

## LEGISLATIVE HISTORY CHECKLIST

NJSA: 2A:78-7 and 2C:11-3

(Capital punishment—  
clarify procedural aspects)

LAWS OF: 1985

CHAPTER: 178

Bill No: S950

Sponsor(s): Russo

Date Introduced: Pre-filed

Committee: Assembly: Judiciary

Senate: Judiciary

Amended during passage: Yes Amendments during passage denoted  
by asterisks.

Date of Passage: Assembly: April 15, 1985

Senate: January 24, 1985

Date of Approval: June 10, 1985

Following statements are attached if available:

Sponsor statement: Yes Attached: Senate floor  
amendments, adopted  
5-14-84 (with statement)Committee statement: Assembly Yes  
Senate Yes 11-29-84 and 3-1-84

Fiscal Note: No

Veto Message: No

Message on Signing: Yes

Following were printed:

Reports: No

Hearings: Yes

(OVER)

Hearing, referred to in committee statement:

974.90 New Jersey. Legislature. Senate. Judiciary Committee.  
C244 Public hearing, held 5-26-83. Trenton,  
1983 1983.

See newspaper clipping file "New Jersey—Capital punishment—1984 and 1985" in New Jersey Reference Department.

CHAPTER 118 LAWS OF N. J. 1985  
APPROVED 6-10-85

[THIRD OFFICIAL COPY REPRINT]

SENATE, No. 950

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Senator RUSSO

AN ACT concerning the procedures employed in criminal cases involving capital punishment and amending N. J. S. 2A:78-7 and N. J. S. 2C:11-3.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. N. J. S. 2A:78-7 is amended to read as follows:

2 2A:78-7. Upon the trial of any action in any court of this State,  
3 the parties thereto shall be entitled to peremptory challenges as  
4 follows:

5 a. In any civil action [not to be tried by a struck jury], each  
6 party, six.

7 b. [In any civil action to be tried by a struck jury, each party,  
8 three.] Deleted by amendment (P. L. , c. )

9 c. Upon an indictment for [treason, murder, kidnapping, mis-  
10 prision of treason, manslaughter, sodomy, rape, arson, burglary,  
11 robbery, forgery, perjury, or subornation of perjury, a defendant,  
12 if tried alone, 20; if two or more defendants are tried together,  
13 10 each; the State, six peremptory challenges for each 10 allowed  
14 to the defendants. This paragraph c. shall not apply to struck or  
15 foreign juries] *kidnapping, murder, aggravated manslaughter,*  
16 *manslaughter, aggravated assault, aggravated sexual assault,*  
17 *sexual assault, aggravated criminal sexual contact, aggravated*  
18 *arson, arson, burglary, robbery, forgery if it constitutes a crime*  
19 *of the third degree as defined by subsection b. of N. J. S. 2C:21-1,*  
20 *or perjury, the defendant, 20 peremptory challenges if tried alone*  
21 *and 10 challenges if tried jointly and the State, 12 peremptory*

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

\*—Senate committee amendments adopted March 1, 1984.

\*\*—Senate amendment adopted May 14, 1984.

\*\*\*—Senate committee amendments adopted November 29, 1984.

22 *challenges if the defendant is tried alone and six peremptory*  
 23 *challenges for each 10 afforded defendants if tried jointly. The*  
 24 *trial court, in its discretion, may, however, increase proportionally*  
 25 *the number of peremptory challenges available to the defendant*  
 26 *and the State in any case in which the sentencing procedure set*  
 27 *forth in subsection c. of N. J. S. 2C:11-3 might be utilized.*

28 d. Upon any other indictment, defendants, 10 each, the State,  
 29 10 peremptory challenges for each 10 challenges allowed to the  
 30 defendants. **[This paragraph d. shall not apply to struck or**  
 31 **foreign juries.]** *When the case is to be tried by a foreign jury,*  
 32 *each defendant, five peremptory challenges, and the State, five*  
 33 *peremptory challenges for each five peremptory challenges*  
 34 *afforded the defendants.*

35 e. **[Upon any indictments for which a struck or foreign jury**  
 36 **shall be summoned and returned, defendants, five each; the State,**  
 37 **five peremptory challenges for each five challenges allowed to all**  
 38 **defendants.] Deleted by amendment. (P. L. , c. )**

1 2. N. J. S. 2C:11-3 is amended to read as follows:

2 2C:11-3. Murder. a. Except as provided in section 2C:11-4  
 3 criminal homicide constitutes murder when:

4 (1) The actor purposely causes death or serious bodily injury  
 5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
 7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
 9 one or more other persons, is engaged in the commission of, or  
 10 an attempt to commit, or flight after committing or attempting to  
 11 commit robbery, sexual assault, arson, burglary, kidnapping or  
 12 criminal escape, and in the course of such crime or of immediate  
 13 flight therefrom, any person causes the death of a person other  
 14 than one of the participants; except that in any prosecution under  
 15 this subsection, in which the defendant was not the only partici-  
 16 pant in the underlying crime, it is an affirmative defense that the  
 17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
 19 request, command, importune, cause or aid the commission  
 20 thereof; and

21 (b) Was not armed with a deadly weapon, or any instrument,  
 22 article or substance readily capable of causing death or serious  
 23 physical injury and of a sort not ordinarily carried in public places  
 24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
 26 ticipant was armed with such a weapon, instrument, article or  
 27 substance; and

28 (d) Had no reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 b. Murder is a crime of the first degree but a person convicted  
32 of murder \***[may]**\* *shall* be sentenced, except as provided in sub-  
33 section c. of this section, by the court to a term of 30 years, during  
34 which the person shall not be eligible for parole or to a specific  
35 term of years which shall be between 30 years and life imprison-  
36 ment of which the person shall serve 30 years before being eligible  
36A for parole.

37 c. Any person convicted under subsection a. (1) or (2) who  
38 committed the homicidal act by his own conduct or who as an  
39 accomplice procured the commission of the offense by payment  
40 or promise of payment, of anything of pecuniary value shall be  
41 sentenced as provided hereafter:

42 (1) The court shall conduct a separate sentencing proceeding  
43 to determine whether the defendant should be sentenced to death  
44 or pursuant to the provisions of subsection b. of this section.  
45 Where the defendant has been tried by a jury, the proceeding  
46 shall be conducted by the judge who presided at the trial and before  
47 the jury which determined the defendant's guilt except that, for  
48 good cause, the court may discharge that jury and conduct the  
49 proceeding before a jury empaneled for the purpose of the pro-  
50 ceeding. Where the defendant has entered a plea of guilty or has  
51 been tried without a jury, the proceeding shall be conducted by  
52 the judge who accepted the defendant's plea or who determined  
53 the defendant's guilt and before a jury empaneled for the purpose  
54 of the proceeding. On motion of the defendant and with consent  
55 of the prosecuting attorney the court may conduct a proceeding  
56 without a jury. *Nothing in this subsection shall be construed to*  
57 *prevent the participation of an alternate juror in the sentencing*  
58 *proceeding if one of the jurors who rendered the guilty verdict*  
59 *becomes ill or is otherwise unable to proceed before or during the*  
60 *sentencing proceeding.*

61 (2) (a) At the proceeding, the State shall have the burden of  
62 establishing beyond a reasonable doubt the existence of any  
63 aggravating factors set forth in paragraph (4) of this subsection.  
64 The defendant shall have the burden of producing evidence of the  
65 existence of any mitigating factors set forth in paragraph (5) of  
66 this subsection *but shall not have a burden with regard to the*  
67 *establishment of a mitigating factor.*

68 (b) *The admissibility of evidence offered by the State to estab-*  
69 *lish any of the aggravating factors shall be governed by the rules*

70 governing the admission of evidence at criminal trials. The  
 71 defendant may offer, without regard to the rules governing the  
 72 admission of evidence at criminal trials, reliable evidence relevant  
 72A to any of the mitigating factors. \*\*\*If the defendant produces  
 72B evidence in mitigation which would not be admissible under the  
 72C rules governing the admission of evidence at criminal trials, the  
 72D State may rebut that evidence without regard to the rules  
 73 governing the admission of evidence at criminal trials.\*\*\*

73A \*(c) Evidence admitted at the trial, which is relevant to the  
 73B aggravating and mitigating factors set forth in paragraphs (4)  
 73C (5) of this subsection, shall be considered without the necessity of  
 73D reintroducing that evidence at the sentencing proceeding provided  
 73E that the fact finder at the sentencing proceeding was present as  
 73F either the fact finder or the judge at the trial.\*

74 \*[(c)]\* \*(d)\* The State and the defendant shall be permitted to  
 75 rebut any evidence presented by the other party at the sentencing  
 76 proceeding and to present argument as to the adequacy of the  
 77 evidence to establish the existence of any aggravating or mitigating  
 78 factor.

79 \*[(d)]\* \*(e)\* Prior to the commencement of the sentencing  
 80 proceeding, or at such time as he has knowledge of the existence of  
 81 an aggravating factor, the prosecuting attorney shall give notice  
 82 to the defendant of the aggravating factors which he intends to  
 83 prove in the proceeding.

84 \*[(e)]\* \*(f)\* Evidence offered by the State with regard to the  
 85 establishment of a prior homicide conviction pursuant to paragraph  
 86 (4) (a) of this subsection may include the \*[(circumstances sur-  
 86A rounding the prior homicide)]\* \*identity and age of the victim, the  
 86B manner of death and the relationship, if any, of the victim to the  
 86C defendant\*.

87 (3) The jury, or if there is no jury, the court shall return a  
 88 special verdict setting forth in writing the existence or non-exist-  
 89 ence of each of the aggravating and mitigating factors set forth in  
 90 paragraphs (4) and (5) of this subsection. If any aggravating  
 91 factor is found to exist, the verdict shall also state whether it [is  
 92 or is not outweighed by] outweighs beyond a reasonable doubt  
 93 any one or more mitigating factors.

94 (a) If the jury or the court finds that any aggravating \*\*\*[factor  
 95 or factors exists and [is not outweighed by] that the factor or]\*\*\*  
 96 \*\*\*factors exist and that all of the aggravating\*\*\* factors outweigh  
 97 beyond a reasonable doubt \*\*\*[any one or more]\*\*\* \*\*\*all of the\*\*\*  
 97A mitigating factors, the court shall sentence the defendant to death.

