numb the pain of knowing that a man had died by their hands."

A fourth requirement included specific symptoms such as difficulty sleeping, anger, concentration, hypervigilance and startle response.

McAndrew: "I turned to drinking and couldn't sleep at night." "And you know what? None of us deserve this! Being a corrections officer is supposed (to be) an honorable profession in the service of the public and yet the state dishonors us by putting us through these experiences."

Ron McAndrew, with the support of his wife, sought counseling to deal with his trauma. The fact that he could present this very personal account is a testament to his success in resolving repeated traumatic events. However, he adds that, "I still go to help ease the pain and find some comfort."

This is clear anecdotal evidence that some who participate in death row executions suffer from severe trauma. This adds to the long list of people who are harmed by murder and its retribution. Recognition by state governments of Compassion Fatigue and severe trauma is an important lesson to learn and hopefully will lead to system change. Change that will reduce the level of trauma. To quote McAndrew: "Having disgruntled, traumatized and depressed employees is a recipe for disaster."

"And you know what? None of us deserve this! Being a corrections officer is supposed to be an honorable profession of the public and yet the state dishonors us by putting us through these experiences. A correctional officer is not a soldier killing the enemies of his country. He's a public servant who participates in the most premeditated, carefully thought out ceremonial killing anywhere."

1. Dr. Donna McCarten White is the Addiction Specialist for the

Lemuel Shattuck Hospital, a Public Health Hospital for the Commonwealth of Massachusetts.

2. Ron McAndrew, Testimony before the New Hampshire Commission to Study the Death Penalty, August 12, 2010.

3. Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association, Washington, DC, Fourth Edition, 1994.

Statement of Sherilyn Burnett Young

I came to the first meeting of the Commission with an open mind, prepared to listen to the testimony and consider the evidence both for and against the death penalty. Unlike many around the table, I had no strong feelings either in favor of or against the imposition of the death penalty. At the end of an extensive, educational and emotional process of hearings and deliberations, I have concluded that I am opposed to the death penalty.

In my view, the evidence before the Commission did not demonstrate that the death penalty is a meaningful deterrent to the commission of murder. I am concerned that the decision to seek the death penalty may be arbitrary and unfair, despite the best intentions of the decision maker, and therefore cannot be constitutionally applied. I believe that putting a murderer to death through a state proceeding is not consistent with societal standards of decency – an overwhelming majority of those that testified were against the death penalty, and the death penalty has been rejected by most of the Western world. The religious community throughout New Hampshire is united against the death penalty. And the costs to seeking the death penalty are substantially greater than seeking a sentence of life without parole.

While there are several factors that lead me to oppose the death penalty, one above all was the testimony I heard from the family members of murder victims. To my great surprise, the testimony of these witnesses was overwhelmingly opposed to the death penalty. I believe that life without parole is an acceptable alternative to the death penalty, and far better serves the interests of the families of murder victims. It provides for relatively swift justice to be served, placing the murderer out of public view for the remainder of his life, and lets the healing process begin for the families who have themselves been victimized.

Because it was so powerful, I share below some excerpts of the family members' testimony we heard:

Andrea LeBlanc, a retired veterinarian, whose husband was killed on September 11, 2001, as a passenger on the second plane that was flown into the World Trade Center. She noted in her remarks opposing the death penalty:

When violent crimes occur, a just response is in fact required. The death penalty, however, is not about justice; it's ultimately about revenge. Justice and revenge are not the same thing. There are very few things that I know to be absolutely true. One of them is that violence begets violence. The death penalty is inherently violent.

Bess Klassen-Landis, whose mother was beaten, stripped, raped, and shot four times in her home, in Elkhart, Indiana. Bess and her sisters came home from school to the aftermath. The murderer was never found. For the next 37 years, she lived with symptoms of Post-Traumatic Stress Disorder. In her testimony, Bess stated:

I know what victim family members need to heal. They need to feel safe, they need to feel protected, we need to be able to talk about what we've been through to people who understand, support groups, therapy. ... And, we desperately need to be able to recover our own sense of humanity, our own goodness, to let go of feelings of hate and fear and failure, and to allow a place for real joy back in our lives. And, this takes time. But, it can't happen while we are wishing evil on another human being. We need to find ways to move on. I need healing in my life, not hate. ... The good news is that when I came to acknowledge my mother's murderer as a human being, I began to reclaim my own humanity and to heal.

So, what do we do with the murderer? Life without the possibility of parole keeps society safe. ...

I've heard it said that in New Hampshire, the death penalty is a moral issue, and shouldn't have anything to do with cost. I say, how we spend our money in government has everything to do with morality. That money could be used to get murder victim family members counseling. It could be used to help them rebuild their lives. We could put more police on the streets, we could offer educational opportunities to those in poverty, to reduce the root causes of crime. And, we could investigate cold cases like my own, to get dangerous people off the street.

The luxury of vengeance belongs to those in positions of power. It has no benefit to those of us who need healing. It does nothing to make society a safer place. When you execute the murderer, you take away all chances for the possibility of reconciliation, rehabilitation, and even forgiveness, which is the deepest kind of healing available to all touched by murder.

Carol Stamatakis, whose father was shot and bludgeoned to death in his furniture store in Ohio. It was an apparent robbery, a random act of violence, and his case is still unsolved; there were never any arrests. In her testimony against the death penalty, Carol stated:

I think when we talk about deterrence, we need to always remember that, that before we even get to the question of punishment, trial, etcetera, half go free. There's no justice. ... So, I think it's important that if we are looking at how to support the family of a victim, it's important to understand what family members experience, and the different ways that our criminal justice system is or is not meeting their needs. ...

[An] important issue is support. In our case, my mother was told over the phone about my father's death, and there was very little done to make sure that she was okay, or had the support she needed. ...

Another important need that family members of victims and victims have, is of competent police investigations, in all cases, which assumes training, financial resources, the technology to properly investigate, to gather evidence, enough investigators to be able to devote time to cases, so that they don't declare that they're cold too soon. ...

[In New Hampshire there are] 117 victims who are considered, currently, to be on [the "cold case"] list, or subject to investigation by that unit. But, they've been allocated \$1.2 million through July of 2013. However, the resources that had been dedicated to the two capital cases exceeds \$5 million. So, that's two victims versus 117. So, I think it is important that this commission do the math and think about the 117, and if the interest is in supporting victims. Think about how we're allocating our resources, and what implications that might have for public policy.

Anne Lyczak, herself a victim of attempted murder, and the widow of a murder victim. In her testimony to abolish the death penalty, Anne stated:

The death penalty does not decrease the grief of a victim's family. It does not make New Hampshire a safer place. ... The death penalty is an act of revenge; it's not an act of justice. ... By using the death penalty, we lower ourselves to the level of the gunman who shot my husband. ... Reliance on the death penalty obscures the true causes of crime, and distracts attention from the social conditions that contribute to crime. We should not teach the permissibility of killing to solve social problems. A decent and humane society does not deliberately kill human beings. ...

Laura Bonk, whose mother was shot in 1989 while visiting an elderly woman in Massachusetts suffering from dementia. The woman's son shot Laura's mother and sister (who survived) as they sat at the kitchen table. A murder with no motive, and no explanation. In Laura's testimony before the Commission on the anniversary of her mother's birthday, she stated:

The unexpected death of a loved one is always a tremendous shock; however, when the death is a homicide, the victims become part of our government that few people experience. ...

I remember the impulsive detectives who jumped to conclusions and ignored facts. I remember a trial that was postponed several times – each postponement created debilitating anxiety and stress. It was more than a year later before the trial began. We all wanted justice and we wanted it swiftly. The postponements only prolonged our agony. More than one year was a horrible wait. The length of time in capital punishment appeals must cause great harm to the victim's family. Each day of waiting for a trial is a day that is not lived fully – it is a day of stress and anxiety. ...

I would like to believe that our society has matured to the point of realizing that State sponsored killing is beneath us. The most important thing is to remove those who have murdered from the public arena and that can certainly be done with a long prison term.

[Three years ago I was notified] that the murderer died of natural causes in prison. There is a false belief that death brings closure to the victims. It does no such thing. The murderer's death does not bring your loved one back. It does not lessen the pain. It does not help the victims heal. ...

Reverend Mary Higgins, who provided outreach ministry to families of murder victims, testified as follows:

I, like many of you, thought that the families of murder victims would share a similar outlook on the need for those convicted of murdering their family member to be put to death in order for justice to be served, that somehow the death penalty would allow these families to move on with their lives with some degree of peace and closure. This was not often so, I found. And, as I began to know these families, I heard a much different story from many of them.

They too had felt, at the beginning, that they might finally start living again with the imposition of the death penalty. What I heard from them, though, with the exception of the shocking and immediate grief they felt at the time of the death, that many of them put much of their grief on hold until the trial and/or the appeal process was over. ...

Many told me that when the expected relief did not come at sentencing, then their shock was doubled, the shock of the original murder was doubled, and many times caused them to sink into a deeper grief after the sentencing than before it. ... They spoke of time wasted, the raw pain of suffering through the re-telling of the murder, time and time again, with the false sense that the result would bring healing to their troubled souls. ...

It seems rational to think that death would be the final justice. But, what I witnessed with these families was that they clung emotionally to the prospect of the sentence as their lifeline. ... The years waiting for trials and appeals had kept the wounds open. The family's emotions were often more fragile than they would have been if the sentence of life imprisonment without the possibility of parole had been exacted early on, and life could have gone on. ...

Ron McAndrew, a correctional officer who ran the State Prison in Starke, Florida, home of death row and the execution chamber, also offered deeply compelling testimony against the death penalty. He told of his own personal experiences, as well as the

suffering and trauma of correctional officers from around the country who worked as correctional officers in the death chambers, as follows:

... I wasn't the only one affected by the executions. In both Florida and Texas, I saw staff traumatized by the duties they were asked to perform. Officers who had never even met the inmates fought tears, cowering in corners so as not to be seen. Some of my colleagues turned to drugs and alcohol to numb the pain of knowing that a man had died by their hands.

We never admitted it at the time. That would have shown weakness in a job that demanded strength. But as I've spoken out over the years, many colleagues have contacted me. Sometimes they approach me after a speech I've given, noticeably drying tears from their eyes. Others call me, and we spend hours at a time on the phone, trying to process the horror that we went through.

These aren't weak men. These are good 'ol country boys who spent their life in careers that forced them to be hard. And yet we suffer now, crying through the pain and intense guilt.

I myself was haunted by the men I was asked to execute in the name of the State of Florida. I would wake up in the middle of the night to find them lurking at the foot of my bed. ...

Unfortunately, my experience is not unique. Prison officials from all over the country have come forward to tell the stories of their suffering and trauma. Many have quit because they just cannot participate anymore. Some have committed suicide, including two of the most recent executioners in New York. ...

Don't get me wrong. I'm no softy. I have no sympathy for rapists, killers, and those who prey on the most vulnerable. But life without parole can keep our communities and prisons safe. It's the most severe punishment you could give anyone – to lock them up in a little cage made of concrete and steel...with a steel cot, a mattress that is 3 inches thick, a stainless steel toilet without a lid, and to leave them there for the rest of their natural life. ...

Finally, I was influenced by the united opposition to the death penalty expressed by religious leaders from around the State. Of particular note was the testimony of **Rabbi Klein of Temple Beth Jacob** in Concord, New Hampshire, who has served as chair of the Justice and Peace Committee of the Central Conference of American Rabbis, and as Vice Chair of the Commission on Social Action of the Union for Reform Judaism. He noted in his remarks that:

Three thousand years ago, Biblical Judaism, as represented in the Hebrew Bible, imposed a death sentence for numerous crimes, ranging from willful murder and adultery, to violating the Sabbath and shaming one's parents in public. One thousand years later, the Rabbis had developed rules of evidence

so onerous that it was all but impossible to impose a death sentence. What happened?

Those Rabbis did not take their obligation to maintain the integrity of the Hebrew Bible lightly. Their decision to effectively eliminate capital punishment from the legal system grew out of a recognition that it was ineffective as a deterrent to crime, flawed by the fallibility that human error introduced into the justice system, and diminished the value of human life in their community. I believe that it is time for us, in New Hampshire, to recognize the wisdom of those conclusions.

To conclude, in light of the emotional toll the death penalty extracts from the families of murder victims and those charged with overseeing the executions, the lengthy and expensive trial and appeals process the death penalty demands, the lack of credible evidence that the death penalty serves as a deterrent to murder, the possibility that those wrongly accused may be put to death by the State, the concern that the decision to seek the death penalty may be arbitrary and fraught with political influences, and the availability of an acceptable alternative sentence of life without parole, I favor abolishing the death penalty in New Hampshire. I support the minority report of the Commission, which sets forth in greater detail the responses to the questions posed by the General Court. I thank my fellow Commissioners for a respectful debate of this important issue, as well as all those who took the time to testify or submit information, whether in favor or against, the death penalty. It has been an enlightening and remarkable experience.

COMMISSION TO STUDY THE DEATH PENALTY
Statement of John C. Kissinger, Jr.

I am not in favor of abolishing the death penalty. It is my belief that in very limited circumstances the death penalty represents appropriate punishment. Although I join in the majority report, my reasons for supporting capital punishment differ in certain respects from aspects of the majority report. Like many of those who spoke eloquently before the Commission, I share a personal belief in the sanctity of life. This belief must be balanced against the sincere and legitimate societal interest in “justice.”

In reaching my opinion, I draw upon my experience as a prosecutor working in the Attorney General’s office. In particular, I recall the pain and anguish suffered by family members of murder victims. I recognize that the family members of murder victims who testified before the Commission do not have a single unified view on the acceptability of capital punishment. The views of people of good faith can be found on both sides of this issue. As I listened to the moving testimony from the many family members of murder victims, I was reminded of the ongoing struggles faced by the survivors with whom I worked. The devastating consequences caused by the heinous act of murder cannot be overstated.

Reserving the death penalty for the few who society concludes to be the perpetrators of the most heinous forms of murder is measured and appropriate. It is important to point out the extremely narrow circumstances in which the death penalty statute has been applied in New Hampshire over the past seventy years. It is hard not to conclude from this experience that the death penalty has not been over utilized or abused by prosecutors. This limited application strikes a balance between the demands of society for just punishment for the perpetrators of the most serious offenses with a respect for the sanctity of human life.

I am not persuaded by the use of economic models to find a measurable correlation between the presence of a capital murder statute and avoidance of specific numbers of murders. That is not to say that I reject the notion of deterrence as a justification generally. Rather, I am not persuaded that a statistically sound correlation has been established. I do not believe that the perpetrators of such crimes weigh the consequences of their actions in ways even remotely similar to how most of us go through life.

The reality in New Hampshire is that recent efforts to try to eliminate the death penalty have been unsuccessful. I believe the reason it has survived these challenges lies in the depths to which many people of this state sincerely believe it represents a just punishment. While some proponents of the death penalty may want to see a significant expansion in its application, I do not believe that would be consistent with societal standards of decency. In my opinion, limiting the situations in which the death penalty applies is essential to meeting the evolving societal standard.

Because imposition of the death penalty is irreversible, we must remain committed as a state to conducting complete and thorough investigations in cases which might involve application of the death penalty. That commitment eliminates to the extent possible the risk that any innocent person is convicted of capital murder. To make sure the application of the statute is as fair as possible, the state must also continue to provide the resources necessary to ensure that all defendants faced with a capital crime are provided highly competent and trained defense counsel. This representation must include the ability to retain the necessary experts for both the guilt/innocence and sentencing phases of proceedings. These protections for people accused of capital murder should not be viewed as road blocks. They are important safeguards to make sure justice is served.

John C. Kissinger, Jr.

Statement of John A. Jaskolka

After spending more than 31 years as a law enforcement officer, with 18 years of that time assigned to an investigative unit, having investigated over 60 homicides, and having attended far too many police officer funerals, I strongly disagree with the abolishment of the Death Penalty in New Hampshire.

