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DEATH PENALTY INFORMATION CENTER

Testimony of

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Concerning the Pennsylvania Death Penalty

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Good morning. I am Robert Dunham, Executive Director of the Death Penalty Information Center ("DPIC"). On behalf of DPIC, I would like to thank you, Chairman Marsico, and the entire House Judiciary Committee for the opportunity to testify concerning Pennsylvania's death penalty and concerning Governor Wolf's use of the reprieve power to impose a moratorium on executions in the Commonwealth.

I would like to start with an apology. DPIC was invited to testify in those proceedings very recently, and as I began drafting my remarks on Monday I realized that our written submission would be at best incomplete. With the Committee's permission, we will submit revised testimony to this Committee in the very near future more fully addressing other issues relating to Pennsylvania's death penalty.

As many of you know, for the twenty years before I became DPIC's executive director earlier this year, I represented many of the men and women on – or formerly on – Pennsylvania's death row. I was executive director of the Pennsylvania Capital Case Resource Center during its five years of existence from 1994-1999; the director of training in the capital habeas unit of the Philadelphia federal defender's office for the next ten years; and an assistant federal defender in the Harrisburg federal defender's capital habeas unit for five-and-one-half years after that. I also taught death penalty law at Villanova Law School for eleven years.

I do not come before you today as the legal representative of my former clients. I come as the representative of a national non-profit organization that serves the media and the public with analysis and information on issues concerning capital punishment. DPIC does not take a formal position for or against the death penalty, nor do we take a position on the specific action this Committee should take in response to the moratorium

imposed by Governor Wolf. We do, however, have a national perspective on the state of the death penalty as administered in Pennsylvania and on the circumstances upon which Governor Wolf relied in his decision to impose a moratorium on executions in this state.

That is not say that my twenty years representing inmates on death row, training lawyers across the country on death penalty legal developments, and teaching law students about death penalty law is irrelevant to DPIC's analysis. During that time, I compiled a substantial database of information about Pennsylvania's death penalty and experienced firsthand a number of the problems facing Pennsylvania's administration of the death penalty. The data that I compiled and my experiences as a litigator and a teacher inform much of what I wish to tell you today.

Let us start with the conclusion – one that should be clear to anyone who has been paying attention to this issue: Pennsylvania's death penalty is broken and it has been for many years. It is for you to decide whether that is irretrievably so and, if not, what to do about it.

There is an invariable tension in states that have the death penalty between fairness and finality, between ensuring as best as humanly possible that no person is unconstitutionally convicted or sentenced to death and that the law of the Commonwealth, if fairly administered, is in fact carried out. The critical issue is the fairness and reliability of the process, for a finality achieved by expediting executions that are the product of an unfair or unreliable process is a deadly miscarriage of justice.

Pennsylvania's death penalty is plagued by systemic problems. Its administration has left Pennsylvania with many unwanted distinctions.

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The Commonwealth is the only state in the country that has a death penalty but provides no state funding for indigent defense at any stage of a capital proceeding. That responsibility is left to the counties, which almost universally fail to provide the resources necessary for a meaningful capital defense.

While virtually every other state that offers capital sentencing jurors the options of life without parole or death requires its judges to explain that a defendant will be ineligible for parole if sentenced to life, Pennsylvania does not.

When the Capital Jury Project conducted a nationwide analysis of how well death penalty jurors understood their jobs, they found that 98.6% of Pennsylvania's jurors misunderstood their instructions – including the meaning of a life sentence – in ways that were harmful to a capital defendant. That level of misunderstanding was worse than with jurors from any other state the researchers surveyed.

While the death penalty should be reserved for the most serious of cases and with the most heightened procedural safeguards, Pennsylvania has instead broadened the scope of the law and weakened those protections.

Initially, Pennsylvania's death penalty statute had ten aggravating circumstances. That has expanded over time to 18 – an expansion that calls into question whether the statute meaningfully identifies the worst of the worst murders and the worst of the worst killers.

Initially, Pennsylvania's courts held that, because of the overwhelming public interest in preventing unconstitutional executions, it would not apply technical procedural rules to prevent capital defendants from raising on appeal issues that their lawyers had

missed at trial. The Pennsylvania Supreme Court has done away with that relaxed waiver rule, increasing the risk of executions as a result of procedural technicalities.

Initially, Pennsylvania's sentencing statute called for the Pennsylvania Supreme Court to conduct an automatic review of the proportionality of a death sentence, comparing it to other cases in which the death penalty had been imposed or rejected. At about the same time that a study of Philadelphia's death penalty revealed statistically significant evidence of racial disproportionality in the way the death penalty was imposed, proportionality review was repealed, without explanation and without any public hearing.

Pennsylvania has enacted no law to implement the United States Supreme Court's prohibition against executing persons with mental retardation – now known as intellectual disability. Given this void, the state supreme court has approved procedures that are among the most unfavorable to capital defendants in the county and that create some of the greatest risks that persons with intellectual disability will be sentenced to death.

Pennsylvania has one of the most restrictive procedures for pardon or commutation of a death sentence. It is one of two states that require a unanimous recommendation from the Board of Pardons as a precondition to action by the Governor, and the only state in which the Attorney General – a potential party to many of the cases the Board may consider – holds effective veto power over whether a Governor may act.