98 (b) If the jury or the court finds that no aggravating factors

99 exist, or that \*\*\*[any]\*\*\* \*\*\*all of the\*\*\* aggravating factors  
100 which exist [are outweighed by] *do not outweigh* \*\*\*[any one or  
101 more]\*\*\* \*\*\*all of the\*\*\* mitigating factors, the court shall  
101A sentence the defendant pursuant to subsection b.

102 (c) If the jury is unable to reach a unanimous verdict, the court  
103 shall sentence the defendant pursuant to subsection b.

104 (4) The aggravating factors which may be found by the jury or  
105 the court are:

106 (a) \*\*\*[The defendant has previously been convicted of  
106A murder]\*\*\* \*\*\**The defendant has been convicted, at any time, of  
106B another murder. For purposes of this section, a conviction shall  
106C be deemed final when sentence is imposed and may be used as an  
106D aggravating factor regardless of whether it is on appeal*\*\*\*;

107 (b) In the commission of the murder, the defendant purposely  
108 or knowingly created a grave risk of death to another person in  
109 addition to the victim;

110 (c) The murder was outrageously or wantonly vile, horrible or  
111 inhuman in that it involved torture, depravity of mind, or an  
112 aggravated [battery] *assault* to the victim;

113 (d) The defendant committed the murder as consideration for  
114 the receipt, or in expectation of the receipt of any thing of  
115 pecuniary value;

116 (e) The defendant procured the commission of the offense by  
117 payment or promise of payment of anything of pecuniary value;

118 (f) The murder was committed for the purpose of escaping  
119 detection, apprehension, trial, punishment or confinement for  
120 another offense committed by the defendant or another;

121 (g) The offense was committed while the defendant was engaged  
122 in the commission of, or an attempt to commit, or flight after  
123 committing or attempting to commit *\*murder,\** robbery, sexual  
124 assault, arson, burglary or kidnapping; or

125 (h) The defendant murdered a public servant, as defined in  
126 2C:27-1, while the victim was engaged in the performance of his  
127 official duties, or because of the victim's status as a public servant.

128 (5) The mitigating factors which may be found by the jury or  
129 the court are:

130 (a) The defendant was under the influence of extreme mental or  
131 emotional disturbance insufficient to constitute a defense to prose-  
132 cution;

133 (b) The victim solicited, participated in or consented to the  
134 conduct which resulted in his death;

135 (c) The age of the defendant at the time of the murder;

136 (d) The defendant's capacity to appreciate the wrongfulness of

137 his conduct or to conform his conduct to the requirements of the  
138 law was significantly impaired as the result of mental disease or  
139 defect or intoxication, but not to a degree sufficient to constitute  
140 a defense to prosecution;

141 (e) The defendant was under unusual and substantial duress  
142 insufficient to constitute a defense to prosecution;

143 (f) The defendant has no significant history of prior criminal  
144 activity;

145 (g) The defendant rendered substantial assistance to the State  
146 in the prosecution of another person for the crime of murder; or

147 (h) Any other factor which is relevant to the defendant's char-  
148 acter or record or to the circumstances of the offense.

149 d. The sentencing proceeding set forth in subsection c. of this  
150 section shall not be waived by the prosecuting attorney.

151 e. Every judgment of conviction which results in a sentence of  
152 death under this section may be appealed, pursuant to the  
153 rules of court, to the Supreme Court\*\*[, which shall also deter-  
154 mine whether the sentence is disproportionate to the penalty im-  
155 posed in similar cases, considering both the crime and the  
156 defendant]\*\*. \*\*\**Upon the request of the defendant, the Supreme*  
156A *Court shall also determine whether the sentence is disproportion-*  
156B *ate to the penalty imposed in similar cases, considering both the*  
156C *crime and the defendant.\*\*\**

157 f. *Prior to the jury's sentencing deliberations, the trial court*  
158 *shall inform the jury of the sentences which may be imposed*  
159 *pursuant to subsection b. of this section on the defendant if the*  
160 *defendant is not sentenced to death. The jury shall also be in-*  
161 *formed that a failure to reach a unanimous verdict shall result in*  
162 *sentencing by the court pursuant to subsection b.*

1 3. This act shall take effect immediately.

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SENATE, No. 950

STATE OF NEW JERSEY

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involving capital punishment and amending N. J. S. 2A:78-7  
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8 **three.]** Deleted by amendment (P. L. , c. )

9 c. Upon an indictment for **[treason, murder, kidnapping, mis-**  
10 **prision of treason, manslaughter, sodomy, rape, arson, burglary,**  
11 **robbery, forgery, perjury, or subornation of perjury, a defendant,**  
12 **if tried alone, 20; if two or more defendants are tried together,**  
13 **10 each; the State, six peremptory challenges for each 10 allowed**  
14 **to the defendants. This paragraph c. shall not apply to struck or**  
15 **foreign juries]** *kidnapping, murder, aggravated manslaughter,*  
16 *manslaughter, aggravated assault, aggravated sexual assault,*  
17 *sexual assault, aggravated criminal sexual contact, aggravated*  
18 *arson, arson, burglary, robbery, forgery if it constitutes a crime*  
19 *of the third degree as defined by subsection b. of N. J. S. 2C:21-1,*  
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21 *and 10 challenges if tried jointly and the State, 12 peremptory*

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 24 *trial court, in its discretion, may, however, increase proportionally*  
 25 *the number of peremptory challenges available to the defendant*  
 26 *and the State in any case in which the sentencing procedure set*  
 27 *forth in subsection c. of N. J. S. 2C:11-3 might be utilized.*

28 d. Upon any other indictment, defendants, 10 each, the State,  
 29 10 peremptory challenges for each 10 challenges allowed to the  
 30 defendants. [This paragraph d. shall not apply to struck or  
 31 foreign juries.] *When the case is to be tried by a foreign jury,*  
 32 *each defendant, five peremptory challenges, and the State, five*  
 33 *peremptory challenges for each five peremptory challenges*  
 34 *afforded the defendants.*

35 e. [Upon any indictments for which a struck or foreign jury  
 36 shall be summoned and returned, defendants, five each; the State,  
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 38 defendants.] Deleted by amendment. (P. L. , c. )

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 5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
 7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
 9 one or more other persons, is engaged in the commission of, or  
 10 an attempt to commit, or flight after committing or attempting to  
 11 commit robbery, sexual assault, arson, burglary, kidnapping or  
 12 criminal escape, and in the course of such crime or of immediate  
 13 flight therefrom, any person causes the death of a person other  
 14 than one of the participants; except that in any prosecution under  
 15 this subsection, in which the defendant was not the only partici-  
 16 pant in the underlying crime, it is an affirmative defense that the  
 17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
 19 request, command, importune, cause or aid the commission  
 20 thereof; and

21 (b) Was not armed with a deadly weapon, or any instrument,  
 22 article or substance readily capable of causing death or serious  
 23 physical injury and of a sort not ordinarily carried in public places  
 24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
 26 ticipant was armed with such a weapon, instrument, article or  
 27 substance; and

28 (d) Had no reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 b. Murder is a crime of the first degree but a person convicted  
32 of murder may be sentenced, except as provided in subsection c.  
33 of this section, by the court to a term of 30 years, during which the  
34 person shall not be eligible for parole or to a specific term of years  
35 which shall be between 30 years and life imprisonment of which  
36 the person shall serve 30 years before being eligible for parole.

37 c. Any person convicted under subsection a. (1) or (2) who  
38 committed the homicidal act by his own conduct or who as an  
39 accomplice procured the commission of the offense by payment  
40 or promise of payment, of anything of pecuniary value shall be  
41 sentenced as provided hereafter:

42 (1) The court shall conduct a separate sentencing proceeding  
43 to determine whether the defendant should be sentenced to death  
44 or pursuant to the provisions of subsection b. of this section.  
45 Where the defendant has been tried by a jury, the proceeding  
46 shall be conducted by the judge who presided at the trial and before  
47 the jury which determined the defendant's guilt except that, for  
48 good cause, the court may discharge that jury and conduct the  
49 proceeding before a jury empaneled for the purpose of the pro-  
50 ceeding. Where the defendant has entered a plea of guilty or has  
51 been tried without a jury, the proceeding shall be conducted by  
52 the judge who accepted the defendant's plea or who determined  
53 the defendant's guilt and before a jury empaneled for the purpose  
54 of the proceeding. On motion of the defendant and with consent  
55 of the prosecuting attorney the court may conduct a proceeding  
56 without a jury. *Nothing in this subsection shall be construed to*  
57 *prevent the participation of an alternate juror in the sentencing*  
58 *proceeding if one of the jurors who rendered the guilty verdict*  
59 *becomes ill or is otherwise unable to proceed before or during the*  
60 *sentencing proceeding.*

61 (2) (a) At the proceeding, the State shall have the burden of  
62 establishing beyond a reasonable doubt the existence of any  
63 aggravating factors set forth in paragraph (4) of this subsection.  
64 The defendant shall have the burden of producing evidence of the  
65 existence of any mitigating factors set forth in paragraph (5) of  
66 this subsection *but shall not have a burden with regard to the*  
67 *establishment of a mitigating factor.*

68 (b) *The admissibility of evidence offered by the State to estab-*  
69 *lish any of the aggravating factors shall be governed by the rules*  
70 *governing the admission of evidence at criminal trials. The*

71 *defendant may offer, without regard to the rules governing the*  
72 *admission of evidence at criminal trials, reliable evidence relevant*  
73 *to any of the mitigating factors.*

74 (c) The State and the defendant shall be permitted to rebut any  
75 evidence presented by the other party at the sentencing proceeding  
76 and to present argument as to the adequacy of the evidence to  
77 establish the existence of any aggravating or mitigating factor.

78 (d) Prior to the commencement of the sentencing proceeding, or  
79 at such time as he has knowledge of the existence of an aggravat-  
80 ing factor, the prosecuting attorney shall give notice to the  
81 defendant of the aggravating factors which he intends to prove  
82 in the proceeding.

