

JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

CAPITAL PUNISHMENT IN PENNSYLVANIA:

*The Report of the Task Force
and Advisory Committee*

June 2018



*Serving the General Assembly of the
Commonwealth of Pennsylvania Since 1937*

JOINT STATE GOVERNMENT COMMISSION

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A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission.

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¹ Act of July 1, 1937 (P.L.2460, No.459); 46 P.S. §§ 65-69.

² Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth of Pennsylvania receives the financial benefit of such volunteerism, along with their shared expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be consulted to construe or apply a statute.³

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Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

³ 1 Pa.C.S. § 1939.

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EXECUTIVE SUMMARY

In the fall of 1607, a blacksmith named James Read was sentenced to hang for striking a representative of King James I in the Jamestown colony in Virginia. But at the top of the ladder that led to the gallows, he offered up details about a supposed mutiny in the making. Shortly thereafter, he was back at work and George Kendall, the putative leader of the plot, was tried, convicted, placed before a firing squad and shot. He was shot rather than hanged because of his higher social standing.

With that, Kendall became the first person executed after a legal proceeding in what would become the United States of America, and we've been wrestling with the practice ever since—including the fundamental questions of whether there is ever any justification for taking another life, and if so, how to do the deed.⁴

“Capital punishment is currently authorized in 31 states, by the federal government and the U.S. military.”⁵ The Commonwealth is one of these 31 states.⁶ During the last 56 years, the Commonwealth executed three condemnees even though it has had a death penalty for approximately 50 of those years.⁷ These three condemnees, who had psychiatric problems, waived

⁴ L.A. Times Ed. Bd., *Execution Is Inhumane, No Matter What Method States Use*, L.A. Times (Mar. 16, 2018), <http://www.latimes.com/opinion/editorials/la-ed-oklahoma-executions-nitrogen-lethal-injection-20180315-story.html>.

⁵ Nat'l Conf. of State Legiss., *States & Capital Punishment* (June 1, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.

⁶ 42 Pa.C.S. § 9711.

⁷ Keith Zettlemoyer & Leon Moser were executed in 1995; Gary Heidnik was executed in 1999. Pa. Dep't of Corrections, *Execution Warrants/Notices Issued by Governor (1985 to Present)*, <http://www.cor.pa.gov/Initiatives/Documents/Death%20Penalty/Warrants.pdf> (last updated Apr. 5, 2018). The death penalty was ruled unconstitutional in 1972 & reenacted by the Commw. in 1978.

their appeals,⁸ which dates the last involuntary execution in the Commonwealth back to 1962.⁹ Since 1985, at least 466 warrants of execution were issued in the Commonwealth, which resulted in those three executions.¹⁰ Since 1987, approximately 35 inmates died while on death row while still under a sentence of execution (but not from being executed).¹¹ Since the death penalty was reinstated in 1978, the subsequent judicial dispositions of the Commonwealth's condemnees' convictions and sentences resulted in more than 97% of them being resentenced to life imprisonment or less.¹² Also since 1978, the number of the Commonwealth's inmates under a sentence of death peaked at 243 in 2002.¹³ As of June 2018, the number of the Commonwealth's inmates under a sentence of death had been reduced to 150.¹⁴ Finally, during that same time frame, six condemnees were fully exonerated of the crime(s) for which they were convicted and sentenced to death.¹⁵

⁸ “Zettlemoyer was taking an anti-depressant/anti-psychotic drug when he testified before the district court and when he wrote a letter on March 28, 1995, indicating that he wanted no further appeals. . . . [T]he record is clear that Zettlemoyer voluntarily took the medication as part of a course of treatment for his medical problems. He testified before the district court that ‘I have a number of health problems, and the psychiatrist and the psychologist at the SCI Pittsburgh Institution have recommended a variety of medications for me to take. . . . [S]o I always take it.’” *In re Zettlemoyer*, 53 F.3d 24, 28-29 (3d Cir. 1995). “Throughout the proceedings, Leon Moser maintained that he wanted to die. From all indications, he still does. . . . Moser had been hospitalized . . . for depression . . . ; and . . . takes a common anti-depressant, Imipramine.” *In re Moser*, 69 F.3d 691, 693-94 (3d Cir. 1995) (Nygaard, J., dissenting). “Moser . . . underwent psychiatric treatment while in prison”. Associated Press, *Killer of His Ex-Wife & 2 Daughters Is Executed*, *N.Y. Times* (Aug. 17, 1995), <https://www.nytimes.com/1995/08/17/us/killer-of-his-ex-wife-and-2-daughters-is-executed.html>. “Dr. Bernstein stated that it was his opinion within a reasonable degree of medical certainty that Heidnik suffered from paranoid schizophrenia, and described him as a seriously disturbed, cognitively impaired, psychotic individual. . . . Dr. McKenzie opined with a reasonable degree of medical certainty that Heidnik suffers from schizophrenia, is actively psychotic, and is not in contact with reality. . . . Heidnik indicated in response to questioning . . . that he did not wish the attorneys to appeal. . . . The court stated that Heidnik's paranoid schizophrenia does not substantially affect his capacity to appreciate his position and make a rational choice with respect to continuing or abandoning habeas corpus proceedings in federal court.” *In re Heidnik*, 720 A.2d, 1016, 1024-26 (Pa. 1998).

⁹ This was Elmo Smith. Associated Press, *Pa. Execution 1st Since '62*, *N.Y. Times* (May 3, 1995), <https://www.nytimes.com/1995/05/03/us/pennsylvania-execution-first-since-62.html>.

¹⁰ Pa. Dep't of Corrections, *supra* note 7. From these warrants, this amounts to an execution rate of .006%.

¹¹ E-mail from Kristofer B. Bucklen, Ph.D., Dir. of Research & Statistics, Pa. Dep't of Corrections (May 8, 2018) (on file with Pa. J. State Gov't Comm'n). The average number of condemnees dying but before being executed during this 31-year period is 1.13/year.

¹² Robert Brett Dunham, Pa. Capital Post-conviction Reversals & Subsequent Dispositions (Death Penalty Information Ctr. 2018).

¹³ Appdx. I, *infra* p. 255.

¹⁴ Pa. Dep't of Corrections, Persons Sentenced to Execution in Pa. as of June 1, 2018, <http://www.cor.pa.gov/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf>. Later in May 2018, a man was condemned, making him the 150th. Myles Snyder, York Cnty. Gets Death Sentence in 2016 Double-murder, abc 27 News (May 24, 2018), <http://www.abc27.com/news/local/york/york-county-gets-death-sentence-in-2016-double-murder/1197032992>.

¹⁵ *Infra* p. 171.

Some of the deficiencies identified and recommendations contained in this study are not new and remain a concern. Several earlier reports have found our system to be deficient in some of the same areas and addressed them as well, notably: Final Report of the Supreme Court Committee on Racial and Gender Bias in the Justice System;¹⁶ The Pennsylvania Death Penalty Assessment Report published by American Bar Association in 2007,¹⁷ which evaluated fairness and accuracy by analyzing Pennsylvania’s laws, procedures and practices; Report of the Advisory Committee on Wrongful Convictions;¹⁸ and, Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants.¹⁹

“[W]e can start with the obvious—the current state of Pennsylvania’s capital jurisprudence is impaired. . . . [T]he question arises: Just what is wrong?”²⁰

Summaries of the 17 subjects from Senate Resolution No. 6²¹

(1) **Cost:** Whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole; in considering the overall cost of the death penalty in Pennsylvania, the cost of all the capital trials that result in life sentences as well as death sentences that are reversed on appeal must be factored into the equation;²²

There is a significant difference between the cost of the death penalty compared to life in prison without parole,²³ primarily because of more extensive litigation and higher correctional cost for those sentenced to execution; however, Department of Corrections is changing its housing of condemned inmates and it is premature to calculate if higher correctional costs will persist for condemnees. An example of a systematic cost difference at trial between capital and non-capital cases is the penalty trial, which does not occur in non-capital cases. “It is a simple fact that seeking the death penalty is more expensive. There is not one credible study . . . that presents evidence to the contrary.”²⁴

¹⁶ Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *Final Rep.* (2003), http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

¹⁷ Am. Bar Ass’n, *Evaluating Fairness & Accuracy in State Death Penalty Sys.: The Pa. Death Penalty Assessment Rep.* (2007), <https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/pennsylvania/finalreport.authcheckdam.pdf>.

¹⁸ Pa. J. State Gov’t Comm’n, *Rep. of the Advisory Comm. on Wrongful Convictions* (2011), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-212-9-15-11%20rpt%20-%20Wrongful%20Convictions.pdf>.

¹⁹ *Id.*, *A Constitutional Default: Servs. to Indigent Crim. Defendants in Pa.* (2011), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf>.

²⁰ Thomas G. Saylor, *Death-Penalty Stewardship & the Current State of Pa. Capital Jurisprudence*, 23 *Widener L.J.* 1 (2013).

²¹ (Sess. of 2011), appdx. A, *infra* pp. 217-22. Material for this rep. was developed by the subcomms., *infra* p. 33.

²² *Infra* pp. 35-58.

²³ “Extant literature on the costs of capital punishment unambiguously finds that capital cases are more expensive to prosecute from beginning to end than non-capital cases.” John Roman *et al.*, *The Cost of the Death Penalty in Md.* 29 (2008), available at <https://www.urban.org/sites/default/files/publication/31526/411625-The-Cost-of-the-Death-Penalty-in-Maryland.PDF>.

²⁴ Okla. Death Penalty Rev. Comm’n, *Rep.* 234 (2017), available at <https://drive.google.com/file/d/0B-Vtm7xVJVVONmdNMmM5bzk3Qnc/view>.

The studies from other jurisdictions used a combination of actual cost data, actual resource data and estimates of both to compare cumulative and partial costs of the death penalty with sentences of life imprisonment without parole among the different stages of the process that result in either sentence. As is true elsewhere, no reliable data exists to comprehensively and accurately assess this difference in Pennsylvania. The process includes different levels and branches of government which are independently budgeted. It involves fixed and variable costs, and the budgeting would neither typically nor uniformly reflect different projections and allowances to pursue these two penalties among others. To try to assess whether there are significantly different costs between these two penalties, surveys were electronically distributed to judges, prosecutors, public defenders and victim advocates in nine Pennsylvania judicial districts of varying population sizes and caseloads that had past or current capital murder cases.

(2) **Bias and unfairness:** Whether the selection of defendants for capital trials in Pennsylvania is arbitrary, unfair or discriminatory in any way and whether there is unfair, arbitrary or discriminatory variability at any stage in the process including in the sentencing phase;²⁵

The subcommittee on policy could not answer the question relating to the selection of defendants for capital trials because the only recent study was limited to examining cases resultant in convictions for murder of the first degree. This limitation means that the influence of race or ethnicity on the decision of charging the homicide or on “whether to retract the motion to seek the death penalty in any case that did not result in a first-degree murder conviction” was not studied.²⁶ The Pennsylvania State University researchers spent approximately eight years²⁷ developing, researching, accessing and collecting data, and drafting a report in which it found disparate variability within those cases based on the race of the victim, the type of the defendant’s legal representation, and the variation among counties in the selection of those defendants for the death penalty.²⁸ The largest and most prominent differences were those “among counties in death penalty outcomes and the effects of other variables on death penalty outcomes”.²⁹ Contrasting with the Baldus and other literature, “Black defendants with White victims were not at greater risk to receive the death penalty”.³⁰ The notable differences based upon the race of the victim were “not in combination with the race/ethnicity of defendant.”³¹ The likelihood of seeking the death penalty was more when there was a Hispanic victim and there was less likelihood for receiving the death penalty when the victim was Black than when the victim was White, which differences were

²⁵ *Infra* pp. 58-90.

²⁶ John Kramer *et al.*, *Capital Punishment Decisions in Pa.: 2000-2010*, at 39 (2017), available at <http://justicecenter.psu.edu/research/projects/files/the-administration-of-the-death-penalty-in-pennsylvania-pdf>. The study was also limited to the “18 counties that had ten or more first-degree murder convictions” which “was more than 80% of all first-degree murder convictions in the Commonwealth in” the study’s “time frame.” *Id.*

²⁷ Appdx. L, *infra* p. 263.

²⁸ The advisory committee is grateful to have had the opportunity to collaborate with both the university’s Justice Center for Research and Pennsylvania Interbranch Commission on Gender, Racial and Ethnic Fairness and will summarize the center’s research, *infra* pp. 75-90.

²⁹ Kramer *et al.*, *supra* note 26, at 121. *E.g.*, “prosecutors in Allegheny County and Philadelphia were less likely to seek the death penalty against defendants represented by public defenders than” in the other 16 counties in the field study. *Id.* at 120-21.

³⁰ *Id.* at 122.

³¹ *Id.* at 121. Regardless of the defendant’s race or ethnicity, cases with White victims were 8% more likely to receive the death penalty; conversely, cases with Black victims were 6% less likely to receive the death penalty. *Id.*

not “attributed to the many factors” measured by the control variables used in the study.³² “[D]ifferences among counties in death penalty outcomes, and the effects of other variables on death penalty outcomes, were the largest and most prominent differences found in” the study.³³

*In a very real sense, a given defendant’s chance of having the death penalty sought, retracted, or imposed depends on where that defendant is prosecuted and tried. In many counties of Pennsylvania, the death penalty is simply not utilized at all. In others, it is sought frequently. If uniform prosecution and application of the death penalty under a common statewide framework of criminal law is a goal of Pennsylvania’s criminal justice system, these findings raise questions about the administration of the death penalty in the Commonwealth.*³⁴

To the extent convictions were studied *via* multivariate analyses, the impact found based upon race was on victims rather than on defendants.

When we control for a wide variety of factors that could impact the decisions, we find that the likelihood of having the death penalty filed, retracted, or given does not differ by race of defendant, but the likelihood of having the death sentence given does vary by race of victim. And, we didn’t find disparity specific to black defendants with white victims, but rather, disparity connected to race of victim regardless of race of defendant.³⁵

However, there was no examination of possible bias associated with any other stage of the process, including arrest, charging and plea bargaining.³⁶ Regarding unfairness in general and racial or ethnic bias in particular, the subcommittee on policy supports including a recommendation that Pennsylvania consider replicating what other states have done in this area to statutorily provide for proportionality review, which would routinely and systematically collect relevant data for review.

(3) **Proportionality:** Whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison and whether there is an adequate process for determining when death sentences are excessive or out of line with sentences imposed in other cases where a sentence other than death was imposed;³⁷

³² *Id.* at 123.

³³ *Id.* at 124. Compared to defendants represented by public defenders, those represented by privately-retained counsel were “significantly less likely to receive the death penalty”, but defendants represented by public defenders were “less likely to have the death penalty filed against them than other defendants”. *Id.* n.33.

³⁴ *Id.* at 125. Appdx. K, *infra* p. 261, shows the ratio of execution to life sentences by county based on the inmate population in 2015.

³⁵ E-mail from Jeffery T. Ulmer, Ph.D., Prof. & Assoc. Head, Dep’t of Sociology & Criminology. Pa. State U. (June 12, 2018) (on file with Pa. J. State Gov’t Comm’n).

³⁶ Kramer *et al.*, *supra* note 26, at ii, 114. Just. Ctr. for Research plans to follow its study with one focusing on possible bias in the pre-trial stages of prosecution in potential capital cases.

³⁷ *Infra* pp. 90-112.

The subcommittee on policy could not answer the question relating to selection because there is no process for determining whether the crimes for which defendants receive the death penalty differ from the crimes for which defendants receive life imprisonment (without parole). The statute lists aggravating circumstances, which would allow the death penalty for one convicted of murder of the first degree, but charging and plea bargaining are done at the county level. The Commonwealth's large number (18) of statutory aggravating circumstances³⁸ is at the high end of that count nationally,³⁹ and this numerosity, along with the numerosity of Pennsylvania's 67 counties, can easily result in significant differences in proportionality. The only available recent data is from the study detailed under the issue of bias and unfairness, which was limited to those cases that had convictions for first-degree murder. Justice Center for Research is seeking funding to follow that study with one to directly address this inquiry, but it will take years to accomplish.

The Pennsylvania statutory provision that mandated a process to determine if the death sentence is comparatively and (dis)proportionately excessive was repealed in 1997.⁴⁰ To reduce differences in the crimes selected for the punishment of death would require the reduction of aggravating circumstances. To determine if death sentences are comparatively and (dis)proportionately excessive would require reinstatement of the former statutory mandate or a comparable one to routinely and systematically collect useful data on the circumstances of individual murder cases.

(4) Impact on and services for family members: The impact of the death penalty on family members and loved ones of murder victims and the availability and cost of services currently being provided in Pennsylvania for family members and loved ones of murder victims and whether these services are sufficient to meet the needs of surviving families;⁴¹

Services for family members and loved ones of murder victims in this Commonwealth are provided on a county-by-county basis. Predominantly, those services are provided within the county's Office of District Attorney.⁴² Some counties have one or more private, not-for-profit victims' support offices that operate in conjunction with or in lieu of a victim's witness advocate working for a district attorney. These services are funded through a mix of public and private sources. The services are generally but not precisely uniformly available throughout the counties. When staff from Joint State Government Commission spoke with staff from various advocacy offices to determine the sufficiency of the services provided, there was a wide range of responses. One third of the providers said that the services were insufficient. Conversely, almost half of the advocates felt that the services were sufficient, although this group of responders often acknowledged that the loss of a family member or loved one through homicide left a hole that could never be fully filled.

³⁸ 42 Pa.C.S. § 9711(d).

³⁹ Appdx. B, *infra* pp. 223-26.

⁴⁰ The provision directed Pa. Supreme Court to vacate a sentence of death if "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." Former 42 Pa.C.S. § 9711(h)(3)(iii).

⁴¹ *Infra* pp. 113-19.

⁴² Prosecutors have statutory responsibilities to some victims. Act of Nov. 24, 1998 (P.L.882, No.111), § 213; 18 P.S. § 11.213. "A family member of a homicide victim" is a victim. *Id.* § 103; 18 P.S. § 11.103.

The cost of services that are provided to family members and loved ones of murder victims can only be provided as part of the larger picture of state and federal funding for victims within this Commonwealth.⁴³ In other words, at the service provider level, the grants are not typically broken down by type of victim⁴⁴ so that family members and loved ones of murder victims receive support services as part of a larger group of victims of violent crimes within this Commonwealth.⁴⁵ Staff from Joint State Government Commission questioned staff from various offices of victims' witness advocates to get their opinion about the cost of these services, specifically how they were reflected in homicide cases rather than other crimes with which the office dealt. As a follow up to the original questions, they were then asked if the costs were "more, less or about the same as those services that you provide to victims of other crimes." The responses could be categorized into two distinct approaches of calculating or envisioning service cost. The first type of responses indicated that the services provided for family members and loved ones of murder victims cost more than the services that the office provided for other types of crime. In the second category of responses, the advocates indicated that they believed that the services cost the same amount as they would for the victim of a different sort of crime, because they viewed the fixed operating costs of the office and the fixed costs of the salaries to be the same regardless of the service provided.

(5) **Mental retardation:** Whether, in light of the Supreme Court ruling in *Atkins v. Virginia*, there are adequate procedural protections in place to assure that people with mental retardation are not in fact being sentenced to death and executed;⁴⁶

The subcommittee on procedure⁴⁷ sought to reply to this factual inquiry by obtaining readily available data, which was the intelligence quotient (IQ) scores supplied by Department of Corrections for the inmates on death row and those serving life imprisonment for first-degree murder. Notwithstanding a recognition of the standard error of measurement,⁴⁸ some states statutorily prescribed a score for the IQ and the Commonwealth would argue that the intellectual disability is below 70.⁴⁹ For this reason, data obtained from Department of Corrections was initially analyzed using a score of 70 or below as an imperfect proxy for intellectual disability. Since IQ is relatively static, whether the scores closely replicated scores before age 18 is unknown but presumed. Information on substantially deficient adaptive functioning also remains unknown,

⁴³ Appdx. J, *infra* pp. 257-59.

⁴⁴ Pa. Comm'n on Crime & Delinquency recently awarded requested grants totaling \$2,346,175 for four recipients in Phila. to serve survivors of homicide victims. McMahon, *infra* note 799.

⁴⁵ Beginning in 2016, VOCA recipients have been required to keep confidential records on each crime victim that receives services to report as Victim Assistance Program Performance Measures. Pt. of this data includes the total no. of survivors of homicide victims served during the reporting period, but this data is too new to develop numbers for this report.

⁴⁶ *Infra* pp. 119-23; appdcs. G, H, *infra* pp. 239-53.

⁴⁷ The data was collected and analyzed for the subcomm. by Dr. Gary Zajac & Laura Winger from The Pa. State U. Just. Ctr. for Research. Appdx. H, *infra* p. 243.

⁴⁸ "Reporting the range within which the person's true score falls, rather than only a score, underlies both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices in the field of" intellectual disability. Kevin S. McGrew, Ph.D., APPLIED PSYCHOMETRICS 101, 1 (2009), <http://www.iapsych.com/iapap101/iapap1015.pdf>. An IQ of 70 is roughly two standard deviations below the norm, the definition for intellectual disability (formerly "mental retardation") employed by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychological Association ("APA").

⁴⁹ *E.g., Commw. v. Sanchez*, 36 A.3d 24, 51 (Pa. 2011).

which is why using a score for IQ alone is unreliable to determine intellectual disability. When an IQ score of 70 or below was used as the classification for intellectual disability, “4.1% of the death row inmates” fell within that classification as compared to 8.7% of those serving life imprisonment for first-degree murder.⁵⁰ Although it was partially reassuring that the percentage of potentially intellectually disabled inmates⁵¹ was lower for condemnees than for those imprisoned for life, judicial rulings after this analysis was done subsequently clarified that using a score of 70 or below for this possible classification is too low, based on the standard error of measurement.⁵² Aside from that, it still meant that as many as approximately 4% of the death row inmates were under an unconstitutional sentence if they are in fact intellectually disabled, due to the application of the other two components of the diagnosis.⁵³

With further clarification from these judicial rulings, the same data was re-analyzed using the score of 75 instead of 70.⁵⁴ The higher score more than tripled the percentage of death row inmates from 4.1% to 14%, and almost doubled the percentage for those serving life imprisonment for murder of the first degree, from 8.7% to 15%.⁵⁵ The troubling revelation from this inquiry is that as many as 14% of the Commonwealth’s condemnees could be constitutionally ineligible for this sentence.⁵⁶ As a result, the subcommittee on procedure could not conclude that procedural protections are adequate to ensure that people with intellectual disability are neither being nor have been sentenced to death. As a comparison with the general population, it appears that an IQ score of 75 or below represents the bottom 5% of the population,⁵⁷ but is approximately triple that percentage for inmates on death row or serving life imprisonment for murder of the first degree.

The subcommittee recommends that the Rules of Criminal Procedure be amended to require a judge to determine mental retardation at the pre-trial stage instead of the jury determining it post-trial. It would resolve the issue early in the process; if the defendant is determined to be intellectually disabled pre-trial, it would save a significant amount of money and many days of court time because the case would not proceed capitally.

(6) **Mental illness:** Whether persons suffering from mental illness constitute a disproportionate number of those on death row, what criteria should be used in judging the level of mental illness involved and whether people with mental illness who are convicted of murder should be executed,⁵⁸

⁵⁰ Appdx. H, *infra* p. 245.

⁵¹ The scores can only indicate potential mental retardation because the other two diagnostic criteria of early onset & deficient, adaptive functioning were neither available nor obtained.

⁵² *E.g.*, *Hall v. Florida*, 134 S.Ct. 1986 (U.S. 2014).

⁵³ Adaptive deficits and onset prior to age 18.

⁵⁴ Appdx. H, *infra* p. 246.

⁵⁵ *Id.*

⁵⁶ The most recent data obtained places almost 13% of the death row prisoners and 12% inmates serving life imprisonment for murder of the first degree at an IQ score of 75 or below. Bucklen, *supra* note 11 (Apr. 26, 2018).

⁵⁷ Edublox Online Tutor, IQ Test Scores: The Basics of IQ Score Interpretation, <https://www.edubloxtutor.com/iq-test-scores/> (last visited Apr. 15, 2018).

⁵⁸ *Infra* pp. 123-43.

The subcommittee on policy⁵⁹ sought to reply to this factual inquiry of disproportionality by obtaining readily available data, which was the mental health status supplied by Department of Corrections for the inmates on death row and those serving life imprisonment for first-degree murder. Inmates' mental health was assessed and classified into four categories, two of which reflected either no current mental health issues or need to be medicated, and two of which reflected a current need for active treatment or close psychiatric monitoring for serious mental health issues. Since mental health is more dynamic than IQ, this data and classification would be expected to be more variable than IQ scores. It is understood that Department of Corrections used *Diagnostic and Statistical Manual of Mental Disorders*, a "handbook used by health care professionals in the United States . . . as the authoritative guide to the diagnosis of mental disorders" that "has been periodically reviewed and revised since it was first published in 1952."⁶⁰ In 2013, Department of Corrections classified almost 10% of those on death row with an active mental disorder and double that proportion for those serving life imprisonment for first-degree murder.⁶¹ When this data was updated in 2018, the department classified approximately one quarter of the inmates on death row and a similar (albeit slightly higher) percentage of those serving life imprisonment with an active mental disorder.⁶² A smaller difference in this data between those years is that more than half of death row inmates had a recent (albeit not current) need for mental health treatment, while less than a third of the life prisoners for first-degree murder had a recent (albeit not current) need for mental health treatment when checked in 2013.⁶³ When checked in 2018, the recent (albeit not current) need for mental health treatment, was below half for death row inmates and almost the same 30% for the life prisoners for first-degree murder.⁶⁴ This begs the question of how the inmates in these two groups compare to the overall human population with respect to prevalence of mental disorder. As of 2016, 4.2% of U.S. adults were seriously mentally ill and 18.3% had some type of mental illness.⁶⁵ The subcommittee agreed that the proportion of inmates on death row suffering from some type of mental illness is likely much greater than in the general population.

Because the question regarding the criteria to judge mental illness also requires a certain level of psychiatric expertise to answer, the subcommittee cannot authoritatively comment on the requested criteria. However, the subcommittee determined that the current standard that is

⁵⁹ The data was collected and analyzed for the subcomm. by Dr. Gary Zajac & Laura Winger from The Pa. State U. Just. Ctr. for Research. Appdx. H, *infra* pp. 243-53.

⁶⁰ Am. Psychiatric Ass'n, *DSM-5: Frequently Asked Questions*, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> (2018).

⁶¹ Appdx H, *infra* p. 246.

⁶² Buklen, *supra* note 11 (Apr. 26, 2018). The difference between the percentages from 2013 to 2018 is approximately 150% higher for the inmates on death row now classified with an active mental disorder, compared to five years earlier & approximately 25% higher for those serving life imprisonment for first-degree murder, now classified with an active mental disorder than five years earlier.

⁶³ Appdx. H, *infra* p. 246.

⁶⁴ Bucklen, *supra* note 11 (June 13, 2018).

⁶⁵ Nat'l Inst. of Mental Health, *Mental Illness*, <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml> (last updated 2017). Citing a study from 2004, Ctrs. for Disease Control & Prevention publishes an estimated 25% of adult Americans "reported having a mental illness within the previous" yr.. Ctrs. for Disease Control & Prevention, *CDC Mental Illness Surveillance*, <https://www.cdc.gov/mentalhealthsurveillance/faqs.html> (last reviewed 2013).

commonly used by practitioners to diagnose the level of mental illness is Diagnostic and Statistical Manual of Mental Disorders (DSM—5) from American Psychiatric Association.⁶⁶

The subcommittee noted that the inquiry on executing a mentally ill inmate has been partially judicially resolved. A sentence of death may not be carried out “upon a prisoner who is insane.”⁶⁷ A defendant who was legally insane at the time of the crime may use that as a valid defense to the charge.⁶⁸ If the defendant was not legally insane at the time of the crime but becomes unable “to comprehend the nature of the penalty” and “the reasons for” it “or its implications”, he cannot then be executed.⁶⁹ In their study detailed in this report under the section on bias and unfairness, The Pennsylvania State University researchers found that in 35 cases in which defendants presented evidence of a serious mental illness at trial, the jury accepted only 11 of these arguments. Even if a defendant is not legally insane, the subcommittee recommends extending a version of guilty but mentally ill as a bar to imposition of the death penalty for the same reasons that legal insanity would excuse a crime, or because the defendant’s severe mental disorder significantly impaired his exercise of rational judgment or conformance to legal requirements. This would allow a severely mentally ill murderer to be punished in the same way that an intellectually disabled murderer is, rather than subject the former to condemnation but not the latter.⁷⁰

(7) **Juries:** The impact on the reliability and fairness of capital trials of death qualifying jurors and the impact of this practice on the ability of women, people of color and people of faith to serve on capital juries; whether there are adequate procedural protections and remedies in place to make sure that women and African Americans are not excluded from serving as jurors in capital cases; and whether there are adequate procedural protections in place to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case;⁷¹

Assuming that social science studies “are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries”, U.S. Supreme Court ruled “that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”⁷² The concern raised in the question was the same raised in these cases, namely “that the death qualification process potentially results

⁶⁶ This “authoritative volume . . . defines and classifies mental disorders in order to improve diagnoses, treatment, and research.” Am. Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders (DSM–5)*, <https://www.psychiatry.org/psychiatrists/practice/dsm> (2018).

⁶⁷ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

⁶⁸ 18 Pa.C.S. § 315. To be excused for the crime due to legal insanity, it would mean that at the time of the offense, the defendant did not “know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.” *Id.*

⁶⁹ *Ford*, 477 U.S. at 417.

⁷⁰ All three condemnees who were executed in Pa. since 1962 voluntarily dropped their resistance to execution by relinquishing their appeals and all three had psychiatric problem, *supra* pp. 1-2 notes 7, 8.

⁷¹ *Infra* pp. 143-52.

⁷² *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). This assumption was made after the Court pointed out “several serious flaws in the evidence” introduced *via* the social science studies. *Id.* at 168-73.

in biased juries”⁷³ because of the resultant composition. There is no limitation to challenging jurors for cause, but peremptory challenges “[i]n trials involving a capital felony . . . when there is only one defendant” are limited to 20 *per side*.⁷⁴ A challenge for cause occurs when a juror demonstrates bias in his responses to questioning or when he says something that indicates that he will not follow instructions or be impartial. A peremptory challenge is used to exclude a juror because of a suspected or presumed bias, instead of an expressed one.⁷⁵ Peremptory challenges are restricted to race because “the Equal Protection Clause forbids a party to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”⁷⁶ It was subsequently ruled that in the exercise of peremptory challenges, “gender, like race, is an unconstitutional proxy for juror competence and impartiality.”⁷⁷ “Research examining the effects of death qualification on jury composition suggests that death qualification often results in juries that are biased in ways that consistently disadvantage capital defendants.”⁷⁸ Because of General Social Survey and other social science research, “research suggests that death qualification is more likely to eliminate members of some groups than others.”⁷⁹ Systematic exclusion of specific social groups could occur because some groups might be “consistently more in favor of the death penalty than another”, who then could be excluded by “prosecutors who know such statistics”.⁸⁰ As noted elsewhere in the report, some religions have official stances on the death penalty which might impact “jury selection practices”.⁸¹ In short, “findings support the idea that the death qualification process systematically eliminates jurors who belong to certain social and demographic groups” and “can also change the way in which case facts are interpreted and discussed by a jury.”⁸² To exclude potential jurors, attorneys, who know statistical research on demographics and attitudes, might rely on that knowledge to “exclude potential jurors . . . to increase the possibility of creating a jury that will decide in their favor.”⁸³ Maybe more often, “attorneys are likely to base their exclusions on intuitions related to certain attitudes and beliefs associated with individuals and their group statuses.”⁸⁴ The concern “related to death-qualified jurors is that the death qualification process itself influences jurors such that jurors who experience the death qualification process hold more pro-prosecution or anti-defendant perceptions of the trial information than jurors who do not experience death qualification.”⁸⁵ Repeatedly asking jurors “whether they are able to give the death penalty, *assuming* the defendant is *guilty* . . . reiterates the statement that the defendant is

⁷³ Logan A. Yelderman *et al.*, *Capital-izing Jurors: How Death Qualification Relates to Jury Composition, Jurors’ Perceptions, & Trial Outcomes*, in *Advances in Psychology & Law*: Vol. 2, 27, 32 (B.H. Bornstein & M.K. Miller eds. 2016).

⁷⁴ Pa. R. Crim. P. 634(A)(3). For alternate jurors, each side has one peremptory challenge for every two alternate jurors selected. *Id.* 633(B).

⁷⁵ Yelderman *et al.*, *supra* note 73, at 32.

⁷⁶ *Batson v. Ky.*, 476 U.S. 79, 89 (1986).

⁷⁷ *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). “[T]he Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.” *Id.* at 130.

⁷⁸ Yelderman *et al.*, *supra* note 73, at 33 (citation omitted).

⁷⁹ *Id.* at 35-36.

⁸⁰ *Id.* at 35.

⁸¹ *Id.* at 36. A sample of some religious stances appears *infra* pp. 212-13

⁸² Yelderman *et al.*, *supra* note 73, at 36.

⁸³ *Id.* at 43.

⁸⁴ *Id.* “Specifically, attorneys might try to identify and exclude jurors who would vote against their side.” *Id.*

⁸⁵ *Id.* at 43-44.

guilty.”⁸⁶ If “specific social groups and individuals with shared attitudes or beliefs that are thought of as prejudicial” are excluded, the “death-qualified juries . . . might actually be more susceptible to systemic biases”.⁸⁷ Effects of death qualification “on juries and trial outcomes . . . should continue to be studied”, especially because of “findings that demonstrate that the death qualification process produces conviction prone juries”.⁸⁸

In 2003, Joint State Government Commission published *Minority Representation in the Jury Selection Process in Pennsylvania*.⁸⁹ The data gathered for this report did not reveal counties excluding large, distinctive groups from the jury pool in unconstitutional proportions but showed that “some counties could stand to improve their representation of minorities on juries.”⁹⁰ This analysis was not limited to juries in capital cases. Since this report was published, Pennsylvania law was amended to add exemptions from jury duty,⁹¹ authorize expansion of the master list of prospective jurors⁹² and establish a statewide jury information system.⁹³ This report has not been updated so that it is unknown whether and how much the statutory amendments have impacted the representation of minorities on juries, capital or otherwise. One of the recommendations in the report is for “[t]he judicial system” to

voluntarily, routinely monitor itself to determine if it is fulfilling its constitutional obligation to draw jurors from a cross section of the community. . . . As the constitutional obligation to draw jurors from a representative cross section of the community is an essential component of a right to a jury trial, it would seem that the judicial system itself could and should make it easier for parties to learn relevant numerical information specifying demographic data about whom courts summon rather than leave it up to aggrieved individuals or classes to try to calculate information the court could easily collect.⁹⁴

One remedy supported by the subcommittee on procedure would be enactment of a Racial Justice Act to statutorily allow death sentences to be challenged on a statistical basis instead of on the basis of purposeful discrimination.

“Prior research has repeatedly revealed that jurors (1) base their decisions on erroneous assumptions about the early release of those who are not sentenced to death, (2) prematurely decide the punishment before hearing sentencing evidence and instructions, and (3) fail to understand sentencing instructions.”⁹⁵ The Commonwealth “is one of only two states with life” imprisonment “without parole . . . that does not require that juries be told in every capital case that there is no

⁸⁶ *Id.* at 44. If so, “death-qualified jurors enter the trial with a *biased* presumption of innocence instead of a complete presumption of innocence.” *Id.* at 46.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2003-52-JURY.PDF>.

⁹⁰ *Id.* at 3, 81, 87.

⁹¹ 42 Pa.C.S. § 4503(a)(5)-(8).

⁹² *Id.* § 4521(a)(3)(v).

⁹³ *Id.* § 4521.1.

⁹⁴ *Id.* at 3, 87. Presumably, this would be done by court administrators. *Id.*

⁹⁵ Wanda D. Foglia, *They Know Not What They Do: Unguided & Misguided Discretion in Pa. Capital Cases*, 20 *Just. Q.* 187, 188 (2003).

possibility of parole”.⁹⁶ This research has been partially updated since then, both in Pennsylvania and elsewhere; however, because the researcher who was updating this died, it might not be completed. Nonetheless, “the percentages getting things wrong was remarkably similar to what” was “found in the original study. . . . The only improvement was that the median estimate for how long someone usually spends in prison if they don't get death went from 15 years to 25 years, but 25 years is still underestimating the reality.”⁹⁷ The membership of the subcommittee writing these suggested standard criminal jury instructions is comprised of attorneys and judges. Linguists, social scientists and psychologists have not been employed to revise these standard suggested instructions. It would seem to the subcommittee that if the Commonwealth decides to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case, there would need to be formal, empirical feedback on a routine basis. If jurors are unable to understand and apply these instructions as research discussed above indicates, the subcommittee on procedure advocates that suggested standard instructions be rewritten by attorneys and judges with the assistance of linguists, social scientists and psychologists, as well as the data disclosing the misunderstanding and misapplication. Even with routine, empirical feedback and additional professional assistance drafting these standard instructions, they would still be suggested rather than mandated.

(8) State appeals and postconviction: Whether there are adequate procedures in place to assure that serious error in capital cases is identified and corrected and to what extent procedural doctrines, such as waiver or forfeiture, operate to prevent judicial review of serious constitutional claims on the merits;⁹⁸

There are both adequate and inadequate procedures to assure that serious error in capital cases is identified and corrected, and procedural doctrines sometimes prevent, but perhaps more often, delay judicial review of serious constitutional claims on their merits. The procedures and procedural doctrines that are probably intended to limit judicial review for systematic efficiency and effectiveness of the death penalty likely more often generate systematic inefficiency and ineffectiveness of the death penalty. This is borne out by the fact that the Commonwealth has executed three condemnees during the last 56 years, and all three of them relinquished their appeals.⁹⁹ There are other data showing that less than 3% of condemnees who had their original death sentences judicially vacated and subsequently disposed of since 1995 were resentenced to death.¹⁰⁰

The subcommittee on procedure advocates reinstating the practice of relaxed waiver on direct capital appeals as it was employed in the 1980s and 1990s, in which Pennsylvania's Supreme Court would have a “duty to transcend procedural rules” in capital cases,¹⁰¹ and to “address and, if possible from the record, resolve all significant issues perceived by this Court or raised by the

⁹⁶ *Id.*

⁹⁷ E-mail from Wanda D. Foglia, Professor of L. & Just. Studies, Rowan U. (Aug. 2, 2015) (on file with Pa. J. State Gov't Comm'n).

⁹⁸ *Infra* pp. 152-58.

⁹⁹ *Supra* pp. 1-2, notes 7, 8.

¹⁰⁰ *Supra* p. 2.

¹⁰¹ *Commw v. McKenna*, 383 A.2d 174, 181 (Pa. 1978).

parties” irrespective of waiver.¹⁰² Generally, “on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable” but “may be pursued under the” Post Conviction Relief Act “as claims sounding in trial counsel’s ineffectiveness or, if applicable, a statutory exception to the” act’s “waiver provision.”¹⁰³ Delaying review of a potentially dispositive issue until the petitioner reaches post-conviction proceedings, when that issue could have been resolved on the record on direct appeal, is inefficient for the judiciary and everyone else involved in proceedings.¹⁰⁴ When Pennsylvania’s Supreme Court dropped relaxed waiver, it did “not foreclose the possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal.”¹⁰⁵ By dropping the relaxed waiver rule in a self-contradictory manner to rely on a self-contradictory Post Conviction Relief Act, one does not arrive at judicial efficiency. Moreover, the Court’s justification for abrogating relaxed waiver overlooks the statutory authority it has “to correct errors at trial” regardless of waiver, when it automatically reviews death sentences.¹⁰⁶ It also completely overlooks the practical reality that more than 97% of post-conviction reversals disposing of death sentences in Pennsylvania since 1978 have subsequently resulted in a sentence of life imprisonment or less. The same judicial opinion that rejected the justification of “relaxation of waiver principles on direct appeal . . . on grounds of judicial economy because it reduces the number and necessity of post-conviction relief petitions” because the “efficient use of the resources of this court’s resources” were frustrated by the relaxed waiver doctrine also contended that abrogation of relaxed waiver would do no harm because “[a]ny meritorious claims which escape counsel’s recognition on direct appeal can then be raised on grounds of counsel’s ineffectiveness.”¹⁰⁷ But preserving judicial resources on direct appeal by limiting the scope of direct review does not serve judicial economy, the public fisc, or the interests of justice by burdening post-conviction review with claims that could have been earlier resolved, by unnecessarily burdening the post-conviction process with claims of ineffectiveness for prior counsel’s failures to preserve for appeal claims that could have been decided under the relaxed waiver rule, and by keeping prisoners who have meritorious claims in death-row confinement for the extra years needed for post-conviction review and appeal. Neither judicial economy nor fairness is served when the more than 97% of cases in which death sentences are converted to life sentences or less leave death row only after post-conviction review. Finally, since the statute provides for automatic judicial review of death penalties to correct errors at trial, the judiciary

¹⁰² *Commw. v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984). The Court later described the relaxed waiver rule as discretionary, *Commw. v. Malloy*, 856 A.2d 767, 778 (Pa. 2004), but for more than twenty years, it was “this Court’s practice to address all issues arising in a death penalty case irrespective of a finding of waiver.” *Commw. v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995); *Commw. v. Jermyn*, 709 A.2d 849, 856 n.20 (Pa. 1998); *Commw. v. Morales*, 701 A.2d 516, 520 n.13 (Pa. 1997); *Commw. v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996). The Court said the relaxed waiver rule “requires us to examine” technically waived issues, *Commw. v. Simmons*, 662 A.2d 621, 636 (Pa. 1995), and stressed that, in a death penalty case, an issue “cannot be considered waived,” *Commw. v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986).

¹⁰³ *Commw. v. Freeman*, 827 A.2d 385, 402 (Pa. 2003).

¹⁰⁴ The joint trial of co-defendants Kelley O’Donnell and William Gribble illustrates this point. O’Donnell was awarded a new sentencing hearing in 1999 after being granted penalty-phase relief on a claim raised and decided under the relaxed waiver rule. *Commw. v. O’Donnell*, 740 A.2d 198 (Pa. 1999). Gribble’s lawyer failed to raise the issue—equally applicable to his case—on direct appeal, and it took eight more years, including a remand by the Pennsylvania Supreme Court for further post-conviction proceedings, before Gribble’s post-conviction petition was resolved.

¹⁰⁵ *Freeman*, 827 A.2d at 402.

¹⁰⁶ 42 Pa.C.S. § 9711(h).

¹⁰⁷ *Commw. v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998).

should not insist on a timely notice of appeal to consider any claims unassociated with the statutorily-mandated review of the sufficiency of the evidence. This would be a corollary to Pennsylvania Rules of Civil Procedure that are liberally construed and applied “to secure the just, speedy and inexpensive determination of every action”.¹⁰⁸ The imposition of capital punishment might be a penalty that is unique enough for “an appellate court” to “consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure” by upholding “the mandates of the constitution over the countervailing considerations of normal appellate procedure”, especially since the doctrine of waiver’s purported “means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve” has not been realized in the capital context.¹⁰⁹

(9) **Clemency:** Whether the current clemency process has procedures in place to assure that it functions as a safety net to assure that factual and procedural errors that directly undermine the reliability and fairness of a capital sentence are remedied;¹¹⁰

The short answer is, simply, no. The Governor may exercise this authority for any reason or no reason, and this includes the circumstance where he believes the capital sentence is unreliable or unfair. However, the Governor can commute or pardon a capital sentence only upon receipt of a written and unanimous recommendation from the Board of Pardons.¹¹¹ The Board may likewise base its recommendation on any consideration, including the innocence of the convicted criminal or the unfairness of the sentence. The Board of Pardons serves as a check on any Governor that might wield the clemency power unwisely, arbitrarily or for political gain. The Board of Pardons was not established to provide a “safety net” where the criminal justice system has failed to produce an accurate and fair judgment of guilt in a capital case. Accordingly, the Board of Pardons has only limited power, *i.e.*, to make recommendations. Further, its recommendation can be ignored by the Governor.

Were the General Assembly to decide to develop a “safety net” to address unreliable or unfair capital sentences, it could amend the Post Conviction Relief Act,¹¹² which already “provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.”¹¹³ These amendments could confer additional authority upon the judiciary, beyond that which presently exists, to order relief in a particular circumstance. The Constitution could also be amended to reduce the requirement of the board’s unanimity to its majority recommendation for the Governor to consider clemency; however, the Board could still base its recommendation on any consideration and the Governor could still ignore a favorable recommendation.

¹⁰⁸ Pa. R. Civ. P. 126.

¹⁰⁹ *Commw. v. McKenna*, 383 A.2d 174, 180-81 (Pa. 1978).

¹¹⁰ *Infra* pp. 158-60.

¹¹¹ *Id.*

¹¹² 42 Pa.C.S. §§ 9541-9546.

¹¹³ *Id.* § 9542. *See also*, Pa. R. Crim. P. 900-910, which govern capital and noncapital cases under the Post Conviction Relief Act.

(10) **Penological intent:** Whether the death penalty rationally serves a legitimate penological intent such as public safety or deterrence;¹¹⁴

For the most part, the debate concerning capital punishment centers on the aims of deterrence, incapacitation and retribution—increasingly the last of these. There is a great deal of disagreement about whether the death penalty meaningfully advances the deterrence purpose; it certainly advances the aims of retribution and incapacitation, and the debate largely centers on whether it does this more effectively than alternatives. Insofar as advancing these latter two purposes, the death penalty is no more effective than life imprisonment if executions do not occur. Whether the death penalty deters first-degree murder has long been a matter of debate between proponents and opponents of the death penalty. The evidence relating to deterrence is inconclusive, and leading advocates on both sides treat this issue as one of more or less secondary importance. In a state like Pennsylvania, with a relatively large number of death sentences but almost no executions, the deterrent effect of the death penalty is attenuated, regardless of whether a more vigorously applied death penalty would have a deterrent effect.¹¹⁵ A prominent research study of the death penalty’s effectiveness as a deterrent reached this sound but noncommittal conclusion:

[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, . . . these studies [should] not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.¹¹⁶

(11) **Innocence:** Whether there is a risk of execution of an innocent person and whether there are adequate procedural protections in place to prevent an innocent person from being sentenced to death and executed;¹¹⁷

Since 1973, 162 United States’ condemnees turned out to be innocent after having been exonerated *via* subsequent acquittals or dismissals of the charges of the crime for which they were originally condemned, and pardons granted for innocence.¹¹⁸ The “[a]verage number of years between being sentenced to death and exoneration” is “11.3 years”.¹¹⁹ Six of these exonerees are from Pennsylvania, where they averaged just over nine years between being condemned and then exonerated.¹²⁰

¹¹⁴ *Infra* pp. 160-70.

¹¹⁵ Carol S. & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in ‘Executing’ v. ‘Symbolic’ States in the U.S.*, 84 Tex. L. Rev. 1869, 1922 (2006).

¹¹⁶ Nat’l Research Council of the Nat’l Acads., *Deterrence & the Death Penalty* 102 (Daniel S. Nagin & John V. Pepper, eds., 2012), available at http://www.nap.edu/download.php?record_id=13363.

¹¹⁷ *Infra* pp. 171-74.

¹¹⁸ Death Penalty Information Ctr., *The Innocence List*, <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last updated Apr. 19, 2018).

¹¹⁹ *Id.*

¹²⁰ *Id.*

If the Commonwealth were executing condemnees, the possibility that one or more factually innocent persons might be condemned and executed could not be eliminated, notwithstanding procedural safeguards intended to minimize and reduce this possibility. It might be better stated that the procedural safeguards are really intended to eliminate this possibility, but an assurance of 100% effectiveness would be difficult to establish and unlikely to occur. Our Commonwealth has executed three condemnees during the last 56 years. Since all three condemnees relinquished their resistance to execution, one would presume they were factually guilty. The only certain way to eliminate the risk of condemning and executing a factually innocent person would be to eliminate the sentence and not execute any convict.

(12) **Alternatives:** Whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penological interests;¹²¹

While the topics of penological purpose are analytically distinct, to consider the penological purpose of the death penalty without regard to alternatives inserts the artificial assumption that the only alternative to the death penalty would be to set the perpetrator free. Because the severely punitive alternative of life imprisonment without parole is available, the subcommittee on policy concludes that the death penalty is unnecessary, given the many objections to its use, the number of innocent persons wrongfully convicted and sentenced to death, and the effectiveness of the alternative.

(13) **Counsel:** The quality of counsel provided to indigent capital defendants and whether such counsel and the process for providing counsel assures the reliability and fairness of capital trials;¹²²

The subcommittee on procedure generally endorses a report of the task force and advisory committee on services to indigent criminal defendants¹²³ but focused on indigent capital defendants and limits its comments to that subset. The advisory committee that prepared that report found some indigent defense practitioners failed to meet professional standards, partially because the system delivering that service is not standardized to train or supervise statewide but does so on a county-by-county basis.¹²⁴ The Commonwealth's lack of support for these services undermines "the effectiveness of indigent defense",¹²⁵ which is borne out by successful challenges to death penalties based upon ineffective assistance of counsel. As of May 2018, 150 Pennsylvania death-row inmates sentenced to death under Pennsylvania's 1978 death-penalty statute have had their convictions or sentences overturned on the basis of ineffective assistance of counsel.¹²⁶ Death sentences in 93 of these cases were overturned because of counsel's failure to investigate and present mitigating evidence in the penalty phase.¹²⁷ The inadequate remuneration of assigned

¹²¹ *Infra* pp. 174-83.

¹²² *Infra* pp. 183-86.

¹²³ Pa. J. State Gov't Comm'n, *supra* note 19.

¹²⁴ *Id.* at 5.

¹²⁵ *Id.*

¹²⁶ Robert Brett Dunham, Pa. Capital Convictions & Death Sentences Rev'd as a Result of Ineffectiveness of Counsel (Death Penalty Information Ctr. 2018).

¹²⁷ Of these 93, 68 were reversed by state courts & 25 by federal courts. *Id.*, Pa. Capital Case Cite List of Reversals Because of Ineffective Assistance of Counsel (Death Penalty Information Ctr. 2018). Other reversals related to

counsel can “result in poor quality representation.”¹²⁸ “Poor systems of defense do not make economic sense.”¹²⁹

“[T]he quality of the defense representation provided by the Commonwealth to indigent capital defendants is an issue” that Chief Justice Saylor has “written on many times in appellate decisions.”¹³⁰

I am unable to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania. I would submit that, in fact, we have seen more than enough instances of deficient stewardship to raise very serious questions concerning the presumption's accuracy. It is my considered position, like that of many others, that a contributing factor may be the pervasive underfunding of indigent defense.¹³¹

Justice Saylor called for “a collaborative conversation among the judicial, legislative, and executive branches to institutionalize statewide remedies and facilitate ongoing improvements” and noted “[t]he importance of legislative involvement”.¹³² The right to counsel is grounded in both our Commonwealth’s and national constitutions.¹³³

The subcommittee generally endorses Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that were published in 2003 by American Bar Association “to set forth a national standard of practice . . . to ensure high quality legal representation” within “any jurisdiction.”¹³⁴

(14) **Secondary trauma:** The impact of the death penalty process on law enforcement, prosecutors, defense counsel, judges, jurors, correctional officers, family members and loved ones of victims and family members of the accused;¹³⁵

To try to assess the impact of the death penalty process on judges, prosecutors, public defenders and victim advocates, surveys were distributed in nine judicial districts of varying population sizes and caseloads that had past or current capital murder cases.¹³⁶

failures to investigate & present guilt-stage defenses, failures to request or object to instructions, failures to object to improper evidence or argument, failures relating to guilty pleas or trial waiver and making a deficient or affirmatively harmful argument. *Id.*

¹²⁸ Pa. J. State Gov’t Comm’n, *supra* note 19, at 5, 47-48.

¹²⁹ Saylor, *supra* note 20, at 38.

¹³⁰ *Id.* at 3.

¹³¹ *Commw. v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring).

¹³² *Id.* at 811 n.3.

¹³³ Pa. Const. art. I, § 9; U.S. Const. amend. VI.

¹³⁴ Am. Bar Ass’n, *Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 919 (2003). Am. Bar Ass’n also published *Ten Principles of a Pub. Defense Delivery Sys.* (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf. These principles provide a guide of “valuable measures of the prevailing professional norms of effective representation”. *Padilla v. Ky.*, 599 U.S. 356, 367 (2010).

¹³⁵ *Infra* pp. 186-89.

¹³⁶ Counties of Adams, Allegheny, Berks, Dauphin, Lancaster, Montgomery, York & Westmoreland & City of Phila. Judges were surveyed in 2015. Prosecutors, public defenders and victim advocates were surveyed in 2013.

Cumulatively, more than 64% of the responses indicated that a typical, capital murder case causes more stress or anxiety than a typical, noncapital murder case. This conclusion was reached by a majority or 100% for each category of respondents except for victim service providers, more than 53% of whom indicated that a typical, capital murder case causes about the same amount of stress or anxiety.

Cumulatively, 70% of the responses indicated that a typical, capital murder case causes no difference in adverse health conditions or consequences compared to a typical, noncapital murder case. Cumulatively, more than 73% of the responses indicated that a typical, capital murder case causes no difference in consumption of alcohol and other drugs or medications, compared to a typical, noncapital murder case.

Cumulatively, more than 54% of the responses indicated that a typical, capital murder case causes no difference in adverse consequences on one's family, home or social life, compared to a typical, noncapital murder case. This conclusion was reached by a majority for each category of respondents except for public defenders, 80% of whom indicated that a typical, capital murder case cause more adverse consequences on one's family, home or social life.

Cumulatively, more than 70% of the responses indicated that a typical, capital murder case causes more emotional strain than a typical, noncapital murder case. This was a majority or 100% of responses for each category of respondents except for prosecutors, half of whom indicated that a typical, capital murder case causes more emotional strain compared to a typical, noncapital murder case and the other half indicated no difference in emotional strain between the two.

Cumulatively, more than 58% of the responses indicated that a typical, capital murder case causes no difference in religious, spiritual or moral consideration, introspection or counsel, compared to a typical, noncapital murder case.

In 2013, The Pennsylvania State University and Department of Corrections staff administered surveys to State Correctional Institution Greene correctional officers, victims' family members, and inmates' loved ones.¹³⁷ The correctional officers' hardcopy survey consisted of 35 questions designed to measure their workplace conditions, stress, anxiety and background characteristics. The victims' family member survey was administered *via* an online survey with over 80 questions covering post-traumatic stress disorder, depression, views on the death penalty and demographic/background characteristics. Survey requests were sent to 440 eligible participants with valid addresses on file at the Office of Victim Advocate. The inmates' loved ones' survey was administered *via* a hardcopy survey of 31 questions covering post-traumatic stress disorder, depression, views on the death penalty and demographic/background characteristics. Eligible participants were loved ones (one *per* inmate) who were visiting inmates. Eligible participants were provided survey packets in visitation waiting rooms by prison staff.

¹³⁷ There is a gap in services because convicts relatives have traditionally been disregarded. Historically, law and practice did not recognize victims of crime as victims when it came to services either. One might not be too sympathetic towards inmates' relatives; however, their children are typically adversely impacted by the incarceration of parent. Dep't of Corrections' initiatives relating to children of incarcerated parents appear at <http://www.cor.pa.gov/About%20Us/Initiatives/Pages/Children-of-Incarcerated-Parents.aspx> (2018).

The survey revealed that in no instance was the capital punishment condition associated with statistically higher PTSD, depression or stress than the non-capital punishment condition. For correctional officers and victims' family members, overall reports of PTSD, depression and stress were low to moderate, suggesting that few of the respondents were suffering from mental health difficulties. This was not the case for inmates' loved ones and their children. Inmates' family members reported relatively high rates of PTSD and depression compared to national and high-risk (*e.g.*, deployed military) populations. Although the mental health challenges of inmates' families do not appear to be directly connected to capital punishment, they do warrant additional attention and point to a vulnerable population that might not be receiving adequate therapeutic services.

The relatively small sample sizes did not provide the statistical power to detect small differences between the experimental (*i.e.*, capital punishment) and control (*i.e.*, non-capital punishment) conditions. However, although the samples were relatively small, the observed differences were small enough that it is unlikely they would have reached significance even with greater numbers of respondents.

(15) **Length and conditions of confinement on death row:** Whether the conditions comply with the requirements of the United States Constitution, the Constitution of the Commonwealth of Pennsylvania and standards of international law and the impact of those conditions on correctional officers;¹³⁸

Each facility of Department of Corrections audited to date has achieved initial accreditation or reaccreditation by American Correctional Association.¹³⁹ It is under no judicial orders or consent decrees regarding conditions of confinement in Capital Case Units, otherwise known as death row.¹⁴⁰ So far as the subcommittee on impact is aware, the department complies with constitutional requirements for confinement. The only way to know for certain is after an inmate has challenged the department, claiming a constitutional violation, and the judiciary rules accordingly.¹⁴¹ An example of learning about a constitutional violation occurred last year, when the judiciary announced “a clearly established due process right under” U.S. Const. amend. XIV “to avoid unnecessary and unexamined solitary confinement on death row.”¹⁴² This was a recently recognized “due process right” that meant that the departmental policy of keeping an inmate in “the Capital Case unit” after being resentenced to life imprisonment while the district attorney appealed the resentencing is unconstitutional when “reflexively imposed without individualized justification.”¹⁴³ The department is currently defending a class action lawsuit challenging the

¹³⁸ *Infra* pp. 189-99.

¹³⁹ Am. Correctional Ass'n, Accredited Facilities,

http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/SAC_AccFacHome.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=f53cf206-2285-490e-98b7-66b5ecf4927a&CCO=2#CCO (last visited June 5, 2018).

¹⁴⁰ E-mail from Diana Woodside, Dir. of Policy, Grants & Legis. Affairs, Pa. Dep't of Corrections (June 11 & 15, 2018) (on file with Pa. J. State Gov't Comm'n).

¹⁴¹ An example of how this might arise, is the mental health investigation by U.S. Dep't of Just., *infra* p. 125-26.

¹⁴² *Williams v. Pa. Sec'y of Corrections*, 848 F.3d 549, 574 (3d Cir. 2017).

¹⁴³ *Id.* at 556-57, 572, 574. In other words, there must be “procedural protections” afforded inmates to “ensure that continuing this level of deprivation is required for penological purposes”. *Id.* at 574.

conditions of confinement on death row as an unconstitutional violation of the U.S. constitutional prohibition on cruel and unusual punishment.¹⁴⁴

It is more difficult to assess whether confinement on death row in Pennsylvania meets the standards of international law. The department does not officially recognize these standards and departmental staff were unable to indicate one way or the other whether the conditions of confinement on death row meet these standards. It seems as though the consensus of developed countries is that the punishment of execution should be abolished. To the extent that other countries use capital punishment, it appears that Pennsylvania largely comports with the standards of confinement conditions, other than the lengthy interval between condemnation and execution. This would be due to the presumptive stress of awaiting one's own execution; however, condemnees do not seem to be eager to advance their own executions to relieve the presumptive stress of the wait.

Correctional officers were surveyed on the impact of conditions of confinement on death row.¹⁴⁵

Length of confinement varies *per* inmate, primarily due to their date of conviction. Currently, the longest serving inmate on death row resides at State Correctional Institution Greene. Inmate No. AM-5999 was sentenced to death in 1983; later this year, this inmate will have completed his thirty-fifth year on Pennsylvania's death row.¹⁴⁶ The average length of confinement for all inmates on death row is 17.49 years.

The general understanding of constitutional compliance is framed by a ruling applying the U.S. constitution to prison conditions.¹⁴⁷ The constitution “‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones, and it is now settled that ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment’.”¹⁴⁸ This amendment restrains “‘prison officials, who may not, for example, use excessive physical force against prisoners.’”¹⁴⁹ Prison officials must supply essential items to the inmates, including food, clothing, shelter, medical care, and adequate steps to ensure those measures are met.¹⁵⁰

Although the department makes no representations about conformity with international standards, several trends have emerged throughout Europe and other developed countries over the years. European Union nations have abolished capital punishment. Issues in Europe include arguments that capital punishment is torture, violating provisions against freedom from torture and inhuman and degrading treatment or punishment.¹⁵¹

¹⁴⁴ *Reid v. Wetzel*, No. 1:18-cv-00176 (M.D.Pa. 2018).

¹⁴⁵ *Infra* pp. 187-89.

¹⁴⁶ Pa. Dep't of Corrections, *supra* note 14.

¹⁴⁷ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹⁴⁸ *Id.* at 832 (citation omitted).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Equality & Human Rights Comm'n, Art. 3, <http://www.equalityhumanrights.com/about-us/our-work/human-rights/human-rights-review-2012/articles/article-3> (2012).

[I]n the Court’s view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3).¹⁵²

Earlier this year, the department changed the operation of its capital case units by allowing capital case inmates to have the opportunity to participate in out-of-cell congregate activities for at least 20 hours *per* week. Previously, the policy only generally provided capital case inmates with the opportunity to have 10-12 hours of yard time out of cell *per* week in a setting that was less conducive to congregate activity. Capital case inmates will continue to have the opportunity to work as unit block workers, to have access to the law library, showers, telephone calls, non-contact visits and medical and mental health services in accordance with policy. Capital case inmates who have serious mental illness will continue to have enhanced opportunity to participate in out-of-cell treatment services.

(16) **Lethal injection:** Whether there are adequate procedures and protocols in place to assure that the death sentence is administered in accordance with requirements of the United States Constitution and the Constitution of the Commonwealth of Pennsylvania; and¹⁵³

Based upon a U.S. Supreme Court ruling¹⁵⁴ and its application by U.S. Court of Appeals for the Third Circuit to Delaware’s lethal injection procedures and protocols,¹⁵⁵ Pennsylvania’s similar procedures and protocols appear to be constitutional. Bolstering this assessment is the U.S. District Court grant of summary judgment to Secretary Wetzel because Pennsylvania’s protocol did not have identified risks “very likely to cause . . . needless suffering in violation of” U.S. Const. amend. VIII.¹⁵⁶

Based upon a U.S. Court of Appeals ruling,¹⁵⁷ Pennsylvania’s observational protocol appeared to be unconstitutional. Bolstering this assessment is the U.S. District Court’s grant of a preliminary injunction forbidding the Commonwealth’s secretary of corrections from obscuring parts of an execution because the plaintiff was likely to succeed on the merits of its claim of

¹⁵² *Soering v. U.K.*, 11 Eur. Ct. H.R. (1989), ¶ 111, available at http://www.uio.no/studier/emner/jus/jus/JUR5710/h10/undervisningsmateriale/5nov_Soering-v-UK.pdf.

¹⁵³ *Infra* pp. 199-203.

¹⁵⁴ *Baze v. Rees*, 553 U.S. 35 (2008). “It is not disputed that Pennsylvania uses the same three-drug protocol that Kentucky uses.” *Chester v. Beard*, 657 F.Supp.2d 534, 543 n.9 (M.D.Pa. 2009). But by 2012, Department of Corrections “revised its lethal injection protocol”. *Id.*, 2012 WL 4758346. (The protocol was revised in Aug. 2012. *Id.*, 2012 WL 5386129. It “supersedes all prior versions”. *Id.*, 2012 WL 5389319.) This controlling opinion has subsequently been applied to a similar method of execution using a substituted drug. *Glossip v. Gross*, 135 S.Ct. 2726, 2732-34 (U.S. 2015). This subsequent ruling found that petitioners’ did not prove a substantial risk posed by the substituted drug compared to available alternative methods and the district court was not clearly erroneous in its factual finding that the substituted drug would not “result in severe pain and suffering.” *Id.* at 2737-38.

¹⁵⁵ *Jackson v. Danberg*, 594 F.3d 210, 222-23, 230 (3d Cir. 2010). Delaware’s capital sentencing scheme was subsequently ruled unconstitutional on different grounds. *Rauf. v. Del.*, 145 A.3d 430 (Del. 2016).

¹⁵⁶ *Chester v. Wetzel*, 2015 WL 632374 at 10 (M.D.Pa. 2015).

¹⁵⁷ *Cal. 1st Amend. Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002).

unconstitutionality.¹⁵⁸ This suit was settled by the parties so that the protocol was changed. Now “witnesses would be permitted to see and hear inside the lethal injection chamber from the time the condemned inmate enters the chamber until the time he/she is pronounced dead. During the last completed execution, in the late 1990’s, witnesses were only permitted to see the inmate immediately before the administration of the lethal injection. They did not see the inmate enter the chamber, they did not see the inmate strapped down, etc.”¹⁵⁹

Pennsylvania’s constitutional prohibition against cruel punishments is co-extensive with the U.S. constitutional prohibition against cruel and unusual punishment¹⁶⁰ so that any distinction between the two authorities would be factual rather than legal. Factors that have not been analyzed for this are whether internal, departmental procedures suffice instead of regulations and the continued availability of the drugs in the current protocol.

The Commonwealth’s lethal injection protocol is confidential so that the subcommittee on procedure is uncertain what the current protocol is. Statutory confidentiality applies to the identity of departmental employees, contractors and victims participating in the execution.¹⁶¹ The protocol that the subcommittee considered was the information published in judicial opinions ruling on litigation over its constitutionality.¹⁶² Some of these opinions are not reported but available electronically *via* a subscription to Westlaw. The protocol revealed in these judicial opinions do not violate the statute’s confidentiality requirement and could be public, which the subcommittee on procedure advocates rather than a confidential one. The drugs used should appropriately be selected by qualified, professional expertise to be delivered humanely and ethically.

There are potential, practical problems with the current protocol so far as the subcommittee perceives it to be. Department of Corrections might not have or be able to obtain these drugs. Perhaps further affecting the viability of the lethal injection protocol, is the fact that numerous relevant organizations have taken positions that could hamper this method of execution.

(17) **Public opinion:** The opinions of Pennsylvania residents regarding capital punishment, including whether it is a just and appropriate punishment and, if so, under what circumstances should it be imposed;¹⁶³

To determine Pennsylvania residents’ opinions about capital punishment, six public opinion polls were analyzed about the death penalty. Two were conducted nationally: the 2016 Pew Research Center poll and the 2017 Gallup poll; and four surveyed only Pennsylvania residents: the 2013 Pennsylvania State University poll, the 2015 Public Policy Polling poll, the 2015 Office of Victim Advocate poll, and the 2016 Pennsylvania State University poll.

¹⁵⁸ *The Phila. Inquirer v. Wetzel*, 906 F.Supp.2d 362, 375 (M.D.Pa. 2012).

¹⁵⁹ E-mail from Andrew Barnes, Legis. Liaison, Pa. Dep’t of Corrections (Nov. 13, 2013) (on file with Pa. J. State Gov’t Comm’n).

¹⁶⁰ *Commw. v. Zettlemyer*, 454 A.2d 937, 967 (Pa. 1982).

¹⁶¹ 61 Pa.C.S. § 4305(c).

¹⁶² *Chester v. Wetzel*, 2012 WL 5439054 (M.D.Pa. 2012), 2015 WL 632374 (M.D.Pa. 2015); *The Phila. Inquirer v. Wetzel*, 906 F.Supp.2d 362 (M.D.Pa. 2012).

¹⁶³ *Infra* pp. 203-13.

The questions in the Spring 2013 Pennsylvania State University Poll were sponsored by Joint State Government Commission as part of this study. Overall, almost three quarters of Pennsylvanians surveyed (72.3%) thought that the death penalty is a just and appropriate penalty for intentional murder in the Commonwealth. Most respondents indicated they would change their attitude towards the death penalty for those convicted of intentional murder based on how the murder was carried out (21.6%) and the reasons for the murder (18.3%). Over half of Pennsylvanians surveyed (53.5%) stated that the circumstances of an intentional murder would determine what type of sentence they would ultimately choose. Due to the fact that this poll is from 2013, it is unknown if these percentages reflect current perspectives.

Office of Victim Advocate's survey of registered crime victims whose offenders were under a sentence of death showed overwhelming support for the death penalty, but this was not a survey of the general population nor a survey of registered crime victims in first-degree murder cases in which the death penalty was sought but not returned and registered crime victims in first-degree murder cases in which the death penalty was not sought.

The Spring 2016 Pennsylvania State University Poll showed less support for the death penalty than the Spring 2013 poll; however, the questions differed. It can be difficult and imprecise to compare polling from different years, asking different questions and sampling different populations, but they could be perceived as collectively showing:

- 1) A majority of Pennsylvanians support the death penalty.
- 2) Support for the death penalty is declining.
- 3) A significant proportion of the population supports the idea of the death penalty but is opposed to the death penalty as a matter of public policy because more respondents favor the death penalty when asked for or against, but that percentage drops when given the option of life imprisonment or death as a penalty.

*Conclusions*¹⁶⁴

- **Cost:** There is a significant difference between the cost of the death penalty and the cost of life in prison without parole.
- **Bias and unfairness:** The subcommittee on policy could not answer the question relating to the selection of defendants for capital trials because the only recent study was limited to examining cases resultant in convictions for murder of the first degree.

As for convictions of murder of the first degree, The Pennsylvania State University researchers found disparate variability within those cases based on the race of the victim, the type of the defendant's legal representation, and the variation among counties in the selection of those defendants for the death penalty. The largest and

¹⁶⁴ Material for this report was developed by the subcommittees, *infra* p. 33.

most prominent differences were those “among counties in death penalty outcomes and the effects of other variables on death penalty outcomes”.¹⁶⁵

- **Proportionality:** There is no process for determining whether the crimes for which defendants receive the death penalty differ from the crimes for which defendants receive life imprisonment (without parole). The statute lists aggravating circumstances, which would allow the death penalty for one convicted of murder of the first degree, but charging and plea bargaining are done at the county level.

The only available data is from the study detailed under the issue of bias and unfairness, which was limited to those cases that had convictions for first-degree murder. Justice Center for Research might be able to follow that study with one to directly address this inquiry, but it will take years to accomplish.

- **Impact on and services for family members:** These services are paid for from a mix of public and private funding. The services are generally but not precisely uniformly available throughout the counties. When asked by staff, almost half of the advocates felt that the services were sufficient, although this group of responders often acknowledged that the loss of a family member or loved one through homicide left a hole that could never be fully filled.

The cost of services that are currently provided to family members and loved ones of murder victims can only be provided as part of the larger picture of state and federal funding for victims within this Commonwealth. When asked if the costs were “more, less or about the same as those services that you provide to victims of other crimes”, the responses categorized costs for services provided for family members and loved ones of murder victims cost as more than the services that the office provided for other types of crime or the same amount as they would cost in response to the victim of a different sort of crime, because they viewed the fixed operating costs of the office and the fixed costs of the salary to be the same regardless of the service provided.

