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Box 80, Folder 9, Capital punishment, 1979.

July 30, 1979

Rabbi Marc Tannenbaum
American Jewish Congress
New York, New York

Dear Rabbi Tannenbaum:

Enclosed is an article which I have written, dealing with the legal and moral implications of capital punishment. This article is a clearer statement of the ideas which I expressed in a letter to President Jimmy Carter, dated June 5, 1979, following the execution in Florida on May 25th. In that letter I pointed out that the resumption of official involuntary executions on a scale envisaged by Florida and other like-minded states was both unnecessary and morally unconscionable. I asked the President to consider the moral consequences that capital punishment would pose to this nation and to its people.

My position on capital punishment is one which you may at first find difficult to comprehend. But as you read the article slowly and thoughtfully, you may begin to see the point I am trying to make. Personally, I am opposed to the death penalty in principle. On the otherhand, I do recognize and understand that the proponents of capital punishment have a strong argument in certain cases (which I identify as exceptions or extreme cases in my article). In grappling with this difficult question, I tried to resolve the intellectual and moral dilemma which I faced- how to justify the exceptions in light of my philosophical opposition to capital punishment. After much thought and reflection following the execution in Florida, I began to construct in my mind an idea. This idea or new approach is one which I feel is the answer to the moral and philosophical dilemma of capital punishment in America. Please read the article carefully and tell me what you think of this new approach.

Why, you may ask, have I sent you this letter and the accompanying article? The answer is simple. You are a recognized moral and spiritual authority. As a religious leader, you must be concerned with matters of conscience and morality. Capital punishment is such an issue. And as an American, you must also be cognizant of the implications that this question has for the moral fiber of the nation. When President Carter addressed himself to the question of the nation's moral fiber in his recent speech to the American people, he probably was not thinking about the issue of capital punishment. But I think that this is also a part of the problem. In recent years we have seen a sharp decline in the respect for human life. Whether it be wars, mass executions in certain foreign countries, the Boat People, liberalization of abortion laws here and abroad, and now the resumption of official executions in this country, it all comes down to the same thing- the sanctity of human life is being eroded. I believe that a life is a life is a life, no matter how incomplete (in the case of a fetus) or how dispicable (in the case of a condemned prisoner). Every reasonable effort should be made to preserve and respect human life. And when human life is to be taken, it should be taken only where absolutely necessary and essential. In the case of abortion, the criterion of compelling necessity is satisfied when the life of the mother is endangered. And in the case of capital punishment, in the extreme cases I cite in my article. But the important thing is that life, when

it is taken, should not be taken whimsically nor on a scale planned by the states having large death row populations.

As you can see, this issue has troubled me very deeply in the past two months. I believe our country is making a terrible mistake, one which it will eventually come to regret. The real tragedy about all of this is that it is an avoidable mistake. The use of the death penalty as envisaged by Florida and other like-minded states is, as I have said, both unnecessary and unconscionable. It is one thing to be tough on crime but quite another to be both tough and barbaric. Instead of emulating the countries of Western Europe, America, it appears, is plummeting into the abyss occupied by such countries as Iran, Afghanistan, South Africa, the Communist states, and all the other "moral banana republics" of the world. As one whose respect for and love of country are more than just words, I find this very disturbing, very disturbing indeed.

Sincerely yours,

Fred Thomisser

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Whitehouse Station, New Jersey
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P.S. Besides yourself, I have shared my thoughts with the following individuals:

President Carter
Rev. Billy Graham
Terence Cardinal Cook
Rev. Theodore Hesburgh
Governor Hugh Carey
Senator Howard Baker
Senator Edward Kennedy



A NEW PERSPECTIVE ON THE DEATH PENALTY

AMERICAN JEWISH
ARCHIVES

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A NEW PERSPECTIVE ON THE DEATH PENALTY

The issue of capital punishment has been discussed, it seems, very thoroughly and exhaustively in recent weeks, ever since the electrocution in Florida on May 25th. Proponents and opponents of the death penalty have had their say in television debates and commentaries and in countless newspaper editorials. The topics covered have included such questions as: 1) whether the State has the right to take the life of a condemned prisoner who is in custody and no longer poses a physical danger to the community; 2) whether the penalty is a necessary and essential one in order to satisfy the need for retribution; 3) whether mandatory life imprisonment is an appropriate or perhaps preferable alternative; 4) whether the death penalty is a deterrent or not; and 5) whether its imposition does or does not conform to the 8th Amendment prohibition against cruel and unusual punishment as applied to the states through the equal protection principle of the 14th Amendment.