More than 40 Pennsylvania capital cases have been overturned, or reprosecution barred, because of prejudicial prosecutorial misconduct.

There are significant geographic and racial disparities in Pennsylvania's administration of the death penalty.

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Six defendants have been exonerated from death row, either because they won new trials and were acquitted, prosecutors dropped charges against them after evidence of innocence emerged, or courts barred their retrial because of extreme prosecutorial misconduct. That is twice as many exonerations as executions. Other almost certainly innocent death row inmates either died on death row while the Commonwealth appealed the grant of a new trial (Fred Thomas) or pled no contest to offenses they did not commit so they could be freed immediately, instead of risking a new capital trial (e.g., Dennis Counterman). A number of other Pennsylvania death-row inmates are in the midst of litigating serious claims of innocence.

There is neither time nor space to address all of the many problems with the death penalty in Pennsylvania. I have elsewhere described it as an extraordinary failure. But in my written remarks, I have taken the opportunity to discuss some of the history of Pennsylvania's endemic failure to provide meaningful representation and some of the issues with the Commonwealth's failed death warrant practice. Because this Committee has already taken a position on the Governor's authority to use the reprieve power to implement a moratorium on the death penalty, I do not address that issue here.

This history of capital representation in Pennsylvania is a history of the death penalty administered on the cheap.[1] For the counties that do so, however, the cost comes back to bite them in the end. The product of the Commonwealth's deficient funding of indigent capital defense is that death sentences are unconstitutionally imposed. Indeed,

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[1] See, e.g., Michael Kroll former Executive Director, Death Penalty Information Center, *Justice on the Cheap: The Philadelphia Story* (May 1992), http://www.deathpenaltyinfo.org/justice-on-the-cheap; PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT, chs. 5 & 6 (2003) (hereinafter, RACE & GENDER REPORT).

the single most likely outcome of a capital case in Pennsylvania once a death sentence has been imposed is that the defendant's conviction or death sentence will be reversed.

My data as of December 31, 2014, indicates that more than 250 capital convictions or death sentences imposed under our current death penalty statute have been overturned.[2] More than 145 have been overturned because of defense counsel's ineffectiveness[3] – either unreasonably failing to perform a basic duty such as investigating relevant facts and raising relevant issues or taking some action during the course of representation that was objectively unreasonable and prejudicial. The single most frequent grounds for counsel's ineffectiveness is counsel's failure to investigate and present mitigating evidence relating to his client's background, upbringing, and mental health.[4] And that failure is directly related to the Commonwealth's continuing refusal to provide the resources necessary to meaningfully represent capital defendants.

This should not come as news to anyone in this room. Chief Justice Saylor has repeatedly noted this fact in his capital case opinions and in public remarks and articles on the subject. And it is a systemic failure of which the Commonwealth has been aware for decades. In 1989, the Pennsylvania Supreme Court and the Third Circuit Court of Appeals created a Joint Task Force on Death Penalty Representation to recommend solutions to

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[2] Robert Brett Dunham, *Pennsylvania Capital Case Summary of Grounds for Reversal* (Dec. 31, 2014 update) (cataloguing at least 314 reversals of Pennsylvania capital convictions or death sentences, of which 253 reversals were under the current death penalty statute).

[3] Robert Brett Dunham, *Pennsylvania Capital Case Summary of Grounds for Reversal in Ineffectiveness of Counsel Cases* (Dec. 31, 2014 update) (at least 146 Pennsylvania capital cases reversed for ineffectiveness of counsel).

[4] Robert Brett Dunham, *Pennsylvania Capital Case Cite List of Reversals Because of Ineffective Assistance of Counsel* (Dec. 31, 2014 update) (87 Pennsylvania death sentences reversed because of penalty phase counsel's ineffectiveness in failing to investigate and present mitigating evidence).

what it described as a "problem of major proportions" in the provision of counsel at all levels of Pennsylvania capital cases.[5]

The scale of defense counsel's failures have been epic. Counsel have proceeded to trial not knowing that the prosecution was seeking the death penalty,[6] not knowing what statute governed the case,[7] and barely, if at all, speaking to the client.[8] Several capital defendants have been represented by defense counsel who were preoccupied with running for public office,[9] including running for District Attorney.

Prior to the Commonwealth's belated adoption of experience and continuing legal education standards for entering an appearance in a Pennsylvania capital case, any person who had passed the Pennsylvania bar could – and at times it seemed, would – be appointed to handle capital cases. Scott Blystone was represented by a part-time public defender who had been trying cases for less than three months. Carolyn King was represented by a