- **Mental retardation:** It could not be determined if procedural protections are adequate to assure that people with intellectual disability are not being sentenced to death. The percentage of inmates on death row with an IQ low enough to be diagnosed as intellectually disabled is approximately the same as those serving life imprisonment for murder of the first degree, both of which are between two and three times the percentage with that low of an IQ in the general population.
- **Mental illness:** In 2018, Department of Corrections classified approximately a quarter of the inmates on death row and a similar albeit slightly higher percentage of the life prisoners for first-degree murder with an active mental disorder.¹⁶⁶ In 2018, the recent

¹⁶⁵ Kramer *et al.*, *supra* note 26, at 121. *E.g.*, “prosecutors in Allegheny County and Philadelphia were less likely to seek the death penalty against defendants represented by public defenders than” in the other 16 counties in the field study. *Id.* at 120-21.

¹⁶⁶ Buklen, *supra* note 11 (Apr. 26, 2018). The difference between the percentages from 2013 to 2018 is approximately 150% higher for the inmates on death row now classified with an active mental disorder compared to five years earlier

(albeit not current) need for mental health treatment, was approximately 43% for death row inmates and almost 30% for the life prisoners for first-degree murder.¹⁶⁷ As of 2016, 4.2% of U.S. adults in the U.S. were seriously mentally ill and 18.3% had some kind of mental illness.¹⁶⁸ It is believed that the proportion of inmates on death row suffering from some type of mental illness is likely greater than in the general population.

The current standard that is commonly used by practitioners to diagnose the level of mental illness is Diagnostic and Statistical Manual of Mental Disorders (DSM—5) from American Psychiatric Association.¹⁶⁹

The inquiry on executing a mentally ill inmate has been partially judicially resolved. A sentence of death may not be carried out “upon a prisoner who is insane.”¹⁷⁰ Even if a defendant is not legally insane, the subcommittee on policy recommends extending a version of guilty but mentally ill as a bar to imposition of the death penalty for the same reasons that legal insanity would excuse a crime or because the defendant’s severe mental disorder significantly impaired his exercise of rational judgment or conformance to legal requirements. This would allow a severely mentally ill murderer to be punished in the same way that an intellectually disabled murderer is rather than subject the former to condemnation but not the latter.¹⁷¹

- **Juries:** “Research examining the effects of death qualification on jury composition suggests that death qualification often results in juries that are biased in ways that consistently disadvantage capital defendants.”¹⁷² In short, “findings support the idea that the death qualification process systematically eliminates jurors who belong to certain social and demographic groups” and “can also change the way in which case facts are interpreted and discussed by a jury.”¹⁷³

The data gathered for a 2003 report did not reveal counties excluding large, distinctive from the jury pool in unconstitutional proportions but showed that “some counties could stand to improve their representation of minorities on juries.”¹⁷⁴ This

and approximately 25% higher for those serving life imprisonment for first-degree murder now classified with an active mental disorder than five years earlier.

¹⁶⁷ *Id.* (June 13, 2018).

¹⁶⁸ Nat’l Inst. of Mental Health, Mental Illness, <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml> (last updated 2017). Citing a study from 2004, Ctrs. for Disease Control & Prevention publishes an estimated 25% of adult Americans “reported having a mental illness within the previous” year. Ctrs. for Disease Control & Prevention, CDC Mental Illness Surveillance, <https://www.cdc.gov/mentalhealthsurveillance/faqs.html> (last reviewed 2013).

¹⁶⁹ This “authoritative volume . . . defines and classifies mental disorders in order to improve diagnoses, treatment, and research.” Am. Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders (DSM–5)*, <https://www.psychiatry.org/psychiatrists/practice/dsm> (2018).

¹⁷⁰ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

¹⁷¹ All three condemnees who were executed in Pa. since 1962 voluntarily dropped their resistance to execution by relinquishing their appeals and all three had psychiatric problems.

¹⁷² Yelderman *et al.*, *supra* note 73, at 33 (citation omitted).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 3, 81, 87.

analysis was not limited to juries in capital cases. Since this report was published, Pennsylvania law was amended to add exemptions from jury duty,¹⁷⁵ authorize expansion of the master list of prospective jurors¹⁷⁶ and establish a statewide jury information system.¹⁷⁷ This report has not been updated so that it is unknown whether and how much the statutory amendments have impacted the representation of minorities on juries, capital or otherwise.

“Prior research has repeatedly revealed that jurors (1) base their decisions on erroneous assumptions about the early release of those who are not sentenced to death, (2) prematurely decide the punishment before hearing sentencing evidence and instructions, and (3) fail to understand sentencing instructions.”¹⁷⁸ The membership of the committee writing these suggested standard criminal jury instructions is attorneys and judges. Linguists, social scientists and psychologists are not employed to revise these standard suggested instructions. It would seem to the subcommittee on procedure that if the Commonwealth decides to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case, there would need to be formal, empirical feedback on a routine basis.

- **State appeals and postconviction:** There are both adequate and inadequate procedures to assure that serious error in capital cases is identified and corrected and procedural doctrines sometimes prevent but maybe more often delay judicial review of serious constitutional claims on their merits. The procedures and procedural doctrines that are probably intended to limit judicial review for systematic efficiency and effectiveness of the death penalty likely more often generate systematic inefficiency and ineffectiveness of the death penalty. This is borne out by the fact that the Commonwealth has executed three condemnees during the last 56 years, and all three of them relinquished their appeals showing that less than 3% of condemnees who got their original death sentences judicially vacated and subsequently disposed since 1978 were resentenced to death.
- **Clemency:** The current clemency process does not have procedures in place to assure that it functions as a safety net to assure that factual and procedural errors that directly undermine the reliability and fairness of a capital sentence are remedied.
- **Penological intent:** For the most part, the debate concerning capital punishment centers on the aims of deterrence, incapacitation and retribution—increasingly the last of these. There is a great deal of disagreement about whether the death penalty meaningfully advances the deterrence purpose; it certainly advances the aims of retribution and incapacitation, and the debate largely centers on whether it does this more effectively than alternatives. Insofar as advancing these latter two, it is no more effective than life imprisonment if executions do not occur.

¹⁷⁵ 42 Pa.C.S. § 4503(a)(5)-(8).

¹⁷⁶ *Id.* § 4521(a)(3)(v).

¹⁷⁷ *Id.* § 4521.1.

¹⁷⁸ Foglia, *supra* note 95, at 188 (2003).

- **Innocence:** If the Commonwealth were executing condemnees, a possibility that one or more factually innocent persons might be condemned and executed could not be eliminated notwithstanding procedural safeguards intended to minimize and reduce this possibility. The only certain way to eliminate the risk of condemning and executing a factually innocent person would be to eliminate the sentence and not execute any convict.
- **Alternatives:** Because the severely punitive alternative of life imprisonment without parole is available, the subcommittee on policy concludes that an alternative to the death penalty exists that would sufficiently ensure public safety and address other legitimate social and penological interests.
- **Counsel:** The subcommittee on procedure generally endorses a report of the task force and advisory committee on services to indigent criminal defendants¹⁷⁹ but focused on indigent capital defendants and limits its comments to that subset. The advisory committee that prepared that report found some indigent defense practitioners failed to meet professional standards, partially because the system delivering that service is not standardized to train or supervise statewide but does so on a county-by-county basis.¹⁸⁰ The Commonwealth’s lack of support for these services undermines “the effectiveness of indigent defense”,¹⁸¹ which is borne out by successful challenges to death penalties based upon ineffective assistance of counsel.
- **Secondary trauma:** To try to assess the impact of the death penalty process on judges, prosecutors, public defenders and victim advocates, surveys were distributed in nine judicial districts of varying population sizes and caseloads that had past or current capital murder cases.¹⁸² A typical, capital murder compared to a typical, noncapital murder case resulted in cumulative supermajorities indicating more stress or anxiety and emotional strain but no difference in adverse health conditions or consequences. For the same comparison, cumulative simple majorities reported no difference in adverse consequences on one’s family, home or social life nor in religious, spiritual or moral consideration, introspection or counsel.

In 2013, The Pennsylvania State University and Department of Corrections staff administered surveys to State Correctional Institution Greene correctional officers, victims’ family members, and inmates’ loved ones.¹⁸³ The survey revealed that in no instance was the capital punishment condition associated with statistically

¹⁷⁹ Pa. J. State Gov’t Comm’n, *supra* note 19.

¹⁸⁰ *Id.* at 5.

¹⁸¹ *Id.*

¹⁸² Counties of Adams, Allegheny, Berks, Dauphin, Lancaster, Montgomery, York & Westmoreland & City of Phila. Judges were surveyed in 2015. Prosecutors, public defenders and victim advocates were surveyed in 2013.

¹⁸³ There is a gap in services because convicts relatives have traditionally been disregarded. Historically, law and practice did not recognize victims of crime as victims when it came to services either. One might not be too sympathetic towards inmates’ relatives; however, their children are typically adversely impacted by the incarceration of parent. Dep’t of Corrections’ initiatives relating to children of incarcerated parents appear at <http://www.cor.pa.gov/About%20Us/Initiatives/Pages/Children-of-Incarcerated-Parents.aspx> (2018).

higher PTSD, depression or stress than the non-capital punishment condition. For correctional officers and victims' family members, overall reports of PTSD, depression and stress were low to moderate, suggesting that few of the respondents were suffering from mental health difficulties. This was not the case for inmates' loved ones and their children. Inmates' family members reported relatively high rates of PTSD and depression compared to national and high-risk (e.g., deployed military) populations.

- **Length and conditions of confinement on death row:** Department of Corrections is under no judicial orders or consent decrees regarding conditions of confinement in Capital Case Units, otherwise known as death row.¹⁸⁴ So far as the subcommittee on impact is aware, the department complies with constitutional requirements for confinement. The only way to know for certain is after an inmate has challenged the department, claiming a constitutional violation, and the judiciary rules accordingly.¹⁸⁵

It is more difficult to assess whether confinement on death row in Pennsylvania meets the standards of international law. The department does not officially recognize these standards and departmental staff were unable to indicate one way or the other whether the conditions of confinement on death row meet these standards. It seems as though the consensus of developed countries is that the punishment of execution should be abolished. To the extent that other countries use capital punishment, it appears that Pennsylvania largely comports with the standards of confinement conditions, other than the lengthy interval between condemnation and execution.

Correctional officers were surveyed on the impact of conditions of confinement on death row.¹⁸⁶

The average length of confinement for all inmates on death row is 17.49 years. Earlier this year, the department changed the operation of its capital case units by allowing capital case inmates to have the opportunity to participate in out-of-cell congregate activities for at least 20 hours *per* week. Previously, policy only generally provided capital case inmates with the opportunity to have 10-12 hours of yard time out of cell *per* week in a setting that was less conducive to congregate activity.

- **Lethal injection:** Based upon a U.S. Supreme Court ruling¹⁸⁷ and its application by U.S. Court of Appeals for the Third Circuit to Delaware's lethal injection procedures

¹⁸⁴ Woodside, *supra* note 140.

¹⁸⁵ An example of how this might arise, is the mental health investigation by U.S. Dep't of Just., *infra* pp. 125-26.

¹⁸⁶ *Infra* pp. 187-89.

¹⁸⁷ *Baze v. Rees*, 553 U.S. 35 (2008). "It is not disputed that Pennsylvania uses the same three-drug protocol that Kentucky uses." *Chester v. Beard*, 657 F.Supp.2d 534, 543 n.9 (M.D.Pa. 2009). But by 2012, Department of Corrections "revised its lethal injection protocol". *Id.*, 2012 WL 4758346. (The protocol was revised in Aug. 2012. *Id.*, 2012 WL 5386129. It "supersedes all prior versions". *Id.*, 2012 WL 5389319.) This controlling opinion has subsequently been applied to a similar method of execution using a substituted drug. *Glossip v. Gross*, 135 S.Ct. 2726, 2732-34 (2015). This subsequent ruling found that petitioners' did not prove a substantial risk posed by the substituted drug compared to available alternative methods and the dist. ct. was not clearly erroneous in its factual finding that the substituted drug would not "result in severe pain and suffering." *Id.* at 2737-38.

and protocols,¹⁸⁸ Pennsylvania's similar procedures and protocols appear to be constitutional. Based upon a U.S. Court of Appeals ruling,¹⁸⁹ Pennsylvania's observational protocol but has been changed. The Commonwealth's lethal injection protocol is confidential so that the subcommittee on procedure is uncertain what the current protocol is. There are potential, practical problems with the current protocol so far as the subcommittee perceives it to be.

- **Public opinion:** A majority of Americans and Pennsylvanians favor the death penalty. In all six polls, respondents most frequently indicated that they support or prefer the death penalty. In four of the six polls, a majority of respondents (greater than 50%) supported or preferred the death penalty. Support for the death penalty is declining. The polls presented show that support and preference for the death penalty is declining. This decline has been steady since the late 1990s, but has been more pronounced over the past few years. Support for the death penalty is higher in theory than in practice. Most of the polls discussed only provided the option to choose whether they support or oppose the death penalty. However, some polls allow respondents to select the punishment that they prefer for those convicted of murder (*e.g.* death penalty or life in prison without parole). Support for the death penalty might be higher among respondents when given the either-or option of favoring or opposing the death penalty than it is in polls where respondents are able to select their preferred punishment.

Recommendations¹⁹⁰

- **Bias and unfairness:** The subcommittee on policy supports including a recommendation that Pennsylvania consider replicating what other states have done in this area to statutorily provide for proportionality review, which would routinely and systematically collect relevant data for review that can reveal unfair, arbitrary or discriminatory variability in outcomes.¹⁹¹ This could also determine whether death sentences are excessive of out of line with sentences imposed in other cases where a sentence other than death was imposed.
- **Proportionality:** The subcommittee on policy supports including a recommendation to amend statutory aggravating and mitigating circumstances to reduce any significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison.¹⁹²
- **Mental retardation:** The subcommittee on procedure recommends that the Rules of Criminal Procedure be amended to require a judge to determine intellectual disability at the pre-trial stage instead of the jury determining it post-trial. It would resolve the

¹⁸⁸ *Jackson v. Danberg*, 594 F.3d 210, 222-23, 230 (3d Cir. 2010). Delaware's capital sentencing scheme was subsequently ruled unconstitutional on different grounds. *Rauf v. Del.*, 145 A.3d 430 (Del. 2016).

¹⁸⁹ *Cal. 1st Amend. Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002).

¹⁹⁰ Material for this report was developed by the subcommittees, *infra* p. 33.

¹⁹¹ *Infra* pp. 59, 90.

¹⁹² *Infra* pp. 101-05.

issue early in the process; if the defendant is determined to be intellectually disabled pre-trial, it would save a significant amount of money and many days of court time because the case would not proceed capitally.¹⁹³

- **Mental illness:** Even if a defendant is not legally insane, the subcommittee on policy recommends extending a version of guilty but mentally ill as a bar to imposition of the death penalty for the same reasons that legal insanity would excuse a crime, or because the defendant's severe mental disorder significantly impaired his exercise of rational judgment or conformance to legal requirements. This would allow a severely mentally ill murderer to be punished in the same way that an intellectually disabled murderer is, rather than subject the former to condemnation but not the latter.¹⁹⁴
- **Juries:** One remedy supported by the subcommittee on procedure would be enactment of a Racial Justice Act to statutorily allow death sentences to be challenged on a statistical basis in addition to the purposeful discrimination.¹⁹⁵

It would seem to the subcommittee on procedure that if the Commonwealth decides to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case, there would need to be formal, empirical feedback on a routine basis. If jurors are unable to understand and apply these instructions as research discussed above indicates, the subcommittee on procedure advocates that suggested standard instructions be rewritten by attorneys and judges with the assistance of linguists, social scientists and psychologists, as well as the data disclosing the misunderstanding and misapplication.¹⁹⁶

- **State appeals and postconviction:** The subcommittee on procedure advocates reinstating the previous practice of relaxed waiver on direct capital appeals as it was employed in the 1980s and 1990s. Also, since the statute provides for automatic judicial review of death sentences to correct errors at trial, the judiciary should not insist on a timely notice of appeal to consider any claims unassociated with the statutorily-mandated review of the sufficiency of the evidence. Finally, the statutory trigger that mandates issuance of a warrant of execution should be amended to the more realistic, statutory timeliness mandating the warrant's issuance only following state post-conviction proceedings, if any, when the capital defendant failed to file a timely petition for writ of *habeas corpus* in the appropriate federal district court, or failed to timely appeal or petition an adverse *habeas corpus* decision to the United States Court of Appeals for the Third Circuit.¹⁹⁷
- **Counsel:** The subcommittee recommends the creation of a state-funded capital defender office to represent all persons charged with or convicted of capital crimes at the trial, appellate, and state post-conviction levels. Such an office will save money

¹⁹³ *Infra* p. 123.

¹⁹⁴ *Infra* p. 143.

¹⁹⁵ *Infra* p. 149.

¹⁹⁶ *Infra* p. 152.

¹⁹⁷ *Infra* p. 158.

for the counties, be cost efficient by reducing the number of cases that require reversal in post-conviction proceedings at either the state or federal level, and improve the quality of representation, thereby reducing the likelihood of error at the trial level.¹⁹⁸

- **Lethal injection:** The subcommittee on procedure recommends that the lethal injection protocol:¹⁹⁹
 - 1) Be public rather than confidential information.
 - 2) Use an appropriate and effective drug selected by qualified professional expertise to execute humanely and be ethically delivered.
 - 3) Comply with applicable statutory law.

¹⁹⁸ *Infra* p. 186.

¹⁹⁹ *Infra* p. 203.

INTRODUCTION

After its initial conference, the advisory committee divided into subcommittees on impact, policy and procedure. Justice Center for Research at The Pennsylvania State University collaborated with the subcommittees on impact and policy; Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness collaborated with all three subcommittees. The advisory committee reconvened *via* teleconference shortly before reporting to the task force; however, the material for this report was developed by the subcommittees.

The advisory committee was to have reported its findings and recommendations to the Senate at end of 2013, but that was an unrealistic deadline because of the ambitious scope of the 17 interrelated but separate topics in the resolution, the funding challenges for part of the research and unanticipated delays in selected areas, most especially collecting data from the field, which was quite tedious for Justice Center for Research.²⁰⁰ Collecting usable data when there is no systematic or rational collection of data statewide is a difficulty that can be insurmountable when resources are spare.

The subcommittee on impact collaboratively developed the material in this report on cost, impact on and services for family members, secondary trauma, length and conditions of confinement on death row and public opinion. From 2012-2015, it convened in person or *via* teleconference at least five times.

The subcommittee on policy collaboratively developed the material in this report on bias and unfairness, proportionality, mental illness, penological intent and alternatives. From 2012-2018, it convened in person or *via* teleconference at least 15 times.

The subcommittee on procedure collaboratively developed the material in this report on mental retardation, juries, state appeals and postconviction, clemency, innocence, counsel and lethal injection. From 2012-2018, it convened in person or *via* teleconference at least 10 times.

“Capital punishment is currently authorized in 31 states, by the federal government and the U.S. military.”²⁰¹ The Commonwealth is one of these 31 states.²⁰²

²⁰⁰ Appdx. L, *infra* p. 263.

²⁰¹ Nat’l Conf. of State Legiss., *supra* note 5.

²⁰² 42 Pa.C.S. § 9711.

Cost

The question that serves as the basis of the study of cost to administer the death penalty in our Commonwealth is:

Whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole; in considering the overall cost of the death penalty in Pennsylvania, the cost of all the capital trials that result in life sentences as well as death sentences that are reversed on appeal must be factored into the equation;²⁰³

As described below, the death penalty is much more expensive than sentences of life imprisonment without parole because of the long and complex process for capital cases and the increased costs for incarceration on death row.

Capital punishment is an inefficient, bloated program that has bogged down law enforcement, delayed justice for victims' families, and devoured millions of crime-fighting resources that could save lives and protect the public. . . . More than a dozen states have tried to capture the cost of death penalty cases and found evidence that they are up to 10 times more expensive than other comparable cases. In California, a 2011 study showed death penalty cases are 20 times more expensive. That state has spent over \$4 billion on the death penalty since 1978. . . . Many of the extra costs are legally mandated to reduce the risk of executing an innocent person. And even these safeguards are not enough. At least 160 people have been exonerated from death row after waiting years for the truth to come out. Streamlining the process would virtually guarantee the execution of an innocent person.²⁰⁴

The death penalty costs more than life imprisonment. With its many appeals it is an expensive way to deal with violent crime. The lengthy trial and appeal procedures and the cost of maintaining maximum security on death row have led to prohibitive expenses in an already burdened criminal justice system. The appeal process costs taxpayers millions of dollars which could be better spent on more effective crime control.²⁰⁵

²⁰³ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 219.

²⁰⁴ Conservatives Concerned About the Death Penalty, Wasteful & Inefficient: The alarming costs of the death penalty, <https://conservativesconcerned.org/why-were-concerned/cost/> (last visited May 20, 2018).

²⁰⁵ Memo from Amnesty Int'l Group 39 (Pittsburgh) addressed to Members of the Commw. Capital Punishment Advisory Comm. (Apr. 15, 2013) (on file with Pa. J. State Gov't Comm'n).

The cost issue has received far more attention now than previously. The extra process constitutionally required since the 1970's has made it more expensive to pursue a death penalty case as compared to cases where the death penalty is not sought. Bifurcated trial proceedings with a focused punishment phase have become the national norm, and emerging judicial capital doctrines substantially altered "state capital practices, including *voir dire*, the use of experts, the expectations of defense counsel, and, especially the investigation and presentation of mitigating evidence. In addition, post-trial litigation costs would become vastly greater in capital cases."²⁰⁶ The additional litigation further resulted in greatly extending the period between sentence and execution, bringing with it the increased expense of maintaining a large death row.²⁰⁷

The combination of increased trial and postconviction litigation costs, and increased incarceration costs in capital cases, together with the absence of significant numbers of executions in many states, has changed the way in which the 'costs' of the death penalty are understood and discussed. The relative cost of the death penalty is no longer captured by a simple comparison of the cost of a capital trial together with the cost of carrying out an execution, on the one hand, versus the cost of a non-capital trial and the cost of a lengthy imprisonment, on the other. Rather, the relative cost of administering the death penalty . . . now often requires a comparison of the cost of *multiple* capital trials *and* the cost of lengthy, often indefinite imprisonment on death row versus the cost of a single non-capital trial and the cost of a lengthy (non-capital) imprisonment.²⁰⁸

At the same time, some costs might be avoided if the prospect of a capital sentence induces one to plead guilty to avoid that sentence.

Cost Analyses from Elsewhere

Every published study that analyzed the cost of another state's death penalty has found it to be substantially higher when compared with non-death-prosecuted murder cases. The methodology of these studies has varied, but the results are consistent enough to persuasively establish that the cost differential is significant. The next few pages summarize the methodology and results from these other analyses.

California. "[I]t is impossible to ascertain the precise costs of the administration of California's death penalty law".²⁰⁹ Noting "quite consistent results" from other states' comparisons of the costs of murder trials seeking the death penalty with those in which that penalty was not sought, California Commission on the Fair Administration of Justice conservatively estimated "that seeking the death penalty adds \$500,000 to the cost of a murder trial".²¹⁰ At the time, spending for "post-trial review of death cases in California" was "at least" \$54,400,000 *per* year to cover the Supreme Court's appointment of private lawyers, the State Public Defender for

²⁰⁶ Carol S. & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. Crim. L. & Criminology 643, 669 (2010).

²⁰⁷ *Id.* at 669-70.

²⁰⁸ *Id.* at 670-71.

²⁰⁹ Cal. Comm'n on the Fair Admin. of Just., *Final Rep.* 144 (2008).

²¹⁰ *Id.* at 144-45. "The costs of a second defense lawyer, the background investigation for the penalty phase, and the added duration and expense of the trial would easily add up to the \$500,000 in most cases." *Id.* at 145.

death penalty appeals, *habeas* representation by California Habeas Corpus Resource Center and the Attorney General’s criminal division devoted to capital cases.²¹¹ The cost of confinement on California’s death row was estimated by Department of Corrections to add \$90,000 per year beyond the normal cost.²¹² The “conservative, rough” estimate was that it was costing \$137,700,000 year for its “dysfunctional system”.²¹³ Conversely, to convert this punishment to a maximum of lifetime incarceration, the additional cost would amount to \$11,500,000 per year to cover the trials, appeals and *habeas corpus* proceedings as well as confinement.²¹⁴

A more detailed study calculated that California state and federal taxpayers spent \$4,000,000,000 to administer that state’s death penalty from 1978 to 2011 with an additional \$619,000,000 to be spent on federal *habeas corpus* petitions, plus additional spending to house condemned inmates despite carrying “out only 13” executions during that period while housing “over 714 condemned inmates”.²¹⁵ Of those whose “whose petitions for federal habeas corpus relief” had “been reviewed, nearly 70% had “been granted relief”.²¹⁶

“[O]btaining data concerning how much the administration of California’s death penalty actually costs state and federal taxpayers has not been easy.”²¹⁷ Amounts spent to litigate “capital habeas corpus petitions in federal court . . . are ‘not made public.’”²¹⁸ California Commission on the Fair Administration of Justice confirmed “the need for more comprehensive collection of data and the continual monitoring and analysis of that data”.²¹⁹ As with other jurisdictions, “[t]he categories of costs associated with California’s capital punishment system can be broken down as follows: (1) pre-trial and trial costs, (2) costs related to direct appeals and state habeas corpus petitions, (3) costs related to federal habeas corpus petitions, and (4) costs of incarceration.”²²⁰ The “easily identifiable costs incurred in every death penalty trial that are not incurred in non-death penalty homicide trials” are: two rather than one “death penalty-qualified attorneys per side”, multiple investigators and experts, a longer “jury selection process”, the separately tried penalty phase, the certified, daily trial transcript and the length of time in the criminal court.²²¹

²¹¹ *Id.* at 146. For 2009-10, another source calculated this amount to be \$58,543,000 with conservatively estimated annual spending on these costs associated with automatic appeals and capital state habeas proceedings at \$37,000,000 during the immediately preceding quarter century. Alarcón & Mitchell, *infra* note 215, at S88.

²¹² Cal. Comm’n on the Fair Admin. of Just., *supra* note 209, at 146. The amount is *per* condemnee.

²¹³ *Id.*

²¹⁴ *Id.* at 147. California executed 13 condemnees since 1978 with 746 other condemnees remaining on death row so that based on this 2008 calculation, the state could have spent \$126,200,000 less *per* year to achieve almost the same outcome. See Cal. Dep’t of Corrections & Rehabilitation, Capital Punishment, Inmates Executed, 1978 to Present (2017), https://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html; Div. of Adult Operations Death Row Tracking Sys. (2018), https://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates.

²¹⁵ Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the Cal. Legis.’s Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41, S51 n.14 (2011).

²¹⁶ *Id.* at S55. This would have been a new trial for guilt or the penalty. *Id.*

²¹⁷ *Id.* at S62.

²¹⁸ *Id.* at S63.

²¹⁹ Cal. Comm’n on the Fair Admin. of Just., *supra* note 209, at 154.

²²⁰ Alarcón & Mitchell, *supra* note 215, at S69. The costs to litigate suits challenging the method of execution are omitted. *Id.* n.62.

²²¹ *Id.* at S75-S79.

“Based on the foregoing, we have calculated that an average death penalty trial consumes approximately \$1 million in publically funded resources”.²²²

Extrapolating from calculated, average cost estimates for “federal habeas corpus proceedings” worked out to \$1,107,142.85 *per* petition in federal court.²²³ “Almost . . . every capital prisoner seeks habeas corpus relief in federal court after the” state “Supreme Court has rejected his or her federal constitutional claims”, which is paid “by federal . . . rather than state taxpayers.”²²⁴ When “claims of federal constitutional violations that have not yet been reviewed by the” state “Supreme Court” are discovered,²²⁵ federal law requires the exhaustion of remedies in state court before “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court” may “be granted”.²²⁶ This typically results with the federal proceedings being “stayed while the newly discovered claims are filed in state court for exhaustion”.²²⁷ At the time of this study, the rate at which federal habeas corpus relief has been granted, was 68.25%.²²⁸ The “full investigation into the inmate’s alleged federal constitutional violations does not occur until many years after the judgment of death was imposed, when the petitioner’s claims are presented in a federal habeas corpus petition.”²²⁹ Because state and local governmental entities did not provide actual cost data, estimated “costs associated with death penalty trials that took place between 1983 and 2006 averaged about \$1 million more per trial than the costs of average non-death penalty homicide trials.”²³⁰ Court-appointed counsel staffing federal *habeas corpus* cases “averaged a total of \$635,000 per case, including appeals.”²³¹ A conservatively estimated cost of litigation by Federal Public Defender Capital Habeas Units in two U. S. District Courts in California averaged \$1,580,000 during the corresponding period and this average amount excludes “costs to the state Attorney General’s Office to respond to these challenges in federal court.”²³² These “cost calculations” also exclude amounts for “death penalty law clerks, court accountants, and clerical workers.”²³³

As has occurred in some other jurisdictions during recent decades, since the early 1980’s, California’s annual spending percentage from its general fund on its “prison system” increased from 4% to 11% while its “budget for the University of California system” decreased from 5% to 2.5%.²³⁴ In fiscal year 2007-08, California’s Department of Corrections and Rehabilitation’s “average annual cost to incarcerate an adult inmate” was \$49,300.²³⁵ In 2005, a departmental spokesperson was quoted saying that “[t]he additional cost of confining an inmate to death row, as compared to the maximum security prisons where those sentenced to life without possibility of

²²² *Id.* at S79.

²²³ *See id.* at S93.

²²⁴ *Id.* at S89.

²²⁵ *Id.*

²²⁶ 28 U.S.C. § 2254(b)(1)(A).

²²⁷ Alarcón & Mitchell, *supra* note 215, at S89-S90.

²²⁸ *Id.* at S55 n.26.

²²⁹ *Id.* at S89.

²³⁰ *Id.* at S75.

²³¹ *Id.* at S94.

²³² *Id.* at S97-S98.

²³³ *Id.* at S99.

²³⁴ *Id.* at S99-S100.

²³⁵ *Id.* at S103.

parole ordinarily serve their sentences, is \$90,000 per year per inmate.”²³⁶ Omitting “funds expended defending the death penalty in federal court in actions based on civil rights violations . . . challenging methods used in carrying out execution or related delays”, research for 2009 estimated that “administering the death penalty in California . . . cost . . . approximately” \$184,000,000 “above what taxpayers would have spent without the death penalty.”²³⁷

A year after this study was published, California voters were offered the proposition to retain or reject the death penalty. “The major fiscal effects of the measure” to reject the death penalty would save costs to “state and local governments” associated with murder trials, “state expenditures” associated with appellate litigation and “state prison costs”.²³⁸ According to that state’s Legislative Analyst’s Office, eliminating that state’s death penalty would result in net savings that “would likely be about \$100 million annually in the first few years, growing to about \$130 million annually thereafter.”²³⁹ In anticipation of the voting on this proposition, the study’s authors wrote more about costs of capital punishment in California, characterizing the “current death-penalty scheme” as essentially life imprisonment (without parole), “but—according to our calculations—it costs taxpayers roughly an additional” \$200,000,000 “per year to maintain the illusion that California has a functioning death penalty.”²⁴⁰

Colorado. This analysis compared “the time required by the trials and pleas of death penalty cases to the time required for the prosecution of the most serious of the first-degree murders during the same timeframe.”²⁴¹ This comparison measured the cost figure *via* an “objectively verifiable” number of days rather than *via* “a set dollar figure”.²⁴² The comparison was between death penalty prosecutions resultant in either jury trials or plea bargains and first-degree murder cases with one or more aggravating circumstances that were tried resultant in convictions with nonparolable life sentences.²⁴³

Excluding appeals and post-conviction proceedings, death prosecutions averaged 148 days in court while the other murder cases averaged 24½ days in court, so that the death prosecutions took approximately six times longer in court days.²⁴⁴ In the last 48 years, Colorado executed one inmate; in the last four decades, the reversal or vacation of sentence rate for its death penalties is

²³⁶ Cal. Comm’n on the Fair Admin. of Just., *supra* note 209, at 141, n.94. This increased expenditure to house condemnees on death row was spent on a number of those who were not executed because “their sentences were later vacated on appeal . . . or because they died of natural causes . . . or died . . . awaiting the outcomes of their petitions for federal habeas corpus relief.” Alarcón & Mitchell, *supra* note 215, at S108.

²³⁷ *Id.* at S109. For this estimate and the lower estimate from Cal. Comm’n on the Fair Admin. of Just., *supra* p. 36, the highest extra cost for the death penalty in 2008-09 was attributed to incarceration; however, the biggest cumulative cost estimated for 1978-2010 was for pre-trial investigation & trial costs. Alarcón & Mitchell, *supra* note 215, at S110.

²³⁸ Cal. Legis. Analyst’s Office, Proposition 34 (2012), http://www.lao.ca.gov/ballot/2012/34_11_2012.aspx.

²³⁹ *Id.*

²⁴⁰ Judge Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in Cal.: Will Voters Choose Reform this Nov.?*, 46 Loy. L.A. L. Rev. S1, S34-S35 (2012).

²⁴¹ Justin F. Marceau & Hollis A. Whitson, *The Cost of Colo.’s Death Penalty*, 3 U. Denv. Crim. L. Rev. 145, 147 (2013). The time was the number of court days for pretrial proceedings, *voir dire*, trial and sentencing; which excluded appeals and post-conviction proceedings. *Id.* at 151-52.

²⁴² *Id.* at 149.

²⁴³ *Id.* at 150-51.

²⁴⁴ *Id.* at 152-53.

75%.²⁴⁵ Colorado Department of Corrections estimates that the appeals would minimally delay an inmate's execution for a decade, during which time the inmate is housed in Administrative Segregation and incurs higher costs than inmates housed at a lower level of security.²⁴⁶

There were only a few pleas of guilty to first-degree murder in prosecutions for the death penalty, but they cost about the same as a nonparolable life sentence case “as measured in court days required.”²⁴⁷ In other words, the threat of a death sentence did not induce “a swift or less expensive guilty plea to a first degree murder charge. . . . These results reveal no empirical support for the claim that the death penalty is cost-effective based on its ability to induce guilty pleas to first degree murder.”²⁴⁸ Aside from the lack of empirical support for this proposition, the cost of these cases (and potential savings or not) must be considered with “the cost of maintaining the entire death penalty machinery, without which there is no . . . prerequisite to inducing the guilty plea.”²⁴⁹ In Colorado's case, it saved approximately six court days by inducing guilty pleas, but these were more than offset by the hundreds of additional court days on failed death penalty prosecutions.²⁵⁰ After citing research finding no evidence in support of a deterrence thesis, the authors deem it to “be implausible that the death penalty could have any deterrent effect in a state where only one person has been executed since 1967.”²⁵¹ This study concludes that “the death penalty imposes a major cost without yielding any measurable benefits.”²⁵²

Connecticut. Because Connecticut Commission on the Death Penalty had “limited resources available” and many state agencies' record keeping was of a “limited nature”, a precise comparison could not be obtained; however, “the [c]ommission solicited information from several state agencies involved in various aspects of administering the death penalty” to estimate costs compared to those incurred in “imposing a sentence of life imprisonment without release.”²⁵³ Division of Criminal Justice did not quantify or separately track any added costs in death penalty cases but reported increased costs “spread out over several different agencies.”²⁵⁴ Plus, “[p]ost-conviction review of death sentences involves additional costs that are not found in serious, non-death felony cases.”²⁵⁵ Conversely, Division of Public Defender Services tracked its “cost information on an ongoing basis through its “Capital Defense and Trial Services Unit” devoted “to representing indigent defendants in capital felony cases”.²⁵⁶ “[D]efense costs for capital felony

²⁴⁵ *Id.* at 155; Colo. Dep't of Corrections, <http://www.doc.state.co.us/death-row> (last visited July 13, 2015).

²⁴⁶ Colo. Dep't of Corrections, <http://www.doc.state.co.us/death-row-faq> (last visited July 13, 2015). These inmates are in a single for 23 hours/day and are fully restrained and accompanied by at least two correctional officers when moved. *Id.*, <http://www.doc.state.co.us/daily-routine> (last visited July 13, 2015).

²⁴⁷ Marceau & Whitson, *supra* note 241, at 156-58.

²⁴⁸ *Id.* at 158. “[T]here is a distinct probability that the death prosecutions that result in guilty pleas would have cost the State the least to try.” *Id.*

²⁴⁹ *Id.* at 159.

²⁵⁰ *Id.* at 160. These failures placed the net cost at an extra 696 days. *Id.* When a death penalty prosecution resulted in a plea of life without parole instead of a trial, the approximate savings was one less court day required and there were only six of these pleas. *Id.*

²⁵¹ *Id.* at 161-62.

²⁵² *Id.* at 162.

²⁵³ Conn. Comm'n on the Death Penalty, Study Pursuant to Pub. Act No. 01-151 of the Imposition of the Death Penalty in Conn. 12 (2003), *available at* http://www.ct.gov/redcjs/lib/redcjs/documents/commission_on_the_death_penalty_final_report_2003.pdf.

²⁵⁴ *Id.* at 13.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

cases” averaged “88% higher than the defense costs incurred for those sentenced to life imprisonment without release.”²⁵⁷ The Judicial Branch could not specify cost estimates but predicted “additional costs” and acknowledged that “capital felony cases are more time-consuming than other serious felony cases”.²⁵⁸ Overall, the commission found “that as a general rule, capital felony cases are more expensive to adjudicate than non-capital cases.”²⁵⁹ A “more comprehensive analysis of cost factors associated with the death penalty would require” the assignment of dedicated staff “as well as improved documentation relating to cost factors”.²⁶⁰

Additionally, condemnees were housed at a level five, maximum security institution in which support and sustenance of these offenders averaged approximately twice the annual expense it cost to house “offenders sentenced to life without parole . . . in less expensive facilities”.²⁶¹

Idaho. “Legislators wanted to know whether costs of sentencing defendants to death could be compared with costs of sentencing them to life in prison.”²⁶² Because cost data was unavailable, “the total financial cost of the death penalty” could not be quantified.²⁶³ Since 1977, more than half of condemnees have been resentenced.²⁶⁴ This report concluded that capital cases are more expensive than noncapital ones, aligning its findings with studies nationally.²⁶⁵ “[W]e found consensus that death penalty cases are more complex and involved.”²⁶⁶

In the 15-year period analyzed, less than one fifth of first-degree murder cases were capital ones.²⁶⁷ A substantially higher percentage of noncapital cases did not go to trial compared to the capital cases; however, the share was a majority for both.²⁶⁸ An overwhelming percentage of the capital cases resulted in life rather than death sentences.²⁶⁹ Most of the death sentences since 1977 have subsequently been changed to life sentences.²⁷⁰

²⁵⁷ *Id.* at 14.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 16.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 15. When this information was submitted to the comm’n, Dep’t of Correction housed seven men on death row. *Id.* Subsequently, that number increased to 10. Conn. Dep’t of Correction, 2013 Annual Rep. 1, *available at* <http://www.portal.ct.gov/DOC/Common-Elements/Common-Elements/Publications>. The last execution occurred in 2005. *Id.* Before that, the last execution in this state was 1960. *Id.*, Annual Rep. 2002-2003 2. In 2012, Conn. prospectively abolished its death penalty, which was judicially extended its retrospective abolition. Conn. Gen. Stat. § 53a-46a(a); *Conn. v. Santiago*, 122 A.3d 1 (Conn. 2015).

²⁶² Office of Performance Evaluations, Idaho Legis., Financial Costs of the Death Penalty iii (2014), *available at* <http://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1402.pdf>.

²⁶³ *Id.* E.g., salaried staff do not track time working on types of cases. *Id.* at iv. Cost data is described as “minimal” or “nearly nonexistent.” *Id.*

²⁶⁴ *Id.* Idaho has nine offenders under a sentence of death, who remain in their cells 23 hours/day & are restrained when moved. Idaho Dep’t of Correction, Death Row, http://www.idoc.idaho.gov/content/prisons/death_row (last visited Apr. 6, 2018). Since 1977, three inmates have been executed. *Id.* To execute a condemnee in 2011 and 2012, the department spent almost \$170,000 to remodel a building and improve the ground. Office of Performance Evaluations, *supra* note 262, at 32. The executions themselves cost an average of \$51,283.50 with approximately 80% of that amount being spent on staff overtime as well as medical supplies, training and other expenses. *Id.* at 33.

²⁶⁵ *Id.* at vi.

²⁶⁶ *Id.* at 7.

²⁶⁷ *Id.* at 10.

²⁶⁸ *Id.* 76% for noncapital cases and 55% for capital cases. *Id.*

²⁶⁹ *Id.* at 13.

²⁷⁰ *Id.* at 14. “Four offenders originally sentenced to death have been released.” *Id.*

During the 15-year period analyzed, both the direct and post-conviction appeals for capital cases averaged more than a year longer for the State Appellate Public Defender’s Office to complete than the noncapital cases.²⁷¹ During a 13-year period, this office averaged 7,918 billable hours/defendant sentenced to death and 179 hours/defendant with a life sentence.²⁷² “[L]aw enforcement costs do not typically differ between capital and noncapital first-degree murder cases”²⁷³

Kansas. In 2013, “the Judicial Council assigned the Death Penalty Advisory Committee to update its previous 2009 study on costs of the death penalty.”²⁷⁴ The committee sought additional costs incurred since 2003 for 22 cases, comparing costs then as well as surveyed the judiciary and the executive about 41 capital-eligible cases filed between 2004 and 2011.²⁷⁵ Of these 63 cases, cost estimates were received from less than one third of prosecutors and police surveyed.²⁷⁶ Because of dismissals and ineligibility for capital punishment due to youth, the 41 capital-eligible cases between 2004 and 2011 were reduced to 34, of which 16 were tried and 18 were pled.²⁷⁷ The hours spent on the cases were “generally estimated”, but “actual cost information” otherwise associated with these cases was “often provided”.²⁷⁸ Since these cases were selected by Kansas Board of Indigent Defense Services, the reported costs exclude those cases in which a defendant was represented by his own, private attorney.²⁷⁹ Future costs were excluded from the survey because they had not yet been incurred and remained unprojected notwithstanding the likelihood of their incursion.²⁸⁰ The number of cases is small, some costs were estimates and some cases were at different stages than others when the survey was done, but Board of Indigent Defense Services reported that its defense costs averaged \$296,799 higher for cases in which the death penalty was sought, compared to cases in which that penalty was not sought.²⁸¹ For cases that resulted in a guilty plea, the average difference in the board’s defense costs was \$65,884 higher in cases in which the death penalty was sought, compared to cases in which that penalty was not sought.²⁸² Similarly, district court costs averaged \$50,976 higher for cases in which a death penalty was sought compared to cases in which that penalty was not sought.²⁸³ For cases that resulted in a guilty plea, the average difference in district court costs was \$8,879 higher for cases in which a death penalty was sought compared to cases in which that penalty was not sought.²⁸⁴

²⁷¹ *Id.* at 26-27.

²⁷² *Id.* at 31.

²⁷³ *Id.* at 30. Law enforcement costs refer to the cost of criminal investigation. *Id.*

²⁷⁴ Kan. Jud. Council, Rep. of Death Penalty Advisory Comm. 2 (2014), *available at* <http://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf>.

²⁷⁵ *Id.* at 3.

²⁷⁶ *Id.* Office of Att’y Gen. considered cost estimates too speculative to provide; however, police indicated that homicides would be investigated similarly “regardless of whether” it would be prosecuted as a death penalty. *Id.* at 4.

²⁷⁷ *Id.* at 5.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 5-7.

²⁸² *Id.* at 7.

²⁸³ *Id.* at 8.

²⁸⁴ *Id.*

To update the earlier audit of the other 22 cases, the advisory committee surveyed the same respondents, asking for “any additional costs incurred since January 1, 2004.”²⁸⁵ Board of Indigent Defense Services reported that its defense costs averaged \$137,658 higher for cases in which the death penalty was sought, compared to cases in which that penalty was not sought.²⁸⁶ District court costs averaged \$2,885 higher for cases in which a death penalty was sought compared to cases in which that penalty was not sought.²⁸⁷

Kansas Supreme Court “estimated that justices spend approximately 20 times more hours on a death penalty case versus a non-death case when the justice is assigned to write the opinion and 5 times more hours when the justice is not writing.”²⁸⁸ It also has a death penalty unit with two research attorneys “who work exclusively on death penalty appeals”.²⁸⁹

Comparing the number of district court days from first appearance through sentencing, cases in which the death penalty was sought averaged 23 days more than cases in which that penalty was not sought.²⁹⁰ For cases that resulted in a guilty plea, the number of district court days for cases in which a death penalty was sought averaged five days more than the cases in which that penalty was not sought.²⁹¹

Inmates sentenced to death are incarcerated in administrative segregation, which Department of Corrections calculates to cost double the average annual cost to incarcerate an inmate among the general population of prisoners.²⁹²

“Death penalty cases simply take more time and resources than non-death cases.”²⁹³ Based upon survey responses, the advisory committee found that costs triple or quadruple for Board of Indigent Services and district courts for cases in which the death penalty is sought compared to those in which that penalty is not sought.²⁹⁴ And, in cases that resulted in a guilty plea, “costs are roughly twice as high in cases where the death penalty is sought than in cases where it is not.”²⁹⁵

Maryland. “[T]he lifetime costs of all homicides eligible to receive the death penalty where the homicide occurred between 1978 and 1999” were studied.²⁹⁶ “A capital-eligible case in which prosecutors unsuccessfully sought the death penalty . . . cost . . . \$700,000 more than a comparable case in which the death penalty was not sought. . . . An average capital-eligible case

²⁸⁵ *Id.* at 9. One of these cases involved a juvenile at the time of the crime so that the number was reduced from 22 to 21. *Id.*

²⁸⁶ *Id.* at 10.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 11.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 12-13.

²⁹¹ *Id.* at 13.

²⁹² *Id.* at 11-12. Kan. has 10 inmates sentenced to death but has not executed anyone “since 1965.” Kan. Dep’t of Corrections, Annual Rep. Fiscal Yr. 2017 64, available at <https://www.doc.ks.gov/publications/Reports/2017>.

²⁹³ *Id.* at 15.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ John Roman *et al.*, *supra* note 23, at abstract.

resulting in the death penalty . . . cost” \$1,900,000 “more than a case where the death penalty was not sought.”²⁹⁷ These costs “were estimated for each stage of case processing.”²⁹⁸

For case costs, “[a]bout 70% of the added cost of a death notice case occurs during the trial phase.”²⁹⁹ This difference is attributed to

a greater number of pre-trial motions, longer and more intensive voir dire, longer trials and a greater amount of general preparation time. In addition, a typical capital case involves two attorneys on each side of the aisle while a case in which a death notice is not filed usually involves a single attorney. Another systematic cost difference between capital and non-capital cases is the penalty trial.³⁰⁰

Previous “research on the costs of capital punishment in other states unambiguously finds that capital cases are more expensive to prosecute than non-capital cases.”³⁰¹ The “two key costs” estimated were “1) those associated with the filing of a death notice; and 2) those associated with the imposition of a death sentence.”³⁰²

This study did “not estimate the effects of deterrence” because “the literature gives no consensus on the effect of the death penalty on deterrence” and “research studies are unlikely to correctly estimate a deterrent effect of the death penalty”.³⁰³ From 1979-1999, “[n]early “80% of capital eligible cases” were from City of Baltimore and two counties.³⁰⁴

“Death sentence cases have a higher average number of trial days, hearing days, and overall length of phase at every stage of the trial except for post-conviction.”³⁰⁵ The stages of case processing in which death notice cases were “significantly more expensive” were the guilt and

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 2. “[T]he average death notice cases cost \$474,000 more than no death notice cases just through the trial stage.” *Id.* at 29.

³⁰⁰ *Id.* at 30. “[T]he average length of voir dire for a capital case is five days and two days for a non-capital case.” *Id.* at 49.

³⁰¹ *Id.* at 1. Notwithstanding the “substantial variation” in estimates from earlier studies, “the extant literature consistently finds that capital punishment adds costs to case processing when compared to capital eligible cases where the death penalty is not sought.” *Id.* at 5, 8.

³⁰² *Id.* Estimated costs exclude “additional pre-trial costs of cases in which a death notice is filed but subsequently waived, the costs of cases tried under a death notice that resulted in a not guilty verdict, and costs of appeals to” U.S. Sup. Ct.. *Id.* at 3. Filing and withdrawing a notice of aggravating circumstances was at the State Attorney’s discretion. *Id.* at 10-11.

³⁰³ *Id.* at 9.

³⁰⁴ *Id.* at 21. The two counties are Baltimore & Prince Georges. *Id.* “Twenty-three counties and Baltimore City make up the twenty-four main local jurisdictions found in Maryland.” Md. Manual On-line, Local Gov’t, <http://msa.maryland.gov/msa/mdmanual/01glance/html/county.html> (2018). Death notices and sentences were “substantially underrepresented” from City of Baltimore but “substantially overrepresented” from neighboring County of Baltimore. Roman *et al.*, *supra* note 23, at 23. This study omitted acquittals, which were 7% of the “death noticed cases”. *Id.* at 31.

³⁰⁵ *Id.* at 23-24.

penalty trials plus the state-level appellate phase.³⁰⁶ These three phases of case processing plus “the lifetime cost of prison . . . explain the majority of differences in cost.”³⁰⁷

Nebraska. During the 41 years between 1973 and 2014, 1.1% of “murder convictions” in Nebraska “resulted in an execution.”³⁰⁸ In 2015, “Nebraska’s maintenance of the death penalty cost the state . . . approximately” \$14,600,000 “annually and each additional death penalty arraignment costs the state almost” \$1,500,000.³⁰⁹ Goss & Associates Economic Solutions concluded that in “2012 and 2013, the average U.S. state with the” death penalty “would have saved \$46,474,823 had the state eliminated the” death penalty and replaced it with life imprisonment without parole.³¹⁰

“[N]ationally, defendants in” death penalty “states are more likely to plead guilty to longer sentences, but the rate of guilty pleas was not different.”³¹¹ Perversely, “[p]lea bargaining combined with the use of the” death penalty “can increase the cost to the taxpayer.”³¹² In one case from this state, five individuals falsely confessed to avoid a threatened death penalty, after which they and the sixth defendant, who was also convicted but did not confess, were exonerated through DNA evidence and were awarded \$28,100,000 in damages.³¹³ “Furthermore, past data indicate that the existence of the” death penalty “has no negative impact on state murder rates.”³¹⁴

During the 41 years between 1973 and 2014, approximately 1.8% of all murders in Nebraska resulted in a death sentence but almost half of these death sentences were judicially reduced to a lesser sentence or vacated.³¹⁵ Other studies identified “five major factors driving the cost of the” death penalty “over and above” life imprisonment without parole.³¹⁶

1. Defense costs
2. Pretrial/jury selection/trial/sentencing
3. Court days and court costs
4. Incarceration/prison system costs
5. Appeals costs

³⁰⁶ *Id.* at 24. “Death notice cases are also more likely to incur costs during the appellate phase even where a death sentence is not handed down.” *Id.* at 30.

³⁰⁷ *Id.* at 25.

³⁰⁸ Goss & Assoc. Econ. Solutions, *The Econ. Impact of the Death Penalty on the State of Neb.: A Taxpayer Burden?* i (2016), available at <https://bloximages.newyork1.vip.townnews.com/omaha.com/content/tncms/assets/v3/editorial/a/6d/a6de772c-7515-11e6-8138-1f408072cffb/57d03c36d04e9.pdf>. There were three executions. *Id.* at 2.

³⁰⁹ *Id.* at 1.

³¹⁰ *Id.* at 2. This estimate used “multivariate statistical analysis”. *Id.*

³¹¹ *Id.* at 23. “What this demonstrates is that using the death penalty to plea bargain does not save money since the same number of cases would be resolved through a plea bargain without the death penalty.” Alarcón & Mitchell, *supra* note 240, at S22 n.96.

³¹² *Id.* at 3.

³¹³ *Id.*

³¹⁴ *Id.* at 24.

³¹⁵ *Id.* at 4. Elsewhere in this rep., it says that “more than half of those death sentences” between 1973 and 2014 “were reversed”. *Id.* at 25.

³¹⁶ *Id.* at 5-8.

“[T]he length of the appeals process, pre-trial costs, and court costs . . . thwart . . . efforts” to contain costs incurred by “the capital punishment process”.³¹⁷ The direct and post-conviction appeals averaged 6.76 “on behalf of Nebraska capital defendants, versus 1.64 appeals for those who received” life imprisonment without parole.³¹⁸

Nevada. “[F]rom arrest through the end of incarceration,” the death penalty was estimated to cost “about \$532,000 more than other murder cases where the death penalty is not sought.”³¹⁹ The average for trial and appellate case costs of the death penalty was triple that of non-death penalty cases.³²⁰ Because they are housed at a higher cost facility, the death penalty is a slightly more expensive sentence than “those sentenced to life without the possibility of parole.”³²¹ Plea bargains among those facing a sentence of death occurred “14% less often than in non-death penalty cases.”³²² This audit focused on the difference of costs prosecuting a death penalty versus a non-death penalty case and “the potential savings attributable to the death penalty through plea bargaining and strategic litigation choices.”³²³

Since 1977, more than a quarter of this state’s death sentences were overturned with those individuals resented or released and more died while in prison awaiting execution than were executed.³²⁴

“The legal process for the death penalty differs from other types of murder . . . charges. Typical death penalty process differences include longer jury selection, bifurcated trials . . . , and a complex appeals process for both conviction and sentence. Further, two attorneys are provided” to defend “an individual facing the death penalty.”³²⁵

This study was done using a sample of cases, and costs could not be completely accounted for because “agencies with significant roles in the death penalty process could not provide actual staff time attributable to any specific case” and were “hesitant . . . to provide estimates of time”.³²⁶ Cost information either was not accumulated or was limited for “Nevada Supreme Court, the Judicial District Courts, and county district attorneys.”³²⁷ Nonetheless, estimates of staff time were used and believed to result in an understated cost.³²⁸ The case costs that were obtainable showed that death penalty cases averaged triple the cost of non-death penalty cases.³²⁹

³¹⁷ *Id.* at 10.

³¹⁸ *Id.* at 18. “[T]his contributes to a higher likelihood of a successful appeal”. *Id.*

³¹⁹ Nev. Legis. Auditor, Perf. Audit (2014), *available at* <https://www.leg.state.nv.us/Division/Audit/Full/BE2014/Costs%20of%20Death%20Penalty,%20LA14-25,%20Full.pdf>.

³²⁰ *Id.*

³²¹ *Id.*

³²² Eleven of the 12 inmates executed since 1977 gave up their rights to continue their appeals.

³²³ *Id.* This audit focused on death penalty and non-death penalty murder cases from the two most populous counties from 2000-2012. *Id.* at 8, 10.

³²⁴ *Id.* at 4.

³²⁵ *Id.* at 6.

³²⁶ *Id.* at 8-9.

³²⁷ *Id.* at 12.

³²⁸ *Id.* at 9, 12.

³²⁹ *Id.* at 12.

“Adjudicating death penalty cases takes more time and resources compared to murder cases where the death penalty sentence is not pursued as an option. These cases are more costly because there are more procedural safeguards in place to ensure the sentence is just and free from error.”³³⁰ Included in this are the appointment of two attorneys to represent indigent defendants, death qualification of the jury, separate hearings for the penalty, and an automatic appeal for review by the state Supreme Court.³³¹ It took almost twice as long for a decision on a direct appeal of a death sentence than for one when a death sentence wasn’t sought.³³² In the cases sampled, “death penalty trials transpired over 7 to 15 days. Correspondingly, non-death penalty trials ranged from 3 to 10 days to complete.”³³³

Prosecutors strongly suggested the death penalty is not used as a strategic litigation choice to reduce or avoid a trial and its associated costs through plea bargaining. Nevertheless, plea bargains are made with defendants who are facing the possibility of death; however, the rate at which this occurs is lower than for non-death penalty murder cases.³³⁴

When a death sentence was pursued, trial costs were “generally the same” regardless of whether death was the sentence; however, “total appeal costs” were lower between the two when the sentence was not death.³³⁵ At the trial stage, the biggest additional cost accounted for in death penalty trials compared to non-death penalty trials was for defense and a longer detention period.³³⁶ “Total pretrial costs were as much as nine times more when the death penalty was sought.”³³⁷ Pretrial defense costs averaged “as much as 11 times” higher for cases with a death penalty being sought and obtained compared to those with the death penalty not being sought.³³⁸

During the trial phase of a death penalty case whether or not that was the sentence, defense costs for experts, witnesses, investigators and other expenses cost more than the attorneys and their staff, which is the inverse of cases in which a death penalty cost was not sought.³³⁹ The cost difference for appeals of a death penalty compared to a penalty other than death (whether sought or not) averaged “nearly triple the cost.”³⁴⁰

³³⁰ *Id.* at 10.

³³¹ *Id.* at 12. “[W]hether the cost was an estimate or based on actual verifiable data”, it was higher on death penalty cases for almost every cost information accumulated. *Id.* at 16.

³³² *Id.* at 13.

³³³ *Id.* at 24.

³³⁴ *Id.* at 15. The rates are 53% and 67%. *Id.*

³³⁵ *Id.* at 16-17.

³³⁶ *Id.* at 17-18.

³³⁷ *Id.* at 19-20. The quoted statement compares average pretrial costs for a death penalty sought but not sentenced to a death penalty not sought.

³³⁸ *Id.* at 20-21. Due to “the limited availability of actual cost data”, most “defense costs were determined based upon estimates provided by staff”. *Id.* at 21.

³³⁹ *Id.* at 25. Other costs were for travel, records & small incidentals. *Id.*

³⁴⁰ *Id.* at 38. The appeals were direct and both state and federal postconviction. *Id.* The death penalty cases on direct appeal “cost about twice as much as other cases in” the sample. *Id.* at 39. “The average defense counsel cost in the direct appeal segment on death penalty cases” was about double that when no death penalty was obtained, whether sought or not. *Id.* at 41. For a death penalty, state postconviction cost for Cnty. of Washoe Dist. Att’y was estimated to be quintuple the amount when the penalty was not death. *Id.* at 47.

New Jersey. New Jersey Death Penalty Study Commission found the costs of the death penalty to be “greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.”³⁴¹ The commission obtained “detailed cost estimates” from Office of the Public Defender and Department of Corrections but nothing from prosecutors or the judiciary.³⁴² If the death penalty were eliminated (in 2006), Office of Public Defender expected to save \$1,460,000 *per year*.³⁴³ Department of Corrections was spending \$32,481 more *per year* for an inmate in the Capital Sentence Unit than it would have if the inmate was in the general population.³⁴⁴ Administrative Office of the Courts expected savings for trial court costs and the proportionality reviews if the death penalty would be eliminated.³⁴⁵ Office of Attorney General did not expect “measurable cost savings” if the death penalty were eliminated because of other prosecutions.³⁴⁶ The commission noted that unmeasured cost savings would still be savings.³⁴⁷

North Carolina. Had the death penalty been abolished in this state approximately a decade ago, “the state would have spent almost \$11 million less each year on criminal justice activities” in fiscal years 2005 and 2006.³⁴⁸ Implementing special due-process protections accorded to capital defendants “is costly to the state and federal government, since in practice both sides of the adversarial process are publicly financed.”³⁴⁹ Abolition of the death penalty would save “cash and in-kind costs.”³⁵⁰ Defense attorneys’ and expert fees were calculated to be \$48,600 higher for a capital trial compared to a noncapital trial that could have been tried capitally.³⁵¹ “Remarkably, noncapital cases that went to trial had lower defense expenditures . . . than capital cases that were disposed of by pleas.”³⁵² The capital cases that resulted in a guilty plea also had higher defense attorneys’ and expert fees than the noncapital cases that resulted in a guilty plea.³⁵³ Excluding “extra payments for the jury pool during *voir dire*, or the reimbursement for parking and meals”, extra juror payments were estimated to be \$224,640 for the almost 12 days *per trial* that capital trials averaged longer than noncapital trials.³⁵⁴

³⁴¹ N.J. Death Penalty Study Comm’n, Rep. 1, 31 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

³⁴² *Id.* at 31.

³⁴³ *Id.* Capital murder trials cost more pretrial (preparation, investigation, motions, jury selection), for staffing (add’l & pool att’y’s), penalty phase (mitigation investigation) & for appeals (transcripts, proportionality rev. & post-conviction relief). *Id.* at 31-32.

³⁴⁴ *Id.* at 32. This difference in cost would amount to approximately \$1,136,835 extra/inmate over a lifetime. *Id.*

³⁴⁵ *Id.* “[E]ach proportionality review costs an average of \$93,018 in additional salary costs for court staff.” *Id.*

³⁴⁶ *Id.* at 33.

³⁴⁷ *Id.* Additional spending in capital cases “for pretrial investigation and preparation; . . . experts for penalty phase testimony; enhanced transcript fees and travel expenses, and additional post-conviction litigation” are borne by both prosecution and defense. *Id.*

³⁴⁸ Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in N.C.*, 11 Am. L. & Econ. Rev. 498 (2009). This is an estimate of “net savings”. *Id.* at 504-05.

³⁴⁹ *Id.* at 502. From 1977-2008, almost 72% of condemnees had been removed from N.C.’s death row because of successful appeals. *Id.* at 503.

³⁵⁰ *Id.* at 516.

³⁵¹ *Id.* at 517. These attorneys were appointed “and financed by the Office of Indigent Defense Services”. *Id.* at 511.

³⁵² *Id.* The defense expenditures were attorneys’ and expert fees. *Id.* The difference was \$24,600. *Id.*

³⁵³ *Id.* The difference was \$34,900. *Id.*

³⁵⁴ *Id.* at 520.

North Carolina Supreme Court justices spent 10-15% of their time on capital cases.³⁵⁵ Office of the Appellate Defender estimated that 10% of staff attorneys' time is spent on capital cases "after the end of the trial phase".³⁵⁶

At the time of this analysis, condemnees were held in close custody and those serving unparolable life sentences were held in close custody or "medium security, which is less costly."³⁵⁷ As is true now, close custody is more costly than medium custody.³⁵⁸

Tallying the expenditures for extra defense costs for capital cases in the trial phase, extra payments to jurors, capital post-conviction costs, resentencing hearings and prison system spending, "abolition of the death penalty would have reduced state expenditures on murder cases by about \$10.8 million per year" for fiscal years 2005 and 2006.³⁵⁹ Uncalculated in a monetary amount, in-kind costs include "nine assistant prosecutors each year, as well as 345 days of trial court time and something like 10% of the resources of the Supreme Court and the Office of the Appellate Defender" would also have been freed up.³⁶⁰ "The true cost consequences of abolition would depend on such factors as how district attorneys responded to the loss of leverage in plea bargaining, how they chose to utilize the resources freed up if no more cases were prosecuted capitally, and how potential killers would respond to the new regime"³⁶¹

Based upon the 1,034 murder cases disposed of in fiscal years 2005 and 2006,³⁶² any loss of leverage in plea bargains would not seem to present much of a cost burden. Almost 61% of all the murder cases resulted in a guilty plea, with almost 72% of those pleas coming in noncapital cases obtaining pleas for murder in the first or second degree or for a lesser crime.³⁶³ More than half of these pleas in noncapital cases were for murder of the second degree.³⁶⁴ Similarly, almost 65% of the capital cases resulted in a guilty plea (*versus* 59% pleading in noncapital cases) to murder in the first or second degree or a lesser crime.³⁶⁵ Also similarly, more than half of these pleas in capital cases were for murder of the second degree.³⁶⁶ "The bottom line is that the death penalty is a financial burden on the state and a resource-absorbing burden on trial courts."³⁶⁷

³⁵⁵ *Id.* at 525 n.27.

³⁵⁶ *Id.* at 525.

³⁵⁷ *Id.* at 524. For the fiscal yr. ending June 30, 2011, close custody cost \$5,939 more/inmate annually than medium security. N.C. Dep't of Pub. Safety, <http://www.doc.state.nc.us/DOP/cost/index.htm>. From 1910-61, N.C. executed 362 condemnees; from 1984-2006, it executed an additional 43 condemnees. *Id.* at <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/list-of-persons-executed> (last visited Apr. 24, 2018).

³⁵⁸ N.C. has 143 condemnees on death row, which is eight less than 2004, the year used in the study. *Id.* at <https://www.ncdps.gov/Index2.cfm?a=000003,002240,002327,002328> (last visited Apr. 24, 2018); Cook, *supra* note 348, at 523-24.

³⁵⁹ Cook, *supra* note 348, at 525-26.

³⁶⁰ *Id.* at 525.

³⁶¹ *Id.* at 526-27.

³⁶² *Id.* at 511.

³⁶³ *Id.* at 513.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 528. "[T]here is no basis for predicting whether abolition of the death penalty would increase or reduce the murder rate, and good reason to believe that the effect in either direction would be small." *Id.*

Oklahoma. “[C]onsistent with all previous research on death penalty costs, . . . seeking and imposing the death penalty is more expensive than not seeking it” in Oklahoma.³⁶⁸ “The main objective . . . is to measure the difference in enumerated costs between first degree murder cases where the prosecutor seeks the death penalty and similar first degree murder cases in which the death penalty is not sought.”³⁶⁹ This study relied on “all cases in which a formal bill of particulars . . . was filed” from 2004 through 2010 and compared them to a random “sample of first degree murder cases in which the death penalty was not sought” during the same period and categorized costs for jail, defense, prosecution and appeals.³⁷⁰

“[T]he estimated average per-case difference in total costs when the death penalty is sought is approximately \$110,000” with “post-conviction incarceration costs . . . about twice as much . . . on death row than off of death row.”³⁷¹ A defendant spent “over one and a half times as many days in jail” between arrest and sentencing when the death penalty was sought compared to “first degree murder cases in which the death penalty was not sought”.³⁷² Pretrial through trial defense costs were “nearly ten times more” when a formal bill of particulars was filed, compared to when it was not, and prosecution costs were triple when compared in the same context.³⁷³ “[S]tate capital appeals . . . costs incurred by” defense “ran at an average of . . . over five times more than the non-capital appeals did.”³⁷⁴ Activities in each docket category “were almost three times more depending on whether there was a” formal bill of particulars filed.³⁷⁵ “[A]ll case-level studies, including the present study, have shown that pursuing the death penalty costs more on average than when it is not pursued in similar cases.”³⁷⁶

The authors of this study reviewed 15 past economic studies from 2001 to 2016 among 14 jurisdictions to conservatively average a \$700,000 “difference in case-level costs for seeking the death penalty” or not.³⁷⁷ “[O]n average, seeking the death penalty incurs significantly more time, effort, and costs, than when the death penalty is not sought in the first degree murder cases included in this study.”³⁷⁸

Oregon. In a comparison of death sentences to life sentences, costs associated with the former ranged “from about \$800,000 to over \$1,000,000 more per case” on average.³⁷⁹ Since

³⁶⁸ Okla. Death Penalty Rev. Comm’n, *supra* note 24, at 224. “It is a simple fact that seeking the death penalty is more expensive. *There is not one credible study . . . that presents evidence to the contrary.*” *Id.* at 227.

³⁶⁹ *Id.* at 223.

³⁷⁰ *Id.* at 224.

³⁷¹ *Id.* at 225. “[H]istorically, about half of those sentenced to death have their sentences reduced to life without parole, or . . . are acquitted.” *Id.* at 226, 242, 249. The estimate is “extremely conservative” and “lacks many costs incurred by the system, especially by the courts and appeals costs linked to the prosecution.” *Id.* at 228.

³⁷² *Id.* at 225.

³⁷³ *Id.* at 225, 245, 253, 260.

³⁷⁴ *Id.* at 225, 246. “This situation, in which the defender resources are stretched, results in spending less time on their cases than they think they should. It also results in a distorted perspective on the real costs of death penalty cases, because the amount of time the state defenders are able to spend on their case is less than it should be.” *Id.* at 249.

³⁷⁵ *Id.* at 225.

³⁷⁶ *Id.* at 227.

³⁷⁷ *Id.* at 233. The average is given in 2017 dollars. *Id.*

³⁷⁸ *Id.* at 260.

³⁷⁹ Aliza B. Kaplan *et al.*, Or.’s Death Penalty: A Cost Analysis iii, <https://law.lclark.edu/live/files/22888-oregons-death-penalty-a-cost-analysis-2016> (2016). “The main reason cited in many . . . of the more empirically rigorous studies, relate to increased case complexity, increased time to complete all phases of the trial process including

1984, Oregon condemned 62 individuals and executed two who dropped their appeals.³⁸⁰ Appeals are continuing for almost 55% of these condemnees, but approximately 35% of the condemnees have been resentenced to life imprisonment or less.³⁸¹

The average number of hearings and court filings by defense and prosecution was more than double for aggravated murder death penalty cases compared to the aggravated murder non-death penalty cases.³⁸²

Tennessee. Comptroller of the Treasury compared “the costs of first-degree murder cases in Tennessee” and concluded that death penalty “cases cost more than life without parole and life with the possibility of parole cases.”³⁸³ The principal reasons for this are: duration of trials, extra trial phase for sentencing in a capital trial, capital case attorneys employed to assist trial judges, privately appointed counsel, two attorneys for each capital defendant, additional peremptory challenges of jurors and more sequestration of juries.³⁸⁴

Because “incarceration costs for . . . death row inmates are the same as other maximum-security inmates”, executing an inmate would save the state on correctional costs.³⁸⁵ Department of Correction spent \$11,668 on its most recent execution, which was by lethal injection.³⁸⁶

“Death penalty cases cost more because:

- they are more complex;
- more agencies and people are involved in the adjudication;
- both the prosecution and defense spend more time in preparation;
- and
- the appellate process has more steps.”³⁸⁷

appeals, and increased effort in the form of human capital, all of which are constitutional requirements.” *Id.* at 20. The data set for this study included aggravated murder cases from 2000-2013, murder cases during the same period and aggravated murder cases resultant in a death sentence from 1984-2000. *Id.* at 22.

³⁸⁰ *Id.* at vi. “The last involuntary execution . . . occurred in 1962 . . .” *Id.* at 9.

³⁸¹ *Id.* at vi. Four condemnees died naturally rather than by execution, but another two were subsequently released from prison altogether. *Id.*

³⁸² *Id.* at vii.

³⁸³ Office of Research, Tenn. Comptroller of the Treasury, *Tenn.’s Death Penalty: Costs & Consequences* i (2004), available at <http://www.comptroller.tn.gov/Repository/RE/deathpenalty.pdf>.

³⁸⁴ *Id.* at ii. Juries were present for 79% of capital cases and 74% of life without parole cases revealed in the survey. *Id.* at 20. Juries were sequestered in 70% of the sample’s capital trials and 57% “of the life without parole trials”. *Id.* at 21.

³⁸⁵ *Id.* at iii. Since 1960, Tennessee has executed six inmates but has 67 condemnees on death row now. Tenn. Dep’t of Correction, <https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html>; <https://www.tn.gov/correction/statistics-and-information/death-row-facts.html> (last visited Apr. 25, 2018).

³⁸⁶ Office of Research, *supra* note 383, at iii. This expenditure was for “additional security, medical supplies” and personnel and chemicals plus some exterior lighting and portable toilets. *Id.* It excludes costs for the department’s central office staff, Tenn. Highway Patrol, Tenn. Bureau of Investigation, Tenn. Emergency Mgmt., pub. information officers “from various state agencies”, and the metropolitan police dep’t. *Id.* at 38.