Space does not allow me to delve into these points to any great degree, and it is not my major intention in writing this article to go over old ground. My purpose is to discuss new areas which have not been given the attention that they deserve and, more importantly, to suggest an entirely different approach to the issue of capital punishment in America. Suffice it to say here that I am opposed to the death penalty in principle. This position should not, however, be misconstrued as reflecting either a lenient attitude toward criminals (especially premeditated murderers) or a total prohibition against capital punishment under any and all circumstances. It is my view that mandatory life imprisonment should be the norm for 1st degree murder, that murderers should be required to perform useful work in prison, and that as a form of retribution life imprisonment is morally preferable to capital punishment since it does not force the State to engage in the same act for which the prisoner has been condemned. On the issue of deterrence, who can say with certitude which of the two alternatives is "better." Both proponents and opponents of capital punishment can cite statistics and studies which "prove" the validity of their argument. Both can also identify situations and circumstances where the possibility of a death sentence might deter a would-be murderer or possibly have the exact opposite effect. There is a doubt. Since there is such a doubt and since the State should refrain from taking human life except where absolutely necessary and essential to the maintenance of an ordered society, this doubt ought to be resolved in favor of the less draconic and less irrevocable of the two penalties- namely, life imprisonment.

On the question of exceptions, let me say that there is a strong argument for the death penalty in the following cases: 1) where a prisoner serving a life term for a previous murder commits another murder while in prison; 2) where genocide is involved; and 3) where a "condemned" prisoner in the death penalty states proves totally incorrigible and commits violent assaults or worse on prison guards and other inmates. In each of these cases, there appears to be no other appropriate penalty left but death. In the first and third cases, the prisoner constitutes a continuing physical menace requiring draconic measures on society's part. In the second case, of course, the cumulative enormity of the crime may warrant the death penalty. But the point is that these are truly exceptional and extreme cases. The State is not resorting to capital punishment as a matter of routine. It is using the penalty rarely and in the most devastatingly justifiable cases. It is neither engaging in mass executions, which would be the case if the 500 or so now on death row in this country are executed,

nor in the arbitrary and freakish exemplary execution here and there of a few randomly selected murderers just to satisfy real or imagined public opinion. The State is refraining from taking human life except where absolutely necessary and essential. The penalty exists but is reserved for these cases only.

II.

The issue raised here is more than simply the question of capital punishment. It deals with a much broader issue- what we are as a people, what ideals we cherish, what example we wish to set for ourselves and for the rest of the world. What occurred on May 25th in Florida, and what may very well have occurred again before this article is printed, has a direct impact on the nation, even though it may not be felt in physical terms. The resumption of official involuntary executions after a 12 year moratorium has raised immense moral implications for our country, for its people both individually and collectively, and for the image which this nation conveys to the world. It is this perspective on the death penalty that also needs to be considered.

Beginning in 1967, for the 1st time in our history, executions came to a halt. In 1967 there were only 2 executions and in the preceding year only 1. Discounting the execution of Gary Gilmore in 1977 as a bizarre aberration (he had demanded to be put to death), the United States of America refrained from using the death penalty for 12 years. In so doing, this country appeared to be joining the other countries of Western Europe, many nations of Latin America, Canada, Australia, Mexico, and Israel, where the death penalty has all but been abolished either by law or in practice. It appeared that as a progressive, enlightened country, our nation was coming to the realization that there was a more rational way of dealing with major crimes such as murder than through the use of a penalty which was and is today most assuredly administered in a highly selective, arbitrary, and freakish manner. The Supreme Court decision of 1976 has not altered this fundamentally self-evident truth one bit. The disparity in punishment is not only apparent between states having the death penalty and those not having it. If this were the only disparity, that would be bad enough as it is. But this glaring inconsistency is compounded by an even more obvious disparity- the different punishments meted out to murderers within and between states having the death penalty. One man is executed for a single murder; another man gets life imprisonment or far less for a multiple homicide. This is clearly not equal justice under the law.