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[5] REPORT OF THE JOINT TASK FORCE ON DEATH PENALTY LITIGATION IN PENNSYLVANIA (July 1990) (TASK FORCE REPORT).
[6] E.g., Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705 (1994).
[7] E.g., **Error! Main Document Only.**Frey v. Fulcomer, 1991 WL 53662 (E.D. Pa. Mar. 28, 1991).
[8] E.g., Commonwealth v. Weiss, CP-32-CR-218-199 (Ind. C.P. Mar. 19, 2012). In Weiss, penalty-phase counsel "were ineffective for failing to investigate and present mitigation evidence ranging from facts about his family history to medical, prison, and schooling records to expert testimony that may have cast doubt on his ability to control himself the night of the murder." Counsel "entered the case on a volunteer basis and without any prior experience working on a death penalty case[, and] was nonetheless assigned to the penalty phase of the trial, where his inexperience quickly became apparent." Counsel could not recall whether he ever met with his client in preparation for the penalty phase; "did not hire an investigator or seek to retain a mitigation specialist; did not interview any family members other than Weiss's son, whom he thought he had talked with the day before the penalty hearing began; and made no attempt to gain access to his client's school, medical, or prior criminal records or to hire a psychological expert" until two weeks before the penalty penalty phase.
[9] In my first Pennsylvania capital case, Commonwealth v. Morales, Oct. Term, 1982, No. 1293 (Phila. C.P., Crim. Div.), the defendant's court-appointed lawyer, Alexander Hemphill, was a former Philadelphia City Controller who was running for City Council at the time of the trial. The Democratic primary in which Hemphill was a candidate was on May 17, 1983. After a week of voir dire, the trial itself started on Friday, May 13, 1983. The prosecution's case-in-chief continued on Monday, May 16, 1983 and, with a break on election day, concluded on May 18, 1983. Hemphill presented no defense. The penalty phase, for which Hemphill also had nothing prepared, began and ended on May 19, 1983, with the jury finding aggravating circumstances and no mitigating circumstances, and imposing a mandatory death sentence after Hemphill's's illiterate, intellectually disabled client was held to have waived his right to present mitigating evidence. But Hemphill did not meet his client until a week before trial, when he discovered that Morales spoke no English. Hemphill, who had not even begun to conduct a penalty-phase investigation, spoke no Spanish and so could not communicate with his client, nor begin to investigate his background and upbringing in rural Puerto Rico.

family law practitioner who had never taken a serious criminal case to trial. Lawrence Christy was represented by two lawyers who, between them, had less than three years of legal experience and – in an insanity case – did not know how to get mental health records admitted into evidence.[10]

Rule 801 of the Rules of Criminal Procedure was designed to address the problem of inexperience, but it does not address the problem of incompetence, such as in the case of Willie Cooper,[11] in which defense counsel urged the jury that the biblical admonition of "an eye for an eye" should be limited to cases involving the killing of a pregnant woman. The problem was that his client in that very case had killed a pregnant woman. Nor has Rule 801 addressed the epidemic of deficient lawyering on appeal, in which lawyers who have been deemed qualified on paper have repeatedly failed to preserve issues for appellate review, failed to present any justiciable claim for review, or presented issues so unintelligibly that the Court had no idea what the defense was trying to argue.[12]

Just as disturbingly, Rule 801 bars some extremely qualified lawyers from providing representation in capital cases. One example is my former colleague at Schnader, Harrison LLP, Samuel Silver. Before Rule 801 was adopted, Mr. Silver retried two capital penalty phases. In both, he won unanimous life verdicts. He also tried a controversial murder case in which the Philadelphia District Attorney sought a first-degree murder conviction when the victim died several decades after having been shot and the defendant had already

[10] Pennsylvania's state courts have consistently refused to hold that the appointment of such egregiously unqualified lawyers is itself a deprivation of the right to counsel.
[11] Commonwealth v. Cooper, 941 A.2d 655 (Pa. 2007).
[12] When faced with such deficient representation in the 1980s and 1990s, the Pennsylvania Supreme Court had removed counsel from the case and ordered the appointment of a new appeal lawyer. Most recently, it has simply denied the defendant's appeal, and the state post-conviction courts have found appellate counsel ineffective and restored the right to appeal, delaying the adjudication of the case for several years. E.g., Commonwealth v. Walter, CP-18-CR-0000179-2003 (Clinton C.P. Nov. 29, 2011); Commonwealth v. Hairston, No. 200109056 (Allegheny C.P. Nov. 14, 2011); Commonwealth v. Sanchez, CP-09-CR-0001136-2008 (Bucks C.P. Dec. 8, 2009); Commonwealth v. Wholaver, CP-22-CR-0000692-2003 (Dauphin C.P. Mar. 21, 2007).

served his sentence for attempted murder. His client was acquitted. And yet, under Rule 801, Mr. Silver is deemed insufficiently experienced to handle a capital trial or penalty phase. Likewise, the Rule has been applied in the post-conviction context to exclude major law firms from providing *pro bono* representation without first finding local Rule 801 counsel to assist in the case.

But assuming that Rule 801 finds Pennsylvania qualified lawyers, even the best of them cannot adequately represent a capital defendant without the resources necessary to do so. And as repeatedly emphasized in every study to date in Pennsylvania, the Commonwealth's counties almost uniformly fail to do so.[13] All these studies found Pennsylvania's provision of defense services in capital cases to be deficient, including near universal failures by the counties to provide adequate resources for investigators and mental health experts. The American Bar Association assessment of the Commonwealth specifically found that Pennsylvania failed to comply with prevailing national norms for capital representation. Making matters worse, Pennsylvania's courts have essentially interpreted United States Supreme Court caselaw on indigent funding for experts[14] as not applying in this Commonwealth, and have never granted a capital defendant a remedy for denial of resources by the trial courts.[15]

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[13] TASK FORCE REPORT (July 1990); RACE & GENDER REPORT (2003); ABA PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT (October 2007).