³⁸⁷ *Id.* at 11.

Costs of a capital cases averaged \$15,297 more than costs of a life without parole case, by calculating the costs of public defenders, prosecution, judges and other costs.³⁸⁸ Compensation for appointed lead counsel in capital trials exceed that of lead counsel in non-capital trials.³⁸⁹ In the 10-year sample of cases, judicially appointed private attorneys represented 47% of the capital defendants and 71% of the life without parole defendants.³⁹⁰ Appointed counsel for direct appeals cost more for capital cases than the counsel appointed for life-without-parole cases because of the complexity of the issues, more preparation time and an additional attorney's appointment.³⁹¹ This difference per case amounted to \$18,849.³⁹²

“Tennessee Bureau of Investigation provides more investigative services in capital cases than in other non-capital first-degree murder cases.”³⁹³

Washington. “The purpose of this study was to estimate the costs associated with pursuit of the death penalty, as compared to cases where the death penalty was not sought, for aggravated first-degree murder cases in” the state.³⁹⁴ The difference between the average costs for a case seeking the death penalty *versus* a case not seeking the death penalty totaled \$1,152,808.³⁹⁵ The costs that were more expensive pursuing the death penalty were for jail, trial level defense and prosecution costs, judicial, sheriff and miscellaneous costs, as well as personal restraint petitions and appeals.³⁹⁶ “Combining all cost categories, the average total costs to the justice system related to pursuit of the death penalty are about . . . 1.5 times more expensive than” cases not seeking the death penalty.³⁹⁷

³⁸⁸ *Id.* at 16. Other costs “includes witness fees, jury per diem, lodging, and food expenses.” *Id.*

³⁸⁹ *Id.* at 19. Appointed counsel, other than public defenders, are allowed up to \$40/hour for trial preparation & up to \$50/hour in ct. for non-capital cases. Tenn. Sup. Ct. R. 13, § 2(c)(1). The hourly rate for appointed counsel, other than pub. defenders, in capital cases is \$75/hour out of ct. & \$100/hour in ct.. *Id.* at § 3(k). Co-counsel and post-conviction counsel get an hourly rate of \$60/out of ct. & \$80/in ct. while “[c]o-counsel or associate attorneys in non-capital cases” are uncompensated. *Id.* at §§ 2(b), 3(k). Private attorneys are appointed if a public defender is unqualified or has a conflict of interest. Office of Research, *supra* note 383, at 19. Since capital cases have “much longer” records than non-capital first-degree murder cases, times are longer for these cases whether on direct or post-conviction appeal. *Id.* at 27.

³⁹⁰ *Id.* at 18, 19.

³⁹¹ *Id.* at 22, 23.

³⁹² *Id.* at 23. The prosecution costs for the direct appeals “do not vary significantly among case types”. *Id.* The reversal rate on direct appeal was 29%. *Id.*

³⁹³ *Id.* at 38. This bureau “has the only full-service laboratory in” the state. *Id.*

³⁹⁴ Peter A. Collins *et al.*, An Analysis of the Econ. Costs of Seeking the Death Penalty in Wash. State 3 (2015), available at

http://www.law.seattleu.edu/Documents/korematsu/deathpenalty/The_Economic_Costs_of_Seeking_the_Death_Penalty_in_WA_FINAL.pdf.

³⁹⁵ *Id.* at 4, 5.

³⁹⁶ *Id.* at 4.

³⁹⁷ *Id.* at 5. Since 1904, State of Washington executed 78 condemnees, five of whom were executed since 1963. Wash. Dep’t of Corrections, <http://www.doc.wa.gov/docs/publications/reports/100-SR002.pdf> (2016). Three of the five condemnees executed dropped their resistance to execution by discontinuing judicial challenges. Collins *et al.*, *supra* note 394, at 71.

Three prior studies in Washington “concluded that the cost of death penalty cases is greater than those in which the prosecutor seeks a sentence of life without parole.”³⁹⁸ For this analysis, costs were tied to cases “within general stages of the case process”.³⁹⁹ Jail costs associated with cases seeking the death penalty were significantly higher than the same costs associated with cases not seeking the death penalty.⁴⁰⁰ “The median defense cost” associated with cases seeking the death penalty was “substantially higher . . . as compared to” cases not seeking the death penalty.⁴⁰¹ “The median prosecution cost is about double for” cases seeking the death penalty “as compared to” cases in which the death penalty was not sought.⁴⁰² The median cost for court, police/sheriff and miscellaneous costs for cases seeking the death penalty were almost 3½ times higher than cases in which the death penalty was not sought.⁴⁰³ The median “[c]osts associated with post-conviction personal restraint petitions and appeals” were almost eight times higher for cases seeking the death penalty “as compared to” cases in which the death penalty was not sought.⁴⁰⁴ Curiously, “[p]ost-sentence lifetime incarceration costs were lower on average for” cases seeking the death penalty “as compared to” cases in which the death penalty was not sought;⁴⁰⁵ however, “there are many reasons to support a conclusion that post-sentencing incarceration costs for ‘death row’ inmates are greater than for non-death-sentenced inmates.”⁴⁰⁶ Death penalty cases had “total combined costs” higher than the total associated with “cases where the death penalty was not sought.”⁴⁰⁷

Either the conviction or the death sentence or both have been reversed in 75% “of cases involving death sentences” since 1981.⁴⁰⁸ This compares “to the 7.5% reversal rate of the 201 non-death penalty appeals” during the same period.⁴⁰⁹ The court and parties spend “substantially more time and resources . . . addressing pre-trial motions and challenges not found in non-capital cases.”⁴¹⁰ Jury selection for death penalty cases is “significantly prolonged and more expensive . . . than the jury selection process in a non-capital aggravated murder case.”⁴¹¹ Capital trials have two phases.⁴¹² The state Supreme Court is “statutorily required to review four issues” on direct appeal.⁴¹³

³⁹⁸ *Id.* at 12.

³⁹⁹ *Id.* at 28. “These *primarily identified* stages included police response/investigation, pre-trial, trial, direct appeal, state post-conviction . . . , federal habeas, federal appeals, and clemency.” *Id.* at 35.

⁴⁰⁰ *Id.* at 42.

⁴⁰¹ *Id.* at 43.

⁴⁰² *Id.* at 44.

⁴⁰³ *Id.* at 45.

⁴⁰⁴ *Id.* at 46.

⁴⁰⁵ *Id.* at 47. “[T]hese figures are based on a very conservative cost estimation method.” *Id.* at 51.

⁴⁰⁶ *Id.* at 38.

⁴⁰⁷ *Id.* at 48.

⁴⁰⁸ *Id.* at 57, 70. “Reversals of capital cases are predominately due to inadequate mitigation investigation.” *Id.* at 61.

⁴⁰⁹ *Id.* at 70.

⁴¹⁰ *Id.* at 63.

⁴¹¹ *Id.* More summons are “mailed to prospective jurors for a capital case far” exceeding “those mailed for a non-capital aggravated murder trial.” *Id.* The capital cases have lengthier questionnaires for jurors than the non-capital cases. *Id.* at 64.

⁴¹² *Id.* at 65. The phases are for pronouncing guilt or innocence and then the penalty if the verdict is guilty. *Id.*

⁴¹³ *Id.* at 66. Sufficiency of the evid., prejudice in sentencing, proportionality of the sentence and whether the condemnee is intellectually disabled. *Id.*

Cost Analyses for Pennsylvania

The studies from other jurisdictions used a combination of actual cost data, actual resource data and estimates of both to compare cumulative and partial costs of the death penalty with sentences of life imprisonment without parole among the different stages of the process that results in either sentence. As is true elsewhere, no reliable data exists to comprehensively and accurately assess this difference in Pennsylvania. The process includes different levels and branches of government which are independently budgeted. It involves fixed and variable costs, and the budgeting would neither typically nor uniformly reflect different projections and allowances to pursue these two penalties among others.

To try to assess whether there are significantly different costs between these two penalties, surveys were electronically distributed to judges, prosecutors, public defenders and victim advocates in nine Pennsylvania judicial districts of varying population sizes and caseloads that had past or current capital murder cases.⁴¹⁴ Cumulatively, the response rate was approximately 75%; however, not everyone answered all questions. Since the survey responses were returned anonymously, it is unknown how and whether particular recipients responded. The surveys focused on the resources required at various stages of the process.

Pretrial phase. The responses from victim services staff estimated that they spent a higher number of hours, on average, working with clients on a typical, capital murder case than a typical, non-capital murder case. The responses were widely distributed but they skewed higher for the typical, capital murder case. Also skewing higher in average number of hours or days estimated for the pretrial phase of a typical, capital murder case compared to a typical, noncapital murder case were lead and additional public defense attorney, lead and additional prosecutor, and public defender and prosecution paralegal. Similarly, responding judges estimated that the average number of hours or days for the pretrial phase of a typical, capital murder case compared to a typical, non-capital murder phase skewed higher for judges, tipstaff, secretary and minute and law clerks.

Judges, prosecutors and public defenders all replied that jury selection required more days for typical, capital murder cases compared to typical, non-capital murder cases. Prosecutors and public defenders estimated five or fewer days for a typical, non-capital murder case and almost 70% of them estimated six or more days for a typical, capital murder case.

Trial phase. The responses from victim services staff estimated that they spent a higher number of hours, on average, working with clients on a typical, capital murder case than a typical, non-capital murder case. The responses skewed higher for the typical, capital murder case. Also skewing higher in average number of hours or days estimated for the trial phase of a typical, capital murder case compared to a typical, non-capital murder case were lead and additional public defense attorney, lead and additional prosecutor, and public defender and prosecution paralegal. Similarly, responding judges estimated that the average number of hours or days for the trial phase of a typical, capital murder case compared to a typical, non-capital murder phase skewed higher for judges, secretary minute clerks and deputy sheriffs (if assigned to a court room).

⁴¹⁴ Counties of Adams, Allegheny, Berks, Dauphin, Lancaster, Montgomery, York & Westmoreland & City of Phila. Judges were surveyed in 2015. Prosecutors, public defenders and victim advocates were surveyed in 2013.

Judges, prosecutors and public defenders all replied that there are more jury days for typical, capital murder cases compared to typical, non-capital murder cases. Almost two-thirds of the respondents estimated five or fewer days for a typical, non-capital murder case and more than 94% of them estimated six or more days for a typical, capital murder case.

Penalty phase. Since there is no separate penalty phase trial following a conviction in a non-capital, murder case, the time spent by lead and additional public defense and prosecution attorneys and their paralegals in this phase could be a significant difference in cost for a capital conviction. Even if a defendant were to be acquitted, the public defense would have already incurred the costs of preparation for a potential penalty phase that would have occurred had the capital defendant been convicted. Similarly, any hours spent by victim service staff working with clients during this phase is additional time that is not consumed in non-capital, murder trials. The same could be said for the time spent on this phase by judges, their secretaries, law and minute clerks, tipstaff and deputy sheriffs (if assigned to a court room).

More than 88% of the responding judges, prosecutors and public defenders replied that this phase typically takes one to five jury days. The remaining respondents estimated six or more jury days to be typical for this phase.

Postconviction phase. The differences in responses during this phase were not as pronounced as in the preceding phases, which is unexpected because capital convictions are seemingly more active during this phase than non-capital, murder convictions. For public defense, the estimated average number of hours or days skewed higher only for the additional attorneys in typical, capital murder cases than typical, non-capital murder cases. For the prosecution, the estimated average number of hours or days skewed higher for the lead and additional prosecutors in typical, capital murder cases compared to typical, non-capital murder cases. Conversely, the estimated number of hours or days skewed slightly higher for the prosecution paralegal in a typical non-capital, murder case than in a typical, capital murder case.

The estimated average number of hours or days for a typical, capital murder case compared to a typical, non-capital murder case skewed higher for judges, their secretaries, tipstaff, minute and law clerks and deputy sheriffs (if assigned to a court room). The estimates from victim service staff was about the same during this phase regardless of whether it was for a capital or non-capital murder case.

Extra costs. For prosecution and public defense, extra costs could be spent on consultants, experts, supplemental technology, etc..⁴¹⁵ In estimating extra costs for a typical, capital murder case, public defenders placed them as equal to or greater than \$50,001 compared to mostly equal to or less than \$10,000 for typical, non-capital murder cases. Prosecutors estimated extra costs as equal to or less than \$50,000, for a typical murder case regardless of whether it is capital or non-capital, but the capital ones skew equal to or greater than \$10,001 and the noncapital ones skew equal to or less than \$10,000.⁴¹⁶

⁴¹⁵ They could be investigatory, jury, translational, mental health, scientific, medical, pathological, technological, mitigatory, etc..

⁴¹⁶ This survey was done in 2013. Adjusted for inflation from that time to Mar. 2018, \$50,000 would amount to \$53,351.55; \$10,000 would amount to \$10,670.31; \$2,000 would amount to \$2,141.46. Bureau of Labor Statistics,

Extra costs for victim advocates would be for assisting victims and exclude salaries but include, *e.g.*, travel, overtime, *etc.*. Similarly, extra costs estimated by responding victim advocates skewed equal to or greater than \$2,001 for typical, capital murder cases and equal to or less than \$2,000 for typical, non-capital murder cases.

Guilty pleas. Some speculate that the prospect of a death sentence induces some defendants to plead guilty to avoid that sentence and that this offsets the extra costs and other resources that would be otherwise incurred in seeking a death sentences. Responses varied among judges, prosecutors and public defenders, but estimates were generally higher for the percentage of typical, non-capital murder cases resultant in guilty pleas, compared with typical, capital murder cases.⁴¹⁷ Although answers varied widely, responding prosecutors and public defenders indicated that a higher percentage of guilty pleas skewed in the pretrial phase, regardless of whether the murder case was a typical capital or non-capital one.

Department of Corrections. Because of segregation and close supervision, in fiscal year 2016-17, it cost \$15,010 more per year to house an inmate in the capital case unit than in general population.⁴¹⁸ This differential represents a 47% premium and is for the average, departmental general population inmate compared to State Correctional Institution Greene's capital case inmate cost.⁴¹⁹ As for the average length of stay, those sentenced to death have spent an average of 17.49 years awaiting their execution.⁴²⁰ Using constant dollars, the differential amount spent per inmate in the capital case unit would total \$262,524.90 *per* inmate during a period of 17.49 years. Multiplying that amount by the 150 inmates in the capital case unit would equal an aggregate difference of \$39,378,735 during the same period of 17.49 years. Clearly, this is a significant difference in correctional costs.

This differential is attributed to security, food delivery, medical costs, utilities, the execution complex and transport.⁴²¹ The differential, however, has varied in recent years. The differential in fiscal year 2013-14 between a capital case inmate the average for a general population inmate was \$20,103 per year.⁴²² The same differential for fiscal year 2011-12 was \$11,796 *per* year.⁴²³ For fiscal year 2010-11, the same differential was \$10,956 per year.⁴²⁴ These figures demonstrate that there is a significant difference in cost for the department's capital case unit compared to its general population.

U.S. Dep't of Labor, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited May 16, 2018).

⁴¹⁷ One responding lead prosecutor commented that there are rarely guilty pleas to noncapital, 1st degree murder charges.

⁴¹⁸ Woodside, *supra* note 140 (Apr. 18, 2018). *Id.*, Capital Case Inmate Costs (Nov. 30, 2014) (on file with J. State Gov't Comm'n).

⁴¹⁹ *Id.*

⁴²⁰ Pa. Dep't of Corrections, *supra* note 14; calculations conducted by Pa. J. State Gov't Comm'n staff.

⁴²¹ Woodside, *supra* note 418.

⁴²² Barnes, *supra* note 159 (July 6, 2015).

⁴²³ Bucklen, *supra* note 11 (Feb. 11, 2013).

⁴²⁴ *Id.* (Jan. 22, 2013).

Prospectively, whether this differential persists and by how much is unclear because the department is changing the housing on its capital case unit. This change is too new to determine its cost differential. Retrospectively, this has been a significant cost differential.

Supplemental sample of costs from 1st Judicial District.⁴²⁵ For fiscal years 2012 through 2015, the subject provided the amounts of fees spent on attorneys, expert witnesses, investigators and jurors for capital and non-capital homicide cases.⁴²⁶ For fiscal year 2012, these fees averaged \$522.40 higher for the non-capital homicide cases than the capital homicide cases. For fiscal year 2013, these fees averaged \$3,060.07 higher for the capital homicide cases than the non-capital homicide cases. For fiscal year 2014, these fees averaged \$29,888.68 higher for the capital homicide cases than the non-capital homicide cases. For fiscal year 2015, these fees averaged \$54,569.09 higher for the capital homicide cases than the non-capital homicide cases.

From fiscal year 2012 to fiscal year 2015, the fees spent on attorneys, expert witnesses, investigators and jurors for capital homicide cases increased from an average of \$2,787 *per case* to \$59,169 *per case*. During the same fiscal years, the fees spent on attorneys, expert witnesses, investigators and jurors for non-capital homicide cases ranged from an average of \$3,309 *per case* to \$5,177 *per case*.

In fiscal year 2012, this judicial district was paying appointed counsel \$2,000 to prepare for the disposition of a homicide at trial plus *per diems* of \$200 or \$400 depending upon whether the trial day was three hours or less or over three hours.⁴²⁷ Mitigation homicide appointment/co-counsel was paid \$1,700 to prepare for the disposition of homicide at trial plus *per diems* of \$100 or \$200 depending upon whether the day during the mitigation trial was three hours or less or over three hours. Beginning in fiscal year 2013, this judicial district's Administrative Governing Board decided⁴²⁸ to compensate the appointed counsel in capital cases a flat fee of \$10,000 for lead counsel and \$7,500 for penalty phase counsel regardless of the circumstances of the case's disposition and resolution plus a *per diem* payment of \$400 for each day of representation at trial beyond one week.⁴²⁹

⁴²⁵ These costs exclude the 20% of all Philadelphia homicide cases that are handled by the Defender Association. The Defender Association homicide unit staffs each case with two attorneys, a mitigation specialist and an investigator. The Defender Association homicide unit has been in existence since 1993 and has never had a client receive the death penalty.

⁴²⁶ Office of Budget & Fiscal, 1st Judicial Dist. of Pa., Homicide Counsel Fees for Capital & Non-Capital Cases (on file with Pa. J. State Gov't Comm'n).

⁴²⁷ C.P., 1st Judicial Dist. of Pa., Trial Div. Payment Voucher (on file with Pa. J. State Gov't Comm'n).

⁴²⁸ That decision directly resulted from a legal challenge to the low fees in death penalty cases in Philadelphia that was filed in 2011. Joseph A. Slobodzian, *Petition Critical of Low Pay for Ct.-appointed Death Penalty Lawyers*, Phila. Inquirer (Apr. 7, 2011), http://www.philly.com/philly/news/local/20110407_Petition_critical_of_low_pay_for_court-appointed_death-penalty_lawyers_1.html.

⁴²⁹ Admin. Governing Bd., 1st Judicial Dist. of Pa., Admin. Order No. 01 (2013) (on file with Pa. J. State Gov't Comm'n).

Conclusion. The survey sample is small, but responses seem to confirm observations from elsewhere that pretrial, trial and post-conviction phases consume more resources for typical, capital murder cases than typical, non-capital murder cases. Plus, the capital murder cases require an additional penalty phase upon conviction. The extra costs are also higher for typical, capital murder cases in comparison with typical, non-capital murder cases. There is no data to conclude guilty pleas for capital murder cases offset the extra costs incurred and other resources consumed for capital cases that do not result in a guilty plea. Responses indicate that guilty pleas are also obtained in non-capital murder cases. Also, while efficiency in criminal justice would be preferred to inefficiency, purely financial motivation to pursue one punishment or another would be improper and can create unjust results.

Over the past 56 years, the Commonwealth has executed three condemnees. In 2016, The Reading Eagle published its “revised analysis of the death penalty's cost” and calculated that each execution effectively cost \$272,000,000 under the system since 1978.⁴³⁰ One of the advisors on this study is quoted in that newspaper article acknowledging “more costs” but disputing the extent.⁴³¹ This analysis reported that “a death sentence adds about \$2 million to a murder case”, attributing “[n]early 45%” of this amount to “prison costs”.⁴³² Almost all of the 150 condemnees incarcerated now have judicial challenges to their death sentences pending. The reason that only three condemnees have been executed is that more than 97% of them have been successful in getting their death sentences judicially vacated and others died in prison while awaiting execution. The difference in costs between capital and non-capital trials becomes more significant when one considers the cumulative totals of capital trials over a period of decades and the unlikelihood of an execution.⁴³³ If the differential in costs for capital case unit inmates compared to general population inmates persists, Department of Corrections can expect to spend an extra \$39,378,735 or more to incarcerate condemnees, who are unlikely to be executed.⁴³⁴ Most of the staffing costs for the judiciary, prosecution and defense are salaried, fixed costs; however, when staff is spending more time on particular cases, they are spending less time on other cases. The difference in costs could be characterized as both actual, extra cost and opportunity cost.

Bias and Unfairness

The question that serves as the basis of the study of bias and unfairness in the administration of the death penalty in our Commonwealth is:

⁴³⁰ Nicole C. Brambila & Liam Migdail-Smith, *Executing Just.: A Look at the Cost of Pa.'s Death Penalty*, Reading Eagle, June 19, 2016, <http://www.readingeagle.com/news/article/executing-justice-a-look-at-the-cost-of-pennsylvanias-death-penalty>.

⁴³¹ *Id.* The newspaper's analysis “extrapolated from the method” in the Maryland study, which is summarized *infra* pp. 43-45. Brambila & Migdail-Smith, *supra* note 430.

⁴³² *Id.*

⁴³³ The three condemnees who were executed all dropped their resistance to imposition of the sentence so that some refer to these as volunteers. *Supra* pp. 1-2, notes 7, 8.

⁴³⁴ If the capital case unit were no longer used or if its prospective differential is lower, the Commw. could either save that money by not spending it or it could be redirected elsewhere within or without that dep't to fund unmet needs.

Whether the selection of defendants for capital trials in Pennsylvania is arbitrary, unfair or discriminatory in any way and whether there is unfair, arbitrary or discriminatory variability at any stage in the process including in the sentencing phase;⁴³⁵

The subcommittee on policy could not answer this question because the only recent study was limited to examining cases resultant in convictions for murder of the first degree. The Pennsylvania State University researchers spent approximately eight years developing, researching, accessing and collecting data, and drafting a report in which it found disparities within those cases based on the race of the victim, the type of the defendant's legal representation, and the variation among counties in the selection of those defendants for the death penalty.⁴³⁶ However, there was no examination of possible bias associated with any other stage of the process, including arrest, charging and plea bargaining.⁴³⁷ Justice Center for Research is seeking funding to follow that study with one to examine earlier stages of the process, but it will take years to accomplish. The advisory committee is grateful to have had the opportunity to collaborate with both the university's Justice Center for Research and Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness and will detail the center's research below.⁴³⁸

Regarding unfairness in general and racial or ethnic bias in particular, the subcommittee on policy supports including a recommendation that Pennsylvania consider replicating what other states have done in this area, such as Washington State, that statutorily provides for proportionality review (although the statute is limited to cases that resulted in convictions for aggravated first-degree murder), which would routinely and systematically collect and review relevant data:

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

- (1) Information about the defendant, including the following:
 - (a) Name, date of birth, gender, marital status, and race and/or ethnic origin;
 - (b) Number and ages of children;
 - (c) Whether his or her parents are living, and date of death where applicable;
 - (d) Number of children born to his or her parents;
 - (e) The defendant's educational background, intelligence level, and intelligence quotient;

⁴³⁵ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 219.

⁴³⁶ Kramer *et al.*, *supra* note 26.

⁴³⁷ *Id.* at ii, 114.

⁴³⁸ *Infra* pp. 75-90.

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act;

and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;

(e) The jury's answer to the question posed in RCW 10.95.060(4);

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

- (d) The length of time the victim resided in Washington and the county;
 - (e) Whether the victim was the same race and/or ethnic origin as the defendant;
 - (f) Whether the victim was the same sex as the defendant;
 - (g) Whether the victim was held hostage during the crime and if so, how long;
 - (h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;
 - (i) The victim's age; and
 - (j) The type of weapon used in the crime, if any.
- (5) Information about the representation of the defendant, including:
- (a) Date counsel secured;
 - (b) Whether counsel was retained or appointed, including the reason for appointment;
 - (c) The length of time counsel has practiced law and nature of his or her practice; and
 - (d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.
- (6) General considerations, including:
- (a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;
 - (b) What percentage of the county population is the same race and/or ethnic origin of the defendant;
 - (c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;
 - (d) Whether there was evidence that such members were systematically excluded from the jury;
 - (e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;
 - (f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;
 - (g) Whether there was extensive publicity concerning the case in the community;
 - (h) Whether the jury was instructed to disregard such publicity;
 - (i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;
 - (j) The nature of the evidence resulting in such instruction; and
 - (k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.
- (7) Information about the chronology of the case, including the date that:
- (a) The defendant was arrested;
 - (b) Trial began;
 - (c) The verdict was returned;

- (d) Post-trial motions were ruled on;
 - (e) Special sentencing proceeding began;
 - (f) Sentence was imposed;
 - (g) Trial judge's report was completed; and
 - (h) Trial judge's report was filed.
- (8) The trial judge shall sign and date the questionnaire when it is completed.⁴³⁹

Another way to address potential bias and unfairness in the administration of the death penalty would be to statutorily allow individual death sentences to be challenged on the basis of systemic bias *via* statistically-based evidence.⁴⁴⁰ Kentucky has this provision, but it requires the claim to be raised pre-trial and places the burden of proof on the defendant at a clear and convincing standard.⁴⁴¹ Almost a decade after Kentucky enacted its provision, North Carolina enacted a more expansive version, applying it retroactively. However, after being used successfully by defendants, the state amended the law three years after enactment before repealing it the next year.⁴⁴²

This section will focus on the central claim of unfairness lodged against the death penalty, namely, that it is administered in a manner that is biased against individuals on the basis of their race, ethnicity or socio-economic status. It will also discuss the role of the death penalty in plea negotiations and the assertion that the prosecution has too much discretion over the selection of defendants who are charged with the death penalty. The problems regarding ineffective representation of capital defendants will be addressed in the section relating to counsel.

The justice system demands that fairness apply to the taking of human life. Not only must the factual guilt of the accused be established beyond a reasonable doubt, but it must be reliably determined “that death is the appropriate punishment in a specific case.”⁴⁴³

Racial bias

Perhaps the most prevalent charge against the death penalty is that it is unfair to African-Americans. “Two types of discrimination plague our capital punishment system: (1) a capital sentence influenced by the defendant's race (race-of-defendant discrimination) and (2) a death sentence impacted by the victim's race (race-of-victim discrimination).”⁴⁴⁴

An important, if not the major reason for the U.S. Supreme Court's intervention in death penalty cases was racial bias. “Between 1930, when the Department of Justice started keeping

⁴³⁹ Wash. Rev. Code § 10.95.120.

⁴⁴⁰ An example of this type of legis. is Pa. H.R. No. 1996 (Sess. of 2009).

⁴⁴¹ Ky. Rev. Stat. § 532.300. Because there are no notes of decisions published on this, it might not have been used during the 20 years in which it has been enacted.

⁴⁴² Former N.C. Gen. Stat. §§ 15A-2010, 15A-2011.

⁴⁴³ *Woodson v. N.C.*, 428 U.S. 280, 305 (1976)

⁴⁴⁴ Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 Berkeley J. Crim. L. 29, 32 (2007). “Race-of-victim discrimination typically occurs when racial bias by a judge, jury, or prosecutor renders the capital defendant more likely to be sentenced to death because the defendant is a minority and the victim is white.” *Id.*

statistics, and 1972 when *Furman* was decided, 455 people were put to death for the crime of rape; 405 were African American”⁴⁴⁵ Unfair application of the death penalty was one of the driving forces in the Court’s ruling the death penalty unconstitutional. “[W]hatever the justices may have intended, everyone understood *Furman* as having been about race.”⁴⁴⁶ Racial and class bias was the deciding factor for Justice William Douglas:

In a Nation committed to equal protection of the laws there is no permissible ‘caste’ system of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty⁴⁴⁷ enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment, and under that law ‘(g)enerally, in the law books, punishment increased in severity as social status diminished.’ We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.⁴⁴⁸

Since *Furman*, the Supreme Court’s most extensive discussion of racial bias as it relates to the death penalty appears in *McCleskey v. Kemp*.⁴⁴⁹ The case involved a challenge to a death sentence based on a statistical study by Professor Baldus and others “that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant.”⁴⁵⁰ Because of this, the petitioner argued that the death sentence was invalid under the Eighth and Fourteenth Amendments.⁴⁵¹ The Court rejected these claims by noting that even if the study was accepted as proof of the biases claimed, it failed to show both that the defendant himself had suffered from such bias in his own case and that such

⁴⁴⁵ Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, & Mental Illness in the Decline of the Death Penalty*, 49 U. Rich. L. Rev. 671, 678 (2015).

⁴⁴⁶ Evan J. Mandery, *A Wild Justice: The Death & Resurrection of Capital Punishment in Am.* 276 (2013).

⁴⁴⁷ The statutes under review in *Furman* did not prescribe aggravating or mitigating circumstances.

⁴⁴⁸ *Furman*, 408 U.S. 238, 255-57 (Douglas, J., concurring).

⁴⁴⁹ 481 U.S. 279 (1987).

⁴⁵⁰ *Id.* at 286.

⁴⁵¹ *Id.*

discrimination was purposeful; proof of both of these points was necessary to sustain an equal protection claim.⁴⁵² The Court added that petitioner's position undermined the credibility of the entire criminal justice system, and that overturning his verdict on such broad grounds would require a legislative judgment by the Court.⁴⁵³ The states, however, could eliminate or modify their own death penalty laws on the basis of statistical evidence.

McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are ‘constituted to respond to the will and consequently the moral values of the people.’ Legislatures also are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’ Capital punishment is now the law in more than two-thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case, the law of Georgia was properly applied.⁴⁵⁴

The weight of this case may be diminished because after his retirement Justice Powell, who wrote the opinion for the majority of five justices, publicly repudiated the result in this case and came out against the death penalty, telling his biographer that he did not understand statistics.⁴⁵⁵ Justice Scalia, who joined the majority opinion, “was persuaded in the *McCleskey* case itself that Baldus had proved racial discrimination in the administration of the death penalty in Georgia” but that this did not require reversal (since it was only shown by statistical evidence).⁴⁵⁶

In this case, only a minority of the Justices directly acknowledged the truth of the Baldus study, but none of them has ever tried to deny it. . . . No single accomplishment, however impressive, does justice to a person as remarkable as David Baldus. What Baldus achieved in *McCleskey*, however, is worth dwelling on, and not only because of its historic importance. David Baldus forced reluctant judges to face up to facts they would have preferred to ignore.⁴⁵⁷

⁴⁵² *Id.* at 292, 298-99, 308.

⁴⁵³ *Id.* at 293, 297, 311-19.

⁴⁵⁴ *Id.* at 319 (citations omitted).

⁴⁵⁵ Samuel R. Gross, *David Baldus & the Legacy of McCleskey v. Kemp*, 97 Iowa L. Rev. 1905, 1918-19, 1921 (2012).

⁴⁵⁶ *Id.* at 1921.

⁴⁵⁷ *Id.* at 1923.

***Pennsylvania Supreme Court Committee
on Racial and Gender Bias in the Justice System Report***

*Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*⁴⁵⁸ (*Final Report*) stands as the most comprehensive study of bias in the administration of the justice in Pennsylvania. While acknowledging a lack of comprehensive data,⁴⁵⁹ it concluded that the evidence suggested pervasive discrimination, particularly against African Americans:

Based on existing data and studies, the [Supreme Court] Committee concluded that there are strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner. . . . After controlling for the seriousness of the offense and other non-racial factors, researchers [in Philadelphia] found that African American defendants were sentenced to death at a significantly higher rate than similarly situated non-African Americans; researchers further concluded that one-third of African-Americans on death row in Philadelphia . . . would have received life sentences if they were not African American. Race was also shown to be a major factor in capital jury selection, with the prosecution striking African Americans from the jury twice as often as non-African Americans, and with the defense doing just the opposite. Also, both sides routinely, but to a lesser degree, discriminate on the basis of gender, with the prosecution favoring men and the defense favoring women.⁴⁶⁰

In reaching these conclusions, the Supreme Court Committee relied on a study of conducted by David C. Baldus and George Woodworth and a second study led by William Bowers, assisted in Pennsylvania by Wanda Foglia.⁴⁶¹

In testimony before the Committee, Baldus summarized four principal findings from his research in Philadelphia. First, in Philadelphia capital trials, African American defendants are at higher risk of receiving the death sentence than are similarly situated non-African American defendants. Second, in the selection of capital juries, Philadelphia prosecutors and defense counsel systematically exclude venire members on the basis of their race and gender, in spite of federal law prohibiting such discrimination. Third, this jury selection strategy skews jury sentencing decisions towards increasing the frequency of death sentences. It also enhances the level of race discrimination against African American defendants. Fourth, this skewing effect is principally the product of high prosecutorial strike rates against African American venire members that are not offset or counteracted by high defense counsel strike rates against non-African American members.⁴⁶²

⁴⁵⁸ Pa. Sup. Ct. Comm. on Racial & Gender in the Just. Sys., *supra* note 16, hereinafter *Final Rep.*.

⁴⁵⁹ *Id.* at 201, 203-04.

⁴⁶⁰ *Id.* at 201.

⁴⁶¹ *Id.* at 205.

⁴⁶² *Id.* The statistical support for these conclusions is described *id.*, at 206-07.

Using “standard statistical methodology . . . commonly used in employment discrimination cases,” Baldus “likened the impact of being African American” in Philadelphia to having an additional aggravating circumstance on one’s chances for a death sentence, that one third of Philadelphia residents on death row would not have been put there had they been white, and that juries were significantly more likely to find mitigating circumstances for white defendants than for African-American defendants.⁴⁶³

In the aforementioned *Final Report*, “the racial composition of juries” was associated with “the frequency with which death sentences were imposed” along with “the level of race-of-defendant discrimination in . . . sentencing.”⁴⁶⁴ The report cited a complementary study by Dr. Bowers who researched “juror decision-making” as part of the Capital Jury Project.⁴⁶⁵ This study was based on detailed interviews with jurors who had served on death penalty cases.⁴⁶⁶ It found that jurors with six or more white men were more likely to hand down a death sentence; jurors prejudged the case more often if the defendant was not white; lingering doubt was more likely to factor into the sentencing if the defendant was white; and African American jurors were more likely than white jurors to find that the defendant was remorseful.⁴⁶⁷

The *Final Report* further cited an important national study by James S. Liebman.⁴⁶⁸ He looked at appellate reversals of death cases and found that 41% of death cases reviewed by state appellate courts were reversed on grounds that called into question “the reliability of the guilt finding or death sentence imposed at trial.”⁴⁶⁹ Adding in reversals upon post-conviction review and federal *habeas corpus* review, the rate of reversal for such error was 68%.⁴⁷⁰ By far the predominant cause of these reversals on state post-conviction was “egregiously incompetent defense lawyering”.⁴⁷¹

In response to these findings, the Supreme Court Committee on Racial and Gender Bias in the Justice System recommended that the General Assembly adopt a Racial Justice Act that would in effect countermand *McCleskey v. Kemp* in Pennsylvania. Such legislation would allow “a court to consider legitimate statistical data as evidence of racial bias in the imposition of the death sentence within a particular jurisdiction. Upon a demonstration of such bias by the defense, the burden would [shift] to the prosecution to demonstrate that race was not a significant factor in seeking the death sentence in the specific case.”⁴⁷² Similar legislation was enacted in Kentucky in 1998 and in North Carolina in 2009 before its repeal there in 2013. The Kentucky

⁴⁶³ *Id.* at 206. For a complete discussion of the findings of the Baldus study, see David C. Baldus *et al.*, *Racial Discrimination & the Death Penalty in the Post-Furman Era: An Empirical & Legal Overview, with Recent Findings from Phila.*,” 83 Cornell L. Rev. 1638 (1998).

⁴⁶⁴ *Final Rep.*, *supra* note 16, at 207.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 208-09.

⁴⁶⁸ *Id.* at 209.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 214.

statute was restricted in application and has had little impact, while the North Carolina statute had been successfully used to show racial bias, which might have contributed to its repeal.⁴⁷³

Other recommendations from the Supreme Court Committee on Racial and Gender Bias relating to sentencing disparities in the criminal justice system, indigent defense in Pennsylvania and racial and ethnic disparities in the imposition of the death penalty appear in Appendix M.⁴⁷⁴ These recommendations were made to the judiciary, the legislature and the executive.

Geographical bias⁴⁷⁵

Nationally, the use of the death penalty is highly concentrated in a “small handful of counties”.⁴⁷⁶ As of 2010, Pennsylvania had the highest intrastate disparity between population and death penalty cases of any state nationally, because Philadelphia County accounted for 106 of the 223 inmates on death row, while only eleven death row inmates were from Allegheny County, although its population was about as large as Philadelphia’s.⁴⁷⁷ (More recently, Philadelphia has cut down drastically on its use of the death penalty; *e.g.*, in 2010 there were over 100 pending capital cases in Philadelphia with that number steadily declining to 13 that were resolved pre-trial in 2017 with the number of capital trials there during the years 2011-2017 ranging from nine in 2011 to one in 2017.⁴⁷⁸ Philadelphia has generated only three death sentences since 2010 with the last one in 2016.⁴⁷⁹ Of those three, one was remanded on appeal and the defendant is no longer on death row.⁴⁸⁰ Currently, of the 150 inmates on Pennsylvania’s death row, 50 are from Philadelphia and nine are from County of Allegheny.⁴⁸¹) Texas showed a similar pattern, with four of its 254 counties accounting for more than half of its death row, while 130 counties had not used the death penalty in 30 years.⁴⁸² Similar disparities existed between City and County of Baltimore in Maryland, New York City and upstate New York, Hamilton County (Cincinnati) and Franklin

⁴⁷³ Rees Alexander, *A Model State Racial Just. Act: Fighting Racial Bias without Killing the Death Penalty*, 24 Geo. Mason U. C.R. L.J. 113 (2014); Anne Blythe, *N.C. Sup. Ct. Vacates Racial Just. Act Decisions*, News & Observer, Dec. 18, 2015, <http://www.newsobserver.com/news/politics-government/state-politics/article50478335.html>.

⁴⁷⁴ *Infra* pp. 265-70.

⁴⁷⁵ Appdx. K., *infra* p. 261, shows the ratio of execution to life sentences by county based upon the 2015 inmate population.

⁴⁷⁶ “Of the 3,143 county or county equivalents in the United States, only 16—or one half of one percent—imposed five or more death sentences between 2010 and 2015.” Fair Punishment Project, *New Rep. Finds Counties that Use Death Penalty the Most are Plagued by Prosecutorial Misconduct, Bad Lawyers, & Racial Bias*, <http://fairpunishment.org/new-report-finds-counties-that-use-death-penalty-the-most-are-plagued-by-prosecutorial-misconduct-bad-lawyers-and-racial-bias/> (posted 2016). By June 2018, the total no. of persons sentenced to execution in Pa. was 150. Pa. Dep’t of Corrections, *supra* note 14.

⁴⁷⁷ Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 Vand. L. Rev. 307, 314-15 (2010).

⁴⁷⁸ E-mail from Atl. Ctr. for Capital Representation (May 16, 2018).

⁴⁷⁹ *Id.* (June 5, 2018).

⁴⁸⁰ *Id.* (May 16, 2018).

⁴⁸¹ Pa. Dep’t of Corrections, *supra* note 14. Phila.’s estimated population for 2016 is 1,567,872 or approximately 12¼% of the Commw.’s estimated 12,784,227 population; Cnty. of Allegheny’s estimated population for 2016 is 1,225,365 of approximately 9½% of the Commw.’s estimated population; compared to their percentages on Pa.’s death row of approximately 33% for Phila. & 6% for Cnty. of Allegheny. Further discussion of this appears *infra* p. 86.

⁴⁸² Gershowitz, *supra* note 477, at 315-16.

County (Columbus) in Ohio, and Davidson County (Nashville) and Shelby County (Memphis) in Tennessee.⁴⁸³

“[N]et of legally relevant factors,” death penalty outcomes in our Commonwealth are shaped more by differences among counties, the victim’s race and type of defense counsel, rather than by the defendant’s race or ethnicity.⁴⁸⁴ The most prominent difference found in this study is the differences in death penalty outcome among the counties.⁴⁸⁵ Appendix F has the disposition of capital cases in the Commonwealth for the years 2011-2017.⁴⁸⁶ In more than half of the cases, the notice of aggravating circumstances was withdrawn; a death sentence was imposed in less than 6% of the cases.⁴⁸⁷

Sexual bias

Nationally, the patterns of sentencing suggest that the death penalty regime has been considerably harsher toward men as compared to women:

Studies of gender and the death penalty have, for the most part, focused on the gender of the defendant and have consistently found that women are sentenced to death and executed at significantly lower rates than men. A study of the death penalty applied to women from 1973-2005 found that at every stage of the process female defendants appear to be diverted away from the death penalty at a greater rate than men. While 10% of people arrested for murder are women, only 2% of death sentences imposed at trial are imposed upon women, and women account for only 1.1% of persons actually executed. Men arrested for murder are six times more likely to be sentenced to death than are women arrested for murder.⁴⁸⁸

As of 2011, Texas had executed 464 men and only three women since the reinstatement of the death penalty, although women commit nearly ten percent of death eligible crimes.⁴⁸⁹ The probability of a death sentence is also higher where the murder victim is a woman than where the victim is a man.⁴⁹⁰

Bias in the death penalty process

Murder differs from other crimes in important respects. It is often more difficult to solve a capital murder than other crimes because the victim is unable to assist in the investigation, and

⁴⁸³ *Id.* at 315-18.

⁴⁸⁴ *Infra* pp. 76, 86-87.

⁴⁸⁵ *Id.* “A given defendant’s chance of having the death penalty sought, retracted, or imposed depends a great deal on where that defendant is prosecuted and tried.” *Infra* p. 90.

⁴⁸⁶ *Infra* p. 237.

⁴⁸⁷ *Id.*

⁴⁸⁸ Steven F. & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, & the Death Penalty*, 27 Berkeley J. Gender L. & Just. 64, 84 (2012).

⁴⁸⁹ Jessica Salvucci, *Femininity & the Elec. Chair: An Equal Prot. Challenge to Tex.’s Death Penalty Statute*, 31 B.C. Third World L.J. 405, 407 (2011).

⁴⁹⁰ Shatz & Shatz, *supra* note 488, at 85-86, 107-10.

it is more likely that the perpetrator is unknown to the victim.⁴⁹¹ At the same time, there is more pressure from the public to clear murder cases than other crimes. Murder cases receive more attention and effort from law enforcement, which has mixed consequences for the accuracy of the investigation.⁴⁹² With more resources and staff devoted to the case, there may be more likelihood of an accurate investigation, but public pressure to solve the case may induce law enforcement to cut corners or even falsify evidence.⁴⁹³ The prosecution may go to trial on a murder case with an uncertain probability of conviction, while it would drop an equally iffy armed robbery case.⁴⁹⁴ The conviction rate for murder is about 70 percent, roughly the same as for other felonies.⁴⁹⁵

We turn from the types of bias that may be exercised to the process by which it may emerge. The prosecution has the most important role in selecting the murders that will be deemed death eligible.

The two most important decisions made in every death penalty case—whether to seek the death penalty, and whether to offer a plea bargain—are completely in the hands of prosecutors. They are unregulated and subject to no judicial review. There are many prosecutors who never seek the death penalty, others who seldom seek it, and others who seek it in every case in which it could be imposed. Most death penalty cases are resolved with plea bargains (depending on whether the prosecution is willing to offer it and whether the defendant is willing to accept it). Some prosecutors will offer a plea bargain allowing the defendant to plead guilty in exchange for a sentence less than death, usually life imprisonment without the possibility of parole. Mentally impaired and intellectually limited defendants may not understand their options. They may reject the plea offer and end up on death row.

A small number of aggressive prosecutors in the counties that account for so many death sentences refuse to offer plea bargains and try to obtain the death penalty at every opportunity. They are usually successful in jurisdictions in which defendants facing the death penalty receive very poor legal representation. Between 1976 and the end of 2014, 122 people sentenced to death in Harris County, which includes Houston, have been executed, more people than executed by any state except Texas itself. Harris County judges have made the job easier by appointing incompetent lawyers to represent people facing the death penalty. And, after they are sentenced to death, the condemned are assigned equally bad lawyers to represent them in post-conviction proceedings.⁴⁹⁶

The use of the death penalty charge to induce a murder defendant to plead guilty or waive a jury trial has come under attack in the legal academy and by other observers, largely on the ground that the threat of the death penalty is likely to coerce innocent defendants to plead guilty.

⁴⁹¹ Samuel R. Gross, *Lost Lives: Miscarriages of Just. in Capital Cases*, 61 *Law & Contemp. Probs.* 125, 127 (1998).

⁴⁹² *Id.* at 127-28.

⁴⁹³ *Id.* at 135.

⁴⁹⁴ *Id.* at 143-44.

⁴⁹⁵ Bureau of Just. Statistics, U.S. Dep't of Just., <http://www.bjs.gov/index.cfm?ty=qa&iid=403> (last visited Apr. 26, 2018).

⁴⁹⁶ Bright, *supra* note 445, at 680-81.

At the same time, some may defend the practice on the ground that such pleas save substantial time and money for law enforcement.

The U.S. Supreme Court has conditionally authorized plea bargains, both in general and in death penalty cases. Plea bargains are analyzed as a waiver issue and pass constitutional muster if the waiver is voluntary and informed.

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that . . . criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.⁴⁹⁷

As *Brady* was a death penalty case, the Court added that “a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.”⁴⁹⁸ A guilty plea is unlikely to be invalid if the defendant was represented by competent counsel.⁴⁹⁹

⁴⁹⁷ *Brady v. U.S.*, 397 U.S. 742, 748, 751-52 (1970).

⁴⁹⁸ *Id.* at 755.

⁴⁹⁹ *Mabry v. Johnson*, 467 U.S. 504, 508-11 (1984).

Pennsylvania law is similar to federal law in that a guilty plea to first-degree murder is constitutionally valid if it is “knowingly, voluntarily and intelligently entered.”⁵⁰⁰ The plea is not rendered invalid by the fact that it helps clear the way for a death sentence.⁵⁰¹

It has been argued that plea bargaining with the death penalty results in a sentencing procedure that creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner, in violation of *Gregg v. Georgia*.⁵⁰² To critics, an accused who receives the death penalty does so as much for insisting on exercising his or her right to a jury trial as for the underlying crime. Plea bargaining a death case seems contrary to the policy underlying the penalty.

Plea bargaining undermines the most common rationale for the death penalty. Proponents of this penalty maintain that some crimes are so horrible that they simply require it. They insist that no lesser punishment can adequately express the community's condemnation. But the actions of American prosecutors convey an entirely different message: No lesser punishment can adequately express the community's condemnation *unless* the accused pleads guilty. For defendants who agree to save the government the costs of a trial, lesser punishments are just fine. These defendants' horrible crimes do not demand death after all. In the immortal words of Gilda Radner, “Never mind.” Plea bargaining devalues the death penalty. It changes what the death penalty is about.⁵⁰³

As many as one half to three-quarters of death defendants turned down a plea bargain that would have taken the death penalty out of the case.⁵⁰⁴

United States Attorneys are forbidden to seek or threaten to seek the death penalty “solely for the purpose of obtaining a more desirable negotiating position.”⁵⁰⁵ It would appear almost impossible to enforce this standard because an admixture of any motive, other than a purely tactical one, would render it inapplicable. A statistical study of the use of plea bargaining in murder cases concluded that “the threat of the death penalty increases the plea-bargaining rate from approximately 40% to 60%” and thus “deters roughly two out of ten death-noticed defendants from pursuing a trial.”⁵⁰⁶ Very little systematic research has been done on this issue, however.⁵⁰⁷ Observers note that plea bargaining is pervasively central to the administration of the criminal justice system. “Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”⁵⁰⁸

Whether specifically intended or not, it is argued that prosecutors obtain considerable strategic advantages by charging death. They can empanel a death-qualified jury, and there is

⁵⁰⁰ *Commw. v. Fears*, 836 A.2d 52, 62 (Pa. 2003).

⁵⁰¹ *Id.* at 62-63; 42 Pa.C.S. § 9711(b).

⁵⁰² *Gregg v. Ga.*, 428 U.S. 153, 188 (1976).

⁵⁰³ Albert W. Alschuler, *Plea Bargaining & the Death Penalty*, 58 DePaul L. Rev. 671, 674 (2009).

⁵⁰⁴ *Id.* at 671-72.

⁵⁰⁵ U.S. Attorneys' Manual 9-10.120 (1997).

⁵⁰⁶ Sherod Thaxton, *Leveraging Death*, 103 J. Crim. L. & Criminology 475, 483 (2013).

⁵⁰⁷ *Id.* at 480-81.

⁵⁰⁸ *Mo. v. Frye*, 566 U.S. 134, 143 (2012).

evidence that such juries are more likely to convict.⁵⁰⁹ A death case increases the burden on the defense by expanding the attorney's responsibilities and the demands on the defender's "skill set and financial resources" needed to take on the case, markedly diminishing the pool of attorneys willing to undertake the case, thereby increasing the odds for an outcome favorable to the prosecution.⁵¹⁰ The chances of an acquittal diminish because defense attorneys deemphasize evidence of innocence in the guilt phase, where they are unlikely to win, in order to preserve credibility in the penalty phase; this is because juries are likely to view an aggressive defense on the facts as inconsistent with remorse. Such a defense strategy reduces the possibility of an acquittal.⁵¹¹ If this analysis is correct, more innocent defendants are induced to plead, and those who do go to trial are more likely to be wrongfully convicted.

There are factors that can make a plea bargain more difficult to arrive at in death cases, as compared to other serious crimes. There may be pressure from the victim's family and community to pursue the maximum penalty. The statutory minimum for a death case in Pennsylvania is life imprisonment, so the defendant has less to lose if he goes to trial and the prosecutor has less to offer, especially because the likelihood of execution has been low during the last 56 years. This consideration inhibits plea bargaining even where life with parole exists as an alternative.⁵¹² Capital defendants are likely to be more risk seeking and more skeptical of their attorney's good faith than other defendants, perhaps because of mental health issues or racial or cultural differences if the defendant is a member of a minority group and the attorney is white.⁵¹³

Defendants who have committed crimes that have traditionally been considered deathworthy are unlikely to plead to a life sentence, except to avoid a death sentence. If these cases go to trial, the cost is four times as high for the prosecution and ten times for the defense. Cost considerations are particularly important in districts affected by a high crime rate (including murder), combined with severely overburdened resources. Prosecutors consult the victim's family for their views on whether to accept a plea bargain to life imprisonment. Some prosecutors might decide to obtain the acquiescence of the bereaved family before it proceeds with a plea bargain, and the family might prefer that the murderer suffer more severe punishment than life imprisonment affords.

Prosecutorial discretion

Legal academic John Horowitz wrote that "American prosecutors have long possessed unrestrained power in the criminal process."⁵¹⁴ He does not claim that an American prosecutor can simply order that the accused be shot, and he acknowledges that the Supreme Court has upheld the death penalty against arguments that it is vitiated by excessive prosecutorial discretion.⁵¹⁵ Rather, he is troubled by the "essentially unrestricted" discretion of the prosecutor to charge the

⁵⁰⁹ Thaxton, *supra* note 506, at 484.

⁵¹⁰ *Id.* at 485.

⁵¹¹ *Id.* at 486.

⁵¹² *Id.* at 489. At least if parole is distant and parole bds. are perceived to be reluctant to release. *Id.*

⁵¹³ *Id.* at 490.

⁵¹⁴ John A. Horowitz, *Prosecutorial Discretion & the Death Penalty: Creating a Comm. to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571, 2573 (1997).

⁵¹⁵ *Id.* at 2577.

defendant, which allows him or her to apply the law selectively.⁵¹⁶ Horowitz emphasizes the breadth of the prosecutor's power to choose who is faced with a death charge:

[D]espite the constitutionality of vesting the discretionary decision of whether to seek the death penalty in one person, this power subjects each defendant to the whims of local prosecutors. Prosecutors may introduce other factors into the decision--most likely their religious, ethical, or philosophical beliefs. Hence, whether defendants will face the death penalty may be more a result of prosecutors' belief systems than the characteristics of the criminal's conduct. This subjective system for such a serious decision is fundamentally unfair to the defendant.⁵¹⁷

"The United States Supreme Court has long been concerned about the role of discretion in the imposition of the death penalty, in particular the possibility that unchecked discretion can lead to arbitrary and inconsistent application of the penalty."⁵¹⁸ Of course, after *Coker v. Georgia*, a death penalty charge cannot be filed unless the prosecutor has probable cause to charge the defendant with aggravated first-degree murder.

Prosecutors elected by individual counties may apply the law disproportionately in different parts of the state, especially because constituencies differ in their acceptance of the death penalty.⁵¹⁹ The Governor of New York State has the power to supersede the District Attorney (usually for conflicts of interest, not for policy differences).⁵²⁰ This fails to solve the problem, because it merely removes the discretion from the prosecutor to the Governor. California and Colorado also have supersedure provisions.⁵²¹ To Horowitz, "[t]he risk of supersedure and subsequent litigation highlights the dangers of placing the decision to seek the death penalty in a single individual."⁵²² Pennsylvania empowers the Attorney General to supersede the district attorney upon the latter's request or with judicial approval.⁵²³

Horowitz argues that the best way to control prosecutorial discretion to seek the death penalty is to create a review committee by statute in each county with power to decide whether a defendant, whom the prosecutor has charged with first-degree murder, should face the possibility of the death penalty. United States Attorneys seeking authority to pursue a death penalty confer with a departmental Capital Review Committee, which considers material submitted by both the prosecution and defense to recommend the grant or denial of this authority.⁵²⁴ Supreme Court Committee on Racial and Gender Bias in the Justice System recommended that "[t]he Attorney General empanel a statewide committee of county district attorneys to review each decision by a

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 2579.

⁵¹⁸ Amanda S. Hitchcock, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. Rev. 931, 932 (2007).

⁵¹⁹ Horowitz, *supra* note 514, at 2579-80.

⁵²⁰ *Id.* at 2580-87.

⁵²¹ *Id.* at 2588-92.

⁵²² *Id.* at 2592.

⁵²³ Act of Oct. 15, 1980 (P.L.950, No.164), § 205(a); 71 P.S. 732.205(a). A dist. att'y may request to be superseded if he lacks the resources to adequately investigate or prosecute a crim. matter or envisions a potential conflict of interest; the Att'y Gen. may ask a judge to supersede if a dist. att'y abused his discretion by failing to prosecute. *Id.*

⁵²⁴ U.S. Attorneys' Manual 9-10.130 (1997).

district attorney to seek the death penalty with the goal of ensuring geographic consistency in” its application.⁵²⁵ Horowitz’s plan envisions a seven-member committee, with three members appointed by the Governor, three by the district attorney, and the remaining member by the six selected as aforesaid.

The entire process will benefit by removing the discretionary decision to seek the death penalty from an elected official and placing it with a committee. The committee will ensure a less political decision, increase the legitimacy of the system, increase the public accountability of the decision maker, and avoid discriminatory application of the death penalty.⁵²⁶

In particular, committees would reduce discriminatory use of the death penalty by making it more likely that the decision maker will reflect the diversity of the community. Part of the information that U.S. Department of Justice’s Capital Review Committee would consider includes “any allegation of individual or systemic racial bias in the Federal administration of the death penalty.”⁵²⁷ Both the Governor and the district attorney will be impelled by political pressures to ensure balanced representation.⁵²⁸

Another commentator decries excessive prosecutorial discretion:

Prosecutorial discretion plays a pervasive role in the administration of criminal justice. Limited resources and crowded criminal dockets force prosecutors to make quasi-judicial decisions, regarding whom to charge, the severity of the charge, whether to offer a plea bargain, and whether to proceed to trial. Prosecutors exercise this extensive power beyond public view, without objective criteria, and in an “essentially unreviewable” manner. In fact, the presumption that prosecutors act in good faith gives prosecutors virtual impunity in their pretrial decisions.⁵²⁹

Because almost all district attorneys are white, unconscious bias can enter the system because of “the racial disparity between the prosecutors and the death row population” and “the similarity between the prosecutor and the victim populations.”⁵³⁰ A statistical analysis of the respective populations shows that the racial and ethnic composition of the prosecutorial staff is much closer to the victim population. This may help explain the racial disparities found by the Baldus study.⁵³¹

⁵²⁵ *Final Rep.*, *supra* note 16, at 221.

⁵²⁶ Horowitz, *supra* note 514, 2605-06.

⁵²⁷ U.S. Attorneys’ Manual 9-10.130 (1997).

⁵²⁸ Horowitz, *supra* note 514, at 2609.

⁵²⁹ Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 *Cornell L. Rev.* 1811, 1813 (1998).

⁵³⁰ *Id.* at 1818-19.

⁵³¹ *Id.* at 1817-19.

Unfairness of the legal system

The death penalty reflects aspects of the American legal system that can be characterized as arbitrary or unfair (if not necessarily discriminatory). These may include the dependence of the outcome on the ability and experience of the lawyers for the respective sides, disparities in resources, differences among judges, regional disparities,⁵³² and the application of rules of evidence. The general issues that may make the American justice system unfair are beyond the scope of this study, but those that have a particularly strong impact in the death penalty context are addressed here or elsewhere as indicated below.

Legal representation

About 80% of capital defendants are indigent and are represented by the public defender or other free counsel.⁵³³ Some observers have argued that many of the lawyers who represent death defendants are unqualified to meet the heavy demands of capital cases; consequently, defendants receive poor representation, resulting in reversible errors and, in some cases, the risk of convicting an innocent person.⁵³⁴

Death qualification

Death qualification refers to the exclusion for cause of prospective jurors who indicate at the jury selection (*voir dire*) phase that because of their opposition to the death penalty, they will refuse to vote for a death verdict regardless of the evidence. This practice has been upheld by the U.S. Supreme Court, but some observers claim it predisposes the jury toward a verdict of guilt.⁵³⁵

Justice Center for Research

Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness initiated and partially funded this study by Justice Center for Research at Penn State University. Both generously collaborated with the advisory committee and task force as it considered the topics under this resolution.⁵³⁶ This section summarizes its research on bias and unfairness.

“Blacks are highly disproportionately represented among those individuals who receive capital sentences in Pennsylvania, leading one to question whether this is the result of unwanted disparity in the administration of the death penalty.”⁵³⁷ The “primary research goal was to determine the impact . . . a defendant’s or a victim’s race, ethnicity, or other social characteristics has on a prosecutor’s decision to seek the death penalty; to retract it if sought; and the . . . decision

⁵³² Death penalty cases vary significantly geographically.

⁵³³ The percentage would increase to almost 100% after condemnation.

⁵³⁴ *Infra* pp. 183-86.

⁵³⁵ This topic is discussed in more detail, *infra* pp. 144-48.

⁵³⁶ Just. Ctr. researchers were involved in several research topics from the resolution including fairness, public opinion, secondary trauma, and role of mental disorder in capital punishment. Pa. Interbranch Comm’n for Gender, Racial & Ethnic Fairness was involved in all research topics from the resolution. Pa. J. State Gov’t Comm’n highly valued this collaboration and is grateful for the assistance of both.

⁵³⁷ Kramer *et al.*, *supra* note 26.

to impose the death penalty.”⁵³⁸ The type of the defendant’s legal representation was also examined to determine its effect on “death penalty case-processing”.⁵³⁹ Due to resource and time constraints, the main analysis of disparity was on cases resultant in convictions for first-degree murder.⁵⁴⁰

Statewide data was obtained from Administrative Office of Pennsylvania Courts, Pennsylvania Commission on Sentencing and Department of Corrections.⁵⁴¹ This data was supplemented and refined by a field data collection of “offenders *convicted* of first-degree murder” in “the 18 counties with 10 or more first-degree murder convictions.”⁵⁴² In almost half of the cases in which a Notice of Aggravating Circumstances was filed by an attorney for the Commonwealth, the notice was retracted.⁵⁴³ In almost a third of the cases in which a Notice of Aggravating Circumstances was filed and unretracted, the sentence was death.⁵⁴⁴ Juries decided the sentencing in 70% of the death penalty trials.⁵⁴⁵ In City of Philadelphia, Notices of Aggravating Circumstances were retracted “far more often” and defendants in that city were also “less likely to receive the death penalty” than in the other 17 counties in this field study.⁵⁴⁶ “[N]et of legally relevant factors,” death penalty outcomes in our Commonwealth are shaped more by differences among counties, the victim’s race and type of defense counsel, rather than by the defendant’s race or ethnicity.⁵⁴⁷ The most prominent difference found in this study is the differences in death penalty outcome among the counties.⁵⁴⁸

More than half of the inmates under a sentence of death in our Commonwealth are black, while almost 12% of the overall state population is black, which makes blacks “highly overrepresented on Pennsylvania’s death row relative to their proportion in the state population.”⁵⁴⁹ During the last year of data collection for this study, more than half of those arrested for murder in Pennsylvania were young, black males.⁵⁵⁰ “[T]he key research issue was to determine whether this disproportionality resulted from racial bias in decision-making, or whether legally relevant factors . . . accounted for this disproportionality.”⁵⁵¹ The legally relevant factors

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* Subsequent research might analyze the arrest and charging stages for disparity. *Id.*

⁵⁴¹ *Id.* at ii-iii.

⁵⁴² *Id.* at iii. One important limitation is case selection bias because the included ones are based on *ex post* outcomes rather than *ex ante* attributes. In other words, all cases eligible for first-degree murder were not collected because the selection point was conviction for first-degree murder.

⁵⁴³ *Id.* at iv. (The percentage is 47%. *Id.*) Unless the existence of aggravating circumstances is unknown to the attorney for the Commonwealth at the time of arraignment or the judiciary extends to time to file this notice, it is required to be filed “at or before the time of arraignment”. Pa. R. Crim. P. 802.

⁵⁴⁴ Kramer *et al.*, *supra* note 26, at iv. (The percentage is 31%. *Id.*)

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at v. Similarly, “[d]efendants with public defenders were much less likely to receive the death penalty in Philadelphia, than their counterparts in the other 17 counties in the field study.” *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* “A given defendant’s chance of having the death penalty sought, retracted, or imposed depends a great deal on where that defendant is prosecuted and tried.” *Id.*

⁵⁴⁹ *Id.* at 1. Approximately 51% of Pennsylvania’s condemnees are black. *Infra* p. 191; U.S. Census Bureau, Dep’t of Commerce, *Quick Facts Pa.*, <https://www.census.gov/quickfacts/fact/table/PA,US/PST045217> (2016).

⁵⁵⁰ Kramer *et al.*, *supra* note 26, at 3. (92% male; 68% black; almost 52% under age 25: *id.*)

⁵⁵¹ *Id.*

were accounted for and then sought to determine if they “predict the prosecutor’s decision to seek death for first-degree murder charges, or . . . subsequently retract” that notification and to predict the sentencing decision if the notification was not retracted: race, ethnicity or other characteristics of the defendant and victim.⁵⁵² Legally relevant factors were accounted for and then it was determined if outcomes differed “across counties” and “according to the type of legal representation a defendant had”.⁵⁵³

Response to Furman v. Georgia. In a 1972 opinion, U.S. Supreme Court ruled “that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of” U.S. Constitutional amendments VIII and XIV.⁵⁵⁴ There were five opinions supporting this judgment, including differing as well as similar rationales for the *per curium* opinion, but a key consideration is that no standards governed the selection of the penalty.⁵⁵⁵ This meant that the death penalty could be administered arbitrarily or discriminatorily because of its discretionary imposition. To remedy the “[t]he basic concern of Furman” centering “on those defendants who were being condemned to death capriciously and arbitrarily”, Georgia enacted procedures to “focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.”⁵⁵⁶ The jury’s discretion “is always circumscribed by the legislative guidelines” in the form of statutory aggravating factors and mitigating circumstances.⁵⁵⁷

[C]oncerns . . . that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.⁵⁵⁸

The responsive “Georgia statutory scheme” provided “for automatic appeal of all death sentences to the State’s Supreme Court”, which was “required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.”⁵⁵⁹ Since “the statutory system under which Gregg was sentenced to death” was ruled constitutional,⁵⁶⁰ other jurisdictions⁵⁶¹ seeking to enact constitutional death penalties copied

⁵⁵² *Id.* at 3-4.

⁵⁵³ *Id.* at 4.

⁵⁵⁴ *Furman v. Ga.*, 408 U.S. 238, 239-40 (1972).

⁵⁵⁵ *Id.* at 253 (Douglas, J., concurring). Three justices agreed “that the statutes then before the Court were invalid as applied” and two justices would have held capital punishment unconstitutional *per se*. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976)).

⁵⁵⁶ *Gregg*, 428 U.S. at 206.

⁵⁵⁷ *Id.* at 206-07.

⁵⁵⁸ *Id.* at 195.

⁵⁵⁹ *Id.* at 198.

⁵⁶⁰ *Id.* at 207.

⁵⁶¹ Our Commw. was one of these jurisdictions. 42 Pa.C.S. § 9711.

Georgia’s statutory system. “It remains unclear whether these procedures approved in *Gregg v. Georgia*—and used in Pennsylvania—have reduced or eliminated these unwarranted disparities.”⁵⁶²

Focal concerns theory. “Focal concerns theory holds that decisions regarding the processing of alleged and convicted offenders draw on three key ingredients”: an assessment of the defendant’s blameworthiness and dangerousness, along with “the practical implications of” criminal justice “processing decisions.”⁵⁶³ This “theory highlights the complexity of decision-making, in that it indicates the importance of the characteristics of the offender, the victim, and the local normative culture within which decision-makers are elected or appointed.”⁵⁶⁴

Prior studies. Prior “studies of potential death penalty cases have focused on the effect of . . . race”, with one governmental review characterizing “race-of-victim” to be an “influence” on “the likelihood of being charged with capital murder or receiving a death sentence” with “[t]his finding” being “remarkably consistent across data sets, states, data collection methods, and analytic techniques.”⁵⁶⁵ As for race, “research has generally supported the notion that prosecutors are more likely to seek the death penalty in cases involving a White victim, and particularly when the defendant is Black and the victim was White.”⁵⁶⁶ In the only study located examining plea bargain acceptances, “black offenders charged with killing a white victim were much less likely to benefit from a plea in a capital case”.⁵⁶⁷ For two studies about the victim’s social class, one “found that prosecutors were more likely to seek the death penalty,” which “was more likely to be imposed, on defendants who were accused of killing victims of higher socio-economic status.”⁵⁶⁸ The other study similarly attributed a higher likelihood of seeking “the death penalty when the victim had higher education.”⁵⁶⁹ Another “important factor” is the “judicial district” because “prosecutorial decisions about the death penalty vary among courts and jurisdictions.”⁵⁷⁰ The type of legal representation of defendants has not generally been a research focus of prosecutorial decisions on the death penalty.⁵⁷¹

“A considerable body of research has found that Black defendants who are convicted of killing White victims are the most likely to receive the death penalty.”⁵⁷² Despite “concerns with the quality of legal representation in capital cases”, the “research to date has generally failed to”

⁵⁶² Kramer *et al.*, *supra* note 26, at 5.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at 7. “Local courts develop distinctive formal and informal case processing and sentencing norms.” *Id.* at 6. “Research in social psychology and criminal justice shows that implicit racial bias can indeed operate in contemporary criminal justice decision-making, including arrests, prosecution, and sentencing.” *Id.*

⁵⁶⁵ *Id.* at 7-8. The governmental study is one by U.S. Gen. Accountability Office in 1990, noting race-of-victim to be this influence “[i]n 82% of the studies”. *Id.* at 8.

⁵⁶⁶ *Id.* at 8 (citations omitted).

⁵⁶⁷ *Id.* at 9. This was a study in Ky., *id.*.

⁵⁶⁸ *Id.* at 9-10.

⁵⁶⁹ *Id.* at 10. “Studies generally conclude that female defendants are less likely to be prosecuted for the death penalty”, with other studies finding “that offenses involving female victims are more likely to result in prosecution for the death penalty.” *Id.* n.3.

⁵⁷⁰ *Id.* at 10.

⁵⁷¹ *Id.* at 11.

⁵⁷² *Id.* Some “research has failed to find a race-of-defendant/race-of-victim effect.” *Id.* at 12.

analyze this variable.⁵⁷³ A study published in 2012, “found that defendants with Philadelphia public defenders had a reduced conviction rate and significantly lower sentence severity compared with defendants represented by court-appointed attorneys.”⁵⁷⁴ Data for this study was analyzed “using standard logistic regression” and re-analyzed “using propensity score weighting/matching” because different methods may affect the accuracy “of the relationship between variables” studied.⁵⁷⁵

“Prior to this study, in Pennsylvania there was only one study of decision-making in the application of the death penalty and another study consisting of interviews with jurors in capital trials.”⁵⁷⁶ For cases with victims who were not Black, the jury was less likely to find mitigation; when the victim was from a “low socio-economic status”, the prosecution was less likely to pursue the death penalty and when it did, there was a lower likelihood of the imposition of the death penalty.⁵⁷⁷ The study of jurors revealed that they misunderstood the “instructions regarding mitigation” and erroneously assumed that those “given a life sentence” would subsequently be released.⁵⁷⁸

Murder of the first degree. There are three degrees of murder in our Commonwealth.⁵⁷⁹ A “sentence of death” is only available if there is “a verdict of murder of the first degree” and one or more aggravating circumstances is proven beyond a reasonable doubt, which outweigh any mitigating circumstances.⁵⁸⁰

(d) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

⁵⁷³ *Id.* at 13.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 14.

⁵⁷⁶ *Id.* at 15.

⁵⁷⁷ *Id.* at 16.

⁵⁷⁸ *Id.* at 17.

⁵⁷⁹ 18 Pa.C.S. § 2502. First is “an intentional killing”; second “is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony”; third is “[a]ll other kinds of murder”. *Id.*

⁵⁸⁰ Or there are no mitigating circumstances. 42 Pa.C.S. § 9711. If a jury does not unanimously agree “as to the sentence”, the sentence is “life imprisonment.” *Id.*

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

(16) The victim was a child under 12 years of age.

(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.

(18) At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

(e) Mitigating circumstances.--Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.⁵⁸¹

The process can be divided into 10 steps:⁵⁸²

(1) Homicide occurs;

(2) Homicide recognized by authorities;

(3) Investigation by law enforcement and facts discovered/generated;

(4) Homicide suspect identified and arrested;

(5) Prosecution charges 1st-degree murder [or criminal homicide];

(6) Prosecution indicts [or informs] for 1st-, 2d-, or 3d-degree murder [or criminal homicide];

(7) If indicted [or informed] for 1st-degree murder, prosecution decides whether to seek death penalty;

(8) Prosecution and defense disagree on a plea;

(9) Defendant is convicted of murder;

(10) If convicted of 1st-degree murder & the prosecutor pursued the death penalty, the sentencing authority considers the aggravating and mitigating circumstances for sentencing.