During many of those homicides I met with members of both the victim's family as well as the accused's family and know how such event affects their lives.

New Hampshire has and needs to keep the ultimate punishment when the ultimate crime is committed.

As Chief of Police I had the unfortunate experience of having a police officer killed in the line of duty. I know firsthand the tremendous loss that brought not only to the members of his family and the department but also to the public in general. I also know of the tremendous outpouring of support that the department received from the public, along with the support the department received for his killer's arrest and conviction and his being sentenced to death.

As you know, I speak of the case of career criminal Michael Addison. Addison went on a several day violent crime spree. Then, knowing that he was about to be arrested and was most likely going to spend most if not the rest of his left in prison, he decided take the life of a dedicated police officer to make good his escape.

Michael Addison committed the ultimate crime by taking the life of Officer Michael Briggs, a decorated military veteran, a dedicated police officer, a devoted husband and father of 2 young boys.

This type of crime deserved the ultimate punishment. Without the death penalty Michael Addison's crime, the killing of a police officer would have gone unpunished. Life in prison is not the ultimate punishment for the type of crime.

Now, let's take the case of the prisoner who is already sentenced to life without parole and has nothing else to lose. When this prisoner decides he does not like a particular corrections officer or another prisoner and decides to murder him, without the death penalty this person's crime would also go unpunished. You can only go to jail for life one time.

Let's not forget the premeditated brutal murder carried out during a home invasion in Mount Vernon. This type of crime deserved the ultimate punishment. I strongly believe this type of premeditated crime should be added to the Death Penalty statute.

Finally, let's take a look at the number of homicides that have been committed in this state in just the past few weeks. I don't believe that the violence is going away and will most likely get worst.

Unfortunately it's only a matter of time before such tragic events occur again. Perpetrators of such crimes must be dealt with and, therefore, I strongly believe that New Hampshire cannot do away with the ultimate penalty for the ultimate crime.

Individual Statement of Commission Member Randy Hawkes

For me, the decision as to whether the State should retain or abolish capital punishment turned on two questions:

- (1) Does the possibility of receiving a death sentence serve as a more effective deterrent to murder than a mandatory sentence of life in prison without the possibility of parole?
- (2) Can capital punishment be administered fairly, even-handedly, and justly?

The reader should know that I am not morally opposed to the death penalty. I believe that some people commit crimes so heinous that they do not deserve to live.

The reader should also know that my conclusions are not grounded in "evolving societal standards of decency". The general trend toward increased restrictions on the use of the death penalty is undeniable. Whether that trend is moving inexorably and inevitably toward abolition is an open question. Meanwhile, society's current standards are best reflected in the law as enacted by the people's representatives. We can no more objectively confirm the "rightness" or "wrongness" of those standards than we can confirm the moral "rightness" or "wrongness" of the death penalty itself.

Deterrence

I have already expressed my personal conclusions regarding general deterrence in the *Minority Report* at Question 1, section I.A. I wish to augment that section by stating the following:

If I believed that retaining the death penalty would save innocent lives, I would have voted to retain it. If I were convinced that the death penalty provided additional protection for police officers or any of the other public officials or private citizens covered by the capital murder statute, I would have voted to retain it.

Proponents *believe* that the death penalty might deter potential murderers; but they concede that there is no conclusive evidence that that is so. Nonetheless, they cite a number of econometric studies in support of their

position. Those holding a contrary view cite other, equally sophisticated econometric studies with countervailing conclusions. I urge legislators to be cautious about such studies.

The reasons that homicide rates fluctuate are even more complex than any of these econometric models suggest. Invariably, the studies draw causal inferences from correlations between variables. However, correlation is not causation. If econometric models were perfect, they would be able to predict what was going to happen in the future. Instead, they manipulate statistics in an attempt to explain what has happened in the past. Common sense tells us that a perfect measure of all causal variables is impossible. Therefore, legislators should not look to statistics to end the controversy regarding deterrence and behavior. Considering the disparity in the results of the various studies, New Hampshire's lawmakers cannot confidently draw public policy conclusions based upon *any* of them.

Question 3

I have already expressed my conclusions regarding the arbitrary nature of the decision to seek the death penalty in the Question 3 section of the Minority Report. I feel compelled to augment that section because I believe that the Majority Report's conclusion -that the death penalty, as applied, is not arbitrary- does not address the specific question presented by the legislature, which is whether the *decision to seek* the death penalty for eligible defendants is arbitrary.

In an effort to demonstrate that a defendant's *trial and verdict* are not arbitrary, the Majority Report lists the panoply of procedural protections afforded a defendant *after* the Attorney General makes the decision to seek the death penalty (Majority Report p.23-25). However, the Majority Report gives short shrift to *the decision*, itself.

In an effort to demonstrate that the initiation of capital charges is not arbitrary, the proponents imply that the Grand Jury has a hand in the decision-making. They state "At all times, it is the Grand Jury, representing the community at large, who (*sic*) makes the ultimate charging decision" (Majority Report p.25). In order for that statement to be true, the Attorney General would have to present *all* death-eligible murders to the Grand Jury

and seek the death penalty in *all* of them. The Grand Jurors could then return indictments in the cases they believed warranted the death penalty; and they could refuse to indict those they felt did not warrant the death penalty. If that were the procedure, the Grand Jury, acting on behalf of the community at large, truly would be the ultimate arbiter. But that is not how the system works.

By the time a murder case is presented to a Grand Jury the *decision to seek* the death penalty has already been made; and the case has already been initiated as a capital case. The Grand Jury can give its imprimatur to the Attorney General's decision to seek the death penalty by returning an indictment. However, the Grand Jury cannot intervene in the cases in which the Attorney General elects to NOT seek the death penalty. No matter how heinous the facts of a crime may be, the Grand Jury cannot initiate a capital murder indictment *sua sponte*.

For me, the fact that many death-eligible defendants are *not* charged with capital murder is evidence of the arbitrary nature of the charging decision. New Hampshire went more than seventy years without a death penalty trial. Since the Furman decision, ten consecutive Attorneys General completed their terms without overseeing a single death penalty trial. The fact that the eleventh decided to seek the death penalty twice within six months is not only a reflection of the arbitrary nature of the charging decision; it also can give rise to concerns that the decision might be driven more by personality or politics than by principle. The Attorney general's decision to seek the death penalty is unfettered, and thus susceptible to human limitations. I do not believe that any individual - even the most conscientious public official - can seek the death penalty in a manner that is evenhanded, non-selective, and non-arbitrary.

It has been an honor and a privilege to serve on this Commission. The issue is complicated, and the dispute not readily resolved. I hope that the members of the House and Senate who will vote on upcoming death penalty legislation will give as much thoughtful consideration to the issues as the members of the Commission who participated in the deliberations and the writing of the Reports. Thank you for the opportunity to participate.

Randy Hawkes

Statement of Amanda Merrill

I remember discussion among Senate members last session regarding the relative importance of a variety of legislative issues before us. In particular, I recall the remarks of a colleague who supported legislation to mandate the use of seat belts: “Let’s not waste time talking about repeal of the death penalty, when the seat belt legislation can actually save lives.” True, mandatory seat belts would undoubtedly save a greater number of lives than would repeal of the death penalty—and it would save the lives of innocent citizens, not murderers. Still, my response was that the debate about the death penalty was important for us to have, not because the outcome of such a debate would likely have a tangible effect on the lives of a significant number of New Hampshire citizens, but because I believe it is an issue that goes to the heart of who we are as a society and what we believe to be the role of our government, in this case our state government. Because of this belief, I welcomed the opportunity to serve on the commission that was the outcome of our deliberations on the death penalty repeal bill sent to us by the House.

My previous involvement with the death penalty was limited to my legislative role. As a five-term House member, I had voted against expansion of the death penalty and for its abolition. My votes were based on a personal sense that it was inappropriate, and even perverse, for the State to engage in a sanitized form of homicide and retribution, and that it reflected a harsh and deeply pessimistic view about the potential for remorse, rehabilitation, and human redemption. I hadn’t looked at data supporting or refuting the deterrent effect of capital punishment, hadn’t weighed the pros and cons of the alternative sentence of life in prison without the possibility of parole, and hadn’t studied the differences between New Hampshire’s capital crime statutes and those of other states. I did have the experience of witnessing the reaction of a close friend whose father was murdered and who became a leader among co-victims opposed to the death penalty—an experience that reinforced rather than formed my outlook. I had not experienced violence against any of my own family members, and while my grandfather was a police officer, he died before I had the opportunity to talk with him about the responsibilities and dangers of his job and whether that shaped his views on the death penalty.

My appointment to the Death Penalty Commission in 2009 offered me the chance to examine and reevaluate my beliefs. As evidenced by my support for the Minority Report, I remain opposed to the death penalty. Frankly, my position can best be described as rooted in my continued personal aversion to the idea of capital punishment and what I know, in a limited sense, to be the reality of the punishment-- now bolstered by the increased knowledge of the quantitative findings regarding the application and consequences of the death penalty that was afforded by participation in the Commission.

I will not restate the findings of the Minority Report. I agree with the conclusions that the death penalty does not serve as a specific or general deterrent, that it has been applied arbitrarily and unfairly, that it is expensive and diverts resources from victims’ assistance and cold case investigations, and that the alternative sentence of life in prison without the possibility of parole

is consistent with the goal of public safety and in no way increases instability and violence within our prisons. I am satisfied that the quantitative data presented to the Commission support those conclusions. I find myself looking, however, to the question posed to us that most resists quantitative analysis and that, at the same time, was at the center of much of the overwhelmingly anti-death penalty testimony we received: “Whether the death penalty in New Hampshire is consistent with evolving societal standards of decency.” I think that for many who testified against the death penalty, that question was likely revised internally to “Do I think the death penalty is decent (or moral, or civilized)?” Yes, we heard the supporting arguments about the anti-death penalty tenets of various religions, and we saw the lists of death penalty countries and non-death penalty countries—but I think that for many the question probably triggered a personal response, rather than one based on systematic evaluation of “societal standards”—either as reflected in current government or religious policy or as presented in public opinion polls. Personally, I am not swayed by the stance of one church or another, and I view polls with an understanding of the variables that can affect their outcomes greatly. Instead, I’m back to my original sense of the death penalty, described above, which has been with me as long as I can remember and that has been clarified by my participation in this Commission.

As someone trained in social science methodology, I was impressed with the anti-deterrence data presented to us. I was reassured by the testimony of those representing the New Hampshire judicial and corrections systems. I was moved by the stories we heard from co-victims who described the toll taken on them by the death penalty process. And I came away more appreciative than ever of the strength of belief of those who do not share my outlook on the death penalty (and fully admit that I cannot say with total certainty that I would not join in their outlook if confronted with the death of someone I love). But I close with a quote from Rev. Stephen Edington, who testified before the Commission and whose remarks speak to my core, unquantifiable concern: “I...have a difficulty with the statement the use of the death penalty makes when it says, in effect, that some human lives have become, by virtue of their actions, so irredeemable that the only thing to do is to dispose of them. Is this a statement we here in the State of New Hampshire really want to make?” I don’t. I believe capital punishment serves only to address a desire for retribution, and it does so in an unacceptably flawed way. Death *is* different. For me, the difference makes capital punishment unacceptable.

Statement of James M. Reams and Charles T. Putnam

Governor Lynch and the leadership of both houses of the New Hampshire Legislature deserve great credit for constituting this Commission in a way that effectively balanced the views of both those favoring repeal and those favoring retention of the New Hampshire Death Penalty statutes. We are grateful to Senator Larson and the Association of Counties for considering us for appointment to this study commission, to Judge Walter Murphy for chairing the sometimes contentious proceedings of the commission, and to Attorney James Cianci for his diligence and good humor in supporting the Commission's work. We are exceedingly grateful to all our fellow Commission members for the chance to engage together in this process.

Although we join the report of those Commission members who recommend retention of the New Hampshire death penalty statutes, we write separately to outline six additional considerations that enter into our decision to vote as we do.²⁵

Comment 1: The decency of the New Hampshire death penalty statute should be determined by the people of New Hampshire

The Legislature directed the Commission to consider, among other issues, “[w]hether the death penalty in New Hampshire is consistent with evolving societal standards of *decency*.” (emphasis added). A question arose late in the Commission's deliberations as to whether the study of the “decency” of the New Hampshire death penalty statutes necessarily includes consideration of their “morality.” That question was surprising to us, because it would seem that a recommendation that these statutes were not consistent with evolving standards of decency, would be a finding that the statutes were “indecent.” It seems difficult to dispute that such a finding would contain moral and ethical conclusions. It was also surprising because to our recollection no witness and no commission member had previously drawn a distinction between the “decency” and the “morality” of the New Hampshire death penalty statutes. Thus, we write here at some length about morality, despite the acknowledgement in the draft report recommending the repeal of the New Hampshire death penalty (“repeal report”) that this Commission could not determine the underlying morality of the New Hampshire death penalty statutes.

Perhaps “decency” only requires a consideration of what is “normal,” or “acceptable” policy, and the numerous religious leaders and other witnesses who testified before the Commission were simply engaged in pointing out to the Commission that the death penalty is “indecent” in the sense that it is unfashionable, like an outmoded suit of clothes, or impolite, like rude mobile phone behavior in a movie theater, without regard to any underlying moral precept or universal value, like the value of human life.

²⁵ We make these comments as private citizens, free from any current institutional or partisan obligations, in the hope that they may illuminate important public policy questions that those coming after us may have to revisit. These comments should not be attributed to our colleagues or employers.

We think not, however. We strongly doubt that the Legislature, the Governor and the members of this Commission would go to all the work involved in this process if they were not also concerned about the moral effects of retaining or repealing the death penalty in New Hampshire. We have heard far too many attacks on the death penalty as an *immoral*, not just *unpopular*, practice to believe that a defense of the morality of the practice is not required by the Legislature's instruction to this Commission to consider these statutes in the light of "evolving standards of decency."

Generally speaking, human societies have a strong desire to conform their laws to deeply held, "universal" moral principles. Individual legislators and citizens may feel that a particular law or rule is more legitimate and that difficult choices among competing proposed laws is easier when one of those laws is consistent with universal, moral truths. Even our own conformity with the law as individual citizens may be improved when we believe it is derived from moral truths that we share. As an example, most human societies, including our own, value human life very highly. Laws in those societies prohibit murder, and though those laws do not eliminate homicide, moral beliefs strengthen both the legal prohibition against taking human life and the social response to homicide crimes.

On the other hand, moral beliefs can be a problematic basis for law. For instance, whose morality should be the basis for lawmaking? In the modern world, there tends to be little confidence in any "universal" morality. Even those of us who seek such universality in our private lives through religious faith often find that on moral questions we are separated from others who worship differently, are members of a different social class, have had different educational experiences, or have a different racial, ethnic or national heritage. So, should society look to a particular religion, a particular ethnic group or some other group as the authoritative source of morality in determining which of its laws are "decent"?

Even if we could decide which group or groups within our society possess universal moral truths, how would we decide which particular New Hampshire laws should be retained or repealed based on a finding of what is moral or decent? Murder, assault and sexual assault might seem to be easy choices as "decent" laws, but should societies stop there? Not all do, of course, and even the white steepled churches on New Hampshire village greens attest to a time, now past, when people aspired to create a more perfect world by eliminating the gap between moral and temporal spheres of life. Why not base abortion, alcohol control, tax and education statutes on moral views? Not a few societies, and not a few groups, like members of the Temperance movement in a bygone era, have argued that laws on one or more of these subjects should incorporate their deeply held moral view. In fact, however, modern societies often do not look to moral precepts as guides for making law on those subjects because individual members of the society have profoundly different views about these topics, making it virtually impossible to identify what single moral truth establishes what is "decent" for society to legislate.

Finally, a profound difficulty with basing law on moral views is that they tend toward absolutist results. In this instance, if the death penalty statutes were found to be “not decent,” in a universal sense, there can be no compromise, no matter how carefully the Legislature works to restrict the statute to the most heinous crimes, no matter how many safeguards are incorporated into the process, because no “decent” society would choose to have even as narrow a statute as New Hampshire has adopted. While that is a politically convenient way to make a policy argument, it is not consistent with other values, like fairness, discourse and compromise, that democratic societies also treat as significant in the legislative process.