The questions about capital punishment go on and on. If the 500 or so now on death row are all to be executed, what sort of example to the rest of the world will we set? A nation that purports to be the champion of human rights and condemns mass executions in foreign countries does the same? Is this what the United States of America is all about? We are supposedly the strongest nation on the earth militarily and, it is hoped, morally and spiritually. Can then such a nation resort to mass executions and still be regarded as a credible champion of human rights?

If, on the otherhand, the 500 or so are not eliminated in short order, the problem of getting rid of them is compounded. At the rate of say 2 or 3 a month (which is much higher than the current rate), it would take 14-25 years to exterminate the whole lot of them. And there are always more coming on line. Does this make sense? Even if it were not regarded as cruel and unusual punishment, it would certainly be a waste of the taxpayer's dollar- to have these prisoners sit on death row year after year doing nothing constructive. If they were serving life

terms instead, they could be compelled to perform useful and productive work in prison, thereby providing society with a degree of restitution for their crimes.

It is clear that the only proper standard a civilized Western nation such as the United States ought to apply in considering use of the death penalty is the criterion of compelling necessity. Before the authorities resort to such a draconic and irrevocable a punishment, they must ask themselves the following questions: Is this penalty absolutely necessary and essential? Are there alternatives (such as mandatory life imprisonment) that serve the same end? Those who argue that the death penalty is a necessary and appropriate punishment overlook the basic reality of capital punishment- that it is a penalty of a different species entirely from all other forms of punishment. It is final and irrevocable; the others are not. The counter to this argument, of course, is that murder is final and irrevocable. The victim has lost his life and justice, therefore, demands the life of the perpetrator. Such an argument would, standing alone and in the absence of other considerations, be plausible only if it were consistently applied. If justice demands the retributive remedy of an eye for an eye, then all convicted of premeditated murder and perhaps even of Murder 2 should be executed. Premeditated murder would be premeditated murder, no matter what. Society would be outraged in each such case and would demand the necessary and essential retribution- death. But that has not been, is not now, and never will be the case. In practice only a small fraction of the eligible candidates are ever put to death. Retribution, therefore, becomes unevenly applied and is arbitrarily meted out.

If the death penalty is unevenly applied, would a mandatory sentence of life imprisonment for all 1st degree murder convictions be a better form of retribution? I maintain that it would. First of all, it would be uniform. Secondly, it would accomplish the same purpose that capital punishment as a form of retribution serves- to punish the criminal and to express society's sense of outrage. And by its very nature it is morally superior to capital punishment because it does not force the State to resort to the same act for which the murderer has been imprisoned.

On the question of restitution, life imprisonment is again unquestionably superior to capital punishment. With capital punishment there is no way at all for the condemned to provide restitution. Once he is executed, that is it. With life imprisonment, however, there is a possibility for restitution. We are obviously not talking about restitution in the normal sense- the victim can never be compensated. But what of the survivors of the victim and what of society itself? If, as suggested above, a way could be found where a life inmate would be required to perform useful and productive work in prison, then something positive at least would come out of all of this. The only thing capital punishment provides is retribution. Life imprisonment offers both retribution and restitution.

III. A New Approach to Capital Punishment

What I shall now propose is something different from any of the ideas that I have ever heard regarding the death penalty. It is a basic compromise between those who call for the outright abolition of capital punishment and those who believe it should be used in cases of premeditated murder. What it does not do is eliminate the death penalty for murder committed by a prisoner already serving a life term for a previous homicide, nor for the rare cases where genocide is involved. In all other cases, however, the plan I propose would restrict the imposition of the death

penalty to those few and extreme cases where even the opponents of capital punishment might find some credence in it. What the proposal does is to draw a fundamental distinction between the death penalty as a sentence that may be handed down on the one hand, and a sentence that may be carried out on the other. In practice few death sentences would ever be carried out; the vast majority would be commuted to mandatory life imprisonment after a specified period of time. What my plan also does is to eliminate the consequences of uneven sentencing by making the death penalty a conditional and not an absolute sentence. Since the vast majority of death sentences would eventually be commuted to mandatory life imprisonment, the effective penalty for 1st degree murder would become a uniform one throughout the country. In order for this goal to be realized, all of the death penalty states would have to adopt the plan. Once this is accomplished, even the non-death penalty states might consider its adoption. At this point, however, the ball is clearly in the court of the states having the death penalty.