83 (e) *Evidence offered by the State with regard to the establish-*  
84 *ment of a prior homicide conviction pursuant to paragraph*  
85 *(4) (a) of this subsection may include the circumstances sur-*  
86 *rounding the prior homicide.*

87 (3) The jury, or if there is no jury, the court shall return a  
88 special verdict setting forth in writing the existence or non-exist-  
89 ence of each of the aggravating and mitigating factors set forth in  
90 paragraphs (4) and (5) of this subsection. If any aggravating  
91 factor is found to exist, the verdict shall also state whether it [is  
92 or is not outweighed by] *outweighs beyond a reasonable doubt*  
93 any one or more mitigating factors.

94 (a) If the jury or the court finds that any aggravating factor  
95 or factors exists and [is not outweighed by] *that the factor or*  
96 *factors outweigh beyond a reasonable doubt any one or more miti-*  
97 *gating factors, the court shall sentence the defendant to death.*

98 (b) If the jury or the court finds that no aggravating factors  
99 exist, or that any aggravating factors which exist [are outweighed  
100 by] *do not outweigh any one or more mitigating factors, the court*  
101 *shall sentence the defendant pursuant to subsection b.*

102 (c) If the jury is unable to reach a unanimous verdict, the court  
103 shall sentence the defendant pursuant to subsection b.

104 (4) The aggravating factors which may be found by the jury or  
105 the court are:

106 (a) The defendant has previously been convicted of murder;

107 (b) In the commission of the murder, the defendant purposely  
108 or knowingly created a grave risk of death to another person in  
109 addition to the victim;

110 (c) The murder was outrageously or wantonly vile, horrible or  
111 inhuman in that it involved torture, depravity of mind, or an  
112 aggravated [battery] *assault* to the victim;

113 (d) The defendant committed the murder as consideration for

114 the receipt, or in expectation of the receipt of any thing of  
115 pecuniary value;

116 (e) The defendant procured the commission of the offense by  
117 payment or promise of payment of anything of pecuniary value;

118 (f) The murder was committed for the purpose of escaping  
119 detection, apprehension, trial, punishment or confinement for  
120 another offense committed by the defendant or another;

121 (g) The offense was committed while the defendant was engaged  
122 in the commission of, or an attempt to commit, or flight after  
123 committing or attempting to commit robbery, sexual assault,  
124 arson, burglary or kidnapping; or

125 (h) The defendant murdered a public servant, as defined in  
126 2C:27-1, while the victim was engaged in the performance of his  
127 official duties, or because of the victim's status as a public servant.

128 (5) The mitigating factors which may be found by the jury or  
129 the court are:

130 (a) The defendant was under the influence of extreme mental or  
131 emotional disturbance insufficient to constitute a defense to prose-  
132 cution;

133 (b) The victim solicited, participated in or consented to the  
134 conduct which resulted in his death;

135 (c) The age of the defendant at the time of the murder;

136 (d) The defendant's capacity to appreciate the wrongfulness of  
137 his conduct or to conform his conduct to the requirements of the  
138 law was significantly impaired as the result of mental disease or  
139 defect or intoxication, but not to a degree sufficient to constitute  
140 a defense to prosecution;

141 (e) The defendant was under unusual and substantial duress  
142 insufficient to constitute a defense to prosecution;

143 (f) The defendant has no significant history of prior criminal  
144 activity;

145 (g) The defendant rendered substantial assistance to the State  
146 in the prosecution of another person for the crime of murder; or

147 (h) Any other factor which is relevant to the defendant's char-  
148 acter or record or to the circumstances of the offense.

149 d. The sentencing proceeding set forth in subsection c. of this  
150 section shall not be waived by the prosecuting attorney.

151 e. Every judgment of conviction which results in a sentence of  
152 death under this section may be appealed, pursuant to the  
153 rules of court, to the Supreme Court, which shall also deter-  
154 mine whether the sentence is disproportionate to the penalty im-  
155 posed in similar cases, considering both the crime and the  
156 defendant.

157 *f. Prior to the jury's sentencing deliberations, the trial court*  
 158 *shall inform the jury of the sentences which may be imposed*  
 159 *pursuant to subsection b. of this section on the defendant if the*  
 160 *defendant is not sentenced to death. The jury shall also be in-*  
 161 *formed that a failure to reach a unanimous verdict shall result in*  
 162 *sentencing by the court pursuant to subsection b.*

1 3. This act shall take effect immediately.

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### STATEMENT

This bill is intended to clarify several procedural aspects of the capital punishment statute. Those clarifications are as follows:

1. Provide, with regard to the juror selection process, that the trial court may increase the number of peremptory challenges available to both the State and the defense in capital cases.

2. Clarify that if one of the jurors who rendered the guilty verdict becomes ill or is unable to proceed in the sentencing phase of the trial, an alternate juror can participate in the sentencing proceeding.

3. State that while a defendant has the burden of producing evidence of the existence of any of the factors which would mitigate against the imposition of the death penalty, the defendant has no burden with regard to establishment of those mitigating factors.

4. Provide that the Rules of Evidence are applicable to evidence offered by the State in establishing the aggravating factors required for the imposition of a death sentence but that all reliable evidence relevant to the establishment of mitigating factors may be introduced.

5. Clarify that the aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed.

6. Require that jurors be informed prior to their deliberations of the sentencing alternatives to the death penalty and of the sentencing consequences of their failure to reach a unanimous verdict.

5950(1985)

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE, No. 950

STATE OF NEW JERSEY

DATED: MARCH 1, 1984

This bill is intended to clarify several procedural aspects of the capital punishment statute. Many of the bill's provisions resulted from suggestions received at the public hearing held by the committee during the last session with those who participated in the first two cases tried under the new capital punishment statute.

A summary of the bill's provisions is as follows:

1. Provide, with regard to the juror selection process, that the trial court may, in its discretion, increase the number of peremptory challenges available to both the State and the defense in capital cases.

2. Clarify that if one of the jurors who rendered the guilty verdict becomes ill or is unable to proceed in the sentencing phase of the trial, an alternate juror can participate in the sentencing proceeding.

3. State that while a defendant has the burden of producing evidence of the existence of any of the factors which would mitigate against the imposition of the death penalty, the defendant would have no burden with regard to establishment of those mitigating factors.

4. Provide that the Rules of Evidence would be applicable to evidence offered by the State in establishing the aggravating factors required for the imposition of a death sentence but that all reliable evidence relevant to the establishment of mitigating factors may be introduced.

5. Clarify that the aggravating factors must outweigh any mitigating factors beyond a reasonable doubt in order for a death sentence to be imposed.

The following amendments to the bill were adopted:

1. The fact that a defendant has been previously convicted of murder is one of the aggravating factors to be considered during the sentencing proceeding. Presently, the prosecution may only introduce that fact that the defendant had been convicted of murder. As originally drafted, Senate Bill No. 950 would have permitted all the circumstances surrounding the prior homicide to be introduced into evidence. In order to avoid turning the sentencing proceeding into a second trial of the previous case and at the same time to provide the jury with some information about the prior conviction, the amendments would modify

that provision to permit the identity and age of the victim, the manner of death and the relationship of the victim to the defendant, if any, to be introduced into evidence during the sentencing proceeding.

2. The amendments would add language providing that if evidence introduced during the guilt phase of the proceeding relates to either an aggravating or mitigating factor, that evidence need not be reintroduced during the sentencing proceeding unless the trier of fact was not present during the guilt phase.

3. Presently, a murder committed while committing or attempting to commit another crime such as robbery or sexual assault is an aggravating factor. This bill would include murder itself among those offenses so that a murder committed during the commission of another murder would be an aggravating circumstance.

4. The amendments also change the word "may" to "shall" in the portion of the statute dealing with those convicted of murder and not sentenced to death. This is to clarify that the sentencing court may not impose the sentence ordinarily proscribed for crimes of the first degree but must impose the sentence specifically provided in the murder statute.

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[OFFICIAL COPY REPRINT]

SENATE, No. 950

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Senator RUSSO

AN ACT concerning the procedures employed in criminal cases involving capital punishment and amending N. J. S. 2A:78-7 and N. J. S. 2C:11-3.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. N. J. S. 2A:78-7 is amended to read as follows:

2 2A:78-7. Upon the trial of any action in any court of this State,  
3 the parties thereto shall be entitled to peremptory challenges as  
4 follows:

5 a. In any civil action **[not to be tried by a struck jury]**, each  
6 party, six.

7 b. **[In any civil action to be tried by a struck jury, each party,**  
8 **three.] Deleted by amendment (P. L. , c. )**

9 c. Upon an indictment for **[treason, murder, kidnapping, mis-**  
10 **prision of treason, manslaughter, sodomy, rape, arson, burglary,**  
11 **robbery, forgery, perjury, or subornation of perjury, a defendant,**  
12 **if tried alone, 20; if two or more defendants are tried together,**  
13 **10 each; the State, six peremptory challenges for each 10 allowed**  
14 **to the defendants. This paragraph c. shall not apply to struck or**  
15 **foreign juries]** *kidnapping, murder, aggravated manslaughter,*  
16 *manslaughter, aggravated assault, aggravated sexual assault,*  
17 *sexual assault, aggravated criminal sexual contact, aggravated*  
18 *arson, arson, burglary, robbery, forgery if it constitutes a crime*  
19 *of the third degree as defined by subsection b. of N. J. S. 2C:21-1,*  
20 *or perjury, the defendant, 20 peremptory challenges if tried alone*  
21 *and 10 challenges if tried jointly and the State, 12 peremptory*

EXPLANATION—Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

\*—Senate committee amendments adopted March 1, 1984.