[14] Ake v. Oklahoma, 470 U.S. 68 (1985).

[15] E.g., Commonwealth v. Appel, 547 Pa. 171, 206, 689 A.2d 891, 908 (1997) (in the pre-trial context, no Ake violation where no expert assistance was sought or provided in a pre-trial competency hearing), *rev'd*, Appel v. Horn, 250 F.3d 203 (3d Cir. 2001) (on grounds of denial of the assistance of counsel at the competency hearing); Commonwealth v. Christy, 540 Pa. 192, 203-04, 656 A.2d 877, 882 (1995) (holding in the guilt-stage that Ake provides no right to expert assistance to prove self-defense or diminished capacity), *rev'd*, Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. 1998) (on violation of Ake); Commonwealth v. Miller, 746 A.2d 592, 600 (Pa. 2000) (holding in the sentencing phase that Ake does not entitle a capital defendant "to psychiatric assistance to prove . . . mental health mitigating circumstances," only to rebut prosecutorial evidence or argument of future dangerousness); Commonwealth v. Bardo, 551 Pa. 140, 149, 709 A.2d 871, 875 (1998) (holding Ake is limited to court-appointed psychiatrists and does not apply to requests for funds for

What are Pennsylvania's "problems of major proportions" with capital representation? In July of 1990, the Joint Task Force spotlighted a range of of systemic defects that it determined had a direct adverse impact on capital litigation in Pennsylvania. These included that Pennsylvania had "[n]o method for identifying and appointing qualified counsel"; "[p]ublic defender offices [were] ill-equipped to deal with" these cases; "[t]here [was] a potential shortage of attorneys able and willing to litigate this type of case in the state and federal courts"; and that lawyers who were otherwise available to take on capital cases were deterred from doing so because of "[c]oncerns regarding the adequacy of resource[s,] ... compensation, and reimbursement for experts."[16]

The "primary problems" in Pennsylvania's provision of defense services in capital cases included "[p]roviding competent representation of counsel" at all levels of state litigation, establishing qualification standards for court-appointed attorneys, and providing adequate compensation for court-appointed attorneys. The Task Force recognized that county payment systems that deferred reimbursement and compensation until the conclusion of a case created financial disincentives to representation, and it advocated "[a] statewide compensation plan for the costs of state court litigation" that provided for "payment of preliminary expenses via interim petitions for reimbursement" as "a critical component" of that plan. It recommended compensation (in 1990 dollars) at $75.00 per hour for in-court time and $50.00 per hour for out-of-court preparation time.[17]

As a centerpiece of its recommendations to redress Pennsylvania's defects in providing capital representation, the Task Force recommended the creation of a death

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investigators); Commonwealth v. Reid, 537 Pa. 167, 173-74, 642 A.2d 453, 457 (1994) (Ake does not require the county to pay the "excessive" fee of $1,000 to secure testimony of a psychologist who had examined the defendant for mitigation and was in the courtroom prepared to testify).

[16] TASK FORCE REPORT, *A Review of the Problems.*

[17] TASK FORCE REPORT, *Primary Problems; id., Compensation.*

penalty resource center, which the legislature never included in the state budget, which Congress defunded, and to which Governor Ridge unilaterally refused to release funds from a designated legislative initiative grant.[18]

If Pennsylvania's status as an outlier state in the provision of capital defense services wasn't already clear by the time of the Joint Task Force Report, it became so shortly thereafter. A study prepared for the American Bar Association by The Spangenberg Group in 1993 showed that Pennsylvania was among only seven death penalty states that provided no state funding for capital defense services at any stage of the case. [19]

In 2000, the Pennsylvania Supreme Court created a special committee to examine the problem of racial and gender bias in Pennsylvania's justice system. As part of its inquiry, the Committee considered the delivery of counsel services to indigent defendants in capital cases. Using the American Bar Association standards as its "benchmark," the Committee concluded that delivery of these services, whether by public defender offices or through court-appointed counsel, was "inadequate throughout the Commonwealth."[20]

The Committee retained the Spangenberg Group to study Pennsylvania's indigent defense system. Of the counties it surveyed, the Spangenberg Group found that "only one met ABA standards for public defenders. Virtually every other county surveyed showed serious deficiencies in its ability to deliver services to capital defendants."

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[18] Federal funds had been available for death penalty resource centers since the mid 1980s. However, Pennsylvania never provided state matching funds. The Pennsylvania Capital Case Resource Center finally opened in July 1994 after it was designated as the recipient of a $200,000 legislative initiative grant – a grant from funds that individual state legislators could designate to non-profit organizations. When Governor Ridge took office in January 1995, he curtailed the use of legislative initiative grants and refused to release funds for a second legislative initiative grant that had previously been approved by the Casey administration.
[19] THE SPANGENBERG GROUP, *A Study of Representation of Capital Cases in Texas*, Tables 9-4 through 9-7 (Mar. 1993). Other states addressed that issue, but Pennsylvania did not. In time, the Commonwealth became – and remains – the only death penalty state that fails to provide state funding for indigent defense services at any level of a capital case.
[20] RACE & GENDER REPORT, *Delivery of Counsel Services to Indigent Defendants*, ch. 5, at 210.