* What I am proposing is that a new procedure be adopted for dealing with cases where the death penalty is handed down. Essentially what it amounts to is the creation of a new sentence classification to replace the death penalty per se. Judges and juries would still have the option to sentence 1st degree murderers to death or to life imprisonment. If sentenced to life imprisonment, the prisoner would be assimilated into the state prison system according to existing practice. If, however, the court opted for the alternative, a different procedure would follow. Instead of imposing the death sentence per se, as is currently the practice, the court would hand down a CONDITIONAL SENTENCE OF DEATH or, another way of putting it, the SENTENCE OF DEATH IN ABEYANCE. What this means is that the court has imposed a sentence of death which is not final or absolute.

Following conviction and sentencing, the "condemned", instead of being taken to death row to waste away months and years at taxpayer's expense while awaiting the outcome of judicial appeals, would be placed in a special prison facility with other "condemned" prisoners. This facility, whether a part of the existing state prison system or a federal institution to which the states would send all their "condemned" prisoners, would not be a death row in disguise. It would take on all the appearances of a regular custodial institution. The prisoner, depending on his state of health, would be required to perform physical labor which is useful and productive to society. He would be under close supervision and scrutiny during his stay at this special facility. His behavior, his attitudes would be carefully observed and a record kept. Following a period of 5 years, if he has a generally good record of behavior and has begun to demonstrate character traits that the sentencing jury found totally lacking, he would be removed from the facility, returned to the general prison population, and his sentence commuted to life imprisonment.

Just as suspects are read their rights by the police when apprehended, every "condemned" prisoner when entering this facility or program would be told in no uncertain terms where he stands and what will be expected and demanded of him. Right from the start he would know that his life is at stake. The warning would be quite blunt and might read as follows:

"The decision whether you live or whether you die is entirely up to you. The State has sentenced you to death. Your behavior over the next five years will determine whether that sentence shall be carried out or not.

If you work, do what you are told to do, refrain from violent acts, demonstrate that you have the willingness to atone for your crimes, and your remorse is genuine, you will earn back the right to live. If you do, your sentence shall be commuted to life imprisonment. If you do not, the sentence which hangs over you now will be carried out. The choice is yours."

When the time for evaluation of the prisoner's record comes, prison officials would make a decision one way or the other. If the decision is in favor of the inmate, the recommendation for commutation to life imprisonment would be binding. If, however, the prisoner has demonstrated an unwillingness to alter his character, has a bad work and disciplinary record, and has engaged in violent acts against prison officials or other inmates, the recommendation for execution of sentence would likely be made. If such a recommendation is made, the findings would be reviewed by the appropriate state appeals court and by the governor. If the appeals court did not overrule the findings and the governor agreed with them, the death sentence would be carried out.

I can well anticipate the criticisms that may be voiced of this plan. Opponents of the death penalty would argue that since the State has no right to take human life, my plan is no improvement over the existing system. They would also point a critical finger at the inmate evaluation procedure, arguing that it is no less subjective than the sentencing phase of the original trial court. My response to these criticisms would be as follows, using a hypothetical case as an example:

"Now wait a minute," I would say. "This prisoner has been given every conceivable opportunity to clean up his act. Alright, I'll grant you, maybe the original trial court could have been unduly influenced by the nature of the crime and did not adequately assess the character of the man. Maybe the jurors wavered and could have gone either way on this sentencing thing. Fine. But if what you say were true, then this guy had 5 years to prove the jury wrong; 5 years to demonstrate remorse, to behave like a normal human being, to refrain from violence. But what did he do instead? He was uncooperative, was cited on numerous occasions for disciplinary infractions, and refused to perform work assignments. On top of that, he also assaulted prison guards. This guy turned out to be totally incorrigible. He knew he was already under a death sentence when he came here and had to toe the line. He had his chance and he threw it away."