22 *challenges if the defendant is tried alone and six peremptory*  
 23 *challenges for each 10 afforded defendants if tried jointly. The*  
 24 *trial court, in its discretion, may, however, increase proportionally*  
 25 *the number of peremptory challenges available to the defendant*  
 26 *and the State in any case in which the sentencing procedure set*  
 27 *forth in subsection c. of N. J. S. 2C:11-3 might be utilized.*

28 d. Upon any other indictment, defendants, 10 each, the State,  
 29 10 peremptory challenges for each 10 challenges allowed to the  
 30 defendants. [This paragraph d. shall not apply to struck or  
 31 foreign juries.] *When the case is to be tried by a foreign jury,*  
 32 *each defendant, five peremptory challenges, and the State, five*  
 33 *peremptory challenges for each five peremptory challenges*  
 34 *afforded the defendants.*

35 e. [Upon any indictments for which a struck or foreign jury  
 36 shall be summoned and returned, defendants, five each; the State,  
 37 five peremptory challenges for each five challenges allowed to all  
 38 defendants.] Deleted by amendment. (P. L. , c. )

1 2. N. J. S. 2C:11-3 is amended to read as follows:

2 2C:11-3. Murder. a. Except as provided in section 2C:11-4  
 3 criminal homicide constitutes murder when:

4 (1) The actor purposely causes death or serious bodily injury  
 5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
 7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
 9 one or more other persons, is engaged in the commission of, or  
 10 an attempt to commit, or flight after committing or attempting to  
 11 commit robbery, sexual assault, arson, burglary, kidnapping or  
 12 criminal escape, and in the course of such crime or of immediate  
 13 flight therefrom, any person causes the death of a person other  
 14 than one of the participants; except that in any prosecution under  
 15 this subsection, in which the defendant was not the only partici-  
 16 pant in the underlying crime, it is an affirmative defense that the  
 17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
 19 request, command, importune, cause or aid the commission  
 20 thereof; and

21 (b) Was not armed with a deadly weapon, or any instrument,  
 22 article or substance readily capable of causing death or serious  
 23 physical injury and of a sort not ordinarily carried in public places  
 24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
 26 ticipant was armed with such a weapon, instrument, article or  
 27 substance; and

28 (d) Had no reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 b. Murder is a crime of the first degree but a person convicted  
32 of murder ~~\*[may]~~ \*shall\* be sentenced, except as provided in sub-  
33 section c. of this section, by the court to a term of 30 years, during  
34 which the person shall not be eligible for parole or to a specific  
35 term of years which shall be between 30 years and life imprison-  
36 ment of which the person shall serve 30 years before being eligible  
36A for parole.

37 c. Any person convicted under subsection a. (1) or (2) who  
38 committed the homicidal act by his own conduct or who as an  
39 accomplice procured the commission of the offense by payment  
40 or promise of payment, of anything of pecuniary value shall be  
41 sentenced as provided hereafter:

42 (1) The court shall conduct a separate sentencing proceeding  
43 to determine whether the defendant should be sentenced to death  
44 or pursuant to the provisions of subsection b. of this section.  
45 Where the defendant has been tried by a jury, the proceeding  
46 shall be conducted by the judge who presided at the trial and before  
47 the jury which determined the defendant's guilt except that, for  
48 good cause, the court may discharge that jury and conduct the  
49 proceeding before a jury empaneled for the purpose of the pro-  
50 ceeding. Where the defendant has entered a plea of guilty or has  
51 been tried without a jury, the proceeding shall be conducted by  
52 the judge who accepted the defendant's plea or who determined  
53 the defendant's guilt and before a jury empaneled for the purpose  
54 of the proceeding. On motion of the defendant and with consent  
55 of the prosecuting attorney the court may conduct a proceeding  
56 without a jury. *Nothing in this subsection shall be construed to*  
57 *prevent the participation of an alternate juror in the sentencing*  
58 *proceeding if one of the jurors who rendered the guilty verdict*  
59 *becomes ill or is otherwise unable to proceed before or during the*  
60 *sentencing proceeding.*

61 (2) (a) At the proceeding, the State shall have the burden of  
62 establishing beyond a reasonable doubt the existence of any  
63 aggravating factors set forth in paragraph (4) of this subsection.  
64 The defendant shall have the burden of producing evidence of the  
65 existence of any mitigating factors set forth in paragraph (5) of  
66 this subsection *but shall not have a burden with regard to the*  
67 *establishment of a mitigating factor.*

68 (b) *The admissibility of evidence offered by the State to estab-*  
69 *lish any of the aggravating factors shall be governed by the rules*

70 governing the admission of evidence at criminal trials. The  
 71 defendant may offer, without regard to the rules governing the  
 72 admission of evidence at criminal trials, reliable evidence relevant  
 73 to any of the mitigating factors.

73A *\*(c) Evidence admitted at the trial, which is relevant to the*  
 73B *aggravating and mitigating factors set forth in paragraphs (4)*  
 73C *(5) of this subsection, shall be considered without the necessity of*  
 73D *reintroducing that evidence at the sentencing proceeding provided*  
 73E *that the fact finder at the sentencing proceeding was present as*  
 73F *either the fact finder or the judge at the trial.\**

74 *\*[(c)]\* \*(d)\** The State and the defendant shall be permitted to  
 75 rebut any evidence presented by the other party at the sentencing  
 76 proceeding and to present argument as to the adequacy of the  
 77 evidence to establish the existence of any aggravating or mitigating  
 78 factor.

79 *\*[(d)]\* \*(e)\** Prior to the commencement of the sentencing  
 80 proceeding, or at such time as he has knowledge of the existence of  
 81 an aggravating factor, the prosecuting attorney shall give notice  
 82 to the defendant of the aggravating factors which he intends to  
 83 prove in the proceeding.

84 *\*[(e)]\* \*(f)\* Evidence offered by the State with regard to the*  
 85 *establishment of a prior homicide conviction pursuant to paragraph*  
 86 *(4) (a) of this subsection may include the \*[(circumstances sur-*  
 86A *rounding the prior homicide)]\* *identity and age of the victim, the*  
 86B *manner of death and the relationship, if any, of the victim to the*  
 86C *defendant\*.**

87 (3) The jury, or if there is no jury, the court shall return a  
 88 special verdict setting forth in writing the existence or non-exist-  
 89 ence of each of the aggravating and mitigating factors set forth in  
 90 paragraphs (4) and (5) of this subsection. If any aggravating  
 91 factor is found to exist, the verdict shall also state whether it [is  
 92 or is not outweighed by] *outweighs beyond a reasonable doubt*  
 93 any one or more mitigating factors.

94 (a) If the jury or the court finds that any aggravating factor  
 95 or factors exists and [is not outweighed by] *that the factor or*  
 96 *factors outweigh beyond a reasonable doubt any one or more miti-*  
 97 *gating factors, the court shall sentence the defendant to death.*

98 (b) If the jury or the court finds that no aggravating factors  
 99 exist, or that any aggravating factors which exist [are outweighed  
 100 by] *do not outweigh any one or more mitigating factors, the court*  
 101 *shall sentence the defendant pursuant to subsection b.*

102 (c) If the jury is unable to reach a unanimous verdict, the court  
 103 shall sentence the defendant pursuant to subsection b.

104 (4) The aggravating factors which may be found by the jury or  
 105 the court are:

- 106 (a) The defendant has previously been convicted of murder;
- 107 (b) In the commission of the murder, the defendant purposely  
108 or knowingly created a grave risk of death to another person in  
109 addition to the victim;
- 110 (c) The murder was outrageously or wantonly vile, horrible or  
111 inhuman in that it involved torture, depravity of mind, or an  
112 aggravated [battery] *assault* to the victim;
- 113 (d) The defendant committed the murder as consideration for  
114 the receipt, or in expectation of the receipt of any thing of  
115 pecuniary value;
- 116 (e) The defendant procured the commission of the offense by  
117 payment or promise of payment of anything of pecuniary value;
- 118 (f) The murder was committed for the purpose of escaping  
119 detection, apprehension, trial, punishment or confinement for  
120 another offense committed by the defendant or another;
- 121 (g) The offense was committed while the defendant was engaged  
122 in the commission of, or an attempt to commit, or flight after  
123 committing or attempting to commit \*murder,\* robbery, sexual  
124 assault, arson, burglary or kidnapping; or
- 125 (h) The defendant murdered a public servant, as defined in  
126 2C:27-1, while the victim was engaged in the performance of his  
127 official duties, or because of the victim's status as a public servant.
- 128 (5) The mitigating factors which may be found by the jury or  
129 the court are:
- 130 (a) The defendant was under the influence of extreme mental or  
131 emotional disturbance insufficient to constitute a defense to prose-  
132 cution;
- 133 (b) The victim solicited, participated in or consented to the  
134 conduct which resulted in his death;
- 135 (c) The age of the defendant at the time of the murder;
- 136 (d) The defendant's capacity to appreciate the wrongfulness of  
137 his conduct or to conform his conduct to the requirements of the  
138 law was significantly impaired as the result of mental disease or  
139 defect or intoxication, but not to a degree sufficient to constitute  
140 a defense to prosecution;
- 141 (e) The defendant was under unusual and substantial duress  
142 insufficient to constitute a defense to prosecution;
- 143 (f) The defendant has no significant history of prior criminal  
144 activity;
- 145 (g) The defendant rendered substantial assistance to the State  
146 in the prosecution of another person for the crime of murder; or
- 147 (h) Any other factor which is relevant to the defendant's char-  
148 acter or record or to the circumstances of the offense.

149 d. The sentencing proceeding set forth in subsection c. of this  
150 section shall not be waived by the prosecuting attorney.

151 e. Every judgment of conviction which results in a sentence of  
152 death under this section may be appealed, pursuant to the  
153 rules of court, to the Supreme Court, which shall also deter-  
154 mine whether the sentence is disproportionate to the penalty im-  
155 posed in similar cases, considering both the crime and the  
156 defendant.

157 f. *Prior to the jury's sentencing deliberations, the trial court*  
158 *shall inform the jury of the sentences which may be imposed*  
159 *pursuant to subsection b. of this section on the defendant if the*  
160 *defendant is not sentenced to death. The jury shall also be in-*  
161 *formed that a failure to reach a unanimous verdict shall result in*  
162 *sentencing by the court pursuant to subsection b.*

1 3. This act shall take effect immediately.

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**ADOPTED**  
MAY 14 1984

R-37

ok  
M  
6/1/84

Senate  
Floor Amendments

to

Senate Bill No. 950 OCR

By: Senator Russo  
(5/14/84)

Amend:

Page	Sec.	Line
6	2	153-156

On line 153 omit ", which shall also deter-"  
Lines 154-155 omit in entirety  
On line 156 omit "defendant"

STATEMENT

This amendment would eliminate the present requirement that the New Jersey Supreme Court conduct a proportionality review in each case in which a death sentence is imposed.