⁵⁸¹ *Id.*

⁵⁸² *Kramer et al., supra* note 26, at 20-21, 24.

“At each stage in the process, some attrition occurs and the universe of cases that could result in a death sentence narrows” with “a . . . small fraction of the number of people who commit a homicide” sentenced to death.⁵⁸³

Pennsylvania data.

Data sets: It “took several years” for the authors of this study to build this “data set”.⁵⁸⁴ An “eleven-year time frame of 2000-2010” provided “a large enough pool of death-eligible offenders to result in a strong and reliable statistical analysis. . . . [W]e estimated that approximately 60 offenders received the death sentence during this time frame, and another 1,200 offenders received a life sentence, with the vast majority of these life sentences imposed for first-degree murder.”⁵⁸⁵ The “source of data to identify cases entering the criminal justice system and . . . the starting point for” the study was Common Pleas Case Management System within Administrative Office of Pennsylvania Courts (AOPC), but that “data does not provide information that would have allowed” identification of “death-eligible defendants that are central to this study.”⁵⁸⁶ To verify data from AOPC, “data for sentences imposed during the period 2000 through 2014” was obtained from Pennsylvania Commission on Sentencing.⁵⁸⁷ Data for “all offenders incarcerated for” murder “during the period of 2000 through” 2012 was received from Department of Corrections.⁵⁸⁸

Racial disproportionality of defendants: Prosecutions can commence with a charge for criminal homicide, which is “classified as murder, voluntary manslaughter, or involuntary manslaughter.”⁵⁸⁹ Since the death penalty is limited to murder of the first degree,⁵⁹⁰ this study sampled “only cases with a first-degree murder *conviction*, as representative of cases that were potentially death-eligible.”⁵⁹¹ For “defendants prosecuted during the 2000-2010 time period,” AOPC listed “1,115 docket cases with at least one first-degree murder *conviction*.”⁵⁹² Of those “charged with murder/criminal homicide”, 53% of the cases involved Black defendants, “highly disproportionate to their proportion of Pennsylvania’s population.”⁵⁹³ An overwhelming percentage of these defendants was male.⁵⁹⁴

⁵⁸³ *Id.* at 22.

⁵⁸⁴ *Id.* at 25. Appdx. L, *infra* p. 263.

⁵⁸⁵ Kramer *et al.*, *supra* note 26, at 27. A recent period was chosen to reflect “contemporary capital sentencing practices”. *Id.*

⁵⁸⁶ *Id.* at 27-28. “[I]t was necessary to verify the accuracy of the information whenever possible”, which originated “in each of 540 Magisterial District Courts, the Philadelphia Municipal Courts, and the 12 Pittsburgh Municipal Courts.” *Id.* at 28.

⁵⁸⁷ *Id.* at 29.

⁵⁸⁸ *Id.* This data was then updated in 2014 and 2015. *Id.* at 30.

⁵⁸⁹ 18 Pa.C.S. § 2501.

⁵⁹⁰ 42 Pa.C.S. § 9711.

⁵⁹¹ Kramer *et al.*, *supra* note 26, at 30. This decision ignored the acceptance of “a guilty plea to a lesser offense” than “first-degree murder” and “the overlap among the statutory grades of murder”, namely that murder of the second degree is ineligible for the death penalty, although a killing under the same circumstance is an aggravating circumstance for the death penalty if the conviction is for murder of the first degree. *Id.* at 30-31.

⁵⁹² *Id.* at 31-32.

⁵⁹³ *Id.* at 34.

⁵⁹⁴ 89%, *id.*

Limitations of study's scope: After compiling data from AOPC, Pennsylvania Commission on Sentencing and Department of Corrections, coding the departmental data “and linking the three data sets”, missing information was “obtained from local county files.”⁵⁹⁵ The “data collection instrument” was tested in County of Blair and then substantially revised.⁵⁹⁶ After estimating the workload and affordability of the data collection from counties “across the Commonwealth”, the number of cases was reduced to “those who were convicted of first-degree murder.”⁵⁹⁷ This limitation means that the influence of race or ethnicity on the decision of charging the homicide or on “whether to retract the motion to seek the death penalty in any case that did not result in a first-degree murder conviction” was not studied.⁵⁹⁸ The study was also limited to the “18 counties that had ten or more first-degree murder convictions” which “was more than 80% of all first-degree murder convictions in the Commonwealth in” the study’s “time frame.”⁵⁹⁹ Because “the most detailed information was likely to be found in each county’s District Attorney’s files”, those offices were contacted, resulting in 14 of them assisting with the field sample.⁶⁰⁰ “The time to code . . . files varied from” 30 “minutes to several hours” after which “local news reports and appellate documents” were used “to verify and to fill-in information”.⁶⁰¹ Errors found in AOPC’s data classification of murders was corrected based upon the field research.⁶⁰² Data collection from the field took 31 months instead of the anticipated 18 months.⁶⁰³ Data sets from AOPC, Department of Corrections, Pennsylvania Commission on Sentencing and the field were reviewed to identify “inconsistent or missing information.”⁶⁰⁴ It took “several months” to “gain access to . . . death certificate information” from Department of Health.⁶⁰⁵ The data was merged to remove duplicates “and locate and correct” missing and invalid data, after which the analysis began.⁶⁰⁶ The period from the development of the research design and original request for data from AOPC to the analysis of that data was approximately six years.⁶⁰⁷

Field data: The field data did not allow an assessment of “the process . . . by which some criminal homicide cases that are death-eligible result in first-degree murder convictions and” others “do not.”⁶⁰⁸ The 18 counties in this study encompassed “87% of the first-degree murder convictions in the . . . docket data”, with “[t]he majority of cases” involving “first-degree murder

⁵⁹⁵ *Id.* at 35-36.

⁵⁹⁶ *Id.* at 37-38.

⁵⁹⁷ *Id.* This “reduced the number of cases to review in the field from 4,274 to 1,115.” *Id.* at 38.

⁵⁹⁸ *Id.* at 39.

⁵⁹⁹ These were Allegheny, Berks, Bucks, Chester, Dauphin, Del., Fayette, Lackawanna, Lancaster, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Phila., Wash., Westmoreland & York. *Id.*

⁶⁰⁰ *Id.* at 40-41. Offices in Chester, Westmoreland, Fayette & Northampton did not reply to the request for assistance so that information was alternatively sought, *e.g.*, *via* the cnty. clerk, defense attorneys and local newspaper coverage. *Id.* at 41-42. After initial rejection for assistance from Phila.’s Office of Dist. Att’y, the request was repeated with a reduction by half in the number of years sampled and the approval for data collection was obtained, but that process took 18 months. *Id.* at 42-43.

⁶⁰¹ *Id.* at 44.

⁶⁰² *Id.*

⁶⁰³ *Id.* at 45-46.

⁶⁰⁴ *Id.* at 48.

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.* at 49.

⁶⁰⁷ *Id.* at 50.

⁶⁰⁸ *Id.* at 51-52. This is potentially significant because a charge of criminal homicide could “involve first-degree murder and exposure to the possibility of the death penalty.” *Id.* at 51.

conviction by juries.”⁶⁰⁹ Most of these “cases involved an additional felony conviction”.⁶¹⁰ Of these first-degree murder convictions from the field data, notices of aggravating circumstances were filed to seek the death penalty in 35.5% of them but then later retracted in 46.7% of that subset.⁶¹¹ Of the remaining “cases with defendants ultimately exposed to death at sentencing,” 30.5% received that sentence, with the remaining 69.5% sentenced to life imprisonment.⁶¹² Prosecutors filed notices of aggravating circumstances, including ones for murders committed in perpetration of a felony and knowingly creating a grave risk of death each in approximately 15% of these notices.⁶¹³ In approximately 2.5% of these cases, the judge or jury found either of these same, two aggravating circumstances or that the defendant was convicted of another murder.⁶¹⁴ Prosecutors filed notices of aggravating circumstances containing one circumstance in 17% of these cases.⁶¹⁵ In approximately 3.5% of these cases, the judge or jury found either one or two aggravating circumstances.⁶¹⁶ In approximately 24% of the death penalty trials, “not one mitigating circumstance” was “presented.”⁶¹⁷ The defense presented age as a mitigating circumstance in 7.4% of the cases, but the judge and jury found that to be a mitigating circumstance in only 1.8% of the cases.⁶¹⁸ In almost 6% of the cases, the defense presented the mitigating circumstance of no significant history of prior crime, but the judge and jury found that to be a mitigating circumstance in only 2.5% of the cases.⁶¹⁹ In 3.6% of the cases, the defense presented two mitigating circumstances, but the judge and jury found two mitigating circumstances in only 1.4% of the cases.⁶²⁰ The defense presented eight or more mitigating circumstances in 2.1% of the cases, but the judge and jury did not find that many mitigating circumstances in any of the cases.⁶²¹ The judge and jury found one mitigating circumstance in 2.6% of the cases.⁶²² The sentencing was decided by the jury in 70.1% of these cases.⁶²³

Type of defense counsel: “[T]he type of defense counsel” was ‘roughly evenly split among’ privately-retained counsel, public defenders and judicially-appointed counsel for all of these convictions.⁶²⁴ When the death penalty was sought, defendants were represented by privately-retained counsel in 38.9% of those cases, with the public defender acting as counsel in a little over 30% of the cases and judicially-appointed counsel representing the defendant in a little under 30% of the cases.⁶²⁵ Defendants in these cases were overwhelmingly male; approximately two-thirds of the defendants were Black and almost one quarter were White.⁶²⁶ For the females

⁶⁰⁹ *Id.* at 52. The majority is 75%. *Id.*

⁶¹⁰ 59.1%, *id.*

⁶¹¹ *Id.* at 53.

⁶¹² *Id.* at 53-54. The data is limited to convictions meaning that any acquittal was not analyzed. *Id.* at 53.

⁶¹³ *Id.* at 56.

⁶¹⁴ *Id.*

⁶¹⁵ *Id.* at 57.

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ *Id.* at 58.

⁶¹⁹ *Id.*

⁶²⁰ *Id.*

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ *Id.* at 59.

⁶²⁴ *Id.* at 59.

⁶²⁵ *Id.*

⁶²⁶ *Id.* at 60. Males were defendants in 96.1% of these cases. *Id.* at 61.

convicted of first-degree murder, almost a quarter of them were notified of aggravating circumstances, but they were retracted for most so that 8.8% of them remained “exposed to a death penalty trial.”⁶²⁷ “[I]t appears that females are much less likely to be exposed to, or receive, the death penalty”, but the “numbers of first-degree murder cases involving female defendants” was inadequate to further analyze any impact of the defendant’s sex on “the processing and sentencing of” first-degree murder cases.⁶²⁸

Ethnicity: Black defendants comprised a greater proportion of those with “a concurrent felony conviction of any kind compared to White . . . and Hispanic . . . defendants. Also, White defendants in the field data . . . had a smaller proportion of convictions for robbery, than Black . . . or Hispanic . . . defendants.”⁶²⁹

Comparatively, a “greater proportion of Hispanic defendants had the death penalty sought against them”; the death penalty was sought against Black and White defendants in “nearly equal proportions”.⁶³⁰ The death penalty was retracted in a greater proportion of the cases involving “Black or Hispanic defendants, as opposed to White defendants.”⁶³¹ Among those who faced the death penalty, almost 40% of White and Hispanic defendants and 25% of Black defendants received it.⁶³² While the population of first-degree murder charges and convictions are a “very racially disproportionate population”, “the proportions of defendants *within race/ethnicity categories* reveal that proportionally more White defendants are exposed to and receive the death penalty, compared to the percentages of Black defendants exposed to and receiving the death penalty.”⁶³³

Race and aggravating and mitigating circumstances: Approximately 80% of the cases had Black defendants in which prosecutors asserted the aggravating circumstances of the victim being a peace officer, creating a grave risk of death to another and being convicted of another murder.⁶³⁴ Prosecutors listed greater numbers of aggravating circumstances *per* case against Black defendants.⁶³⁵ Because “aggravating circumstances are found far less often than they are filed”, “Black defendants do not dominate the percentages for the aggravating circumstances found by the judge or jury, as much as they do for those filed by the prosecutor.”⁶³⁶ The distribution of statutory mitigating circumstances “filed tended to be distributed between White, Black, and, to a lesser extent, Hispanic defendants, more equally than the aggravating circumstances filed by prosecutors” with “Black defendants” tending “to have greater numbers of mitigating circumstances presented per case.”⁶³⁷

⁶²⁷ *Id.* at 61-62. One of the females was sentenced to death, comprising 1.9% of the females convicted of first-degree murder. *Id.* at 62.

⁶²⁸ *Id.*

⁶²⁹ *Id.* at 62-63.

⁶³⁰ *Id.* at 64.

⁶³¹ *Id.* at 65.

⁶³² *Id.* at 66.

⁶³³ *Id.* at 66.

⁶³⁴ *Id.* at 67.

⁶³⁵ *Id.* at 68.

⁶³⁶ *Id.*

⁶³⁷ *Id.* at 72.

Almost two-thirds of Black and Hispanic defendants “were represented by either public defenders or court-appointed attorneys”, with that percentage dropping to 55% for the same representation “[a]mong White defendants”.⁶³⁸ A higher proportion of White defendants “facing the death penalty were sentenced by judges, compared to” Black and Hispanic defendants.⁶³⁹ Most of the defendants and victims were Black males.⁶⁴⁰ “[I]t appears that cases involving Black defendants and White victims have a greater probability of receiving the death penalty, compared to the average overall probability of receiving the death penalty for all cases.”⁶⁴¹

Propensity score weighting: The Pennsylvania State University researchers used propensity score weighting to balance error variance.⁶⁴² For one thing, Black, White and Hispanic defendants are imbalanced on control variables “such as aggravating circumstances, concurrent convictions, case characteristics, etc.”⁶⁴³ Whether selection bias exists “affecting the likelihood of being arrested, charged, and/or convicted of first-degree murder” could not be directly assessed” so that the “weighting on the propensity score is a way to balance the comparison groups, or render them more similar and comparable, on the control variables.”⁶⁴⁴

County variations:⁶⁴⁵ White defendants had “a 7% smaller probability of having a motion for the death penalty filed against them” when county differences were controlled.⁶⁴⁶ For “each type of defendant, victim, and defendant/victim combination”, the likelihood of “a motion for the death penalty filed against them in Allegheny County” was significantly less than in the other 17 judicial districts.⁶⁴⁷ “[C]ases with Hispanic victims . . . had a 21% greater probability of having the death penalty filed.”⁶⁴⁸ White defendants were “16% less likely to have a death filing retracted” when county differences were controlled.⁶⁴⁹ For “cases with Black defendants, Black victims, and any defendant/victim combination involving Black individuals were very highly likely to have a death filing retracted” with “cases with White defendants . . . comparatively much less likely to have a death filing retracted”, making this a significant difference between Philadelphia and the other 17 counties.⁶⁵⁰ Controlling for county differences, cases with White victims were 6% more likely to receive a death sentence, which demonstrates “clear evidence of race-of-victim effects”.⁶⁵¹ The odds of receiving the death penalty were lower for “nearly all defendant types and defendant/victim combinations” in Philadelphia than in the other 17

⁶³⁸ *Id.* at 74.

⁶³⁹ *Id.* at 75. These percentages are: White-45%, Black-38%, Hispanic-29%. *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.* at 79.

⁶⁴² *Id.* at 85-86.

⁶⁴³ *Id.* at 85.

⁶⁴⁴ *Id.* at 85, 87.

⁶⁴⁵ Appdx. K., *infra* p. 261, shows the ratio of execution to life sentences by county based upon the 2015 inmate population.

⁶⁴⁶ Kramer *et al.*, *supra* note 26, at 92.

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 95.

⁶⁵⁰ *Id.* at 96.

⁶⁵¹ *Id.* at 97-98.

counties.⁶⁵² “Additionally, the death penalty was notably less likely to be imposed in cases with White victims in Allegheny County . . . than in the other 17 counties”.⁶⁵³

Even for cases that are highly similar on the variables, “[p]rosecutors in Allegheny County are notably . . . less likely . . . to file motions to seek the death penalty” than in the other counties.⁶⁵⁴ Compared to County of Allegheny and Philadelphia, defendants in the other judicial districts “have a 5% greater probability of being sentenced to death”.⁶⁵⁵ The cases in Philadelphia had “a 31% greater probability of a death filing being retracted” than in the other judicial districts.⁶⁵⁶

Compared to the other 16 counties, public defenders in County of Allegheny and Philadelphia had “significantly lower odds of having the death penalty filed against their clients than public defenders” elsewhere.⁶⁵⁷ “[T]he odds of securing the retraction of a death penalty filing relative to the type of legal representation afforded a defendant likely varies widely among counties.”⁶⁵⁸ Controlling for county differences, defendants represented by public defenders were “5% more likely” to receive the death penalty, but those in Philadelphia represented by public defenders had “significantly smaller odds . . . of receiving the death penalty” than in the other 17 judicial districts.⁶⁵⁹ Depending on the controlling for county differences, “White defendants represented by a public defender are 16% to 19% less likely to have the death penalty filed against them”.⁶⁶⁰ Compared to defendants with other types of legal representation, “Black defendants with court-appointed attorneys had an 18% greater probability of having the death penalty filing retracted”.⁶⁶¹ For White defendants represented by public defenders, prosecutors sought the death penalty in 31% of those cases before dropping that penalty in 35% of those cases; of the “remaining cases with White defendants represented by public defenders, the death penalty was imposed” in 69% of them.⁶⁶²

Summary:

- The data set from 18 counties “represents 87% of all first-degree murder convictions” from 2000-2010 “in the Commonwealth.”⁶⁶³
- “Black defendants are very disproportionately charged with and convicted of murder overall and first-degree murder particularly, relative to White defendants. One of the

⁶⁵² *Id.* at 99.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.* at 100.

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.* In Phila., the motions filed for a death penalty in cases involving Black defendants, victims or both were “much more likely to be retracted than in cases involving White defendants, victims or both. *Id.*

⁶⁵⁷ *Id.* at 102. Overall, “defendants represented by public defenders are 7-8% less likely to have motions for the death penalty filed against them”. *Id.*

⁶⁵⁸ *Id.* at 104.

⁶⁵⁹ *Id.* at 105.

⁶⁶⁰ *Id.* at 107.

⁶⁶¹ *Id.* at 109. “[T]he likelihood of retraction of a death penalty filing in cases involving Black defendants with privately-retained attorneys varies a great deal among counties.” *Id.*

⁶⁶² *Id.* at 111.

⁶⁶³ *Id.* at 113.

important limitations of this study, however, is that we were not able to analyze the early stages of this process—the decision to detain, arrest, and charge a suspect.”⁶⁶⁴

- “First-degree murder victimization was largely intra-racial.”⁶⁶⁵
- Defendants were overwhelmingly male “especially for first-degree murder,” and “[t]he large majority of defendants in first-degree murder cases do not face the death penalty.”⁶⁶⁶
- At least one aggravating circumstance was filed in “39% of the cases” with the most common ones being creating a grave risk of death to somebody other than the victim and killing while in perpetration of a felony.⁶⁶⁷
- “[W]ithin racial groups, 37% of Black defendants had one or more aggravating circumstances filed, compared to 43% of White defendants.”⁶⁶⁸
- In nearly a quarter of the cases, “no mitigating circumstances were filed by the defense” raising “questions about the effectiveness with which defense counsel pursued those cases”⁶⁶⁹.
- A jury decided “70% of death sentencing trials” instead of the judge, and juries were “significantly more likely to impose the death penalty than judges.”⁶⁷⁰
- The odds of eventually obtaining a guilty plea to first-degree murder is “nearly three times” higher for “cases in which the death penalty is filed”.⁶⁷¹
- This research did “not find an overall pattern of disparity to the disadvantage of Black or Hispanic defendants in the decision to seek the death penalty, the decision to retract the death penalty once filed, or the decision to impose the death penalty.”⁶⁷² Nor did it “find disparity in these decisions to the disadvantage of defendants in cases with Black defendants and White victims.”⁶⁷³

⁶⁶⁴ *Id.* at 113-14. “Consequently, we cannot comment on whether disparity, discrimination or arbitrariness played any role in the disproportionately large number of Black defendants charged with murder.” *Id.* at 114.

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.* “Prosecutors filed notices of aggravating circumstances in 39% of first-degree murder cases,” but retracted them “in 47% of cases in which they were filed.” *Id.* Of the remaining ones, “[a]pproximately 31% of defendants received the death penalty”. *Id.*

⁶⁶⁷ *Id.* at 115.

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.* at 116. This study was unable “to examine the actual jury process and dynamics”. *Id.*

⁶⁷¹ *Id.*

⁶⁷² *Id.* at 117.

⁶⁷³ *Id.*

- In cases with Hispanic victims, the prosecutor was “21% more likely to . . . seek the death penalty.”⁶⁷⁴
- Findings in this study contrast with Baldus’s study of capital case processing in Philadelphia from 1983-1993, but this study used statewide data, more advanced data analysis, had access to district attorneys’ files and prosecutorial practices might differ since then.⁶⁷⁵
- “Overall, we find that defendants represented by public defenders are less likely than defendants with privately-retained or court-appointed attorneys to have the death penalty filed against them, but there is no clear indication that the type of representation affects the decision to retract the motion for the death penalty.”⁶⁷⁶
- When privately-retained attorneys represented defendants, “they were 4%-5% less likely to receive the death penalty, while defendants represented by public defenders were 5%-7% more likely to receive the death penalty. . . . On the other hand, defendants represented by public defenders in Philadelphia were much less likely to receive the death penalty than defendants represented by public defenders in the other 17” judicial districts “in the field study.”⁶⁷⁷
- Compared to the other judicial districts, “prosecutors in Allegheny County were much less likely to seek the death penalty” and “prosecutors in Philadelphia were much more likely to retract the death penalty”.⁶⁷⁸
- The largest and most prominent differences among the counties were “in death penalty outcomes and the effects of other variables on death penalty outcomes”.⁶⁷⁹
- The notable differences based upon the race of the victim were “*not* in combination with the race/ethnicity of defendant.”⁶⁸⁰
- Contrasting with the Baldus and other literature, “Black defendants with White victims were not at greater risk to receive the death penalty”.⁶⁸¹

⁶⁷⁴ *Id.* at 118.

⁶⁷⁵ *Id.*

⁶⁷⁶ *Id.* at 119.

⁶⁷⁷ *Id.* at 120.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.* at 121. *E.g.*, “prosecutors in Allegheny County and Philadelphia were less likely to seek the death penalty against defendants represented by public defenders than” in the other 16 counties in the field study. *Id.* at 120-21.

⁶⁸⁰ *Id.* at 121. Regardless of the defendant’s race or ethnicity, cases with White victims were 8% more likely to receive the death penalty; conversely, cases with Black victims were 6% less likely to receive the death penalty. *Id.*

⁶⁸¹ *Id.* at 122.

- The likelihood of seeking the death penalty was more when there was a Hispanic victim and there was less likelihood for receiving the death penalty when the victim was Black than when the victim was White, which differences were not “attributed to the many factors measures by” the control variables listed in the study.⁶⁸²
- “[D]ifferences among counties in death penalty outcomes, and the effects of other variables on death penalty outcomes, were the largest and most prominent differences found in” the study.⁶⁸³

*In a very real sense, a given defendant’s chance of having the death penalty sought, retracted, or imposed depends on where that defendant is prosecuted and tried. In many counties of Pennsylvania, the death penalty is simply not utilized at all. In others, it is sought frequently. If uniform prosecution and application of the death penalty under a common statewide framework of criminal law is a goal of Pennsylvania’s criminal justice system, these findings raise questions about the administration of the death penalty in the Commonwealth.”*⁶⁸⁴

Recommendation

Regarding unfairness in general and racial or ethnic bias in particular, the subcommittee on policy supports including a recommendation that Pennsylvania consider replicating what other states have done in this area, such as Washington State, that statutorily provides for proportionality review.

Proportionality

The question that serves as the basis of the study of proportionality in the administration of the death penalty in our Commonwealth is:

Whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison and whether there is an adequate process for determining when death sentences are excessive or out of line with sentences imposed in other cases where a sentence other than death was imposed;⁶⁸⁵

Whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison.

⁶⁸² *Id.* at 123.

⁶⁸³ *Id.* at 124. Compared to defendants represented by public defenders, those represented by privately-retained counsel were “significantly less likely to receive the death penalty”, but defendants represented by public defenders were “less likely to have the death penalty filed against them than other defendants”. *Id.* n.33.

⁶⁸⁴ *Id.* at 125. Appdx. K, *infra* p. 261, shows the ratio of execution to life sentences by county based on the 2015 inmate population.

⁶⁸⁵ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 219.

The subcommittee on policy could not answer this because there is no process for determining whether the crimes for which defendants receive the death penalty differ from the crimes for which defendants receive life imprisonment (without parole). The only available data is from the study detailed under the issue of bias and unfairness, which was limited to those cases that had convictions for first-degree murder. Justice Center for Research is seeking funding to follow that study with one to directly address this inquiry, but it will take years to accomplish.

Whether there is an adequate process for determining when death sentences are excessive or out of line with sentences imposed in other cases where a sentence other than death was imposed.

The Pennsylvania statutory provision that mandated this process was repealed in 1997.⁶⁸⁶ Once again, the subcommittee members agreed that there is no such process for making such a determination. The Pennsylvania State University research reveals disparities among counties in seeking and obtaining the death penalty, as well as other disparities, but does not directly answer the question, and is limited to cases of defendants convicted of first-degree murder.

Federal law. The U.S. Supreme Court has held “that the Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed.”⁶⁸⁷ The death penalty imposed “for the crime of murder, and when a life has been taken deliberately by the offender,” could be proportionate under suitable circumstances of the offense, considering the character of the offender following appropriate procedures.⁶⁸⁸ On the other hand, “with respect to rape of an adult woman, . . . a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”⁶⁸⁹ When this ruling was extended to find death penalty unconstitutionally excessive for the rape of a child, U.S. Supreme Court distinguished “between intentional first-degree murder . . . and nonhomicide crimes against individual persons”, regarding the latter to be incomparable to murder in severity and irrevocability.⁶⁹⁰ Ignoring crimes against the state, this ruling effectively limited the death penalty to homicide crimes against individual persons.⁶⁹¹ Death penalty statutes must prescribe objective factors so that they are applied non-discriminatorily to differentiate and narrow murders that are eligible for the death penalty and the murders that are not.⁶⁹² These cases assure that the death penalty is applied in at least a broadly proportional fashion; it does not apply to a selection of criminal offenses chosen at random. Indeed, the fundamental premise that should guide this aspect

⁶⁸⁶ *Infra* pp. 108-11.

⁶⁸⁷ *Coker v. Ga.*, 433 U.S. 584, 592 (1977)). “Under Gregg, a punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.” *Id.*

⁶⁸⁸ *Gregg v. Ga.*, 428 U.S. 153, 187.

⁶⁸⁹ *Coker*, 433 U.S. at 592. When *Coker* was decided, Ga. was “the sole jurisdiction in the United States” that authorized “a sentence of death when the rape victim is an adult woman”. *Id.* at 595-96. The uniquely severe and irrevocable death penalty “is an excessive penalty for the rapist who, as such, does not take human life.” *Id.* at 598.

⁶⁹⁰ *Kennedy v. La.*, 554 U.S. 407, 438 (2008).

⁶⁹¹ “We do not address . . . crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.” *Id.* at 437.

⁶⁹² *Gregg*, 428 U.S. at 196-98.

of the inquiry is that the death penalty, if retained at all, should be reserved for only “the most heinous offenses and most culpable offenders.”⁶⁹³

The subcommittee on policy further assumes that federal authorities will deal with extreme mass murder cases similar to those involving Timothy McVeigh (the Oklahoma City bombing) and Khalid Sheikh Mohammed (the 9/11 attack).

Pennsylvania statutory law. Pennsylvania statutory law prescribes the manner in which the judicial system differentiates between murders that deserve the death penalty and other murders. The death penalty only applies to murder of the first degree,⁶⁹⁴ defined as “[a] criminal homicide . . . committed by an intentional killing.”⁶⁹⁵ “Criminal homicide” requires that the accused cause “the death of another human being.”⁶⁹⁶ A murder is “intentional” when it is done “by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”⁶⁹⁷

To qualify for the death penalty, at least one of the 18 statutory aggravating circumstances must apply, and the aggravating circumstances supporting the death penalty must outweigh the statutory mitigating circumstances cutting against the death penalty.⁶⁹⁸ Like guilt of first-degree murder, each aggravator must be proved beyond a reasonable doubt, while mitigators need only be proved by a preponderance of the evidence.⁶⁹⁹ Unlike other crimes, trials for first-degree murder proceedings are bifurcated, with the first proceeding addressing whether the defendant is guilty of first-degree murder and, the second, which takes place only if the defendant is convicted, addresses whether the defendant should be sentenced to death.⁷⁰⁰ This bifurcation is intended to ensure that relevant evidence the defendant may wish to introduce in mitigation of the death penalty will not prejudice the question of his guilt.⁷⁰¹

The issue of whether each death penalty case should be reviewed to determine whether the penalty is applied consistently on the particular facts of each case is discussed below under “Comparative and Specific Proportionality.” There is presently no such requirement under Pennsylvania law.

Constitutional requirements. In *Gregg v. Georgia*, the U.S. Supreme Court set forth the broad guidelines to determine whether a punishment violates the Cruel and Unusual Punishment Clause of the Eighth Amendment:

⁶⁹³ The Const. Project, *Mandatory Justice: The Death Penalty Revisited*, xvii (2005), available at <https://static.prisonpolicy.org/scans/MandatoryJusticeRevisited-2-09.pdf>.

⁶⁹⁴ 42 Pa.C.S. § 9711.

⁶⁹⁵ 18 Pa.C.S. § 2502(a).

⁶⁹⁶ *Id.* § 2501(a).

⁶⁹⁷ *Id.* § 2502(d).

⁶⁹⁸ 42 Pa.C.S. § 9711(c)(1)(iv).

⁶⁹⁹ *Id.* § 9711(c)(1)(iii). The prosecution has the burden to prove guilt and aggravating circumstances; the defendant has the burden to prove mitigating circumstances.

⁷⁰⁰ 42 Pa.C.S. § 9711(a)(1).

⁷⁰¹ *Gregg v. Ga.*, 428 U.S. 153, 191-92.

When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into “excessiveness” has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.⁷⁰²

The plurality opinion held that the death penalty is not necessarily disproportionate for murder.

[W]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.⁷⁰³

At the same time, a state death penalty statute must ensure that the verdicts rendered under it are reasonably consistent:

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.⁷⁰⁴

The use of aggravating and mitigating circumstances was one of the reasons the *Gregg* Court upheld the Georgia statute under review. That statute required the jury to identify aggravating circumstances and to weigh them against mitigating circumstances. In addition, the statute required an automatic appeal to the Georgia Supreme Court and that the reviewing court ensure that the accused’s death sentence was in line with sentences applied to similar crimes.

In short, Georgia's new sentencing procedures require, as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, . . . the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be “no meaningful basis for distinguishing the few

⁷⁰² *Id.* at 173 (citations omitted).

⁷⁰³ *Id.* at 187.

⁷⁰⁴ *Id.* at 189.

cases in which (the death penalty) is imposed from the many cases in which it is not.”⁷⁰⁵

....

The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. . . . Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.⁷⁰⁶

The use of aggravating and mitigating circumstances was thus one of the grounds on which the Supreme Court distinguished the Georgia statute that was upheld in *Gregg v. Georgia* from the Georgia statute that was struck down four years earlier in *Furman v. Georgia*. The controlling opinion in *Gregg* explained the distinction in these terms:

Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards, so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.⁷⁰⁷

More specifically, the Court elaborated on how the statute guided the jury’s discretion:

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman*’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury’s attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way, or in a manner that endangered the lives of many persons? In addition, the jury’s attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions of capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (E.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, “the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.”⁷⁰⁸

⁷⁰⁵ *Id.* at 198.

⁷⁰⁶ *Id.* at 203.

⁷⁰⁷ *Id.* at 199.

⁷⁰⁸ *Id.* at 197-98.

The U.S. Supreme Court further refined the proportionality requirement in *Woodson v. North Carolina*⁷⁰⁹ and *Coker v. Georgia*.⁷¹⁰ “North Carolina . . . responded to the Furman decision by making death the mandatory sentence for all persons convicted of first-degree murder.”⁷¹¹ U.S. Supreme Court ruled that “North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments.”⁷¹² Decided the same day as *Gregg v. Georgia*, *Woodson* concluded that categorical death penalty provisions are unconstitutional:

It is now well established that the Eighth Amendment draws much of its meaning from “the evolving standards of decency that mark the progress of a maturing society.” . . . [O]ne of the most significant developments in our society’s treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina’s mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments’ requirement that the State’s power to punish “be exercised within the limits of civilized standards.”⁷¹³

. . . .

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. . . . While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.⁷¹⁴

In *Coker v. Georgia*, the U.S. Supreme Court mandated a significant measure of proportionality by forbidding the death penalty for rape.⁷¹⁵

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may

⁷⁰⁹ 428 U.S. 280 (1976).

⁷¹⁰ 433 U.S. 584 (1977).

⁷¹¹ *Woodson v. N. C.*, 428 U.S. at 286-87.

⁷¹² *Id.* at 305.

⁷¹³ *Id.* at 301 (citation omitted).

⁷¹⁴ *Id.* at 304 (citation omitted).

⁷¹⁵ 433 U.S. 584, 592 (1977).

be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.⁷¹⁶

In *Lockett v. Ohio*, the U.S. Supreme Court set forth the test for whether a death penalty statute gives the trier of fact sufficient latitude to render an individualized and proportionate sentence:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in noncapital cases. . . .

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.⁷¹⁷

Following this direction, Pennsylvania and other jurisdictions provide for individualized determinations of deathworthiness by statutorily specifying aggravating and mitigating circumstances. Appendix B shows statutory aggravating circumstances nationally.⁷¹⁸ The current, statutory list of the Commonwealth’s aggravators reads as follows:⁷¹⁹

(d) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General

⁷¹⁶ *Coker*, 433 U.S. at 598 (citation omitted).

⁷¹⁷ 438 U.S. 586, 604-05 (1978).

⁷¹⁸ *Infra* pp. 223-26.

⁷¹⁹ 42 Pa.C.S. § 9711.

Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that

association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

(16) The victim was a child under 12 years of age.

(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.

(18) At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

Aggravating Circumstances. Statutory aggravating circumstances should be drafted to ensure that the death penalty is limited to a narrow class of the worst murders of the first degree. Aggravators should differentiate murders that genuinely deserve the death penalty from the majority that do not; in other words, the aggravators should distinguish “garden variety” murder from “the worst of the worst.” They should identify crimes that affect the Commonwealth as a whole. At the same time, aggravators should not have a discriminatory effect against racial and ethnic minorities. Selection of the aggravating circumstances should reflect the subcommittee on policy’s considered views regarding whether they identify especially heinous factors, significantly narrow eligibility for the penalty, and apply to cases that are likely to actually occur. Consideration should be given to retaining aggravating circumstances that our Commonwealth has and which have been adopted in many other jurisdictions; at the same time, aggravating circumstances that would be unique or that are used in only a few other jurisdictions should not be enacted here.

In its comprehensive, national review, The Constitution Project recommends the following, limited list:⁷²⁰

- The murder of a police officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance.
- The murder of any person (including . . . inmates, staff, and visitors) occurring at a correctional facility.
- The murder of two or more persons, regardless of whether the deaths occurred as the result of the same act or . . . unrelated acts, as long as (a) the deaths were the result of an intent to kill more than one person, or (b) the defendant knew the act or acts would cause death or create a strong probability of death or great bodily harm to the murdered individual or others.

⁷²⁰ The Const. Project, *supra* note 693, at 10.

- The intentional murder of a person involving the infliction of torture. In this context, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim’s death; depraved means that the defendant relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion, or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
- The murder by a person who is under investigation for, or has been charged with or convicted of a felony; or the murder of anyone involved in the investigation, prosecution, or defense of that crime, including . . . witnesses, jurors, judges, prosecutors, and investigators.

The Constitution Project emphasizes criminal intent and deemphasizes the result of the crime, when it may not have been intended.⁷²¹ The aggravators should target “the fewest, most heinous and shocking first degree murders, for which any lesser response would minimize the magnitude of the offense”.⁷²² They should promote public safety by protecting law enforcement personnel and should avoid singling out murders that are likely to reveal “racial or class bias”, such as gang activity.⁷²³ California Commission on the Fair Administration of Justice noted that “a narrowing of the California special circumstances to” these “five factors . . . could largely eliminate the geographic variation in use of the death penalty” in that state.⁷²⁴

A study about mistakes in death verdicts that were judicially reversed “due to serious errors” was followed by another study to address why so many mistakes were made and how to prevent them.⁷²⁵ This comprehensive, statistical study observes that “expanded and indiscriminate use of the death penalty,” which is often extended “to weakly aggravated cases as a way of demonstrating a firm resolve to fight crime”, results in “a greatly increased risk of serious capital mistake, reversal and costly retrials.”⁷²⁶ It is common to enact additional aggravating circumstances to address a crime that slips through the cracks of the preexistent ones. “New aggravating circumstances should be resisted on principle. If consideration is given to them, any change should not proceed piecemeal, but should be part of an overall revamping of the statute that removes other, less appropriate circumstances at the same time.”⁷²⁷ Primarily to be avoided are vague, “catch-all aggravating circumstances that . . . apply to essentially all first-degree murders . . . ;”⁷²⁸ others “that simply duplicate the definition of murder . . . ;”⁷²⁹ and ones “that treat the same fact as two different reasons to impose death”.⁷³⁰

⁷²¹ *Id.* at 13.

⁷²² *Id.* at 15.

⁷²³ *Id.* at 14-16.

⁷²⁴ Cal. Comm’n on the Fair Admin. of Just., *supra* note 209, at 140.

⁷²⁵ James S. Liebman *et al.*, *A Broken System, Pt. II: Why There Is So Much Error in Capital Cases, & What Can Be Done About It*, <http://www2.law.columbia.edu/brokensystem2/report.pdf> (2002).

⁷²⁶ *Id.* at 362.

⁷²⁷ *Id.* at 420.

⁷²⁸ *Id.*, *e.g.*, atrocious, depraved, *etc.*.

⁷²⁹ *Id.*, *e.g.*, occurred in the course of a felony, *etc.*.

⁷³⁰ *Id.*, *e.g.*, a single aggravating circumstances is effectively double-counted: in the course of a robbery & for pecuniary gain.

The authors of this study advocate that the statute should require aggravating circumstances to *substantially* outweigh the mitigators. Accordingly, jurors would be required

to impose a lesser sentence unless they are convinced that the case is so aggravated, after taking mitigating factors into account, that only the death penalty will suffice to punish the offender and protect society. By limiting the death penalty to the strongest cases for that punishment, these policies are well calculated to avoid the high rates of unreliable error that our regression analyses associate with broad death-sentencing policies.⁷³¹

Due to the likelihood of inflated “capital-sentencing rates—and, as a result, rates of serious capital error”, these authors are critical of provisions from “California and Pennsylvania” that impose the death penalty whenever:

the aggravating circumstances outweigh the mitigating circumstances by any amount, however minor or miniscule. . . . **It is hard to imagine sentencing policies that are more likely than those of California, Pennsylvania and Arizona to inflate capital sentencing rates—and, as a result, rates of serious capital error—through imposition of death verdicts in marginal cases.**⁷³²

Another author divides aggravators into aggravating circumstances and aggravating motives, cautioning that these two categories overlap. He advises using the following:

- especially heinous, atrocious, or cruel killing (as in sadistic pleasure, extended pain and suffering, or torture)
- vulnerable victim due to age or mental condition
- deliberate killing of law enforcement or emergency medical personnel
- serial killer (three or more people on three or more unrelated occasions)
- mass murder (four or more victims in a single incident)
- contract killer or paid assassin, or other killing for pecuniary gain
- hate crimes (motivated by the victim’s race, religion, national origin, or sexual orientation)
- killing of an unresisting robbery victim or a potential witness
- knowing endangerment of several persons⁷³³

This author would remove the felony murder aggravator because it “ensnares a shocking number of innocents” and because it can operate in a racially biased way.⁷³⁴

⁷³¹ *Id.* at 399-400.

⁷³² *Id.* at 400 (bolded in original). This study excludes a numerical estimate of the impact of this suggested change.

⁷³³ Robert Blecker, *The Death of Punishment: Searching for Just. Among the Worst of the Worst* 279-80 (2013).

⁷³⁴ *Id.* at 46.

Aggravating Circumstances in Plea Bargaining.⁷³⁵ Not only are aggravating circumstances considered for sentencing, but they are also used by prosecutors in plea bargaining. Prosecutors may pose the possibility of the death penalty to induce an accused into a guilty plea, in return for which the prosecutor removes the death penalty from the case. The Constitution requires that a death charge should be reserved only for particularly deserving crimes, for which some would contend that plea bargaining is inappropriate. The use of the death penalty charge as a plea bargaining tool is unfair to the accused if it used coercively. The greater the number and more broadly worded statutory aggravating circumstances, the easier it is for a prosecutor to extract a plea. Some of our Commonwealth's aggravating circumstances are overbroad in that they are vulnerable to the complaint that almost any murder can be charged as a capital murder; this is particularly true of the felony murder⁷³⁶ and grave risk⁷³⁷ aggravators. At the same time, the statutory list does include all of the crimes that the death penalty could possibly apply to, and should not be broadened to include any crime that could not currently be charged as aggravated murder without a compelling reason.

Suggested Reforms to Pennsylvania's Aggravating Circumstances. The consensus of the subcommittee on policy is that the following aggravating circumstances identify particularly deserving murders and are therefore appropriate if the death penalty is retained: (1) murder of specified, public officials and employees; (2) paid murder; (3) murder of a hostage; (5) murder of a prosecution witness to prevent testimony; (8) torturous murder; (15) retaliatory murder of a nongovernmental informant; (16) murder of a child under age 12; (17) murder of a woman in the third trimester of pregnancy; and (18) murder of a person while violating Protection from Abuse Act.⁷³⁸

With respect to the remainder of the statutory aggravating circumstances, the subcommittee on policy recommends consideration of these possible amendments.

1. The aggravating circumstance of a murder during an (4) aircraft hijacking should be repealed because it insufficiently specifies the circumstances under which it would apply and is more appropriately within the purview of a federal prosecution.
2. The aggravating circumstance for (5) murder of a prosecution witness to prevent testimony should be clarified to apply to any person who murders a prosecution witness. It appears to be limited to the defendant who murders a prosecution witness to prevent the witness from testifying against the defendant himself. If that defendant induces a third party to murder a witness, this aggravating circumstance might not apply to the witness's murderer, although it does apply to the defendant against whom witness would have testified.
3. The aggravating circumstance for (6) murder in perpetration of a felony is equivalent to murder of the second degree, which carries a sentence of life imprisonment (without parole).⁷³⁹ At common law, felony murder could apply even though the offender had

⁷³⁵ A more general discussion of plea bargaining death cases appears *supra* pp. 68-72.

⁷³⁶ 42 Pa.C.S. § 9711(d)(6).

⁷³⁷ *Id.* § 9711(d)(7).

⁷³⁸ 42 Pa.C.S. § 9711(d).

⁷³⁹ 18 Pa.C.S. §§ 1102(b), 2502(b).

no specific intent to kill, under a legal fiction known as transferred intent: the intent to commit the felony supplied the intent to commit murder. More recently, the U.S. Supreme Court narrowed felony murder to cases where the defendant either took life, attempted to take life, or intended or contemplated that a life would be taken.⁷⁴⁰ It can also apply where the accused had a major participation in the felony and acted with reckless indifference to human life.⁷⁴¹ Under Pennsylvania law, this aggravating circumstance is restricted to persons who actually “commit the killing” and “may not be applied to an accomplice who does not”.⁷⁴² However, even with these limitations, this aggravating circumstance is overbroad and should be repealed. A large proportion, or even a majority, of murders fall under this category, and the fact that the murder is committed in the perpetration of a felony does not by itself create the level of blameworthiness that is particularly deserving of the death penalty.

4. The aggravating circumstance of (7) creating a grave risk of death to another in addition to the victim is overbroad; it can apply to any murder committed in the presence of a third person and does not require that the murderer intend any death other than the victim's. However, eliminating it entirely would leave out heinous crimes, such as where the murderer kills one person and simultaneously inflicts multiple gunshots on a second person who happens to survive, often because of heroic medical care. To limit this aggravating circumstance to genuinely deathworthy offenses, it should further require that the perpetrator caused serious injury to at least two bystanders or one or more persons other than the murder victim, either intentionally, knowingly, or with extreme or depraved indifference to the value of human life.
5. The aggravating circumstance for (8) tortuous murder is rarely seen in Pennsylvania but might occur from time to time. The term is vague, but it has been judicially interpreted: “Torture is the intentional infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel manifesting exceptional depravity. There must be an indication that the killer was not satisfied with the killing alone.”⁷⁴³ Given this interpretation, this aggravating circumstance should be retained.
6. The aggravating circumstances set forth in paragraphs (9) through (12)⁷⁴⁴ apply to felonies committed prior to or simultaneously with the offense at issue. Evidence of prior offenses is typically excluded at the guilt stage of a criminal trial, but may be considered at the sentencing stage and likely would be if there was evidence to present attributable to these aggravating circumstances. Juries and the public believe that prior serious offenses are important in considering the gravity of the offense, just as a clean criminal record is considered an important mitigating factor.⁷⁴⁵

⁷⁴⁰ *Enmund v. Fla.*, 458 U.S. 782, 801 (1982).

⁷⁴¹ *Tison v. Ariz.*, 481 U.S. 137, 158 (1987).

⁷⁴² *Commw. v. Lassiter*, 722 A.2d 657, 662 (Pa. 1998).

⁷⁴³ *Commw. v. Whitney*, 708 A.2d 471, 480 (Pa. 1998) (citations omitted).

⁷⁴⁴ 42 Pa.C.S. § 9711(d).

⁷⁴⁵ *Id.* § 9711(e)(1).

Paragraph (9)⁷⁴⁶ is an aggravating circumstance applicable if “[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person.” Other than the facts of the crime itself, the criminal history of a defendant is probably the most important factor in sentencing. This aggravating circumstance has been judicially construed to require at least two prior convictions within the ambit of that paragraph.⁷⁴⁷ Subsequently, paragraphs (11) and (12) were enacted to apply the aggravating circumstance in paragraph (9) if the single prior conviction is for murder or voluntary manslaughter.⁷⁴⁸ Thus, a previous conviction for murder would support an aggravating circumstance under paragraph (11) instead of (9). The phrase “felony convictions involving the use or threat of violence to the person” refers to the nature of the other offenses that form the basis for applying this aggravating circumstance; a conviction for “burglary has always been and continues to be viewed as a crime involving the use or threat of violence to the person” when graded “as a felony of the first degree . . . consistent with the theory that the unprivileged entries into buildings and structures where people are likely to be found is a clear threat to their safety.”⁷⁴⁹

The subcommittee on policy recommended that paragraph (9) be redrafted to clarify and narrow its application by requiring two or more felonies of the first class, with each predicate offense involving either serious injury to an individual other than the victim of the offense at issue or an imminent threat of death or serious injury to the other individual. This change is intended to ensure that the predicate offense is sufficiently grave to constitute an appropriate ground for seeking the death penalty, as well as to remove the possibility that this aggravating circumstance would be predicated on a verbal threat.

Paragraphs (10) and (11) apply to a defendant who is under or potentially serving under a prior life or death sentence or was convicted of another murder. The significant difference between them is that paragraph (10) applies to any offense that was punishable by life imprisonment, which could be an aggravated murder of the first degree or a third crime of violence,⁷⁵⁰ whereas paragraph (11) is limited to murder. An aggravating circumstance on a “third strike” offense, instead of murder, might be overbroad, in which case it should be restricted to murders committed before or simultaneously with the murder at issue. Since paragraph (11) states this, the subcommittee suggested that it be retained and paragraph (10) be repealed.

The subcommittee concluded that the aggravating circumstance in paragraph (12) for a prior voluntary manslaughter should be removed. Whether it involved a serious provocation resulting in a crime of passion or imperfect self-defense, voluntary manslaughter requires an intentional killing, which makes it arguably more appropriate than paragraph (9).⁷⁵¹ Some would favor retaining the aggravating circumstance for a prior voluntary manslaughter because it often represents a case where the prosecution unsuccessfully sought a murder conviction. Whenever a

⁷⁴⁶ *Id.* § 9711(d).

⁷⁴⁷ *Commw. v. Goins*, 495 A.2d 527, 534 (Pa. 1985).

⁷⁴⁸ *See Commw. v. Moran*, 636 A.2d 612, 613 n.1 (Pa. 1993).

⁷⁴⁹ *Commw. v. Rolan*, 549 A.2d 553, 559 (Pa. 1988). “What makes burglary more serious in nature is the added element of intent to commit a crime while inside the building or occupied structure.” *Commw. v. Thomas*, 561 A.2d 699, 709 (Pa. 1989).

⁷⁵⁰ 42 Pa.C.S. § 9714(a)(2).

⁷⁵¹ This could also be a negligent or accidental killing of somebody else instead of the intended victim. 18 Pa.C.S. § 2503.

prior conviction is proposed as an aggravating circumstance, the prosecution must bring the specific facts of the prior case before the jury, through witnesses, stipulation of counsel, or otherwise. This enables the jury to make an informed decision as to whether the prior offense is serious enough to support a death verdict. Characterizing the prior voluntary manslaughter conviction as if it were for murder would unfairly ignore the earlier verdict.

7. The aggravating circumstances dealing with drug offenses in paragraphs (13) and (14) should also be repealed. Other states do not have similar language, and the paragraphs do not seem to describe a murder so particularly deserving of the death penalty.
8. The aggravating circumstance for the retaliatory murder of an informant in paragraph (15) should be retained. Removing it may hamper murder investigations, as it is intended to be protective of both an ordinary citizen who comes forward with information and a regular, nongovernmental informant. The criminal justice system sometimes faces problematic witness resistance and intimidation. Paragraphs (5) and (15) are attempts to address this problem.

The subcommittee on policy considered several other, potential aggravating circumstances but rejected them under the general policy presumption that the number of aggravating circumstances should not be expanded absent a compelling reason.

Mitigation. To narrow the application of the death penalty to the particularly deserving offenders, the statute specifies mitigating circumstances that permit the jury to consider factors that may make the death penalty inappropriate. While “[a]ggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence”,⁷⁵² which is a lower burden of proof.

Appendix C shows statutory mitigating circumstances nationally.⁷⁵³ The current list of mitigating circumstances under Pennsylvania law reads as follows:

- (e) Mitigating circumstances.--Mitigating circumstances shall include the following:
- (1) The defendant has no significant history of prior criminal convictions.
 - (2) The defendant was under the influence of extreme mental or emotional disturbance.
 - (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
 - (4) The age of the defendant at the time of the crime.
 - (5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.
 - (6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.
 - (7) The defendant's participation in the homicidal act was relatively minor.

⁷⁵² 42 Pa.C.S. § 9711(c)(iii).

⁷⁵³ *Infra* pp. 227-28.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.⁷⁵⁴

Except as noted below, the subcommittee on policy recommends that the mitigating circumstances paragraphs (1) through (7) be retained. However, it also recommends that the words bracketed below in bold be repealed because they limit the consideration of mitigating evidence:

(2) The defendant was under the influence of [**extreme**] mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was [**substantially**] impaired.

* * *

(5) The defendant acted under [**extreme**] duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress) or acted under the [**substantial**] domination of another person.

These statutory modifiers do not unconstitutionally limit “the range of mitigating circumstances that the jury could consider through its use of the words *extreme* and *substantial*.”⁷⁵⁵ Nonetheless, whether they “serve to inform, rather than hinder, the jury regarding its discretion with respect to the specific mitigating circumstances”,⁷⁵⁶ not all jurisdictions use such qualifiers, which casts some doubt on whether they are necessary.⁷⁵⁷

Moral desert. The mitigating circumstance in paragraph (8), permits the capital case jury to consider “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense.”⁷⁵⁸ In connection with mitigation, a proposal from American Bar Association on the Pennsylvania death penalty would expand the jury’s discretion to refuse the death penalty. The subcommittee on policy recommends that the following recommendation be adopted and reflected in § 9711:

*Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.*⁷⁵⁹

The principle should also apply where the jury finds that the aggravating circumstances outweigh the mitigating ones. It is probably rare for a jury to hand down a death sentence when one or more jurors believes the sentence to be inappropriate; however, it could clear up potential juror confusion over the requirement on unanimity for a finding of an aggravating circumstance that does not apply to a finding of a mitigating circumstance.

⁷⁵⁴ 42 Pa.C.S. § 9711(e).

⁷⁵⁵ *Commw. v. Williams*, 615 A.2d 716, 723-24 (Pa. 1992), following *Blystone v. Pa.*, 494 U.S. 299, 308-09 (1990).

⁷⁵⁶ *Id.*

⁷⁵⁷ *E.g.*, N.C. Gen. Stat. § 15A-2000 (f)(2) (mental or emotional disturbance), (f)(5) (duress or domination), & (f)(6) (impaired capacity).

⁷⁵⁸ 42 Pa.C.S. § 9711(e).

⁷⁵⁹ Am. Bar Ass’n, *supra* note 17, at 218.

In prepared testimony, a professor proposed that a defendant should not be sentenced to death unless the jury “feels morally certain that he deserves to die”.⁷⁶⁰ This criterion should apply even when “a jury may have found that aggravating circumstances outweigh mitigating circumstances . . . notwithstanding no reasonable or residual doubts of . . . guilt”.⁷⁶¹ In his view, moral desert is independent of the factual issue of guilt of the offense and the weighing of aggravating and mitigating circumstances.

While some members of the subcommittee on policy found his proposal persuasive, the majority rejected it because it evades the careful analysis that the current law prescribes. Such a direct approach carries too great a risk that the jury will make a snap decision on the basis of emotion, especially because it is couched in terms of “moral certainty.”

Residual doubt. Doubt that may still exist, even when proof beyond a reasonable doubt is satisfied, is called “lingering” or “residual” doubt. For instance, there might be doubt about the perpetrator’s intent where it is difficult to conclude definitively. Strictly speaking, residual doubt is a matter of the quantum of proof rather than the defendant’s “character and record,” but it is similar to the mitigating circumstances in that it constitutes a reasonable basis for handing down a life sentence. Some research suggests that residual doubt is the single most common mitigating factor that leads juries to recommend a life sentence.⁷⁶²

Defense attorneys commonly argue residual doubt generally as a mitigating circumstance, and it is appropriate to do so in view of the following conclusion by U.S. Supreme Court:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.⁷⁶³

Despite this conclusion, U.S. Supreme Court “has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation”, while repeating “the simple truism” that states “could allow defendants to capitalize on ‘residual doubts,’” inuring to his benefit.⁷⁶⁴

Nevertheless, if the trier of fact is convinced that residual doubt of the defendant’s guilt applies, it should either be treated as a mitigating circumstance or bar a death sentence. Model Penal Code no longer has a section relating to capital punishment⁷⁶⁵ but formerly recommended that the defendant be sentenced “for a felony of the first degree” where the evidence sufficed to

⁷⁶⁰ Pa. H.R. Comm. on the Judiciary (June 11, 2015) (statement of Prof. Robert Blecker).

⁷⁶¹ *Id.*

⁷⁶² Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code’s Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 54-60 (2001). “More recent studies repeatedly confirm that jurors focus on lingering doubt during their deliberations, and that this is by far the most significant factor in their deliberations. . . . The primacy of lingering doubt in life-sentencing decisions is universal.” *Id.* at 56, 60.

⁷⁶³ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

⁷⁶⁴ *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988).

⁷⁶⁵ Am. Law Inst., Model Penal Code, <https://www.ali.org/publications/show/model-penal-code/> (2018).

sustain the verdict but “not foreclose all doubt respecting the defendant’s guilt.”⁷⁶⁶ Use of residual doubt in either of these ways reduces the possibility of imposing a death sentence on a factually innocent defendant. And it is consistent with the principle that “[g]iven the irrevocable nature of the penalty of death, a decision to impose the penalty requires a greater degree of reliability than is required for the imposition of other penalties.”⁷⁶⁷

Specific and Comparative Proportionality Review. As mentioned above, one of the bases on which the death penalty statute in *Gregg v. Georgia* was upheld was that it mandated state Supreme Court review of the death sentence to “determine whether it is imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and *whether the sentence is disproportionate compared to sentences imposed in similar cases.*”⁷⁶⁸ (Appellate review under the italicized standard is referred to here as “comparative proportionality review.”) These standards, along with prescribed aggravating and mitigating circumstances, assured the Court that the death penalty would not be applied in an impermissibly arbitrary and capricious manner.⁷⁶⁹

Under comparative proportionality review, the state Supreme Court “compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.”⁷⁷⁰ In other words, the state Supreme Court must review a death verdict that meets the statutory requirements for the death penalty to determine whether it should nevertheless be overturned because it is out of line with the results in prior death penalty cases. Using this standard, the Georgia Supreme Court invalidated death sentences in cases of rape and armed robbery when they were capital offenses on the ground that persons convicted of these crimes were almost always given lesser sentences.⁷⁷¹

In *Pulley v. Harris*, the U.S. Supreme Court held that comparative proportionality review is not necessary to make a death penalty scheme constitutional if other features were present “to promote the evenhanded, rational, and consistent imposition of death sentences.”⁷⁷² Although proportionality review is “an additional safeguard against arbitrarily imposed death sentences,”⁷⁷³ constitutional checks on arbitrariness could be met by other features, such as a definition narrowing capital murder to a sub-class, prompt and automatic review by the state Supreme Court, and defined aggravating and mitigating factors (with the aggravating ones proven beyond a reasonable doubt).⁷⁷⁴

⁷⁶⁶ *Id.*, Rep. of the Council to the Membership of the Am. Law Inst. on the Matter of the Death Penalty, Annex A (2009), available at https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

⁷⁶⁷ The Const. Project, *supra* note 693, at 90.

⁷⁶⁸ *Gregg v. Ga.*, 428 U.S. 153, 198 (1976), citing Ga. Stat. § 27-2537(c) (emphasis added.)

⁷⁶⁹ *Id.* at 198.

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.* at 205.

⁷⁷² *Pulley v. Harris*, 465 U.S. 37, 45, 49-51 (1984).

⁷⁷³ *Id.* at 50.

⁷⁷⁴ *Id.* at 49-53.

When Pennsylvania's death penalty statute was rewritten in 1978 (in response to *Gregg v. Georgia*), it included a provision mandating comparative proportionality review. The provision directed our Supreme Court to vacate a sentence of death if "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant."⁷⁷⁵ This provision was repealed in 1997⁷⁷⁶ because it had never been used to overturn a death sentence and its existence created a concern related to a then-pending challenge to a judicial procedure applying that provision.⁷⁷⁷ Those favoring repeal perceived this challenge as a threat to the death penalty itself; however, the judicial review found the sentence neither "excessive or disproportionate to the penalty imposed in similar cases" and the judiciary in compliance with the statutory provision.⁷⁷⁸

When the Commonwealth's statute required a judicial, comparative proportionality review, Pennsylvania's Supreme Court independently evaluated "all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted under . . . 42 Pa.C.S.A. § 9711."⁷⁷⁹ To be able to do this, each "President Judge of each county" was ordered

to supply to the Administrative Office of Pennsylvania Courts (the AOPC) information pertaining to each such conviction and imposed a continuing obligation on the President Judges to update the AOPC with data pertaining to future cases. This information includes the facts and circumstances of the crimes, the aggravating and mitigating circumstances arguably presented by the evidence, the gender and race of the defendant and the victim, and other information pertaining to the conduct and prosecution of the case. The data will be compiled and monitored by the AOPC to insure that the body of 'similar cases' is complete and to expedite our proportionality review.⁷⁸⁰

⁷⁷⁵ Former 42 Pa.C.S. § 9711(h)(3)(iii).

⁷⁷⁶ Act of June 25, 1997 (P.L.293, No.28), § 1.

⁷⁷⁷ *Commw. v. Gribble*, 703 A.2d 426, 440 (Pa. 1997).

⁷⁷⁸ *Id.* at 441.

⁷⁷⁹ *Commw. v. Frey*, 475 A.2d 700, 707 (Pa. 1984).

⁷⁸⁰ *Id.* at 707-08.

The form that was developed to collect the data is set forth below:⁷⁸¹

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
REVIEW FORM
MURDER OF THE FIRST DEGREE
IN THE COURT OF COMMON PLEAS OF ____ COUNTY, PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA : CASE NO. ____:
vs. : ____

1. Defendant's: (a) date of birth: _____
(b) race: _____
(c) sex: _____

2. Victim's: (a) date of birth: _____
(b) race: _____
(c) sex: _____

3. Guilt determined by: jury ()
trial court ()
guilty plea ()

4. Was the death penalty sought?
Yes ()
No ()

5. If No. 4 is answered yes,
(a) sentencing disposition: death penalty ()
life imprisonment ()
(b) sentence determined by: jury ()
trial court ()
(c) List all aggravating circumstances, see 42 Pa.C.S. § 9711(d), presented at the sentencing hearing by the Commonwealth and briefly set forth the facts and evidence relevant to each such circumstance: _____
(d) List all mitigating circumstances, see 42 Pa.C.S. § 9711(e), presented at the sentencing hearing by the defendant and briefly set forth the facts and evidence relevant to each such circumstance: _

6. List all other offenses which were tried at the same trial and indicate which offenses stemmed from or related to the charge of murder of the first degree, and whether defendant was convicted or acquitted on these other offenses: _____

⁷⁸¹ *Id.* at 711. Challenges “arguing that the AOPC’s proportionality database is flawed” were “consistently rejected” by rulings “particularly noting that the data compiled by the AOPC is neither defective nor flawed.” *Commw. v. Spatz*, 896 A.2d 1191, 1249 (Pa. 2006).

7. If there were any co-defendants involved in this case, complete the following:

(a) Name: _____
Information/Indictment No(s).: _____
Offenses charged:
Disposition:
Status of case:

(b) Name: _____
Information/Indictment No(s).: _____
Offenses charged:
Disposition:
Status of case:

(c) Name: _____
Information/Indictment No(s).: _____
Offenses charged:
Disposition:
Status of case:

8. Status of case, including date of most recent action: _____
(E.g., verdict returned on _____ but formal sentencing delayed pending disposition of post-verdict motions; notice of appeal filed on _____; etc.)

9. If any opinions have been written in this case, attach to this Review Form. Otherwise, please forward when available.

10. If a transcript of the sentencing hearing is available in this case, attach a certified copy to the Review Form; if not immediately available, transmit a certified copy to the AOPC upon receipt.

END OF FORM

While the ruling of *Pulley v. Harris* rejected comparative proportionality review as a constitutional requirement, there remains the question of whether it should be adopted as a matter of policy. Proportionality review is used in sixteen states and was used in other states before they abolished the death penalty.⁷⁸²

Evaluation of Proportionality Review. Proponents of proportionality review, such as The Constitution Project, argue that it can achieve three goals: “(1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process”.⁷⁸³

Professor James Liebman supports the use of comparative review as an important tool to ensure that the death penalty will apply to “core capital murders” and will exclude “outlier” cases.⁷⁸⁴ This will help promote consistency while reducing the possibility of error.⁷⁸⁵ Comparative review excludes weak cases and cases where the death verdict may be significantly affected by political pressure on prosecutors and trial judges.⁷⁸⁶

Professor Barry Latzer, however, regards comparative proportionality review as conceptually unsound because if a case deserves the death penalty, it does so regardless of whether it was applied in a similar case. Regarding two specific cases he comments:

Most . . . prosecutors and jurors, and I daresay most people who are not absolutely opposed to the death penalty, would agree that a man who committed more than one murder in separate incidents is prima facie deathworthy. The fact that other serial killers, e.g. [Defendant A], the multiple rape-murderer may have been more deathworthy is of no moment: [Defendant B] clearly meets the threshold requirement for a death sentence.⁷⁸⁷

A different version of proportionality review, called specific proportionality review, is proposed by Professor Evan J. Mandery. The test is whether contemporary standards of decency permit or forbid the use of the death penalty in the case reviewed.⁷⁸⁸ The standard of decency can be objectively determined by examining dispositions where the same factor was present that forms the ground for the claim for relief.

⁷⁸² Ala. Code § 13A-5-53(b)(3), Ga. Code Ann. § 17-10-35(c)(3), Ky. Rev. Stat. Ann. § 532.075(3)(c), La. Code Crim. Proc. Ann. art. 905.9.1 § (1)(c), Miss. Code Ann. § 99-19-105(3)(c), Mo. Ann. Stat. § 565.035(3)(3), Mont. Code Ann. § 46-18-310(1)(c), Neb. Rev. Stat. § 29-2521.03, N.H. Rev. Stat. Ann. § 630:5(XI)(c), N.C. Gen. Stat. § 15A-2000(d)(2), Ohio Rev. Code Ann. § 2929.05(A), S.C. Code Ann. § 16-3-25(C)(3), S.D. Codified Laws § 23A-27A-12(3), Tenn. Code Ann. § 39-13-206(c)(1)(D), Wash. Rev. Code Ann. § 10.95.130(2)(b), & *Sinclair v. Fla.*, 657 So. 2d 1138, 1142 (Fla. 1995).

⁷⁸³ The Const. Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 27 (2001), available at <https://constitutionproject.org/wp-content/uploads/2012/08/MandatoryJustice.pdf>.

⁷⁸⁴ Liebman *supra* note 725, at 407.

⁷⁸⁵ *Id.*

⁷⁸⁶ *Id.*

⁷⁸⁷ Barry Latzer, *The Failure of Comparative Proportionality Rev. of Capital Cases (w/Lessons from N.J.)*, 64 Alb. L. Rev. 1161, 1232 (2001). Latzer thinks that comparative proportionality review creates “an unrealistic standard” because “[p]erfectly evenhanded enforcement of the death penalty is unattainable.” *Id.* at 1243-44.

⁷⁸⁸ Evan J. Mandery, *In Defense of Specific Proportionality Rev.*, 65 Alb. L. Rev. 883, 887-88 (2002).

Unlike comparative review, . . . specific review does not concern itself with how defendants sentenced to die are treated vis à vis similar defendants given a life sentence. Rather, the question is similar to that asked under inherent review: whether death is ever appropriate for this type of criminal. But whereas, in determining appropriateness, inherent review inquires only into the nature of the offense committed, specific review considers other factors. Under inherent review, a court would ask only whether death were an appropriate punishment for murderers. Under specific review, a court would go on to ask, for example, whether death is an appropriate punishment for convicted murderers who did not pull the trigger, or for murderers who operated under a significant level of mental impairment.⁷⁸⁹

Opponents of proportionality review might suspect that abolitionists advance it primarily as another hurdle for a death penalty case to clear.⁷⁹⁰ If the death penalty statute is constitutional, it would seem to provide both a reasonably consistent set of criteria for separating death eligible murderers from others and, given the opportunity to present mitigating evidence of the defendant's character and record along with the circumstances of the offense, an opportunity for the jury to examine each crime individually. Thus proportionality review, whether specific or comparative, might strike the death penalty supporter as less of an omission. A possibly genuine problem may be that the aggravators are so broad and so numerous that most murders are arguably death eligible, which thwarts consistency in sentencing.⁷⁹¹ Repeal of overly broad aggravating circumstances could address that concern, but so can comparative proportionality review. "Courts could mitigate the influence of race, for instance, with the application of an objective, neutral standard. Likewise, a state supreme court could eliminate the influence of geography, at least within a state, by applying a consistent statewide standard."⁷⁹²

One key argument and justification often overlooked by commenters on both sides of the issue is the usefulness of comparative proportionality review as a safeguard to prevent racial, ethnic or socio-economic unfairness. For instance, it may overturn a verdict where an African-American was given a death sentence, while a similarly-situated White defendant was given life imprisonment. In such cases, one may infer that conscious or unconscious racism played a part in the disparity. Proportionality review also encourages the collection of useful data on the circumstances of individual murder cases. On the other hand, proportionality review calls upon the judiciary to invade a province that is otherwise assigned to the jury. For all other crimes, the criminal justice system tolerates differences in outcomes arising from differences among juries, but it could be argued that in this issue, as in others, death should be treated differently.

⁷⁸⁹ *Id.* at 894-95.

⁷⁹⁰ Professor Berry forthrightly recognizes the possibility that "adopting meaningful comparative proportionality review could ultimately lead to the abolition of the death penalty." William W. Berry III, *Practicing Proportionality*, 64 Fla. L. Rev. 687, 718 (2012).

⁷⁹¹ *Id.* at 702, 705, 718.

⁷⁹² *Id.* at 718.

Impact on and Services for Family Members

The question that serves as the basis of the study of impact on and services for family members in the administration of the death penalty in our Commonwealth is:

The impact of the death penalty on family members and loved ones of murder victims and the availability and cost of services currently being provided in Pennsylvania for family members and loved ones of murder victims and whether these services are sufficient to meet the needs of surviving families;⁷⁹³

Services

Services for family members and loved ones of murder victims in this Commonwealth are provided on a county-by-county basis. Predominantly, those services are provided within the county's Office of District Attorney.⁷⁹⁴ Some counties have one or more private, not-for-profit victims' support offices that operate in conjunction with or in lieu of a victim's witness advocate working for a district attorney. These services are paid for from a mix of public and private funding.

There are a broad range of services available to family members and loved ones impacted by homicides,⁷⁹⁵ including crisis counseling, intervention and group support, as well as referrals to on-going therapy. Advocates will also help them to understand the legal process and work with them to navigate each aspect of the criminal and juvenile justice systems. This type of assistance goes beyond explaining the system, in that they accompany victims to judicial proceedings and help them register for various notifications. The advocate will also help victims write their impact statements to clearly and appropriately state how the crime changed their and their family's life financially, physically and emotionally. Victims Compensation Assistance Program⁷⁹⁶ will provide financial help to deal with expenses, such as funeral costs, loss of earnings and support, and medical and counseling expenses among other eligible expenses.

⁷⁹³ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* pp. 219-20.

⁷⁹⁴ Prosecutors have statutory responsibilities to some victims. Act of Nov. 24, 1998 (P.L.882, No.111), § 213; 18 P.S. § 11.213. "A family member of a homicide victim" is a victim. *Id.* § 103; 18 P.S. § 11.103.

⁷⁹⁵ Pa. Office of Victim Servs., Pa. Comm'n on Crime & Delinquency, http://pcv.pccd.pa.gov/available-services/Pages/Interactive-Map.aspx#.VBB2X_ldVyx (2018); Pa. Office of Victim Advocate, Locate a Victim Serv. Agency, <http://www.o.va.pa.gov/Services/Resources/LocateaVictimServiceAgency/Pages/default.aspx> (2018). Victims of crime have statutory rights. Act of Nov. 24, 1998 (P.L.882, No.111), § 201; 18 P.S. § 11.201.

