

Statement of Kent Scheidegger  
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Before the New Jersey Death Penalty Study Commission  
October 24, 2006

I thank the commission for the opportunity to testify today. The correct identification and sufficient punishment of murderers is a matter of the greatest importance. Indeed, there is no more important function of the state government than the protection of their citizens from murder. Regrettably, that function is not being properly performed in New Jersey today.

In recent years, we have seen a sea change in the scholarship on deterrence and the death penalty. The availability of data for the 30 years since the restoration of capital punishment as well as improved methods of econometrics have produced a new generation of studies. While the studies are not unanimous and absolute proof is not possible, a preponderance of studies published in peer-reviewed journals confirms what common sense has always told us. The death penalty does have a deterrent effect and does save innocent lives *if* it is actually enforced.<sup>1</sup>

I will not attempt to explain the math behind these studies or pretend that I completely understand it myself. To illustrate deterrence in more understandable terms, I have computed the change in the murder rate for each state using as a base the moratorium period from 1968 to 1975 when there were no executions in the United States and it was doubtful there ever would be any again. This gives us a basis to compare states at a time when none of them had an effective death penalty and see how they changed when the death penalty was restored. In 2004, the State of Delaware had the greatest drop since the moratorium period of any state in the nation, and Delaware has also had the most effective death penalty of any state by a wide margin. I do not believe this is a coincidence. Of the five states with the best improvements in their homicide rates, all five are states actively using the death penalty. Over 11,000 people were murdered in New Jersey between 1977 and 2004, and I believe it is probable that some of them would be alive today if the state had an effective death penalty during this time.

So why doesn't New Jersey have an effective death penalty? Thirty years of experience in 38 states has demonstrated one truth beyond question. You cannot have an effective death penalty in a state if your court of last resort is determined to block it and willing to twist the law to do so. Regrettably, that appears to be the case in New Jersey.

To see this, one need only look at the decision last July in the case of Anthony DiFrisco.<sup>2</sup> DiFrisco was a hired killer, a hit man, who committed murder in 1986. In 1994, the New Jersey Supreme Court reviewed all his claims of procedural error and decided by a majority vote that no reversible error had occurred in his case. The next year, the court reviewed his claim that his sentence was disproportionate and decided 5-2 that it was not. Eleven years after that second decision and 20 years after the crime, the New Jersey Supreme Court went back, counted noses

in its two previous decisions, decided it could put together a majority for reversal in those two decisions, and on that basis alone overturned the death sentence. Not only was the decision on the merits an outrage, but to reopen this eleven-year-old case, the court had to brush aside and effectively nullify a rule of court placing a five-year limit on collateral review of final judgments. After 20 years of litigating these matters, I thought I had seen it all. But this is beyond belief. This is not law in any meaningful sense of the word. This is pure obstruction of the enforcement of the law simply because a majority of the judges disagree with it, and they are willing to make up new rules without limit to impose their preference on the state.

Nor is the *DiFrisco* case the only outrage by any means. Earlier, you heard the poignant testimony of Sandra Place. Her elderly mother was strangled by a man who broke into her house and who then cut off her clothing and sexually violated her. The New Jersey Supreme Court held that the death penalty for this offense was disproportionate and struck it down.<sup>3</sup> To reach this bizarre result, the court decided that for any disputed fact not conclusively resolved by the jury's verdict, it would presume that the defendant's version was the truth. This is diametrically opposed to the long-standing and universal rule of appellate practice throughout the United States. In reviewing jury verdicts, American courts have uniformly assumed the version of the facts most favorable to the verdict. Nothing but pure hostility to the death penalty and a desire to block its enforcement can explain the gratuitous and unprecedented adoption of the opposite presumption.

The primary question before this commission and the Legislature and people of New Jersey is whether you are going to value the lives of the innocent above the lives of the guilty and do what it takes to actually have an effective death penalty in this state. Several measures suggest themselves.