[SECOND OFFICIAL COPY REPRINT]

SENATE, No. 950

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Senator RUSSO

AN ACT concerning the procedures employed in criminal cases involving capital punishment and amending N. J. S. 2A:78-7 and N. J. S. 2C:11-3.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. N. J. S. 2A:78-7 is amended to read as follows:

2 2A:78-7. Upon the trial of any action in any court of this State,  
3 the parties thereto shall be entitled to peremptory challenges as  
4 follows:

5 a. In any civil action **[not to be tried by a struck jury]**, each  
6 party, six.

7 b. **[In any civil action to be tried by a struck jury, each party,**  
8 **three.]** Deleted by amendment (P. L. , c. )

9 c. Upon an indictment for **[treason, murder, kidnapping, mis-**  
10 **prison of treason, manslaughter, sodomy, rape, arson, burglary,**  
11 **robbery, forgery, perjury, or subornation of perjury, a defendant,**  
12 **if tried alone, 20; if two or more defendants are tried together,**  
13 **10 each; the State, six peremptory challenges for each 10 allowed**  
14 **to the defendants. This paragraph c. shall not apply to struck or**  
15 **foreign juries]** *kidnapping, murder, aggravated manslaughter,*  
16 *manslaughter, aggravated assault, aggravated sexual assault,*  
17 *sexual assault, aggravated criminal sexual contact, aggravated*  
18 *arson, arson, burglary, robbery, forgery if it constitutes a crime*  
19 *of the third degree as defined by subsection b. of N. J. S. 2C:21-1,*  
20 *or perjury, the defendant, 20 peremptory challenges if tried alone*  
21 *and 10 challenges if tried jointly and the State, 12 peremptory*

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter printed in italics thus is new matter.**

**Matter enclosed in asterisks or stars has been adopted as follows:**

\*—Senate committee amendments adopted March 1, 1984.

\*\*—Senate amendment adopted May 14, 1984.



22 *challenges if the defendant is tried alone and six peremptory*  
 23 *challenges for each 10 afforded defendants if tried jointly. The*  
 24 *trial court, in its discretion, may, however, increase proportionally*  
 25 *the number of peremptory challenges available to the defendant*  
 26 *and the State in any case in which the sentencing procedure set*  
 27 *forth in subsection c. of N. J. S. 2C:11-3 might be utilized.*

28 d. Upon any other indictment, defendants, 10 each, the State,  
 29 10 peremptory challenges for each 10 challenges allowed to the  
 30 defendants. **¶**This paragraph d. shall not apply to struck or  
 31 foreign juries. **¶**When the case is to be tried by a foreign jury,  
 32 each defendant, five peremptory challenges, and the State, five  
 33 peremptory challenges for each five peremptory challenges  
 34 afforded the defendants.

35 e. **¶**Upon any indictments for which a struck or foreign jury  
 36 shall be summoned and returned, defendants, five each; the State,  
 37 five peremptory challenges for each five challenges allowed to all  
 38 defendants. **¶**Deleted by amendment. (P. L. , c. )

1 2. N. J. S. 2C:11-3 is amended to read as follows:

2 2C:11-3. Murder. a. Except as provided in section 2C:11-4  
 3 criminal homicide constitutes murder when:

4 (1) The actor purposely causes death or serious bodily injury  
 5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
 7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
 9 one or more other persons, is engaged in the commission of, or  
 10 an attempt to commit, or flight after committing or attempting to  
 11 commit robbery, sexual assault, arson, burglary, kidnapping or  
 12 criminal escape, and in the course of such crime or of immediate  
 13 flight therefrom, any person causes the death of a person other  
 14 than one of the participants; except that in any prosecution under  
 15 this subsection, in which the defendant was not the only partici-  
 16 pant in the underlying crime, it is an affirmative defense that the  
 17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
 19 request, command, importune, cause or aid the commission  
 20 thereof; and

21 (b) Was not armed with a deadly weapon, or any instrument,  
 22 article or substance readily capable of causing death or serious  
 23 physical injury and of a sort not ordinarily carried in public places  
 24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
 26 ticipant was armed with such a weapon, instrument, article or  
 27 substance; and

28 (d) Had no reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 b. Murder is a crime of the first degree but a person convicted  
32 of murder \*~~may~~\* *shall* be sentenced, except as provided in sub-  
33 section c. of this section, by the court to a term of 30 years, during  
34 which the person shall not be eligible for parole or to a specific  
35 term of years which shall be between 30 years and life imprison-  
36 ment of which the person shall serve 30 years before being eligible  
36A for parole.

37 c. Any person convicted under subsection a. (1) or (2) who  
38 committed the homicidal act by his own conduct or who as an  
39 accomplice procured the commission of the offense by payment  
40 or promise of payment, of anything of pecuniary value shall be  
41 sentenced as provided hereafter:

42 (1) The court shall conduct a separate sentencing proceeding  
43 to determine whether the defendant should be sentenced to death  
44 or pursuant to the provisions of subsection b. of this section.  
45 Where the defendant has been tried by a jury, the proceeding  
46 shall be conducted by the judge who presided at the trial and before  
47 the jury which determined the defendant's guilt except that, for  
48 good cause, the court may discharge that jury and conduct the  
49 proceeding before a jury empaneled for the purpose of the pro-  
50 ceeding. Where the defendant has entered a plea of guilty or has  
51 been tried without a jury, the proceeding shall be conducted by  
52 the judge who accepted the defendant's plea or who determined  
53 the defendant's guilt and before a jury empaneled for the purpose  
54 of the proceeding. On motion of the defendant and with consent  
55 of the prosecuting attorney the court may conduct a proceeding  
56 without a jury. *Nothing in this subsection shall be construed to*  
57 *prevent the participation of an alternate juror in the sentencing*  
58 *proceeding if one of the jurors who rendered the guilty verdict*  
59 *becomes ill or is otherwise unable to proceed before or during the*  
60 *sentencing proceeding.*

61 (2) (a) At the proceeding, the State shall have the burden of  
62 establishing beyond a reasonable doubt the existence of any  
63 aggravating factors set forth in paragraph (4) of this subsection.  
64 The defendant shall have the burden of producing evidence of the  
65 existence of any mitigating factors set forth in paragraph (5) of  
66 this subsection *but shall not have a burden with regard to the*  
67 *establishment of a mitigating factor.*

68 (b) *The admissibility of evidence offered by the State to estab-*  
69 *lish any of the aggravating factors shall be governed by the rules*

70 governing the admission of evidence at criminal trials. The  
 71 defendant may offer, without regard to the rules governing the  
 72 admission of evidence at criminal trials, reliable evidence relevant  
 73 to any of the mitigating factors.

73A *\*(c) Evidence admitted at the trial, which is relevant to the*  
 73B *aggravating and mitigating factors set forth in paragraphs (4)*  
 73C *(5) of this subsection, shall be considered without the necessity of*  
 73D *reintroducing that evidence at the sentencing proceeding provided*  
 73E *that the fact finder at the sentencing proceeding was present as*  
 73F *either the fact finder or the judge at the trial.\**

74 **\*[(c)]\* \*(d)\*** The State and the defendant shall be permitted to  
 75 rebut any evidence presented by the other party at the sentencing  
 76 proceeding and to present argument as to the adequacy of the  
 77 evidence to establish the existence of any aggravating or mitigating  
 78 factor.

79 **\*[(d)]\* \*(e)\*** Prior to the commencement of the sentencing  
 80 proceeding, or at such time as he has knowledge of the existence of  
 81 an aggravating factor, the prosecuting attorney shall give notice  
 82 to the defendant of the aggravating factors which he intends to  
 83 prove in the proceeding.

84 **\*[(e)]\* \*(f)\*** *Evidence offered by the State with regard to the*  
 85 *establishment of a prior homicide conviction pursuant to paragraph*  
 86 *(4) (a) of this subsection may include the **\*[circumstances sur-***  
 86A *rounding the prior homicide]\* \*identity and age of the victim, the*  
 86B *manner of death and the relationship, if any, of the victim to the*  
 86C *defendant\*.*

87 (3) The jury, or if there is no jury, the court shall return a  
 88 special verdict setting forth in writing the existence or non-exist-  
 89 ence of each of the aggravating and mitigating factors set forth in  
 90 paragraphs (4) and (5) of this subsection. If any aggravating  
 91 factor is found to exist, the verdict shall also state whether it **[is**  
 92 **or is not outweighed by]** *outweighs beyond a reasonable doubt*  
 93 *any one or more mitigating factors.*

94 (a) If the jury or the court finds that any aggravating factor  
 95 *or factors exists and **[is not outweighed by]** that the factor or*  
 96 *factors outweigh beyond a reasonable doubt any one or more miti-*  
 97 *gating factors, the court shall sentence the defendant to death.*

98 (b) If the jury or the court finds that no aggravating factors  
 99 exist, or that any aggravating factors which exist **[are outweighed**  
 100 **by]** *do not outweigh any one or more mitigating factors, the court*  
 101 *shall sentence the defendant pursuant to subsection b.*

102 (c) If the jury is unable to reach a unanimous verdict, the court  
 103 shall sentence the defendant pursuant to subsection b.

104 (4) The aggravating factors which may be found by the jury or  
 105 the court are:

- 106 (a) The defendant has previously been convicted of murder;
- 107 (b) In the commission of the murder, the defendant purposely  
108 or knowingly created a grave risk of death to another person in  
109 addition to the victim;
- 110 (c) The murder was outrageously or wantonly vile, horrible or  
111 inhuman in that it involved torture, depravity of mind, or an  
112 aggravated **[battery]** *assault* to the victim;
- 113 (d) The defendant committed the murder as consideration for  
114 the receipt, or in expectation of the receipt of any thing of  
115 pecuniary value;
- 116 (e) The defendant procured the commission of the offense by  
117 payment or promise of payment of anything of pecuniary value;
- 118 (f) The murder was committed for the purpose of escaping  
119 detection, apprehension, trial, punishment or confinement for  
120 another offense committed by the defendant or another;
- 121 (g) The offense was committed while the defendant was engaged  
122 in the commission of, or an attempt to commit, or flight after  
123 committing or attempting to commit *\*murder,\** robbery, sexual  
124 assault, arson, burglary or kidnapping; or
- 125 (h) The defendant murdered a public servant, as defined in  
126 2C:27-1, while the victim was engaged in the performance of his  
127 official duties, or because of the victim's status as a public servant.
- 128 (5) The mitigating factors which may be found by the jury or  
129 the court are:
- 130 (a) The defendant was under the influence of extreme mental or  
131 emotional disturbance insufficient to constitute a defense to prose-  
132 cution;
- 133 (b) The victim solicited, participated in or consented to the  
134 conduct which resulted in his death;
- 135 (c) The age of the defendant at the time of the murder;
- 136 (d) The defendant's capacity to appreciate the wrongfulness of  
137 his conduct or to conform his conduct to the requirements of the  
138 law was significantly impaired as the result of mental disease or  
139 defect or intoxication, but not to a degree sufficient to constitute  
140 a defense to prosecution;
- 141 (e) The defendant was under unusual and substantial duress  
142 insufficient to constitute a defense to prosecution;
- 143 (f) The defendant has no significant history of prior criminal  
144 activity;
- 145 (g) The defendant rendered substantial assistance to the State  
146 in the prosecution of another person for the crime of murder; or
- 147 (h) Any other factor which is relevant to the defendant's char-  
148 acter or record or to the circumstances of the offense.