⁷⁹⁶ Pa. Office of Victim Servs., Victims Compensation, <http://pcv.pccd.pa.gov/available-services/Pages/Victims-Compensation.aspx> (2018). Act of Nov. 24, 1998 (P.L.882, No.111), §§ 701-710; 18 P.S. §§ 11.701-11.710.

The services are generally but not precisely uniformly available throughout the counties; there are reporting requirements for services receiving grants. In some cases, because of the geographical size of a county, there may be a challenge to obtain the services. In other words, it may be difficult for a family member or loved one of a homicide victim to travel to get the service. There also may be a delay in providing the services due to insufficient staffing. In some cases, where size of the county would impact availability or the infrequency of homicides means that counties do not maintain certain services on an ongoing basis, counties share or pool services to improve availability.

Staff from Joint State Government Commission spoke with staff from various advocacy offices to determine the sufficiency of the services provided. There was a wide range of responses. One third of the providers said that the services were insufficient. Some of those expounded that their services were meant to help family members navigate the criminal justice system. Others referenced family members' ongoing counseling needs as being beyond their office's scope of service. One advocate reported that her county had no support group specifically for families of murder victims. Another said that because of funding cuts over the last 15 years, there was often a delay of up to 24 hours in responding to victims' families. Funding cuts were mentioned several times as the reason that services were insufficient.⁷⁹⁷

Conversely, almost half of the advocates felt that the services were sufficient, although this group of responders often acknowledged that the loss of a family member or loved one through homicide left a hole that could never be fully filled. One particular advocate stated that the services were sufficient and if there was something else that was needed, she would take care of it.

Cost of services

The cost of services that are provided to family members and loved ones of murder victims can only be provided as part of the larger picture of state and federal funding for victims within this Commonwealth.⁷⁹⁸ In other words, at the service provider level, the grants are not typically broken down by type of victim⁷⁹⁹ so the funding listed below covers victims of all crimes that would be provided services through these offices.⁸⁰⁰ Family members and loved ones of murder victims receive support services as part of a larger group of victims of violent crimes within this Commonwealth. "On average, the Victims Compensation Assistance Program receives over 8,600 new claims and pays an average \$13 million per year on behalf of crime victims"⁸⁰¹

⁷⁹⁷ Since then, some of the funding might have rebounded a bit.

⁷⁹⁸ Appdx. J, *infra* pp. 257-59.

⁷⁹⁹ Pa. Comm'n on Crime & Delinquency recently awarded requested grants totaling \$2,346,175 for four recipients in Phila. to serve survivors of homicide victims. Telephone interview w/Valerie Barbin McMahon, Dir., Office of Victim Servs. (Apr. 27, 2018).

⁸⁰⁰ Beginning in 2016, VOCA recipients have been required to keep confidential records on each crime victim that receives services to report as Victim Assistance Program Performance Measures. Pt. of this data includes the total no. of survivors of homicide victims served during the reporting period, but this data is too new to develop information on it for this report.

⁸⁰¹ Pa. Comm'n on Crime & Delinquency, Helping Crime Victims, [http://www.pccd.pa.gov/Victim-Services/Pages/Victims-Compensation-Assistance-Program-\(VCAP\).aspx](http://www.pccd.pa.gov/Victim-Services/Pages/Victims-Compensation-Assistance-Program-(VCAP).aspx) (2018).

With some exceptions, the total amount of an award in this program is limited to \$35,000.⁸⁰² Within this limitation, the maximum aggregate award for “loss of earnings or support” for a direct victim of homicide is limited to \$20,000.⁸⁰³ Since awards from this program are a last resort, they would be reduced by the amount received from other sources, such as restitution, insurance, other public funds, pension benefits and other legal settlements.⁸⁰⁴ When “two or more individuals claim” an award for the death of a direct victim, the award is apportioned.⁸⁰⁵ These awards are administered by Office of Victims’ Services in Pennsylvania Commission on Crime and Delinquency.⁸⁰⁶

Victims of Crime Act of 1984 (VOCA). This is a federal grant program through U.S. Department of Justice that supports direct assistance services to victims of all types of crime.

This includes a broad array of services for victims of violence ranging from crisis intervention, shelter, counseling, and criminal justice advocacy. The Crime Victims Fund is comprised of fines, forfeitures, and penalty assessments on offenders of federally prosecuted cases. County allocations are determined by formula using the county’s population (75%) and target crimes (25%). Eligible activities are those direct services which respond to the emotional and physical needs of crime victims; assist victims of crime in stabilizing their lives after a victimization; assist victims in understanding and supporting them through the criminal and juvenile justice process; or provide victims of crime with a safe and secure environment. Ineligible activities include, but are not limited to, procedural services, prosecution and law enforcement activities, fundraising, crime prevention, and lobbying and administrative advocacy. PCCD has made a policy decision to limit the use of VOCA for procedural services. Funds in 2014/15 were awarded to 103 community-based agencies and 15 system-based agencies in the 67 counties.⁸⁰⁷

⁸⁰² Act of Nov. 24, 1998 (P.L.882, No.111), § 707(b); 18 P.S. § 11.707(b). The limitation of \$35,000 dates from the statute’s original enactment in 1998. Exceptions were added in 2002 to cover up to either \$5,000 or \$10,000 in counseling, up to \$1,000 for a forensic rape examination and up to \$500 to clean the crime scene of a private residence. Act of June 28, 2002 (P.L.496, No.85), § 4. The schedule of reimbursement rates and compensation limits appears in 37 Pa. Code §§ 411.41-411.44.

⁸⁰³ Act of Nov. 24, 1998 (P.L.882, No.111), § 707(b)(2); 18 P.S. § 11.707(b)(2).

⁸⁰⁴ *Id.* § 707(e); 18 P.S. § 11.707(e).

⁸⁰⁵ *Id.* § 707(d); 18 P.S. § 11.707(d).

⁸⁰⁶ *Id.* §§ 311(a), 312(5); 18 P.S. §§ 11.311(a), 11.312(5).

⁸⁰⁷ Pa. Comm’n on Crime & Delinquency, Rights, Servs., Technology & Training, <http://www.pccd.pa.gov/Victim-Services/Pages/Victim-Services--Rights,-Services,-Technology-and-Training.aspx> (2018).

VOCA Victim Compensation Formula Awards to Pennsylvania Commission on Crime and Delinquency from Office for Victims of Crime⁸⁰⁸ for VOCA Victim Compensation⁸⁰⁹	
Fiscal Year	Amount
2017	\$4,152,000
2016	\$4,480,000
2015	\$4,475,000
2014	\$2,353,000
2013	\$3,564,000
2012	\$4,386,000
2011	\$4,089,000
2010	\$4,448,000
2009	\$5,885,000 ⁸¹⁰
2008	\$6,752,000
2007	\$5,083,000
2006	\$4,491,000
2005	\$3,817,000
2004	\$2,071,000
2003	\$3,863,000

“No more than 5 percent of each year's VOCA compensation formula grant may be used for administration and training; the rest must be used for awards of compensation to crime victims.”⁸¹¹

⁸⁰⁸ “[A] a component of the Office of Justice Programs, U.S. Department of Justice.” Office for Victims of Crime, U.S. Dep’t of Just., Grants & Funding, https://www.ovc.gov/grants/grant_award_search.html (last visited Mar. 29, 2018). “From the Fund deposits available for victim compensation grants, the Director shall make an annual grant from the Fund to an eligible crime victim compensation program of 60 percent of the amounts awarded during the preceding fiscal year (two years prior to the grant year).” *Id.*, <https://ojp.gov/ovc/grants/cvfa2017.html> (last visited Mar. 29, 2018).

⁸⁰⁹ “Crime victim compensation is a direct reimbursement to or on behalf of a crime victim for the following statutorily identified crime-related expenses:” med. costs, mental health counseling, lost wages or support, *etc.* “Although each state administers its own program independently, most programs have similar eligibility requirements and offer comparable types of benefits.” *Id.*, Crime Victims Fund, <https://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html#VictimAssist> (last visited Apr. 6, 2018).

⁸¹⁰ There was an additional grant from the recovery act for this fiscal year in the amount of \$1,536,233.

⁸¹¹ *Id.*, Crime Victims Fund, <https://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html> (last visited Mar. 29, 2018).

VOCA Victim Assistance Formula awards to Pennsylvania Commission on Crime and Delinquency from Office for Victims of Crime⁸¹² for VOCA Victim Assistance⁸¹³	
Fiscal Year	Amount
2017	\$71,649,740
2016	\$86,776,184
2015	\$77,028,140
2014	\$17,604,722
2013	\$16,479,712
2012	\$14,730,846
2011	\$16,779,293
2010	\$16,086,343
2009	\$14,088,213 ⁸¹⁴
2008	\$12,048,000
2007	\$14,666,000
2006	\$15,858,000
2005	\$14,987,000
2004	\$14,364,000
2003	\$14,239,000

“VOCA allows state grantees to use no more than 5 percent of each year's grant for training and administering the VOCA victim assistance grant at the state grantee level with the remaining portion being used exclusively for direct service providers.”⁸¹⁵

⁸¹² “[A] a component of the Office of Justice Programs, U.S. Department of Justice.” Office for Victims of Crime, U.S. Dep’t of Just., Grants & Funding, https://www.ovc.gov/grants/grant_award_search.html (last visited Mar. 29, 2018). “From the Fund deposits available for victim assistance grants, each state grantee receives a base amount of \$500,000, After the victim compensation allocations are determined, the remaining Fund deposits are allocated to victim assistance grants based upon the state's population in relation to all other states, as determined by current census data.” *Id.*, <https://ojp.gov/ovc/grants/cvfa2017.html> (last visited Apr. 6, 2018).

⁸¹³ “Victim assistance includes, but is not limited to, the following services:” crisis intervention, emergency shelter, emergency transp., counseling, crim. justice advocacy, *etc.*. “In each state and territory, VOCA assistance funds are awarded to local community-based organizations and public agencies that provide services directly to victims of crime.” *Id.*, Crime Victims Fund, <https://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html#VictimAssist> (last visited Apr. 6, 2018).

⁸¹⁴ There was an additional grant from the recovery act for this fiscal year in the amount of \$1,323,000.

⁸¹⁵ *Id.*

Rights and Services Act (RASA). This is state funding that supports victim notification, accompaniment, assistance with victim impact statements and crime victims compensation assistance.

RASA provides financial support, training and technical assistance to county-based victim service agencies to promote the rights and services under Pennsylvania's Crime Victims Act. This funding source provides the primary financial support for the victim/witness offices within the District Attorneys' Offices. The source of funds for RASA is the Victim/Witness Fund which is comprised of a \$25 penalty assessment on convicted/diverted offenders. County allocations are determined by a formula using the county's population (75%) and target crimes (25%). Eligible activities support the full range of rights, services, and responsibilities within the criminal justice system outlined in the Crime Victims Act. (e.g. notification, accompaniment, assistance with victim impact statements, and crime victims compensation assistance.) Examples of ineligible activities include, but are not limited to, counseling/therapy, community/prevention education, prosecution activities, and restitution collection. Funds in 2005 were awarded to 56 system-based agencies, 3 county juvenile probation offices and 2 community-based agencies in the 67 counties.⁸¹⁶

Victims of Juvenile Offenders (VOJO). This supports the same activities as RASA but is directed to victims of juvenile offenders.

VOJO provides financial support, training, and technical assistance to county-based victim service agencies to promote the rights and services to victims in the juvenile justice system. VOJO is funded by an Annual State Appropriation. County allocations are determined by a formula using the county's juvenile population (75%) and juvenile dispositions at (25%). Eligible activities support the the full range of rights, services, and responsibilities within the juvenile justice system outlined in the Crime Victims Act. (e.g. notification, accompaniment, assistance with victim impact statements and crime victims compensation assistance.) Examples of ineligible activities include, but are not limited to, counseling/therapy, community/prevention education, prosecution activities, victim/offender mediation programs, and restitution collection. Funds in 2014/15 were awarded to 42 system-based agencies, 11 county juvenile probation offices and 16 community-based agencies in 65 counties.⁸¹⁷

Staff from Joint State Government Commission questioned staff from various offices of victims' witness advocates to get their opinion about the cost of these services, specifically how they were reflected in homicide cases rather than other crimes with which the office dealt. As a follow up to the original questions, they were then asked if the costs were "more, less or about the same as those services that you provide to victims of other crimes." The responses could be categorized into two distinct approaches of calculating or envisioning service cost.

⁸¹⁶ Pa. Comm'n on Crime & Delinquency, *supra* note 807.

⁸¹⁷ *Id.*

The first type of responses indicated that costs for services provided for family members and loved ones of murder victims were greater than the services that the office provided for other types of crime. The responses frequently indicated that there would naturally be more costs because there was more of everything.⁸¹⁸ One advocate responded:

[W]e are often engaged with family members of homicides much longer than other crimes. It is probably fair to say that other crimes, such as robbery – they are short term. Then the next level would be sexual assault and victims of other types of crime who are engaged in the system such as juvenile justice system. But with the homicides, the investigation takes longer and the court case takes longer (both to prepare and when they are actually in a trial). The death penalty is even longer because they will have hearings around the death penalty right after the sentencing and it will be much more intense. It is long days and a lot of staff assigned to it. I would guess those cases can often cost 3 to 4 times as much staff time as other types of crime.

In the second category of responses, the advocates indicated that they believed that the services cost the same amount as they would in response to the victim of a different sort of crime, because they viewed the fixed operating costs of the office and the fixed costs of the salaries to be the same, regardless of the service provided. In one office, an advocate stated “we provide those services to every victim if it is something that they need and it is at no cost to them. It is sort of built into our costs. So – the cost is the same.” Many providers stated that attributing cost by type of crime was difficult, as the following quote demonstrates: “That’s hard to say because some people want nothing to do with the court system—but other people are very needy—I think they even each other out cost-wise. Somebody who had their house broken into could be more needy than a homicide victim. I can’t break it out cost-wise.” And from an advocate in a different county, “For my office, it doesn’t cost any more than services that you provide to anybody. You could look at it that way, but cost is a hard thing to measure because I am grant funded. I can only give my staff comp time—I can’t pay them more if they stay extra. I don’t spend any more money because I don’t have it to spend.”

Mental Retardation

The question that serves as the basis of the study of intellectual disability in the administration of the death penalty in our Commonwealth is:

Whether, in light of the Supreme Court ruling in *Atkins v. Virginia*, there are adequate procedural protections in place to assure that people with mental retardation are not in fact being sentenced to death and executed;⁸¹⁹

⁸¹⁸ Time spent in one-on-one and family contact, court hearings, accompaniments, appeals, *etc.*.

⁸¹⁹ Pa. S. Res. No. 6 (Sess. of 2011); appdx A, *infra* p. 220.

In 2002, U.S. Supreme Court ruled that death is an unconstitutionally excessive punishment for “a mentally retarded offender.”⁸²⁰ As it did for insanity, “the task of developing appropriate ways to enforce this constitutional restriction” was left to the states.⁸²¹ Subsequently, Pennsylvania’s Supreme Court specified that intellectual disability is to be established under either a classification system from American Psychiatric Association or American Association of Mental Retardation,⁸²² both of which shared “three core components: (1) substantial intellectual impairment; (2) impact of that impairment on the everyday life of the individual (i.e., substantial deficits in adaptive functioning); and (3) appearance of the disability prior to age 18.”⁸²³ At the time, American Psychiatric Association used an intelligence quotient (IQ) score “of approximately 70 or below” to signify the “subaverage intellectual functioning” for this diagnosis.⁸²⁴ American Association of Mental Retardation took into account a “standard error of measurement . . . estimated to be three to five points”.⁸²⁵ Two standard deviations below the mean IQ scores would place this in the range of 65 to 75 when applying a standard error of measurement.⁸²⁶ Because “the interaction between limited intellectual functioning and deficiencies in adaptive skills . . . establish mental retardation”, a “cutoff” for the IQ score was not adopted.⁸²⁷ The preponderant evidence from this early ruling in Pennsylvania, placed the appellee’s IQ “between 70 and 75, or below, placing him in the mild mental retardation range.”⁸²⁸

To reply to the resolution’s factual inquiry on this subject, the subcommittee on procedure⁸²⁹ sought readily available data, which was the IQ scores supplied by Department of Corrections for the inmates on death row and those serving life imprisonment for first-degree murder. Notwithstanding a recognition of the standard error of measurement, some states statutorily prescribed a score for IQ and the Commonwealth would argue that the intellectual disability range is below 70.⁸³⁰ For these reasons, data obtained from Department of Corrections was initially analyzed using a score of 70 or below as an imperfect proxy for intellectual disability. Since IQ is relatively static, whether the scores closely replicated scores before age 18 are unknown but presumed. Information on substantially deficient adaptive functioning also remains unknown, which is why using a score for IQ made this an imperfect effort. When an IQ score of 70 or below was used to classify an inmate for possible intellectual disability, “4.1% of the death row inmates” compared to 8.7% of those serving life imprisonment for first-degree murder⁸³¹ fell within that classification.

⁸²⁰ *Atkins v. Va.*, 326 U.S. 304, 321 (2002).

⁸²¹ *Id.* at 317 n.22.

⁸²² This is now Am. Ass’n on Intellectual & Dev. Disabilities. Aaidd, About Us, https://aaidd.org/about-aaidd#.Wx_VCu4vyUk (2018).

⁸²³ *Commw. v. Miller*, 888 A.2d 624, 627, 631 (Pa. 2005).

⁸²⁴ *Id.* at 629.

⁸²⁵ *Id.* at 630.

⁸²⁶ *Id.*

⁸²⁷ *Id.* at 631.

⁸²⁸ *Id.* at 632.

⁸²⁹ The data was collected and analyzed for the subcomm. by Dr. Gary Zajac & Laura Winger from The Pa. State U. Just. Cen. for Research. Appdx. H, *infra* pp. 243-53.

⁸³⁰ *E.g., Commw. v. Sanchez*, 36 A.3d 24, 51 (Pa. 2011).

⁸³¹ Appdx. H, *infra* p. 245.

Although it is partially reassuring that the percentage of potentially intellectually disabled inmates⁸³² was lower for condemnees than for those imprisoned for life, judicial rulings after this analysis was done subsequently clarified that a score of 70 or below for this possible classification is too low. Nevertheless, the fact that as many as 4% of the death row inmates should not have been sentenced to death is concerning if they were in fact intellectually disabled retarded with the application of the other two components of the diagnosis.⁸³³

Approximately six months after this analysis, Florida's rigid rule that foreclosed "further exploration of intellectual disability" unless one could "show an IQ test score of 70 or below" was ruled unconstitutional by U.S. Supreme Court.⁸³⁴ This is because "clinical definitions . . . take into account that IQ scores represent a range, not a fixed number, . . . [a]nd those clinical definitions have long included the" standard error of measurement.⁸³⁵ A little over a year after that ruling by U.S. Supreme Court, Pennsylvania's Supreme Court reiterated that its earlier ruling in 2005 "allows an IQ score of 75 or below" and declined "the Commonwealth's request to prohibit individuals with a prior IQ score of 76 or above from asserting intellectual disability."⁸³⁶ Two days after Pennsylvania Supreme Court reiterated its support of the higher score, U.S. Supreme Court accounted for the same margin of error by characterizing a "reported IQ test result of 75" as "squarely in the range of potential intellectual disability" saying that the conclusion that subaverage intelligence could not be demonstrated by a "reported score IQ of 75 . . . reflected an unreasonable determination of the facts."⁸³⁷

With further clarification from these judicial rulings, the same data was re-analyzed by The Pennsylvania State University researchers using the IQ score of 75 instead of 70.⁸³⁸ The higher score more than tripled the percentage of death row inmates from 4.1% to 14% and almost doubled the percentage for those serving life imprisonment for murder of the first degree from 8.7% to 15%.⁸³⁹ The troubling revelation from this inquiry is that since as many as 14% of the Commonwealth's condemnees could be constitutionally ineligible for this sentence,⁸⁴⁰ the subcommittee on procedure could not conclude that procedural protections are adequate to ensure that people with intellectual disability are not being nor have been sentenced to death. As a comparison with the general population, it appears that an IQ score of 75 or below represents the bottom 5% of the population⁸⁴¹ but is approximately triple that percentage for inmates on death row or serving life imprisonment for murder of the first degree.

⁸³² The scores can only indicate potential mental retardation because the other two diagnostic criteria of early onset & deficient, adaptive functioning were neither available nor obtained.

⁸³³ Adaptive deficits and onset prior to age 18.

⁸³⁴ *Hall v. Fla.*, 134 S.Ct. 1986, 1990, 1992 (2014).

⁸³⁵ *Id.* at 1999.

⁸³⁶ *Commw. v. Bracey*, 117 A.3d 270, 283, 287 (Pa. 2015), *abrogated on other grounds*, *Moore v. Tex.*, 137 S.Ct. 1039 (2016). The other grounds are factors placing "undue emphasis on adaptive strengths", which are superseded standards. *Moore*, 137 S.Ct. at 1051.n.9-1053. These superseded and now disallowed standards had been discretionary in Pa..

⁸³⁷ *Brumfield v. Cain*, 135 S.Ct. 2269, 2278 (U.S. 2015).

⁸³⁸ Appdx. H, *infra* pp. 245-46.

⁸³⁹ *Id.* at 246.

⁸⁴⁰ The most recent data obtained places almost 13% of the death row prisoners and 12% inmates serving life imprisonment for murder of the first degree at an IQ score of 75 or below. Bucklen, *supra* note 11 (Apr. 26, 2018).

⁸⁴¹ Edublox Online Tutor, IQ Test Scores: The Basics of IQ Score Interpretation, <https://www.edubloxtutor.com/iq-test-scores/> (last visited Apr. 15, 2018).

The earliest cases involving this issue were brought on behalf of prisoners already sentenced to death, who raised the issue by filing petitions under the Post Conviction Relief Act.⁸⁴² As usual, the hearings held in these matters were conducted before a judge sitting alone. In *Commonwealth v. Bracey*, Pennsylvania Supreme Court held that an appellant is not entitled to have a jury decide a claim of intellectual disability “presented in collateral proceedings.”⁸⁴³ To the surprise of many, Pennsylvania Supreme Court subsequently approved the procedure of a trial court submitting the intellectual disability “issue to the jury for a penalty phase decision” instead of having the trial court determine the claims (unless the parties “agree to waive a jury and ask the trial court to decide the . . . claim”).⁸⁴⁴ The Court also approved “the placement of the burden of proof on the defendant by a preponderance of evidence”⁸⁴⁵ and indicated that the jury had to agree unanimously⁸⁴⁶ that the defendant had successfully borne that burden as to each of the three factors. The Court further indicated that a defendant whose claim of intellectual disability “is rejected by the jury still has the right to present or argue the same competent evidence in mitigation at the selection phase of the trial, in conjunction with other relevant evidence of mitigation (including other evidence bearing on his mental state and condition independent of mental retardation).”⁸⁴⁷

This subsequent ruling that judicially established the procedure for a trial court to submit the intellectual disability issue to the jury went beyond what was necessary to rule on that case. The request for a determination of intellectual disability was not made until “the morning of the first day of trial, before jury selection began.”⁸⁴⁸ Since the judge was unable to provide the Commonwealth with expert reports until sometime during jury selection, the Commonwealth did not have sufficient time for review of the reports by its own experts.⁸⁴⁹ Ordinarily, the issue of a defendant’s intellectual disability would have been raised as soon as possible to avoid having to face a capital trial. A judge would likely then hold a hearing pre-trial and decide the issue as early as possible in the process to avoid the additional costs and additional time required for a capital trial where the defendant prevailed.

Legislation that would have effectively reversed this procedure to determine intellectual disability by moving it from the post- to pre-trial phase and having the judge determine it was not enacted.⁸⁵⁰ Under that legislation, the defendant who lost before the judge still was free to submit the evidence to a jury at the penalty phase hearing as a mitigating circumstance. Approximately two years after Pennsylvania Supreme Court established *via* opinion the procedures for seeking to preclude imposition of a sentence of death by reason of the defendant’s intellectual disability, it adopted those judicially announced procedures as Rules of Criminal Procedure.⁸⁵¹

⁸⁴² 42 Pa.C.S. ch. 95 subch. B.

⁸⁴³ 986 A.2d 128, 130, 146 (Pa. 2009).

⁸⁴⁴ *Commw. v. Sanchez*, 36 A.3d 24, 64, 67 (Pa. 2011).

⁸⁴⁵ *Id.* at 68, 76.

⁸⁴⁶ *Id.* at 77.

⁸⁴⁷ *Id.* at 79.

⁸⁴⁸ *Id.* at 51.

⁸⁴⁹ *Id.*

⁸⁵⁰ Pa. S. Bill No. 937 (Sess. of 2011).

⁸⁵¹ Pa. R. Crim. P. ch. 8, pt. B.

Appendix G shows the procedural options in each state along with the decisional authority.⁸⁵²

Recommendation

The subcommittee on procedure recommends that the adopted Rules of Criminal Procedure be amended to allow the judge to determine intellectual disability at the pre-trial phase instead of the jury determining it at the post-trial phase. This change would resolve the issue early in the process; if the defendant is determined to be intellectually disabled pre-trial, it would save a large amount of money and many days of court time because the case would not proceed capitally. A decision on this issue made pre-trial by a judge is likely to be more fair and just than a decision made on this issue by a jury that has just found the defendant guilty of first-degree murder. It would put this important decision in the hands of a qualified, experienced judge rather than leaving it to a group of people who may never have been exposed to anything like the complicated issues involved in determining intellectual disability. Civil cases often have juries deciding cases that are factually very complicated, but these cases never involve the question of whether one of the parties to the suit is qualified for execution. Jury verdicts in civil cases are usually simplified by the judge *via* submission of a series of interrogatories to the jury, but this is not the practice in criminal cases. Moreover, judges' determinations of intellectual disability would be detailed in writing explaining why the determination was made and be subject to appeal by either side. A jury decision cannot be questioned this way.⁸⁵³

Mental Illness

The question that serves as the basis of the study of mental illness in the administration of the death penalty in our Commonwealth is:

Whether persons suffering from mental illness constitute a disproportionate number of those on death row, what criteria should be used in judging the level of mental illness involved and whether people with mental illness who are convicted of murder should be executed;⁸⁵⁴

⁸⁵² *Infra* pp. 239-41.

⁸⁵³ For an example of the detailed considerations that go into such a decision, read the opinion: *Commw. v. Williams*, 61 A.3d 979 (Pa. 2013).

⁸⁵⁴ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 220.

Whether persons suffering from mental illness constitute a disproportionate number of those on death row.

This inquiry does not specify with whom the number of inmates on death row should be compared: the general population, those inmates serving life imprisonment without parole sentences or some other group. To reply to this factual inquiry, the subcommittee on policy sought readily available data,⁸⁵⁵ which was the mental health status supplied by Department of Corrections for the inmates on death row and those serving life imprisonment for first-degree murder.⁸⁵⁶ Inmates' mental health was assessed and classified into four categories, two of which reflected either no current mental health issues or need to be medicated and two of which reflected a current need for active treatment or close psychiatric monitoring for serious mental health issues. Mental health is more dynamic than intelligence so that this data and classification would be expected to be more variable than scores for IQ. In making its assessments, it is understood that Department of Corrections used *Diagnostic and Statistical Manual of Mental Disorders*, a "handbook used by health care professionals in the United States . . . as the authoritative guide to the diagnosis of mental disorders" that "has been periodically reviewed and revised since it was first published in 1952."⁸⁵⁷

In *Ford v. Wainwright*, U.S. Supreme Court ruled that a sentence of death may not be carried out "upon a prisoner who is insane."⁸⁵⁸ The data from Department of Corrections is too temporal to determine how many inmates are insane; however, these two groups were selected to try to reply to the inquiry about the disproportionality of mental illness on death row. In 2013, Department of Corrections classified almost 10% of those on death row with an active mental disorder and the proportion was double that for those serving life imprisonment for first-degree murder.⁸⁵⁹ Due to the diagnostic categories used, at least for 2013, the percentages might be understated.⁸⁶⁰ Another big difference in this data then is that more than 50% of death row inmates had a recent (albeit not current) need for mental health treatment while approximately 30% of the prisoners serving a life sentence for first-degree murder had such a need.⁸⁶¹ When this data was updated in 2018, the department classified approximately 25% of the inmates on death row and a similar albeit slightly higher percentage of those serving life imprisonment with an active mental disorder.⁸⁶² When checked in 2018, the recent (albeit not current) need for mental health treatment,

⁸⁵⁵ The data was collected and analyzed for the subcomm. by Dr. Gary Zajac & Laura Winger from The Pa. State U. Just. Ctr. for Research. Appdx. H, *infra* pp. 243-53.

⁸⁵⁶ *Id.*

⁸⁵⁷ Am. Psychiatric Ass'n, *DSM-5: Frequently Asked Questions*, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> (2018).

⁸⁵⁸ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

⁸⁵⁹ Appdx. H, *infra* p. 246.

⁸⁶⁰ Pa. J. State Gov't Comm'n, *Mental Health Servs. & the Crim. Just. Sys. in Pa.* 4, 35 (2014), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2014-370-Final%20HR226%20Mental%20Health%20Services%20Report%20May%2016%202014%20updated%207.30.15%204pm.pdf>.

⁸⁶¹ Appdx. H, *infra* p. 246.

⁸⁶² Buklen, *supra* note 11 (Apr. 26, 2018). The difference between the percentages from 2013 to 2018 is that approximately 150% higher for the inmates on death row are now classified with an active mental disorder compared to five yrs. earlier & approximately 25% higher for those serving life imprisonment for first-degree murder are now classified with an active mental disorder than five years earlier.

was below half for death row inmates and almost the same 30% for the life prisoners for first-degree murder.⁸⁶³

“This begs the question of how the inmates in these two groups compare to the overall human population with respect to prevalence of mental disorder. It is reasonably well established that prison inmates in general have higher levels of many mental disorders than is the case for the general human population (Fazel and Danesh, 2002).”⁸⁶⁴ As of 2016, 4.2% of U.S. adults in the U.S. were seriously mentally ill and 18.3% had some type of mental illness.⁸⁶⁵ The subcommittee on policy agreed that the proportion of inmates on death row suffering from some type of mental illness is likely much greater than in the general population. There are various studies on this matter, but one from approximately a dozen years ago estimated that “more than half of all prison and jail inmates had a mental health problem”, defined as “a recent history or symptoms of a mental health problem”, compared to “[a]n estimated 11% of the U.S. population” of adults in general.⁸⁶⁶

Among prisoners sentenced to life or death, there was little variation in sentence length by mental health status About 8% of State prisoners who had a mental health problem and 9% of those without were sentenced to life or death. Among Federal prisoners, 3% of both those who had a mental health problem and those without were sentenced to life or death.⁸⁶⁷

In 2015, Pennlive estimated that nearly a third of Pennsylvania’s inmates were mentally ill “on an average day”, and a third of those seriously.⁸⁶⁸

Assuming that the comparable group was meant to be those serving life imprisonment without parole sentences, subcommittee members discussed the results of a study on this issue that was conducted for the subcommittee, which was based exclusively on data received from Department of Corrections comprised of the numbers of inmates who had been assigned to groups based upon their perceived degree of mental illness. Before, during and after the study was concluded, the department’s diagnoses, assignment and treatment of its mentally ill inmates was challenged by two entities as under-representative of the true number of inmates suffering from serious mental illness.⁸⁶⁹ The department ultimately settled the lawsuit, agreeing to address its problematic handling of inmates with mental illness, making the data used in the study too

⁸⁶³ *Id.* (June 13, 2018).

⁸⁶⁴ Appdx. H, *infra* p. 247.

⁸⁶⁵ Nat’l Inst. of Mental Health, Mental Illness, <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml> (last updated 2017). Citing a study from 2004, Ctrs. for Disease Control & Prevention publishes an estimated 25% of adult Ams. “reported having a mental illness within the previous” yr.. Ctrs. for Disease Control & Prevention, CDC Mental Illness Surveillance, <https://www.cdc.gov/mentalhealthsurveillance/faqs.html> (last reviewed 2013).

⁸⁶⁶ Bureau of Just. Statistics, U.S. Dep’t of Just., Mental Health Problems of Prison & Jail Inmates 1, 3 (2006), available at <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

⁸⁶⁷ *Id.* at 8. These findings were based upon a survey of inmates. *Id.* at 11.

⁸⁶⁸ Daniel Simmons-Ritchie, *Why are so many mentally ill people imprisoned in Pa.?*, Pennlive, July 21, 2015, http://www.pennlive.com/midstate/index.ssf/2015/07/post_764.html#incart_m-rpt-2.

⁸⁶⁹ U.S. Dep’t of Just. investigated the “prison system’s mental health services for seriously mentally ill inmates” beginning in 2013. Pa. Dep’t of Corrections, News Release (Feb. 24, 2014).

questionable to be reliable.⁸⁷⁰ After finding that Department of Corrections violated prisoners' constitutional and statutory rights by subjecting those with serious mental illness and intellectual disability to solitary confinement, U.S. Department of Justice's Civil Rights Division closed its investigation based upon improvements and planned reform.⁸⁷¹ Additionally, mental health problems can vary for each individual over time. For the reasons stated above, the subcommittee cannot answer this part of the question.

What criteria should be used in judging the level of mental illness involved?

Because the question also requires a certain level of psychiatric expertise to answer, the subcommittee on policy cannot authoritatively comment on the requested criteria. However, the subcommittee determined that the current standard that is commonly used by practitioners to diagnose the level of mental illness is Diagnostic and Statistical Manual of Mental Disorders (DSM—5) from American Psychiatric Association.⁸⁷² This standard is one that the American Bar Association has included in a resolution it produced on the issue of determining the level of mental illness of criminal defendants and inmates. The American Bar Association's resolution also raises a related question regarding of the application of the death penalty to defendants whose mental illness reduces their culpability for the crime. They pointed to the reasoning of the Supreme Court in its line of juvenile life imprisonment without parole cases, in which the justices determined that the underdevelopment of the juvenile brain renders the juveniles less culpable for crimes they have committed, specifically murder. Subcommittee members concluded that the requirement that the death penalty be reserved for the worst of the worst cases should operate as a type of exemption for mentally ill defendants, whose illness prevents them from being among the most culpable defendants and deserving of the death penalty. The subcommittee also noted that currently, "extreme mental disability" can be raised as a mitigating circumstance in capital cases.

Whether people with mental illness who are convicted of murder should be executed.

The subcommittee on policy noted that the use of the word, should, makes this a policy question, albeit one that has been partially judicially resolved by U.S. Supreme Court's ruling that

⁸⁷⁰ *Disability Rights Network v. Wetzel* (M.D.Pa. 2015), Settlement Agreement & Gen. Release, <http://www.cor.pa.gov/About%20Us/Newsroom/Documents/2015%20Press%20Releases/DOC-DRN%20Agreement%2001-05-2015.pdf>. This settlement agreed on screening & dev. of an individual recovery plan @ Diagnostic & Classification Cen. reception, hous. of inmates w/serious mental illness, residential treatment units, secure residential treatment units, diversionary treatment units, disciplinary process for inmates w/serious mental illness, placement of inmates w/serious mental illness in disciplinary or admin. custody status during the transition period, evaluation of inmates who have not been identified as having serious mental illness in a housed in a restricted hous. unit in either admin. or disciplinary custody status, suicide prevention & use of psychiatric observation cells, use of force & restraints, training, staffing, designation of a tech. compliance consultant, & independent assessment & reporting. Compliance Rep. 1 (2016) is available at <http://www.cor.pa.gov/About%20Us/Newsroom/Documents/2016%20Press%20Releases/DRN%20of%20PA%20vs%20John%20Wetzel%20-%20Compliance%20Report%201%20-%20%20January%2025,%202016.pdf>.

⁸⁷¹ Letter from Civ. Rights Div., U.S. Dep't of Just., to Governor Wolf (Apr. 14, 2016), available at <http://www.cor.pa.gov/General%20Information/Documents/Mental%20Health%20Services/DOJ%20Letter%20to%20Governor%20Wolf%20April%2014%202016%20-%20closing%20DOC%20investigation.pdf>.

⁸⁷² This "authoritative volume . . . defines and classifies mental disorders in order to improve diagnoses, treatment, and research." Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders (DSM—5)*, <https://www.psychiatry.org/psychiatrists/practice/dsm> (2018).

a sentence of death may not be carried out “upon a prisoner who is insane.”⁸⁷³ A defendant who was legally insane at the time of the crime may use that as a valid defense to the charge.⁸⁷⁴ If the defendant was not legally insane at the time of the crime but becomes unable “to comprehend the nature of the penalty” and “the reasons for” it “or its implications”, he could not then be executed.⁸⁷⁵ In their study detailed in this report under the section on bias and unfairness, The Pennsylvania State University researchers found that in 35 cases in which defendants presented evidence of a serious mental illness at trial, the jury accepted only 11 of these arguments. But many capital cases have been overturned on appeal for inadequate representation due to defense counsel not raising mental health issues at trial.

Mentally disabled and juveniles. “[I]n conjunction with the American Psychiatric Association, American Psychological Association and National Alliance on Mental Illness”, American Bar Association “adopted a policy opposing the death penalty for individuals with severe mental disorders or disabilities present at the time a crime is committed”.⁸⁷⁶ This position must be seen in light of key U.S. Supreme Court rulings defining categories of persons who are constitutionally exempt from the death penalty. Thus, in *Atkins v. Virginia*,⁸⁷⁷ the Court forbid condemning the intellectually disabled, and, in *Roper v. Simmons*,⁸⁷⁸ the Court similarly exempted juveniles under the age of 18.

In *Atkins*, the U.S. Supreme Court held that the Eighth Amendment precludes the execution of the “intellectually disabled,” formerly referred to as the “mentally retarded.” The Court reasoned that the application of the death penalty to such defendants fails to advance the penalty’s rational purposes. Unless the imposition of the death penalty measurably contributes to the valid goals of retribution or deterrence, “it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”⁸⁷⁹ As explained below, mental disability reduces the murderer’s degree of guilt.

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that become manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than

⁸⁷³ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

⁸⁷⁴ 18 Pa.C.S. § 315. To be excused for the crime due to legal insanity, it would mean that at the time of the offense, the defendant did not “know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.” *Id.*

⁸⁷⁵ *Ford*, 477 U.S. at 417.

⁸⁷⁶ Am. Bar Ass’n, *Severe Mental Illness & the Death Penalty 1* (2016), available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf. Mental Health Am. subsequently adopted a similar policy. *Id.*

⁸⁷⁷ 536 U.S. 304 (2002).

⁸⁷⁸ 543 U.S. 551 (2005).

⁸⁷⁹ *Atkins*, 536 U.S. at 319.

others, but there is abundant evidence that they often act on impulse rather than a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.⁸⁸⁰

“With respect to retribution,” the Court has “consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.”⁸⁸¹

If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.⁸⁸²

With respect to deterrence, the Court observed that this purpose assumes that the would-be murderer is capable of planning his actions in advance, but the mentally disabled largely lack this capability.

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.⁸⁸³

The Court added that exempting the intellectually disabled will not diminish deterrence for those of normal intelligence because they “are unprotected by the exemption and will continue to face the threat of execution.”⁸⁸⁴ The Court concluded that maintaining death penalty eligibility for the retarded, therefore, does not advance the aim of deterrence.⁸⁸⁵

The Court further noted that the intellectually disabled are impaired in their ability to resist inducements to make a false confession and to assist in their own defense, to give testimony in court, and to express remorse.⁸⁸⁶ For these reasons, they are at greater risk for wrongful execution.⁸⁸⁷ Along with the reasons based on the purposes of the death penalty, the Court concluded that a constitutional rule, deeming the mentally disabled as unsuited for the death penalty, is justified.⁸⁸⁸

⁸⁸⁰ *Id.* at 318.

⁸⁸¹ *Id.* at 319.

⁸⁸² *Id.*

⁸⁸³ *Id.* at 320.

⁸⁸⁴ *Id.*

⁸⁸⁵ *Id.*

⁸⁸⁶ *Id.* at 320-21.

⁸⁸⁷ *Id.* at 321.

⁸⁸⁸ *Id.* at 321.

Decided three years after *Atkins*, *Roper v. Simmons* also established a bright-line rule, exempting juveniles under the age of 18 (when their crimes were committed) from eligibility for the death penalty.⁸⁸⁹ In doing so, the Court extended the exemption it had already established for persons under the age of 16 in *Thompson v. Oklahoma*.⁸⁹⁰ The *Roper* Court also emphasized “that juvenile offenders cannot with reliability be classified among the worst offenders.”⁸⁹¹ The culpability of juveniles is diminished by three factors: their natural “lack of maturity and . . . underdeveloped sense of responsibility” with resultant “impetuous and ill-considered actions and decisions”; their greater susceptibility to “negative influences and outside pressures, including peer pressure”; and the fact that their character “is not as well formed as that of an adult” being “more transitory, less fixed.”⁸⁹² Therefore, juveniles are not among the worst offenders.

Using reasoning similar to *Atkins*, the Court argued that the diminished culpability of the juvenile undermines the pertinence of retribution.

Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. . . .

[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular . . . ‘[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.’ To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.⁸⁹³

Severe mental illness. Although the Court has never held that severe mental illness renders a death penalty condemnee ineligible for the death penalty,⁸⁹⁴ parallels exist between intellectual disability and the diminished capacity of juveniles and the effects of severe mental illnesses:

⁸⁸⁹ 543 U.S. at 575, 578.

⁸⁹⁰ 487 U.S. 815, 838 (1988).

⁸⁹¹ *Roper*, 543 U.S. at 569.

⁸⁹² *Id.* at 569-70.

⁸⁹³ *Id.* at 571-72.

⁸⁹⁴ A sentence of death may not be carried out “upon a prisoner who is insane.” *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). If the defendant was not legally insane at the time of the crime but becomes unable “to comprehend the nature of the penalty” and “the reasons for” it “or its implications”, he could not then be executed. *Ford*, 477 U.S. at 417. A defendant who was legally insane at the time of the crime may use that as a valid defense to the charge. 18 Pa.C.S. § 315. To be excused for the crime due to legal insanity, it would mean that at the time of the offense, the defendant did not “know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.” *Id.*

[A]lthough the Court has construed the Eighth Amendment to protect from execution teenagers, mentally retarded offenders, and persons deemed “insane” at the time of their execution, the Eighth Amendment currently does not protect all or even a substantial majority of severely mentally ill capital defendants. Yet, such severely mentally ill prisoners, those suffering from psychosis or schizophrenia, possess many of the same attributes, including diminished culpability and blameworthiness, as others who have been exempted from the death penalty. For example, schizophrenia is defined by the National Institute of Mental Health as “a chronic, severe, and disabling brain disorder.” Individuals diagnosed with schizophrenia suffer from hallucinations, delusions, thought disorders, movement disorders, with hearing voices being the most common hallucination. Moreover, cognitive symptoms that can accompany this disability include a “poor . . . ability to understand information and use it to make decisions,” “[t]rouble focusing or paying attention,” and “[p]roblems with . . . the ability to use information immediately after learning it.” Often individuals with schizophrenia display a lack of understanding of the consequence of their actions, particularly when the individual suffers from delusions or hallucinations, and a lack or limited control of impulses, which can arise from the limits the illness imposes on the individual's ability to process and use information or to control behavior, particularly behavior resulting from delusions caused by their mental illness. These attributes are not unlike the limited judgment, reasoning and impulse control of mentally retarded and juvenile offenders. Moreover, these qualities provide strong evidence of diminished culpability or blameworthiness, which should place those who suffer these illnesses outside the category of the worst of the worst.

Further, the defendant who suffers from severe mental illness may be at greater risk of an unfair trial or inadequate defense. For example, a jury may very well view the defendant's mental illness as an aggravating factor, which could increase the risk that a jury would impose an excessive or inappropriate sentence. Likewise, a defendant who suffers from severe mental illness may lack or have a limited ability to assist in his defense, make rational legal decisions, or adequately advise his lawyer about meaningful defenses. Particularly during the capital sentencing phase of trial, a severely mentally ill defendant may be unable to meaningfully assist his lawyer in developing and presenting mitigating evidence to the jury. These same concerns also plagued the sentencing process of juvenile and mentally retarded offenders.⁸⁹⁵

Death penalty defendants who are competent to stand trial but become “insane” thereafter are exempt from execution, as will be further discussed below.

American Bar Association Proposal to Exempt the Seriously Mentally Ill from the Death Penalty. American Bar Association, American Psychiatric Association, American Psychological Association, and National Alliance on Mental Illness all oppose “the death penalty for individuals

⁸⁹⁵ Lyn Entzeroth, *The Challenge & Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 Akron L. Rev. 529, 557-59 (2011).

with severe mental disorders or disabilities present at the time a crime is committed”.⁸⁹⁶ In 2006, American Bar Association adopted a resolution that couples that exemption with a proposal for defining the mental disorder’s significant impairment.⁸⁹⁷ The linchpin of the argument for exempting the mentally ill is the analogy between their condition and that of juveniles and especially the intellectually disabled.⁸⁹⁸ “This approach rests on the traditional understanding that significant cognitive or volitional impairment attributable to a severe disorder or disability often renders the death penalty disproportionate to the defendant’s culpability, even though the offender may still be held accountable for the crime.”⁸⁹⁹

The American Bar Association’s resolution will be taken as representative of the approach favored by those who support this exemption. It reads as follows:

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

3. Mental Disorder or Disability after Sentencing

(a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

(b) *Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings.* If a court finds that a prisoner under sentence of death

⁸⁹⁶ Am. Bar Ass’n, *supra* note 876, at 1.

⁸⁹⁷ *Id.*, Recommendation 122A, 1 (2006),

https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf.

⁸⁹⁸ In *Atkins v. Va.*, the Court uses the term, mentally retarded, for those who suffer from abnormally low intelligence. The term currently used by mental health professionals is intellectually disabled.

⁸⁹⁹ Am. Bar Ass’n, *supra* note 897, at 10.

who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) *Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings.* If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to the sentence imposed in capital cases when execution is not an option.

(d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option.⁹⁰⁰

A report was published with these recommendations.⁹⁰¹ The report points out that the exemption requires a “severe” disorder or disability, such as

schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders — with schizophrenia being by far the most common disorder seen in capital defendants. In their acute state, all of these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory, and perception of the environment.⁹⁰²

The disorder must “significantly impair cognitive or volitional functioning at the time of the offense.”⁹⁰³ Unlike mental disability, the exemption should apply on a case-by-case basis, “because the symptoms of these disorders are much more variable than those associated with retardation or other disabilities”.⁹⁰⁴

⁹⁰⁰ *Id.* at 1-2.

⁹⁰¹ *Id.* at 3-18.

⁹⁰² *Id.* at 6.

⁹⁰³ *Id.* at 7.

⁹⁰⁴ *Id.*

The report explains the carve-out for offenses due “solely to the acute effects of alcohol or other drugs.”⁹⁰⁵ Voluntary intoxication may be taken into account to reduce the grade of the offense or in mitigation of a potential capital sentence.

However, in light of the wide variability in the effects of alcohol and other drugs on mental and emotional functioning, voluntary intoxication alone does not warrant an automatic exclusion from the death penalty. At the same time, this recommendation is not meant to prevent exemption from the death penalty for those offenders whose substance abuse has caused organic brain disorders or who have other serious disorders that, in combination with the acute effects of substance abuse, significantly impaired appreciation or control at the time of the offense.⁹⁰⁶

The report adds that the proposal contemplates a categorical exclusion for defendants whose impairment meets the description included therein.⁹⁰⁷ The jury may exclude defendants with less severe impairments through mitigation.⁹⁰⁸

“Numerous studies document” that juries harbor negative attitudes toward the mentally ill and that they are prone to treating mental illness as an aggravating rather than a mitigating factor, partly because they erroneously view mentally ill defendants as more dangerous than other defendants.⁹⁰⁹ The American Bar Association recommendation would “ensure that . . . the most severe types of mental disorder” are treated as a disability and could only be considered as a mitigating circumstance when they are not an exemption.⁹¹⁰

Defenses based on mental illness. Pennsylvania law does not categorically exempt the severely mentally ill from the death penalty, but there are several possible grounds whereby a murder defendant can respond to a death charge by claiming that he or she is suffering from a mental illness: the insanity defense, a defense of guilty but mentally ill (GBMI), a defense of diminished capacity, and mitigation. Despite these defenses, Pennsylvania Supreme Court Justice Debra Todd’s concurring opinion noted the similarities between the severely mentally ill and the categories of persons recently exempted under the Eighth Amendment and called on the General Assembly to reexamine this issue.⁹¹¹ When Connecticut still had capital punishment, it exempted the severely mentally ill from the death penalty with the statutory test that “the defendant’s mental capacity was significantly impaired or the defendant’s ability to conform the defendant’s conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution[.]”⁹¹²

⁹⁰⁵ *Id.* at 9.

⁹⁰⁶ *Id.* at 9-10.

⁹⁰⁷ *Id.* at 10.

⁹⁰⁸ *Id.* at 10-11.

⁹⁰⁹ Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 *Cath. U. L. Rev.* 1133, 1150-51 (2005).

⁹¹⁰ *Id.* at 1150-52.

⁹¹¹ *Commw v. Baumhammers*, 960 A.2d 59, 102-08 (Pa. 2008).

⁹¹² Former Conn. Gen. Stat. § 53a-46a(3).

The Insanity Defense and Guilty but Mentally Ill. In Pennsylvania, the statutory provisions for the insanity defense⁹¹³ and for a verdict of guilty but mentally ill⁹¹⁴ may apply in some cases to exempt a severely mentally ill defendant from the death penalty. The provision regarding the insanity defense reads as follows:

§ 315. Insanity.

(a) General rule.--The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

(b) Definition.--For purposes of this section, the phrase "legally insane" means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

The provision for a verdict of "guilty but mentally ill" could apply to a defendant who is mentally ill instead of legally insane:

§ 314. Guilty but mentally ill.

(a) General rule.--A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

(b) Plea of guilty but mentally ill.--A person who waives his right to trial may plead guilty but mentally ill. No plea of guilty but mentally ill may be accepted by the trial judge until he has examined all reports prepared pursuant to the Rules of Criminal Procedure, has held a hearing on the sole issue of the defendant's mental illness at which either party may present evidence and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered. If the trial judge refuses to accept a plea of guilty but mentally ill, the defendant shall be permitted to withdraw his plea. A defendant whose plea is not accepted by the court shall be entitled to a jury trial, except that if a defendant subsequently waives his right to a jury trial, the judge who presided at the hearing on mental illness shall not preside at the trial.

(c) Definitions.--For the purposes of this section and 42 Pa.C.S. § 9727 (relating to disposition of persons found guilty but mentally ill):

(1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

(2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to

⁹¹³ 18 Pa.C.S. § 315. The common law *M'Naghten's* Rule is preserved by § 314(d), which is the definition for legally insane. *Commw. v. Woodhouse*, 164 A.2d 98, 103 (Pa. 1960).

⁹¹⁴ *Id.* § 314.

know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.

(d) Common law M'Naghten's Rule preserved.--Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this Commonwealth on the effective date of this section.

The verdict of GBMI applies if the defendant's proffered insanity defense fails the necessary *M'Naghten* standard but meets the definition for mentally ill. "In a capital case, evidence tending to show a defendant was 'guilty but mentally ill' is properly admitted only at the penalty phase—not the guilt phase."⁹¹⁵ Thus, a criminal trial where an insanity defense is proffered has four possible verdicts: guilty, GBMI, not guilty by reason of insanity, or not guilty.⁹¹⁶ In a murder trial, the jury must first consider whether defendant committed the acts charged; if not, the defendant is acquitted. The next issue is whether the defendant is insane. If he is, the verdict is not guilty by reason of insanity. If not, the defendant may still be found GBMI or guilty.

The verdict of not guilty by reason of legal insanity labels a defendant as sick rather than bad. It signifies that in the eyes of the law the person, because of mental abnormality at the time of the crime, does not deserve to be blamed and treated as a criminal for what he or she did. The verdict of guilty but mentally ill labels a defendant as both bad and sick. It means that in the law's eyes that person, at the time of the crime, was not so mentally abnormal as to be relieved from blame and criminal punishment for what he or she did, but that the defendant was abnormal enough to make him or her a likely candidate for special therapeutic treatment.⁹¹⁷

*Commonwealth v. Trill*⁹¹⁸ includes a thorough discussion of the background and theory of GBMI legislation in Pennsylvania. The addition of the verdict of GBMI arose because of the desire to include a disposition responsive to cases where the defendant is mentally ill, but his impairment is not the complete cognitive breakdown described in § 315. The first state to adopt GBMI was Michigan, after its Supreme Court held that automatic commitment of defendants who were acquitted by reason of insanity was unconstitutional.⁹¹⁹ It was feared that defendants acquitted under an insanity excuse would be freed and endanger the community.⁹²⁰ The acquittal of John Hinckley by reason of insanity for the attempted assassination of then-President Reagan spurred nationwide interest in the passage of GBMI legislation, including Pennsylvania's enactment of section 315.⁹²¹ There was a public demand for a sentence for persons whose offenses arose in part from mental illness, but were considered, nevertheless, in some degree responsible for their actions. There was also a perception that the insanity defense was being raised too broadly, and that offenders who should have been severely punished were walking away after a brief and undemanding period in therapy. GBMI also seemed the appropriate disposition for defendants who merited some punishment but also needed psychiatric treatment.

⁹¹⁵ *Commw. v. Faulkner*, 595 A.2d 28, 36 (Pa. 1991).

⁹¹⁶ *Commw. v. Andre*, 17 A.3d 951, 962 (Pa. Super. Ct. 2011).

⁹¹⁷ Pa. Suggested Standard Crim. Jury Instructions 5.01A(1) (2016).

⁹¹⁸ *Commw. v. Trill*, 543 A.2d 1106 (Pa. Super. Ct. 1988).

⁹¹⁹ *Id.* at 1116.

⁹²⁰ *Id.* at 1116-17.

⁹²¹ *Id.* at 1117, 1120.

Under the provision that governs the sentencing of persons found to be GBMI, the defendant “may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense.”⁹²² With respect to sentencing, the only advantage to the defendant over a verdict of guilty is that before the sentencing, the court is directed to “hear testimony and make a finding on the issue of whether the defendant at the time of sentencing is severely mentally disabled and in need of treatment pursuant to the . . . ‘Mental Health Procedures Act’.”⁹²³ If he is, the court is directed to order treatment “consistent with available resources.”⁹²⁴ The treatment may be provided by Departments of Corrections or Human Services or the county, in accordance with that act.⁹²⁵ Since a verdict of GBMI necessarily implies that mental illness was a partial cause in fact of the crime, it would seem that such a defendant would not be appropriate for the death penalty, as he would not be among the worst of the worst.

Diminished capacity. “Diminished capacity is an extremely limited defense, which requires extensive psychiatric testimony establishing a defendant suffered from one or more mental disorders which prevented him from formulating the specific intent to kill.”⁹²⁶ If successful, diminished capacity reduces the crime from first-degree to third-degree murder, thereby negating the applicability of the death penalty.⁹²⁷ It is sometimes asserted that “[a] defense of diminished capacity is only available to a defendant who admits criminal liability but contests the degree of guilt”;⁹²⁸ however, “a defendant, merely by introducing expert testimony of diminished capacity or by requesting a diminished capacity charge, does not automatically and inevitably (i) admit that he or she killed the victim, (ii) admit that he or she committed third-degree murder, or (iii) waive other possible defenses.”⁹²⁹

Mitigation. Pennsylvania’s statutory mitigating circumstances include as grounds for mitigation that “the defendant is under the influence of extreme mental and emotional disturbance”⁹³⁰ and substantial impairment of the defendant’s “capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law”.⁹³¹ This is similar to the American Bar Association resolution that would exempt a defendant from a death sentence if the defendant’s “severe mental disorder . . . significantly impaired” the defendant’s “capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law.”⁹³²

⁹²² 42 Pa.C.S. § 9727(a).

⁹²³ *Id.*

⁹²⁴ *Id.* § 9727(b)(1).

⁹²⁵ *Id.*

⁹²⁶ *Commw. v. Cuevas*, 832 A.2d 388, 393 (Pa. 2003).

⁹²⁷ *Commw. v. Faulkner*, 595 A.2d 28, 35 n.4 (Pa. 1991).

⁹²⁸ *Commw. v. Laird*, 726 A.2d 346, 353 (Pa. 1999).

⁹²⁹ Pa. Suggested Standard Crim. Jury Instructions 5.01B, subcomm. n. (2016).

⁹³⁰ 42 Pa.C.S. § 9711(e)(2).

⁹³¹ *Id.* § 9711(e)(3).

⁹³² Am. Bar Ass’n, *supra* note 897, at 1.

Proposed Procedure under the American Bar Association’s Resolution. Procedurally, the American Bar Association’s resolution divides the consideration of severe mental illness into three stages of competency to: 1) waive appeals from the death sentence; 2) assist in the condemned’s defense; and 3) understand the reason why he is being executed.⁹³³

Competency to waive appeals. A competent defendant can refuse legal assistance and permit the execution to take place, as did all three of the condemned inmates in Pennsylvania who were executed since the ruling in *Gregg v. Georgia* did; however, all three had psychiatric problems.⁹³⁴ Commentators have identified two issues in these voluntary cases: determining that the condemned’s waiver of defense is knowing, intelligent, and voluntary and is not primarily the product of mental illness; and assuring that the condemned genuinely deserves the death penalty.

The American Bar Association’s resolution applies when the condemned “wishes to forgo or terminate post-conviction proceedings.”⁹³⁵ This language implies that the condemned is not permitted to waive the trial and the appeal. The reason for this limitation is that if such waivers are permitted, there is no judicial determination regarding the facts of the case; it is never decided that the defendant is actually guilty and that death is the appropriate penalty.⁹³⁶ One commentator argues that the volunteer situation entails the balancing of the state’s interest in fair and reliable use of the death penalty against the defendant’s interest in autonomy and free choice.⁹³⁷ This balance shifts from the state to the individual defendant as the proceeding moves from the earlier to the later stages.⁹³⁸ According to this view, the condemned should not be permitted to waive trial and presentation of mitigating evidence but should be able to waive post-conviction review.⁹³⁹

“[T]he appropriate standard for assessing . . . competency to proceed with collateral review . . . would be whether the defendant is able to understand the nature of the proceedings and able to communicate with and assist his counsel.”⁹⁴⁰ The American Bar Association’s standard for a next friend to substitute for an incompetent prisoner would be if the “mental disorder . . . significantly impairs” the prisoner’s “capacity to make a rational decision,”⁹⁴¹ which would supplement the current, appropriate standard.

Competency to assist defense. The strong possibility that a severely mentally ill defendant is incapable of assisting in his or her own defense was advanced as a reason for exempting the “insane” from capital punishment as far back as Blackstone’s *Commentaries* in the 17th century.⁹⁴² Since the reliability of capital convictions has come under stricter scrutiny, the possibility of the execution of a defendant who was unable to recognize or communicate a defense because of mental

⁹³³ *Id.* at 1-2.

⁹³⁴ *Supra* pp. 1-2, notes 7, 8.

⁹³⁵ Am. Bar Ass’n, *supra* note 897, at 1-2.

⁹³⁶ See Stephen Skaff, *Chapman v. Commw.: Death Row Volunteers, Competency, & “Suicide by Court”*, 53 St. Louis U. L.J. 1353, 1365-66 (2009).

⁹³⁷ Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 Am. J. Crim. L. 75, 76 (2002).

⁹³⁸ *Id.* at 77.

⁹³⁹ *Id.* at 105-06.

⁹⁴⁰ *Commw. v. Zook*, 887 A.2d 1218, 1225 (Pa. 2005).

⁹⁴¹ Am. Bar Ass’n, *supra* note 897, at 1.

⁹⁴² *Ford v. Wainwright*, 477 U.S. 399, 406-07 (1986).

illness has become more widely recognized. Due Process does not exempt such defendants from the death penalty, but in the subcommittee on policy's view, it arguably should, both on human dignity and reliability grounds.⁹⁴³

The American Bar Association's proposal includes a procedure specifically applicable to capital defendants who have "a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings" where "the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence".⁹⁴⁴ In such cases, the court is directed to "suspend the proceedings" and reduce the punishment to the alternative sentence "when execution is not an option" upon a finding "that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future."⁹⁴⁵

This proposed procedure has a standard similar to the Commonwealth's;⁹⁴⁶ however, instead of reducing the punishment, the Commonwealth would likely permit a next friend and counsel to represent the incompetent prisoner⁹⁴⁷ or compel the involuntary administration of antipsychotic medication to render the appellee competent.⁹⁴⁸

Competency to be executed. In some cases, the defendant manifests serious mental illness after the initial murder conviction, or the mental illness has been found by the trier of fact to be insufficiently mitigating, and the defendant advances mental illness as grounds for exemption, often years after conviction. While exemption can in the first instance be decided as part of the sentencing phase of the trial, the same issue after the trial raises the thorny question of what additional proceedings are necessary to decide the issue. The American Bar Association resolution identifies the most important issues and suggests how to resolve them.⁹⁴⁹

Competency for execution was addressed by the Supreme Court in *Ford v. Wainwright*⁹⁵⁰ and *Panetti v. Quarterman*,⁹⁵¹ where the Court held that the Eighth Amendment forbids execution of a person who is "insane" at the time he or she is scheduled to be executed.⁹⁵² In *Ford*, the four justice plurality opinion noted that no state permits the execution of the insane and that the prohibition of such executions under various rationales goes back to common law.⁹⁵³ Such executions go against contemporary penal theory as well. "[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why

⁹⁴³ Christopher Seeds, *The Afterlife of Ford & Panetti: Execution Competence & the Capacity to Assist Counsel*, 53 St. Louis U. L.J. 309, 343-48 (2009).

⁹⁴⁴ Am. Bar Ass'n, *supra* note 897, at 2.

⁹⁴⁵ *Id.*

⁹⁴⁶ *Commw. v. Zook*, 887 A.2d 1218, 1225 (Pa. 2005).

⁹⁴⁷ *Commw. v. Haag*, 809 A.2d 271, 278, 284-85 (Pa. 2002). "[A] putative next friend must demonstrate that the prisoner is incompetent" to rationally decide "whether to pursue PCRA relief." *Id.* at 280.

⁹⁴⁸ *Commw. v. Sam*, 952 A.2d 565, 588-89 (Pa. 2008).

⁹⁴⁹ Am. Bar Ass'n, *supra* note 897, at 1-2.

⁹⁵⁰ 477 U.S. 399 (1986).

⁹⁵¹ 551 U.S. 930 (2007)

⁹⁵² *Ford*, 477 U.S. at 409-10.

⁹⁵³ *Id.* at 408-09.

he has been singled out and stripped of his fundamental right to life.”⁹⁵⁴ The plurality opinion did not address the test for insanity in this context, holding that the state procedure under review did not satisfy due process.⁹⁵⁵ The narrower and therefore controlling opinion by Justice Lewis Powell alone, proposed that “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”⁹⁵⁶ *Panetti* applied or extended the *Ford* exclusion to persons who lack a rational understanding of the connection between the offense and the punishment by execution due to a severe mental illness, as in *Panetti*’s case, paranoid schizophrenia.⁹⁵⁷ Both cases emphasize that once the condemned makes a sufficient showing of incompetence to be executed, a full and fair judicial hearing must be afforded.

In the plurality opinion in *Ford*, Justice Marshall insisted that the death penalty context called for a stringent application of due process.⁹⁵⁸ The procedure under review in *Ford* fell short because it failed “to include the prisoner in the truth-seeking process” in that it did “not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution.”⁹⁵⁹ The condemned must have the opportunity to present psychiatric evidence.

We recently had occasion to underscore the value to be derived from a factfinder’s consideration of differing psychiatric opinions when resolving contested issues of mental state. In *Ake v. Oklahoma*, 470 U.S. 68 . . . (1985), we recognized that, because ‘psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms,’ the factfinder must resolve differences in opinion within the psychiatric profession ‘on the basis of the evidence offered by each party’ when a defendant’s sanity is at issue in a criminal trial. The same holds true after conviction; without any adversarial assistance from the prisoner’s representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.⁹⁶⁰

For the same reason, the failure of the state to permit the condemned to cross-examine the state’s psychiatrist denied him due process.⁹⁶¹

Even more damaging was the assignment of the determination to the executive branch:

Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing. The commander

⁹⁵⁴ *Id.* at 409.

⁹⁵⁵ *Id.* at 413-18.

⁹⁵⁶ *Id.* at 422 (Powell, J., concurring).

⁹⁵⁷ *Panetti*, 551 U.S. at 954-56.

⁹⁵⁸ *Ford*, 477 U.S. at 411-12.

⁹⁵⁹ *Id.* at 413.

⁹⁶⁰ *Id.* at 414.

⁹⁶¹ *Id.* at 415.

of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.

Historically, delay of execution on account of insanity was not a matter of executive clemency . . . or judicial discretion . . . ; rather, it was required by law Thus, history affords no better basis than does logic for placing the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power, in the hands of the State's own chief executive. In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal.⁹⁶²

Justice Powell's concurring opinion in *Ford* agreed with Justice Marshall that competency must be determined by a judge after a fair hearing.⁹⁶³ The determination under review fell short of the applicable requirement of a "full and fair hearing," as it was made by the Governor on the basis of examination and reports by state-appointed psychiatrists.⁹⁶⁴ But Powell stopped short of requiring a "full-scale 'sanity trial.'"⁹⁶⁵ He noted that due process is a flexible concept that depends on the situation addressed by the case and that the issue in a competency hearing "is not *whether*, but *when* [the] execution may take place."⁹⁶⁶ A post-trial competency hearing must have grounds to overturn the determination at the trial that the condemned was competent, so that the state could presume competency and require "a substantial threshold showing of insanity merely to trigger the hearing process."⁹⁶⁷ Finally, the issue of "sanity calls for a basically subjective judgment" in which the procedures of an adversarial hearing "are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity."⁹⁶⁸

We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of [28 U.S.C.] § 2254(d) on federal habeas corpus.⁹⁶⁹

Beyond the invalidity of executing the severely mentally ill and locating the responsibility for the decision in the judicial branch, many issues were not addressed or left unclear by *Ford* and *Panetti*, and implicitly left to the states to resolve, including the following:

⁹⁶² *Id.* at 416 (citations omitted).

⁹⁶³ *Id.* at 423 (Powell, J., concurring).

⁹⁶⁴ *Id.* at 423-24.

⁹⁶⁵ *Id.* at 425.

⁹⁶⁶ *Id.*

⁹⁶⁷ *Id.* at 426.

⁹⁶⁸ *Id.*

⁹⁶⁹ *Id.* at 427.

The criteria for insanity or mental illness in this context
Who may initiate an inquiry into competency for execution
The evidence needed to initiate a competency proceeding
Who decides whether there should be a competency hearing and on what standard
Right to appeal a decision granting or denying a competency hearing
Nature of the competency hearing

- Burden of proof
- Right to counsel
- Live testimony
- Expert testimony (including designation of impartial experts)
- Cross-examination
- Oral argument
- Standard of review

Appeal from decision
Renewal of proceedings upon alleged change in competency status
Disposition of defendant upon determination of incompetency⁹⁷⁰

A description of an execution competency procedure that is thoroughly protective of the rights of the condemned has been developed.⁹⁷¹ “Procedurally, states must, at a minimum, provide an impartial decision maker regarding the competency determination who can receive evidence and argument presented on behalf of the offender, including expert mental health evidence.”⁹⁷² States are free to provide more ample protections.⁹⁷³

The determination of competency should take place after the execution date has been set and after the other appeals and the initial collateral review challenges have been exhausted.⁹⁷⁴ Multiple parties should be allowed to raise the competency issue, including correctional officers, family members, the condemned himself or his attorney, or the court on its own motion.⁹⁷⁵ To avoid frivolous or repetitive claims, the defendant must make a showing of reasonable cause by a verified petition accompanied by supporting documentary evidence.⁹⁷⁶ There should then be a preliminary hearing before the sentencing judge or a trial judge of the county where the prison housing capital defendants is located to determine whether a formal competency hearing is justified; the judge may hold a hearing or decide the threshold question on the pleadings.⁹⁷⁷ If the judge denies a competency hearing, the defendant should get an expedited appeal.⁹⁷⁸ The determination should be upheld unless clearly erroneous or against the overwhelming weight of the evidence.⁹⁷⁹

⁹⁷⁰ Peggy M. Tobolowsky, *To Panetti & Beyond--Defining & Identifying Capital Offenders Who Are Too “Insane” to Be Executed*, 34 Am. J. Crim. L. 369, 417-28 (2007).

⁹⁷¹ *Id.* at 420-28.

⁹⁷² *Id.* at 428.

⁹⁷³ *Id.* at 417.

⁹⁷⁴ *Id.* at 421.

⁹⁷⁵ *Id.* at 421-22.

⁹⁷⁶ *Id.* at 422.

⁹⁷⁷ *Id.* at 423.

⁹⁷⁸ *Id.*

⁹⁷⁹ *Id.*

If a competency hearing is granted, it should be an adversarial process including live testimony, cross-examination, and oral argument.⁹⁸⁰ The defendant should be afforded counsel, and if the defendant is not represented, an attorney should be appointed for him or her as soon as possible.⁹⁸¹ Both sides should be able to present expert testimony, and there should be at least one state-appointed independent expert to examine the defendant and testify.⁹⁸² The defendant should have the burden of proving incompetence by a preponderance of the evidence.⁹⁸³ The judge should make written findings.⁹⁸⁴ Either side should have the right to an expedited appeal.⁹⁸⁵ On appeal, the determination should be upheld unless clearly erroneous or against the overwhelming weight of the evidence.⁹⁸⁶ If the condemned is found competent, a further appeal on competency must include a showing of changed circumstances.⁹⁸⁷

If the defendant is found incompetent for execution, he should be transferred to a prison or state mental health facility.⁹⁸⁸ “The chief mental health officer of the facility . . . should provide an annual status report” on his mental condition to the judge and counsel for both sides.⁹⁸⁹ If the officer finds that the defendant has become competent to be executed, he should report this finding to the judge and counsel.⁹⁹⁰ Another evidentiary hearing should be held, with the state bearing the burden of proof of competency by preponderance of the evidence.⁹⁹¹ The losing side should have the right to an expedited appeal.⁹⁹² If the defendant remains incompetent after two status reports, the judge should hold a hearing on whether he or she will remain incompetent for the foreseeable future, with the burden of proof on the state.⁹⁹³ If the judge finds there is no reasonable probability of restored competence, the defendant should be given the strictest sentence other than death.⁹⁹⁴ If the court rules otherwise, the defendant would retain his current status and the process would be repeated at two-year intervals, with the loser having the right of expedited appeal.⁹⁹⁵

Finally, there is the difficult issue of medical intervention to restore the condemned to competency in order to permit him to be executed:

An additional concern surfaces when the state seeks to execute the severely mentally ill. . . . Ford and Panetti give constitutional effect to the long-standing common law prohibition of the execution of the insane. This exemption, however, raises the specter of the government forcibly medicating the condemned prisoner with anti-psychotic drugs to render the “insane” capital defendant “sane” enough

⁹⁸⁰ *Id.* at 424.