Is it wrong for individuals to have deeply held moral views, to use those views to guide their policy decisions or to urge others to share those views? Of course not. We deeply respect the moral views of those who would abolish the death penalty. What we reject is the conclusion that the only right view of what is “decent” requires the repeal of the New Hampshire death penalty statutes in their entirety, to the exclusion of all other possible conclusions.

Whose moral views ought to control law making then? In a democratic society, the answer is that the people’s moral views generally should control. If the death penalty is incompatible with “decency,” let the people of New Hampshire, say so in a free and fair referendum, with a fairly worded proposition, with fair participation by opponents and supporters of the statutes.

Perhaps it would be unwise to trust the moral intelligence of our fellow citizens on the question of whether it is morally right to retain the death penalty in New Hampshire. We think it would be wise.

In fact, we believe that “decent” people of all stripes in this State value life – the life of the murder victim and the lives of potential future victims as well as the life of the offender. Through their elected representatives they have enacted narrow statutes that comply with constitutional requirements. Those statutes reasonably and morally reflect the peoples’ view that in valuing the lives of homicide victims and offenders, the law prefers to spare the offender’s life in all but a very few rare instances of the most egregious homicides, homicides that assault the rule of law or violate deeply held notions of community integrity. Even then, our laws reflect a legal and moral conclusion that the offender’s life can only be taken after the painstakingly fair process outlined in the report of those who would retain New Hampshire’s capital murder statutes. Our children or grandchildren may strike the balance differently at a later time in our history, but we do not find that the balances currently struck between the lives of victims and offenders and between individual and public interests in existing New Hampshire death penalty statutes to be naïve, or “indecent” with respect to either existing or emerging moral truth here or in the larger world.

Comment 2: The State can Administer Capital Punishment in a Moral Fashion, Consistent with “Evolving Standards of Decency”

The question remains whether the State can administer capital punishment in a morally acceptable way. Even those of us who advocate the retention of New Hampshire’s capital murder statutes must acknowledge that a core question is whether it is ever moral for the

State to execute a human being. Reasonable people on this Commission whom we greatly admire disagree on the answer to that question of course.

The question whether the state can purposely take a life, of course, is answered very differently depending on one's views on a variety of issues. Committed pacifists, for instance, say that the State can never take life, even in war. Others, including our current President, and the national party platforms of both major U.S. political parties, answer the question differently, both with respect to taking the lives of those who lead terrorist organizations committed to the taking of innocent human life and the death penalty.

Like the death penalty, law itself is an expression of State policy and power over human life. New Hampshire law already authorizes the taking of human life in some situations. Killing in self-defense, in defense of others and by law enforcement officers under special circumstances are all examples of law-sponsored homicides. The law not infrequently views human life in contextual, not absolute terms. This contextual characteristic of the law leads us to reject the view that "decency" requires New Hampshire to categorically reject the death penalty for all places, all times, and all crimes.

The Commission heard evidence and argument that despite all the procedural protections and resources expended on capital cases, the New Hampshire death penalty statutes contain an infinitesimal risk of a wrongful death. That is literally true. Taken to the extreme, however, that logic would require the repeal of other statutes, like the self-defense statute too. The retained risk of erroneously causing the death of a human being that is inherent in maintaining New Hampshire's death penalty statutes is not unique to those statutes. In the context of self-defense for example, a person is legally entitled to kill another person without any judicial fact finding, any legal right of representation or any right of appeal for the deceased person. In fact, under our law a person may kill an innocent person if the killer reasonably believed (a much lower evidentiary burden than is applied in death penalty cases) that the deceased was about to use deadly force. RSA 627:4, II As a result, the likelihood of error that an innocent person will be wrongly killed is exponentially greater in the context of self-defense than it is in the context of the capital punishment. Nonetheless, even the most ardent death penalty abolitionists have not advocated the repeal of self-defense laws on the ground that they are "indecent" exercise of state power. Logic simply does not compel the Commission to find that this infinitesimal risk is "indecent."

For at least some members of the Commission, the death penalty statutes are intended to protect morally innocent lives from some kinds of egregious homicides. New Hampshire law shoulders obligations to protect innocent lives in many other contexts. Laws against drunk driving, for instance, are intended to deter risky behavior that endangers innocent third persons as well as drunk persons and their passengers. Drunken driving laws do not, of course, deter all drunk driving, but that's not the test for legislation in a democratic society – the legislature deems the trade offs between imperfect protection, imperfect deterrence and imperfect punishment to be worth the cost of maintaining these laws.

Isn't death different? It's one thing to convict an innocent person of first degree murder, where an erroneous verdict can be corrected on appeal and another thing for the State to take even an infinitesimally small risk of executing a person in the mistaken belief that the person is guilty of a capital crime. That is true as a factual matter. It does not, in our view, change the moral calculus. The State risks the death of morally innocent people in a variety of situations: in the way that it designs roads, in operating ski areas and even in the way that it provides health insurance to indigent persons, where a mistake or omitted case risks the loss of life. For example, it is well accepted that the failure to have a mandatory seat belt law or a mandatory motorcycle helmet law will result in a reasonably specific, predictable number of deaths or that raising the speed limit by 10 mph will result in the death of some specific number of innocent motorists or passengers, yet the New Hampshire Legislature has rejected proposed laws in these areas after balancing individual and social interests. In none of these cases is it the conscious policy of the State to inflict death on an innocent person, rather it is that the pursuit of other policies leads the State to accept a small risk of death. This balancing of important public policy goals is not "indecent," even when there is an infinitesimally small risk of the loss of innocent life.

Comment 3: The process of making a charging decision under the New Hampshire death penalty statutes is fair, rational and safeguarded from error

The repeal report and the statement of the Commission chair both attack the way that prosecutors decide whether to seek a capital murder charge and conclude that the death penalty statutes work arbitrarily. On the one hand, the chair argues that prosecutors are "unfettered" in their decision making and the repeal report argues that prosecutors are unduly constrained by political considerations, overwhelmed by the "pressures" of handling high profile homicides and are blind to the "intrinsic nature" of homicides. In our view, none of these arguments are persuasive.

First, discretion looms large for all persons who work in the criminal justice system. Law enforcement officers, defense counsel, prosecutors, judges and jurors all are given considerable discretion in how to carry out their assigned roles. Defense counsel, for instance, exercise discretion in how they guide their client with respect to important decisions about going to trial and waiving the Fifth Amendment privilege to testify at trial. Judges enjoy substantial discretion in ruling on many pretrial matters, ruling on evidentiary arguments and imposing sentences in many cases. Prosecutors have discretion to pick what charge, if any, should be pursued in a case. Some of the prosecutors who exercise discretion in charging capital murder cases in this state appeared before the commission, testified at length, provided documents and responded to questions, all in order to outline the internal and external processes that constrain their decision to seek a capital murder charge. Not the least of these constraints is the grand jury process and the extensive pretrial litigation both of which test the wisdom of any prosecution decision to seek the charge. While prosecutors enjoy substantial discretion in doing their work, we respectfully, but emphatically, disagree with the characterization of that process as "unfettered."

Second, the argument that prosecutors are too constrained by political ambition or outside political pressures does not bear serious scrutiny. The repeal report coyly (why repeat *unfounded* allegations of impropriety?) repeats a barb in a recent political campaign directed against a successful candidate for the U.S. Senate. ***Both*** candidates in that race were former homicide prosecutors. ***Both*** claimed the mantle of being “tough on crime.” ***Both*** candidates mentioned specific cases they prosecuted. See, “Hodes Campaign Announces Prosecutors for Hodes,” http://paulhodesforsenate.com/press_releases/details/2010-09-hodes-campaign-announces-prosecutors-for-hodes. Indeed, an impressive number of former homicide prosecutors lent their name to the unsuccessful candidate in that race, suggesting that their favored candidate would be as tough on crime as his opponent. ***Id.*** ***Both*** candidates also had significant involvement with criminal defense at one or another stage of their careers, see, “Both Candidates Boast Tough Stance on Crime,” <http://www.nashuatelegraph.com/newsstatenewengland/893380-227/both-candidates-boast-tough-stance-on-crime.html> (retrieved Nov. 26, 2010). To repeat even an “unfounded” claim that only one of the two candidates in that recent race was motivated by career aspirations during her time as Attorney General may inadvertently reveal more about ordinary party and political allegiances of the repeal report’s authors than it does about the death penalty statute or the level of professionalism among the members of the office of New Hampshire Attorney General.

Moreover, the argument that an Attorney General *could* respond to a particular case out of personal ambition or in response to preferences expressed by external constituencies, like the Governor, Executive Councilors, members of the press, members of the law enforcement community or other advocacy groups does not support the conclusion that the Legislature must repeal New Hampshire death penalty. The Governor and Executive Council could (and regularly does) insist that nominees for the position of Attorney General possess relevant experiences and attributes of character showing that they, like their predecessors, are worthy of being entrusted with the job of New Hampshire Attorney General. The Legislature could remain vigilant for evidence that outside constituencies inappropriately influenced the AG’s decision-making on a variety of matters, including the decision to seek a capital murder charge. The Legislature could require that certain procedures be followed in the charging process in capital cases. In short, even if the Legislature were to find the repeal report’s charges against prosecutors to be warranted, there are a variety of other measures to address those concerns other than by simply repealing the death penalty statutes in their entirety.

Third, the repeal report also makes a converse argument, that New Hampshire prosecutors are so overwhelmed by the enormity of what they do that they are prone to error. It is common knowledge in our state that the Attorney General’s Office prosecutes all first and second degree murder cases, and has for many years. It is beyond reasonable dispute that many non-capital cases generate inordinate public attention. Mr. Putnam worked in the Attorneys General’s Office from 1986 until 2001, under four Attorneys General. During that time the office responded to a substantial number of intensely scrutinized cases. His observation of dozens of colleagues as they worked on more scrutinized cases, was that the most important obligation they and he felt was to serve the public by working with law enforcement colleagues to build a case that would withstand the most searching scrutiny. His observation is that members of the Attorney General’s

Office do that work fully expecting such scrutiny to occur during pretrial, trial, appeal and collateral attack not just in capital cases, not just in sensational cases, but in every case. In sum, the public record of the body of work amassed by New Hampshire attorneys general and their staff credits the view that the process here in New Hampshire, though not perfect, is not inordinately prone to mistakes due to the unavoidable pressures of the work in sensational cases.

Finally, the repeal report suggests that even if prosecutors are not overwhelmed by their work they are blind to the “intrinsic nature” of the homicide cases they work on. See circulation draft Repeal Report page 33 (asserting that many “death eligible” cases” are not charged as such). Though we have great regard for all members of this Commission, We believe that the repeal report’s suggested repeal of the New Hampshire death penalty statutes because prosecutors do not recognize the “intrinsic” nature of these cases is a very superficial argument with obvious flaws.

The public record establishes that the behavior of New Hampshire prosecutors, over a very long span of time, demonstrates *appropriate* restraint in seeking to press death penalty cases. The repeal report misstates or overlooks important facts about the very cases it seeks to rely on to show that the Attorney General’s Office is erratic:

- State v. James Dale, 146 N.H. 286, 770 A.2d 1111,(2001) – The defendant was convicted of “reckless” second degree murder in the brutal sexual assault and killing of a four year old girl. “Reckless” second degree murder does not meet the statutory requirement that a capital murder be “knowing,” regardless of the “intrinsic” and profoundly reprehensible nature of that crime. Far from showing that prosecutors were indifferent to the life of a four year old child, the decision not to seek a capital charge in that case in all likelihood spared the taxpayers and the defendant the economic and psychological costs of a case where evidence of “knowing” homicide did not ultimately meet the constitutional burden of proof on a required element of capital murder.
- State v. Sanchez, 152 N.H. 625, 883 A.2d 292, N.H. (2005). The defendant in that case was convicted of first degree murder in 2005 in a murder for hire committed in 1989. As the repeal report itself notes, however, the capital murder statute in effect in 1989 was later found to be unconstitutional, and the New Hampshire Supreme Court had prohibited retroactive application of the amended statute, which applies today. It is similarly pointless to argue that the “intrinsic nature” of other homicides occurring before the capital murder statutes were amended in the wake of the Johnson Homicide justify a capital murder charge.
- State v. Perry (no publicly reported decision). We are aware that this case weighs deeply on the heart of a fellow Commission member whose son was the victim of that homicide. We hope to take care here to write in a way that does make his burden any heavier. We are also aware that the case touches upon concerns of some members of the law enforcement community. It is highly misleading, however, to portray either the decision to accept a guilty plea from Mr. Perry or to

reject one from Mr. Addison as examples of “arbitrary” behavior by prosecutors. In its discussion of what it terms “exonerations” the repeal report highlights the risk of basing convictions in capital murder cases on the testimony of cooperating co-defendants. By the time of any trial in the Perry case, the State would have been required to rely extensively on co-defendant testimony even to convict Mr. Perry of the homicide. It seems inconsistent at best, and disingenuous at worst, to argue on the one hand that an “evil” of the death penalty is that criminal convictions sometimes rely on co-defendant testimony and in the next breath to argue that prosecutors are “arbitrary” when they make professional decisions based on the strength of the evidence in the case before them, or when they choose not to expose the system to a higher risk of error.

The repeal report also blithely asserts that the Attorney General’s Office regularly overlooks capital murders arising from kidnappings. The intersection of kidnapping and capital murder statutes is a difficult area of New Hampshire law. It is not a law school hypothetical. Kidnapping requires more than just momentary confinement. It requires the additional element, like a purpose to terrorize or a purpose to avoid apprehension. Without these additional elements the crime is the lower offense of criminal restraint or false imprisonment, neither of which would qualify for a capital murder charge under New Hampshire law. In addition, there is an open question under New Hampshire law whether the confinement must be sufficiently distinct from the murder to justify a capital murder charge. One might expect that the actual evidence of confinement and the intent to commit a kidnapping would weigh in the balance, but the repeal report omits even a casual reference to actual evidence in these cases, choosing instead to urge a conclusion on the Legislature for a problem that the Commission itself did not actually study or take evidence on.

Taking other factors beyond the “intrinsic” nature of the crime, like the quality of the evidence of guilt, the quality of the evidence of aggravating and mitigating factors and potential legal challenges in making the charging decision is neither “arbitrary” nor “unfettered.” The process of considering those contextual factors helps ensure that prosecutors do not seek the death penalty in a weak or marginal case. That process serves the public and the justice system itself well by minimizing the risk of error and reserving the death penalty for the most obvious cases. In fact, if the Legislature adopted the logic of the repeal report it would also repeal laws against homicide, sexual assault and assault as well, because there are numerous instances in those cases where prosecutors “arbitrarily” seek lower charges than they believe the “intrinsic” nature of the crime would deserve, because they simply do not have the evidence they need to prove the higher charge. That would be unwarranted of course – judges, legislators and even defense counsel all *expect* professional prosecutors to use good judgment in exercising their discretion to press criminal charges, and no one expects, in these other contexts that prosecutors will behave in thoughtlessly aggressive ways.

With due respect to the intelligence and good faith of the authors of the repeal report, it is simply unwise, to conclude from the bald allegations made in that report that New

Hampshire prosecutors are too ignorant of the law or too blind to the “intrinsic nature” of the crimes before them to determine when to bring a capital murder indictment.