The failures were universal, not just as matter of geography but of substance. "All Pennsylvania counties surveyed failed to compensate attorneys adequately and provide sufficient funds for experts ....." The counties "uniformly fail[ed] to provide adequate funding for support services such as investigators and social workers." "No county routinely appoints two lawyers on capital cases."[21]

The manner in which counsel were trained, selected, and evaluated, and consultive assistance provided was equally cavalier:

> With the exception of Philadelphia, there was a lack of effective standards for appointment of capital counsel. No training specific to capital representation is required for attorneys by Pennsylvania counties. No county routinely appoints two lawyers on capital cases. No county effectively monitors performance of capital counsel. There is no statewide Capital Defender or Capital Case Resource Center.

Moreover, in the absence of state funding, the counties adopted compensation levels and a set of court-appointed fee structures that varied from the merely inadequate to the clearly unethical. The Race and Gender Committee reported that in 2000, for counties whose population was greater than 100,000, the average salary for a full-time assistant public defender who might be called upon to litigate a capital case ranged from as low as $28,000 to up to $51,000, with an average of $42,807. The average salary for a part-time assistant public defender in these larger counties was $24,728. In smaller counties, the average salary in 2000 for a chief public defender ranged from $17,708 to $50,000, with an average of $34,342. For a full-time assistant public defender, average annual salary ranged from $28,500 to $38,500, with an average salary of was $32,000. And salaries for part-time assistant public defenders, ranged from as low as $11,975 to up to $42,000, with an average annual compensation of $25,272.

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[21] Id., chs. 5 & 6.

There were even more serious issues with respect to the appointment and compensation of court-appointed or conflict counsel. Some counties adopted low-bid contracts as the basis for assigning counsel. Others implemented fixed-fee contracts. The Committee found that fee structures were "inadequate[,] and in some instances, actually discourage[d] effective representation by building in financial disincentives to devote the necessary hours of preparation." These types of compensation schemes violate the ABA Guidelines, and the American Bar Association has challenged similar compensation practices in other states.

The report found that the problem was not simply underfunding by local politicians. Local courts seemed indifferent to deficient representation, and actually contributed to it through a culture of expedience. It wrote that "[j]udicial administrators operate[d] under systems that place[d] a premium on dispositions, rather than quality representation."

The failures in indigent defense had predictable racial and economic consequences: "The Spangenberg Group concluded that 'many counties in Pennsylvania are not meeting their constitutional, ethical, and professional obligation to provide fair and equal treatment to poor people accused of crime,' and that funding inadequacies in the delivery of counsel services disproportionately affects minorities."

The report recommended that the Pennsylvania Supreme Court "[p]romulgate reasonable minimum compensation standards for capital cases throughout Pennsylvania and ensure that sufficient resources for experts and investigators are made available to counsel." It further recommended that the state legislature "[c]reate and adequately fund a statewide independent Capital Resouce Center, or its equivalent, to assist in, and where

local resources are inadequate, undertake the representation of, capitally charged defendants and those currently under sentence of death."

Neither has happened.

Little had changed by the time an American Bar Association committee conducted its own assessment of Pennsylvania's death penalty. In October 2007, it released a report, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report.* The ABA report found that "[t]he Pennsylvania indigent system falls far short of complying with the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases." Among Pennsylvania's systemic shortcomings were failures to comply with key ABA guidelines on the structure of the defense team, availability of supporting services, and funding and compensation.

The ABA assessment report set forth a number of reasons for Pennsylvania's continuing systemic failure, including:

- The Commonwealth of Pennsylvania does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony;

- The Commonwealth of Pennsylvania provides no state funding for indigent defense services, as numerous counties fail to provide adequate funding for defense counsel, experts, and investigators in death penalty cases; and

- Pennsylvania law does not guarantee the appointment of two attorneys at all stages of the legal proceedings, nor does it guarantee access to investigators and mitigation specialists.[22]

[22] ABA PENNSYLVANIA ASSESSMENT REPORT, *Executive Summary* at xv; id, Ch. 6, *Defense Services*, at 114 ("The Commonwealth of Pennsylvania provides no state funding of indigent defense."); id. at 117 ("Pennsylvania law does not mandate the appointment of two attorneys at any stage of the proceedings, including trial, direct appeal, and post-conviction proceedings.").