First, get rid of proportionality review. It is not constitutionally required,<sup>4</sup> and it is not needed as a practical matter. The criteria to be eligible for the death penalty, the jury's decision informed by every mitigating fact the defendant chooses to offer, and the final backstop of executive clemency make this additional level of review unnecessary. The New Jersey Supreme Court wastes resources trying to quantify a fundamentally unquantifiable decision, and the case of the murder of Mildred Place demonstrates that the court cannot be trusted to do this correctly.

Second, enact some strong limits on collateral review. Every capital defendant should be entitled to a direct appeal and one post-conviction proceeding, and there should be no further reviews of any issue that does not raise a substantial doubt of the identity of the perpetrator. The execution of a person who is in fact guilty of murder and is in fact eligible for the death penalty is not an injustice warranting multiple reviews over a period of 20 years.

Finally, though, nothing will achieve the goal unless you fix the New Jersey Supreme Court. We hear a lot about judicial independence. But the other, equally important side of that coin is judicial responsibility. Judges must use their power for its proper purpose of enforcing the Constitution and not for the improper purpose of imposing their policy preferences on the

people of the state. Unfortunately, life tenure tempts too many judges to do exactly that. I suggest that New Jersey amend its Constitution so that Justices of the Supreme Court must go before the people for a yes or no confirmation at regular intervals, as is done in California. The experience in California demonstrates that this system comes as close as possible to the optimum, providing effective life tenure in most cases while still providing a safety valve to remove the most egregious abusers of judicial power.

Thank you again for inviting me to speak to you today, and I would be glad to answer any questions you may have.

#### Notes:

1. Articles finding a deterrent effect include Dale O. Cloninger & Roberto Marchesini, Execution and Deterrence: A Quasiconrolled Group Experiment, *Applied Economics*, vol. 33, no. 5, pp. 569-576 (2001); James A. Yunker, A New Statistical Analysis of Capital Punishment Incorporating U.S. Postmoratorium Data, *Social Science Quarterly*, vol. 82, no. 2, pp. 297-311 (2002); Hashem Dezhbakhsh, Paul H. Rubin, & Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, *American Law & Economics Review*, vol. 5, no. 2, pp. 344-376 (Fall 2003); H. Naci Mocan & R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, *Journal of Law and Economics*, vol. 46, no. 2, pp. 453-478 (October 2003); Zhiqiang Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, *Eastern Economic Journal*, vol. 30, no. 2, p. 237 (Spring 2004); Paul R. Zimmerman, State Executions, Deterrence and the Incidence of Murder, *Journal of Applied Economics*, vol. 7, no. 1, pp. 163-193 (May 2004); Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, *Journal of Legal Studies*, vol. 33, no. 2, pp. 283-322 (June 2004); Dale O. Cloninger & Roberto Marchesini, Execution Moratoriums, Commutations and Deterrence: the case of Illinois, *Applied Economics*, vol. 38, no. 9, pp. 967-973 (May 20, 2006). A list of articles with abstracts, both pro and con, is maintained on CJLF's Web site at <http://www.cjlf.org/deathpenalty/DPDeterrence.htm>.
2. *State v. DiFrisco*, 187 N.J. 156, 900 A.2d 820 (2006).
3. *State v. Papasavvas*, 170 N.J. 462, 790 A.2d 798 (2002).
4. *Pulley v. Harris*, 465 U.S. 37 (1984).

# Changes in Murder Rate

## 2004 Relative to 1968-1975 Average

Five States with Best Improvement:

State	Ex/kM*	%Change**
Delaware	15.532	-73.6%
Wyoming	1.792	-67.2%
Alabama	2.576	-59.5%
Florida	1.829	-59.1%
Georgia	1.865	-55.9%

For Comparison:

US avg	1.689	-35.8%
New Jersey	0	-27.0%

11088 murders in 1977-2004

\* Executions in the period 1977-2004 per 1000 murders in the same period

\*\* Percent change in per capital murder rate for 2004 relative to 1968-1975 average.