⁹⁸¹ *Id.*

⁹⁸² *Id.* at 424-25.

⁹⁸³ *Id.* at 425-26.

⁹⁸⁴ *Id.* at 426.

⁹⁸⁵ *Id.*

⁹⁸⁶ *Id.*

⁹⁸⁷ *Id.*

⁹⁸⁸ *Id.* at 427.

⁹⁸⁹ *Id.*

⁹⁹⁰ *Id.*

⁹⁹¹ *Id.*

⁹⁹² *Id.*

⁹⁹³ *Id.* at 427-28.

⁹⁹⁴ *Id.* at 428.

⁹⁹⁵ *Id.*

to execute. Because anti-psychotic drugs exist to treat mental illness such as schizophrenia, a defendant, who otherwise is exempt from execution under Ford and Panetti, may be forced to take medication for the sole purpose of rendering him ready for execution. Further adding to the moral dilemmas created by this macabre situation, a capital defendant may actually forgo medically appropriate and humane treatment for his mental illness to avoid execution.⁹⁹⁶

In Pennsylvania, execution of the insane was held unconstitutional in *Commonwealth v. Moon*⁹⁹⁷ and reaffirmed in *Commonwealth v. Jermyn*.⁹⁹⁸ There is no procedure in place regarding the determination of whether a condemned prisoner must be exempted from the death penalty on the grounds of mental illness.

Recommendation

The subcommittee on policy recommends treating what would approximate a guilty but mentally ill situation in a noncapital trial as a disqualification for capital punishment rather than as a mitigating circumstance. This is what is recommended by American Bar Association, American Psychiatric Association, American Psychological Association and National Alliance on Mental Illness. It is based upon the same or similar judicial rationale that exempt juvenile and intellectually disabled murderers from the death penalty. Instead of relying upon insanity as a disqualification for the penalty, it would extend the disqualification to one whose severe mental illness significantly impaired his capacity to: (i) appreciate the nature, consequences, or wrongfulness of his conduct in the criminal offense; (ii) exercise rational judgment in relation to the criminal offense; or (iii) conform the person's conduct to the requirements of the law in connection with the crime.

Juries

The question that serves as the basis of the study of the selection of juries in the administration of the death penalty in our Commonwealth is:

The impact on the reliability and fairness of capital trials of death qualifying jurors and the impact of this practice on the ability of women, people of color and people of faith to serve on capital juries; whether there are adequate procedural protections and remedies in place to make sure that women and African Americans are not excluded from serving as jurors in capital cases; and whether there are adequate procedural protections in place to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case;⁹⁹⁹

⁹⁹⁶ Entzeroth, *supra* note 895, at 559.

⁹⁹⁷ 117 A.2d 96, 100-01 (1955).

⁹⁹⁸ 652 A.2d 821, 822-23 (1995).

⁹⁹⁹ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 220.

The impact on the reliability and fairness of capital trials of death qualifying jurors and the impact of this practice on the ability of women, people of color and people of faith to serve on capital juries

If there is “a verdict of murder of the first degree” recorded from a jury in a trial in which the Commonwealth is pursuing the death penalty, the jury then determines whether the defendant is “sentenced to death or life imprisonment.”¹⁰⁰⁰ The criminally accused enjoy a constitutional right to be tried by an impartial jury.¹⁰⁰¹ “[L]arge, distinctive groups” may not be “excluded from the pool” of jurors.¹⁰⁰² These large groups are distinguished “on the basis of some immutable characteristic such as race, gender, or ethnic background” as opposed to “any other group defined solely in terms of shared attitudes”.¹⁰⁰³ To clarify, “petit juries, as opposed to jury panels or venires,” are not required “to reflect the composition of the community at large” because that would be “unworkable and unsound”.¹⁰⁰⁴ A “group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement”, which means that “those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case,” are not unfairly or unconstitutionally prohibited from serving as a juror on a capital case.¹⁰⁰⁵ “The essence of a ‘fair-cross-section’ claim is the systematic exclusion of “a ‘distinctive’ group in the community.”¹⁰⁰⁶ At *voir dire*, removal for cause of “prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty . . . hardly can be said to create an ‘appearance of unfairness’” and excludes a fair-cross-section claim from this type of death qualification.¹⁰⁰⁷

“The process of death qualification is considered to be a necessary component in capital trials because it minimizes the possibility that a jury would consist of individuals who are unable to evaluate evidence appropriately and impartially; however, research suggests that the process itself might bias various aspects of the trial.”¹⁰⁰⁸

Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State’s legitimate interest in administering constitutional capital sentencing schemes by not following their oaths. . . . [T]he

¹⁰⁰⁰ 42 Pa.C.S. § 9711(a).

¹⁰⁰¹ U.S. Const. amend. VI; Pa. Const. art. I, § 9. The U.S. Const. amend. VI provision is extended to state criminal cases *via* amend. XIV. *Duncan v. La.*, 391 U.S. 145, 149 (1968).

¹⁰⁰² *Taylor v. La.*, 419 U.S. 522, 530 (1975). In this case, the group was women. *Id.* at 525. Most simply stated, this requirement forbids systematically excluding large, distinctive groups from the jury pool so that the pool reasonably represents the community; however, chosen *petit* juries do not have to be a particular composition. *Id.* at 538. Stated another way, a jury must be “drawn from a fair cross section of the community”. *Id.* at 535-37.

¹⁰⁰³ *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986).

¹⁰⁰⁴ *Id.* at 173-74.

¹⁰⁰⁵ *Id.* at 173-76. “The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).” *Holland v. Ill.*, 493 U.S. 474, 480 (1990).

¹⁰⁰⁶ *Lockhart*, 476 U.S. at 174.

¹⁰⁰⁷ *Id.* at 166-74. “We simply cannot conclude . . . that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.” *Witherspoon v. Ill.*, 391 U.S. 510, 517-18 (1968).

¹⁰⁰⁸ Yelderman *et al.*, *supra* note 73, at 27, 30.

proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'¹⁰⁰⁹

Assuming that social science studies "are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries", U. S. Supreme Court ruled "that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."¹⁰¹⁰ It would also seem that those potential jurors who would automatically vote either for or against the death penalty would be removable for cause because "such jurors-whether they be unalterably in favor of, or opposed to, the death penalty in every case-by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding."¹⁰¹¹

Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties. Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror.¹⁰¹²

The concern in the question was the same raised in these cases, namely "that the death qualification process potentially results in biased juries"¹⁰¹³ because of their resultant composition. There is no limitation to challenging jurors for cause, but peremptory challenges "[i]n trials involving a capital felony . . . when there is only one defendant" are limited to 20 *per side*.¹⁰¹⁴ A challenge for cause occurs when a juror demonstrates bias by his responses to questioning or when he says something that indicates that he will not follow instructions or be impartial. A peremptory challenge is used to exclude a juror because of a suspected or presumed bias instead of an expressed one.¹⁰¹⁵ Peremptory challenges are restricted on race because "the Equal Protection Clause forbids a party to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."¹⁰¹⁶ In the exercise of peremptory challenges, "gender, like race, is an unconstitutional proxy for juror competence and impartiality."¹⁰¹⁷

¹⁰⁰⁹ *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

¹⁰¹⁰ *Lockhart*, 476 U.S. at 173. This assumption was made after the court pointed out "several serious flaws in the evidence" introduced *via* the social science studies. *Id.* at 168-73.

¹⁰¹¹ *Morgan v. Ill.*, 504 U.S. 719, 735 (1992).

¹⁰¹² *Uttecht v. Brown*, 551 U.S. 1, 22 (2007).

¹⁰¹³ *Yelderman et al.*, *supra* note 73, at 32.

¹⁰¹⁴ Pa. R. Crim. P. 634(A)(3). For alternate jurors, each side has one peremptory challenge for every two alternate jurors selected. *Id.* 633(B).

¹⁰¹⁵ *Yelderman et al.*, *supra* note 73, at 32.

¹⁰¹⁶ *Batson v. Ky.*, 476 U.S. 79, 89 (1986).

¹⁰¹⁷ *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). "[T]he Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race." *Id.* at 130.

Research examining the effects of death qualification on jury composition suggests that death qualification often results in juries that are biased in ways that consistently disadvantage capital defendants. It is possible to argue that as long as those who are extremely against *and* extremely for the death penalty are excluded, that risk would be minimal. However, this is not necessarily true because . . . the process likely excludes those who strongly oppose the death penalty at a higher rate than those who strongly support the death penalty.¹⁰¹⁸

This is because it is procedurally easier to ask for a yes/no response to disqualify a potential juror as death qualified while harder to elicit a disqualifying response from a potential juror who says he would consider life imprisonment without parole while harboring “attitudes and beliefs” leading him “to always vote for the death penalty if a defendant was found guilty of a capital crime”¹⁰¹⁹ Because of General Social Survey and other social science research, “research suggests that death qualification is more likely to eliminate members of some groups than others.”¹⁰²⁰ Systematic exclusion of specific social groups could occur because some groups might be “consistently more in favor of the death penalty than another”, who then could be excluded by “prosecutors who know such statistics”.¹⁰²¹ As noted elsewhere in the report, some religions have official stances on the death penalty which might impact “jury selection practices”.¹⁰²² In short, “findings support the idea that the death qualification process systematically eliminates jurors who belong to certain social and demographic groups” and “can also change the way in which case facts are interpreted and discussed by a jury.”¹⁰²³

If death qualification can affect the composition of a jury, the same effect “likely shapes the ways in which jurors view and evaluate aggravating and mitigating circumstances”.¹⁰²⁴ If death qualification increases both negative perceptions of the defendant and positive perceptions of the victim as some research suggests, it could result in jurors being more accepting of aggravating circumstances and less accepting of mitigating evidence.¹⁰²⁵ Some research also found that “death-qualification resulted in retaining jurors who tended to process information . . . using less systematic and analytical cognitive strategies when compared to excludables”.¹⁰²⁶ There is some relatively recent social science research “that death-qualified individuals . . . perceive *individuals* differently in death penalty trials” and “perceive and process the *evidence* differently.”¹⁰²⁷

¹⁰¹⁸ Yelderman *et al.*, *supra* note 73, at 33 (citation omitted).

¹⁰¹⁹ *Id.* at 34. A co-author of this source observed that “it took much longer to identify and exclude jurors who were extremely in favor of the death penalty” than those “who were against the death penalty” during the *voir dire* phase. *Id.*

¹⁰²⁰ *Id.* at 35-36.

¹⁰²¹ *Id.* at 35.

¹⁰²² *Id.* at 36. A sample of some religious stances appears *infra* pp. 212-13.

¹⁰²³ Yelderman *et al.*, *supra* note 73, at 36.

¹⁰²⁴ *Id.* at 38.

¹⁰²⁵ *Id.* Pretrial publicity might similarly bias jurors. *Id.* at 40.

¹⁰²⁶ *Id.* at 39.

¹⁰²⁷ *Id.* at 40.

Some of this research reveals that “the death qualification process is a suggestive and influential process that leads to conviction prone juries by creating juries that are less likely to share attitudes in opposition of giving a death penalty and reaffirming jurors’ willingness and expectations to convict the defendant and sentence him to death.”¹⁰²⁸ The contention is that systematically excluding “jurors who are considered unable to be impartial” uses a process that reinforces jurors’ “willingness to give the death penalty” and leads to “increased receptivity to guilt confirming evidence and aggravating factors while simultaneously rejecting innocence confirming evidence and mitigating factors.”¹⁰²⁹

To exclude potential jurors, attorneys, who know statistical research on demographics and attitudes, might rely on that knowledge to “exclude potential jurors . . . to increase the possibility of creating a jury that will decide in their favor.”¹⁰³⁰ Maybe more often, “attorneys are likely to base their exclusions on intuitions related to certain attitudes and beliefs associated with individuals and their group statuses.”¹⁰³¹ The concern “related to death-qualified jurors is that the death qualification process itself influences jurors such that jurors who experience the death qualification process hold more pro-prosecution or anti-defendant perceptions of the trial information than jurors who do not experience death qualification.”¹⁰³² Repeatedly asking jurors “whether they are able to give the death penalty, *assuming* the defendant is *guilty* . . . reiterates the statement that the defendant is guilty.”¹⁰³³ Some research reveals that “[d]eath qualification might exclude jurors who naturally process information more rationally, resulting in a jury that process information more experientially.”¹⁰³⁴

This research suggests that “the death qualification process facilitates convictions and death sentences” because the potentially more punitive individuals would be selected for capital juries, whose interpretation of trial information differs compared to the excluded ones, and “the process of death qualification and the individual traits of those selected through death qualification both relate to higher rates of convictions and death sentences.”¹⁰³⁵ This research has not yet been judicially accepted so that futures studies might “need to use actual trials, trial videos, or reenactments . . . to increase the realism related to participating in a capital trial.”¹⁰³⁶ It would also help to study deliberations between jurors that are death-qualified and those that are not.¹⁰³⁷

Ironically, instead of death qualification resulting in a “jury absent any extreme death penalty biases, it might instead . . . perpetuate such biases.”¹⁰³⁸ If “specific social groups and individuals with shared attitudes or beliefs that are thought of as prejudicial” are excluded, the “death-qualified juries . . . might actually be more susceptible to systemic biases”.¹⁰³⁹ Effects of

¹⁰²⁸ *Id.* at 41.

¹⁰²⁹ *Id.* at 42.

¹⁰³⁰ *Id.* at 43.

¹⁰³¹ *Id.* “Specifically, attorneys might try to identify and exclude jurors who would vote against their side.” *Id.*

¹⁰³² *Id.* at 43-44.

¹⁰³³ *Id.* at 44. If so, “death-qualified jurors enter the trial with a *biased* presumption of innocence instead of a complete presumption of innocence.” *Id.* at 46.

¹⁰³⁴ *Id.* at 45.

¹⁰³⁵ *Id.* at 47.

¹⁰³⁶ *Id.* at 48.

¹⁰³⁷ *Id.*

¹⁰³⁸ *Id.* at 49.

¹⁰³⁹ *Id.*

death qualification “on juries and trial outcomes . . . should continue to be studied”, especially because of “findings that demonstrate that the death qualification process produces conviction prone juries”.¹⁰⁴⁰

Whether there are adequate procedural protections and remedies in place to make sure that women and African Americans are not excluded from serving as jurors in capital cases

The Commonwealth’s declared policy is that:¹⁰⁴¹

- (1) All persons entitled to a jury trial in a . . . criminal proceeding . . . have the right to jurors selected at random from a representative cross section of the eligible population of the county.
- (2) All qualified citizens . . . have the opportunity to be considered for service as jurors in the courts of this Commonwealth and . . . have an obligation to serve as jurors when summoned for that purpose.
- (3) A citizen shall not be excluded from service as a juror on the basis of race, color, religion, sex, national origin or economic status.

In 2003, Joint State Government Commission published *Minority Representation in the Jury Selection Process in Pennsylvania*.¹⁰⁴² The data gathered for this report did not reveal counties excluding large, distinctive from the jury pool in unconstitutional proportions but showed that “some counties could stand to improve their representation of minorities on juries.”¹⁰⁴³ This analysis was not limited to juries in capital cases. Since this report was published, Pennsylvania law was amended to add exemptions from jury duty,¹⁰⁴⁴ authorize expansion of the master list of prospective jurors¹⁰⁴⁵ and establish a statewide jury information system.¹⁰⁴⁶ Because this report has not been updated, it is unknown whether and to what extent much the statutory amendments have impacted the representation of minorities on juries, capital or otherwise. One of the recommendations in the report is for “[t]he judicial system” to

voluntarily, routinely monitor itself to determine if it is fulfilling its constitutional obligation to draw jurors from a cross section of the community. . . . As the constitutional obligation to draw jurors from a representative cross section of the community is an essential component of a right to a jury trial, it would seem that the judicial system itself could and should make it easier for parties to learn relevant numerical information specifying demographic data about whom courts summon rather than leave it up to aggrieved individuals or classes to try to calculate information the court could easily collect.¹⁰⁴⁷

¹⁰⁴⁰ *Id.*

¹⁰⁴¹ 42 Pa.C.S. § 4501.

¹⁰⁴² Pa. J. State Gov’t Comm’n, <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2003-52-JURY.PDF>.

¹⁰⁴³ *Id.* at 3, 81, 87.

¹⁰⁴⁴ 42 Pa.C.S. § 4503(a)(5)-(8).

¹⁰⁴⁵ *Id.* § 4521(a)(3)(v).

¹⁰⁴⁶ *Id.* § 4521.1.

¹⁰⁴⁷ Pa. J. State Gov’t Comm’n, *supra* note 1042, at 3, 87. Presumably, this would be done by court administrators. *Id.*

Recommendation

One remedy supported by the subcommittee on procedure would be enactment of a Racial Justice Act to statutorily allow death sentences to be challenged on a statistical basis, in addition to purposeful discrimination.

Whether there are adequate procedural protections in place to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case

“Prior research has repeatedly revealed that jurors (1) base their decisions on erroneous assumptions about the early release of those who are not sentenced to death, (2) prematurely decide the punishment before hearing sentencing evidence and instructions, and (3) fail to understand sentencing instructions.”¹⁰⁴⁸ The Commonwealth “is one of only two states with life” imprisonment “without parole . . . that does not require that juries be told in every capital case that there is no possibility of parole”.¹⁰⁴⁹

To determine whether jurors understand instructions, previous studies used both mock jurors and interviewed actual jurors from capital cases.¹⁰⁵⁰ National Science Foundation sponsored Capital Jury Project, in which jurors from capital cases in 14 states were interviewed afterwards.¹⁰⁵¹ As part of this project, a professor and trained graduate students interviewed scores of jurors from 27 capital cases in Pennsylvania.¹⁰⁵² These jurors were asked:¹⁰⁵³

- (1) to estimate the duration of a life sentence;
- (2) to indicate which punishment was considered at four different stages¹⁰⁵⁴ and how and when that was decided;
- (3) to answer three questions each about aggravating and mitigating circumstances to reveal if jurors understood the instructions; and
- (4) the acceptability of death for nine crimes.

Almost 75% of the jurors estimated that life-sentenced prisoners would be paroled or otherwise released.¹⁰⁵⁵ Most jurors discussed, considered, were concerned about and agreed that convicted murderers who were not sentenced to death would be a societal danger and are released too soon.¹⁰⁵⁶ Most discussed punishment and future dangerousness of the accused while

¹⁰⁴⁸ Foglia, *supra* note 95, at 188.

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.* at 193.

¹⁰⁵¹ *Id.* at 194. The interviews occurred one to two years after trial but the results were consistent with responses from mock juries who were tested immediately after being instructed. *Id.* at 206.

¹⁰⁵² *Id.*

¹⁰⁵³ *Id.* at 195-96.

¹⁰⁵⁴ “(1) after the guilt phase but before the sentencing phase, (2) after they were given sentencing instructions but before the deliberations, (3) at the first vote, and (4) at the final vote.” *Id.* at 195.

¹⁰⁵⁵ *Id.* at 196.

¹⁰⁵⁶ *Id.* at 197.

deliberating guilt.¹⁰⁵⁷ An overwhelming percentage believed that the crime, rather than the kind of person the convict is, should determine the punishment.¹⁰⁵⁸

Moreover, most jurors in the study incorrectly thought that a mitigating circumstance required unanimity to consider.¹⁰⁵⁹ For aggravating circumstances, most jurors correctly answered the query on the burden of proof and requisite unanimity.¹⁰⁶⁰ Of the 70 questioned, “[t]he one juror who got all the answers correct on the questions related to sentencing instructions did not believe that a life sentence really meant life in prison.”¹⁰⁶¹ Most jurors disbelieved that life in prison really means life, decided the punishment before beginning the sentencing phase and incorrectly answered more than half of the questions about the sentencing instructions.¹⁰⁶² The more accurate the responses were to the estimates for life sentences and the lower prematurity of decision corresponded to a higher the likelihood that the juror voted for life instead of death.¹⁰⁶³ More than twice as many respondents estimating life sentences to be 15 or fewer years considered death the only acceptable punishment for most of the crimes asked about (in comparison to those estimating longer periods for a life sentence).¹⁰⁶⁴

This research has been partially updated since then, both in Pennsylvania and elsewhere. The results were that “the percentages getting things wrong was remarkably similar to what” was “found in the original study. . . . The only improvement was that the median estimate for how long someone usually spends in prison if they don't get death went from 15 years to 25 years, but 25 years is still underestimating the reality.”¹⁰⁶⁵

[T]he law that should be guiding jurors’ discretion and eliminating arbitrary decisions often does not work. The underestimates of life sentences, premature decision making, and failure to understand sentencing instructions found in Pennsylvania are the same problems that were found in the national CJP data, interviews with capital jurors reported for other individual states, and prior research using different methodologies discussed in the literature review. . . . Nearly half had at least one of these problems, and over 40% revealed multiple problems to a prejudicial or extreme level. . . . The finding that considering death the only acceptable punishment was more strongly related to estimates of life sentences and a premature stance than to the final vote support this interpretation of how the process works. . . . [I]f jurors tried to follow the law, they would have difficulty because many fail to understand the guidelines.¹⁰⁶⁶

¹⁰⁵⁷ *Id.* at 198.

¹⁰⁵⁸ *Id.*

¹⁰⁵⁹ *Id.* at 200.

¹⁰⁶⁰ *Id.*

¹⁰⁶¹ *Id.* at 199.

¹⁰⁶² *Id.* at 201.

¹⁰⁶³ *Id.* at 202.

¹⁰⁶⁴ *Id.* at 203.

¹⁰⁶⁵ Foglia, *supra* note 97.

¹⁰⁶⁶ *Id.* at 204-05.

Pennsylvania Suggested Standard Jury Instructions

carry no official imprimatur of the Supreme Court of Pennsylvania. The goal of the committee is to have these instructions accurately reflect the law of Pennsylvania and provide meaningful guidance to courts in the critical task of instructing jurors in the performance of their constitutional duty. Trial judges, . . . maintain the final responsibility to craft accurate instructions and may certainly invite suggestions from the advocates to make sure that clear and accurate instructions are provided to the trial jury.¹⁰⁶⁷

Pennsylvania Supreme Court appoints the leadership of Committee for Proposed Standard Jury Instructions, with a subcommittee for civil and another for criminal.¹⁰⁶⁸ “Each subcommittee ensures that a proper statement of law is conveyed to jurors in language that is understandable. Committees update the instructions every 18 to 24 months.”¹⁰⁶⁹ Presumably, this committee of experts accurately incorporate statutory and case law in its proposed standard jury instructions, but those are just suggestions to the trial judges, who exercise the final authority to instruct the jury as suggested or otherwise. Pointedly, the relevant subcommittee strives to suggest standardized jury instructions to properly reflect the law of Pennsylvania in a way that would be understandable to jurors in both the guilt and penalty phases of a death penalty prosecution. In a given case, trial judges must modify or replace these suggested instructions to provide greater guidance where the trial court believes it is necessary to ensure that the jurors are properly advised in the critical determinations the law requires them to make.

The subcommittee on criminal jury instruction works with Pennsylvania Bar Institute, which publishes these suggested standard criminal jury instructions. Historically, the subcommittee has not studied jurors’ responses to their instructions by use of empirical surveys or other formal, scientific, analytical techniques. That subcommittee always invites feedback on the accuracy and efficacy of the suggested instructions from the bench and the bar, but neither that subcommittee nor The Unified Judicial System of Pennsylvania formally survey jurors.

The membership of the subcommittee drafting these suggested standard instructions organization is comprised of attorneys and judges. Linguists, social scientists and psychologists have not been employed to revise these standard suggested instructions.

The criminal jury instruction subcommittee is starting to explore opportunities for studying jurors’ interactions with all of the suggested standard instructions. The Director of the Center for Jury Studies at the National Center for State Courts addressed the subcommittee last year on the topic of juror use and comprehension of jury instructions. Recently, the subcommittee has contacted other jury scholars with the goal of developing a durable framework of jury research in Pennsylvania that will inform the drafting of the suggested standard instructions.

¹⁰⁶⁷ Pa. Suggested Standard Crim. Jury Instructions, Introduction to 3d Ed. (2016).

¹⁰⁶⁸ Unified Judicial Sys. of Pa., Comm. for Proposed Standard Jury Instructions, <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/committee-for-proposed-standard-jury-instructions> (2018).

¹⁰⁶⁹ *Id.*

Recommendation

It would seem to the subcommittee on procedure that if the Commonwealth decides to assure that jurors are able to understand and apply instructions in determining guilt or innocence and the appropriate punishment in a capital case, there would need to be formal, empirical feedback on a routine basis. If jurors are unable to understand and apply these instructions as research discussed above indicates, it is possible that standard suggested instructions would need to be rewritten by attorneys and judges with the assistance of linguists, social scientists and psychologists and the data disclosing the misunderstanding and misapplication. To that end, the subcommittee on procedure supports the nascent efforts of the criminal subcommittee of the Committee for Proposed Standard Jury Instructions to partner with jury researchers as it drafts and revises the suggested standard jury instructions.

State Appeals and Postconviction

The question that serves as the basis of the study of state appeals and postconviction in the administration of the death penalty in our Commonwealth is:

Whether there are adequate procedures in place to assure that serious error in capital cases is identified and corrected and to what extent procedural doctrines, such as waiver or forfeiture, operate to prevent judicial review of serious constitutional claims on the merits;¹⁰⁷⁰

Whether there are adequate procedures in place to assure that serious error in capital cases is identified and corrected

Data was obtained summarizing capital post-conviction reversals and subsequent dispositions on all post-conviction reversals of convictions or death sentences or both imposed under the contemporary death-penalty statute dating from 1978, with the first of those post-conviction reversals coming in 1988.¹⁰⁷¹ For post-conviction reversals in state court during this period, 116 death-row prisoners have obtained post-conviction relief from their convictions or death sentences—and, in some instances, both—in Pennsylvania state courts. Of these, new trials were granted for 18 post-conviction petitioners and 91 were granted new sentencing hearings. In 17 cases, petitioners were declared ineligible for the death penalty, 15 as a result of intellectual disability and two because they were younger than age 18 at the time of the offense.¹⁰⁷² For post-conviction reversals in federal court during the same period, 58 death-row prisoners have obtained relief from their capital convictions or death sentences or both in federal habeas corpus proceedings, with the federal courts granting new trials in 24 cases and overturning death sentences in 44 cases. Three death-row prisoners who were granted penalty-phase relief in state court later had their convictions overturned in federal court. One prisoner who was granted a new penalty-

¹⁰⁷⁰ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A., *infra* p. 220-21.

¹⁰⁷¹ Dunham, *supra* note 12.

¹⁰⁷² Multiple trials and multiple reversals are counted as cases separately from counting the same defendant so a defendant who was tried twice and obtained two reversals would count twice instead of once.

phase trial by the federal courts also had his conviction overturned after the case was remanded back to the state courts. Collectively, 170 Pennsylvania death-row prisoners have had either their convictions or death sentences overturned in state or federal post-conviction proceedings.

For subsequent dispositions from capital post-conviction reversals of either the conviction, death sentence or both in both state and federal court dating from 1978, with the first of those dispositions coming in 1996, 137 of the 170 cases reached a subsequent disposition. Almost all--133 of the cases--resulted in a sentence of life or less or an exoneration. Of these 133 defendants, two were exonerated, 13 pled guilty to third-degree murder, eight of whom have been released or completed their sentence, and the remainder were re-sentenced to life imprisonment. For subsequent dispositions from capital post-conviction reversals in state court since 1995, six defendants were resentenced to death, two of whom then had their death sentences reversed again and are serving life imprisonment so that four of these six remain sentenced to death. In sum, 97.1% of these dispositions following post-conviction reversals resulted in a sentence of life imprisonment or less. Specifically, approximately 86% were resentenced to life imprisonment and almost 11% received less than that with two completely exonerated. Thus, the percentage of those who were resentenced to death following post-conviction reversals is less than 3%.

There are both adequate and inadequate procedures to assure that serious error in capital cases is identified and corrected and procedural doctrines sometimes prevent, but perhaps more often, delay judicial review of serious constitutional claims on their merits. Similarly, the procedures and procedural doctrines that appear to be intended to limit judicial review for systematic efficiency and effectiveness of the death penalty often generate systematic inefficiency and ineffectiveness of the death penalty. This is borne out by the fact that the Commonwealth has executed only three condemnees during the last 56 years, and all three had psychiatric problems and relinquished their appeals,¹⁰⁷³ demonstrating that less than 3% of condemnees who had their original death sentences judicially vacated and then subsequently disposed were resentenced to death.

¹⁰⁷³ “Zettlemoyer was taking an anti-depressant/anti-psychotic drug when he testified before the district court and when he wrote a letter on March 28, 1995, indicating that he wanted no further appeals. . . . [T]he record is clear that Zettlemoyer voluntarily took the medication as part of a course of treatment for his medical problems. He testified before the district court that ‘I have a number of health problems, and the psychiatrist and the psychologist at the SCI Pittsburgh Institution have recommended a variety of medications for me to take. . . . [S]o I always take it.’” *In re Zettlemoyer*, 53 F.3d 24, 28-29 (3d Cir. 1995). “Throughout the proceedings, Leon Moser maintained that he wanted to die. From all indications, he still does. . . . Moser had been hospitalized . . . for depression . . .; and . . . takes a common anti-depressant, Imipramine.” *In re Moser*, 69 F.3d 691, 693-94 (3d Cir. 1995) (Nygaard, J., dissenting). “Moser . . . underwent psychiatric treatment while in prison”. Associated Press, *Killer of His Ex-Wife & 2 Daughters Is Executed*, *N.Y. Times* (Aug. 17, 1995), <https://www.nytimes.com/1995/08/17/us/killer-of-his-ex-wife-and-2-daughters-is-executed.html>. “Dr. Bernstein stated that it was his opinion within a reasonable degree of medical certainty that Heidnik suffered from paranoid schizophrenia, and described him as a seriously disturbed, cognitively impaired, psychotic individual. . . . Dr. McKenzie opined with a reasonable degree of medical certainty that Heidnik suffers from schizophrenia, is actively psychotic, and is not in contact with reality. . . . Heidnik indicated in response to questioning . . . that he did not wish the attorneys to appeal. . . . The court stated that Heidnik’s paranoid schizophrenia does not substantially affect his capacity to appreciate his position and make a rational choice with respect to continuing or abandoning habeas corpus proceedings in federal court.” *In re Heidnik*, 720 A.2d, 1016, 1024-26 (Pa. 1998).

The subcommittee on procedure advocates reinstating the previous practice of relaxed waiver on direct capital appeals as it was employed in the 1980s and 1990s. During that period, Pennsylvania’s Supreme Court had a “duty to transcend procedural rules” in capital cases,¹⁰⁷⁴ and to “address and, if possible from the record, resolve all significant issues perceived by this Court or raised by the parties”, irrespective of waiver.¹⁰⁷⁵ Generally, “on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable” but “may be pursued under the” Post Conviction Relief Act “as claims sounding in trial counsel’s ineffectiveness or, if applicable, a statutory exception to the” act’s “waiver provision.”¹⁰⁷⁶

These are several problems with not having relaxed waiver in effect any more. When a potentially dispositive issue could have been resolved on the record on direct appeal, delaying its review until the petitioner reaches post-conviction proceedings is inefficient for the judiciary and everyone else involved in the proceedings.¹⁰⁷⁷ Although Post Conviction Relief Act “is not intended to . . . provide a means for raising issues waived in prior proceedings”, it specifically provides otherwise¹⁰⁷⁸ if “the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.”¹⁰⁷⁹ Nonetheless, “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.”¹⁰⁸⁰ When Pennsylvania’s Supreme Court dropped the relaxed waiver practice, it did “not foreclose the possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal.”¹⁰⁸¹ By dropping the relaxed waiver rule in a self-contradictory manner to rely on a self-contradictory Post Conviction Relief Act, one does not arrive at judicial efficiency.

Recognizing “the undeniable fact that a death penalty appeal is different in quality and kind because of the final and irrevocable nature of the penalty,” Pennsylvania’s Supreme Court claimed that “our abrogation of relaxed waiver does not eliminate or diminish other substantial safeguards, . . . not available in other criminal matters,” serving

¹⁰⁷⁴ *Commw. v. McKenna*, 383 A.2d 174, 181 (Pa. 1978).

¹⁰⁷⁵ *Commw. v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984). The Court later described the relaxed waiver rule as discretionary, *Commw. v. Malloy*, 856 A.2d 767, 778 (Pa. 2004), but for more than twenty years, it was “this Court’s practice to address all issues arising in a death penalty case irrespective of a finding of waiver.” *Commw. v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995); *Commw. v. Jermyn*, 709 A.2d 849, 856 n.20 (Pa. 1998); *Commw. v. Morales*, 701 A.2d 516, 520 n.13 (Pa. 1997); *Commw. v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996). The Court stated that the relaxed waiver rule “requires us to examine” technically waived issues, *Commw. v. Simmons*, 662 A.2d 621, 636 (Pa. 1995), and stressed that, in a death penalty case, an issue “cannot be considered waived,” *Commw. v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986).

¹⁰⁷⁶ *Commw. v. Freeman*, 827 A.2d 385, 402 (Pa. 2003).

¹⁰⁷⁷ The joint trial of co-defendants K. O’Donnell and W. Gribble illustrates this point. O’Donnell was awarded a new sentencing hearing in 1999 after being granted penalty-phase relief on a claim raised and decided under the relaxed waiver rule. *Commw. v. O’Donnell*, 740 A.2d 198, 201, 204, 214 (Pa. 1999). Gribble’s lawyer failed to raise the issue—equally applicable to his case—on direct appeal, and it took eight more years, including a remand by the Pa. Sup. Ct. for further post-conviction proceedings, before Gribble’s post-conviction petition was resolved.

¹⁰⁷⁸ 42 Pa.C.S. § 9542.

¹⁰⁷⁹ *Id.* § 9543. This is true unless the delay in filing the petition prejudices the Commonwealth. *Id.*

¹⁰⁸⁰ *Id.* § 9544(b).

¹⁰⁸¹ *Freeman*, 827 A.2d at 402.

a function similar to the relaxed waiver rule. First, this Court performs a self-imposed duty to review the sufficiency of the evidence underlying the first-degree murder conviction in all capital direct appeals, regardless of whether the appellant has raised the issue. The Court is also required to conduct a statutory review of the death sentence itself to determine whether it was the product of passion, prejudice or any other arbitrary factor, and to determine whether the evidence adduced at trial was sufficient to support the aggravating circumstance(s) found by the jury. . . . In addition to these special protections afforded capital appellants, the

Post Conviction Relief Act “exists for them, as for other criminal defendants, as a vehicle for a full and fair, counseled proceeding through which they may challenge the stewardship of trial counsel and pursue other appropriate collateral claims.”¹⁰⁸²

But this explanation belies the reality of the Court’s current interpretation of its duty to review the record under 42 Pa. C.S. § 9711(h)(3) and unpersuasively prioritizes a strict, contemporaneous objection rule as a form over the substance of a life at stake. In the 1980s, “passion, prejudice or any other arbitrary factor” under 42 Pa. C.S. § 9711(h)(3)(i) was “quite broad and [went] beyond the normal constraints of an adversary system.”¹⁰⁸³ At that time, the Court understood this provision as an “explicit requirement that an automatic, searching and independent review of all death sentences would be available in this Court on a mandatory basis.”¹⁰⁸⁴ It believed at that time that it was required to review the entire record for constitutional error¹⁰⁸⁵ and to *sua sponte* address all constitutional issues it perceived as present, even if they had not been raised by the defendant¹⁰⁸⁶ and even if the defendant brought no appeal at all.¹⁰⁸⁷ However, following the legislative repeal of proportionality review and its own abrogation of the relaxed waiver rule, the Court, also on its own, severely curtailed the scope of its independent review of the record. In 2009, in *Commonwealth v. VanDivner*,¹⁰⁸⁸ it wrote that section 9711(h)(3) only authorized the Court “to identify and raise claims . . . in narrow circumstances where it appears that the sentence of death is a ‘product of passion, prejudice or an arbitrary factor.’” Not all claims of error, or even all claims of constitutional error,” it wrote, “implicate passion, prejudice, or arbitrariness.”¹⁰⁸⁹ Two years later, the Court ironically told the same litigant, whom it had previously said was entitled to “an automatic, searching and independent review” of his death

¹⁰⁸² *Id.* at 402-03 (citations omitted).

¹⁰⁸³ *Commw. v. Holcomb*, 498 A.2d 833, 837 n.6 (Pa. 1985).

¹⁰⁸⁴ *Commw. v. Lesko*, 501 A.2d 200, 204 (Pa. 1985).

¹⁰⁸⁵ *E.g.*, *Commw. v. Szuchon*, 484 A.2d 1365, 1381-82 (Pa. 1984; *see also Commw. v. Breakiron*, 571 A.2d 1035, 1046 (Pa. 1990) (Nix, C.J., with Zappala, J., dissenting) (“It is understood we are to examine the total record for constitutional compliance.”).

¹⁰⁸⁶ *Commw. v. Zettlemyer*, 454 A.2d 937, 955 n.19 (Pa. 1982); *Commw. v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984); *Commw. v. Beasley*, 475 A.2d 730, 742 n.1 (Pa. 1984); *see also Commw. v. Williams*, 615 A.2d 716, 729-30 (Pa. 1992) (Nix, C.J., dissenting) (would have granted relief for ineffectiveness of counsel’s sentencing-stage closing argument, not raised by the appellant).

¹⁰⁸⁷ *Commw. v. Appel*, 539 A.2d 780, 781, 784 (Pa. 1988) (the court “conducted an independent review of the entire record in the present case and considered all possible bases for overturning the conviction or the sentence”); *Commw. v. Michael*, 674 A.2d 1044, 1046-47 (Pa. 1997); *Commw. v. Graham*, 661 A.2d 1367, 1369 (Pa. 1995); *Commw. v. Heidnik*, 587 A.2d 687, 689 (Pa. 1991).

¹⁰⁸⁸ 983 A.2d 1199 (Pa. 2009).

¹⁰⁸⁹ *Id.* at 1203.

sentence, that he “fails to recognize the very limited purpose of review pursuant to Section 9711(h)(3)(i).”¹⁰⁹⁰

Moreover, the Court’s justification for abrogating relaxed waiver overlooks the statutory authority it has “to correct errors at trial”, regardless of waiver, when it automatically reviews death sentences.¹⁰⁹¹ It also completely overlooks the practical reality that more than 97% of post conviction reversals disposing of death sentences in Pennsylvania since 1978 have subsequently resulted in a sentence of life imprisonment or less. The same judicial opinion that rejected the justification of “relaxation of waiver principles on direct appeal . . . on grounds of judicial economy because it reduces the number and necessity of post-conviction relief petitions” because the “efficient use of” this court’s resources were frustrated by the relaxed waiver doctrine also contended that abrogation of relaxed waiver would do no harm since “[a]ny meritorious claims which escape counsel’s recognition on direct appeal can then be raised on grounds of counsel’s ineffectiveness.”¹⁰⁹² But preserving judicial resources on direct appeal by limiting the scope of direct review does not serve judicial economy, the public fisc, or the interests of justice by burdening post-conviction review with claims that could have been earlier resolved, by unnecessarily burdening the post-conviction process with claims of ineffectiveness for prior counsel’s failures to preserve for appeal claims that could have been decided under the relaxed waiver rule, and by keeping prisoners who have meritorious claims in death-row confinement for the extra years needed for post-conviction review and appeal. Neither judicial economy nor fairness is served when the more than 97% of cases in which death sentences are converted to life sentences or less leave death row only after post conviction disposition.

Finally, since the statute provides for automatic judicial review of death sentences to correct errors at trial, the judiciary should not insist on a timely notice of appeal to consider any claims unassociated with the statutorily-mandated review of the sufficiency of the evidence. This would be a corollary to Pennsylvania Rules of Civil Procedure that are liberally construed and applied “to secure the just, speedy and inexpensive determination of every action”.¹⁰⁹³ The imposition of capital punishment might be a penalty that is unique enough for “an appellate court” to “consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure” by upholding “the mandates of the constitution over the countervailing considerations of normal appellate procedure”, especially since the doctrine of waiver’s purported “means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve” has not been realized in the capital context.¹⁰⁹⁴

61 Pa.C.S. § 4302. From 1985 through April 2018, 466 warrants specifying a day for execution have been signed by the Commonwealth’s executive.¹⁰⁹⁵ Those 466 warrants resulted in three executions occurred, representing .006% of them. During this period, the largest number of warrants signed by an executive were the 220 warrants signed by Governor Ridge. He was also

¹⁰⁹⁰ *Commw. v. Lesko*, 15 A.3d 345, 411 (Pa. 2011).

¹⁰⁹¹ 42 Pa.C.S. § 9711(h).

¹⁰⁹² *Commw. v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998).

¹⁰⁹³ Pa. R. Civ. P. 126.

¹⁰⁹⁴ *Commw. v. McKenna*, 383 A.2d 174, 180-81 (Pa. 1978).

¹⁰⁹⁵ Pa. Dep’t of Corrections, *supra* note 7.

the only governor in this period whose signed warrants resulted in executions. Three executions out of 220 warrants represents .014%. Thus, all the other governors executed nobody from the other 246 warrants of execution they signed. It took a total of six warrants of execution to execute the three condemnees during Governor Ridge's tenure. Under the current administration, 28 of the 32 warrants of execution signed by Secretary Wetzel have been judicially stayed, which amounts to almost 88% of them; this percentage was 100 for some other administrations.¹⁰⁹⁶ This indicates that the statutory time to issue these warrants is unrealistically premature and ineffective.¹⁰⁹⁷

The statute requires the executive to issue a warrant specifying a day for execution "within 90 days" after receiving "a full and complete record of the trial, sentencing hearing, imposition of sentence, opinion and order by the Supreme Court"¹⁰⁹⁸ or "within 30 days" of being notified of termination of a judicial stay of execution.¹⁰⁹⁹ Rather than making the procedure for an execution more effective, the statute is systematically causing serious inefficiencies. The problem with this statutory trigger's ineffectiveness is that it disregards Post Conviction Relief Act and federal *habeas* litigation and appeals, which can each have multiple rounds of review. Registered survivors of homicide victims are notified when a warrant of execution is signed and stayed, which itself can be a roller coaster of emotions for them. Statutorily mistimed warrants of execution help neither survivors of homicide victims nor victim advocates. The following outline demonstrates that the statute typically mandates at least two, mistimed or almost certainly premature warrants of execution.

1. Conviction
2. Automatic appeal to Supreme Court of Pennsylvania
3. Supreme Court affirms
4. Petition for *Certiorari* in the Supreme Court of the United States
5. U.S. Supreme Court denies
6. Death Warrant issued
7. PCRA and Death Warrant stayed
8. PCRA petition denied
9. PCRA appealed to Supreme Court of Pennsylvania
10. Supreme Court affirms
11. Petition for *Certiorari* in the Supreme Court of the United States
12. U.S. Supreme Court denies
13. Death Warrant issued
14. Federal *habeas* petition and Death Warrant stayed
15. Federal *habeas* denied
16. Federal *habeas* appealed to Third Circuit
17. Third Circuit affirms denial
18. Petition for *Certiorari* in the Supreme Court of the United States
19. U.S. Supreme Court denies
20. Death Warrant issued

¹⁰⁹⁶ *Id.*

¹⁰⁹⁷ 61 Pa.C.S. § 4302(a). The day specified for the execution must be within 60 days of the warrant's signing. *Id.*

¹⁰⁹⁸ 42 Pa.C.S. § 9711(i).

¹⁰⁹⁹ 61 Pa.C.S. § 4302(a). The day specified for the execution must be within 60 days of the warrant's reissuance. *Id.*

A more realistic, statutory trigger that mandates issuance of a warrant of execution would not occur until one year after the date a judgment becomes final because post-conviction relief remains statutorily available until then.¹¹⁰⁰ Even that timing would be a premature, statutory trigger because the more realistic, statutory timeliness mandating issuance of a warrant of execution still would not occur at that point but only following state post conviction proceedings, if any, when the capital defendant failed to file a timely petition for writ of *habeas corpus* in the appropriate federal district court, or failed to timely appeal or petition an adverse *habeas corpus* decision to the United States Court of Appeals for the Third Circuit or the United States Supreme Court. One condemnee has had six warrants of execution judicially stayed, and the overwhelming percentage of judicial stays of warrants of execution for the other condemnees indicates that the statutory time to issue a warrant of execution should be more realistically based.

Recommendation

The subcommittee on procedure advocates reinstating the previous practice of relaxed waiver on direct capital appeals as it was employed in the 1980s and 1990s. Also, since the statute provides for automatic judicial review of death sentences to correct errors at trial, the judiciary should not insist on a timely notice of appeal to consider any claims unassociated with the statutorily-mandated review of the sufficiency of the evidence. Finally, the statutory trigger that mandates issuance of a warrant of execution should be amended to the more realistic, statutory timeliness mandating the warrant's issuance only following state post-conviction proceedings, if any, when the capital defendant failed to file a timely petition for writ of *habeas corpus* in the appropriate federal district court, or failed to timely appeal or petition an adverse *habeas corpus* decision to the United States Court of Appeals for the Third Circuit.

Clemency

The question that serves as the basis of the study of clemency in the administration of the death penalty in our Commonwealth is:

Whether the current clemency process has procedures in place to assure that it functions as a safety net to assure that factual and procedural errors that directly undermine the reliability and fairness of a capital sentence are remedied;¹¹⁰¹

The short answer is, simply, no. The Pennsylvania Constitution has vested exclusive authority in the Governor to grant reprieves, commutations and pardons.¹¹⁰² The Governor may exercise this authority for any reason or no reason, and this includes the circumstance where he believes the capital sentence is unreliable or unfair. However, the Governor can commute or pardon a capital sentence only upon receipt of a written and unanimous recommendation from the

¹¹⁰⁰ 42 Pa.C.S. § 9545(b)(1).

¹¹⁰¹ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 221.

¹¹⁰² Pa. Const. art. IV, § 9(a) (Governor has “power to . . . grant reprieves, commutation of sentences and pardons.”).

Board of Pardons.¹¹⁰³ Likewise, the Board may base its recommendation on any consideration, including the innocence of the convicted criminal or the unfairness of the sentence.

The composition of the Board of Pardons is a matter of constitutional law.¹¹⁰⁴ It consists of the Attorney General; the Lieutenant Governor and three persons appointed by the Governor, with the approval of the Senate. One appointee “shall be a crime victim, one a corrections expert and the third a doctor of medicine, psychiatrist or psychologist.”¹¹⁰⁵ The Administrative Code of 1929 implements Article IV, Section 9.¹¹⁰⁶ This statute places some limits on the Board, such as requiring it to notify crime victims of any clemency application and to give victims an opportunity to comment. The statute also authorizes the Board of Pardons to promulgate regulations. The Board’s regulations focus on the application process by which a criminal defendant may seek clemency; they do not articulate the standards by which the Board will exercise its discretion to recommend that the Governor grant a pardon or commutation of any criminal sentence, capital or otherwise.

The Board of Pardons serves as a check on any Governor who might wield the clemency power unwisely, arbitrarily or for political gain. The Board also functions as a clearing house for clemency applications. The Board of Pardons was not established to provide a “safety net” where the criminal justice system has failed to produce an accurate and fair judgment of guilt in a capital case. Accordingly, the Board of Pardons has only limited power, *i.e.*, to make recommendations. Further, its recommendation can be ignored by the Governor.

The General Assembly could amend the Administrative Code of 1929 to require the Board of Pardons to consider the reliability or unfairness of a capital sentence in its review of a clemency application. This would have little efficacy in changing the current state of the clemency process. First, the recommendation for clemency must be unanimous. Given the diversity in the composition of the Board, this will be difficult to achieve in any but the most compelling of circumstances. This is particularly true where the applicant asserts that the capital sentence is legally invalid because only one Board member, the Attorney General, is required to have legal training. Second, the Pennsylvania Constitution limits the power of the Board of Pardons. It lacks the capacity to issue orders; it can only make recommendations. The Board’s governmental power lies in its ability to prevent the Governor from exercising his clemency power. Third, even if the Board of Pardons developed specific processes to address unfair and unreliable capital sentences, and somehow all five members agreed on this point, its clemency recommendation can be rejected by the Governor, for any reason or no reason.

Were the General Assembly to decide to develop a “safety net” to address unreliable or unfair capital sentences, it could amend the Post Conviction Relief Act,¹¹⁰⁷ which already “provides for an action by which persons convicted of crimes they did not commit and persons

¹¹⁰³ *Id.*

¹¹⁰⁴ *Id.* § 9(b).

¹¹⁰⁵ *Id.*

¹¹⁰⁶ See the acts of Apr. 9, 1929 (P.L.177, No.175), §§ 403, 909, & of Apr. 24, 1931 (P.L.71, No.53) § 1; 71 P.S. §§ 113, 299 & 299a.

¹¹⁰⁷ 42 Pa.C.S. §§ 9541-9546.

serving illegal sentences may obtain collateral relief.”¹¹⁰⁸ These amendments could confer additional authority upon the judiciary, beyond that which presently exists, to order relief in a particular circumstance. Notably, the Governor does not need a recommendation from the Board of Pardons to grant a reprieve.¹¹⁰⁹ The Governor’s reprieve power functions as a short-term safety net to prevent the injustice of an execution of a person whose capital sentence has been entered improperly. To vest the Board of Pardons with authority to grant pardons or commutation would require substantial amendments to Article IV, Section 9, of the Pennsylvania Constitution and to The Administrative Code of 1929.

“Prior to November 4, 1997,” this constitutional provision required a majority instead of a unanimous recommendation of the Board before the Governor could pardon or commute the sentence of an individual sentenced in a criminal case to death or life imprisonment.¹¹¹⁰ Its membership also had an attorney instead of a crime victim and a penologist instead of a corrections expert as board members.¹¹¹¹ To reduce the number of votes needed to support the Board’s recommendation to the Governor that a life sentence or condemnation be commuted or pardoned would require another amendment. If amended accordingly, which the subcommittee supports, the Governor would remain free to accept or reject the recommendation for any reason or no reason.

Appendix D shows the clemency options in each state along with the decisional authority.¹¹¹²

Penological Intent

The question that serves as the basis of the study of penological intent in the administration of the death penalty in our Commonwealth is:

Whether the death penalty rationally serves a legitimate penological intent such as public safety or deterrence;¹¹¹³

Four of the generally accepted purposes of criminal punishment include retribution, deterrence, rehabilitation, and incapacitation.¹¹¹⁴ Retribution is based on the premise that “society has an interest in imposing merited suffering upon offenders proportional to the harm that their crime caused society.”¹¹¹⁵ Deterrence “justifies punishment as a means to prevent future

¹¹⁰⁸ *Id.* § 9542. *See also*, Pa. R. Crim. P. 900-910, which govern capital and noncapital cases under the Post Conviction Relief Act.

¹¹⁰⁹ Pa. Const. art. IV, § 9(a).

¹¹¹⁰ *Pa. Prison Soc’y v. Cortes*, 622 F.3d 215, 220-21 (3d Cir. 2010).

¹¹¹¹ *Id.* at 221.

¹¹¹² *Infra* pp. 229-34.

¹¹¹³ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 221.

¹¹¹⁴ “A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.” *Ewing v. Cal.*, 538 U.S. 11, 25 (2003).

¹¹¹⁵ Stephen M. LeBlanc, *Cruelty to the Mentally Ill: An Eighth Amend. Challenge to the Abolition of the Insanity Defense*, 56 Am. U. L. Rev. 1281, 1314 (2007).

crimes.”¹¹¹⁶ “Rehabilitation is the interest in preventing recidivism through assisting and facilitating the offender’s transition to a lawful lifestyle”¹¹¹⁷ and therefore is obviously not a justification for the death penalty. Incapacitation justifies punishment “to protect the rest of society from the danger [criminal offenders] pose.”¹¹¹⁸

For the most part, the debate concerning capital punishment centers on the aims of deterrence, incapacitation and retribution—increasingly the last of these. There is a great deal of disagreement about whether the death penalty meaningfully advances the deterrence purpose; it certainly does advance the aims of retribution and incapacitation, and the debate largely centers on whether it does this more effectively than alternatives. (The death penalty obviously does not advance the aim of rehabilitation; by definition, it eliminates any possibility that the condemned person will be rehabilitated.)

Another possible purpose for the death penalty is labeled denunciation, which pronounces society’s condemnation of the accused for committing a terrible crime. The subcommittee on policy found little material on this purpose as it applies to the death penalty. In a straightforward sense, to give the supreme penalty for an offense undoubtedly denounces it in the strongest possible terms. But death penalty opponents are quick to point out that execution sends a mixed message by replicating the very act that is the classic—and virtually the only—capital crime.

Uniqueness of the Death Penalty

The U.S. Supreme Court has emphasized that the death penalty is a uniquely severe punishment, qualitatively different from all other criminal sanctions. The classic articulation of the “Death Is Different” principle is Justice William J. Brennan’s concurring opinion in *Furman v. Georgia*.

Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. . . .

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose ‘the right to have rights.’ A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel

¹¹¹⁶ *Id.* at 1317.

¹¹¹⁷ *Id.* at 1319.

¹¹¹⁸ *Id.* at 1321.

and unusual punishments, and to treatment as a ‘person’ for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed ‘lost the right to have rights.’¹¹¹⁹

The logical conclusion of this premise, and the one Justice Brennan supported, is that the death penalty is a “cruel and unusual punishment” prohibited by the Eighth Amendment. Short of that, the uniqueness of death is recognized by a number of procedural distinctions between it and any other criminal punishment in Pennsylvania and most other states that use the death penalty, including special qualifications for legal representation,¹¹²⁰ bifurcation of the guilt and punishment stages,¹¹²¹ and automatic appeal to the state Supreme Court.¹¹²² In several states, the supreme court must conduct a proportionality review to ensure that the death sentence in a case under review is consistent with sentences in similar cases—a review not mandated for sentences from other criminal convictions. Acceptance of the principle does not necessarily mandate that a distinction between death and other sentences must be made regarding every issue, but it does tend in that direction. In concert with the consensus of the commentators on the death penalty within the legal academy,¹¹²³ this report adopts Justice Brennan’s Death Is Different principle.

Retribution

Louis P. Pojman provides the following summary of the retributivist view: “The retributivist holds three propositions: (1) that all of the guilty deserve to be punished; (2) that only the guilty deserve to be punished; and (3) that the guilty deserve to be punished in proportion to the severity of the crime.”¹¹²⁴ He distinguishes retribution from impermissible vengeance: “Vengeance signifies inflicting harm on the offender out of anger at what he has done. Retribution is the rationally supported theory that the criminal deserves a punishment fitting the gravity of the crime.”¹¹²⁵

¹¹¹⁹ 408 U.S. 238, 287-88, 290 (1972) (citations omitted).

¹¹²⁰ Pa. R. Crim. P. 801.

¹¹²¹ 42 Pa.C.S. § 9711(a)(1).

¹¹²² *Id.* § 9711(h)(1).

¹¹²³ See Jeffrey L. Kirchmeier, *Aggravating & Mitigating Factors: The Paradox of Today’s Arbitrary & Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 457-59 (1998); Jeffrey Abramson, *Death-Is-Different Jurisprudence & the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117, 164 (2004); Dr. Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Sup. Ct.’s Capital Jurisprudence Post-Roper*, 45 J. Cath. Leg. Stud. 561, 627-29 (2006); William W. Berry III, *Repudiating Death*, 101 J. of Crim. L. & Criminology 441, 492 (2011).

¹¹²⁴ Louis P. Pojman, *Why the Death Penalty Is Morally Permissible*, in *Debating the Death Penalty* 56 (Hugo Bedau & Paul Cassell eds., 2004).

¹¹²⁵ *Id.* at 57.

A recent book by Professor Thane Rosenbaum argues that a reasonable measure of vengeance is an essential element of justice:

The call for justice is always a call for revenge. Despite all the wordplay and mind games, there is no difference between justice and vengeance. They are one and the same no matter how much we run away from revenge while falling into the arms of justice. There is no justice if wrongdoers go unpunished and victims do not feel avenged; and revenge—restoring honor, evening the score, ensuring that wrongdoers receive their just deserts—is inseparably linked to living in a just society, one that is honest about what must be done to those who do harm, and the opportunity that must be given to individuals to redress the indignity caused by another.

[An] objection to revenge and its relationship to capital punishment is the idea that revenge forces the avenger to stoop to the same level as the wrongdoer. But it's really the other way around. It is the wrongdoer's act that has devalued the victim, making him low. Vengeance merely brings him back to where he was before the injury led to his descent. Suggesting that vengeance brings the avenger down to the same level of the wrongdoer misses the point entirely. The victim is already in the gutter. Vengeance is the elevator that restores him to his former stature. Revenge is an action of upward mobility with the avowed purpose of making things even again. The avenger is neither debased nor dehumanized; there is nothing downgrading about settling the score. Vengeance is restorative, not diminishing.¹¹²⁶

The late Hugo Adam Bedau, a leading opponent of the death penalty, explained his rejection of retribution as a proper aim of the criminal justice system. His view of justice centered on the Minimum Invasion Principle, which he described as follows:

Given a compelling state interest in some goal or purpose, the government in a constitutional democracy built on the principle of equal freedom and human rights for all must use the least restrictive means sufficient to achieve that goal or purpose. More expansively, the principle . . . holds that if individual privacy, liberty, and autonomy (or other fundamental values) are to be invaded and deliberately violated, it must be because the end to be achieved is of undeniable importance to society, and no less severe interference will suffice.¹¹²⁷

In Bedau's view, this principle requires the abolition of the death penalty because "[l]ong-term imprisonment is sufficient as an invasion of individual liberty, privacy, and autonomy (and other fundamental values) to achieve valid social goals."¹¹²⁸

¹¹²⁶ Thane Rosenbaum, *Payback: The Case for Revenge* 27, 200 (2013). Rosenbaum uses "vengeance" in a different sense from Pojman, perhaps as punishment motivated by the anger of the survivors, but regulated by law.

¹¹²⁷ Hugo Bedau, *An Abolitionist's Survey of the Death Penalty in Am. Today*, in Bedau & Cassell, *supra* note 1124, at 32.

¹¹²⁸ *Id.* at 33.

Considering the goal of retribution within this conceptual framework, he first argues that retribution is supplied by the application of the punitive measure specifically to the guilty person:

[P]unishment . . . is a retributive act, insofar as the only persons deemed eligible for punishment are persons judged to be guilty of a crime and thought to be deserving of punishment because of their guilt. A system of inflicting deprivations on persons in the name of punishment that lacked this retributive element would be a danger to us all.

Second, I do not believe it is rational to assign as one of the legitimate goals of a system of punishment the exaction of retribution in some special fashion or further degree that goes beyond the inherently retributive nature of any system of punishment, as described above. Thus life imprisonment for murder is every bit as retributive as the death penalty for murder, even if it is less severe.¹¹²⁹

Bedau argues that the principles relied on by retributivists lend no substantial support to the death penalty:

I will not quarrel with appeal to a general principle of desert: “Wrongdoers deserve to be punished.” But by itself, this principle provides no defense of the death penalty; it is fully satisfied by a lesser punishment, such as imprisonment. The proposition that “murderers deserve to die” obviously does support the death penalty, but it does so by essentially begging the question. Why do murderers deserve to die when rapists do not deserve to be raped (or do they? and by whom?)? . . . Retributive considerations rightly tell us *who* deserves to be punished—it is the guilty. But it does not tell us *what* the punishment ought to be. Relying on some version of *lex talionis* is of no help in building a systematic and comprehensive schedule of punishments for crimes. . . .

A similar conclusion is reached if we invoke another retributive principle: “The graver the crime, the greater the punishment deserved.” No doubt some such principle of proportionality will be incorporated into any reasonable theory of punishment. By itself, however, this principle does not defend the death penalty. If murder is the gravest crime, then under this principle it warrants the severest punishment. But that punishment could surely be (as it is in the typical abolition jurisdiction) some form of long-term imprisonment.¹¹³⁰

Bedau does not deny that the death penalty advances the aim of retribution as he defines it: execution meets his test by identifying the perpetrator for special punitive treatment. He objects to the death penalty because it violates the Minimal Invasion Principle. Long-term imprisonment also singles out the guilty for substantial punishment and does so in a less severe, and therefore, a less invasive manner than the death penalty.

¹¹²⁹ *Id.* at 41.

¹¹³⁰ *Id.* at 41-42.

Like other opponents of the death penalty, Justice Thurgood Marshall argued that retribution, as Rosenbaum defines it, is not a proper purpose for a contemporary penal system. In his dissenting opinion in *Gregg v. Georgia*, he identified four meanings of retribution. The first is similar to Bedau's in that it requires that punishment be directed against the perpetrator.¹¹³¹ Secondly, retribution satisfies the instinctive need to punish one who has committed a serious crime, and the punishment must be severe enough to satisfy the public that the murderer has received the punishment he deserves.¹¹³² Marshall denied this justified the death penalty: "It simply defies belief that the death penalty is necessary to prevent the American people from taking the law into their own hands."¹¹³³ Thirdly, retribution expresses society's moral outrage and demonstrates to the public that the perpetrator's crime is wrong (similar to the concept of denunciation).¹¹³⁴ Again, for Marshall, this theory lends no support for the death penalty: "It is inconceivable that any individual concerned about conforming his conduct to what society says is 'right' would fail to realize that murder is 'wrong' if the penalty were simply life imprisonment."¹¹³⁵

Most disturbing to Justice Marshall were the indications from some members of the *Gregg* Court that they accepted the fourth view of retribution: the "purely retributive justification for the death penalty that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is in itself morally good."¹¹³⁶ Marshall considered this idea to be "fundamentally at odds with the Eighth Amendment."¹¹³⁷

To be sustained under the Eighth Amendment, the death penalty must 'compor(t) with the basic concept of human dignity at the core of the Amendment,' the objective in imposing it must be '(consistent) with our respect for the dignity of (other) men.' Under these standards, the taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrong-doer's dignity and worth.¹¹³⁸

Underlying Marshall's view is the Court's seminal statement in *Trop v. Dulles*¹¹³⁹ that the Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹¹⁴⁰

The death penalty advances the purpose of retribution, but, as we shall see, life imprisonment without parole does this sufficiently to obviate the need for the death penalty.

¹¹³¹ *Gregg v. Georgia*, 428 U.S. 153, 237 (1976) (Marshall, J., dissenting).

¹¹³² *Id.* at 238.

¹¹³³ *Id.*

¹¹³⁴ *Id.*

¹¹³⁵ *Id.*

¹¹³⁶ *Id.* at 239.

¹¹³⁷ *Id.* at 240.

¹¹³⁸ *Id.* at 240-41 (citations omitted).

¹¹³⁹ 356 U.S. 86 (1958).

¹¹⁴⁰ *Id.* at 101.

Deterrence

Whether the death penalty deters first-degree murder has long been a matter of debate between proponents and opponents of the death penalty. The evidence relating to deterrence is inconclusive, and leading advocates on both sides treat this issue as one of more or less secondary importance. In a state like Pennsylvania with a relatively large number of death sentences but almost no executions, the deterrent effect of the death penalty is attenuated, regardless of whether a more vigorously applied death penalty would have a deterrent effect.¹¹⁴¹

A prominent research study of the death penalty's effectiveness as a deterrent reached this noncommittal conclusion:

[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, . . . these studies [should] not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.¹¹⁴²

This study identified three flaws that characterize the research into this issue:

- The studies do not factor in the effects of noncapital punishments that may also be imposed.
- They use incomplete or implausible models of potential murderers' perceptions of and response to the use of capital punishment, such as the assumption that would-be murderers accurately perceive the likelihood of execution.
- Estimates of the effect of capital punishment are based on statistical models that make assumptions that are not credible, such as the assumption that the effect of capital punishment is the same regardless of place and time.¹¹⁴³

An opinion survey of criminal law scholars conducted late in the 1990s concluded that "there is a wide consensus among America's top criminologists that scholarly research has demonstrated that the death penalty does, and can do, little to reduce rates of criminal violence."¹¹⁴⁴ A more recent analysis of the research on the causes of the decline in the crime rates concluded that "the death penalty does not have an effect on bringing down crime."¹¹⁴⁵

¹¹⁴¹ Steiker & Steiker, *supra* note 115, at 1922.

¹¹⁴² Nat'l Research Council of the Nat'l Acads., *supra* note 116, at 102.

¹¹⁴³ *Id.* at 101-02.

¹¹⁴⁴ Michael L. Radelet & Ronald L. Akers, *Deterrence & the Death Penalty: The Views of the Experts*, 87 J. Crim. L. & Criminology 1, 10 (1996).

¹¹⁴⁵ Dr. Oliver Roeder *et al.*, What Caused the Crime Decline? 43 (2015), available at https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf. "The findings show a very weak negative relationship between the use of the death penalty and crime that is essentially zero. The same is true for the effect of the use of the death penalty on homicides specifically." *Id.* at 45.

A meticulous examination of the various studies on the deterrent effect of the death penalty by John B. Donahue and Justin Wolfers, scholars affiliated with Yale Law School and the Wharton School respectively, also concluded that the evidence is inconclusive:

We find that the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results. Our key insight is that the death penalty—at least as it has been implemented in the United States since *Gregg* ended the moratorium on executions—is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors. Our estimates suggest not just “reasonable doubt” about whether there is any deterrent effect of the death penalty, but profound uncertainty. We are confident that the effects are not large, but we remain unsure even of whether they are positive or negative. The difficulty is not just one of statistical significance: whether one measures positive or negative effects of the death penalty is extremely sensitive to very small changes in econometric specifications. Moreover, we are pessimistic that existing data can resolve this uncertainty.¹¹⁴⁶

This study is very critical of studies that purport to show a substantial deterrent effect for the death penalty.¹¹⁴⁷

One opposing point of view is offered by Kent Scheidegger of the Criminal Justice Legal Foundation, one of the Nation’s leading proponents of the death penalty, who claims that the Donahue and Wolfers study was published in a law review, not a social science journal, and thus, he claims, avoided peer review by scholars with the relevant expertise.¹¹⁴⁸ Scheidegger claims that most of the studies support a deterrence effect, and his foundation has posted a purportedly complete list of all the relevant studies and their conclusions on its website.¹¹⁴⁹

Another related argument made by opponents of the death penalty is that there is no proof that the death penalty is a better deterrent than life imprisonment without parole. If this is the case, then the Minimum Invasion Principle, or any other principle that forbids the infliction of unnecessary harm, mandates the use of life imprisonment without parole in all cases in preference to the death penalty. One such opponent was Hugo Bedau:

[F]or the sake of argument, let us suppose that the death penalty as currently employed does have a marginally superior deterrent effect. Such an effect is of little use in defending the death penalty because the supposed benefit is obtained at an unacceptable cost. . . . [T]he more a jurisdiction uses the death penalty, the

¹¹⁴⁶ John J. Donahue & Justin Wolfers, *Uses & Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 794 (2006).

¹¹⁴⁷ *Id.* at 842-43.

¹¹⁴⁸ Kent Scheidegger, Legal Director, Crim. Just. Legal Found., Statement to the Cal. Comm’n on the Fair Admin. of Just. 2 (Apr. 11, 2008), available at <http://www.cjlf.org/deathpenalty/ScheideggerCCFAJStatement.pdf>. (The real or apparent knowledge of statistical method displayed in the article at issue was sufficient to impress J. State Gov’t Comm’n staff.)

¹¹⁴⁹ Crim. Just. Legal Found., Tally of Death Penalty Deterrence Studies, <http://www.cjlf.org/deathpenalty/dpdeterrence.htm> (last visited May 13, 2018).

greater the likelihood it will make mistakes—notably, the mistake of convicting the innocent or the mistake of sentencing to death offenders whose crimes should not have made them death-eligible.¹¹⁵⁰

The subcommittee on policy agrees with this analysis.

Conversely, Paul Cassell vigorously defends the deterrent effect of capital punishment on a slightly different basis.¹¹⁵¹ He appeals to common sense, anecdotal evidence and social science studies in concluding that the death penalty may deter at least those who carefully calculate the homicidal act.¹¹⁵² (Even Bedau concedes that the death penalty can have some deterrent effect: “Common sense assures us that punishments generally serve to deter some persons from some crimes on some occasions. There is no reason to think that the death penalty is an exception.”¹¹⁵³) In particular, Cassell emphasizes the importance of the death penalty for deterring murder by prisoners serving life imprisonment without parole since they have a “‘license to kill’ if there is no death penalty.”¹¹⁵⁴

In further support of his argument, former Judge Cassell cites statistical comparisons that may show a deterrent effect for the death penalty. Because of the many factors that affect the murder rate in different states, the lack of a difference between death and non-death states does not settle the issue. Comparing murder rates for 1968 through 1976 (when there were no executions) with 1995-2002, there was a decline in the murder rate that was largest in the states that used the death penalty most vigorously. Several other studies found that the death penalty may deter five to 18 murders *per* execution.¹¹⁵⁵ At the same time, conservative death penalty supporter Jonah Goldberg observes: “Deterrence may have some validity, but it cannot alone justify the death penalty. It is wrong to kill a man just to send a message to others.”¹¹⁵⁶

The consensus of the subcommittee on policy is that there is no definitive proof whether capital punishment deters murder. Because of this, there is no substantial evidence that the death penalty significantly advances the deterrence purpose. Plenty of murderers fail to fully calculate the consequences of their actions. Many of them offer mitigating circumstances, such factors as poverty, low intelligence, child abuse or neglect by their parents, mental illness, or brain damage. Consequently, they act out of impulse, or, if the crime is planned in advance, they delude themselves that they are unlikely to be caught. When they are formulating the intent to murder, they do not fully take account of consequences. In particular, it is unlikely that any difference in deterrent effect between life imprisonment without parole and the death penalty will dissuade a significant proportion of would-be murderers from carrying out the act.

¹¹⁵⁰ Hugo Bedau, *supra* note 1124, at 39. Bedau relies for his factual premise on research by James S. Liebman.

¹¹⁵¹ Hon. Paul G. Cassell, *In Defense of the Death Penalty* in Bedau & Cassell, *supra* note 1124, 189-97.

¹¹⁵² Hon. Paul G. Cassell, *In Defense of the Death Penalty*, IAJC J. 14, 17 (Summer 2008).

¹¹⁵³ Bedau, *supra* note 1124, at 39.

¹¹⁵⁴ Cassell, *supra* note 1124, at 190-92.

¹¹⁵⁵ *Id.* at 192-97.

¹¹⁵⁶ Jonah Goldberg, *In Defense of Capital Punishment*, Nat'l Rev. (May 7, 2014),

<http://www.nationalreview.com/article/377351/defense-capital-punishment-jonah-goldberg>.