Comment 4: Life without parole is not an adequate alternative to the death penalty

The Legislature or the public could determine that life without parole (LWOP) is an adequate punishment for capital murder, though we agree with the retention report’s assertion that LWOP would dilute the punishment. We offer a short additional observation regarding our perspective on the comments of Professor Robert Blecker, who testified before the Commission

Professor Blecker argued that LWOP is not an adequate substitute for the death penalty for the most egregious homicides because it is too “easy” a sentence to serve. At first we recoiled from that argument. In the legal sense, the argument is simply erroneous, because the Eighth Amendment, international treaties and enlightened correctional management all require that conditions of confinement not be calibrated to produce the maximum amount of suffering for the inmate. We would not recommend that the Legislature interfere with the work of correctional officials in this regard. Furthermore, even if it had the desire and the law allowed it, the State probably does not have the financial resources needed to keep its prisons at a “low boil” without also unnecessarily endangering the lives of correctional staff and inmates.

There is another context, however, in which to place Professor Blecker’s argument. Given that it is impossible, consistent with modern law and administrative practice, to make LWOP a more punitive experience, can that sentence realistically be expected to express New Hampshire’s revulsion to the narrow category of most egregious homicides that it currently reserves for the death penalty? We believe that the answer is “no,” though we fully respect the opinion of those who come to a different conclusion.

Comment 5: Unrebutted evidence in the Commission record should not necessarily be interpreted as factually true

The Commission’s hearings were conducted like legislative hearings, not like a trial. Unlike some other states, no budget was available to fund the Commission, so it was unable to bring witnesses representing both sides of the death penalty debate to New Hampshire. Death penalty advocacy groups seeking to repeal the New Hampshire death penalty statutes, however, had access to funds and paid for several witnesses to come to New Hampshire to testify against the death penalty. As a result, the record of the Commission might suggest, based the sheer volume of testimony, that almost no one supports the New Hampshire death penalty statute. This limitation could have been ameliorated somewhat with advance preparation. Unfortunately, Commission members often had little advance notice about the witnesses who would be appearing to testify, so it was difficult to prepare questions for the witnesses in advance.

We honor the right of all persons to have strong personal opinions about the death penalty. There was a further difficulty, however, in the kind of testimony that we received. It was sometimes difficult to adequately discern which witnesses had received outside funding to attend the hearings and which witnesses may have had biases, conflicts of interest or personal histories that might skew their testimony in ways that might not support the Commission’s efforts to conduct a balanced inquiry.

For instance, several anti-death penalty witnesses related horror stories of experiences in the criminal justice system other states. A few claimed that large numbers of death row inmates were “exonerated” primarily by DNA evidence, usually because DNA was not available at the time of the original trial. However, in many of those cases defendants were granted new trials by an appellate court 20 to 30 years after the original conviction. Frequently the prosecution in those cases concluded that it could not go forward with re-trials because with the passage of time witnesses die, move, become infirm or refuse to cooperate. In sum, the chances of reconstructing a case decades after the original trial is highly unlikely, which is sometimes called “prosecution fatigue”. While the failure or inability of the state to retry a defendant under such circumstances rightly entitles the defendant to be treated as “innocent,” as if he had never been convicted of a crime, it does not mean that the original prosecution was a miscarriage of justice or that prosecutors failed to identify the correct perpetrator.

Mr. Steidl, who appeared before the Commission, is an example of one such defendant. After six unsuccessful appeals of his conviction in state and federal courts he was granted a new trial. The State of Illinois dropped the charges against him while saying Mr. Steidl was still the main suspect in the case. Unlike other States, Illinois actually has a Certificate of Innocence that a governor can issue if convinced that a citizen has been wrongfully convicted. Mr. Steidl has tried and failed to convince three separate Illinois Governors of his innocence and failed. Undeterred, he still proclaimed his innocence before the Commission. He is entitled to his opinion, of course, but we believe it would be unwise to accept his un rebutted testimony in the context of this study commission’s work, as fact.

In our view, it is unfair and misleading to use the term “exonerate” or “innocent” in connection with a case like Mr. Steidl’s. Furthermore, by paying travel expenses for witnesses like this it appeared to us that the Commission’s inquiry was being used as a kind of “test case” for national groups that are opposed to the death penalty in general, as it is applied in other states. Regardless of whether we agree or disagree with what occurs in other states, it seems to fundamentally disserve New Hampshire citizens to present this kind of testimony as if it reflected what actually occurs in this state or actually reflects modern New Hampshire law.

Comment 6: The New Hampshire death penalty statutes are not discriminatory as currently applied

There are a number of protected categories (usually related to a person’s immutable personal characteristics, like race, ethnicity, religious affiliation, sexual orientation, gender) and protected behaviors (like the exercise of First Amendment rights) that cannot legitimately form the basis for a decision to prosecute. There was no evidence and no argument that New Hampshire prosecutors base decisions to seek the death penalty on such factors.

A few witnesses pointed out that in the last two capital murder prosecutions an African American man, Mr. Addison, was convicted by a jury and the jury decided to impose the death penalty (that case is still on appeal) and a Caucasian man, Mr. Brooks, was convicted of capital murder but the jury declined to impose the death penalty. Some

persons assert that this is convincing evidence that New Hampshire jurors are racially biased. A sample of just two New Hampshire cases does not justify that conclusion.

First, there are numerous differences in the facts of those two cases that strongly distinguish them on non-racial grounds. The Brooks case involved a murder for hire. The Addison case involved the murder of a police officer. Mr. Brooks hired, encouraged and played a lesser role in beating a victim to death. Mr. Addison shot the victim himself. Mr. Brooks had no criminal record. Mr. Addison had a long, unbroken history of violent crime from his teenage years right up to the time of the murder itself. In fact, Mr. Addison had been convicted of attempted murder, assault, armed robbery, and many other crimes over the course of more than ten years.

Second, those who argue that New Hampshire jurors are racially biased apparently ignore the fact that the foreperson of the jury in the Addison case was an African-American. In this state the jury foreperson is responsible for conducting jury deliberations, referring questions to the judge, conducting polls of fellow jurors and reporting the result to the court. Therefore, in order to conclude that the Addison verdicts were racially motivated, one would have to assume that the foreman, a person with a leading role in proceedings, held racial animus against other African-Americans and encouraged or permitted a unanimous jury to base its decision on such improper motives.

Finally, there was no evidence, either anecdotal or quantitative, that New Hampshire juries return racially discriminatory verdicts in other kinds of cases. On this factual record it would be extremely unjust to repeal the New Hampshire capital murder statutes based on an *assumption* that New Hampshire jurors are racist and do not follow the facts and the law in capital murder cases.

A final comment on the deterrence argument.

The minority report suggests that there is no deterrent effect from the existence of the death penalty. Human nature begs to differ. In fact, the entire justice system is based upon a belief that human behavior can be deterred by sanctions. If behavior can not be deterred what is the justification for punitive damages in civil cases? If behavior can not be deterred why is it that our State Constitution requires the criminal justice system to “rehabilitate rather than destroy”? If there is no deterrence why have any drug treatment or educational programming at the prisons?

As the British Royal Commission on Capital Punishment (1948-1953) stated about deterrence on Page 20 of its Report “We can number its failures, but we cannot number its successes”. If the death penalty saves one innocent life, it can be called successful and worthwhile.

For all these reasons, we voted to recommend the retention of New Hampshire death penalty statutes.

James M. Reams

Charles T. Putnam

As the Representative of the New Hampshire Chiefs of Police Association to the Commission, I welcomed the opportunity to study and listen to the arguments put forth by both sides of the debate. The members of the commission were excellent representatives for the entire state and were dedicated to follow the mandates issued by the Legislature. It was an honor to work with such outstanding members of the community.

I also feel that the reader of this report should also review both the majority and minority report to fully understand the issues that the members of the commission considered and how we reached our final decision to a complicated issue.

Two topics were discussed that should be considered in the future that were related to the death penalty, although were not an issue that was required to be studied by the Legislature. But I feel that they were so important that they should be mention.

First, more assistance is needed to be provided the families of the homicide victim. Secondly, crimes against females should be studied further. While the state is attempting to be proactive in these areas, these issues should continue to be looked into.

I fully endorse the decision of the majority of the committee to maintain the death penalty for the most horrific of crimes and feel that the state has provided the best safeguards of all the other states we have reviewed. The Association of Chiefs of Police, as a professional association is strongly in favor of maintaining the status quo.

We do have a concern that as we see more violence and the two recent horrible home invasions in New England. The New Hampshire case in Mount Vernon where the mother was stabbed to death in her bed and the child was left for dead. The Connecticut case were the whole family was tortured and left to died tied to their beds , which ended in a death penalty conviction in that state. That the legislature needs to address these issues in the future.

Again, it was a pleasure to serve on the commission with such a dedicated group of individuals who gave up their time to serve the state of New Hampshire on this issue.

Theodore Patric Smith
Chief of Police
Lincoln NH

Comments of Philip McLaughlin in Support of The Abolition of Capital Punishment

When Senate President Sylvia Larsen asked me to accept appointment to this Commission, she asked if she could depend on me to keep an open mind. She was right to ask.

When I became Attorney General, I did so in good conscience with no qualms about my responsibility to enforce New Hampshire's Capital Murder statute. I did not then, nor do I now, have moral reservations about the right of the State to seek the death penalty for certain homicides. During my tenure as Attorney General between 1997 and 2002, some 80 homicides were investigated, the majority by State Police Officers assigned to the Major Crimes Unit. Most resulted in prosecutions by very capable assistants at the AG's Office. In the late 1990's I made decisions that led to the capital prosecution of Gordon Perry and considered seeking a capital indictment against Richard Buchanan.

In Commission proceedings during the past year, I listened to testimony, read volumes on the issue, conferred with my Commission colleagues and remembered my own experiences.

I was particularly attentive to the differing views of the three Commission members whose family members were murder victims, Renny Cushing, Brad Whitney and Bob Charron.

I found the testimony of certain witnesses to be particularly compelling.

Attorneys Jeff Strelzin and Will Delker from the Attorney General's Office, with whom I previously served, testified on June 18, 2010, and explained in great detail the rigorous examination that prosecutors make of each homicide case and the care they take in making prosecutorial recommendations to the Attorney General. Their testimony rang true with me. When I heard Jeff and Will speak, it took me back 10 years and renewed my pride in the professional staff at the Attorney General's Office.

Francis Christian, the Auxiliary Bishop of Manchester, presented testimony which recalled the long history of the Catholic Church's evolving position on the issue of capital punishment. Bishop Christian's testimony was consistent with the testimony of virtually all clergy who uniformly testified in opposition to the death penalty.

I found the testimony of Manchester Police Captain Gerald Lessard very compelling. He spoke of the loss of Officer Michael Briggs. He spoke in favor of capital punishment. He was not making an argument for its deterrent effect so much as he was reminding Commission members that the existence of capital punishment in New Hampshire operates, in the view of most law enforcement officers, as a shield from the aggression to which police

are so often exposed. It operates as a symbol of the community's solidarity with police officers who are sent in harm's way.

Retired Marlboro, New Hampshire Police Chief Raymond Dodge testified in Keene in September. He was eloquent in his opposition to the death penalty.

In listening to the many witnesses who testified, I found no evidence to suggest a difference among New Hampshire citizens in their revulsion to homicide. An inability to comprehend the thinking and emotions of a murderer is universal among citizens of all religious, political and philosophical persuasions. Law abiding citizens share a common understanding of our duties toward one another. We also understand that, in the face of violence, we have a duty to respond in a manner that expresses the values of our community. We strive to reach consensus regarding the purpose and limits of punishment.

In this regard, in assessing the Commission's work over the last year, and with the goal of keeping an open mind, I asked myself how New Hampshire citizens could achieve the most broad and sustainable consensus on a fit punishment for the most heinous murders.

I remembered the cases that so bothered me while I held office and the times when I expressed strong support for capital punishment and even supported its expansion. Even now, I am not morally opposed to the death penalty, but I have had experiences that make me doubt its wisdom. These experiences have brought me to the point of joining in the recommendation that capital punishment be abolished in New Hampshire. My reasons follow.

The summer of 1997 was perhaps the most violent in New Hampshire's modern history.

On July 3, 1997, a 6 year old little girl, Elizabeth Knapp, was found dead in her bed in her home just west of Concord. She had been raped and murdered. Richard Buchanan was identified by Elizabeth's mother as the murderer, arrested and charged.

On August 19, 1997, in Colebrook, Carl Drega shot and killed Troopers Scott Philips and Les Lord, Judge Vickie Bunnell and newspaper editor Dennis Joos. He wounded three more officers. Drega was killed that day by State Troopers who pursued him. Few mourned Drega's death.

Officer Jeremy Charron of the Epsom Police Department attended the Colebrook victims' memorial service. On August 24, 1997, Officer Charron was shot and killed in Epsom. Both Kevin Paul and Gordon Perry were indicted, Perry for capital murder. Detectives, prosecutors and I believed that Perry pulled the trigger.

Neither police officers nor prosecutors nor ordinary New Hampshire citizens are made of wood. These killings in the summer of 1997 enraged the community. We all were

moved to do justice. Carl Drega was dead, but not Buchanan or Perry. The demands to pursue the death penalty were loud and clear.

The evidence against Richard Buchanan was damning. He had opportunity; he lived in the same apartment as Elizabeth; his bedroom was next to hers; he was at home the night of Elizabeth's murder; his response to questioning was weak. Elizabeth's mother was interrogated aggressively by State Police homicide investigators who were well trained and experienced. They elicited a statement from Elizabeth's Mum. She identified Richard Buchanan as the man that raped and murdered her daughter. On that basis, I began to ponder a capital murder charge. A senior state senator came to my office, demanded Buchanan be charged with capital murder and guaranteed that the Legislature would appropriate any amount necessary to fund the prosecution. The facts were heinous and could have justified seeking the death penalty. I confidently approved charging an innocent man.

In the fictional world of television police shows, DNA solves many murders. In the real world, DNA is valuable, but is found and traceable in only a small percentage of murders. Thankfully, DNA evidence was available in the Knapp case. Test results were returned. Richard Buchanan, identified by an apparently credible witness, was guilty of nothing. James Dale ultimately was convicted of Elizabeth's murder. Had Elizabeth's murder occurred in 1987, rather than 1997, before DNA analysis, Richard Buchanan may have faced a different fate. Even in New Hampshire, where all police and prosecutorial professionals genuinely take great care to assure meritorious prosecutions, we (I) got it dead wrong. During my remaining years as Attorney General, Elizabeth's photo sat on top of a bookcase in my office, as a remembrance of an innocent child and as a reminder of my certainty of facts which were untrue and of the injustice done to Richard Buchanan.

Gordon Perry was indicted for capital murder. He had made incriminating statements at the Littleton Police station where he was interrogated following apprehension. It was a special case. The murder of a police officer is always a special case. Our police officers protect us in the middle of the night. They answer 911 calls. They intervene in domestic disputes and have the duty to investigate the occupants of suspicious cars, just as Jeremy Charron did, and it cost him his life. Both Perry and Paul were absolute menaces to society.

Officer Charron's murder justified seeking the death penalty, and Officer Charron in death had the right to expect the very best from the State's investigative and prosecution team, including me, but major mistakes were made. The incriminating statements made to the interrogators by Perry were suppressed by Court Order on July 23, 1998. The Judge's ruling included this statement:

In this country we place great value on the process by which criminal justice operates. We place great weight on individuals rights. These

are not new constitutional mandates but ones developed over the two hundred years of our constitutional democracy. These are mandates with which law enforcement officials are thoroughly familiar.

On August 19, 1998, counsel for Gordon Perry filed another pleading, a “Motion to Bar Testimony and for Further Remedies Because the State Withheld and Failed to Preserve Evidence of Gordon Perry’s Innocence.” As it happened, Kevin Paul made statements to his cellmate that suggested that he himself, not Perry, pulled the trigger of the gun that killed Officer Charron. A detective took a statement from Paul’s cellmate. The State had a Court ordered duty to promptly give defense counsel this “exculpatory evidence.” The State did not comply with the Court order. In consequence, on September 15, 1998, the Judge ruled:

In December 1997 and in later orders, I required the State to provide discovery to the defendant as soon as it received the information. Once the defendant established that the State failed to provide discovery of the (name omitted) statement as required, it was the State’s burden to demonstrate that the failure did not result from culpable negligence. The State has failed to do so.