And what would the proponents of the death penalty have to say about this plan? They would probably say that these prisoners are not worth the expense of keeping around. They're ruthless killers that will never show any remorse, that will always pose a threat to the physical safety of prison guards. My response to them would be this:

"You talk of the expense of keeping them around 5 years after conviction. Well, they would be

sitting on death row that long anyway waiting for all their appeals to be exhausted. Why not put them to work instead and let's see if what you say is true, that they're incorrigible, that they're totally unsuited for normal prison life. Maybe some of them are as you say. But what about all the rest? What if, with the hope of commutation, most of these condemned prisoners do in fact clean up their act. After all, there are many killers serving life terms in the prisons of states not having the death penalty. They seem to be behaving themselves. What of the lifer at Trenton State Prison who got his master's degree in, of all things, criminal justice, or of the inmates at Rahway Prison who are running the so-called Lifer Program? Are they a totally useless drain on society? Are they not providing a degree of restitution for their criminal past?"

What this plan presupposes, of course, is that a prisoner under the conditional sentence of death will recognize that he really has no choice but to clean up his act. Although there may be an inmate here or there who turns out to be totally incorrigible, the vast majority will be compelled by the law of survival to alter their behavior. Having adjusted their behavior to avoid the consequences of not doing so, they will be prepared after 5 years for assimilation into the general prison population. Should they then misbehave, they would always be subject to the normal disciplinary measures that any prisoner might face. And if any prisoner serving a life term for murder (whether having originally been sentenced by the jury to life imprisonment or to the conditional sentence of death) were to commit another homicide while in prison, he would upon conviction face the standard death penalty.

Another presupposition is that those who oversee and supervise the inmates receiving the conditional sentence of death be suited by temperament and training for this awesome responsibility. They must be firm and fair at the same time. Anyone with an ax to grind or who does not believe in the program should be disqualified. Moreover, the standards expected of the inmates must be clear and unambiguous. When, therefore, a prisoner fails to pass muster after 5 years, the case against him should be so incredibly overwhelming as to leave no doubt whatsoever that the death sentence is justified.

The plan I have outlined also goes a long way toward eliminating the defects and inconsistencies that are apparent in the administration of the death penalty laws in this country. With the conditional sentence of death or sentence of death in abeyance, the State is giving the "condemned" an opportunity to demonstrate that the court may have been in "error" by handing down the death penalty instead of life imprisonment. The court in essence is saying to the prisoner the following: "We think that the nature of your crime, your present attitude, and your character are such that a sentence of death is warranted. Now you prove us wrong. Prove that you are no less worthy to live than others who have been sentenced to life imprisonment." In this way the burden of determining life or death, although still legally in the hands of the State, has been in a practical sense transferred squarely onto the shoulders of the prisoner himself. He cannot then argue that he was given a raw deal, that he got the death penalty, and not the life sentence given to some other killer, only because there was a public outcry recently about a series of violent crimes and he was set up as an example.

If what he said had some validity, then he would still have a chance to escape the executioner by cleaning up his act. What this plan does, therefore, is to render unimportant the argument that in marginal cases the court could have gone either way and therefore acted arbitrarily.

Another thing that this plan does is to avoid a really gross tragedy- the execution of an innocent person. If an innocent man were convicted of murder, based on what appears to be incontrovertible evidence, and is sentenced to death, would he not have an incentive to be a model prisoner, get his sentence commuted to life imprisonment after 5 years, and then seek exoneration?

These then are the essential elements of my proposal. As an alternative to the existing system and also to total abolition, it will not satisfy those whose position on the death penalty is either strongly for or strongly against. It is a compromise. It leaves the door open for the use of the death penalty in extreme cases where a murderer, handed the conditional sentence of death, proves to be totally incorrigible and unrepentant. It allows society to express its outrage against such exceptionally bad conduct. On the otherhand, by restricting the use of capital punishment to such cases, the plan makes life imprisonment a virtually uniform penalty for 1st degree murder throughout the country. It also compels convicts to begin making restitution by putting them to work, instead of warehousing them on death row.

IV.

When we consider the issue of the death penalty, we are dealing with more than simply a discussion of the moral and constitutional implications of capital punishment. To the average citizen the underlying issue is not so much the death penalty as it is the over-all problem of crime and how best to deal with it. The public rightfully demands that government do something about the problem, that the streets be made safe for the law-abiding, and that those who prey on the innocent pay the consequences. No reasonable person can disagree. It is after all the first responsibility of government to provide for the physical safety and well-being of its citizens. If it fails in this responsibility, it loses the respect and confidence of the people. The issue here, however, is not whether the government should take a firm and uncompromising position toward criminals (there can be no doubt about this), but whether capital punishment will turn out to be the magic solution to the crime problem.