To know the effectiveness of deterrence, one would need to understand “how potential murderers perceive sanction regimes.”¹¹⁵⁷ The perception of the risk of these regimes is “subjective, but researchers have no direct measurements of the perceptions of potential murderers.”¹¹⁵⁸ Instead, researchers “use publicly available statistical data on homicides and executions to construct statistics that purport to measure the objective risk of execution” and “then assume that potential murderers . . . carefully assess the risk of execution.”¹¹⁵⁹ This assumption “has no empirical foundation. Indeed, it hardly seems credible.”¹¹⁶⁰ Keep in mind that a relatively small percentage of condemnees are executed and a larger percentage of death sentences are vacated.¹¹⁶¹ The availability of plea bargains, instability of a state’s sanction regimes and geographical variability within a state further complicate any purported or assumed perceptions of potential murderers.¹¹⁶²

Incapacitation and Public Safety

A classic aim of criminal justice is to ensure that a person who has committed a crime is rendered powerless to do further injury to the public for the duration of the sentence. An execution assures that the person executed will never harm anyone else. However, life imprisonment without parole also provides a substantial assurance for the general public and even for prison inmates and the correctional personnel who supervise them.

There is a considerable consensus among observers that, in most cases, convicts potentially subject to the death penalty pose little threat to other inmates and are model, or at least manageable, prisoners.¹¹⁶³ “As a general matter . . . self-interest guides lifers to avoid trouble because trouble jeopardizes the few privileges they can secure in the prison world and, moreover, can land them in very grim living environments.”¹¹⁶⁴

However, others point out that a minority of life imprisoned without parole inmates are extremely dangerous: they have murdered prison guards, fellow inmates, and (through associates) witnesses.

[P]rison murders, escapes, and retaliation murders illustrate the difficulty in segregating and controlling all of the violent offenders who will kill even with limited resources. Because they have little to lose, the control of an inmate serving life without parole is a formidable challenge. Life without parole is simply no panacea.¹¹⁶⁵

¹¹⁵⁷ Nat’l Research Council of the Nat’l Acads., *supra* note 116, at 105.

¹¹⁵⁸ *Id.* at 106.

¹¹⁵⁹ *Id.*

¹¹⁶⁰ *Id.*

¹¹⁶¹ *Id.*

¹¹⁶² *Id.* at 104, 106. States’ sanction regimes can be unstable due, *e.g.*, to legal decision; geographical variability within a state refers the variance of “prosecutorial vigor in the use of the death penalty”. *Id.* at 106.

¹¹⁶³ Robert Blecker, *supra* note 733, at 94; Robert Johnson & Sandra McGunigall-Smith, *Life without Parole, Am.’s Other Death Penalty: Notes on Life under Sentence of Death by Incarceration*, 88 *Prison J.* 328, 329 (2008).

¹¹⁶⁴ Johnson & McGunigall-Smith, *supra* note 1163, at 331.

¹¹⁶⁵ Richard B. Roper, *The Death Penalty at the Intersection of Reality & Just.*, 41 *Tex. Tech L. Rev.* 15, 25 (2008).

Life imprisonment without parole represents a compromise between the death penalty and life with parole:

In the future, wrongful convictions in death penalty cases should be even more remote. With most states and the federal government adding life without parole, death penalty prosecutions in which guilt/innocence is a genuine issue should diminish. From my observations, when parole is available to defendants who receive a “life” sentence, many prosecutors more aggressively pursue capital charges in an effort to guarantee that the defendant does not return to society. The fear of paroling brutal murderers gives prosecutors a greater incentive to pursue capital charges where proof, although sufficient to convict, is less than overwhelming. Conversely, life without parole provides an option for prosecutors who wish to avoid the rigors of a death penalty trial but, at the same time, provide some measure of protection to society outside of prison.¹¹⁶⁶

The subcommittee on policy concludes that while the death penalty clearly advances the aim of incapacitation, it is little better in that regard than life imprisonment without parole.

Legitimate Penological Intent of Death Penalty	
<i>Penological intent</i>	<i>Rationally serve</i>
Retribution	yes ¹¹⁶⁷
Deterrence (pub. safety)	Specific--yes ¹¹⁶⁸
	Gen.--possibly ¹¹⁶⁹
Incapacitation	Yes ¹¹⁷⁰
Denunciation	Yes ¹¹⁷¹
Restoration	No ¹¹⁷²
Rehabilitation	No ¹¹⁷³

¹¹⁶⁶ *Id.* at 27-28. The author served as U.S. Att’y (N.D.Tex. 2004-2008).

¹¹⁶⁷ *Supra* pp. 162-65.

¹¹⁶⁸ *Supra* pp. 166-69. Specific deterrence applies to the person sentenced. “Perhaps the most straightforward argument for the death penalty is that it saves innocent lives by preventing convicted murderers from killing again.” Cassell, *supra* note 1152, at 16.

¹¹⁶⁹ *Supra* pp. 166-69. General deterrence applies to potential murderers among the general public.

¹¹⁷⁰ *Supra* p. 169-70.

¹¹⁷¹ *Supra* p. 161. This is public censure, which condemnation would exemplify in the strongest of terms.

¹¹⁷² “[R]estorative justice processes ideally allow for a voluntary, face-to-face dialogue between the person who committed the harm, the victim, and community members supporting the person who harmed and the victim. This dialogue is intended for the victim to identify his needs, and for the person who harmed to take accountability for her actions and to come up with ways in which she can meet the victim’s needs. Restorative justice does not seek to alienate or isolate people who commit crimes, but instead to offer community support that will allow the person who harmed to successfully meet her obligations to the victim. Restorative justice is not punitive.” Nat’l Council on Crime & Delinquency, *What Is—and Is Not—Restorative Justice?* (Aug. 20, 2013), <https://www.nccdglobal.org/newsroom/nccd-blog/what-and-not-restorative-justice>.

¹¹⁷³ *Supra* pp. 160-61.

Innocence

The question that serves as the basis of the study of innocence in the administration of the death penalty in our Commonwealth is:

Whether there is a risk of execution of an innocent person and whether there are adequate procedural protections in place to prevent an innocent person from being sentenced to death and executed;¹¹⁷⁴

It is not possible to put adequate procedural protections in place to prevent the execution of an innocent person. There is a conceivable possibility that the Commonwealth could execute an innocent person.

Since 1973, 162 inmates sentenced to death in the United States have been exonerated of their charges.¹¹⁷⁵ These inmates spent an average of 11.3 years on death row before their exonerations.¹¹⁷⁶ The six Pennsylvania exonerees -- Neil Ferber, Jay Smith, William Nieves, Thomas Kimbell, Nicholas Yarris, and Harold Wilson -- spent, on average, nine years on death row before being exonerated.¹¹⁷⁷ There have been 20 exonerations in the U.S. based on DNA evidence, including Nicholas Yarris, who spent 21 years on Pennsylvania's death row.¹¹⁷⁸

Whether or not the Commonwealth may execute an innocent person is a two-prong question:

- 1) Is it possible for adequate procedural protections to be put in place so as to make executing an innocent person impossible?
- 2) If these protections are not possible, is there a *foreseeable* risk that the Commonwealth could execute an innocent person, or is it a theoretical one-in-a-million possibility?

There is no way to put procedural safeguards in place that will guarantee with 100% certainty that the Commonwealth will not execute an innocent person. Following the U.S. Supreme Court's decision in *Gregg v. Georgia*, the resumption of executions was predicated on the fact that the Court believed that states were able to build capital punishment systems that would be applied fairly and in accordance with the Eighth Amendment of the U.S. Constitution.¹¹⁷⁹ Most modern capital cases, including those in the Commonwealth, require a unanimous jury verdict for

¹¹⁷⁴ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A., *infra* p. 221.

¹¹⁷⁵ Death Penalty Information Ctr., The Innocence List, <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last updated Apr. 19, 2018). This number includes those who were "acquitted of all charges related to the crime that placed them on death row, or . . . [h]ad all charges related to the crime that placed them on death row dismissed by the prosecution or the courts, or" were pardoned "based on evidence of innocence." *Id.* For the Commonwealth's six, four of them were acquitted and the charges were dismissed for the remaining two.

¹¹⁷⁶ *Id.*

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *Id.*

¹¹⁷⁹ 428 U.S. 153, 195.

both conviction of the crime and the sentence of death,¹¹⁸⁰ in which the jurors must weigh aggravating and mitigating factors.¹¹⁸¹ Despite these safeguards, the 162 national exonerations, including the six Pennsylvania exonerations, show that states have been unsuccessful in their efforts to create capital punishment systems capable of guaranteeing with 100% certainty that an innocent person will not be sentenced to death.

Whether or not wrongful death sentences translate into wrongful executions is a more controversial question. Procedural safeguards built into the appeals process were able to prevent the wrongful executions of the 162 exonerees, although it averaged more than a decade for these individuals to be exonerated. However, several executions have been carried out in the U.S. despite significant evidence of innocence. For example, Cameron Todd Willingham was convicted and sentenced to death in Texas based on debunked forensic arson evidence.¹¹⁸² He was executed in 2004.¹¹⁸³ Carlos DeLuna was executed in Texas in 1989.¹¹⁸⁴ Evidence emerged that the actual killer was Carlos Hernandez, and that official misconduct allowed Texas to execute “the other Carlos”.¹¹⁸⁵

These cases, along with the number of exonerations, shows that states have failed to put into place procedural safeguards that can guarantee with 100% certainty that innocent individuals will not be sentenced to death and executed. It is important to note that Pennsylvania has not recently had the type of controversial execution seen in the Willingham or DeLuna cases. All three individuals executed by the Commonwealth in the modern death penalty era were only executed after foregoing further appeals.¹¹⁸⁶ There is no reason to believe that the absence of controversial executions in the Commonwealth is the result of its systematic superiority. An unavoidable fact of capital punishment is that as long as it exists, it remains possible that an innocent person will be executed. Pennsylvania is not exempt from this.

The prevalence of capital exonerations and controversial executions shows that the chance of executing an innocent person is a conceivable possibility. Further evidence of this possibility is found in studies of wrongful convictions. In 2014, a report published in the Proceedings of the National Academy of Sciences concluded that 4.1% of individuals convicted and sentenced to death in the U.S. were wrongfully convicted during the time period from 1973-2004.¹¹⁸⁷ The authors note that this is a “conservative estimate” of the proportion of wrongful capital convictions, and that the real proportion may be higher.¹¹⁸⁸

¹¹⁸⁰ Death Penalty Information Ctr., State by State Database, https://deathpenaltyinfo.org/state_by_state (2018).

¹¹⁸¹ Appdcs. B, C, *infra* pp. 223-28.

¹¹⁸² Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, Chicago Tribune (Dec. 9, 2004), <http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09-story.html>.

¹¹⁸³ *Id.*

¹¹⁸⁴ Death Penalty Information Ctr., Executed but Possibly Innocent, <https://deathpenaltyinfo.org/executed-possibly-innocent#carlos> (2018).

¹¹⁸⁵ *Id.*

¹¹⁸⁶ Death Penalty Information Ctr., Pa., <https://deathpenaltyinfo.org/pennsylvania-1> (2018). “The three prisoners executed since 1978 have all been volunteers with serious mental health issues, whom courts found to have waived their rights to an appeals process.” *Id.*, *supra* notes 7, 8.

¹¹⁸⁷ Samuel R. Gross *et al.*, *Rate of False Conviction of Crim. Defendants Who Are Sentenced to Death*, PNAS 7230, 7231, 7234 (May 20, 2014), available at <http://www.pnas.org/content/pnas/111/20/7230.full.pdf>.

¹¹⁸⁸ *Id.* at 7230, 7234.

The implications of this study are sobering. Over the time period analyzed in the study, 1.6% of death row inmates were exonerated of their charges.¹¹⁸⁹ This suggests that 2.5% of death row inmates were wrongfully convicted but not exonerated. According to the study's lead author, University of Michigan Law School professor Samuel Gross, "[t]here are a large number of people who are sentenced to death, and despite our best efforts some of them have undoubtedly been executed."¹¹⁹⁰

Applied to Pennsylvania, this analysis suggests that there are wrongfully convicted inmates on the Commonwealth's death row. In 2004, the last year covered in the study, Pennsylvania had 225 inmates on its death row.¹¹⁹¹ Assuming the rate of wrongful capital convictions is 4.1%, Pennsylvania would have had approximately 9.2 wrongfully convicted inmates on its death row. Yet since 2004, we have only had one death row exoneration, that of Harold Wilson in 2005.¹¹⁹² If the proportion of wrongful convictions held true over time, then there would be an estimated seven wrongfully convicted inmates on Pennsylvania's death row in 2017.¹¹⁹³

It is important to note that the estimate of 4.1% of wrongfully convicted death row inmates assumes that "all death-sentenced defendants remained under sentence of death indefinitely."¹¹⁹⁴ Death row inmates have far more resources at their disposal to fight their convictions than those not under a sentence of death.¹¹⁹⁵ As a result, a disproportionate number of U.S. exonerations come from death row.¹¹⁹⁶

Death sentences represent less than one-tenth of 1% of prison sentences in the United States, but they accounted for about 12% of known exonerations of innocent defendants from 1989 through early 2012, a disproportion of more than 130 to 1. A major reason for this extraordinary exoneration rate is that far more attention and resources are devoted to death penalty cases than to other criminal prosecutions, before and after conviction.¹¹⁹⁷

"Death sentences are different", and therefore are subject to additional judicial scrutiny.¹¹⁹⁸ Death sentences frequently do not meet the standards of this scrutiny and are overturned, with inmates being re-sentenced to a different disposition. From 1973-2013, there were 188 overturned death sentences in the Commonwealth,¹¹⁹⁹ or about 45% of all death sentences imposed during

¹¹⁸⁹ *Id.* at 7231.

¹¹⁹⁰ Ed Pilkington, *US Death Row Study: 4% of Defendants Sentenced to Die are Innocent*, *Guardian* (Apr. 28, 2014), <https://www.theguardian.com/world/2014/apr/28/death-penalty-study-4-percent-defendants-innocent>.

¹¹⁹¹ Appdx. I, *infra* p. 255.

¹¹⁹² "Wilson was convicted of triple homicide in 1989 and sentenced to death. He was thereafter granted a new trial and ultimately acquitted after spending approximately fifteen years in prison." *Wilson v. City of Phila.*, 415 Fed. Appx. 434, 435 (3d Cir. 2011) (citation omitted).

¹¹⁹³ Based on 169 death row inmates. Death Penalty Information Center, *The Death Penalty in 2017: Yr. End Rep.* 3, <https://deathpenaltyinfo.org/documents/2017YrEnd.pdf>.

¹¹⁹⁴ Gross *et al.*, *supra* note 1187, at 7230.

¹¹⁹⁵ *Id.*

¹¹⁹⁶ *Id.* at 7231.

¹¹⁹⁷ *Id.* at 7230.

¹¹⁹⁸ *Id.*

¹¹⁹⁹ Bureau of Just. Statistics, U.S. Dep't of Just., *Capital Punishment, 2013-Statistical Tables* 20, <https://www.bjs.gov/content/pub/pdf/cp13st.pdf> (last revised Dec. 19, 2014).

this time period.¹²⁰⁰ Once individuals are no longer “under threat of execution”, it is less likely that they will be exonerated because their cases are no longer subject to the judicial scrutiny and legal resources of a capital case.¹²⁰¹ There is a strong possibility that wrongfully convicted death row inmates have had their death sentences overturned but have not been exonerated: “the great majority of innocent defendants who are convicted of capital murder in the United States are neither executed nor exonerated. They are sentenced, or resentenced to prison for life, and then forgotten”.¹²⁰² Given the high number of overturned death sentences in the Commonwealth, it is likely true that wrongfully convicted individuals sentenced to death have been re-sentenced to a term of incarceration. While these individuals are no longer at risk of being wrongfully executed, they are wrongfully imprisoned by Pennsylvania’s capital punishment system.

“[T]he most fundamental principle of American jurisprudence” is “that an innocent man not be punished for the crimes of another.”¹²⁰³ The subcommittee on procedure generally endorses Report of the Advisory Committee on Wrongful Convictions and particularly points to its proposals as a roadmap to justice.¹²⁰⁴ These proposals have received legislative consideration since publication of this report but have not been enacted. If implemented, they would operate both as a prophylaxis to prevent wrongful convictions and also enhance the ability of an innocent convict to obtain relief if the prophylaxis was not in place or failed.¹²⁰⁵ “[I]n the first instance, it is law enforcement—not the courts—that can best ensure against an undue risk of convicting the innocent”; however, “the integrity of the criminal justice system demands that we do better”,¹²⁰⁶ which requires continuing reconsideration of the adequacy procedural protections by all branches of government. “The source of public confidence in our criminal justice system resides in its ability to separate those who are guilty from those who are not.”¹²⁰⁷

Alternatives

The question that serves as the basis of the study of alternatives in the administration of the death penalty in our Commonwealth is:

¹²⁰⁰ Based on 417 total death sentences from 1973-2013. *Id.*

¹²⁰¹ Gross *et al.*, *supra* note 1187, at 7231.

¹²⁰² *Id.* at 7235.

¹²⁰³ *Commw. v. Conway*, 14 A.3d, 101, 114 (Pa. Super. Ct. 2011).

¹²⁰⁴ Pa. J. State Gov’t Comm’n, *supra* note 18, at 167-207.

¹²⁰⁵ Pa. Dist. Att’ys Ass’n has an *ad hoc* comm. on best practices “to identify best practices, research, and legal methods to assist in the proper and just evolution of the criminal justice system. Created in 2014, the committee formalized PDAA’s long history of identifying and promoting reforms and efficiencies in order to protect the innocent, convict the guilty, and ensure justice for the victims of crime.” Pa. Dist. Att’ys Ass’n, Pa. Dist. Att’ys Issue Best Practices on Body-Worn Cameras (May 23, 2018), <http://www.pdaa.org/pennsylvania-district-attorneys-issue-best-practices-on-body-worn-cameras/#>. These practices, however, are not binding.

¹²⁰⁶ *Dennis v. Pa. Sec’y of Corrections*, 834 F.3d 343-44 (3d Cir. 2016) (McKee, C.J., concurring).

¹²⁰⁷ Pa. J. State Gov’t Comm’n, *supra* note 18, at 1.

Whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penological interests;¹²⁰⁸

While the topics of penological purpose are analytically distinct, to consider the penological purpose of the death penalty without regard to alternatives inserts the artificial assumption that the only alternative to the death penalty would be to set the perpetrator free. Because the severely punitive alternative of life imprisonment without parole is available, the subcommittee on policy concludes that the death penalty is unnecessary, given the many objections to its use and the effectiveness of the alternative.

Since our judicial system does not tolerate severe corporal punishment (other than the death penalty), the only serious alternative to the death penalty is a lengthy term of imprisonment. Under current Pennsylvania law, the penalty for aggravated first-degree murder is either death or life imprisonment.¹²⁰⁹ There are alternative sentences, such as a very lengthy prison term (*e.g.*, 30 or 40 years) or life with the possibility of parole, but the subcommittee on policy views a sentence less harsh than life imprisonment as probably insufficiently severe for a crime that could qualify for the death penalty.

Constitutional Standard for Conditions of Incarceration

The leading case on the Eighth Amendment standard applied to imprisonment is *Farmer v. Brennan*.¹²¹⁰ A transsexual prisoner was attacked by another inmate in a federal prison.¹²¹¹ He sued the prison administration for damages under 42 Pa.C.S. § 1983, which makes a state liable when it denies a citizen his or her constitutional rights, in this case, the right to be free from cruel and unusual punishment. The Supreme Court applied the Cruel and Unusual Punishment Clause to prison conditions in these terms:

The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that “the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” In its prohibition of “cruel and unusual punishments,” the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must “take reasonable measures to guarantee the safety of the inmates.”

In particular, as the lower courts have uniformly held, and as we have assumed, “prison officials have a duty to . . . protect prisoners from violence at the hands of other prisoners.” . . .

¹²⁰⁸ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 221.

¹²⁰⁹ 42 Pa.C.S. § 9711.

¹²¹⁰ 511 U.S. 825 (1994).

¹²¹¹ *Id.* at 829-30.

The second requirement follows from the principle that “only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.” To violate the Cruel and Unusual Punishments Clause, a prison official must have a “sufficiently culpable state of mind.” In prison-conditions cases that state of mind is one of “deliberate indifference” to inmate health or safety. . . .

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . . The Eighth Amendment does not outlaw cruel and unusual “conditions”; it outlaws cruel and unusual “punishments.” An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.¹²¹²

In propounding these principles, the Court balanced the Constitution’s prohibition of brutal and inhumane conditions against the interest of the State and its citizens in maintaining the penological purposes of punishing the offense and deterring would-be offenders from committing similar crimes. Prison conditions may be punitive, but they are forbidden to be abusive.

Life Imprisonment without Parole

In the U.S. penal system, life imprisonment without parole is the most severe sentence short of the death penalty. In *Graham v. Florida*, the U.S. Supreme Court compared these sentences:

[L]ife without parole is “the second most severe penalty permitted by law.” It is true that the death penalty is “unique in its severity and irrevocability,” yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed . . . , this sentence means “denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”¹²¹³

¹²¹² *Id.* at 832-33, 834, 837-38 (citations omitted).

¹²¹³ 560 U.S. 48, 69-70 (2010) (citations omitted).

When poll respondents who support the death penalty are told that life imprisonment without parole can be an alternative, support for capital punishment drops below 50%. Because of the problems associated with the death penalty, life imprisonment without parole is gaining more attention and support:

As a practical matter, it is life without parole that is the sure and swift penalty, not the death penalty. Moreover, life without parole is increasingly popular with the public—more popular in recent years than the death penalty. Support for the death penalty drops dramatically when the sanction of life without parole is an option. The popularity of life without parole appears to reflect the belief that this sanction may be a better deterrent than the death penalty (because it is more certain) and, moreover, that life without parole is a penalty that spares us the risk of executing an innocent man or woman. There is also the belief held by many that a life sentence without the possibility of parole guarantees that the offender will suffer greatly for the remaining days of his or her life.¹²¹⁴

The late James Q. Wilson, a prominent sociologists and supporter of the death penalty, advocated that capital juries be given the alternative of life imprisonment without parole, so that jurors could “hedge their bets” if they had “some doubts about the strength of the evidence or some other plausible worry.”¹²¹⁵ Former judge and director of Federal Bureau of Investigation William Sessions advocated a sentence short of death that jurors believed was sufficiently protective of society.¹²¹⁶ James Liebman proposed that life imprisonment without parole should be clearly presented to capital juries as an alternative.

Providing support for [Wilson’s and Sessions’s] views, analyses show that (1) jurors are capable of identifying offenders for whom the death penalty is not warranted as long as there are strong assurances that the offender will remain in prison until he is no longer a threat to society, but that (2) jurors usually will *not* impose life verdicts in such cases—even though they believe the death penalty is not required—unless they are assured by the trial judge that the defendant will not be eligible for parole.¹²¹⁷

Life imprisonment without parole is not a lenient punishment. For almost all inmates, the permanent or extended deprivation of liberty is undoubtedly a severe hardship.

Offenders sentenced to death by incarceration suffer “a civil death.” Their freedom—the essential feature of our civil society—has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they “exist” in prison, as prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, a cell their tomb.¹²¹⁸

¹²¹⁴ Johnson & McGunigall-Smith, *supra* note 1163, at 332.

¹²¹⁵ Liebman *et al.*, *supra* note 725, at 404.

¹²¹⁶ *Id.*

¹²¹⁷ *Id.*

¹²¹⁸ Johnson & McGunigall-Smith, *supra* note 1163, at 329.

Certainly it is irrational to believe that LWOP is too commodious for inmates. For many inmates, the pains of imprisonment—whether those contemplated by law—like loss of freedom and loss of outside relationships, or illegitimate ones such as predation by other inmates—make prison such a painful experience that whatever minimal pleasures are available effectively make no dent in the prisoner’s misery. For these inmates, prison is an earthly “hell” that is highly retributive. (It bears emphasizing that to the extent the pain is imposed by other inmates rather than official policy, such retribution is illegitimate.)¹²¹⁹

Prison Conditions in the U.S.

The soundness of the claim that life imprisonment without parole supplies the deterrence and retribution purposes of criminal justice depends in large part on whether prison conditions reasonably satisfy those purposes.

In maximum security prisons in the U.S., the freedoms that ordinary citizens take for granted are severely curtailed. The cells are tiny and are usually shared with another inmate, who may pose a constant, physical threat. Personal effects are restricted and subject to frequent, unannounced searches for weapons, drugs, alcohol, and other contraband. Convicted murderers are often housed in units that are more restrictive than those applicable to the general inmate population. Contact with family members and other outside persons is limited and strictly controlled. There is a constant cat-and-mouse game between the prison administration and the inmates for control, in which the prison administration is hampered by overcrowding and understaffing. Conflict can involve rivalries between prison gangs whose membership breaks down according to racial or ethnic identity.

The following account comparing prison conditions with life in the outside world is representative of the literature:

Many Americans want prison to be a miserable experience for inmates, even if it conflicts with rehabilitation efforts. They think prison life is not all bad, that prisoners have it too easy. This is based largely upon the old public perception of a few federal prisons. The public does not view the insides of state penitentiaries much. Many bad things happen in state prisons and local jails that are never reported to the outside world. Out of sight, out of mind. Television coverage of crime skews the public's perception. Crime is decreasing nationwide, yet a large percent of the public believe it is on the increase. Probation and parole are considered slaps on the wrist. Public anger rises when a probationer or parolee commits a serious crime.

Reality differs from public perception. Most members of the public will never visit a prison or talk to anyone who has experienced life behind bars. Prison takes offenders away from their families, marriages, jobs, friends, communities, and churches and puts them in an extremely bad moral environment for years at a time. Social organization in prison revolves around vicious prison gangs, motivated by

¹²¹⁹ David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 Fla. L. Rev. 1, 80 (1998).

racism, hate, satanic influences and violence. Life among these mostly uneducated felons, including opposing gang members, the insane and the diseased, is generally unpleasant. Overcrowding makes it all worse in most prisons today. Many prisoners are beaten, raped, brutalized or live in fear. Deviant and forced sex increases because members of the opposite sex are unavailable. Guards can be unpleasant and brutal. Annoying noises and bad odors are everywhere; sunlight and fresh air are limited. In most prisons today, overcrowding makes everything worse. Bland and unappealing food, clothing and extremely confining shelter are the norm. Freedom is gone. Some 16% of prisoners are mentally ill, and high percentages suffer from communicable diseases, including HIV-AIDS, hepatitis C, staph infections and tuberculosis. Families and friends often stop communicating with incarcerated family members. Boredom and inactivity take their toll. Depression is common. Suicide is 5 to 15 times greater than in the U.S. generally.¹²²⁰

Without undertaking a detailed study of prison conditions for inmates serving life imprisonment without parole, which is beyond the scope of this resolution, it is presumed that this description applies to them. Life in prison is “not a walk in the park.”

Prison Conditions in Pennsylvania

General Population. Unlike death row inmates, all life-sentenced prisoners are eligible to be housed in the general population units. Department of Corrections operates under the theory that incarceration constitutes the legal punishment, and it is not the proper purpose of correctional staff to punish the prisoners beyond what is necessary to administer the sentence. Prison management determines the privileges granted or denied inmates on the basis of their behavior in the institution and not the nature of the offense they committed. The department does not make conditions unnecessarily punitive because making life miserable for the inmates makes the prison more dangerous for both the inmates and correctional staff.

General population inmates have the following privileges:¹²²¹

- Three meals a day, two of them hot
- Purchase of goods from the commissary, including TV and radio
- Access to a law library
- Purchase of books and magazines
- Visitation, including limited contact visitation
- Telephone
- Recreation and yard

¹²²⁰ John Dewar Gleissner, corrections.com, The Myth That Prisoners Have It Easy (May 23, 2011), <http://www.corrections.com/news/article/28634-the-myth-that-prisoners-have-it-easy>.

¹²²¹ Pa. Dep't of Corrections, Inmate Handbook 12, 15, 16, 19, 25, 29, 42 (2017), <http://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/2017%20DOC%20Inmate%20Handbook.pdf>.

The granting and withholding of privileges is a useful means by which correctional staff can maintain control over the inmates. Inmates who violate prison rules may be reassigned to a restricted housing unit under disciplinary or administrative custody status.¹²²² The inmate is given a hearing before a hearing examiner or through a prison administrative committee through which he or she may contest the transfer.¹²²³ Prisoners in general population have more freedom of movement than inmates in the capital case unit (CCU). General population prisoners are usually housed with a cellmate. They are served their meals in the cafeteria,¹²²⁴ while CCU inmates receive their meals in the CCU, either in or out of their cell for specified meals. There are more jobs available to general population inmates because they can work anywhere on the prison grounds.¹²²⁵ They earn¹²²⁶ 19 to 45 cents *per* hour.¹²²⁷ If an inmate owes unpaid court costs, 20% of the earnings are applied to defray those costs.¹²²⁸ Earnings may be used to purchase items from the commissary.¹²²⁹ Most inmates rely on money deposited into their accounts by family members.¹²³⁰ Personal property, such as a TV set, is subject to confiscation for certain types of misbehavior.

To be sure, incarceration in general population constitutes a far more restrictive environment than life outside prison. Inmates spend much of their time in a cell, which they share with another inmate, who is chosen for him or her by correctional staff.¹²³¹ Except for group movements, such as meals, recreation, or work lines, inmates must have a signed pass to go from one part of the facility to another.¹²³² Inmates are restricted regarding how much and what kinds of personal property they may own.¹²³³ Their personal effects are frequently searched for contraband.¹²³⁴ Any unauthorized goods are seized by the staff, and possession of contraband is grounds for disciplinary action. Some ordinary items are deemed contraband because they can be converted into weapons or can otherwise raise security concerns.¹²³⁵

In the last five years (2013 to 2017), there have been six inmates who have killed another inmate (so roughly about one *per* year), and there have been two breach or walkaway escapes from a State Correctional Institution.¹²³⁶ Seven departmental or Bureau of Corrections employees were killed in the line of duty since the establishment of the Bureau of Corrections in 1952; the first such death since 1979 occurred earlier this year. Since the enactment of the federal Prison Rape

¹²²² *Id.* at 33.

¹²²³ *Id.* at 33-34.

¹²²⁴ *Id.* at 12-13.

¹²²⁵ *Id.* at 47.

¹²²⁶ *Id.* at 47-48.

¹²²⁷ Pa. Dep't of Corrections, Policy Statement, Attach. 1-B (2012), <http://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/816%20Inmate%20Compensation.pdf>.

¹²²⁸ Pa. Dep't of Corrections, *supra* note 1221, at 3; 42 Pa.C.S. § 6602(c).

¹²²⁹ Pa. Dep't of Corrections, *supra* note 1221, at 29.

¹²³⁰ *Id.* at 1.

¹²³¹ *Id.* at 11.

¹²³² *Id.* at 4.

¹²³³ *Id.* at 28-29.

¹²³⁴ *Id.* at 4-6.

¹²³⁵ *Id.* at 30.

¹²³⁶ Bucklen, *supra* note 11 (June 13, 2018).

Elimination Act, there have been increasing efforts by Pennsylvania and other states to cut down on prison rape.¹²³⁷

John Shaffer, a former official at the Department of Corrections and a member of the advisory committee, summarizes the basic conditions for Pennsylvania inmates serving life imprisonment without parole as follows:

[M]urderers, rapists, and lifers (in non-capital cases) are permitted to engage in vocational, educational, recreational, and therapeutic activities in prison unless their institutional conduct warrants placement in the restricted housing unit. They can purchase TVs, radios, and commissary items at their own expense.¹²³⁸

Conditions for death row inmates are described in the section on that subject.¹²³⁹ In both the general population and the CCU, prison management complies with constitutional and statutory law, such as the Prison Rape Elimination Act of 2003.¹²⁴⁰

Conceivably, aggravated murderers could be housed in conditions that duplicate or closely resemble those of the current death row, with its greater isolation and more limited privileges. But the subcommittee on policy finds that life imprisonment without parole in general population constitutes, in and of itself, appropriate punishment for murder because it entails the loss of freedom for the remainder of the offender's entire life.¹²⁴¹ There is no need to institute a harsher regime.

Death in Prison

One commentator has suggested a variant of life imprisonment without parole, called "death in prison" as a suitable alternative to the death penalty because it furthers the aims of deterrence, retribution and protection of the public without incurring the severe disadvantages that accompany the death penalty. Under this proposal, the jury in the penalty phase would choose between a lengthy term of years and life imprisonment without parole. By renaming life

¹²³⁷ E-mails from Pa. Dep't of Corrections (Feb. 11, 2015 & July 14, 2014). The Department's audit reps. under PREA are available at

http://www.cor.pa.gov/Facilities/Prison_Rape_Elimination_Act/Pages/DOC-Audits.aspx.

¹²³⁸ E-mail from John S. Shaffer (Mar. 27, 2014). Dr. Shaffer was Executive Deputy Secretary of the department.

¹²³⁹ *Infra* pp. 197-99.

¹²⁴⁰ 34 U.S.C.A. §§ 30301-30309.

¹²⁴¹ Life imprisonment without parole means that the inmate may not be paroled. The only ways to be released from this sentence would be by a subsequent judicial ruling vacating the sentence or the conviction, clemency or a transfer if the inmate needs med. treatment. 42 Pa.C.S. § 9777. Statutory authority for this med. transfer is ltd. to a temporary period & subject to approval from the sentencing court. To qualify, the inmate could not be ambulatory, must suffer from a terminal illness & likely be near death. The medical propriety of the transfer, the life expectancy of the inmate & the notification to the gov't & registered crime victim along with their opportunity to be heard must be established by clear & convincing evidence. The Commw., registered crime victim & correctional facility would be notified of a petition for this transfer & allowed to be heard. After the grant of a transfer, the prosecuting att'y or Dep't of Corrections could request recommittal if circumstances change. At any time, the sentencing court could also terminate its earlier grant of the transfer's life expectancy would be one year or less. Dep't of Corrections "only have about 2 to 3 such transfers for medical treatment per year" and had "10 over that four year timeframe from 2014 to 2017." Bucklen, *supra* note 11 (June 12, 2018) (on file with Pa. J. State Gov't Comm'n).

imprisonment without parole as death in prison, the state would emphasize that its maximum penalty is equivalent to a death sentence, although the death sentence would be abolished because the state would take no action to bring about the condemned murderer's death.

Death-in-prison . . . would not suffer [the defects of the death penalty]. Far more defendants could be sentenced to death-in-prison. Indeed, most of the large number of capital defendants who currently receive LWOP could be sentenced to death-in-prison with no impact on the current allocation of prison resources. This would ensure that all persons who commit capital murder could be sentenced comparably. By adopting death-in-prison as a jurisdiction's highest penalty, the arbitrary selection of a small handful of unlucky defendants for execution would come to an end. Rather than sentence a few defendants to death and most others to LWOP, both groups of defendants could be sentenced to death-in-prison upon an adequate showing of desert. Exercise of the state's highest penalty would then look less like a lottery and more like a predictable, and fairly distributed, penal sanction. This would not only improve the proportionality of punishment, it would enhance deterrence by clearly communicating to the entire class of would-be offenders that the state's ultimate punishment will be imposed with certainty.¹²⁴²

The substitution of life imprisonment without parole (or death in prison) for the death penalty, theoretically culminating in execution, eliminates the possibility that an innocent defendant will be executed. Because of that, most of the exacting due process requirements imposed under existent law, and the excruciatingly protracted and expensive litigation required to implement them, will become unnecessary. The focus of the penalty phase will shift to the more substantive, if less melodramatic, issue of whether the case calls for the permanent separation of the condemned murderer from society. The victim's survivors will receive the closure they are almost always denied under the current procedure.¹²⁴³

Alternatives to the Death Penalty			
Imprisonment	Sufficient for Public Safety	Addresses Legitimate Social Interests	Addresses Other Legitimate Penological Interests
Life <i>sans</i> parole ¹²⁴⁴	Yes	Public opinion--possibly	Retribution—yes Deterrence—specific, yes; gen. possibly Incapacitation—yes Denunciation—yes Restoration—no Rehabilitation--no

¹²⁴² Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 Ga. St. U. L. Rev. 1085, 1093 (2012).

¹²⁴³ *Id.* at 1099-1101.

¹²⁴⁴ *Supra* pp. 176-78, 181-82.

Alternatives to the Death Penalty			
Imprisonment	Sufficient for Public Safety	Addresses Legitimate Social Interests	Addresses Other Legitimate Penological Interests
Life w/possible parole	Possibly	Public opinion--possibly	Retribution—yes Deterrence—specific, yes; gen. possibly Incapacitation—yes Denunciation—yes Restoration—no Rehabilitation--possibly
Term of years	Possibly	Public opinion--possibly	Retribution—yes Deterrence—specific, yes; gen. possibly Incapacitation—yes Denunciation—yes Restoration—no Rehabilitation--no

Counsel

The question that serves as the basis of the study of counsel in the administration of the death penalty in our Commonwealth is:

The quality of counsel provided to indigent capital defendants and whether such counsel and the process for providing counsel assures the reliability and fairness of capital trials;¹²⁴⁵

The subcommittee on procedure generally endorses a report of the task force and advisory committee on services to indigent criminal defendants¹²⁴⁶ but focused on indigent capital defendants and limits its comments to that subset. The advisory committee that prepared that report found some indigent defense practitioners failed to meet professional standards, partially because the system delivering that service is not standardized to train or supervise statewide but does so on a county-by-county basis.¹²⁴⁷ The Commonwealth’s lack of support for these services undermines “the effectiveness of indigent defense”,¹²⁴⁸ which is borne out by successful challenges to death penalties based upon ineffective assistance of counsel. As of May 2018, 150 Pennsylvania death-row inmates sentenced to death under Pennsylvania’s 1978 death-penalty statute have had their convictions or sentences overturned on the basis of ineffective assistance of counsel.¹²⁴⁹

¹²⁴⁵ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 221.

¹²⁴⁶ Pa. J. State Gov’t Comm’n, *supra* note 19.

¹²⁴⁷ *Id.* at 5.

¹²⁴⁸ *Id.*

¹²⁴⁹ Robert Brett Dunham, Pa. Capital Convictions & Death Sentences Rev’d as a Result of Ineffectiveness of Counsel (Death Penalty Information Ctr. 2018).

Death sentences in 93 of these cases were overturned because of counsel’s failure to investigate and present mitigating evidence in the penalty phase.¹²⁵⁰ The inadequate remuneration of assigned counsel can “result in poor quality representation.”¹²⁵¹ Two years ago, Pennsylvania Supreme Court ruled that “a cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office.”¹²⁵² To avoid justice by geography, “a predominance of state funding is necessary to a successful system.”¹²⁵³ There is no data to use to systematically evaluate the delivery of these services.¹²⁵⁴ The cost of retrials and inappropriate or unjust sentences could presumably be partially offset by more effective representation more consistently delivered *ab initio*.¹²⁵⁵ “Poor systems of defense do not make economic sense.”¹²⁵⁶

“[T]he quality of the defense representation provided by the Commonwealth to indigent capital defendants is an issue” that Chief Justice Saylor has “written on many times in appellate decisions.”¹²⁵⁷

I am unable to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania. I would submit that, in fact, we have seen more than enough instances of deficient stewardship to raise very serious questions concerning the presumption's accuracy. It is my considered position, like that of many others, that a contributing factor may be the pervasive underfunding of indigent defense.¹²⁵⁸

Significantly, Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the *ad hoc* fashion by which indigent defense services are funded from the local government level. Such concerns are consistent with vast compilations of literature containing evidence of long-standing, chronic underfunding of public defense systems in the United States. . . . Nevertheless, this Court seems unable to attend to the apparent systemic difficulties in individual capital cases considered on appeal, as, doctrinally, the adjudicatory focus is on the facts at hand relative to an array of widely disparate claims of deficient stewardship.¹²⁵⁹

¹²⁵⁰ Of these 93, 68 were reversed by state courts & 25 by federal cts.. Robert Brett Dunham, Pa. Capital Case Cite List of Reversals Because of Ineffective Assistance of Counsel (Death Penalty Information Ctr. 2018). Other reversals related to failures to investigate & present guilt-stage defenses, failures to request or object to instructions, failures to object to improper evidence or argument, failures relating to guilty pleas or trial waiver and making a deficient or affirmatively harmful argument. *Id.*

¹²⁵¹ Pa. J. State Gov’t Comm’n, *supra* note 19, at 5, 47-48.

¹²⁵² *Kuren v. Luzerne Cnty.*, 146 A.3d 715, 718 (Pa. 2016).

¹²⁵³ Pa. J. State Gov’t Comm’n, *supra* note 19, at 59-60.

¹²⁵⁴ *Id.* at 47-48.

¹²⁵⁵ *Id.* at 6.

¹²⁵⁶ Saylor, *supra* note 20, at 38.

¹²⁵⁷ *Id.* at 3.

¹²⁵⁸ *Commw. v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring).

¹²⁵⁹ *Commw. v. McGarrell*, 87 A.3d 809, 810-11 (Pa. 2014) (Saylor, J., dissenting) (citations and footnotes omitted).

Justice Saylor called for “a collaborative conversation among the judicial, legislative, and executive branches to institutionalize statewide remedies and facilitate ongoing improvements” and noted “[t]he importance of legislative involvement”.¹²⁶⁰ While delivering the 2013 Widener Law and Government Institute Jurist in Residence Lecture, Justice Saylor focused on mitigation because he thought that it “yields the most vivid example of a debilitating deficiency in the death-penalty regime, which remains in sore need of improvement for the system to work properly.”¹²⁶¹

The right to counsel is grounded in both our Commonwealth’s and national constitutions.¹²⁶² To avoid “judicial murder”, counsel would be appointed in a capital case under the due process clause applying U.S. Const. amend. VI’s assistance of counsel for one’s defense.¹²⁶³ This guarantee of counsel was extended to indigent defendants facing felonies when it was recognized as a fundamental safeguard “of liberty . . . protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”¹²⁶⁴ The assistance of counsel requires adequate legal assistance, which is considered to be effective.¹²⁶⁵ Defective assistance of counsel requires “reversal of a conviction or death sentence”.¹²⁶⁶

Each county has a public defender appointed by its Board of County Commissioners.¹²⁶⁷ Within the Commonwealth’s 67 counties, 23 of them have no attorneys who have “met the CLE qualifying standards for appointment as capital defense counsel as detailed in” Pa. R. Crim. P. 801.¹²⁶⁸ “In all cases in which the attorney for the Commonwealth has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in any stage of the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.”¹²⁶⁹

The subcommittee generally endorses Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that were published in 2003 by American Bar Association “to set forth a national standard of practice . . . to ensure high quality legal representation” within “any jurisdiction.”¹²⁷⁰ One of its guidelines is that “[e]ach jurisdiction . . . adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to

¹²⁶⁰ *Id.* at 811 n.3.

¹²⁶¹ Saylor, *supra* note 20, at 4.

¹²⁶² Pa. Const. art. I, § 9; U.S. Const. amend. VI.

¹²⁶³ *Powell v. Ala.*, 287 U.S. 45, 63, 65 (1932). “[T]he right to counsel, as guaranteed by” Pa. Const. art. I, § 9 “is coterminous with the Sixth Amendment right to counsel for purposes of determining when the right attaches.” *Commw. v. Arroyo*, 723 A.2d 162, 170 (Pa. 1999).

¹²⁶⁴ *Gideon v. Wainwright*, 372 U.S. 335, 336, 340-41 (1963).

¹²⁶⁵ *Strickland v. Wash.*, 466 U.S. 668, 686 (1984).

¹²⁶⁶ *Id.* at 687.

¹²⁶⁷ Act of Dec. 2, 1968 (P.L.1144, No.358), §§ 3, 4: 16 P.S. §§ 9960.3, 9960.4.

¹²⁶⁸ Pa. Sup. Ct. Continuing Legal Educ. Bd., Capital Counsel CLE, https://www.pacle.org/services/cap_counsel.asp (last visited June 11, 2018). Armstrong, Cameron, Carbon, Clarion, Clearfield, Clinton, Crawford, Elk, Forest, Fulton, Greene, Huntingdon, Juniata, Mifflin, Potter, Snyder, Sullivan, Susquehanna, Tioga, Venango, Warren, Wayne & Wyo.. *Id.*

¹²⁶⁹ Pa. R. Crim. P. 801.

¹²⁷⁰ Am. Bar Ass’n, *Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 919 (2003). Am. Bar Ass’n also published *Ten Principles of a Pub. Defense Delivery Sys.* (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf. These principles provide a guide of “valuable measures of the prevailing professional norms of effective representation”. *Padilla v. Ky.*, 599 U.S. 356, 367 (2010).

be provided in accordance with these Guidelines”¹²⁷¹ Another guideline is that “lawyers for specific cases” should be selected by a defender organization or independent authority rather than “the judiciary or elected officials”.¹²⁷² Another guideline sets the minimum of two, qualified attorneys, “an investigator, and a mitigation specialist.”¹²⁷³ Workload needs to be “maintained at a level that enables counsel to provide each client with high quality legal representation”.¹²⁷⁴ Funds should provide for comprehensive and “effective training, professional development, and continuing education of all members of the defense team.”¹²⁷⁵

Recommendation

The subcommittee recommends the creation of a state-funded capital defender office to represent all persons charged with or convicted of capital crimes at the trial, appellate, and state post-conviction levels. Such an office will save money for the counties, be cost efficient by reducing the number of cases that require reversal in post-conviction proceedings at either the state or federal level, and improve the quality of representation, thereby reducing the likelihood of error at the trial level. An alternative option to this would be to have a state-funded capital defender office leaving Defender Association of Philadelphia to continue to represent indigent, capital defendants; however, the association there now represents only 20% of those cases now.¹²⁷⁶

Secondary Trauma

The question that serves as the basis of the study of secondary trauma in the administration of the death penalty in our Commonwealth is:

The impact of the death penalty process on law enforcement, prosecutors, defense counsel, judges, jurors, correctional officers, family members and loved ones of victims and family members of the accused;¹²⁷⁷

Judges, prosecutors, public defenders and victim advocates

To try to assess the impact of the death penalty process on judges, prosecutors, public defenders and victim advocates, surveys were distributed in nine judicial districts of varying population sizes and caseloads that had past or current capital murder cases.¹²⁷⁸ Cumulatively, the response rate was approximately 75%; however, not everyone answered all questions. The survey

¹²⁷¹ Am. Bar Ass’n *Guidelines*, *supra* note 1270, at 939.

¹²⁷² *Id.* at 944-45.

¹²⁷³ *Id.* at 952.

¹²⁷⁴ *Id.* at 965.

¹²⁷⁵ *Id.* at 976. Funding should also extend to “outside experts selected by counsel.” *Id.* at 981.

¹²⁷⁶ Pa. J. State Gov’t Comm’n, *supra* note 19, at 64.

¹²⁷⁷ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A., *infra* p. 221.

¹²⁷⁸ Counties of Adams, Allegheny, Berks, Dauphin, Lancaster, Montgomery, York & Westmoreland & City of Phila. Judges were surveyed in 2015. Prosecutors, public defenders and victim advocates were surveyed in 2013.

responses were returned anonymously, so it is unknown how and whether particular recipients responded. The surveys focused on the resources required at various stages of the process.

Cumulatively, more than 64% of the responses indicated that a typical, capital murder case causes more stress or anxiety than a typical, noncapital murder case. This conclusion was reached by a majority or 100% for each category of respondents except for victim service providers, more than 53% of whom indicated that a typical, capital murder case causes about the same amount of stress or anxiety.

Cumulatively, 70% of the responses indicated that a typical, capital murder case causes no difference in adverse health conditions or consequences compared to a typical, noncapital murder case. This conclusion was reached by half or more for each category of respondents except for public defenders, 60% of whom indicated that a typical, capital murder case causes more adverse health conditions or consequences than a typical, noncapital murder case.

Cumulatively, more than 73% of the responses indicated that a typical, capital murder case causes no difference in consumption of alcohol and other drugs or medications, compared to a typical, noncapital murder case.

Cumulatively, more than 54% of the responses indicated that a typical, capital murder case causes no difference in adverse consequences on one's family, home or social life, compared to a typical, noncapital murder case. This conclusion was reached by a majority for each category of respondents except for public defenders, 80% of whom indicated that a typical, capital murder case cause more adverse consequences on one's family, home or social life.

Cumulatively, more than 70% of the responses indicated that a typical, capital murder case causes more emotional strain than a typical, noncapital murder case. This was a majority or 100% of responses for each category of respondents except for prosecutors, half of whom indicated that a typical, capital murder case causes more emotional strain compared to a typical, noncapital murder case and the other half indicated no difference in emotional strain between the two.

Cumulatively, more than 58% of the responses indicated that a typical, capital murder case causes no difference in religious, spiritual or moral consideration, introspection or counsel, compared to a typical, noncapital murder case.

Correctional officers, victim family members and inmate loved ones

In 2013, The Pennsylvania State University and Department of Corrections staff administered surveys to State Correctional Institution Greene correctional officers, victims' family members, and inmates' loved ones.¹²⁷⁹

¹²⁷⁹ There is a gap in services because convicts' relatives have traditionally been disregarded. Historically, law and practice did not recognize victims of crime as victims when it came to services either. One might not be too sympathetic towards inmates' relatives; however, their children are typically adversely impacted by the incarceration of parent. Dep't of Corrections' initiatives relating to children of incarcerated parents appear at <http://www.cor.pa.gov/About%20Us/Initiatives/Pages/Children-of-Incarcerated-Parents.aspx> (2018).

The correctional officers' hardcopy survey was delivered to their institutional mailboxes. The hardcopy survey consisted of 35 questions designed to measure their workplace conditions, stress, anxiety and background characteristics. The response rate was 56%. Of these respondents, 39% were from the capital unit, 44% were from the maximum security unit, 12% were from the L2/L3 units/pods, and 5% did not report their unit assignment.¹²⁸⁰

The victims' family member survey was administered *via* an online survey with over 80 questions covering post-traumatic stress disorder, depression, views on the death penalty and demographic/background characteristics. Survey requests were sent to 440 eligible participants with valid addresses on file at the Office of Victim Advocate. The response rate was 29%.

The inmates' loved ones' survey was administered *via* a hardcopy survey of 31 questions covering post-traumatic stress disorder, depression, views on the death penalty and demographic/background characteristics. Eligible participants were loved ones (one *per* inmate) who were visiting inmates. Eligible participants were provided survey packets in visitation waiting rooms by prison staff. During the survey administration period, 72 surveys were provided to eligible respondents in inmate-visitation waiting areas. The response rate was 33%.

Analyses compared self-reported post-traumatic stress disorder (PTSD) and depression symptoms from those respondents associated with capital punishment and those associated with non-capital cases. For correctional officers, additional variables, including occupational stress, emotional exhaustion, work-family conflict, and perceived job dangerousness were also analyzed.

The primary hypotheses were as follows:

- Correctional officers working in a prison's capital case unit would have greater psychological trauma (*i.e.*, PTSD, depression, work-related stress) than working in a prison's general population or maximum security units.
- Victims' family members with the murderer sentenced to capital punishment would have greater psychological trauma (*i.e.*, PTSD, stress, and/or depression) than those where the murderer was sentenced to life imprisonment.
- Inmates' loved ones who had a loved one sentenced to capital punishment would have greater psychological trauma (*i.e.*, PTSD, anxiety, and/or depression) than those having a loved one sentenced to life imprisonment for murder.

The survey revealed that in no instance was the capital punishment condition associated with statistically higher PTSD, depression or stress than the non-capital punishment condition. For correctional officers and victims' family members, overall reports of PTSD, depression and stress were low to moderate, suggesting that few of the respondents were suffering from mental health difficulties. This was not the case for inmates' loved ones and their children.

¹²⁸⁰ The total exceeds 100% because the percentage is rounded.

Inmates' family members reported relatively high rates of PTSD and depression compared to national and high-risk (*e.g.*, deployed military) populations. Although the mental health challenges of inmates' families do not appear to be directly connected to capital punishment, they do warrant additional attention and point to a vulnerable population that might not be receiving adequate therapeutic services.

Limitations of the study include the following:

- The relatively small sample sizes did not provide the statistical power to detect small differences between the experimental (*i.e.*, capital punishment) and control (*i.e.*, non-capital punishment) conditions.
- There is a potential bias resulting from non-representative samples.
- There is potential response bias associated with the sensitive items in the self-report surveys.
- The study focused on only three categories listed in the resolution (correctional officers, family members and loved ones of victims, and family members of the accused); although these groups are arguably the most impacted by capital punishment over time, other research would be required to assess the potential secondary trauma experienced by law enforcement, prosecutors, defense counsel, judges, and jurors resulting from Pennsylvania's capital punishment laws.

However, although the samples were relatively small, the observed differences were small enough that it is unlikely they would have reached significance even with greater numbers of respondents.

Length and Conditions of Confinement on Death Row

The question that serves as the basis of the study of length and conditions of confinement on death row in the administration of the death penalty in our Commonwealth is:

Whether the conditions comply with the requirements of the United States Constitution, the Constitution of the Commonwealth of Pennsylvania and standards of international law and the impact of those conditions on correctional officers,¹²⁸¹

Each facility of Department of Corrections audited to date has achieved initial accreditation or reaccreditation by American Correctional Association.¹²⁸² It is under no judicial orders or consent decrees regarding conditions of confinement in Capital Case Units, otherwise known as death row.¹²⁸³ So far as the subcommittee on impact is aware, the department complies with

¹²⁸¹ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* pp. 221-22.

¹²⁸² Am. Correctional Ass'n, Accredited Facilities,

http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/SAC_AccFacHome.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=f53cf206-2285-490e-98b7-66b5ecf4927a&CCO=2#CCO (last visited June 5, 2018).

¹²⁸³ Woodside, *supra* note 140.

constitutional requirements for confinement. The only way to know for certain is after an inmate has challenged the department, claiming a constitutional violation, and the judiciary rules accordingly.¹²⁸⁴ An example of learning about a constitutional violation occurred last year, when the judiciary announced “a clearly established due process right under” U.S. Const. amend. XIV “to avoid unnecessary and unexamined solitary confinement on death row.”¹²⁸⁵ This was a recently recognized “due process right” that meant that the departmental policy of keeping an inmate in “the Capital Case unit” after being resentenced to life imprisonment while the district attorney appealed the resentencing is unconstitutional when “reflexively imposed without individualized justification.”¹²⁸⁶ The department is currently defending a class action lawsuit challenging the conditions of confinement on death row as an unconstitutional violation of the U.S. constitutional prohibition on cruel and unusual punishment.¹²⁸⁷

It is more difficult to assess whether confinement on death row in Pennsylvania meets the standards of international law. The department does not officially recognize these standards and departmental staff were unable to indicate one way or the other whether the conditions of confinement on death row meet these standards. It seems as though the consensus of developed countries is that the punishment of execution should be abolished. To the extent that other countries use capital punishment, it appears that Pennsylvania largely comports with the standards of confinement conditions, other than the lengthy interval between condemnation and execution. This would be due to the presumptive stress of awaiting one’s own execution; however, condemnees do not seem to be eager to advance their own executions to relieve the presumptive stress of the wait.

Correctional officers were surveyed on the impact of conditions of confinement on death row.¹²⁸⁸

Length of Confinement on Death Row

Length of confinement varies *per* inmate, primarily due to their date of conviction. Currently, the longest serving inmate on death row resides at State Correctional Institution Greene. Inmate No. AM-5999 was sentenced to death in 1983; later this year, this inmate will have completed his thirty-fifth year on Pennsylvania’s death row.¹²⁸⁹

Using information compiled by Department of Corrections, quantitative data for specific variables of inmates currently on death row was analyzed as of June 1, 2018.¹²⁹⁰ Pennsylvania’s death row was comprised of 150 total inmates, of which 76 (51 percent) are Black, 57 (38 percent) are White, 14 (9.3 percent) are Hispanic and 3 (2 percent) are Asian. No women were on death row at the time of the latest available DOC data profile.

¹²⁸⁴ An example of how this might arise, is the mental health investigation by U.S. Dep’t of Just., *supra* pp. 125-26.

¹²⁸⁵ *Williams v. Pa. Sec’y of Corrections*, 848 F.3d 549, 574 (3d Cir. 2017).

¹²⁸⁶ *Id.* at 556-57, 572, 574. In other words, there must be “procedural protections” afforded inmates to “ensure that continuing this level of deprivation is required for penological purposes”. *Id.* at 574.

¹²⁸⁷ *Reid v. Wetzel*, No. 1:18-cv-00176 (M.D.Pa. 2018).

¹²⁸⁸ *Supra* pp. 187-89.

¹²⁸⁹ Pa. Dep’t of Corrections, *supra* note 14.

¹²⁹⁰ *Id.*

Death Row Inmates By Race Pennsylvania June 2018		
<i>Race</i>	<i>Number of Inmates</i>	<i>Percent</i>
Asian	3	2.0
Black	76	50.7
Hispanic	14	9.3
White	57	38.0
Total	150	100.0
Source: Pennsylvania Department of Corrections, "Persons Sentenced to Execution as of June 1, 2018," www.cor.pa.gov/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf . Accessed June 14, 2018.		

The average length of confinement for all inmates on death row is 17.49 years. Average length of confinement, analyzed by race, showed the Black inmate population having a slightly higher average length of stay on death row at 18.57 years, compared to 16.6 for White, 16.86 for Hispanic, and 10.0 for Asian. SPSS was used to compute a One-Way ANOVA to compare the different races' average years spent on death row. The results show no statistically significant differences and, therefore, the June 1, 2018 data do not provide evidence that can be used to make broader inferences about race and average time spend on death row.

Average Years on Death Row by Race Pennsylvania June 2018			
<i>Race</i>	<i>Number of inmates</i>	<i>Mean</i>	<i>Std. Deviation</i>
Asian	3	10.00	13.892
Black	76	18.57	8.698
Hispanic	14	16.86	6.724
White	57	16.60	8.668
Total	150	17.49	8.656
Source: Pennsylvania Department of Corrections, "Persons Sentenced to Execution as of June 1, 2018," www.cor.pa.gov/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf . Accessed June 14, 2018.			

The average age of individuals residing on death row was 50, with the average age at conviction being 32 years old.

Inmates Current Age, Age At Conviction, Average Years Spent on Death Row Pennsylvania June 2018				
Period	Minimum	Maximum	Mean	Std. Deviation
Current age	25	75	49.55	10.310
Age at conviction	19	52	31.53	7.823
Average years on death row	< 1	34	17.49	8.656

Source: Pennsylvania Department of Corrections, "Persons Sentenced to Execution as of June 1, 2018," www.cor.pa.gov/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf. Accessed June 14, 2018.

Conditions of Confinement on Death Row

Conditions of confinement must satisfy U.S. Const. amend. VIII and Pa. Const. art. I, § 13, which prohibit cruel and unusual punishments.¹²⁹¹ Department of Corrections policies and mission statement specify the guiding principles for inmates and facility staff alike, including conditions within the facility. These policies cover reasonable accommodations for inmates with disabilities, use of force, food service, inmate discipline, administrative custody, inmate grooming, access to health care and mental health care, and other relevant provisions.¹²⁹² The departmental mission statement reflects the importance of public safety.¹²⁹³ Facility staff must also adhere to a Code of Ethics, with violators subject to immediate disciplinary action.¹²⁹⁴

Constitutional requirements

The general understanding of compliance is framed by a ruling applying the federal constitution to prison conditions.¹²⁹⁵ The constitution "does not mandate comfortable prisons," but neither does it permit inhumane ones, and it is now settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."¹²⁹⁶ This amendment restrains "prison officials, who may not, for example, use excessive physical force against prisoners."¹²⁹⁷ Prison officials must supply essential items to the inmates, including food, clothing, shelter, medical care, and adequate steps to ensure those measures are met.¹²⁹⁸

¹²⁹¹ The Pa. constitutional provision is interpreted as "coextensive" with the U.S. one. *Commw. v. Yasipour*, 957 A.2d 734, 742-43 (Pa. Super. Ct. 2008).

¹²⁹² Pa. Dep't of Corrections, Policies, <http://www.cor.pa.gov/About%20Us/Pages/DOC-Policies.aspx> (2018).

¹²⁹³ *Id.*, Mission Statement, <http://www.cor.pa.gov/About%20Us/Pages/Mission-Statement.aspx> (2018).

¹²⁹⁴ *Id.*, Code of Ethics, <http://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/Code%20of%20Ethics.pdf> (last visited June 7, 2018).

¹²⁹⁵ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹²⁹⁶ *Id.* at 832 (citation omitted).

¹²⁹⁷ *Id.*

¹²⁹⁸ *Id.*

Standards of International Law

Although the department makes no representations about conformity with international standards, several trends have emerged throughout Europe and other developed countries over the years. European Union nations have abolished capital punishment. Issues in Europe include arguments that capital punishment is torture, violating provisions against freedom from torture and inhuman and degrading treatment or punishment.¹²⁹⁹ United Kingdom of Great Britain and Northern Ireland's abolished the death penalty in 1965 with the passage of the Murder (Abolition of Death Penalty) Act of 1965 and other European nations followed suit.¹³⁰⁰ In the United Kingdom, the Equality and Human Rights Commission is a non-departmental public body established by the Equality Act of 2006.¹³⁰¹ The commission's work includes international and domestic based advocacy against current and future use of the capital punishment.¹³⁰²

A leading case elaborating on the United Kingdom's current international viewpoint on capital punishment is *Soering v. United Kingdom*, which addresses "death row phenomena" or the results of waiting on death row.¹³⁰³ In *Soering*, the European Court of Human Rights was asked to determine whether the applicant, a West German national, should be extradited to the United States to stand trial on a charge of capital murder in Virginia pending possible violation of Article 3 of the United Kingdom's Human Rights Act of 1998 if the Commonwealth of Virginia implemented the death penalty.¹³⁰⁴

The Human Rights Act of 1998 outlines the rights and freedoms to which citizens of the United Kingdom are entitled.¹³⁰⁵ Article 2 details a basic right to life protected by law, while Article 3 provides for the prohibition of torture or inhumane or degrading treatment or punishment.¹³⁰⁶ Basing its decision on Article 3 of the Human Rights Act, the court ruled that, if capital punishment were to be implemented, extraditing the applicant to Virginia to face capital murder charges would result in the so-called "death row phenomenon" and thereby violate this article.

[I]n the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3).¹³⁰⁷

¹²⁹⁹ Equality & Human Rights Comm'n, Art. 3, <http://www.equalityhumanrights.com/about-us/our-work/human-rights/human-rights-review-2012/articles/article-3> (2012).

¹³⁰⁰ Murder (Abolition of Death Penalty) Act 1965, available at <http://www.legislation.gov.uk/ukpga/1965/71/contents> (last visited July 7, 2015).

¹³⁰¹ Equality & Human Rights Comm'n, *supra* note 1299, at 7.

¹³⁰² *Id.*

¹³⁰³ *Soering v. U.K.*, 11 Eur. Ct. H.R. (1989)

¹³⁰⁴ *Id.*

¹³⁰⁵ Equality & Human Rights Comm'n, The Human Rights Act, <https://www.equalityhumanrights.com/en/human-rights/human-rights-act> (last updated Jan. 29, 2018).

¹³⁰⁶ *Id.*

¹³⁰⁷ *Soering*, at ¶ 111, available at

Soering further set forth a framework for countries that have abolished capital punishment, while still exercising valid extradition treaties, to retain individuals within their borders in accordance with their laws.

In the case of a fugitive requested by the United States who faces a charge carrying the death penalty, it is the Secretary of State's practice, pursuant to Article IV of the United Kingdom-United States Extradition Treaty, to accept an assurance from the prosecuting authorities of the relevant State that a representation will be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed nor carried out.¹³⁰⁸

The Court then added clarification from a parliamentary debate, citing David Mellor, then Minister of State at the Home Office:

The written undertakings about the death penalty that the Secretary of State obtains from the Federal authorities amount to an undertaking that the views of the United Kingdom will be represented to the judge. At the time of sentencing he will be informed that the United Kingdom does not wish the death penalty to be imposed or carried out. That means the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out – it has never been carried out in such cases. It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who has been returned under those circumstances.¹³⁰⁹

The Court then concluded that any extradition to the United States would, in this circumstance, violate Article 3 of the Human Rights Act.¹³¹⁰ Furthermore, the practice of extradition(s) only on the assurance the death penalty will not be pursued is not uncommon for countries that have abolished the death penalty and have extradition treaties with the United States.

For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject to in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.

http://www.uio.no/studier/emner/jus/jus/JUR5710/h10/undervisningsmateriale/5nov_Soering-v-UK.pdf.

¹³⁰⁸ *Id.* ¶ 37.

¹³⁰⁹ *Id.*

¹³¹⁰ *Id.* ¶ 111.

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, . . . the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.¹³¹¹

International Perspective: Conditions on Death Row

There are roughly 10,100,000 people imprisoned worldwide, an untold number of whom have been sentenced to death.¹³¹² In 2012, U.S. Department of State reported on international prison conditions.¹³¹³ Conditions on death row vary among the countries that have not abolished this punishment. Unlike the practice of segregating death row inmates in the U.S., inmates sentenced to death in many countries are exposed to the same environment as the general prison population.¹³¹⁴ In many countries, prolonged pretrial detention exacerbates prison overcrowding, prisons are understaffed, and death row inmates are reportedly undertreated or treatment is delayed when sick while waiting their pending death sentence.¹³¹⁵ Torture on death row has been reported in several countries, with corruption of prison officials widespread in many countries.¹³¹⁶

Prison conditions in many countries lack adequate safeguards and policies have not been implemented to protect incarcerated individuals from cruel, inhumane or degrading treatment or punishment. In 1955, the First United Nations (UN) Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva, adopted the Standard Minimum Rules for the Treatment of Prisoners.¹³¹⁷ The following illustrates the purpose of these rules:

The following rules are not intended to describe in detail a model system of penal instructions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate system of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.¹³¹⁸

Set forth under Part 1, the General Rules of Application, an underlying principle for these rules is an anti-discriminatory, impartially implemented penal system:

¹³¹¹*Id.* (reference omitted).

¹³¹² Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Rep. on Int'l Prison Conditions* 1, available at <http://www.state.gov/documents/organization/210160.pdf> (last visited June 12, 2018).

¹³¹³ *Id.*

¹³¹⁴ Cornell L. Sch. Ctr. on the Death Penalty Worldwide, *Death Row Conditions*, <http://www.deathpenaltyworldwide.org/death-row-conditions.cfm>, (last updated Sept. 4, 2012).

¹³¹⁵ *Id.*

¹³¹⁶ *Id.*

¹³¹⁷ 1st U. Nations Congress on the Prevention of Crime & the Treatment of Offenders, *Standard Min. Rules for the Treatment of Prisoners*, <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf> (last visited June 11, 2018).

¹³¹⁸ *Id.* at 1.

The following rules shall be applied impartially. There shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . . On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.¹³¹⁹

The Standard Minimum Rules for the Treatment of Prisoners outlines key categories for the care of prisoners, including: accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion, retention of prisoners' property, notification of death or illness, removal of prisoners, institutional personnel, and inspections.¹³²⁰ Further, there are rules for special categories, which include: guiding principles, treatment, classification and individualization, privileges, work, education and recreation, social relations and after-care, insane and mentally abnormal prisoners, prisoners under arrest or awaiting trial, civil prisoners and persons arrested or detained without charge.¹³²¹

For example, the rules for sleeping accommodation call for one inmate per cell, stating it is not desirable to have two prisoners in a cell or room, and sets basic expectations for air flow, light, heating and ventilation, and minimum floor space provided to inmates.¹³²² The rules for food call for proper nutritional value with drinking water available to every inmate whenever the need arises.¹³²³ In regard to discipline and punishment, the rules state:

Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life. . . . Corporal punishment, punishment by placing in a dark cell, and all cruel, inhumane or degrading punishments shall be completely prohibited as punishments for disciplinary offences. . . . Punishments by close confinement or reduction of diet shall never be inflicted unless the medical officers has examined the prisoner and certified in writing that he is fit to sustain it. . . . The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. . . . The medical officer shall . . . shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.¹³²⁴

The UN Office of the High Commissioner for Human Rights, acknowledged the growing number of Member States abolishing the death penalty, stating the action “undermines human dignity and that its abolition, or a moratorium of its use, contributes to the enhancement and progressive development of human rights.”¹³²⁵ More than 160 Member States have either abolished or do not practice the death penalty; the office further argues that individuals have a

¹³¹⁹ *Id.*

¹³²⁰ *Id.* at 2-9.

¹³²¹ *Id.* at 9-14.

¹³²² *Id.* at 2-3.

¹³²³ *Id.* at 3.

¹³²⁴ *Id.* at 4-5.

¹³²⁵ U. Nations Office of the High Commissioner for Human Rights, Human Rights: Death Penalty, <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>, (last visited June 12, 2018).

fundamental right to life, there is great risk to executing innocent people, and cites “absence of proof that the death penalty” deters crime.¹³²⁶

From the early 1960s, drafters of the International Covenant on Civil and Political Rights (ICCPR) had begun their movement to abolish the death penalty in international law. Interestingly, however, Article 6 of the ICCPR states every human being has an inherent right to life but permits the use of the death penalty in limited circumstances.¹³²⁷ In the years following, many resolutions and protocols were adopted to limit the use of the death penalty in international law. In 1984, the UN Economic and Social Council adopted Safeguards guaranteeing protection of the rights of those facing the death penalty, followed in 1989 by the adoption of the Second Optional Protocol to the ICCPR.¹³²⁸ Most recently the council adopted four resolutions urging states to respect international standards protecting the rights of those sentenced to death and progressively reduce the number of death eligible crimes within Member States.

Prison Conditions in Pennsylvania

To obtain an account of prison conditions in Pennsylvania, Commission staff interviewed staff of Department of Corrections regarding conditions for death row inmates (Capital Case Unit) as compared with general population inmates, which includes all other inmates sentenced to life without parole. The Capital Case Unit described below will increase the opportunities for inmates to participate in out-of-cell congregate activities. Instead of being out of the cell for one or two hours a day, the capital case inmates will be out a minimum of 20 hours weekly. The inmates at State Correctional Institution Graterford will be relocated the institution replacing it next door that is identified as Phoenix and is opening this season. The new Capital Case Unit is too new to estimate its effect on the cost differential between housing inmates in this unit compared to the general population.

Capital Case Unit. At this time, most capital case inmates (129) are housed at State Correctional Institution Greene, and most of the remainder (20) are at State Correctional Institution Graterford.¹³²⁹ The Capital Case Unit or “death row” is separate from the rest of the prison. The unit is not solitary confinement because, as stated above, death row inmates have the opportunity to participate in a minimum of twenty hours per week of congregate, out-of-cell activity. Activities include indoor or outdoor yard or recreation, meals and limited programs. Capital case inmates also have the opportunity to work as unit block workers, to have access to the law library, showers, telephone calls, non-contact visits and medical and mental health services in accordance with policy. Capital case inmates who have serious mental illness will continue to have enhanced opportunity to participate in out-of-cell treatment services. The increased out-of-cell opportunities may be restricted for individual inmates for disciplinary or administrative reasons.