The ABA Report repeated the findings of the Race and Gender Committee on public defender compensation. It also examined compensation rates for court-appointed counsel, which, in the absence of any statewide compensation standards, varied widely among the counties. It illustrated the fees paid to private court-appointed counsel in capital cases as follows:

> (1) Philadelphia - $400 per day after the first half day or $60 per hour for in-court work and $50 per hour for out-of-court work (lead counsel);
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> (2) Dauphin - Flat fee of $6,000;
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> (3) Lebanon - Flat fee of $5,000 and an additional $5,000 for appellate proceedings;
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> (4) Montgomery - At least $5,000, but no more than $15,000; and
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> (5) York - $55 per hour for in- and out-of-court work.[23]

The ABA Report noted that, in addition to the absence of any statewide standards for payment of counsel, Pennsylvania "has no statewide fee schedules and instead relies on the counties to establish compensation rates for experts and investigators." As examples of inadequate funding, it cited two of the Commonwealth's largest counties, Allegheny County, which "sets a maximum compensation rate of $500 for an investigator and $2,000 for an expert witness," and Montgomery County, in which "compensation for all investigator and expert fees cannot exceed $1,500 without court approval."

In addition to compliance with guidelines for capital representation, the ABA Committee recommended that Pennsylvania should "at a minimum":

> Adopt uniform statewide indigent defense standards that conform to the ABA Guidelines, including establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a

[23] ABA PENNSYLVANIA ASSESSMENT REPORT, Ch. 6, *Defense Services*, at 118.

> capital case, and establishing minimum rates for attorney compensation. The Commonwealth also should ensure that the salaries of attorneys in the county public defender offices are commensurate with those of the district attorneys' offices.
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> * * * *
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> Provide statewide funding for capital indigent defense services.[24]

Pennsylvania has not addressed any of the financial issues that guarantee continued systemic ineffectiveness of defense counsel in capital cases. To this day, it is the only state in the nation that does not provide any funds for indigent defense,[25] abdicating to its counties the unfunded mandate to provide indigent defense services, including representation of capital defendants.

The resource issue is an issue of fundamental fairness, without which one can have no confidence in the outcome of capital proceedings. Counsel, and the resources available to counsel, make a difference. One need look no further than Philadelphia for a perfect laboratory experiment that demonstrates this point.

In Philadelphia, indigent defendants are represented either by the Defender Association of Philadelphia's homicide unit, which assigns two lawyers to every capital case and employs mitigation specialists and experts in conformity with the ABA Guidelines on capital representation, or by notoriously underfunded and under-resourced court-appointed counsel. By agreement, the Defender Association is limited to twenty percent of homicide appointments.

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[24] Id. at 118.

[25] See JOINT STATE GOVERNMENT COMMISSION, *A Constitutional Default: Services to Indigent Criminal Defendants In Pennsylvania, Report of the Task Force and Advisory Committee On Services to Indigent Criminal Defendants to the General Assembly of the Commonwealth of Pennsylvania* 2 (Dec. 2011), available online at http://jsg.legis.state.pa.us/resources/documents/ftp/documents/Indigent%20Defense.pdf.

Approximately 90 death sentences have been returned in Philadelphia since the Defender Association began taking Philadelphia homicide cases in 1992.[26] If counsel made no difference, one would expect that 18 of the defendants sentenced to death would have been Defender Association clients. But that is not the case. No defendant who has been represented by the Defender Association during his or her capital trial has been sentenced to death. This reflects the national experience that the greatest determinant of who gets sentenced to death is the quality of the defense, not the nature of the offense.

When New York briefly reintroduced its death penalty, it created a state-wide capital defender officer to ensure that death penalty defendants received the heightened procedural protections that are necessary to provide fair process in capital cases. In the period before the New York death statute was declared unconstitution and then abandoned, the only defendants sentenced to death were those who had waived counsel or were represented by conflicts counsel. None of the capital defender clients was sentenced to death. Death sentences were low in New Jersey when its capital defendants were represented by a well-financed state indigent defender. They dropped precipitously in Texas after that state created a regional capital defender system. Likewise, there has been a substantial decline in death verdicts in Virginia after it created an institutional capital defender system in that Commonwealth.

Who your lawyer is doesn't guarantee a particular outcome, but clients of institutional defenders who are given adequate resources and provide representation in conformity with the team approach set forth in the ABA Guidelines are far less likely to be sentenced to death than defendants represented by under-funded public defenders or

[26] Robert Brett Dunham, *Report on Philadelphia Death Sentences* (last updated February 14, 2013).

private court-appointed counsel. And the evidence suggests that institutional defender clients are also more likely to have more favorable outcomes at the guilt stage of capital trials.[27]

The evidence also makes clear that system-wide representation by bad lawyers or under-resourced good lawyers virtually ensures that, system wide, death sentences will be imposed – and eventually overturned – as a result of ineffective assistance of counsel. In Pennsylvania, the collateral cost of systemically inadequate representation is reflected in high reversal rates for ineffective assistance of counsel.

Pennsylvania's post-conviction experience also tells us volumes about the arbitrariness of the death verdicts that are the product of systemic ineffectiveness. For the past 21 years, I have tracked what has happened to the approximately 100 capital cases reversed by the state courts in the PCRA process and the additional 50 cases reverses by the federal courts in habeas corpus proceedings. Of the 154 Pennsylvania capital cases that have been reversed in the post-conviction process, 115 had gone on to reach a new sentencing disposition. In a statistically arbitrary world (a coin flip, for example), approximately half of these cases would have produced death verdicts on resentencing. Instead, the data show that only 5 of these defendants (or 5.13%) are still on death row.