149 d. The sentencing proceeding set forth in subsection c. of this  
150 section shall not be waived by the prosecuting attorney.

151 e. Every judgment of conviction which results in a sentence of  
152 death under this section may be appealed, pursuant to the  
153 rules of court, to the Supreme Court\*\*[, which shall also deter-  
154 mine whether the sentence is disproportionate to the penalty im-  
155 posed in similar cases, considering both the crime and the  
156 defendant]\*\*.

157 f. *Prior to the jury's sentencing deliberations, the trial court*  
158 *shall inform the jury of the sentences which may be imposed*  
159 *pursuant to subsection b. of this section on the defendant if the*  
160 *defendant is not sentenced to death. The jury shall also be in-*  
161 *formed that a failure to reach a unanimous verdict shall result in*  
162 *sentencing by the court pursuant to subsection b.*

1 3. This act shall take effect immediately.

---

SENATE JUDICIARY COMMITTEE

STATEMENT TO

**SENATE, No. 950**

[SECOND OFFICIAL COPY REPRINT]

**STATE OF NEW JERSEY**

DATED: NOVEMBER 29, 1984

Senate Bill No. 950 proposes a series of amendments to New Jersey's capital punishment statute. In enacting the amendments contained in this bill, the intent of the Legislature is to effect only prospective changes. The amendments are not intended to apply retrospectively or to affect cases now on appeal. The following is a description of the bill's provisions:

ORIGINAL PROVISIONS:

Senate Bill No. 950 was introduced on January 23, 1984. Many of Senate Bill No. 950's original provisions resulted from suggestions received at a public hearing held by the Senate Judiciary Committee in May of last year with those who participated as trial judges, prosecutors or defense counsel in the first two cases tried under the death penalty law. The original amendments proposed by Senate Bill No. 950 are as follows:

1. With regard to the juror selection process, the original Senate Bill No. 950 would permit the judge, in his discretion, to increase the number of peremptory challenges available to both the State and the defense in capital cases. Presently, in all criminal cases, the defense is limited to 20 peremptory challenges and the State to 12. Because jury selection is so critical in a death penalty trial, it was felt that some discretion with regard to the number of peremptory challenges was desirable.

2. Current law is unclear about the procedure to be followed if one of the jurors who participated in the guilt phase of a trial becomes ill and is unable to proceed with the sentencing phase of the trial. Senate Bill No. 950 would provide that in this situation one of the alternate jurors who heard the evidence but did not take part in the verdict could participate in the sentencing process. This provision is aimed at avoiding costly and time-consuming retrials.

3. Our statute, which now provides that the State has the burden of establishing by the standard of beyond a reasonable doubt the existence of an aggravating factor, is silent with regard to the burden of proof

that must be met by the defendant when establishing the existence of a mitigating factor. Senate Bill No. 950 would make it clear that while the defendant must produce evidence relating to mitigating factors, he would be required to meet no standard with regard to the establishment of those mitigating factors. The jury would decide whether the defendant had sufficiently proved the existence of a mitigating factor.

4. Another amendment contained in the original Senate Bill No. 950 provides that the Rules of Evidence would be strictly applicable to evidence offered by the prosecution in establishing the aggravating factors required for the imposition of a death sentence but that all reliable evidence relevant to the establishment of mitigating factors may be introduced. Existing law is silent on this issue.

5. Senate Bill No. 950 clarifies that the aggravating factors must outweigh any mitigating factors by a standard of beyond a reasonable doubt before a death sentence can be imposed. Presently, the statute is silent as to whether a jury must weigh aggravating factors against mitigating factors by any standard.

6. Senate Bill No. 950 provides that prior to the sentencing jury's deliberations, the court shall inform the jury of the sentences which may be imposed on the defendant if the defendant is not sentenced to death. The jury is also to be informed that failure to reach a unanimous verdict will result in the same possible sentences.

**COMMITTEE AMENDMENTS (adopted March 1, 1984):**

As the result of consultation with the Division of Criminal Justice, the following amendments to Senate Bill No. 950 were adopted by the committee on March 1, 1984:

1. One of the aggravating factors which a jury may consider is that the defendant was previously convicted of murder. As originally drafted, Senate Bill No. 950 would have permitted all of the circumstances surrounding the prior homicide to be introduced into evidence. In order to avoid turning the sentencing proceeding into a second trial of the previous case and at the same time to provide the jury with some information about the prior conviction, the amendments would limit the circumstances of the prior homicide that could be introduced into evidence during the sentencing proceeding to: the identity and age of the victim; the manner of death and the relationship of the victim to the defendant, if any.

2. The amendments also provide that if evidence introduced during the guilt phase of the proceeding relates to either an aggravating or a mitigating factor, that evidence need not be reintroduced during the sentencing proceeding unless the trier of fact was not present during the guilt phase.

3. Under the current law, a murder committed while committing or attempting to commit another crime, such as robbery or sexual assault, is an aggravating factor. As amended, Senate Bill No. 950 would include murder itself among those offenses, so that a murder committed during the commission of another murder would be an aggravating circumstance.

4. The last of the March 1 amendments to Senate Bill No. 950 clarifies that a person convicted of murder but not sentenced to death may not receive the sentence ordinarily prescribed for crimes of the first degree but must receive the sentence specifically provided in the murder statute.

COMMITTEE AMENDMENTS (adopted November 29, 1984):

1. Presently, under New Jersey's capital punishment statute, our Supreme Court is required to review each case in which the death penalty is imposed in order to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. When the original death penalty statute was passed, it was thought that the United States Supreme Court would not uphold a capital punishment law that did not contain such a "proportionality review." In *Pulley v. Harris*, decided on January 23, 1984, the Supreme Court ruled, contrary to expectation, that proportionality review is not a constitutionally required element of a death penalty statute. A floor amendment to Senate Bill No. 950 eliminating "proportionality review" was adopted on May 14, 1984. The committee amendments would add language indicating that "proportionality review" is available upon the request of the defendant.

2. In two recent decisions, *State v. Bey* and *State v. Biegenwald*, both decided on June 26 of this year, the New Jersey Supreme Court ruled that a defendant found guilty of murder cannot, pending the conclusion of direct appeal proceedings challenging the guilty verdict, be considered as "having been convicted" for sentencing purposes under the capital punishment statute.

Prosecutors are concerned about this ruling because they feel that it will hamper the prosecution of so-called "serial murders", individuals who kill victims randomly in a series of unrelated crimes. When discovered, these murderers usually undergo a separate trial on each murder charge. Often a trial will begin while a prior conviction is still in the appeal process. Prosecutors are concerned that if prior convictions on appeal cannot be introduced, in effect the death penalty will not be able to be used against the type of murderer for which capital punishment was intended. The committee amendments would permit the introduction of prior murder convictions while on appeal during the sentencing phase of a death penalty trial. It should be noted with regard



to this amendment that the majority of states with capital punishment statutes do permit convictions on appeal to be introduced as prior convictions.

3. The committee amendments would provide that while the Rules of Evidence would be strictly applicable to evidence offered by the prosecution in establishing aggravating factors, the prosecution would not be bound by the Rules in Evidence in rebutting evidence introduced by the defense with regard to mitigating factors.

4. The committee amendments also clarify that during the jury deliberations, all aggravating factors found by the jury are to be weighed against all mitigating factors found by the jury. As presently worded, the statute could be read to suggest that each aggravating factor is to be weighed separately against the mitigating factors.

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ASSEMBLY JUDICIARY COMMITTEE

STATEMENT TO

**SENATE, No. 950**

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**STATE OF NEW JERSEY**

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DATED: FEBRUARY 4, 1985

Senate Bill No. 950 proposes a series of amendments to New Jersey's capital punishment statute. In enacting the amendments contained in this bill, the intent of the Legislature is to effect only prospective changes. The amendments are not intended to apply retrospectively or to affect cases now on appeal. The following is a description of the bill's provisions:

**ORIGINAL PROVISIONS:**

Senate Bill No. 950 was introduced on January 23, 1984. Many of Senate Bill No. 950's original provisions resulted from suggestions received at a public hearing held by the Senate Judiciary Committee in May of last year with those who participated as trial judges, prosecutors or defense counsel in the first two cases tried under the death penalty law. The original amendments proposed by Senate Bill No. 950 are as follows:

1. With regard to the juror selection process, the original Senate Bill No. 950 would permit the judge, in his discretion, to increase the number of peremptory challenges available to both the State and the defense in capital cases. Presently, in all criminal cases, the defense is limited to 20 peremptory challenges and the State to 12. Because jury selection is so critical in a death penalty trial, it was felt that some discretion with regard to the number of peremptory challenges was desirable.

2. Current law is unclear about the procedure to be followed if one of the jurors who participated in the guilt phase of a trial becomes ill and is unable to proceed with the sentencing phase of the trial. Senate Bill No. 950 would provide that in this situation one of the alternate jurors who heard the evidence but did not take part in the verdict could participate in the sentencing process. This provision is aimed at avoiding costly and time-consuming retrials.

3. Our statute, which now provides that the State has the burden of establishing by the standard of beyond a reasonable doubt the existence of an aggravating factor, is silent with regard to the burden of proof

that must be met by the defendant when establishing the existence of a mitigating factor. Senate Bill No. 950 would make it clear that while the defendant must produce evidence relating to mitigating factors, he would be required to meet no standard with regard to the establishment of those mitigating factors. The jury would decide whether the defendant had sufficiently proved the existence of a mitigating factor.

