



Eastern Region Office  
PO Box 40008  
Philadelphia, PA 19106  
215-592-1513 T  
215-592-1343 F

Central Region Office  
PO Box 11761  
Harrisburg, PA 17108  
717-238-2258 T  
717-236-6895 F

Western Region Office  
313 Atwood St.  
Pittsburgh, PA 15213  
412-681-7736 T  
412-681-8707 F

June 10, 2015

The Honorable Ron Marsico  
Room 315J Main Capitol  
PO Box 202105  
Harrisburg, PA 17120-2105

The Honorable Joseph A. Petrarca  
220 Irvis Office Building  
PO Box 202055  
Harrisburg, PA 17120-2055

Dear Chairman Marsico and Chairman Petrarca,

Thank you for the opportunity to submit written testimony for the House Judiciary Committee's hearing on the moratorium on executions in the Commonwealth, which the American Civil Liberties Union of Pennsylvania supports. I am submitting this statement on behalf of the 23,000 members of the ACLU of Pennsylvania.

Last month, columnist George Will of *The Washington Post* wrote:

(T)he power to inflict death cloaks government with a majesty and pretense of infallibility discordant with conservatism... (W)hen capital punishment is inflicted, it cannot later be corrected because of new evidence, so a capital punishment regime must be administered with extraordinary competence. It is, however, a government program.<sup>1</sup>

Regardless of how one feels about government programs generally, Will struck a familiar chord in the discussion around capital punishment. Mistakes happen, and innocent people end up on death row. Nationwide, 154 people have been exonerated after being sentenced to death, including six in Pennsylvania, during the modern era of capital punishment.<sup>2</sup>

The most recent exoneration occurred on Monday, the same day that this committee passed House Resolution 143 to protest Governor Wolf's moratorium. After more than 12 years in prison and ten years on death row, Alfred Dewayne Brown of Harris County, Texas, was released when county prosecutors dismissed all charges against him. Phone records corroborated Brown's alibi and proved that he could not have been at the scene of the crime for which he was convicted. In 2013, prosecutors claimed that the records had been misplaced by mistake.<sup>3</sup>

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<sup>1</sup> Will, G. (2015) *Capital punishment's slow death*. Washington Post, May 20, 2015. Available at [http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d\\_story.html](http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d_story.html).

<sup>2</sup> The period since the United State Supreme Court temporarily suspended capital punishment in 1972 is often referred to as the modern era of the death penalty. Pennsylvania amended its capital punishment statute in 1978, two years after the Supreme Court lifted its moratorium.

<sup>3</sup> More information is available at <http://www.deathpenaltyinfo.org/node/6162>.

In declaring a moratorium on executions until the ongoing, Senate-approved study commission returns its findings, Governor Wolf cited the risk of executing an innocent person in justifying the suspension. Nicholas Yarris was nearly executed in Pennsylvania for a crime that he did not commit. Yarris spent 21 years on death row before DNA evidence cleared him of wrongdoing in 2003.<sup>4</sup> Despite the claims of death supporters that capital cases receive adequate review, Yarris consistently *lost* his appeals. It was only the existence of the biological evidence that kept the Commonwealth from committing the ultimate tragedy of executing an innocent person.

Rather than resolving the risk of convicting and executing innocent people, the existence of DNA evidence illuminates the very real possibility that the Commonwealth sometimes gets the wrong person. Yarris was convicted on the testimony of an eyewitness and a jailhouse informant. These witnesses provided enough information for a jury to find Yarris guilty beyond a reasonable doubt. But DNA evidence showed otherwise. The exoneration of convicted inmates calls into question all of the evidence that was used to convict these people.

Earlier this year, A.M. Stroud III, a former prosecutor in Louisiana, made a dramatic admission in acknowledging that he and his office got it wrong when they won the conviction and death sentence of Glenn Ford, who spent 30 years on Louisiana's death row for a crime he did not commit. In an opinion piece in *The Shreveport Times*,<sup>5</sup> Stroud admitted that his office ignored "rumors" that potentially implicated others, after he and his team were already focused on Ford as the primary suspect. Stroud wrote:

My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. And that omission is on me.

Stroud concluded by saying, "No one should be given the ability to impose a sentence of death in any criminal proceeding. We are simply incapable of devising a system that can fairly and impartially impose a sentence of death because we are all fallible human beings."

Last year, the National Academy of Sciences published a study that reached a "conservative" estimate that four percent of people who have been sentenced to death are factually innocent.<sup>6</sup> In the modern era of the death penalty, there have been 8500 people sentenced to death and, at the time of the study, 144 people had been exonerated, or 1.6 percent of those sentenced to death. The study's authors suggest that other innocent people sentenced to death are not cleared because they are resentenced to life imprisonment and those cases do not receive the same level of scrutiny as capital cases.

Meanwhile, in Pennsylvania, prosecutors refuse to even acknowledge that innocent people are ever convicted. There have been rumors for years that prosecutors on the Senate-approved

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<sup>4</sup> Available at <http://www.innocenceproject.org/cases-false-imprisonment/nicholas-yarris>.

<sup>5</sup> Stroud, A.M. (2015) *Lead prosecutor apologizes for role in sending man to death row*. The Shreveport Times, March 8, 2015. Available at <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/>.

<sup>6</sup> Available at <http://www.pnas.org/content/111/20/7230.full>.

Advisory Committee on Wrongful Convictions impeded the progress of that committee by insisting that, “There are no innocent people in prison in Pennsylvania.” In a minority report released in response to that committee’s conclusions,<sup>7</sup> law enforcement officials even refused to accept the innocence of people cleared by DNA evidence and called the proposal to compensate people who spent years of their lives wrongly incarcerated “preposterous.” Signatories to that report included Montgomery County District Attorney Risa Vetri Ferman, the current Vice President of the Pennsylvania District Attorneys Association; Dauphin County District Attorney Edward Marsico, who is scheduled to appear before the committee at today’s hearing; and Philadelphia District Attorney Seth Williams.

Even when biological evidence is presented, district attorneys in Pennsylvania refuse to acknowledge the reality that sometimes innocent people are convicted of crimes.

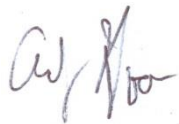
There are additional problems with the implementation of the death penalty in Pennsylvania. The Commonwealth’s abysmal system of indigent defense is particularly problematic. Since Pennsylvania reinstated the death penalty in 1978, more than 200 people who were sentenced to death have had those sentences overturned. If flights crashed as often as the death penalty, airlines would be forced to suspend operations until they determined the problem.

The majority of reversals in Pennsylvania were due to ineffective assistance of counsel. Pennsylvania is the only state in the nation that provides no state funding for public defenders, and this leaves the counties on their own to fund defenders’ offices. Capital cases are costly affairs, with a conviction phase and a penalty phase. If the defendant is convicted, the jury must then consider factors to determine a sentence of life or death. Those factors are determined through expert witnesses and other evidence, which significantly raises the costs of the case.

Because public defenders and court-appointed counsel are so woefully underfunded in Pennsylvania, capital sentences are often significantly flawed, leaving appeals attorneys with a treasure trove of issues to litigate. These problems were highlighted in the Senate-initiated report from 2011 *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania*.

In implementing a moratorium on executions, Governor Wolf faced the reality that the death penalty in Pennsylvania is broken. Thank you for considering our views.

Sincerely,



Andy Hoover  
Legislative Director, ACLU of Pennsylvania

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<sup>7</sup> Independent report of law enforcement and victim representative members of the advisory committee on wrongful convictions. September 2011.