111 of these cases (96.52%) have resulted in sentences of life or less, making the odds of receiving the death penalty upon resentencing 14.80 to 1 against death. 86.09% have resulted in life sentences. In fact, twice as many defendants (10) have received sentences of a term of years than have been resentenced to death, and some of these

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[27] Anderson & Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012) ("Compared to appointed counsel, public defenders in Philadelphia reduce their clients' murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.").

individuals pled guilty to crimes they did not commit so that they could be released from prison more quickly. Two others – Nicholas Yarris and Harold Wilson – have been exonerated by DNA or acquitted or exonerated.

This more than 96% failure rate on resentencing provides additional evidence that Pennsylvania's death penalty operates in a manner that is both arbitrary and ineffective.

Pennsylvania's governors have signed 434 death warrants.[28] Three have been carried out. That's a 99.3% failure rate. But that is less a failure of the executive or judicial branches in adjudicating and administering the death penalty than it is one of the legislative branch for enacting a law that was doomed to fail.

In 1995, Governor Ridge called a special legislative session on crime. In response to the perception that death row inmates had not been initiating post-conviction review of their convictions and sentences and that former Governor Casey had not signed enough death warrants to move them into the post-conviction process, the legislature enacted two measures to speed up the capital appeal process. One amended the Post-Conviction Relief Act to establish a one-year statute of limitations, which forced more than 100 death-row inmates to file uncounseled post-conviction petitions in the state courts within that one-year period. The other – which was largely superflous in light of the new statute of limitations – required the Governor or his Secretary of Corrections to sign death warrants at the completion of various stages of appellate review and upon the expiration or lifting of prior stays of execution.

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[28] Source: Pennsylvania Department of Corrections, Execution Warrants/Notices Issued by Governor (1985 to Present) (under 1978 capital punishment statute), http://www.cor.pa.gov/Administration/General%20Information/Documents/Death%20Penalty/Warrants.pdf

The automatic death warrant statute subjected inmates and the Department of Corrections to various stages of dress rehearsals for executions that would not occur. It also traumatized the families of the inmates, who were sent a letter directing them to make arrangements to pick up their loved one's body. Perhaps worse, it raised false expectations among family members of murder victims that the appeals process was coming to an end, and dashed those hopes time and again as each warrant was stayed. Because the automatic death warrant law required multiple legally premature death warrants, the inmates, prison personnel, and family members of the victims and of the defendant could be faced with as many as five death warrants that would be stayed as a matter of law. The law was so obviously defective that Governor Ridge's Office of General Counsel publicly differentiated between the premature warrants the law required the Governor to sign and "real" warrants that had some prospect of resulting in an execution.

Although Pennsylvania's state and federal courts had called for legislative action to redress the systemic unavailability of qualified counsel at all stages of death penalty proceedings in the Commonwealth, this issue was not considered during the special legislative session on crime.

The numbers speak loudly as to the misplaced focus of the death warrant statute. In mid-September of last year, I did an analysis of the 420 death warrants that had been issued in Pennsylvania since the death penalty was restored in 1978, and the three warrants that had been reactivated after an initial stay or reprieve had been granted. The warrant data reveal that, of the 420 death warrants that had been signed since the death penalty was restored in Pennsylvania in 1978, 416 (99.05%) were legally premature – that

is, they had been directed at individuals who had not had an opportunity to obtain at least one level of judicial review to which they were legally entitled.

Nearly all of these defendants were entitled to stays of execution as a matter of law, if they chose to pursue appellate review. Phrased differently, more than 99 percent of Pennsylvania's death warrants would have executed defendants before they had a chance to obtain full state or federal appellate review of their cases. It was 104 times more likely (416/4) that a Pennsylvania death warrant would have prematurely curtailed available appellate review than that it was directed at a person who had been afforded state and federal appellate review of his or her conviction and death sentence. The odds that any randomly selected Pennsylvania death warrant was legally premature (104:1) was 10,816 times greater than that it was directed at an individual who had exhausted the legal process to which he or she was legally entitled (1:104).[29]

Given their prematurity, it is not surprising that 418 of the 423 death warrants or warrant reactivations had been stayed by court order (98.81%). Another four were halted by reprieves (0.95%), and only three resulted in executions (0.71%). That 99.29% of Pennsylvania death warrants have not achieved their stated goal of executing the defendant is an astonishing exercise in futility and an equally astonishing waste of court and attorney time and resources spent.[30]

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[29] 77 of the warrants (18.33%) had been issued prior to the completion of certiorari review off of direct review, before the conviction had even become final as a matter of law. 322 of the warrants (76.67%) had been issued prior to the completion of state post-conviction review, before the defendant had been afforded an opportunity to present to the state courts facts and legal claims that trial counsel failed to develop, exculpatory information that had been withheld by the prosecution, or other newly discovered evidence. 415 of the warrants (98.81%) had been issued prior to the completion of federal habeas corpus review, before the defendant has been able to obtain any federal court review of his or her legal claims.