The failure of the State to deliver the notes of (name omitted) interview with (name omitted) immediately, is disappointing. Its delay of one hundred days is inexcusable.

The Court then made rulings about the use of the cellmate statement that, in my judgment, seriously undermined the likelihood of the State’s prevailing in Perry’s Capital Murder case. As a consequence, with my approval, Gordon Perry on September 22, 1998, pled guilty to First Degree Murder. He was sentenced to life in prison without the possibility of parole.

In the Knapp case, the State originally arrested the wrong man. In the Charron case, the State failed to follow proper procedures. Such was my experience in dealing with cases which, but for unforeseen developments, might have led to capital murder trials, and perhaps to executions.

It should be noted that during my tenure in Concord, in fact, during the State’s modern history, since 1939, the State has successfully convicted almost all defendants who have been indicted for First Degree Murder. The ordinary prosecution is undertaken skillfully, with apparently universal public support. Such prosecutions occur routinely and have contributed to New Hampshire’s reputation as one of the safest states in the nation. With this in mind, I question: what compelling public good is served by supporting the death penalty, which violates the conscience of so many, when life without parole does not appear to violate the conscience of any?

I offer these additional thoughts against the backdrop of our State’s history of charging and executing murderers.

The Manchester Union Leader reported in a November 13, 2008, news item that since the first record of an execution in 1739, New Hampshire has executed 24 individuals:

- 6 in the Eighteenth Century
- 15 in the Nineteenth Century
- 3 in the Twentieth Century
- 0 since 1939
- 0 to date, in the Twenty-First Century

Individuals may differ in attributing the decline in executions to evolving standards of decency, or to the public's declining demand for vengeance, but the decline in executions is indisputable.

Against this history, on November 13, 2008, our representatives, the jurors in the Michael Addison case, hearing evidence in the murder of Officer Michael Briggs, convicted Addison, a young, poor, Black man, and sentenced him to death. A month earlier, on October 16, 2008, in the John Brooks case, our representatives, the jurors, hearing evidence in the murder of Jack Reid, convicted John Brooks, a middle aged, wealthy, white man, who acted with planning and deliberation, and sentenced him to life without parole.

I followed these two cases as closely as any outsider, with an insider's knowledge of legal process. Prosecutors diligently followed the law. Grand Jurors indicted. The cases were competently tried. The jurors in these two cases no doubt made conscientious decisions. Still, the disparity in results is stark and is a matter of grave concern to me.

The disparate results in the Addison and Brooks cases, coupled with the experiences I had more than a decade ago, in prosecuting the murders of Elizabeth Knapp and Jeremy Charron, have eroded my confidence in the wisdom of maintaining the death penalty in New Hampshire. The risk of injustice is real. Capital Punishment, although the preference of many, is not necessary. Its existence sharply and unnecessarily divides conscientious citizens of this State. I have come to believe that no matter how skillful and conscientious our police, prosecutors, judges and jurors, Capital Punishment takes us a bridge too far in our quest for justice.

Philip McLaughlin
November 30, 2010

To: State Rep's and Senators

From: Bradley Whitney, DP Committee Member

Date: December 01, 2010

Re: Added personal comments and points to be included with the DP commissions report

As the only member of this commission who's had a family member murdered (my father Robert "Eli" Whitney) and the killer (Gary Lee Sampson) sentenced to death I felt I should add a few of my personal feeling and points to consider as the laws pertaining to the death penalty are altered over time.

My upbringing has taught me that people need to take personal responsibility for their actions. When a crime is committed the penalty should best fit the crime. As we are a nation of laws and the government must meter out this punishment rather than the public taking upon themselves to seek vengeance though vigilantly justice we must make sure that the worst punishment is retained for the worst crimes and criminals.

I signed onto what is not the majority report to retain the death penalty as I feel we the people, as represented by our government, should maintain the options of death for those who truly deserve it. As the majority report needed refinement to obtain all 12 members I will detail below my feelings of things that I feel should be considered if this law is altered in any way in the future.

1. The death penalty is the ultimate punishment no matter what others try to tell us. It should be reserved for the worst crime (fit the crime). Many would point out that it's the easy way out and life without parole is worse. Life in our NH state prison where murderers can go about their new life inside the walls, playing in the yard or working in the shop once C3 general population status is reached is not worse than death. If it was then the murderers would not always seek to avoid the death penalty and would commit suicide in prison (and they do not). Death is the ultimate punishment and fits the worst crimes. We should consider keeping killers charged with capital murder but who get life in prison and not death in maximum security. Allowing these individuals to lead a life in prison where they are allowed more time outside that those of us who work in an office is a slap in the face to the victims and their families and outrageous. For the prison management they will just need to find another way to use a smaller carrot when using the carrot and stick to keep inmates of this type in-line.
2. There has been a lot of discussion on the charging decisions and how the Attorney General is the main gate keeper for what moves forward as a DP case and what does not. It seems there are mechanisms in place with the Grand Jury who could possibly reverse this (remember I'm not a lawyer so do your own investigation on this). At that same time what of the AG decides not to pursue a case and it clearly

should based on that AG's beliefs on the DP? Can some mechanism reverse those incorrect decisions is need be?

3. My feeling is that the current legislation and proposed changes has been a piece meal approach. It has been patched together as crimes are committed that jolt the core of the community. It would be better if we could properly define the worst of the worst and then give examples but these may not encompass them all and we may also need to define what murders are not considered capital murder. We should look at what we feel are heinous crimes, cold / cruel / torture, crime for sport (just for the fun of it), crimes against law and order (police, judges, jurors, etc.). The attitude of killer & vulnerability of the victim do matter. Although ones life should not be more valuable than another the truth is if people put themselves in this position it's not the same as a completely innocent victim. For example, if a drug dealer kills 3 of his rivals is that the same as a murderer terrorizing a community for months with an innocent victim each month? It is not! I think if the law can be rewritten and be constitutional that puts less emphasis on the type of crime (home invasion, car jacking, etc.) and more on more specifics like was this done by a long time criminal and was a serial killing, butchering by a hand held machete etc. that would be a better law.
4. Murder victim's families seem to be split on weather the death penalty is sufficient and I would expect this split is similar to that of the general population of our state and the U.S.. If the process was smoother (quicker) this would benefit the families of murder victims. The "quicker" can be accomplished by using the death penalty to enable plea agreements and speedy trials in some cases as well as limiting the funds and those cases where the death penalty are sought. I'm told that limiting funds (for both sides) is never going to happen but there must be a way. With less money only those worst crimes will be elevated to the DP and with less money and possibly schedules set along the way the timing would be quicker while not penalizing the representation of the defendant. If the entire process would take 5 years vs. 20 years I some states wouldn't that let victims families get on with their lives. We all know clear cases where a murderer who has committed the worst crimes taking 20 years until the ultimate sentence is a complete joke. We should try to right this wrong as it truly is ridiculous.
5. Our commission did not determine how many times the death penalty has caused a defendant to plead guilty if life was given and how much money and time this has saved or could save. In my fathers case this was a federal DP case but in NH the killer pleaded guilty saving a lot of time and effort on the states part. Another part of this was deterrence and I truly believe some murders are deterred and as they never occurred we will never know how many. As we all think this type of thing happens to someone else well I can tell you it can happen to you or anyone in your family and if there is a chance of deterrence for that one possible murder you need to consider this in any changes to legislation.

6. We had plenty of testimony suggesting that the money saved by eliminating the DP could be used for other programs like law enforcement, victims programs, and cold cases. While these seem like good programs I'm not sure why the money will not just be in a general pool and wasted. I do believe that the fight for moneys for victims and solving cold cases are important. Also, I suggest money could be used for training our citizens on self defense and the use of non-lethal tools such as pepper spay so they can protect themselves.
7. We all talk about what the victims want and in many cases it's hard to tell. I would not object to people having a "For" or "Against" statement in their Will's or on the back of your driver's license. For many this issue is a moral issue and we all have different beliefs here including victim's families. Why not give the deceased their say that will allow it to be weighted against all of the other mitigating and aggravating factors in a case.
8. As the federal government has called for the death sentence to be carried out against Sampson in NH (as MA does not have the DP) money should be sought from them to create a location to carry this out in this case and other cases we may encounter in the coming decades.

With this last statement for the commissions report I hope to spend less time thinking about this issue of the dead or those that should die and more on the living.

Bradley R. Whitney

Statement of Commissioner Renny Cushing

There were a number of family members of murder victims who appeared before the Commission to share their personal experiences with homicide and the criminal justice system. They expressed their opposition, as victims, to the death penalty. As I listened to their testimony, and as I do when I listen to the experiences of any family member of a murder victim, whether they support, oppose, or have no opinion on the death penalty, I felt a sense of shared experience, empathy, and solidarity. My father, Robert Cushing, Sr., was shotgunned to death in front of my mother in our family home two decades ago. For me, thinking about what should be done after a murder happens is not just an intellectual exercise; it's part of my life. The pain that is difficult to give words to, the emptiness and trauma, are part of my personal reality that I brought to the work of the Commission.

I served on the Commission with two other family members of murder victims: Bob Charron, whose son Officer Jeremy Charron was murdered in Epsom in 1997, and Brad Whitney, whose father Eli Whitney was murdered in 2001. Although we ended up disagreeing about the death penalty, their presence on the Commission was important to me. At times when a witness or a member of the Commission would embark on an explanation of legal intricacies or the theories and arcane points about statistical analysis, I would get a sense that somehow the reality of the murder of real people was getting lost in the process. It was good to know I was not the only person in the room who felt in his gut that this was not just a theoretical discussion. I thank both Bob and Brad.

The courageous voices of family members of murder victims the Commission heard from came from diverse backgrounds, and the details of their tragedies and losses were illustrative of the complexity of murder. They shared in common a belief as co-victims/survivors that the death penalty system is not something they embraced, and recommended its repeal. They differed in their reasons for opposing capital punishment, and the process by which they came their position was unique to each person. Among the voices the Commission members heard from were:

- Bud Welch, whose daughter Julie was killed in the bombing of the Murrah Federal Building in Oklahoma City, who opposed the execution of terrorist Timothy Mc Veigh;
- Gail Rice, whose brother Bruce VanderJagt was a Denver police officer killed in the line of duty, who spoke of her experience of a law enforcement family member opposed to the death penalty;
- Nancy Filiault, whose sister Kitty, her daughter Rachel and son Kyle were murdered during a brutal home invasion;

- Arnie Alpert, whose grandfather Charlie Alpert was murdered with a claw hammer in his hardware store;
- Andrea LeBlanc whose husband Robert Le Blanc was killed in the World Trade Center during the September 11th terrorist attack;
- Carol Stamatakis, whose father Emmanuel “Mike” Stamatakis was murdered in his store in 1997, a murder which remains unsolved;
- Sandra Place, whose mother Mildred Place was murdered in New Jersey, who shared the nightmare her family experienced as the death penalty elevated the killer in the media into a notorious prisoner;
- Laura Bonk, whose mother Laura Hardy was murdered and whose sister, who was shot at the same time as her mother, years later still struggles to recovery from years of surgery she underwent as a result of the shooting;
- Ann Lyczak, whose husband Richard Lyczak was murdered, and she and her son injured when attacked while riding in their car;
- Bess Klassen- Landis, whose mother was murdered when Bess was 13, and the killer never apprehended;
- Bob Curley, whose son Jeffrey was kidnapped by pedophiles, sexually defiled and abused and murdered and then his body was tossed in a river on the Maine-NH border. Bob shared the story of how after his son’s killing he led the effort to reinstate the death penalty in Massachusetts, but now opposes capital punishment;
- Margaret Hawthorne, whose daughter Molly Hawthorne MacDougall was murdered in Henniker on April 29th of this year, who, even as she awaits the trial of the man accused of killing Molly, found a way in her pain to bear witness in her daughters memory to ask the Commission to recommend abolition of the death penalty.

Clearly it must be recognized and acknowledged that those witnesses, and all family members of murder victims, are stakeholders in the discussion and public policy debate about what should be done, by society and individuals, in the aftermath of murder.

The presence of those family members and their sharing of their experiences was a gift to the Commission. It was, therefore, disappointing to me that when it came time for the Commission to deliberate about what we had learned over our year of work together and what our findings and recommendations should be, we failed to discuss or explore in any depth as a group the complicated and painful experiences

of people who have had family members murdered, and the individual and family journeys of survivors after lives had been shattered by a homicide.

I'd like to think that, despite the best efforts of Judge Murphy and all of us to keep on schedule, maybe we as a Commission just ran out of time for such a complicated discussion. In hindsight, perhaps it would have been more useful and appropriate for the legislature to direct the Commission to begin an examination of the death penalty by asking and answering this fundamental question:

“What are the needs of the surviving family members of murder victims?”

From my perspective, I believe there needs to be what Victim Advocate Susan Herman has identified as a parallel system of justice for victims of crime, including co-victims of homicide. Parallel Justice seeks to identify those who have been hurt by criminal acts, asks what the harm is the victim has suffered, and strives to take actions that mitigate and repair the harm that has been done to victims. This process need not be dependent upon the actions or status of the criminal offender, but is done out of a recognition of community responsibility and solidarity.

The two general areas that have the greatest impact upon victims of crime are the impunity of criminals and reparations for victims. Impunity means “exemption from punishment or loss.” Victims’ concerns about impunity focus on the actions of criminals, stopping those who engage in murder and criminal activities from committing further crime and holding them accountable for the crimes they have committed. Reparations for victims of crime focus upon those who have been harmed by homicide and other crimes, and attempt to address the harm to mitigate and repair the damage. Prioritizing ending the impunity of murderers and providing help and support to victims are important to the healing process a survivor of a murder victim must go through.

Testimony before the Commission demonstrated that, whether one supported or opposed capital punishment in theory, the reality of the death penalty system in practice is it just doesn't work. It doesn't make the public or police safer, it is prone to mistakes that snare innocent people, and it is not a good use of scarce public resources. And rather than being some kind of a balm for the pain for murder victims family members, it is both a perception and a reality that the death penalty is a distraction from meeting the overall needs of survivors of homicide victims.

It is clear from a look at our past that New Hampshire dislikes the death penalty. In the 380-year history of New Hampshire there have only been 24 executions, the last one being in 1939. Two of those executions are reminders of current concerns about the death penalty: wrongful convictions and race. Ruth Blay, put to death in 1768, was the last woman executed in the state, and was, according to some historical accounts, “wrongly” executed. Thomas Powers, executed for rape in 1796, was an African-American man who is the only person ever executed in the state for a crime that did not involve the murder of another person.

Capital punishment involves only a tiny fraction of murders committed in New Hampshire, and when the state decides to seek a death penalty it is a radical departure from the norm. As a rare event, seeking a death penalty in a murder case signals that, from the perspective of the state, all victims are not of equal value. The willingness to devote a disproportionate amount of resources to prosecute a death penalty case in comparison to other murder cases, calls into question the government's commitment to all victims. No matter what the Attorney General or the legislature or the media believe to be or attempt to designate as the most heinous homicide that demands a ritual killing of the murderer by the state, for every person who has had a family member murdered, the worst, the most painful, the most awful and heinous murder is the murder of their loved one. Whether intended or not, implicit in the decision to mobilize resources to seek a death penalty is the message to family members of murder victims where the death penalty is not sought that the life of their parent or child or sibling or spouse is somehow of less value than the life of the person for whose murder the state seeks an execution. There is a perception among many victims that this creation by government policy of a hierarchy of victims in some way damages to the memory of their murdered loved one.

The state of New Hampshire has demonstrated the willingness and resolve to spend millions of dollars from the state's general fund on both the prosecution and defense of a single killer charged with a capital murder. As the Commission met, the state has been in the midst of a severe budget crisis that has impacted justice and public safety--- police and prison guards are being laid off, courthouses are shuttered on some days, and crime victims calling the victims assistance commission are greeted with a voice message instead of a human being. And, at the same time the state has focused limited resources in pursuit of a death penalty, the state spends **no general fund** money to fund compensation for victims of crime, including surviving family members of homicide victims, and **no general fund** money on the investigation of cold case homicides.