# Changes in Murder Rate

2004 Relative to 1968-1975 Average

Five Jurisdictions with Increases:

State	Ex/kM*	%Change**
North Dakota	0	51.4%
Vermont	0	23.1%
Wisconsin	0	7.7%
D. of Columbia	0	7.6%
Louisiana	1.515	2.6%

For Comparison:

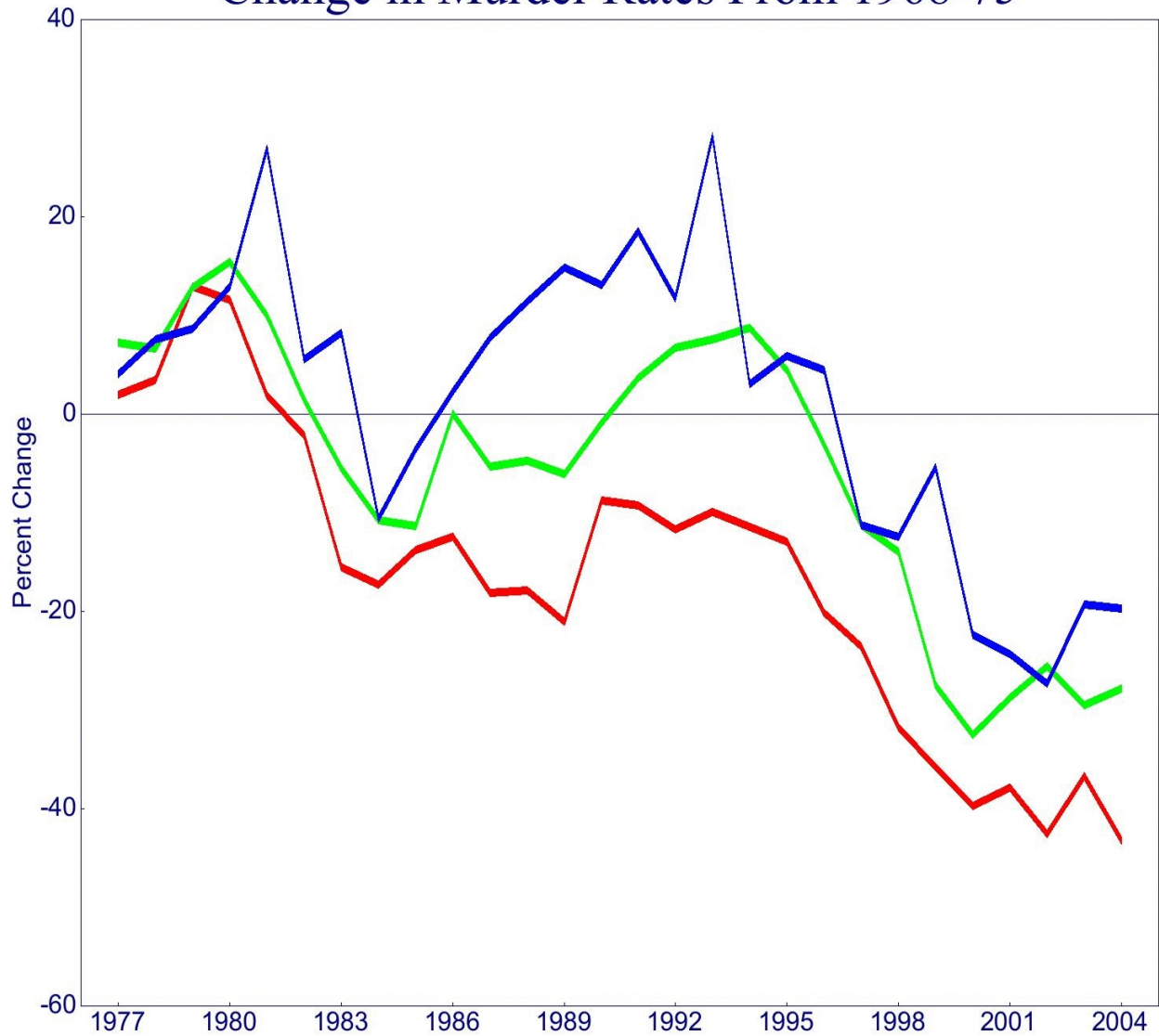
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## Change in Murder Rates From 1968-75



- Above Average Ex/Mr
- Below Average Ex/Mr
- No Executions