[30] A Pennsylvania warrant or warrant reactivation was 140 times more likely to not result in an execution than to result in an execution (420/3), and the odds that any randomly selected warrant would not result in an execution (140:1) were 19,600 times greater than that it would (1:140). That is literally 19 **THOUSAND** 6 hundred, not 19 point 6.

The warrant data further reveal that 192 of the 423 death warrants (or reactivations of warrants) had been directed at individuals who subsequently obtained relief from their conviction or death sentence (44.44%), with most of the remaining defendants still in litigation. That means it was 64 times more likely that a warrant was directed at a defendant whose conviction or death sentence was later overturned than that it was directed at a defendant whom the warrant would execute (192/3). The odds that a randomly selected warrant would have been directed at a defendant whose conviction or death sentence was subsequently overturned (192:231 or 1:1.20) were 116.4 times greater than that the warrant of execution would actually be carried out (1:140). There are a number of similar types of comparisons that illustrate the futility of the automatic warrant law. It is 43.33 times more (130/3) likely that a death warrant will attempt to execute someone who ultimately has been released from death row than that it will execute the defendant.[31] It is 10.67 times more likely (32/3) that a death warrant would be directed at a person who later died on death row by means other than execution, and so serves a "natural life sentence," than that the warrant would result in an execution.[32]

These data reflect two different types of failure. First, the warrants failed to do the only thing for which they were legitimately intended, which was to execute death row inmates. As I already indicated, they were a more than 99% failure at fulfilling that

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[31] 130 of the 423 death warrants (or reactivations of warrants) were directed at individuals who subsequently have been resentenced to life or less or exonerated/acquitted. That means the odds that a randomly selected warrant was directed at a defendant whose case is ultimately non-capitally resolved (130:293 or 1:2.25) are 62.1 times greater than that the warrant of execution would actually be carried out (1:140).

[32] 32 of the death warrants (or reactivations of warrants) were directed at individuals who later died on death row of natural causes, medical neglect, or suicide. The odds that a randomly selected warrant would be directed at a defendant who died in prison of causes other than execution (32:391 or 1:12.22) are 11.5 times greater than that the warrant of execution will actually result in an execution (1:140).

function. But given their legal prematurity, they would have constituted an even more damning failure had they been carried out: they would have executed people we now know for certain should not have been on death row at all.

Finally, I have a brief comment about race and the death penalty in Pennsylvania.

At its peak death row population in 2001, Philadelphia County had the highest death row population per capita and highest minority death-row population per capita among U.S. counties with 30 or more on death row. Philadelphia had the largest number (121) of racial minorities on death row, comprising the highest percentage of racial minorities on any major county death row in the country (90.3%). It had placed 113 African Americans on death row – more than in any other county in the United States and more than in almost every state.[33] It had the highest percentage of African-Americans on death row of any of the 70 largest counties in the United States that had the death penalty at that time.

Studies showed that defendants faced a statistically significant risk of being sentenced to death based upon being black. And it was estimated that 30% of the African Americans on Philadelphia's death row would not have been there but for their race. Researchers also discovered that, for interracial murders in Philadelphia, defendants whose appearance was perceived as stereotypically African were more than twice as likely to be sentenced to death as defendants whose appearance was perceived as less stereotypically black. When there were black victims, there was no difference in death-sentencing rates.

[33] Only California (215), Texas (193), Florida (134), North Carolina (131) had more African Americans on their **state's** death row. Philadelphia had more black inmates on its death row than did the entire states of Illinois (111), Ohio (100), Alabama (87), Georgia (62), or Louisiana (61). Source: NAACP Legal Defense & Educational Fund, Death Row USA (Fall 2001).

Philadelphia prosecutors were criticized for the overuse of the death penalty in the periods covered by these studies – and the high rate of reversals of Philadelphia death sentences imposed in the 1980s and 1990s is consistent with the experience of other counties that have over-indulged in capital prosecutions. One of the reasons so many black defendants went to death row in Philadelphia was almost certainly the historical practice of Philadelphia prosecutors to strike African American jurors from serving in capital cases. Data compiled for more than 12,000 jury strikes in three separate prosecutorial administrations showed that Philadelphia prosecutors struck black jurors with double the frequency of all other jurors, and struck non-black jurors from racially integrated neighborhoods at twice the rate of jurors from highly segregated white neighborhoods.

But the problems with race and the death penalty are intractable. It is undeniable that the Philadelphia District Attorney's office has reformed its prior practices in seeking new death sentences – and the office deserves praise for that effort. Yet even as the Philadelphia District Attorney's office pursued death less frequently, the percentage of minority defendants who were sentenced to death increased. The last 21 death sentences imposed in Philadelphia, dating back to November 2000, have been imposed against black defendants. Of the 24 death sentences imposed in Philadelphia in the 21st century, 23 (95.8%) were against minority defendants: 22 (91.7%) were against black defendants; 1 each against Latino and white defendants (4.2% each).

No one suggests that these death sentences were sought because the defendants were black. But the net result raises even more concerns about the inability of the criminal justice system to extricate itself from racially inequitable outcomes. It is yet another of the

issues the legislature should address in determining how to respond to Pennsylvania's current death penalty crisis.

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