The Commission heard testimony of how, just days after the arrest of Michael Addison for the murder Officer Michael Briggs, the Attorney General went before the Fiscal Committee and Governor and Council to request and be granted \$400,000 for the prosecution of that one homicide. This request was made under a little known provision of state law, RSA 7-12, which permits the Attorney General to obtain funds outside the regular budget process of appropriating state general fund dollars. In contrast to this, during the 2009 session of the legislature, the Attorney General's office **opposed** proposed legislation that would enable the Attorney General to obtain funds under RSA 7-12 for the Victims Assistance Commission to provide financial support for crime victims.

This raises the question: Why is it more important to the legislature and Attorney General of the state of New Hampshire to fund a death penalty prosecution than it is

to provide compensation and assistance for the families of murder victims and other victims of crime?

Instead of making it a priority to spend millions of dollars to pursue executing a prisoner, the legislature should prioritize policies of parallel justice for crime victims, with the funds being spent to pursue the death penalty and other resources redirected to focus on meeting the needs of murder victims' families.

To that end I make the following suggestions for action by the legislature to help further secure justice for crime victims:

- 1) Remove the sunset provision from the law that set up the Cold Case Homicide Unit and, by statute, establish the unit as a permanent operation, with its own line item in the state budget. It is currently scheduled to go out of existence on June 20, 2011.
- 2) As part of the state's commitment to find justice for all homicide victims, the legislature should provide an annual appropriation from the state's general fund equivalent to \$15,000 for each outstanding unsolved murder to support the work of the Cold Case Homicide Unit. Based upon the current list of approximately 115 unsolved murders, this would amount to an appropriation of \$1,725,000. a year, a fraction of the cost of a single death penalty case. I note that this figure is also less than the \$1,778,000. "to construct a lethal injection chamber to address the potential of future capital crime convictions" that is included Department of Corrections Comprehensive Master Plan of July 10, 2008 that was provided to the Commission.
- 3) Raise or eliminate the cap on the amount of money surviving family of homicide victims are eligible to receive from the Victims Assistance Fund. With a limit of \$25,000 on the amount of assistance a victim can receive, New Hampshire ranks near the bottom of states in their support for victims. The state of Washington, for example, caps compensation at 100,000, while the state of New York has no cap on medical expenses.
- 4) End the 2-year statute of limitations on when a survivor of a homicide victim must apply for assistance from the Victims Assistance Commission. The impact of homicide is long lasting, and sometimes needs of a victim, such as counseling for PTSD, do not manifest themselves until years after a murder. There is not a statute of limitations for prosecution for murder; there should not be a statute of limitations on providing help for survivors of murder victims.
- 5) Establish, fund and provide sustaining support for a support group for survivors of homicide victims. At the present time there is no existing group or network in the state where those who have been harmed by homicide can

find peer support and interaction. It is incredibly isolating to go through the experience of the murder of a family member, and the inevitable retraumatization that victims experience through the criminal justice system. It is axiomatic that the only person who can truly understand what that process is like is someone who has shared a similar experience.

- 6) Enact victims' leave law to require employers to give unpaid leave to their employees who are survivors of homicide victims to attend trials and other legal proceedings-- similar to the way we treat jurors. It is often important to a victim's effort to reclaim control over their life that victim gain information about the murder of their loved one and to bear witness by observing trials. Public policy should recognize this need for victims.
- 7) Recognize the impact of murder on families is long lasting and multi-generational and establish a fund to provide post secondary education to the children and spouses of murder victims.
- 8) Amend RSA 7-12 to authorize the Attorney General, when necessary to meet the needs of victims of crime, to seek and obtain funds outside the regular budget and appropriations process. As a matter of fairness and justice, it should be equally as important to ensure that crime victims receive assistance as it is to see that criminals are prosecuted.

In addition to diverting attention from the needs of victims, the death penalty system can sometimes operate ways that does some victims harm.

The death penalty can divide and damage families. Because "death is different", and because individuals have deeply held beliefs about the morality and utility of executions, unlike any other punishment the death penalty sometimes creates irreconcilable conflict amongst the surviving family members of murder victims. At a time when mutual support to weather a shared loss is so important, disagreement over the death penalty, instead of helping bring families together, creates fissures and compounds the tragedy of murder.

The death penalty fosters a hierarchy of victims. Depending upon one's perspective, family members of murder victims are often judged by others on their position on the death penalty, and get divided into categories of "good victims" and "bad victims." Sometimes family members of murder victims who oppose the death penalty have their love for their murdered family member challenged—opposition to the death penalty is taken as sign that that they really didn't love parent/sibling/child. Or, opposition the death penalty is taken as an implication that somehow the victim must be responsible for his or her own murder. Or, opponents of the death penalty are dismissed as either psychos or saints—crazy for not

wanting to see the person who killed their loved one executed, or uncommonly holy for this earth. In some instances opposition to the death penalty results in denial of status and rights under victims rights laws. Fortunately New Hampshire recently amended its Victims Bill of Rights to guarantee equality of treatment for all victims irrespective of their position the death penalty, but subtle prejudices against some victims based upon either their support or opposition to the death penalty remain.

The death penalty puts the media spotlight on murderers and makes rock stars out of killers. Efforts to seek and carry out the death penalty draw attention to the person facing execution. In the process, the life and good work of the victim can be ignored or impugned. In the minds of the public, executions turn offenders into victims, and they gain celebrity in their death. Everyone knows the name of Tim McVeigh, but no one knows the name of Julie Welch or any of the other 167 victims of his crime.

The death penalty creates additional victims. When a prisoner is executed, that person is often someone's parent, someone's child. The Commission gave no consideration to the impact the death penalty has upon the family of the condemned, but when the state carries out an execution his or her surviving family member become family of a homicide victim. The faces of that family are hidden by silence and shame, but we cannot ignore the reality that the innocent children of killers put to death are impacted ways society, as a whole, has never examined.

The death penalty is a false promise to victims. Proponents of the death penalty put forth the notion that an execution can be a solution to the pain experienced by a survivor of a murder victim. Offering up this promise of a ritual event represents a fundamental misunderstanding of a victim's journey. Healing is a process, not an event. When public employees take a killer from a prison cell, strap him on a gurney, putting a needle in his vein and pump him full of poison to kill him, that is not, as my retentionist colleagues on the Commission assert, and act consistent with a standard of decency, it is an act of despair. Executions do not accomplish the thing that victims want above all else—they do not bring back their murdered loved one.

The hardest thing for a victim to do is accept that they cannot change the past. But what they can do, what they need to do, is make decisions about the future, about how they lived their lives. Sometimes victims get so fixated on how their loved one died that they almost forget how their loved one lived. Our broken death penalty system, with its years of delays and other problems, holds a victim's focus, and society's' focus, on the killer, anticipating and expecting an event, the event, the killer's execution. If and when an execution occurs, another coffin is filled, but, sadly, very little changes for the victim. Their loved one is still dead. What sometimes ends up happening is the murder claims two victims: the person killed by the murderer, and the person who is the survivor of that person who was killed, whose life gets claimed by a system that is a set up for failure.

At the end of the day the death penalty is not about those who kill, it is about us. We, as a society, become what we say we abhor, killers. I don't want the state killing in my name.

As a citizen, as member of this Commission, and as the son of murder victim Robert Cushing, I view the death penalty not as a criminal justice sanction, but as a human rights violation. I aspire to live in a society, in a world where human life is cherished and the dignity of all is respected. As a parent I choose hope and optimism for the future, for my children and the world in which they will live, and I believe that history is on the side of those of us on the Commission who support repeal of the death penalty. New Hampshire can live without the death penalty, and I know the day will come when capital punishment is abolished.

Appendix

New Hampshire Capital Murder Statutes

Commission Biographies

Witness List

Legislative History Memo

TITLE LXII

CRIMINAL CODE

CHAPTER 630

HOMICIDE

Section 630:1

630:1 Capital Murder. –

I. A person is guilty of capital murder if he knowingly causes the death of:

(a) A law enforcement officer or a judicial officer acting in the line of duty or when the death is caused as a consequence of or in retaliation for such person's actions in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain;

(d) Another after being sentenced to life imprisonment without parole pursuant to RSA 630:1-a, III;

(e) Another before, after, while engaged in the commission of, or while attempting to commit aggravated felonious sexual assault as defined in RSA 632-A:2;

(f) Another before, after, while engaged in the commission of, or while attempting to commit an offense punishable under RSA 318-B:26, I(a) or (b).

II. As used in this section, a "law enforcement officer" is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or corrections institution, a probation-parole officer, or a conservation officer.

II-a. As used in this section, a "judicial officer" is a judge of a district, probate, superior or supreme court; an attorney employed by the department of justice or a municipal prosecutor's office; or a county attorney; or attorney employed by the county attorney.

III. A person convicted of a capital murder may be punished by death.

IV. As used in this section and RSA 630:1-a, 1-b, 2, 3 and 4, the meaning of "another" does not include a foetus.

V. In no event shall any person under the age of 18 years at the time the offense was committed be culpable of a capital murder.

Source. 1971, 518:1. 1974, 34:1. 1977, 440:1; 588:41. 1988, 69:1, 2. 1990, 199:1. 1994, 128:1, 2. 2005, 35:1, eff. Jan. 1, 2006.

TITLE LXII

CRIMINAL CODE

CHAPTER 630

HOMICIDE

Section 630:5

630:5 Procedure in Capital Murder. –

I. Whenever the state intends to seek the sentence of death for the offense of capital murder, the attorney for the state, before trial or acceptance by the court of a plea of guilty, shall file with the court and serve upon the defendant, a notice:

(a) That the state in the event of conviction will seek the sentence of death; and

(b) Setting forth the aggravating factors enumerated in paragraph VII of this section and any other aggravating factors which the state will seek to prove as the basis for the death penalty.

The court may permit the attorney for the state to amend this notice for good cause shown. Any such amended notice shall be served upon the defendant as provided in this section.

II. When the attorney for the state has filed a notice as required under paragraph I and the defendant is found guilty of or pleads guilty to the offense of capital murder, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted:

(a) Before the jury which determined the defendant's guilt;

(b) Before a jury impaneled for the purpose of the hearing if:

(1) the defendant was convicted upon a plea of guilty; or

(2) the jury which determined the defendant's guilt has been discharged for good cause; or

(3) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary.

A jury impaneled under subparagraph (b) shall consist of 12 members, unless at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

III. When a defendant is found guilty of or pleads guilty to the offense of capital murder, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in paragraphs VI and VII, or any other mitigating factor or any other aggravating factor for which notice has been provided under subparagraph I(b). Where information is presented relating to any of the aggravating factors set forth in paragraph VII, information may be presented relating to any other aggravating factor for which notice has been provided under subparagraph I(b). Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the

trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The state shall open and the defendant shall conclude the argument to the jury. The burden of establishing the existence of any aggravating factor is on the state, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

IV. The jury shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in paragraph VII, which are found to exist. If one of the aggravating factors set forth in subparagraph VII(a) and another of the aggravating factors set forth in subparagraphs VII(b)-(j) is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subparagraph I(b) may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this section, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subparagraph VII(a) is not found to exist or an aggravating factor set forth in subparagraph VII(a) is found to exist but no other aggravating factor set forth in paragraph VII is found to exist, the court shall impose a sentence of life imprisonment without possibility of parole. If an aggravating factor set forth in subparagraph VII(a) and one or more of the aggravating factors set forth in subparagraph VII (b)-(j) are found to exist, the jury shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, if the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of parole. The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

V. Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence of life imprisonment without possibility of parole.

VI. In determining whether a sentence of death is to be imposed upon a defendant, the jury shall consider mitigating factors, including the following:

(a) The defendant's capacity to appreciate the wrongfulness of his conduct or to

conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(b) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(c) The defendant is punishable as an accomplice (as defined in RSA 626:8) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(d) The defendant was youthful, although not under the age of 18.

(e) The defendant did not have a significant prior criminal record.

(f) The defendant committed the offense under severe mental or emotional disturbance.

(g) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(h) The victim consented to the criminal conduct that resulted in the victim's death.

(i) Other factors in the defendant's background or character mitigate against imposition of the death sentence.

VII. If the defendant is found guilty of or pleads guilty to the offense of capital murder, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subparagraph I(b):

(a) The defendant:

(1) purposely killed the victim;

(2) purposely inflicted serious bodily injury which resulted in the death of the victim;

(3) purposely engaged in conduct which:

(A) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(B) resulted in the death of the victim.

(b) The defendant has been convicted of another state or federal offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by law.

(c) The defendant has previously been convicted of 2 or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(d) The defendant has previously been convicted of 2 or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(e) In the commission of the offense of capital murder, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(f) The defendant committed the offense after substantial planning and premeditation.

(g) The victim was particularly vulnerable due to old age, youth, or infirmity.

(h) The defendant committed the offense in an especially heinous, cruel or depraved

manner in that it involved torture or serious physical abuse to the victim.

(i) The murder was committed for pecuniary gain.

(j) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

VIII. If a person is convicted of the offense of capital murder and the court does not impose the penalty of death, the court shall impose a sentence of life imprisonment without possibility of parole.

IX. If the jury cannot agree on the punishment within a reasonable time, the judge shall impose the sentence of life imprisonment without possibility of parole. If the case is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

X. In all cases of capital murder where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules adopted by said court.

XI. With regard to the sentence the supreme court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(b) Whether the evidence supports the jury's finding of an aggravating circumstance, as authorized by law; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

XII. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing.

XIII. When the penalty of death is imposed, the sentence shall be that the defendant be imprisoned in the state prison at Concord until the day appointed for his execution, which shall not be within one year from the day sentence is passed. The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

XIV. The commissioner of corrections or his designee shall determine the substance or substances to be used and the procedures to be used in any execution, provided, however, that if for any reason the commissioner finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances, the sentence of death may be carried out by hanging under the provisions of law for the death penalty by hanging in effect on December 31, 1986.

XV. An execution carried out by lethal injection shall be performed by a person selected by the commissioner of the department of corrections and trained to administer the injection. The person administering the injection need not be a physician, registered nurse, or licensed practical nurse, licensed or registered under the laws of this or any other state.

XVI. The infliction of the punishment of death by administration of the required lethal

substance or substances in the manner required by this section shall not be construed to be the practice of medicine, and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the commissioner of corrections or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law.

XVII. The governor and council or their designee shall determine the time of performing such execution and shall be responsible for providing facilities for the implementation thereof. In no event shall a sentence of death be carried out upon a pregnant woman or a person for an offense committed while a minor.

Source. 1974, 34:10. 1977, 440:2. 1986, 82:1. 1990, 199:3, eff. Jan. 1, 1991.

Hon. Walter L. Murphy, Chair

Walter L. Murphy retired as Chief Justice of the New Hampshire Superior Court in 2004 after serving as Associate Justice from 1983 through 2000. Prior to his appointment to the bench, he was engaged in the private practice of law in Plymouth, N.H. from 1962 to 1983. He is a former member of the Judicial Conduct Committee, the Professional Conduct Committee and member of the Pierce Law Center Faculty and served as Grafton County Chair of the Governor's Commission on Crime and Delinquency in 1968. Judge Murphy was the co-author of N.H. Civil Jury Instructions and the first recipient of the William A. Grimes Award for Judicial Professionalism from the N.H. Bar Association in 1999. In 2004, he was recognized by the National Football Foundation, New Hampshire Chapter, as the recipient of the Distinguished American Award and by the Manchester Bar Association with its Lifetime Achievement Award and served as a member of the faculty at the National Judicial College at the University of Nevada.

Judge Murphy is an appointment by the Speaker of the House.