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Senate Judiciary Committee amendments (adopted March 1, 1984):

As the result of consultation with the Division of Criminal Justice, the following amendments to Senate Bill No. 950 were adopted by the Senate committee on March 1, 1984:

1. One of the aggravating factors which a jury may consider is that the defendant was previously convicted of murder. As originally drafted, Senate Bill No. 950 would have permitted all of the circumstances surrounding the prior homicide to be introduced into evidence. In order to avoid turning the sentencing proceeding into a second trial of the previous case and at the same time to provide the jury with some information about the prior conviction, the amendments would limit the circumstances of the prior homicide that could be introduced into evidence during the sentencing proceeding to: the identity and age of the victim; the manner of death and the relationship of the victim to the defendant, if any.

2. The amendments also provide that if evidence introduced during the guilt phase of the proceeding relates to either an aggravating or a mitigating factor, that evidence need not be reintroduced during the sentencing proceeding unless the trier of fact was not present during the guilt phase.

3. Under the current law, a murder committed while committing or

attempting to commit another crime, such as robbery or sexual assault, is an aggravating factor. As amended, Senate Bill No. 950 would include murder itself among those offenses, so that a murder committed during the commission of another murder would be an aggravating circumstance.

4. The last of the March 1 amendments to Senate Bill No. 950 clarifies that a person convicted of murder but not sentenced to death may not receive the sentence ordinarily prescribed for crimes of the first degree but must receive the sentence specifically provided in the murder statute.

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1. Presently, under New Jersey's capital punishment statute, our Supreme Court is required to review each case in which the death penalty is imposed in order to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. When the original death penalty statute was passed, it was thought that the United States Supreme Court would not uphold a capital punishment law that did not contain such a "proportionality review." In *Pulley v. Harris*, decided on January 23, 1984, the Supreme Court ruled, contrary to expectation, that proportionality review is not a constitutionally required element of a death penalty statute. A floor amendment to Senate Bill No. 950 eliminating "proportionality review" was adopted on May 14, 1984. The committee amendments would add language indicating that "proportionality review" is available upon the request of the defendant.

2. In two recent decisions, *State v. Bey* and *State v. Biegenwald*, both decided on June 26 of this year, the New Jersey Supreme Court ruled that a defendant found guilty of murder cannot, pending the conclusion of direct appeal proceedings challenging the guilty verdict, be considered as "having been convicted" for sentencing purposes under the capital punishment statute.

Prosecutors are concerned about this ruling because they feel that it will hamper the prosecution of so-called "serial murders," individuals who kill victims randomly in a series of unrelated crimes. When discovered, these murderers usually undergo a separate trial on each murder charge. Often a trial will begin while a prior conviction is still in the appeal process. Prosecutors are concerned that if prior convictions on appeal cannot be introduced, in effect the death penalty will not be able to be used against the type of murderer for which capital punishment was intended. The Senate committee amendments would permit the introduction of prior murder convictions while on appeal during the sentencing phase of a death penalty trial. It should be noted with regard to this amendment that the majority of states with capital

punishment statutes do permit convictions on appeal to be introduced as prior convictions.

3. The Senate committee amendments would provide that while the Rules of Evidence would be strictly applicable to evidence offered by the prosecution in establishing aggravating factors, the prosecution would not be bound by the Rules of Evidence in rebutting evidence introduced by the defense with regard to mitigating factors.

4. The Senate committee amendments also clarify that during the jury deliberations, all aggravating factors found by the jury are to be weighed against all mitigating factors found by the jury. As presently worded, the statute could be read to suggest that each aggravating factor is to be weighed separately against the mitigating factors.

In discussing the situation of a serial murder where there is more than one capital punishment trial, the Assembly Judiciary Committee, in reviewing this bill as amended in the Senate, clearly understands that in the event that there would be a presentation of evidence in a second trial in the penalty phase, in which a prior adjudication of murder was submitted by the prosecutor as an aggravating factor, and the death penalty imposed, that in the event the verdict in the first trial for which a murder conviction was opposed was reversed and a new trial granted other than on penalty, that a new trial as to penalty would obviously be applied for and granted by the court as to the sentencing phase of the second trial.

Also, there is an assumption that there would be an application by the defendant for a new trial on the verdict portion.

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SENATE, No. 950

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Senator RUSSO

AN ACT concerning the procedures employed in criminal cases involving capital punishment and amending N. J. S. 2A:78-7 and N. J. S. 2C:11-3.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. N. J. S. 2A:78-7 is amended to read as follows:

2 2A:78-7. Upon the trial of any action in any court of this State,  
3 the parties thereto shall be entitled to peremptory challenges as  
4 follows:

5 a. In any civil action **[not to be tried by a struck jury]**, each  
6 party, six.

7 b. **[In any civil action to be tried by a struck jury, each party,**  
8 **three.] Deleted by amendment (P. L. , c. )**

9 c. Upon an indictment for **[treason, murder, kidnapping, mis-**  
10 **prison of treason, manslaughter, sodomy, rape, arson, burglary,**  
11 **robbery, forgery, perjury, or subornation of perjury, a defendant,**  
12 **if tried alone, 20; if two or more defendants are tried together,**  
13 **10 each; the State, six peremptory challenges for each 10 allowed**  
14 **to the defendants. This paragraph c. shall not apply to struck or**  
15 **foreign juries]** *kidnapping, murder, aggravated manslaughter,*  
16 *manslaughter, aggravated assault, aggravated sexual assault,*  
17 *sexual assault, aggravated criminal sexual contact, aggravated*  
18 *arson, arson, burglary, robbery, forgery if it constitutes a crime*  
19 *of the third degree as defined by subsection b. of N. J. S. 2C:21-1,*  
20 *or perjury, the defendant, 20 peremptory challenges if tried alone*  
21 *and 10 challenges if tried jointly and the State, 12 peremptory*

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter printed in italics thus is new matter.**

**Matter enclosed in asterisks or stars has been adopted as follows:**

**\*—Senate committee amendments adopted March 1, 1984.**

**\*\*—Senate amendment adopted May 14, 1984.**

**\*\*\*—Senate committee amendments adopted November 29, 1984.**

22 *challenges if the defendant is tried alone and six peremptory*  
 23 *challenges for each 10 afforded defendants if tried jointly. The*  
 24 *trial court, in its discretion, may, however, increase proportionally*  
 25 *the number of peremptory challenges available to the defendant*  
 26 *and the State in any case in which the sentencing procedure set*  
 27 *forth in subsection c. of N. J. S. 2C:11-3 might be utilized.*

28 d. Upon any other indictment, defendants, 10 each, the State,  
 29 10 peremptory challenges for each 10 challenges allowed to the  
 30 defendants. **[**This paragraph d. shall not apply to struck or  
 31 foreign juries.**]** *When the case is to be tried by a foreign jury,*  
 32 *each defendant, five peremptory challenges, and the State, five*  
 33 *peremptory challenges for each five peremptory challenges*  
 34 *afforded the defendants.*

35 e. **[**Upon any indictments for which a struck or foreign jury  
 36 shall be summoned and returned, defendants, five each; the State,  
 37 five peremptory challenges for each five challenges allowed to all  
 38 defendants.**]** Deleted by amendment. (P. L. , c. )

1 2. N. J. S. 2C:11-3 is amended to read as follows:

2 2C:11-3. Murder. a. Except as provided in section 2C:11-4  
 3 criminal homicide constitutes murder when:

4 (1) The actor purposely causes death or serious bodily injury  
 5 resulting in death; or

6 (2) The actor knowingly causes death or serious bodily injury  
 7 resulting in death; or

8 (3) It is committed when the actor, acting either alone or with  
 9 one or more other persons, is engaged in the commission of, or  
 10 an attempt to commit, or flight after committing or attempting to  
 11 commit robbery, sexual assault, arson, burglary, kidnapping or  
 12 criminal escape, and in the course of such crime or of immediate  
 13 flight therefrom, any person causes the death of a person other  
 14 than one of the participants; except that in any prosecution under  
 15 this subsection, in which the defendant was not the only partici-  
 16 pant in the underlying crime, it is an affirmative defense that the  
 17 defendant:

18 (a) Did not commit the homicidal act or in any way solicit,  
 19 request, command, importune, cause or aid the commission  
 20 thereof; and

21 (b) Was not armed with a deadly weapon, or any instrument,  
 22 article or substance readily capable of causing death or serious  
 23 physical injury and of a sort not ordinarily carried in public places  
 24 by law-abiding persons; and

25 (c) Had no reasonable ground to believe that any other par-  
 26 ticipant was armed with such a weapon, instrument, article or  
 27 substance; and

28 (d) Had no reasonable ground to believe that any other partici-  
29 pant intended to engage in conduct likely to result in death or  
30 serious physical injury.

31 b. Murder is a crime of the first degree but a person convicted  
32 of murder \***[may]**\* \*shall\* be sentenced, except as provided in sub-  
33 section c. of this section, by the court to a term of 30 years, during  
34 which the person shall not be eligible for parole or to a specific  
35 term of years which shall be between 30 years and life imprison-  
36 ment of which the person shall serve 30 years before being eligible  
36A for parole.