If one were to take a closer look at the problem, one would find that capital punishment is not the answer and cannot possibly be. (Assume for the moment that we are not even considering the moral and constitutional implications of capital punishment. Let us look at the question purely as a matter of practicality.) What then are we really talking about when we speak of the "crime problem"? Are we talking about Murder 1 alone? Obviously not. Murder 1 is but a small fraction of all the major offenses committed these days. What we are left with is Murder 2, manslaughter, assault, armed robbery, rape, muggings, and a whole slew of crimes against property. Capital punishment cannot possibly deal with these crimes, unless, of course, we were to consider executing all who are convicted of Murder 1, Murder 2, manslaughter, rape, assault, and so on. Since we are obviously not about to return to the Dark Ages, it is clear that capital punishment is not the answer. It is little more than a panacea. It did not solve the crime problem in the past and it will not now.

What then is the solution (if such is possible)? The better way to deal with murder, assault, armed robbery, rape, muggings, and so on is to apply the simple maxim: certainty of apprehension, certainty of conviction, and, in the case of 1st degree murder, certainty of life imprisonment. When that fact gets knocked into the heads of the hoodlum element in this country, then we will begin to see results. This is the elusive deterrent that we have been looking for all along. And unlike capital punishment, it is a deterrent which is sound practically, morally, and constitutionally.

It would be useful here to consider for a moment what sort of punishment life imprisonment actually is. Proponents of capital punishment seem to feel that life imprisonment is not sufficient retribution for one who has committed 1st degree murder, and that death is a more fitting punishment. Well, let us see. Imagine all of the good things, all of the pleasures, joys, and satisfactions that come from being free. Imagine family, friends, colleagues. Imagine a day at the beach or on the lake, a movie, a play, the fulfillment of a job well done. Imagine that trip to foreign shores or that ski run down the slopes of Vermont. Imagine that picnic on a Sunday afternoon or a bike ride in the country. Imagine Christmas, the 4th of July. Imagine window shopping at the Mall or working on your favorite project at home. Imagine making your own decisions. Imagine doing what you want to do. Imagine leaving your home to go where you want to go. Imagine being the master of your own destiny. Imagine all of this and more, and now imagine taking it all away. That is what life imprisonment is.

When the State uses life imprisonment instead of capital punishment as the retributive remedy for 1st degree murder, it is accomplishing more. The criminal is being punished and, unlike capital punishment, is also compelled to provide restitution. Moreover, the State avoids committing the same act for which the condemned prisoner has been sentenced to death.

The plan I have presented does not, however, rule out the death penalty completely. It permits use of capital punishment for lifers committing a second murder while in prison, for genocide, and for those rare cases where prisoners handed the conditional sentence of death prove to be totally incorrigible. In each of these instances, the criterion of compelling necessity is far easier to prove than is the case at present with our existing death penalty statutes. The State is using the penalty rarely, in the most devastatingly justifiable cases, and not whimsically or as a matter of routine.

V.

The electrocution on May 25th in Florida, which broke the 12 year moratorium on official involuntary executions, did not end the controversy over capital punishment in America. It only served to make that issue more pressing and more acute. Executions in this country can never again become a matter of routine. The time for that is long passed. Every time a governor in a death penalty state signs a death warrant and the countdown begins, the nation will again be reminded of the issue. It will not go away.

There is one more point which should be mentioned and that relates to the special responsibility which our political and spiritual leaders have in this matter. They are the ones who will ultimately decide what the outcome will be. They are the ones who must recognize that there is

something fundamentally wrong here that needs to be changed. And they are the ones who know that there is an alternative, a better way. All they need is the will and the courage to do the right thing.



CONDITIONAL SENTENCE OF DEATH
(Sentence of Death in Abeyance)

5 year period of incarceration
in work facility

Judicial Appeals of
Conviction

↓
State Supreme Court

↓
US Supreme Court

conviction & sentence
upheld

END OF 5 YEAR PERIOD- Evaluation of Record
by Prison Officials

- 1) Commutation to Life Imprisonment
- 2) Recommendation for Execution of Sentence

→ State Supreme Court

→ Governor

(either has option to commute sentence; if, however, both turn down appeal, death sentence is carried out)