Rep. Stephen J. Shurtleff, Vice-Chair

Stephen J. Shurtleff served three years in the US Army (1966-1969) as a military policeman and is a Vietnam veteran. In 1969 he joined the Concord Police Department. In 1974 he was employed by the US Dept. of Justice, US Marshals Service as a Deputy US Marshal. He spent three years in Cleveland, OH, before transferring to NH in 1977. He retired as a Supervisory Deputy US Marshal in 2000. He holds an A.A from the City College of Chicago and since retirement has been a substitute teacher in the Merrimack Valley School District.

In 2004 he was elected to the NH House and served on the Judiciary Committee. In 2006 he was named Asst. Majority Leader and in 2008 was named by the Speaker as Chair of the Criminal Justice and Public Safety Committee. In 2007 he was elected to the Concord City Council as a councilor at large.

Rep. Shurtleff is an appointment by the Speaker of the House.

Senator Amanda Merrill, Vice-Chair

Amanda Merrill is a first-term state senator representing District 21 (Dover, Epping, Lee, Rollinsford, and her hometown of Durham). She served in the New Hampshire House from 1989 to 1998, and was a House policy staff member during the 2007-08 biennium.

Senator Merrill has lived in New Hampshire for over forty years, graduated from the University of New Hampshire, and received a Ph.D. in experimental psychology from Dartmouth College. She taught psychology in the Massachusetts university system and worked as program associate in the undergraduate research program at UNH.

Her community and non-profit service has included membership on the Durham Planning Board and the boards of the UNH Alumni Association, the Audubon Society of New Hampshire, and the Granite State Conservation Voters. She also worked as visual arts coordinator for the Mill Pond Center for the Arts.

Senator Merrill is an appointment by the President of the Senate.

Theodore Patric Smith

Chief Smith is the Chief of Police of Lincoln NH and is the immediate past president of the NH Association of Chiefs of Police. Chief Smith was the Chief of Troy NH prior to taking his post in Lincoln in 1999. He served with the NH State Parkway Police and retired from the Metropolitan Police, Washington DC where he held various positions, including Special Operations Officer – Tactical, Detective in the Major Violators unit of CID and a patrol supervisor in Georgetown.

He serves on a number of committees and associations and holds the position on the Executive Board of the New England Association of Chiefs of Police as Sgt at Arms. He sits on the National Criminal Justice Information System working group that evaluates and recommends changes to the National Criminal Justice computer network. Chief Smith has an undergraduate degree from Gannon University in History and a Masters in Public Administration from Norwich University. He has attended numerous schools in his field of expertise.

Chief Smith is an appointment by New Hampshire Association of Chiefs of Police.

Robert Charron

My family and I have lived in Hillsborough, NH since 1977. My wife, Fran, and I have five children all of which were raised and educated in Hillsborough. Our middle child, Jeremy, graduated high school and enlisted in the USMC. This had been a goal of his since a very early age; for I had served in the USMC during the 60's and he was always impressed with the history of the United State Marine Corps. Following four years of service he was honorably discharged and began his career in law enforcement. Tragically in 1997, while on duty as a police officer for the Town of Epsom, NH he was shot and killed.

Over the past forty or so years I have been very active in community affairs. While residing in Pittsfield, NH I served two terms on the Board of Selectmen. I participated in Boy Scouts as a leader and participated with the Pittsfield Players both as a performer and in set construction. In 1977 our family moved to Hillsborough where I continued my career in banking with the Bank of New Hampshire. I had served as a loan officer for the Pittsfield National Bank for four years prior to moving to Hillsborough.

In Hillsborough I have served three terms on the Board of Selectmen, two terms on the Hillsboro-Deering School Board and currently the Treasurer for the Town of Hillsborough.

I have resided as President/Chairman of the Hillsborough Historical Society, Chamber of Commerce, Hillsborough Balloon Festival, Big Brothers and Big Sisters of the Monadnock Region and a number of capital improvement committees. Over the years I have served as treasurer for most of the organizations mentioned above as well as others. I have served as Finance Officer for the local American Legion Post and currently am serving as Financial Secretary to Smith Memorial Church in Hillsborough.

In 2004 I retired from banking after 30 years of service as a loan officer. Since my retirement I have continued to be very active in the community serving on a number of boards and assisting various non-profits with their programs. I currently sit on the board of directors of Farmsteads of New England and serve as its treasurer.

Mr. Charron is an appointment by the Governor.

Stephen J. Arnold, Sr.

Detective Steve Arnold recently retired from the Portsmouth Police Department after serving 23 years and is a veteran of the United States Air Force. He is a Past President and current Secretary of the New Hampshire Police Association, a group representing the rank and file of all New Hampshire law enforcement. Up until his retirement, Steve served as a gubernatorial appointment to the New Hampshire Retirement System's Board of Trustees representing police officers. He is the recipient of numerous awards, decorations and proclamations throughout his law enforcement career, including twice being recognized with the United States Congressional Law Enforcement Award. Mr. Arnold is currently employed by the New England Police Benevolent Association serving as the Legislative Director for the State of New Hampshire.

Mr. Arnold is an appointment by the New Hampshire Police Association.

Bradley R. Whitney

Mr. Whitney is a native of New Hampshire and a graduate of the University of New Hampshire with a degree in Mechanical Engineering. He has been selected by the Governor to represent the families of murder victims. His father, Robert "Eli" Whitney, was murdered in July of 2001 in Meredith, New Hampshire while checking in on a friend's cottage. Eli was very involved in local Concord politics, served once as a city counselor from Penacook, and otherwise was involved in trying to better the community. He was 58 at the time of his passing -- just having semi-retired as a local contractor. He was a loving husband, father, and friend to many. Eli was always willing to help others. He believed in neighbor-helping-neighbor and personal responsibility and is truly missed each any every day by many.

His murderer, Gary Lee Sampson, had brutally stabbed two men, 19 and 69 years of age, that week in separate carjacking incidents before finding a cottage in New Hampshire to stay for the night. That morning when confronted by Eli, he strangled him in a very heinous manner. He later pled guilty and received life in prison in New Hampshire as a formality as he had pled guilty to Federal car jacking charges in Boston. In 2003, he was sentenced to the death penalty and the judge had determined that it should be carried out in New Hampshire.

Brad is honored to be on this commission. Knowing that it is very hard for victims to constantly relive these tragedies, he will try to show others how this kind of tragedy affects the innocent.

Mr. Whitney is an appointment by the Governor.

James MacKay

Jim MacKay has served in elective office in Concord for twenty-two years: twelve years on the Concord City Council, including four years as the Mayor of Concord, and ten years as a member of the New Hampshire House of Representatives. In the Legislature, Jim served as Chairman of the Committee on Legislative Administration, Vice Chairman of the Committee on Health, Human Services and Elderly Affairs, as a member of the Joint Legislative Committee on Administrative Rules and as a member of the Health and Human Services Oversight Committee.

Currently, Jim is Chairman of the New Hampshire Mental Health Commission, Chairman of the New Hampshire Suicide Prevention Council, Chairman of the TANF (welfare to work) Task Force and Vice Chairman of the Merrimack Valley Assistance Program (HIV/AIDS agency) and is a member of Touch the Future, the philanthropic committee of the McAuliffe-Shepard Discover Center. He is a member of the Children's Lobby in Manchester and is a board member of Family Strength.

Jim is a graduate of Tufts University with a BA and MA degrees and of Boston University with an MSW. He has a PhD from Union Graduate School and five years of post doctorate study at the Washington (DC) School of Psychiatry.

Jim came to New Hampshire in 1960 to become the Director of the State Alcoholism Program and later as Coordinator of Community Mental Health Program, NH Division of Mental Health. Jim then worked for thirty-two years as a psychotherapist in private practice in Concord.

He has received numerous awards and citations for both his professional and political work. He served as a Major, MSC, in the US Army Reserve.

Dr. MacKay is an appointment by the New Hampshire Mental Health Council.

Charles T. Putnam

Charles Putnam is Co-Director of Justiceworks, a research institute at the University of New Hampshire and he is a Clinical Associate Professor of Justice Studies at the University of New Hampshire. Professor Putnam's research interests include the prosecution of crimes against children, the effective use of educational technology, the interplay between First Amendment and campus disciplinary codes and the evolving issues of personal privacy versus public access to information held by government agencies. He teaches a variety of law related courses to undergraduate students, ranging from overviews of law and society to more specialized courses in family law, legal issues related to children and comparative law. Professor Putnam joined Justiceworks in December, 2001 after working for 15 years as a member of the New Hampshire Attorney General's Office, where his last two assignments were as chief of the Homicide Prosecutions Unit and the chief of the Criminal Justice Bureau. Before that he served as a homicide prosecutor, chief of the Consumer Protection and Antitrust Bureau and an advisor to state boards and agencies. Professor Putnam is a graduate of Yale University and the University of Connecticut School of Law. He served as law clerk to the Hon. Thomas Meskill of the U.S. Court of Appeals for the Second Circuit from 1985-86 and served in the United States Peace Corps in Ecuador, South America from 1979 until 1982.

Professor Putnam is an appointment by the President of the Senate.

Larry Vogelman

Larry Vogelman is a Director in the firm of Nixon, Raiche, Vogelman, Barry & Slawsky, P.A. He has been practicing law in New Hampshire and New York for over thirty-five years. His present practice is primarily in the areas of criminal defense and plaintiff's civil rights law. Larry has been representing persons accused of crimes for his entire legal career. He has tried over two hundred cases and handled a like number of appeals in state and federal courts across the country. Larry has handled a number of capital cases and presently is lead counsel representing a death row inmate in Georgia and is assisting in another matter in California. When New York had a death penalty, he was qualified as lead counsel to represent indigent defendants in capital cases in New York.

For fifteen years he was a member of the faculty of Benjamin N. Cardozo Law School of Yeshiva University in New York. He was also in private law practice with another professor, Barry Scheck. He and Professor Scheck created the clinical program at Cardozo and Larry assisted Professor Scheck and Peter Neufeld in the creation of the Innocence Project. Larry left New York in 1994 to become Deputy Director of the New Hampshire Public Defender. After a few years at that position, he entered private practice, first in Exeter, New Hampshire, and now at his present firm.

Attorney Vogelman is an appointment by the New Hampshire Bar Association.

Philip T. McLaughlin

Philip McLaughlin is an attorney in private practice in Laconia, New Hampshire. Mr. McLaughlin was the Belknap County Attorney from 1979 through 1981 and the Attorney General of the State of New Hampshire from May 1997 until December 2002. He is a graduate of Holy Cross College in Worcester, Massachusetts, holds a Masters Degree in Public Administration from the University of Rhode Island and received his law degree from Boston College. He is a Veteran of the US Navy where he served on active duty from 1967 through 1971. Mr. McLaughlin supervised the prosecution of murder cases during his tenure as New Hampshire Attorney General and defended murder cases while in private practice. He is a member of the Board of Directors of the New Hampshire Charitable Foundation.

Attorney McLaughlin is an appointment by the President of the Senate.

Bud Fitch

Bud Fitch serves as New Hampshire's Deputy Attorney General. Prior to joining the Attorney General's Office in 2001, Bud Fitch completed graduate and law studies at the University of Minnesota-Twin Cities after serving for approximately thirteen years full-time in law enforcement, most recently as the Chief of Police for Sunapee, New Hampshire.

Attorney Fitch is an appointment by the Attorney General.

Michael J. Iacopino

Michael J. Iacopino is a shareholder and director at Brennan Caron Lenehan & Iacopino, a Manchester based litigation law firm. Mr. Iacopino is admitted to the bar in New Hampshire (1984), the United States District Court for the District of New Hampshire (1984), the United States Court of Appeals for the First Circuit (1994) and the United States Supreme Court (1995). Mr. Iacopino currently serves on the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL). He is the immediate past president of the New Hampshire Association of Criminal Defense Lawyers (NHACDL) and presently serves on the NHACDL Board of Directors and as chair of the NHACDL Legislative Committee. Mr. Iacopino was the recipient of the NHACDL Champion of Justice Award in 2006. Mr. Iacopino also sits on the New Hampshire Bar Association's Committee on Cooperation with the Courts and the Legislative Committee.

Attorney Iacopino is an appointment by the New Hampshire Association of Criminal Defense Lawyers.

John C. Kissinger, Jr

John C. Kissinger, Jr. is an attorney and partner with the law firm of Nelson, Kinder, Mosseau & Saturley, P.C. in Manchester, New Hampshire. He graduated from Georgetown University in 1987 and Georgetown University Law Center in 1990. He is admitted to the bars in New Hampshire and Massachusetts. He started his legal career in the trial department of a large firm in Boston. He also served as a Special Assistant District Attorney in the Middlesex County District Attorney's Office. He was a homicide prosecutor in the New Hampshire Attorney General's Office for more than five years. John has extensive appellate experience and has briefed and argued more than fifty appeals to the New Hampshire Supreme Court.

Attorney Kissinger is an appointment by the Governor.

John A. Jaskolka

John A. Jaskolka retired as Chief of Police of the Manchester NH Police Department in April of 2008 after 31 years of service to the community. A lifelong resident of New Hampshire, he attended the NH Technical Institute and Saint Anselm College. He is a graduate of the 193rd Session of the FBI National Academy, Quantico VA, the FBI's Executive Development Program, and the New England Institute of Law Enforcement Management, Command Training Program. He served on the NE HIDTA Executive Board, the US Attorney's Anti Terrorism Advisory Committee, the US Attorney's Joint Terrorism Task Force Executive Board, the US Attorney's Project Safe Neighborhoods Task Force Executive Committee and the NH Governor's Crime Commission. He is a member of the International Association of Chiefs of Police and the NH Association of Chiefs of Police.

Chief Jaskolka is an appointment by the Governor.

Phillip B. Gaiser

Trooper First Class Gaiser is a United States Marine Corps veteran with 16 years law enforcement experience, four years with the Rollinsford Police Department, and 12 years with the NH State Police and is currently assigned to Troop C in Keene, New Hampshire.

Trooper Gaiser is an appointment by the New Hampshire Troopers Association.

Jackie Weatherspoon

Jackie Weatherspoon presently serves as a Harvard Law School Mediator in the Roxbury and Chelsea, Massachusetts courts. She has served on three US delegations preparing the Baltic Nation Women's entry into the EU Iceland, Lithuania and Estonia. She served as the White House Office for Women Coordinator for the 4th UN Conference on Women and was seconded to the United States Department of State under the Organization for Security and Cooperation in Europe serving in Bosnia I Herzegovina to implement the last phases of the Dayton Agreement. She has been affiliated with UN Roster of Electoral Experts, United Nations Secretariat,-since 2004. She served 11 months as the Interim Project Manager/ Technical Adviser to the Elections in Nigeria and served in Malawi as the International Coordinator for Observers for the Registration and the Elections.

She served 6 years in the New Hampshire House of Representatives; six years on the Election Law Committee, two years in Democratic House Leadership and two terms as Secretary of the Legislative Black Caucus.

She received a BS from SUNY Brockport (NY), a Certification from Harvard Law School, Harvard Mediation Program and an MPA from Harvard University John F. Kennedy School of Government and served as a Harvard Fellow at the Harvard School of Public Health.

Ms. Weatherspoon is an appointment by the Governor.

James M. Reams

James Reams is currently County Attorney for Rockingham County and has served in that office since 1998. He began his legal career when he was appointed Assistant County Attorney in the Rockingham County Attorney's Office in 1977; he subsequently entered private practice in the seacoast area of NH concentrating in litigation until 1998.

Attorney Reams was a founding member of the Daniel Webster Inn of Court in Manchester and was Chairman of the Membership Committee; he also helped found the Charles C. Doe Inn of Court in the seacoast. He was a charter member of the New Hampshire chapter of the American Board of Trial Advocates, served ten years on the Board of Governors of the Bar Association and is currently the President-Elect of National District Attorneys Association.

Attorney Reams received a BA with a Dual Major in Political Science and Economics from the University of New Hampshire in 1974 and a JD from Franklin Pierce Law Center in 1977.

Attorney Reams is an appointment of the NH Association of Counties.