37 c. Any person convicted under subsection a. (1) or (2) who  
38 committed the homicidal act by his own conduct or who as an  
39 accomplice procured the commission of the offense by payment  
40 or promise of payment, of anything of pecuniary value shall be  
41 sentenced as provided hereafter:

42 (1) The court shall conduct a separate sentencing proceeding  
43 to determine whether the defendant should be sentenced to death  
44 or pursuant to the provisions of subsection b. of this section.  
45 Where the defendant has been tried by a jury, the proceeding  
46 shall be conducted by the judge who presided at the trial and before  
47 the jury which determined the defendant's guilt except that, for  
48 good cause, the court may discharge that jury and conduct the  
49 proceeding before a jury empaneled for the purpose of the pro-  
50 ceeding. Where the defendant has entered a plea of guilty or has  
51 been tried without a jury, the proceeding shall be conducted by  
52 the judge who accepted the defendant's plea or who determined  
53 the defendant's guilt and before a jury empaneled for the purpose  
54 of the proceeding. On motion of the defendant and with consent  
55 of the prosecuting attorney the court may conduct a proceeding  
56 without a jury. *Nothing in this subsection shall be construed to*  
57 *prevent the participation of an alternate juror in the sentencing*  
58 *proceeding if one of the jurors who rendered the guilty verdict*  
59 *becomes ill or is otherwise unable to proceed before or during the*  
60 *sentencing proceeding.*

61 (2) (a) At the proceeding, the State shall have the burden of  
62 establishing beyond a reasonable doubt the existence of any  
63 aggravating factors set forth in paragraph (4) of this subsection.  
64 The defendant shall have the burden of producing evidence of the  
65 existence of any mitigating factors set forth in paragraph (5) of  
66 this subsection *but shall not have a burden with regard to the*  
67 *establishment of a mitigating factor.*

68 (b) *The admissibility of evidence offered by the State to estab-*  
69 *lish any of the aggravating factors shall be governed by the rules*



70 governing the admission of evidence at criminal trials. The  
 71 defendant may offer, without regard to the rules governing the  
 72 admission of evidence at criminal trials, reliable evidence relevant  
 72A to any of the mitigating factors. \*\*\*If the defendant produces  
 72B evidence in mitigation which would not be admissible under the  
 72C rules governing the admission of evidence at criminal trials, the  
 72D State may rebut that evidence without regard to the rules  
 73 governing the admission of evidence at criminal trials.\*\*\*

73A \*(c) Evidence admitted at the trial, which is relevant to the  
 73B aggravating and mitigating factors set forth in paragraphs (4)  
 73C (5) of this subsection, shall be considered without the necessity of  
 73D reintroducing that evidence at the sentencing proceeding provided  
 73E that the fact finder at the sentencing proceeding was present as  
 73F either the fact finder or the judge at the trial.\*

74 \*[(c)]\* \*(d)\* The State and the defendant shall be permitted to  
 75 rebut any evidence presented by the other party at the sentencing  
 76 proceeding and to present argument as to the adequacy of the  
 77 evidence to establish the existence of any aggravating or mitigating  
 78 factor.

79 \*[(d)]\* \*(e)\* Prior to the commencement of the sentencing  
 80 proceeding, or at such time as he has knowledge of the existence of  
 81 an aggravating factor, the prosecuting attorney shall give notice  
 82 to the defendant of the aggravating factors which he intends to  
 83 prove in the proceeding.

84 \*[(e)]\* \*(f)\* Evidence offered by the State with regard to the  
 85 establishment of a prior homicide conviction pursuant to paragraph  
 86 (4) (a) of this subsection may include the \*[(circumstances sur-  
 86A rounding the prior homicide)]\* \*identity and age of the victim, the  
 86B manner of death and the relationship, if any, of the victim to the  
 86C defendant\*.

87 (3) The jury, or if there is no jury, the court shall return a  
 88 special verdict setting forth in writing the existence or non-exist-  
 89 ence of each of the aggravating and mitigating factors set forth in  
 90 paragraphs (4) and (5) of this subsection. If any aggravating  
 91 factor is found to exist, the verdict shall also state whether it [is  
 92 or is not outweighed by] outweighs beyond a reasonable doubt  
 93 any one or more mitigating factors.

94 (a) If the jury or the court finds that any aggravating \*\*\*[factor  
 95 or factors exists and [is not outweighed by] that the factor or]\*\*\*  
 96 \*\*\*factors exist and that all of the aggravating\*\*\* factors outweigh  
 97 beyond a reasonable doubt \*\*\*[any one or more]\*\*\* \*\*\*all of the\*\*\*  
 97A mitigating factors, the court shall sentence the defendant to death.

98 (b) If the jury or the court finds that no aggravating factors

99 exist, or that \*\*\*[any]\*\*\* \*\*\*all of the\*\*\* aggravating factors  
 100 which exist [are outweighed by] *do not outweigh* \*\*\*[any one or  
 101 more]\*\*\* \*\*\*all of the\*\*\* mitigating factors, the court shall  
 101A sentence the defendant pursuant to subsection b.

102 (c) If the jury is unable to reach a unanimous verdict, the court  
 103 shall sentence the defendant pursuant to subsection b.

104 (4) The aggravating factors which may be found by the jury or  
 105 the court are:

106 (a) \*\*\*[The defendant has previously been convicted of  
 106A murder]\*\*\* \*\*\**The defendant has been convicted, at any time, of  
 106B another murder. For purposes of this section, a conviction shall  
 106C be deemed final when sentence is imposed and may be used as an  
 106D aggravating factor regardless of whether it is on appeal*\*\*\*;

107 (b) In the commission of the murder, the defendant purposely  
 108 or knowingly created a grave risk of death to another person in  
 109 addition to the victim;

110 (c) The murder was outrageously or wantonly vile, horrible or  
 111 inhuman in that it involved torture, depravity of mind, or an  
 112 aggravated [battery] *assault* to the victim;

113 (d) The defendant committed the murder as consideration for  
 114 the receipt, or in expectation of the receipt of any thing of  
 115 pecuniary value;

116 (e) The defendant procured the commission of the offense by  
 117 payment or promise of payment of anything of pecuniary value;

118 (f) The murder was committed for the purpose of escaping  
 119 detection, apprehension, trial, punishment or confinement for  
 120 another offense committed by the defendant or another;

121 (g) The offense was committed while the defendant was engaged  
 122 in the commission of, or an attempt to commit, or flight after  
 123 committing or attempting to commit *\*murder,\** robbery, sexual  
 124 assault, arson, burglary or kidnapping; or

125 (h) The defendant murdered a public servant, as defined in  
 126 2C:27-1, while the victim was engaged in the performance of his  
 127 official duties, or because of the victim's status as a public servant.

128 (5) The mitigating factors which may be found by the jury or  
 129 the court are:

130 (a) The defendant was under the influence of extreme mental or  
 131 emotional disturbance insufficient to constitute a defense to prose-  
 132 cution;

133 (b) The victim solicited, participated in or consented to the  
 134 conduct which resulted in his death;

135 (c) The age of the defendant at the time of the murder;

136 (d) The defendant's capacity to appreciate the wrongfulness of

137 his conduct or to conform his conduct to the requirements of the  
138 law was significantly impaired as the result of mental disease or  
139 defect or intoxication, but not to a degree sufficient to constitute  
140 a defense to prosecution;

141 (e) The defendant was under unusual and substantial duress  
142 insufficient to constitute a defense to prosecution;

143 (f) The defendant has no significant history of prior criminal  
144 activity;

145 (g) The defendant rendered substantial assistance to the State  
146 in the prosecution of another person for the crime of murder; or

147 (h) Any other factor which is relevant to the defendant's char-  
148 acter or record or to the circumstances of the offense.

149 d. The sentencing proceeding set forth in subsection c. of this  
150 section shall not be waived by the prosecuting attorney.

151 e. Every judgment of conviction which results in a sentence of  
152 death under this section may be appealed, pursuant to the  
153 rules of court, to the Supreme Court\*\***]**, which shall also deter-  
154 mine whether the sentence is disproportionate to the penalty im-  
155 posed in similar cases, considering both the crime and the  
156 defendant**]**\*\* . \*\*\**Upon the request of the defendant, the Supreme*  
156A *Court shall also determine whether the sentence is disproportion-*  
156B *ate to the penalty imposed in similar cases, considering both the*  
156C *crime and the defendant.\*\*\**

157 f. *Prior to the jury's sentencing deliberations, the trial court*  
158 *shall inform the jury of the sentences which may be imposed*  
159 *pursuant to subsection b. of this section on the defendant if the*  
160 *defendant is not sentenced to death. The jury shall also be in-*  
161 *formed that a failure to reach a unanimous verdict shall result in*  
162 *sentencing by the court pursuant to subsection b.*

1 3. This act shall take effect immediately.

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# OFFICE OF THE GOVERNOR NEWS RELEASE

CN-001

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Release: WED., JUNE 12, 1985

JUN 9 1985

185 W. State Street  
Trenton, N.J.

Governor Thomas H. Kean has signed legislation which permits a casino licensee to submit a letter of credit to the State Treasurer in lieu of cash as a means of satisfying the licensee's obligation under the Casino Reinvestment statute.

The bill, A-3614/S-2906, was sponsored by Assemblyman A. Joseph Fortunato and State Senator Richard J. Codey, both D-Essex.

The bill permits the use of a letter of credit to satisfy individual casino's 1984 reinvestment obligations, and raises the fine for non-payment of quarterly payments from .5 percent to 5 percent per month.

The Governor also signed S-950, sponsored by State Senator John F. Russo, D-Ocean, which amends the death penalty statute.

Among the changes the bill makes are:

- A change in the burden of proof at sentencing requiring that, if any aggravating factor is found by the jury, the verdict must state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

- Elimination of the mandatory proportionality review by the State Supreme Court of every death penalty case.

- A change which will permit the use of a previous murder conviction in a subsequent murder trial even if the first conviction is still on appeal.

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BILLS SIGNED

PAGE TWO

JUNE 12, 1985

A requirement that the trial judge inform the jury that the law imposes a mandatory 30 years to life sentence as an alternate to the death penalty, and that failure by the jury to reach a unanimous verdict in the penalty phase of the trial shall result in the 30 years to life sentence.

A change which provides that evidence offered by the State to establish aggravating factors shall be governed by the rules of evidence. The defense may introduce mitigating evidence without regard to the rules of evidence. However, should the defense do so, the State may rebut that evidence without regard for the rules of evidence.

The Governor also signed the following bills:

A-3404, sponsored by Assemblyman Willie Brown, which reimburses the Department of Community Affairs for the \$55,000 they provided to the Newark Boys Chorus for their recent exchange trip to China.

A-2065, sponsored by Assemblywoman Jacqueline Walker, D-Monmouth, which requires that only residents of a constituent school district may sign nominating petitions for candidates who will represent the town on a regional board of education.

S-2260, sponsored by State Senator Catherine A. Costa, D-Burlington, which creates a 90-day grace period in which persons holding inactive real estate brokers and sales licenses may reactivate their licenses, provided that the license was eligible for reactivation as of April 30, 1984.

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