Sherilyn Burnett Young

Sherry Young is a founder and President of the law firm of Rath, Young and Pignatelli, P.C., with offices in Concord, Nashua and Boston. She heads the firm's Environmental Practice Group, and assists clients on federal and state environmental matters, real estate transactions, and business and finance transactions. Sherry served as legislative counsel to then-Governor Judd Gregg. She currently serves on the Board of Centrix Bank, the New Hampshire Business and Industry Association, Franklin Pierce Law Center, and the New Hampshire Supreme Court Society. She was the first woman to chair the Board of the State Capital Group, a network of independent law firms in all 50 U.S. State capitals and in business markets and financial centers worldwide. She is a recipient of the New Hampshire Women's Bar Association's Marilla Ricker Achievement Award 2007, for lawyers who have achieved professional excellence or paved the way for other women lawyers. She is included in Chambers and Partners USA, in The Best Lawyers In America, and Who's Who in American Law. Sherry has a BA in psychology from Cornell University and a JD from Franklin Pierce Law Center.

Attorney Young is an appointment by the Governor.

Randy Hawkes

Randy Hawkes is the managing attorney of the New Hampshire Public Defender Office in Dover. He graduated from the University of Maine in 1989 and the University of Maine School of Law in 1992. In 2009 he received the New Hampshire Bar Association's inaugural Award for Outstanding Service in the Public Sector. He is a Fellow of the American College of Trial Lawyers.

Attorney Hawkes is an appointment of the New Hampshire Public Defender.

Witnesses

November 6, 2009

Rep. Stephen Shurtleff
Sen. Amanda Merrill
Attorney Larry Vogelmann
Attorney Philip McLaughlin
Assistant County Attorney Thomas Reid

December 4, 2009

Deputy Attorney General Orville "Bud" Fitch
Richard Dieter, Executive Director, Death Penalty Information Center
Robert Mullen, Director, Division of Administration, NH Department of Corrections
William McGonagle, Assistant Commissioner, NH Department of Corrections
Nina Gardner, Executive Director, NH Judicial Council
Attorney Christopher Keating, Director, NH Public Defender
John Safford, Clerk, NH Superior Court, Hillsborough County North
Dale Trombley, Fiscal Manager, Administrative Office of the Courts
Attorney Peter Beeson

February 5, 2010

Juan Melendez (death row exonoree)
Rabbi Richard Klein
Rep. Elizabeth Merry
Richard Van Wickler, Superintendent, Cheshire County Department of Corrections
Ann Lyczak (family member of murder victim)
Rev. Mary Higgins, Unitarian Universalist Church
Madonna Moran, Sisters of Mercy
Andrea LeBlanc (spouse of murder victim)
Captain Gerald Lessard, Manchester Police Department
Will Thomas, Amnesty International
Bess Klassen-Landis (family member of murder victim)
Arnold Alpert, American Friends Society
Carol Stamatakis (family member of murder victim)
Sally Davis, League of Women Voters
Rep. Peter Schmidt

March 12, 2010

William McGonagle, Assistant Commissioner, NH Department of Corrections
Dr. Robert MacLeod, Director of Forensic Services, NH Department of Corrections
Lt. Paul Cascio, Head of Security, SPU, NH Department of Corrections
Hon. Philip Holman, NH Superior Court (retired)

Randy Steidl (death row exoneree)
Sandra Place (family member of murder victim)
Nancy Filiault (family member of murder victim)
Dan Hogan

April 9, 2010

Jill Rockey, Secretary, NH Troopers Association
Ray Krone (death row exoneree)
Sherriff Craig Wiggin, Belknap County
Prof. John Lamperti, Dartmouth College
Prof. Tomislav Kovandzic, University of Texas at Dallas
John Yurcak, NH Police Association
Gail Rice (family member of murder victim)
John Breckenridge, Manchester Police Department

May 14, 2010

Bishop Francis Christian, Roman Catholic Diocese of Manchester
Rabbi Louis Rieser, Etz Hayim Synagogue
Rev. Stephen Edington, Unitarian Universalist Church of Nashua
Harold White, Religious Society of Friends
Attorney Barry Scheck, Innocence Project
Dennis Maher, Innocence Project
David Lamar Vincent, NH Council of Churches
Rev. John Gregory Davis, United Church of Christ
Rev. William Exner, Chairman, Episcopal Diocese of NH Outreach Commission
Joshua Rubenstein, Amnesty International
Betty Ann Waters (family member of exoneree)

June 18, 2010

Attorney Jeffrey Strelzin, Homicide Chief, NH Attorney General's Office
Attorney N. William Delker, Senior Assistant Attorney General
Hon. Joseph Nadeau, Associate Justice, NH Supreme Court (retired)
Attorney Alan Cronheim

August 12, 2010

Ron McAndrew, Warden, Florida State Prison (retired)
Dr. Allen Ault, Eastern Kentucky University
Prof. Robert Blecker, New York Law School
Laura Bonk (family member of murder victim)
Prof. Carol Steiker, Harvard Law School

September 10, 2010

Warden Richard Gerry, NH State Prison for Men

Dr. Robert MacLeod, Director of Forensic Services, NH Department of Corrections

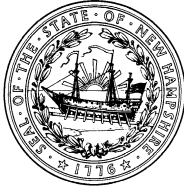
Dr. Daniel Comiskey, State Forensic Examiner, NH Department of Corrections

Emmet Walsh (family member of murder victim)

Attorney Matthew Campbell (former state prosecutor, State of Maryland)

Bud Welch (family member of murder victim)

Attorney Barbara Keshen, NH Civil Liberties Union



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To: Rep. Stephen J. Shurtleff, Vice-Chair
Sen. Amanda Merrill, Vice Chair
Commission to Study the Death Penalty in New Hampshire

From: Jim Cianci, Committee Researcher
House Committee Research

Date: November 6, 2009

Re: legislative history

The following is a legislative history of New Hampshire's capital murder statutes beginning in 1972; for a detailed history of capital punishment in New Hampshire prior to 1972, see, Quentin Blaine, "*Shall Surely Be Put to Death: Capital Punishment in New Hampshire, 1623-1985*", 27:3 N.H. Bar J. (1986).

In 1972 the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) effectively invalidated state death penalty statutes, including New Hampshire's. At the time of the decision, two New Hampshire inmates, Nelson and Martineau, were on death row and their death sentences were subsequently vacated by the New Hampshire Supreme Court, see State v. Martineau, 112 N.H. 278 (1972). The capital murder statute was then rewritten in 1974 (SB 27, Chapter 34, Laws of 1974) to comport with the requirements of Furman.

1977

HB 1137 (Chapter 440, Laws of 1977) amended RSA 630:1, III to provide that a person convicted of capital murder "may" be punished by death; the 1974 law had provided "shall". The bill also amended RSA 630:5 to provide a more extensive procedure in capital murder cases than was provided for in the 1974 law, including the provisions for aggravating and mitigating circumstances.

1986

HB 106 (Chapter 82, Laws of 1986) changed the method of execution from hanging to lethal injection. Current law provides that if the commissioner of corrections finds it impractical to carry out the punishment of death by lethal injection, then the sentence may be carried out by hanging. *See* RSA 630:5, XIV.

1990/1991

During the 1990 legislative session, HB 1157 (Chapter 199, Laws of 1990) (effective January 1, 1991) made several changes to New Hampshire's capital murder statute. The bill amended RSA 630:1 by adding two offenses to the list of eligible capital offenses:

- Death of another before, after, while engaged in the commission of, or while attempting to commit aggravated felonious sexual assault as defined in RSA 632-A:2;
- Death of another before, after, while engaged in the commission of, or while attempting to commit an offense punishable under RSA 318-B:26, I(a) or (b) (manufacture, sale, possession with intent to distribute large quantities of controlled drugs).

HB 1157 also repealed and reenacted the procedures contained in RSA 630:5, making extensive revisions to the 1977 provisions. The most significant change in the amended statute was its application to defendants who either plead guilty or were found guilty by a jury. Among the other changes in the new statute is the requirement that a jury during the penalty phase find at least two statutory aggravating factors, where the prior statute only required one. The jury is also required weigh the aggravating factors against any mitigating factors and the state is required to prove the aggravating factors beyond a reasonable doubt. The new statute also provided two new statutory aggravating factors not available under the prior statute: (1) the offense occurred after substantial planning and premeditation; (2) the victim was particularly vulnerable.

During the period when HB 1157 was being considered by the legislature, the case of State v. Johnson, 134 N.H. 570 (1991) arose. The defendants were indicted on capital murder charges on January 23, 1990, before the statutes were amended; HB 1157 was subsequently signed into law on April 27, 1990 but did not become effective until January 1, 1991. The Superior Court ruled that retroactive application of the new statutes violated the state constitution's prohibition against retrospective laws; that retroactive application of the new statutes was contrary to the legislature's intent and thus unlawful; and that enforcement of the procedures contained in the former RSA 630:5 violated the defendants' rights to trial by jury, equal protection and due process. The New Hampshire Supreme Court subsequently affirmed.

The court found that retroactive application of the new statute would violate the constitution's prohibition against retrospective laws where the retrospective application affects the defendant's substantive rights; specifically, the court determined that the new statute added two new aggravating factors which did not exist in the former statute,

allowing the defendants to face capital punishment due to circumstances which could not have served as the statutory basis for such a penalty under the former statute and increasing the likelihood of imposition of the death penalty. State v. Johnson, 134 N.H. at 573. The court also held that application of the former statute was unconstitutional because it permitted a defendant who chose to plead not guilty and request a jury trial to be subject to the death penalty, while allowing a defendant who plead guilty to escape a death sentence; the court agreed that such a defect in the former statute violated the defendant's right to a jury trial. Id. at 576.

1994

The prior version of RSA 630:1, I (a) accounted for the death of a "law enforcement officer acting in the line of duty." HB 1104 (Chapter 128, Laws of 1994) added the phrase "or judicial officer" to the provision and "or when the death is caused as a consequence of or in retaliation for such person's actions in the line of duty." "Judicial officer" was then defined in RSA 630:1, II-a as "a judge of a district, probate, superior or supreme court; an attorney employed by the department of justice or a municipal prosecutor's office; or a county attorney; or attorney employed by the county attorney."

1997

HB 752 sought to add a number of offenses or actions to the list of eligible capital offenses:

- death resulting from armed robbery or burglary
- death resulting from arson
- defendant with a previous murder conviction
- retaliation for anything done by another in his capacity as witness or informant
- victim under 14

The bill also added a death sentence option for first degree murder. HB 752 was recommended Inexpedient to Legislate (14-2) which was subsequently adopted by the full House.

1998

HB 1025 sought to expand the circumstances under which a person could be convicted of capital murder by applying the statute in all circumstances to both a person who knowingly caused the death of another and to a person who caused serious bodily injury that resulted in death. The bill then added a number of offenses or actions to the list of eligible capital offenses:

- application to the person criminally solicited for pecuniary/tangible gain
- deleted application to a person under sentence of life imprisonment
- application to a person with a previous first or second degree murder conviction
- retaliation for anything done by the victim as a witness or informer

- victim under 13
- multiple victims as part of a common scheme
- multiple victims as the result of conduct which created a substantial risk of death to one or more persons in addition to the victims of the offense

The bill also added “juror” and “attorney general” to the definition of “judicial officer” in RSA 630:1, II-a.

HB 1025 was recommended Ought to Pass with Amendment (14-4). Before the full House, the committee amendment was adopted on a voice vote, followed by a floor amendment (which would have abolished the death penalty) which failed on a roll call of 155-195. However, when the subsequent motion of Ought to Pass with Amendment failed on a roll call vote of 137-215, the House adopted the motion of Inexpedient of Legislate, followed by a motion to Indefinitely Postpone HB 1025.

Also in 1998, a parallel Senate Bill, SB 477, included all of the circumstances contained in HB 1025 as well as the following:

- intentionally killing a firefighter in the course of duty
- the death of any elected, appointed or former official of any level of government
- death based on race, color, religion, nationality, country of origin
- death by administration of poison
- death while avoiding or preventing arrest or during escape from custody
- causing death by torture
- causing death that is “especially heinous, atrocious, or cruel, manifesting exceptional depravity”
- causing death while lying in wait
- causing death by means of discharging a firearm from a motor vehicle at another person
- causing death by bombing or explosive device

SB 477 went to the full Senate with a split recommendation (4-4) of Ought to Pass with Amendment/Inexpedient to Legislate, but was passed by the full Senate on a roll call vote of 14-10. The bill subsequently failed introduction to the House because it lacked the 2/3 majority necessitated by the Indefinite Postponement of HB 1025, failing on a vote of 130-138.

2000

HB 1548 sought to abolish the death penalty and added the circumstances of the capital murder statute to first degree murder. The bill went to the full House without recommendation and was passed on a roll call vote of 191-163; the bill then passed the Senate on a roll call vote of 14-10. The bill was subsequently vetoed by Governor Shaheen, which was sustained by the House failing to gain the necessary 2/3 majority (194-148).

2001

HB 171 sought to abolish the death penalty and added the circumstances of the capital murder statute to first degree murder. The bill went to the full House with a recommendation of Ought to Pass (9-6); the motion failed on a roll call of 180-188. The bill was subsequently Indefinitely Postponed.

2004

SB 513 sought to prohibit the execution of persons under the age of 18 at the time of the offense. The bill passed the Senate on a roll call vote of 12-11 and passed the House on a roll call vote of 272-72. The bill was subsequently vetoed by Governor Benson, which was sustained by the Senate failing to gain the necessary 2/3 majority (11-13).

2005

HB 147 sought to prohibit the execution of persons under the age of 18 at the time of the offense. The bill passed the House on a roll call vote of 285-74 and passed the Senate on a roll call of 16-8. The bill was subsequently signed into law (Chapter 35, Laws of 2005) and amends RSA 630:1, V to provide that “In no event shall any person under the age of 18 years at the time the offense was committed be culpable of a capital murder.”

The passage of the bill brought New Hampshire’s capital punishment statute in line with the United States Supreme Court’s ruling that year in Roper v. Simmons, 543 U.S. 551 (2005), which held that Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

2006

HB 1422 sought to replace death sentence in the capital murder statute with life imprisonment without the possibility of parole. The bill was found Inexpedient to Legislate by the House (200-137).

2007

HB 607 sought to replace death sentence in the capital murder statute with life imprisonment without the possibility of parole. The bill was found Inexpedient to Legislate by the House (185-173).

2008

HB 1180 sought to amend the definition of law enforcement officer in RSA 630:1, II by adding “bailiff or court security officer” and “criminal justice or consumer protection investigator”; the bill also sought to amend the definition of judicial officer RSA 630:1, II-a by adding “family division” to the list of courts. In committee, the bill was amended

to include a commission to study the death penalty in New Hampshire; the bill as amended passed the full House on a voice vote. The Senate subsequently found the bill Inexpedient to Legislate.

Also in 2008, SB 344 sought to add a provision to relating to multiple victims as an additional circumstance which may be prosecuted as capital murder; the bill was referred to Interim Study.

2009

In addition to HB 520 (Chapter 284, Laws of 2009) which established the current Commission to Study the Death Penalty in New Hampshire, the following bills related to capital punishment were introduced:

HB 556 sought to repeal the death penalty and added the circumstances of the capital murder statute to first degree murder. The bill was recommended Inexpedient to Legislate (11-7) which failed in the House on a roll call vote of 179-188; the bill subsequently passed on a roll call vote of 193-174. The bill was Laid on the Table in the Senate (13-11).

HB 37 provided for death by firing squad for causing the death of another by the use of a firearm while engaged in the commission of a felony. The bill was found Inexpedient to Legislate by the House.

HB 512 sought to establish a temporary moratorium on executions until November 1, 2011 and to establishing a commission to study the death penalty in New Hampshire. The bill was found Inexpedient to Legislate by the House.

HB 557 sought to require that in a capital murder case where the defendant pleads guilty, the state shall not seek the death penalty, but shall instead request a sentence of life imprisonment. The bill was found Inexpedient to Legislate by the House.