¹³²⁶ *Id.*

¹³²⁷ *Id.*, Int’l Covenant on Civ. & Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (1966).

¹³²⁸ *Id.*, 2d Optional Protocol to the Int’l Covenant on Civ. & Political Rights <https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx> (1989).

¹³²⁹ Pa. Dep’t of Corrections, *supra* note 14. The Graterford ones are expected to be moved next door to Phoenix.

Death row inmates are housed in close proximity to each other. There is one inmate per cell. Contact between inmates is restricted. The walls are constructed so that almost no sound can travel from one cell to the next. Passing of materials from cell to cell is prohibited. Prisoners must present themselves for counting four times *per* day. It costs \$15,010 more *per* year to house an inmate in the capital case unit than in general population.¹³³⁰

All of an inmate's personal property must fit within two record boxes and a footlocker that fits under the bed. Any item an inmate receives must be handed back to the guard. For instance, the inmate can brush his teeth only with a toothbrush supplied by a correctional officer. When the inmate finishes, he must hand the brush to the correctional officer for inspection. This is to prevent an inmate from making the toothbrush into a weapon by, for example, sawing the handle into a point. Shaving razors must be closely inspected because inmates remove razor blades to make shanks. Inmates are permitted to shower three times *per* week.

Inmates are given three meals *per* day. Specific opportunities exist for inmates to have congregate meals on the unit. All other meals are provided to the inmates in their cells. As with general population inmates, there is one menu item available for each course. They may also have one piece of fruit in the cell.

The exercise periods are two hours *per* day. The floor of the exercise area is entirely concrete. Recreational equipment includes tennis balls, basketballs, playing cards and board games. There is also an In-Cell Art Program.

Three phone calls *per* week are permitted and must be requested from staff at least one day in advance of the call. Inmates are permitted one non-contact visit *per* week. Phone calls between the inmate and his lawyer do not count against the weekly quota, but they must be arranged in advance between the inmate and the lawyer at a specific time.

Much of the activity on death row is related to each inmate's legal cases. There is a law library within the unit, and inmates may visit the library in two-hour increments. They are permitted to bring along only their legal materials, and inspections ensure compliance with this rule. Mail related to legal work is inspected in the presence of the inmate to ensure that no contraband is being smuggled in and to prevent the staff from reading confidential communications.

If the death penalty was abolished and no statutory provision was included regarding the disposition of death row inmates, death row would be abolished as well, and the inmates would be merged into the general prison population. Departmental staff would evaluate each of the inmate's behavioral and mental health to determine their respective housing arrangements. Most would likely be housed in one or more arrangements that are less restrictive than death row, but more restrictive than general population, and if the inmate adjusted to the intermediate environment, he would be merged into the general population. Only prisoners whose record indicated major behavioral problems would continue under conditions similar to those that now obtain on death row.

¹³³⁰ Woodside, *supra* note 418.

The foregoing description of description of the Capital Case Unit was obtained in 2014 but is consistent with a description from a judicial ruling last year.¹³³¹

The record establishes that, unlike those confined on death row, inmates in the general population have: Access to open air activities without strip searches; regular access to windows and natural light; daily access to showers; and the right to more frequent visits where contact is permitted. General population inmates also have access to group religious services, while death row inmates are limited to religious tapes. A variety of jobs and vocational programs—including clothing factory jobs, culinary training, and barbershop training—are limited to inmates in the general population. Likewise, group sport activities are reserved for the general population. General population inmates can make phone calls as frequently as their funds allow. On death row, outside of attorney calls, only three fifteen minute calls are allowed per week.¹³³²

In March of 2018, the department changed the operation of its capital case units that allow capital case inmates to have the opportunity to participate in out-of-cell congregate activities for at least twenty (20) hours per week. The foregoing description includes these changes. Previously, the policy only generally provided capital case inmates with the opportunity to have 10-12 hours of yard time out of cell per week in a setting that was less conducive to congregate activity. Capital case inmates who have serious mental illness will continue to have enhanced opportunity to participate in out-of-cell treatment services. The capital case inmates remain separate from the remainder of the inmate population.

Lethal Injection

The question that serves as the basis of the study of lethal injection in the administration of the death penalty in our Commonwealth is:

Whether there are adequate procedures and protocols in place to assure that the death sentence is administered in accordance with requirements of the United States Constitution and the Constitution of the Commonwealth of Pennsylvania;¹³³³

¹³³¹ *Williams v. Pa. Sec'y of Corrections*, 848 F.3d 549, 554-55, 563 (3d. Cir. 2017)

¹³³² *Id.* at 563.

¹³³³ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 222.

Based upon a U.S. Supreme Court ruling¹³³⁴ and its application by U.S. Court of Appeals for the Third Circuit to Delaware’s lethal injection procedures and protocols,¹³³⁵ Pennsylvania’s similar procedures and protocols appear to be constitutional. Bolstering this assessment is the U.S. District Court grant of summary judgment to Secretary Wetzel because Pennsylvania’s protocol did not have identified risks “very likely to cause . . . needless suffering in violation of” U.S. Const. amend. VIII.¹³³⁶

These rulings are based upon particular facts related to the identification of the drugs used and the qualifications of those who administer the drugs. Although factual findings for Pennsylvania could differ from those found for Delaware and Kentucky, there is no obvious reason to expect them to. *E.g.*, one of the drugs used by Pennsylvania is commonly used to euthanize terminally ill patients. The staff volunteering to execute condemnees routinely inject prisoners intravenously with other controlled substances and would seemingly have the training and qualification to similarly inject a lethal dosage of the prescribed agent.¹³³⁷

Based upon a U.S. Court of Appeals ruling,¹³³⁸ Pennsylvania’s observational protocol appeared to be unconstitutional. Bolstering this assessment is the U.S. District Court’s grant of a preliminary injunction forbidding the Commonwealth’s secretary of corrections from obscuring parts of an execution because the plaintiff was likely to succeed on the merits of its claim of unconstitutionality.¹³³⁹ The recent protocol opens and closes curtains throughout the procedure so that observers would have only seen the condemnee strapped to a gurney and would never have seen any interaction between the condemnee and the executioners.¹³⁴⁰ This suit was settled by the parties so that the protocol was changed. Now “witnesses would be permitted to see and hear inside the lethal injection chamber from the time the condemned inmate enters the chamber until the time he/she is pronounced dead. During the last completed execution, in the late 1990’s, witnesses were only permitted to see the inmate immediately before the administration of the lethal injection. They did not see the inmate enter the chamber, they did not see the inmate strapped down, etc.”¹³⁴¹

¹³³⁴ *Baze v. Rees*, 553 U.S. 35 (2008). “It is not disputed that Pennsylvania uses the same three-drug protocol that Kentucky uses.” *Chester v. Beard*, 657 F.Supp.2d 534, 543 n.9 (M.D.Pa. 2009). But by 2012, Department of Corrections “revised its lethal injection protocol”. *Id.*, 2012 WL 4758346. (The protocol was revised in Aug. 2012. *Id.*, 2012 WL 5386129. It “supersedes all prior versions”. *Id.*, 2012 WL 5389319.) This controlling opinion has subsequently been applied to a similar method of execution using a substituted drug. *Glossip v. Gross*, 135 S.Ct. 2726, 2732-34 (2015). This subsequent ruling found that petitioners’ did not prove a substantial risk posed by the substituted drug compared to available alternative methods and the dist. ct. was not clearly erroneous in its factual finding that the substituted drug would not “result in severe pain and suffering.” *Id.* at 2737-38.

¹³³⁵ *Jackson v. Danberg*, 594 F.3d 210, 222-23, 230 (3d Cir. 2010). Delaware’s capital sentencing scheme was subsequently ruled unconstitutional on different grounds. *Rauf v. Del.*, 145 A.3d 430 (Del. 2016).

¹³³⁶ *Chester v. Wetzel*, 2015 WL 632374 at 10 (M.D.Pa. 2015).

¹³³⁷ *Id.*, 2012 WL 5439054 at 12 (M.D.Pa. 2012).

¹³³⁸ *Cal. 1st Amend. Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002).

¹³³⁹ *The Phila. Inquirer v. Wetzel*, 906 F.Supp.2d 362, 375 (M.D.Pa. 2012).

¹³⁴⁰ *Id.* at 364-65.

¹³⁴¹ Barnes, *supra* note 159.

Pennsylvania's constitutional prohibition against cruel punishments is co-extensive with the U.S. constitutional prohibition against cruel and unusual punishment¹³⁴² so that any distinction between the two authorities would be factual rather than legal. Factors that have not been analyzed for this are whether internal, departmental procedures suffice instead of regulations and the continued availability of the drugs.

A judicial challenge to the killing components of Pennsylvania's execution procedures and protocols is continuing in Commonwealth Court under a statutory rather than constitutional challenge; however, the subcommittee is unaware of any facts that would lead us to conclude that either ruling¹³⁴³ on either constitutional challenge is incorrect.

The Commonwealth's lethal injection protocol is confidential so that the subcommittee on procedure is uncertain what the current protocol is. Statutory confidentiality applies to the identity of departmental employees, contractors and victims participating in the execution.¹³⁴⁴ The protocol the subcommittee considered was the information published in judicial opinions ruling on litigation over its constitutionality.¹³⁴⁵ Some of these opinions are not reported but available electronically *via* a subscription to Westlaw. The protocol revealed in these judicial opinions do not violate the statute's confidentiality requirement and could be public, which the subcommittee on procedure advocates rather than a confidential one. The drugs used should appropriately be selected by qualified, professional expertise to be delivered humanely and ethically.

There are potential, practical problems with the current protocol so far as the subcommittee perceives it to be. The statute specifies "an ultrashort-acting barbiturate in combination with chemical paralytic agents".¹³⁴⁶ Sodium thiopental is an ultrashort-acting barbiturate¹³⁴⁷ but unavailable.¹³⁴⁸ The alternative, pentobarbital, is a short-acting barbiturate.¹³⁴⁹ Pancurium bromide is a chemical paralytic agent,¹³⁵⁰ but potassium chloride does not seem to be either an ultrashort-acting barbiturate or a chemical paralytic agent.¹³⁵¹ These are the three drugs that might remain in the confidential protocol.¹³⁵²

Department of Corrections might not have or be able to obtain these drugs. In September 2014, Governor Corbett issued a reprieve for Hubert Michael because the department did not have

¹³⁴² *Commw. v. Zettlemyer*, 454 A.2d 937, 967 (Pa. 1982).

¹³⁴³ The summary judgment for the execution; the other granting an injunction to expand the observational component.

¹³⁴⁴ 61 Pa.C.S. § 4305(c).

¹³⁴⁵ *Chester v. Wetzel*, 2012 WL 5439054 (M.D.Pa. 2012), 2015 WL 632374 (M.D.Pa. 2015); *The Phila. Inquirer v. Wetzel*, 906 F.Supp.2d 362 (M.D.Pa. 2012).

¹³⁴⁶ 61 Pa.C.S. § 4304(a)(1).

¹³⁴⁷ U.S. Nat'l Library of Med., Nat. Insts. of Health, PubChem, <https://pubchem.ncbi.nlm.nih.gov/compound/thiopental> (last visited June 12, 2018).

¹³⁴⁸ Am. Soc'y of Anesthesiologists, ASA Statement on Sodium Thiopental's Removal From the Market (Jan. 21, 2011).

¹³⁴⁹ U.S. Nat'l Library of Med., *supra* note 1300, <https://pubchem.ncbi.nlm.nih.gov/compound/pentobarbital> (last visited June 12, 2018).

¹³⁵⁰ *Id.*, https://pubchem.ncbi.nlm.nih.gov/compound/pancuronium_bromide#section=Top (last visited June 12, 2018).

¹³⁵¹ *Id.*, https://pubchem.ncbi.nlm.nih.gov/compound/potassium_chloride (last visited June 12, 2018).

¹³⁵² *Chester v. Wetzel*, 2015 WL 632374, at 2 (M.D.Pa. 2015).

the drugs to execute him.¹³⁵³ Hampering the availability of lethal injection drugs for correctional departments is the denial of importation of misbranded and unapproved drugs.¹³⁵⁴

Perhaps further affecting the viability of the lethal injection protocol, is the fact that numerous relevant organizations have taken positions that could hamper this method of execution.

- International Academy of Compounding Pharmacists “discourages its members from participating in the preparation, dispensing, or distribution of compounded medications for use in legally authorized executions.”¹³⁵⁵
- “The American Pharmacists Association discourages pharmacist participation in executions on the basis that such activities are fundamentally contrary to the role of pharmacists as providers of health care.”¹³⁵⁶
- “No physician should be compelled to participate in the process of establishing a prisoner’s competence or be involved with treatment of an incompetent, condemned prisoner if such activity is contrary to the physician’s personal beliefs.”¹³⁵⁷
- “[I]t is the ABA’s position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties. As a consequence, ABA certificates may be revoked if the ABA determines that a diplomate participates in an execution by lethal injection.”¹³⁵⁸
- “The American Nurses Association . . . opposes both capital punishment and nurse participation in capital punishment.”¹³⁵⁹
- “NAEMT is strongly opposed to participation in capital punishment by an EMT, paramedic or other emergency medical practitioners. Participation in executions is viewed as contrary to the fundamental goals and ethical obligations of emergency medical services.”¹³⁶⁰

¹³⁵³ Pa. Dep’t of Corrections, *supra* note 7; Mark Berman, *Pa. Execution Delayed Because the State Doesn’t Have Lethal Injection Drugs*, Wash. Post, Sept. 12, 2014, https://www.washingtonpost.com/news/post-nation/wp/2014/09/12/pennsylvania-execution-delayed-because-the-state-doesnt-have-lethal-injection-drugs/?noredirect=on&utm_term=.b1f41438a977.

¹³⁵⁴ *Cook v. Food & Drug Admin.*, 733 F.3d 1, 10, 12 (D.C.Cir. 2013).

¹³⁵⁵ Int’l Acad. of Compounding Pharmacists, IADC Adopts Position on Compounding of Lethal Injection Drugs (Mar. 24, 2015),

https://c.yimcdn.com/sites/www.iacprx.org/resource/resmgr/Media/Press_Release_Compounding_fo.pdf.

¹³⁵⁶ APhA, APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution (Mar. 30, 2015), <https://www.pharmacist.com/press-release/apha-house-delegates-adopts-policy-discouraging-pharmacist-participation-execution>.

¹³⁵⁷ Am. Med. Ass’n, Code of Med. Ethics Opinion 9.7.3, <https://www.ama-assn.org/delivering-care/capital-punishment> (last visited June 13, 2018).

¹³⁵⁸ The Am. Bd. of Anesthesiology, Inc., Anesthesiologists & Capital Punishment Commentary (2014), <http://www.theaba.org/PDFs/BOI/CapitalPunishmentCommentary>.

¹³⁵⁹ Am. Nurses Ass’n, Capital Punishment & Nurses’ Participation in Capital Punishment Position Statement (2016), https://www.nursingworld.org/~4af078/globalassets/docs/ana/ethics/capital-punishment-position-statement_2017.pdf.

¹³⁶⁰ NAEMT, NAEMT Position Statement: EMT or Paramedic Participation in Capital Punishment (Jan. 26, 2010), http://www.naemt.org/docs/default-source/advocacy-documents/positions/1-26-10-EMT_or_Paramedic_Participation_in_Capital_Punishment.pdf?sfvrsn=3718628f_0.

- “Because of ancient and modern principles of medical ethics, legal execution should not necessitate participation by an anesthesiologist or any other physician. . . . ASA continues to agree with the position of the American Medical Association on physician involvement in capital punishment. ASA strongly discourages participation by anesthesiologists in executions.”¹³⁶¹
- “The correctional health professional should: . . . [n]ot be involved in any aspect of execution of the death penalty.”¹³⁶²

Apparently, the protocol requires all members of the lethal injection team to “be trained health care professionals”, and Department of Corrections obtains drugs from a compounding pharmacy if they are unavailable from a pharmaceutical factory.¹³⁶³

Recommendation

The subcommittee on procedure recommends that the lethal injection protocol:

- 1) Be public rather than confidential information.
- 2) Use an appropriate and effective drug selected by qualified professional expertise to execute humanely and be ethically delivered.
- 3) Comply with applicable statutory law.

Public Opinion

The question that serves as the basis of the study of public opinion in the administration of the death penalty in our Commonwealth is:

The opinions of Pennsylvania residents regarding capital punishment, including whether it is a just and appropriate punishment and, if so, under what circumstances should it be imposed;¹³⁶⁴

To determine Pennsylvania residents’ opinions about capital punishment, six public opinion polls were analyzed about the death penalty. Two were conducted nationally: the 2016 Pew Research Center poll and the 2017 Gallup poll; and four surveyed only Pennsylvania residents: the 2013 Pennsylvania State University poll, the 2015 Public Policy Polling poll, the 2015 Office of Victim Advocate poll, and the 2016 Pennsylvania State University poll. Below is a detailed breakdown of the findings of all six of these polls.

¹³⁶¹ Am. Soc’y of Anesthesiologists, Statement on Physician Nonparticipation in Legally Authorized Executions (last amended Oct. 26, 2016), <http://www.asahq.org/quality-and-practice-management/standards-guidelines-and-related-resources/statement-on-physician-nonparticipation-in-legally-authorized-executions>.

¹³⁶² Am. Correctional Health Servs. Ass’n, Mission & Ethics Statement, <http://www.achsa.org/mission-ethics-statement/> (last visited June 14, 2018).

¹³⁶³ *Chester v. Wetzel*, 2015 WL 632374, at 1, 2 (M.D.Pa. 2015).

¹³⁶⁴ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 222.

It can be difficult and imprecise to compare polling from different years, asking different questions and sampling different populations, but they could be perceived as collectively showing:

- 1) A majority of Pennsylvanians support the death penalty.
- 2) Support for the death penalty is declining.
- 3) A significant proportion of the population supports the idea of the death penalty but is opposed to the death penalty as a matter of public policy because more respondents favor the death penalty when asked for or against, but that percentage drops when given the option of life imprisonment or death as a penalty.

National polls

2016 Pew Research Center Poll. Pew Research Center has conducted a national poll on the death penalty periodically since 1996, with the most recent edition of the poll conducted in 2016.¹³⁶⁵ The poll asks respondents “Do you strongly favor, favor, oppose or strongly oppose the death penalty for persons convicted of murder?”¹³⁶⁶ The 2016 edition of the survey was conducted by random telephone interviews of “1,201 adults . . . living in all 50 U.S. states and the District of Columbia”.¹³⁶⁷ The poll had a margin of error of 3.2%.¹³⁶⁸

The 2016 edition of the poll found that 49% of respondents favored the death penalty, and 42% of respondents opposed it.¹³⁶⁹ This was the lowest level of support and highest level of opposition for the death penalty in any edition of the poll.¹³⁷⁰ It was also the first edition where a majority of respondents did not indicate that they support the death penalty.¹³⁷¹ Comparing the 2016 edition of the poll to the 2011 edition shows that support for the death penalty declined 13% and opposition for the death penalty increased by 11% over this time period.¹³⁷²

Other findings from the survey include:

- The most common response given by respondents was that they “oppose” the death penalty (28%), followed closely by “favor” (27%), “strongly favor” (21%), and “strongly oppose” (14%).¹³⁷³
- Men (55%) were more likely to favor the death penalty than women (43%).¹³⁷⁴

¹³⁶⁵ Pew Research Ctr., Late Aug. 2016 RDD Nonresponse Survey: Final Topline, <http://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/Death-penalty-topline-for-release.pdf>.

¹³⁶⁶ *Id.*

¹³⁶⁷ *Id.*, Methodology (2016), <http://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/Death-penalty-methodology.pdf>.

¹³⁶⁸ *Id.* at 2.

¹³⁶⁹ *Id.*, *Support for the Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016),

<http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

¹³⁷⁰ *Id.*, *supra* note 1365, at 1.

¹³⁷¹ *Id.*

¹³⁷² *Id.*

¹³⁷³ *Id.*

¹³⁷⁴ *Id.*, *supra* note 1369.

- White respondents were most likely to favor the death penalty (57%), followed by Hispanic respondents (36%) and Black respondents (29%).¹³⁷⁵
- Respondents age 50-64 were most likely to favor the death penalty (54%). Respondents age 18-29 were least likely to support the death penalty (42%). Fifty percent of respondents both age 30-49 and 65 or older favored the death penalty.¹³⁷⁶
- College graduates were less likely to favor the death penalty (42%) than respondents with a high school degree or less (51%) or some college experience but no degree (52%).¹³⁷⁷
- Republicans were most likely to favor the death penalty (72%), followed by Independents (44%) and Democrats (34%).¹³⁷⁸ However, the percentage of respondents who favor the death penalty has decreased for all three political affiliations. The percentage of respondents who favor the death penalty in the 2016 edition of the poll was 15 percentage points lower for Republicans, 35 percentage points lower for Independents, and 37 percentage points lower for Democrats.¹³⁷⁹
- Respondents who indicated that they are Catholic were more likely to oppose the death penalty (46%) than favor it (43%).¹³⁸⁰ Respondents identifying as white Evangelicals were more likely to favor the death penalty (69%) than respondents identifying themselves as white mainline Christians (60%).¹³⁸¹

2017 Gallup Poll. Gallup has conducted a national poll on the death penalty periodically since 1937, and at least once per year since 1999.¹³⁸² The poll asks respondents “Are you in favor of the death penalty for a person convicted of murder?”¹³⁸³ The 2017 edition of the poll was conducted by random telephone interviews of 1,028 “adults . . . living in all 50 U.S. states and the District of Columbia.”¹³⁸⁴ The poll had a margin of error of 4.0%.¹³⁸⁵

The 2017 edition of the poll found that a majority (55%) of respondents favor the death penalty.¹³⁸⁶ However, this is lowest level of support in any edition of the poll since 1972.¹³⁸⁷ There have been 35 editions of the poll since the two in 1972.¹³⁸⁸ The percentage of respondents indicating that they support the death penalty has steadily declined since 1994, when 80% of

¹³⁷⁵ *Id.*

¹³⁷⁶ *Id.*

¹³⁷⁷ *Id.*

¹³⁷⁸ *Id.*

¹³⁷⁹ *Id.*

¹³⁸⁰ *Id.*

¹³⁸¹ *Id.*

¹³⁸² Gallup, The Death Penalty, <http://news.gallup.com/poll/1606/Death-Penalty.aspx> (last visited June 11, 2018).

¹³⁸³ *Id.*

¹³⁸⁴ *Id.*, *U.S. Death Penalty Support Lowest Since 1972*, Gallup, (Oct. 26, 2017),

<http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>.

¹³⁸⁵ *Id.*

¹³⁸⁶ *Id.*

¹³⁸⁷ *Id.*

¹³⁸⁸ Gallup, *supra* note 1382.

respondents indicated that they support the death penalty.¹³⁸⁹ The majority of this decline has occurred over the last ten years.¹³⁹⁰

Additional findings of the 2017 edition of the poll include:

- A slight majority (51%) of respondents believe that the death penalty is being applied fairly, with 43% of respondents believing that it is being applied unfairly.¹³⁹¹
- When asked about the frequency with which the death penalty is being imposed, 39% of respondents said that it is being imposed “not enough.” The same proportion of respondents (26%) indicated that it is being imposed “too often” or the “right amount”.¹³⁹²
- Respondents indicating that they were Republicans were most likely to support the death penalty (72%), followed by Independents (58%) and Democrats (39%).¹³⁹³

State polls

2015 Public Policy Polling (PPP) Poll. The 2015 PPP poll was commissioned by Eric Ling, Associate Professor of Criminal Justice at York College of Pennsylvania.¹³⁹⁴ A total of 632 Pennsylvanians were surveyed by telephone.¹³⁹⁵ The poll had a margin of error of 4.2%.¹³⁹⁶

Respondents were asked “Which punishment do you prefer for people convicted of murder: life in prison with no possibility of parole, life in prison with a chance of parole after at least 40 years, life in prison with a chance of parole after at least 20 years, or the death penalty?”¹³⁹⁷ The death penalty received the most responses (42%).¹³⁹⁸ However, the majority of respondents (54%) indicated that they would prefer a sentence other than the death penalty: 32% prefer life in prison with no possibility of parole, 13% prefer life in prison with a chance of parole after at least 40 years, and 9% prefer life in prison with a chance of parole after at least 20 years.¹³⁹⁹

¹³⁸⁹ *Id.*

¹³⁹⁰ *Id.*

¹³⁹¹ *Id.*

¹³⁹² *Id.*

¹³⁹³ Gallup, *supra* note 1384.

¹³⁹⁴ Jan Murphy, *Death Penalty Losing Public Support in Pa., Poll Shows*, PennLive, (Mar. 25, 2015), http://www.pennlive.com/politics/index.ssf/2015/03/life_in_prison_preferred_over.html.

¹³⁹⁵ *Id.*

¹³⁹⁶ *Id.*

¹³⁹⁷ Pub. Policy Polling, Pa. Results, at 1, <https://www.scribd.com/document/259858723/Pennsylvania-Death-Penalty-Results-3-23-15>.

¹³⁹⁸ *Id.*

¹³⁹⁹ *Id.*

Other findings of the study include:

- The majority of respondents (70%) believed that the death penalty was cheaper than life in prison without parole.¹⁴⁰⁰ As discussed in this report, the evidence suggests that the death penalty is in fact more expensive than life in prison without parole.¹⁴⁰¹
- More than three-quarters of respondents (78%) indicated that they would be “very likely” or “somewhat likely” to support a candidate for political office if they disagreed with the candidate’s position on the death penalty, provided that the respondent and candidate agreed on most other issues and were members of the same political party.¹⁴⁰² Only 4% of respondents indicated that they would be “very unlikely” to support a candidate under these parameters.¹⁴⁰³
- Men (48%) were more likely to prefer the death penalty than women (37%).¹⁴⁰⁴
- Republicans (56%) were most likely to prefer the death penalty, followed by Independents (41%) and Democrats (30%).¹⁴⁰⁵
- Republicans (80%) were more likely than Democrats (65%) to believe that the death penalty costs taxpayers more than life in prison without parole.¹⁴⁰⁶
- More than twice as many white respondents (45%) preferred the death penalty than did African American respondents (22%).¹⁴⁰⁷
- Respondents identifying as age “18-45” were most likely to prefer the death penalty (46%). Respondents identifying as “older than 65” were least likely to prefer the death penalty (36%).¹⁴⁰⁸
- When broken down into demographic groups by sex, age, race, and political affiliation, Republicans were the only demographic group with a majority of respondents indicating that they prefer the death penalty (56%).¹⁴⁰⁹

The Spring 2016 Pennsylvania State University Poll. The Spring 2016 Pennsylvania State University Poll randomly surveyed 600 adult Pennsylvania residents, generating 517 unique responses to two questions: 1. “Do you favor o[r] oppose the death penalty for persons convicted

¹⁴⁰⁰ *Id.*

¹⁴⁰¹ *Supra* pp. 35-58.

¹⁴⁰² Pub. Policy Polling, *supra* note 1397.

¹⁴⁰³ *Id.*

¹⁴⁰⁴ *Id.* at 3.

¹⁴⁰⁵ *Id.* at 4.

¹⁴⁰⁶ *Id.*

¹⁴⁰⁷ *Id.* at 5.

¹⁴⁰⁸ *Id.* at 6.

¹⁴⁰⁹ *Id.* at 1-6.

of murder?”, and 2. “What is the main reason or reasons for your position on the death penalty?”¹⁴¹⁰ The poll was conducted by telephone and had a margin of error of 4.0%.¹⁴¹¹

The majority of respondents (58%) indicated that they favored the death penalty for persons convicted of murder.¹⁴¹² Nearly one-third (31%) of respondents indicated that they opposed the death penalty, and 11% of respondents neither favored nor opposed the death penalty.¹⁴¹³ Among respondents who favored the death penalty, the majority (57%) indicated that “crime severity, deterrence, and/or revenge” was the reason for their position.¹⁴¹⁴ Among respondents who opposed the death penalty, the majority (54%) indicated that “religion and/or what they considered to be moral” was the reason for their position.¹⁴¹⁵ Justice and cost were cited by both those who supported the death penalty (25%) and those who opposed it (29%) as reasons for their position.¹⁴¹⁶

The Spring 2013 Pennsylvania State University Poll. The Spring 2013 Pennsylvania State University Poll (Poll) was conducted by the Center for Survey Research (CSR) at The Pennsylvania State University Harrisburg.¹⁴¹⁷ A total of 604 adult Pennsylvanians were interviewed by telephone.¹⁴¹⁸ To ensure that the results of the Poll were not biased toward any demographic group, the results of the survey were checked against the known occurrences of the demographic characteristics of the population using data from the U.S. Bureau of the Census.¹⁴¹⁹

The questions in this poll were sponsored by Joint State Government Commission as part of this study. The first question asked, “Do you think the death penalty is ever just and appropriate as the penalty for intentional murder in Pennsylvania?”¹⁴²⁰ This question was based upon the question in the resolution but inserted the word, ever, to try to reflect the current practice of its relatively rare use. Whether and how much this extra word impacted the results is unknown. The second question asked, “Does your attitude towards the death penalty for persons convicted of intentional murder depend on any of the following circumstances?”¹⁴²¹ The circumstances offered were the characteristics of the victim and the murderer as well as the reasons for the murder and how it was carried out.¹⁴²² The final question asked, “If a person is convicted of intentional murder, which sentence would you choose?”¹⁴²³ The sentencing options were life imprisonment with no chance of parole, the death penalty and it depends on the circumstances.¹⁴²⁴ Before the questions were asked, intentional murder was explained.¹⁴²⁵

¹⁴¹⁰ Pa. State Harrisburg, *Pennsylvanians Perspectives on Capital Punishment 1*, https://csr.hbg.psu.edu/Portals/44/Research%20Brief_Capital%20Punishment_2017.pdf (last visited June 12, 2018).

¹⁴¹¹ *Id.* at 3.

¹⁴¹² *Id.* at 1.

¹⁴¹³ *Id.*

¹⁴¹⁴ *Id.* at 2.

¹⁴¹⁵ *Id.*

¹⁴¹⁶ *Id.*

¹⁴¹⁷ Ctr. for Survey Research, Pa. State Harrisburg, *Spring 2013 Pa. State Poll: Rep. of Findings & Methodology 1* (2013) (on file with Pa. J. State Gov’t Comm’n).

¹⁴¹⁸ *Id.*

¹⁴¹⁹ *Id.* at 12-14.

¹⁴²⁰ *Id.* at 18.

¹⁴²¹ *Id.*

¹⁴²² *Id.*

¹⁴²³ *Id.*

¹⁴²⁴ *Id.*

¹⁴²⁵ *Id.* at 17.

Overall, “almost three quarters of Pennsylvanians surveyed (72.3%)” thought that the death penalty is a just and appropriate penalty for intentional murder in the Commonwealth. Most respondents indicated they would change their attitude towards the death penalty for those convicted of intentional murder based on how the murder was carried out (21.6%) and the reasons for the murder (18.3%). Over half of Pennsylvanians surveyed (53.5%) stated that the circumstances of an intentional murder would determine what type of sentence they would ultimately choose.¹⁴²⁶

Other findings of the survey include the following:¹⁴²⁷

- Men (77.9%) were more likely than women (67.0%) to support the death penalty for intentional murder.
- Regardless of age, most respondents felt the death penalty was an appropriate penalty for intentional murder. Respondents age 45-54 had the highest proportion of support for the death penalty for intentional murder (79.3%).
- White respondents (75.2%) were more likely to support the death penalty for intentional murder than African American respondents (51.9%). However, African American respondents stated that their attitude toward the death penalty would change based on how the murder was carried out (45.3%).
- Non-Hispanic respondents (73.1%) were much more likely to support the death penalty for intentional murder than Hispanic respondents (37.0%). However, Hispanic respondents stated that their attitude toward the death penalty would change based on the characteristics of the victim (32.0%).
- Respondents who resided in households with a higher annual income were more likely to support the death penalty for intentional murder. Respondents with a household income of \$75,000 to \$99,999 annually had the highest proportion of support for the death penalty for intentional murder (87.9%).
- Respondents with less education were more likely to support the death penalty for intentional murder. Over three quarters of respondents with a high school diploma or GED (82.8%) supported the death penalty for intentional murder. Only 61.6% of respondents with graduate level education felt the same way.
- Respondents in northern Pennsylvania (regions 3 (91.6%) and 6 (79.8%)) were most likely to support the death penalty for intentional murder.

¹⁴²⁶ *Id.* at 2.

¹⁴²⁷ *Id.*

Office of Victim Advocate. In spring 2015, Office of Victim Advocate sent surveys to 418 registered crime victims whose offenders were under a sentence of death. The response rate was approximately 40%.¹⁴²⁸ This poll had overwhelming support for the death penalty, but this was not a survey of the general population nor a survey of registered crime victims in first-degree murder cases in which the death penalty was sought but not returned and registered crime victims in first-degree murder cases in which the death penalty was not sought.

Survey Statement	Response Rates
I support the death penalty.	80.1% Strongly Agree 91% Strongly Agree or Agree 5.1% Disagree or Strongly Disagree
I feel the sentence imposed by the courts in my case should be carried out.	87.2% Strongly Agree 93.6% Strongly Agree or Agree 3.8% Disagree or Strongly Disagree
I had the opportunity to voice my wishes during the sentencing phase of my trial regarding the execution of the offender.	60.7% Strongly Agree or Agree 23.6% Disagree or Strongly Disagree
I would support abolishing the death penalty if it means the offender would remain separate from general population (i.e., a version of death row would remain), and that the offender would receive a life sentence without the possibility of parole.	63.2% Disagree or Strongly Disagree 28.4% Strongly Agree or Agree
There should be specific timeframe on the appeals process for death penalty cases.	91.6% Strongly Agree or Agree 3.9% Disagree or Strongly Disagree

Conclusions

1. A majority of Americans and Pennsylvanians favor the death penalty. In all six polls, respondents most frequently indicated that they support or prefer the death penalty. In four of the six polls, a majority of respondents (greater than 50%) supported or preferred the death penalty.
2. Support for the death penalty is declining. The polls presented show that support and preference for the death penalty is declining. This decline has been steady since the

¹⁴²⁸ The Office of Victim Advocate Testimony, Pa. H.R. Comm. on the Judiciary (June 11, 2015), http://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2015_0113_0006_TSTMNY.pdf.

late 1990s, but has been more pronounced over the past few years. Between 2014 and 2017, respondents who “favor” the death penalty in Gallup’s poll declined by 8 percentage points.¹⁴²⁹ Between 2011 and 2016, the percentage of respondents who favor the death penalty in Pew Research Center’s poll declined by 13 percentage points.¹⁴³⁰ The decline in support for the death penalty seen in the last two editions of both the Gallup and Pew Research Center poll is particularly steep. The percentage of respondents who favored the death penalty was 5 percentage points lower in the 2017 Gallup poll than it was in the 2016 edition.¹⁴³¹ Support for the death penalty was 7 percentage points lower in the 2016 Pew Research Center poll than it was in the 2015 edition.¹⁴³²

The decline in support for the death penalty is most obvious in the Pennsylvania State University poll. In the 2016 edition of the poll, support for the death penalty among Pennsylvanians was 14 percentage points lower than it had been in the 2013 edition of the poll, but the questions differed.

3. Support for the death penalty is higher in theory than in practice. Most of the polls discussed only provided the option to choose whether they support or oppose the death penalty. However, some polls allow respondents to select the punishment that they prefer for those convicted of murder (*e.g.* death penalty or life in prison without parole). Support for the death penalty might be higher among respondents when given the either-or option of favoring or opposing the death penalty than it is in polls where respondents are able to select their preferred punishment. The 2015 Public Policy Poll offered respondents the ability to select a preferred punishment and showed significantly lower support for the death penalty than did the other polls examined.

This difference persists in the different editions of the Gallup poll. In some years the Gallup poll asked respondents to indicate if they prefer the death penalty or life in prison without parole as a punishment for murder. The most recent instance was in 2014, but it goes back to 1985.¹⁴³³ In that edition, the percentage of respondents who said they “favor” the death penalty (63%) was 13 percentage points higher than the percentage of respondents who said that they preferred the death penalty when given the option to choose the death penalty or life in prison without parole (50%).¹⁴³⁴

This suggests that a significant proportion of the population might favor the idea of the death penalty as a punishment for murder, but does not support it as a matter of public policy. Evidence from the 2015 Public Policy Polling poll and the 2014 Gallup poll, combined with the recent decline in support for the death penalty found across some polls in the last few years, indicate a growing preference among some for a punishment other than death for murder.

¹⁴²⁹ Gallup, *supra* note 1382.

¹⁴³⁰ Pew Research Ctr., *supra* note 1365.

¹⁴³¹ Gallup, *supra* note 1382.

¹⁴³² Pew Research Center, *supra* note 1365.

¹⁴³³ Gallup, *supra* note 1382.

¹⁴³⁴ *Id.*

A Sample of Religious Positions on the Death Penalty

The subcommittee on impact is including a sample of the religious perspective of different faiths and denominations to supplement the including polling data to further reflect the opinions of Pennsylvania residents. It is also partially informative of and responsive to the resolution's inquiry relating to the death qualification of jurors at capital trials "and the impact of this practice on the ability of . . . people of faith to serve on capital juries".¹⁴³⁵

- **Reform Judaism:** "Since 1959, the Central Conference of American Rabbis . . . and the Union for Reform Judaism . . . have formally opposed the death penalty."¹⁴³⁶
- **Pennsylvania Catholic Conference:** "We oppose capital punishment not just for what it does to those guilty of horrible crimes but for what it does to all of us as a society. Increasing reliance on the death penalty diminishes all of us and is a sign of growing disrespect for human life."¹⁴³⁷
- **American Baptist Churches:** "[T]he General Board of the American Baptist Churches recommends the abolition of capital punishment in those states which still practice it and urges churches and members of our American Baptist constituency to support groups and agencies working for the abolition of capital punishment in those governmental jurisdictions of the U.S. where it is still authorized by law."¹⁴³⁸
- **"The Church of Jesus Christ of Latter-day Saints** regards the question of whether and in what circumstances the state should impose capital punishment as a matter to be decided solely by the prescribed processes of civil law. We neither promote nor oppose capital punishment."¹⁴³⁹
- **Episcopal Church:** "*Resolved*, That this 70th General Convention of the Episcopal Church urge the provinces, dioceses, parishes, missions, and individual members of this Church to engage in serious study on the subject of capital punishment and work actively to abolish the death penalty in their states."¹⁴⁴⁰

¹⁴³⁵ Pa. S. Res. No. 6 (Sess. of 2011); appdx. A, *infra* p. 220. *Supra* pp. 11, 146.

¹⁴³⁶ Religious Action Ctr. of Reform Judaism, Position of the Reform Movement on the Death Penalty (2018), <https://rac.org/position-reform-movement-death-penalty>.

¹⁴³⁷ Pa. Catholic Conf., Death Penalty: Choose Life (2017), <https://www.pacatholic.org/bishops-statements/death-penalty-choose-life/>.

¹⁴³⁸ Am. Baptist Resolution on Capital Punishment (last modified Sept. 2000), <http://www.abc-usa.org/wp-content/uploads/2012/06/Capital-Punishment.pdf>.

¹⁴³⁹ The Church of Jesus Christ of Latter-day Saints, Newsroom: Capital Punishment (2018), <https://www.mormonnewsroom.org/official-statement/capital-punishment>.

¹⁴⁴⁰ The Archives of the Episcopal Church, The Acts of Convention (1991), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1991-D056.

- **Evangelical Lutheran Church of America:** “*The Death Penalty* stands in the Lutheran tradition recognizing that God entrusts the state with the power to take human life when failure to do so constitutes a clear danger to the common good. Nevertheless, it expresses ELCA opposition to the use of the death penalty, one that grows out of ministry with and to people affected by violent crime.

The statement acknowledges the existence of different points of view within the church and society on this question and the need for continued deliberation, but it objects to the use of the death penalty because it is not used fairly and has failed to make society safer.”¹⁴⁴¹

- **Religious Society of Friends:** “The Friends Committee on National Legislation seeks abolition of the death penalty because we believe that state-sanctioned killing denies the sacredness of human life and violates our belief in the human capacity for change.”¹⁴⁴²
- **The United Methodist Church:** “We believe the death penalty denies the power of Christ to redeem, restore and transform all human beings. . . . For this reason, we oppose the death penalty . . . and urge its elimination from all criminal codes.”¹⁴⁴³

¹⁴⁴¹ Evangelical Lutheran Church in Am., Death Penalty (adopted 1991), http://www.elca.org/Faith/Faith-and-Society/Social-Statements/Death-Penalty?_ga=2.54176872.196555638.1529000761-89576762.1529000761.

¹⁴⁴² Friends Comm. on Nat’l Legis., Moral & Practical Reasons to End the Death Penalty (2018), <https://www.fcnl.org/updates/moral-and-practical-reasons-to-end-the-death-penalty-114>.

¹⁴⁴³ The U. Methodist Church, Social Principles: The Political Community (2018), <http://www.umc.org/what-we-believe/political-community>.

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THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION**No. 6**Session of
2011

INTRODUCED BY GREENLEAF, ERICKSON, PIPPY, D. WHITE, LEACH,
FERLO, WASHINGTON, WILLIAMS AND WOZNIAK, JANUARY 12, 2011

SENATOR GREENLEAF, JUDICIARY, AS AMENDED, DECEMBER 6, 2011

A RESOLUTION

1 Directing the Joint State Government Commission to establish a
2 bipartisan task force and an advisory committee to conduct a
3 study of capital punishment in this Commonwealth and to
4 report their findings and recommendations.

5 WHEREAS, In 1972, the Pennsylvania Supreme Court declared
6 Pennsylvania's capital sentencing procedure unconstitutional
7 based on the United States Supreme Court's *Furman v. Georgia*
8 decision; and

9 WHEREAS, In 1978, the Pennsylvania General Assembly responded
10 by reinstating capital punishment in compliance with United
11 States and Pennsylvania Supreme Court rulings; and

12 WHEREAS, Since 1978, 352 people have been sentenced to death
13 in Pennsylvania but only three people have been executed; and

14 WHEREAS, Each of the three people executed waived the right
15 to appeal; and

16 WHEREAS, There are more than 220 existing capital sentences;
17 and

18 WHEREAS, Questions are frequently raised regarding the costs,
19 deterrent effect and appropriateness of capital punishment; and

1 WHEREAS, The American Bar Association has identified several
2 areas in which Pennsylvania's death penalty system falters in
3 guaranteeing each capital defendant fairness and accuracy in all
4 proceedings; and

5 WHEREAS, The Pennsylvania Supreme Court Committee on Racial
6 and Gender Bias in the Justice System has determined that
7 racial, ethnic and gender biases exist and that those biases
8 significantly affect the way parties, witnesses, litigants,
9 lawyers, court employees and potential jurors are treated; and

10 WHEREAS, THE JUSTICE CENTER FOR RESEARCH AT THE PENNSYLVANIA
11 STATE UNIVERSITY, IN CONJUNCTION WITH THE PENNSYLVANIA
12 INTERBRANCH COMMISSION ON GENDER, RACIAL AND ETHNIC FAIRNESS, IS
13 CONDUCTING A STUDY OF THE ADMINISTRATION OF THE DEATH PENALTY IN
14 PENNSYLVANIA AND HAS EXPRESSED INTEREST IN COLLABORATING WITH
15 THE TASK FORCE AND ADVISORY COMMITTEE ESTABLISHED BY THIS
16 RESOLUTION; AND

17 WHEREAS, Postconviction DNA testing has shown that there are
18 wrongful convictions, even in capital cases; therefore be it

19 RESOLVED, That the Senate direct the Joint State Government
20 Commission to establish a bipartisan task force of four members
21 of the Senate to conduct a study of capital punishment in this
22 Commonwealth; and be it further

23 RESOLVED, That the President pro tempore of the Senate
24 appoint two members of the task force and the Minority Leader of
25 the Senate appoint two members of the task force; and be it
26 further

27 RESOLVED, That the Joint State Government Commission oversee
28 the creation of an advisory committee to assist the task force
29 in conducting the study and making recommendations; the advisory
30 committee to have approximately 30 members and be comprised of

1 representatives from those groups most likely to make useful and
2 insightful contributions, such as representatives of the
3 judiciary, prosecution, defense, law enforcement, corrections,
4 victim assistance organizations and also representatives of
5 academia, the faith community, private and public organizations
6 involved in criminal justice issues and other criminal justice
7 experts; and be it further

8 RESOLVED, That the task force, with the assistance of the
9 advisory committee, conduct a study of the following subjects
10 including:

11 (1) Cost: Whether there is a significant difference
12 between the cost of the death penalty from indictment to
13 execution and the cost of life in prison without parole; in
14 considering the overall cost of the death penalty in
15 Pennsylvania, the cost of all the capital trials that result
16 in life sentences as well as death sentences that are
17 reversed on appeal must be factored into the equation;

18 (2) Bias and unfairness: Whether the selection of
19 defendants for capital trials in Pennsylvania is arbitrary,
20 unfair or discriminatory in any way and whether there is
21 unfair, arbitrary or discriminatory variability at any stage
22 in the process including in the sentencing phase;

23 (3) Proportionality: Whether there is a significant
24 difference in the crimes of those selected for the punishment
25 of death as opposed to those who receive life in prison and
26 whether there is an adequate process for determining when
27 death sentences are excessive or out of line with sentences
28 imposed in other cases where a sentence other than death was
29 imposed;

30 (4) Impact on and services for family members: The

1 impact of the death penalty on family members and loved ones
2 of murder victims and the availability and cost of services
3 currently being provided in Pennsylvania for family members
4 and loved ones of murder victims and whether these services
5 are sufficient to meet the needs of surviving families;

6 (5) Mental retardation: Whether, in light of the Supreme
7 Court ruling in *Atkins v. Virginia*, there are adequate
8 procedural protections in place to assure that people with
9 mental retardation are not in fact being sentenced to death
10 and executed;

11 (6) Mental illness: Whether persons suffering from
12 mental illness constitute a disproportionate number of those
13 on death row, what criteria should be used in judging the
14 level of mental illness involved and whether people with
15 mental illness who are convicted of murder should be
16 executed;

17 (7) Juries: The impact on the reliability and fairness
18 of capital trials of death qualifying jurors and the impact
19 of this practice on the ability of women, people of color and
20 people of faith to serve on capital juries; whether there are
21 adequate procedural protections and remedies in place to make
22 sure that women and African Americans are not excluded from
23 serving as jurors in capital cases; and whether there are
24 adequate procedural protections in place to assure that
25 jurors are able to understand and apply instructions in
26 determining guilt or innocence and the appropriate punishment
27 in a capital case;

28 (8) State appeals and postconviction: Whether there are
29 adequate procedures in place to assure that serious error in
30 capital cases is identified and corrected and to what extent

1 procedural doctrines, such as waiver or forfeiture, operate
2 to prevent judicial review of serious constitutional claims
3 on the merits;

4 (9) Clemency: Whether the current clemency process has
5 procedures in place to assure that it functions as a safety
6 net to assure that factual and procedural errors that
7 directly undermine the reliability and fairness of a capital
8 sentence are remedied;

9 (10) Penological intent: Whether the death penalty
10 rationally serves a legitimate penological intent such as
11 public safety or deterrence;

12 (11) Innocence: Whether there is a risk of execution of
13 an innocent person and whether there are adequate procedural
14 protections in place to prevent an innocent person from being
15 sentenced to death and executed;

16 (12) Alternatives: Whether alternatives to the death
17 penalty exist that would sufficiently ensure public safety
18 and address other legitimate social and penological
19 interests;

20 (13) Counsel: The quality of counsel provided to
21 indigent capital defendants and whether such counsel and the
22 process for providing counsel assures the reliability and
23 fairness of capital trials;

24 (14) Secondary trauma: The impact of the death penalty
25 process on law enforcement, prosecutors, defense counsel,
26 judges, jurors, correctional officers, family members and
27 loved ones of victims and family members of the accused;

28 (15) Length and conditions of confinement on death row:
29 Whether the conditions comply with the requirements of the
30 United States Constitution, the Constitution of the

1 Commonwealth of Pennsylvania and standards of international
2 law and the impact of those conditions on correctional
3 officers;

4 (16) Lethal injection: Whether there are adequate
5 procedures and protocols in place to assure that the death
6 sentence is administered in accordance with requirements of
7 the United States Constitution and the Constitution of the
8 Commonwealth of Pennsylvania; and

9 (17) Public opinion: The opinions of Pennsylvania
10 residents regarding capital punishment, including whether it
11 is a just and appropriate punishment and, if so, under what
12 circumstances should it be imposed;

13 and be it further

14 RESOLVED, THAT THE TASK FORCE AND ADVISORY COMMITTEE
15 COLLABORATE WITH THE JUSTICE CENTER FOR RESEARCH AT THE
16 PENNSYLVANIA STATE UNIVERSITY IN CONDUCTING A STUDY OF THE
17 ADMINISTRATION OF THE DEATH PENALTY IN THIS COMMONWEALTH; AND BE
18 IT FURTHER

19 RESOLVED, THAT THE COLLABORATION BETWEEN THE TASK FORCE AND
20 ADVISORY COMMITTEE AND THE JUSTICE CENTER BE FORMALIZED THROUGH
21 A MEMORANDUM OF UNDERSTANDING SPECIFYING WHAT EACH ORGANIZATION
22 WILL PROVIDE TO THE OTHER IN CONDUCTING THIS STUDY; AND BE IT
23 FURTHER

24 RESOLVED, That the task force and advisory committee hold
25 public hearings as necessary to receive testimony about any of
26 the subjects of study enumerated in this resolution; and be it
27 further

28 RESOLVED, That the task force and advisory committee report
29 their findings and recommendations to the Senate no later than
30 two years after the date this resolution is adopted.

APPENDIX B

State-by-State Survey of Aggravating Circumstances for Capital Punishment May 2018	
Circumstances	States
Prisoners: incarcerated, in custody, or on probation	Ala., Ariz., Ark., Colo., Fla., Ga., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.C., Ohio, Okla., Pa. , Tenn., Tex., Utah, Wash., Wyo.
Previous conviction of a capital offense or other violent crime	Ala., Ariz., Ark., Cal., Fla., Ga., Idaho, Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Okla., Pa. , S.C., S.D., Tenn., Utah, Wyo.
Avoiding arrest or escaping from custody; escaped felon	Ala., Ark., Cal., Colo., Fla., Ga., Kan., Miss., Mo., Nev., N.H., N.C., Ohio, Okla., S.D., Tenn., Tex., Utah, Wash., Wyo.
Offense is felony murder ¹⁴⁴⁴	Ala., Cal., Colo., Fla., Ga., Idaho, Ind., Ky., La., Miss., Nev., N.H., N.C., Ohio, Pa. , S.C., Tenn., Tex., Utah, Wash., Wyo.
Knowingly created a risk of death to many others/more than one person – adjectives include great or grave; frequently includes “by means of a destructive device”	Ala., Ariz., Ark., Colo., Fla., Ga., Idaho, Kan., La., Miss., Mo., Nev., N.H., N.C., Okla., Pa. , S.C., S.D., Tenn., Utah, Wyo.
For pecuniary gain	Ala., Ariz., Ark., Cal., Colo., Fla., Ga., Idaho, Ind., Kan., Ky., La., Miss., Mo., Nev., N.H., N.C., Ohio, Okla., Pa. , S.C., S.D., Tenn., Tex., Utah, Wash., Wyo.
Contract killing: defendant engaged a third person to murder the victim	Ariz., Colo., Idaho, Ga., Ind., Kan., Ky., La., Mo., Okla., Pa. , S.C., S.D., Tenn., Tex., Utah
Disrupt or hinder governmental function, political function or enforcement of law	Ala., Ark., Fla., Miss., N.C., Utah
Murder was especially reprehensible: brutal, heinous, atrocious, cruel, ¹⁴⁴⁵ depraved, outrageous, wantonly vile, horrible, inhuman, manifesting exceptional depravity, dismemberment; in a cold, calculated manner without pretense of moral or legal justification; premeditated; utter disregard for human life; evidences a sense of pleasure in the murder; torture; at random and without apparent motive; unreasonable response to the provocation	Ala., Ariz., Ark., Cal., Colo., Fla., Ga., Idaho, Ind., Kan., La., Miss., Mo., Mont., Nev., N.H., N.C., Okla., Ore., Pa. , S.D., Tenn., Utah, Va., Wyo.
Multiple murders in the same occurrence; series of intentional killings; act in a course of violent conduct; mass murder	Ala., Ariz., Ark., Cal., Colo., Idaho, Ky., La., Mo., Mont. ¹⁴⁴⁶ , Nev., N.C. Pa. , S.C., Tenn., Tex., Utah, Wash.
Defendant will constitute a continuing threat to society	Idaho, Okla., Ore., Tex., Va., Wyo.
Victim was held as hostage	Colo, Pa. , Utah

¹⁴⁴⁴ Defendant was engaged in or was an accomplice in the commission of, or attempt to commit or flight after committing, or attempting to commit statutorily enumerated felonies.

¹⁴⁴⁵ “Heinous, atrocious and cruel” has been found to be unconstitutionally vague in Okla. and Cal.

¹⁴⁴⁶ Part of a scheme or operation that if completed would result in multiple deaths.

**State-by-State Survey of
Aggravating Circumstances for Capital Punishment
May 2018**

Circumstances		States
Felonious possession of the weapon used to commit the offense		Colo.
Defendant committed another murder at any time, whether convicted or not		Ind.
Ritualistic mutilation, dismemberment, or torture of a human as part of a ceremony, rite, initiation, observance, performance, or practice		La.
Incident to desecration of a dead human body		Utah
Vulnerable victims	Children and youth ¹⁴⁴⁷	Ala., Ariz., Ark., Colo., Fla., Ind., La., Nev., N.H., Ohio, Pa. , S.C., S.D., Tenn., Tex., Utah, Wyo.
	Unborn child	Ariz., Ind.
	Severe intellectual, mental or physical disability	Ark., Fla., N.H., Tenn., Wyo.
	Elderly person ¹⁴⁴⁸	Ariz., Fla., La., N.H., Tenn., Wyo.
	Pregnant woman	Colo., Ind., Pa. , Tenn.
	Victim covered by a protective order	Fla., Ky., Pa. , Wash.
	Familial or custodial authority over victim; family or household members	Fla., Wash.
Official victims ¹⁴⁴⁹	Law enforcement officer or official ¹⁴⁵⁰	Ariz., Cal., Colo., Fla., Ga., Idaho, Ind., Ky., La., Mo., Mont., Nev., N.C., Ohio, Okla., Pa. , S.C., S.D., Tenn., Tex., Utah, Wash.
	Murder of a family member of a law enforcement officer or official, a judicial officer or a fireman	S.C.
	Corrections official or employee ¹⁴⁵¹	Ga., Ind., Ky., La., Mo., Nev., N.C., Okla., Pa. , S.C., S.D., Tenn., Tex., Utah, Wash.
	Firefighter, fire marshal, fire police	Cal., Colo., Ga., Ind., La., Mo., Nev., N.C., Pa. , S.C., S.D., Tenn., Tex., Utah, Wash.
	Paramedic, EMT ¹⁴⁵²	Colo., Tenn., Utah
	Judicial officer: judge, prosecutor, Attorney General, special investigator	Cal., Colo., Idaho, Ga., Ind., Mo., N.C., Pa. , S.C., S.D., Tenn., Tex., Utah, Wash., Wyo.
	Juror	Cal., N.C., Utah, Wash., Wyo.
	Government official	Cal., Colo., Fla., Idaho, Ky., Mo., Pa. , Tenn., Utah
	Witnesses: to prevent testimony or retaliate for the same ¹⁴⁵³	Ariz., Cal., Colo., Idaho, Ind., Kan., La., Mo., N.C., Ohio, Pa. , S.C., Utah, Wyo.

¹⁴⁴⁷ Under age 15 (Ariz.); under age 13 (Ark., Ohio, S.D.); under age 12 (Colo., Fla., Ind., La., Pa.); under age 14 (Ala., Nev., Utah); under 11 years of age (S.C.); child less than 12 years of age/defendant at least 18 (Tenn.); child under age 10 (Tex.); under age 17 (Wyo.); if a child under 14 is present when his/her parent or guardian is murdered (Ala.).

¹⁴⁴⁸ 70 years of age or older (Ariz., Tenn.); 65 years of age or older (La.); older than 65 years of age (Wyo.).

¹⁴⁴⁹ Victim was engaged in official duties when killed.

¹⁴⁵⁰ Any peace officer and security officers (Utah, eff. July 1, 2019).

¹⁴⁵¹ If murderer was a prisoner (Ky., Tex.).

¹⁴⁵² Includes ambulance personnel, and search and rescue personnel (Utah, eff. July 1, 2019).

¹⁴⁵³ Includes an informant (Pa.).

**State-by-State Survey of
Aggravating Circumstances for Capital Punishment
May 2018**

Circumstances		States
	Victim was a news reporter	Wash.
Specific weapons	Remote stun gun	Ariz.
	Destructive or explosive device ¹⁴⁵⁴	Ark., Cal., Colo., Ind., Ky., Miss., N.C., Tenn., Utah, Wyo.
	Chemical, biological or radiological weapon	Colo.
	Poison	Cal., S.C., Utah
Specific locations	School or secondary educational institution ¹⁴⁵⁵	Ind., Nev.
	Place of worship	Ind.
Specific crimes	Victim had been kidnapped for ransom or reward	Colo., Mont., N.C., Pa. , Utah
	Hate crimes: race; color; religion; ancestry; nationality; country of origin	Cal., Colo., Miss. ¹⁴⁵⁶ , Nev. ¹⁴⁵⁷
	Sexual predator; infamous crime against nature, lewd and lascivious behavior, sexual abuse of a child; during nonconsensual sexual penetration	Fla., Idaho, Mont., Nev., S.C.
	Organized crime: Criminal street gang or criminal syndicate promotion or initiation	Ariz., Cal., Fla., Ind., Mo., Wash.
	Defendant was lying in wait or ambushed the victim	Cal., Colo., Mont.
	Drive-by shooting or discharging firearm into inhabited dwelling	Cal., Ind., Wash.
	During a hijacking	Mo., N.C., Pa. , Tenn., Utah, Wyo.
	As part of an act of terrorism	Ga. (domestic terrorism), Nev., Ohio, Utah ¹⁴⁵⁸
	Assassination of political leader or candidate	Ohio
Crime involved controlled substances ¹⁴⁵⁹	La., N.H., Pa. , S.C., S.D.	

¹⁴⁵⁴ Weapons of mass destruction (Ky., Utah).

¹⁴⁵⁵ On a school bus (Nev.).

¹⁴⁵⁶ To intimidate or coerce a civilian population.

¹⁴⁵⁷ Physical or mental disability or sexual orientation or gender identity or expression.

¹⁴⁵⁸ "Targeting a law enforcement officer"--to intimidate or coerce a civilian population for political or social purposes.

¹⁴⁵⁹ During a drug deal (La.); prior drug convictions (N.H.); drug trafficking (S.C.).

Citations:

Alabama: Ala. Code § 13A-5-49
Arizona: Ariz. Rev. Stat. §13-751(F)
Arkansas: Ark. Code § 5-4-604
California: Cal. Penal Code § 190.2
Colorado: Colo. Rev. Stat. § 18-1.3-1201(5)
Florida: Fla. Stat. § 921.141(5)
Georgia: Ga. Code 17-10-30(b)
Idaho: Idaho Code § 19-2515(9)
Indiana: Ind. Code § 35-50-2-9(b)
Kansas: Kan. Stat. § 21-6624
Kentucky: Ky. Rev. Stat. § 532.025(2)(a)
Louisiana: La. C. Crim. Proc. § art. 905.4
Mississippi: Miss. Code § 99-19-101(5)
Missouri: Mo. Rev. Stat. § 565.032(2)
Montana: Mont. Code § 46-18-303
Nebraska: Death penalty repealed in 2015, reinstated by reference in 2016; no statutory provisions enacted
Nevada: Nev. Rev. Stat. § 200.033
New Hampshire: N.H. Rev. Stat. § 630:5(VII)
North Carolina: N.C. Gen. Stat. §15A-2000(e)
Ohio: Ohio Rev. Code § 2929.04(A)
Oklahoma: Okla. Stat. §21-701.12
Oregon: Ore. Rev. Stat. § 163.150(1)(b)
Pennsylvania: 42 Pa.C.S. § 9711(d)
South Carolina: S.C. Code § 16-3-20(C)(a)
South Dakota: S.D. Codified Laws § 23a-27a-1
Tennessee: Tenn. Code § 39-13-204(1)
Texas: Tex. Penal Code § 19.03; Tex. C. Crim. Proc. Art. 37.071 Sec. 2 (b)(1)
Utah: Utah Code §§ 76-30207(3); 76-5-202(1) & (2); 76-5-210
Virginia: Va.Code §§ 19.2-264.2 & 19.2-264.4(C)
Washington: Wash. Rev. Code § 10.95.020
Wyoming: Wyo. Stat. § 6-2-102(h)

APPENDIX C

State-by-State Survey of Mitigating Circumstances for Capital Punishment May 2018	
Specific Circumstances	States
No significant history of prior criminal activity	Ala., Ark., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Okla., Ore., Pa. , S.C., Tenn., Va., Wash., Wyo.
Under influence of extreme mental or emotional disturbance at time offense committed	Ala., Ark., Cal., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Okla., Ore., Pa. , S.C., Tenn., Va., Wash., Wyo.
Accomplice with relatively minor participation	Ala., Ariz., Ark., Cal., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Pa. , S.C., Tenn., Wash., Wyo.
Under extreme duress or substantial domination of another person; unusual or substantial duress	Ala., Ariz., Ark., Cal., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Okla., Pa. , S.C., Tenn., Wash.
Capacity to appreciate the criminality of the conduct or to conform conduct to the law was substantially impaired ¹⁴⁶⁰	Ala., Ariz., Ark., Cal., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., N.H., N.C., Ohio, Okla., Pa. , S.C., Va., Wash., Wyo.
Age of defendant at time of offense ¹⁴⁶¹	Ala., Ariz., Ark., Cal., Colo., Fla., Ind., Kan., Ky., La., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Okla., Ore., Pa. , S.C., Tenn., Va., Wash., Wyo.
Victim a participant in defendant's conduct or consented to it	Ala., Cal., Fla., Ind., Kan., Ky., Miss., Mo., Mont., Nev., N.H., N.C., Ohio, Okla., Pa. , S.C., Tenn., Va., Wash., Wyo.
Defendant reasonably believed conduct was morally justified; believed in good faith	Cal., Colo., Ky., La., Okla., Tenn.
Defendant's propensity to violence; record of violent behavior	Ariz., Cal.
Cooperation with law enforcement and prosecutors	Colo., N.C., Okla.
Evidence of mental retardation or subaverage intellectual functioning	Okla., S.C., Va.
Could not reasonably have foreseen that conduct would cause or create a grave risk of causing death	Ariz., Colo.
Defendant provoked	Ohio, S.C.
At the time of the offense, defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim	Kan.
Other equally culpable defendants will not be punished by death	N.H.
Personal moral culpability of the defendant	Tex.

¹⁴⁶⁰ As a result of mental disease or defect, intoxication or drug abuse (Ark.); mental disease or defect or intoxication (Cal., Ind., La., Tenn.); influence of drugs or alcohol (Colo.); mental illness, intellectual disability or intoxication (Ky.); mental disease or defect (Ohio, Wash.).

¹⁴⁶¹ Defendant was under age 18 at the time offense committed (Ind., Mont., S.C.); defendant was youthful, but not under the age of 18 (N.H.); youth or advanced age (Tenn.).

**State-by-State Survey of
Mitigating Circumstances for Capital Punishment
May 2018**

General Circumstances	States
Defendant's character, background, history	Ariz., Cal., Fla., N.H., Ohio, Okla., Pa. , Tex., Utah, Va., Wyo.
Nature and circumstances of the offense	Ariz., Cal., Ohio, Pa. , Tex., Utah, Va., Wyo.
Defendant's mental or physical condition	Cal., S.C., Utah
Defendant not a continuing threat to society ¹⁴⁶²	Colo., Okla., Wash.
Any other mitigating circumstances	Cal., Colo., Ind., La., Mont., Nev., N.C., Ohio, Okla., Ore., Tenn., Utah
General proviso for any mitigating circumstances	Ga., Idaho, S.D.

Citations:

<p>Alabama: Ala. Code § 13A-5-51 Arizona: Ariz. Rev. Stat. §13-751(G) Arkansas: Ark. Code § 5-4-605 California: Cal. Penal Code § 190.3 Colorado: Colo. Rev. Stat. § 18-1.3-1201(4) Florida: Fla. Stat. § 921.141(7) Georgia: Ga. Code 17-10-30(b) Idaho: Idaho Code § 19-2515(3) Indiana: Ind. Code § 35-50-2-9(c) Kansas: Kan. Stat. § 21-6625 Kentucky: Ky. Rev. Stat. § 532.025(2)(b) Louisiana: La. C. Crim. Proc. § art. 905.5 Mississippi: Miss. Code § 99-19-101(6) Missouri: Mo. Rev. Stat. § 565.032(3) Montana: Mont. Code § 46-18-304 Nebraska: Death penalty repealed in 2015; reinstated by referendum; statute not amended to reflect mitigating circumstances Nevada: Nev. Rev. Stat. § 200.035 New Hampshire: N.H. Rev. Stat. § 630:5(VI) North Carolina: N.C. Gen. Stat. §15A-2000(f) Ohio: Ohio Rev. Code § 2929.04(B) Oklahoma: Okla. Uniform Jury Instructions: OUJI- CR 4-79</p>	<p>Oregon: Ore. Rev. Stat. § 163.150(1)(c) Pennsylvania: 42 Pa.C.S. § 9711(e) South Carolina: S.C. Code § 16-3-20(C)(b) South Dakota: S.D. Codified Laws § 23a-27a-1 Tennessee: Tenn. Code § 39-13-204(j) Texas: Tex. C. Crim. Proc. Art. 37.071 Sec. 2 (a)(1), (d)(1) and (e)(1) Utah: Utah Code §§ 76-3-207(2) Virginia: Va. Code § 19.2-264.4(B) Washington: Wash. Rev. Code § 10.95.070 Wyoming: Wyo. Stat. § 6-2-102(j)</p>
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¹⁴⁶² Defendant likely to be rehabilitated (Okla.).

APPENDIX D

<p align="center">State-by-State Survey of State Clemency Process in Death Penalty Sentences April 2018</p>							
State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com- mutation	Reprieve	Pardon	Commutation	Reprieve
Alabama	Ala. Const. art. V, § 124; Ala. Code §§ 15-22-27(a) and 15-22-36(a)	X	X	X	Board of Pardons and Paroles, if Governor has commuted the death penalty sentence, person has proven innocence, Board unanimously votes for pardon, and Governor concurs	Governor	Governor
Arizona	Ariz. Const. art. V, § 5; Ariz. Rev. Stat. §§ 31-402, 31-443	X	X	X	Board of Executive Clemency makes affirmative recommendation to the Governor	Board of Executive Clemency makes affirmative recommendation to the Governor; unanimous vote for commutation not signed by Governor within 90 days' is automatically effective	Board of Executive Clemency make affirmative recommendation to the Governor
Arkansas	Ark. Const. art. VI, § 18; Ark. Code § 16-93-204	X	X	X	Governor; Parole Board may make nonbinding recommendations	Governor; Parole Board may make nonbinding recommendations	Governor; Parole Board may make nonbinding recommendations
California	Cal. Const. art. V, § 8; Cal. Penal Code § 4800	X	X	X	Governor; Board of Parole Hearings may make recommendations	Governor; Board of Parole Hearings may make recommendations	Governor; Board of Parole Hearings may make recommendations
Colorado	Colo. Const. art. IV, § 7; Col. Rev. Stat. § 16-17-101	X	X	X	Governor	Governor	Governor

**State-by-State Survey of
State Clemency Process in Death Penalty Sentences
April 2018**

State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com-mutation	Reprieve	Pardon	Commutation	Reprieve
Connecticut*	Conn. Const. art. 4, § 13; Conn. Gen. Stat. § 54-130a			X	Board of Pardons and Paroles	Board of Pardons and Paroles	Governor
Delaware**	Del. Const. art. VII § 1	X	X	X	Board of Pardons makes affirmative recommendation to Governor	Board of Pardons makes affirmative recommendation to Governor	Board of Pardons makes affirmative recommendation to Governor
Florida	Fla. Const. art. IV § 8; Fla. Stat. § 940.01	X	X	X	Board of Executive Clemency (Governor and two Cabinet members)	Board of Executive Clemency (Governor and two Cabinet members)	Governor
Georgia	Ga. Const. art. IV, § 2, ¶ 2; Ga. Code § 42-9-1 <i>et seq.</i>	X	X	X	State Board of Pardons and Paroles	State Board of Pardons and Paroles	State Board of Pardons and Paroles
Idaho	Idaho Const. art. IV § 7; Idaho Code §§ 20-210 and 20-240	X	X	X	Commission for Pardons and Paroles recommends to Governor	Commission for Pardons and Paroles recommends to Governor; if not approved within 30 days, deemed denied	Governor, until next session of Commission for Pardons and Paroles
Indiana	Ind. Const. art. V § 17; Ind. Code §§ 11-9-1-2 and 11-9-2-1 <i>et seq.</i>	X	X	X	Governor; Parole Board receives applications and makes advisory recommendations	Governor; Parole Board receives applications and makes advisory recommendations	Governor; Parole Board receives applications and makes advisory recommendations
Kansas	Kan. Const. art. I § 7; Kan. Stat. §§ 22-3701 and 22-3704	X	X		Governor; must consult with Prisoner Review Board but not bound by its advice	Governor; must consult with Prisoner Review Board but not bound by its advice	Governor may postpone execution for a limited time
Kentucky	Ky. Const. § 77; Ky. Rev. Stat. § 439.450	X	X	X	Governor; may consult Parole Board	Governor; may consult Parole Board	Governor; may consult Parole Board

**State-by-State Survey of
State Clemency Process in Death Penalty Sentences
April 2018**

State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com-mutation	Reprieve	Pardon	Commutation	Reprieve
Louisiana	La. Const. art. IV § 5; La. Rev. Stat. § 15:572 <i>et seq.</i>	X	X	X	Board of Pardons recommends to Governor	Board of Pardons recommends to Governor	Governor
Mississippi	Miss. Const. art. V § 124; Miss. Code § 47-7-5(3)	X		X	Governor; State Parole Board may investigate clemency recommendations upon request of Governor	--	Governor; State Parole Board may investigate clemency recommendations upon request of Governor
Missouri	Mo. Const. art. IV § 7; Mo. Rev. Stat. § 217.800.1	X	X	X	Governor; Board of Probation and Parole receives and investigates applications; makes non-binding recommendations	Governor; Board of Probation and Parole receives and investigates applications; makes non-binding recommendations	Governor; Board of Probation and Parole receives and investigates applications; makes non-binding recommendations
Montana	Mont. Const. art. VI § 12; Mont. Code § 46-23-301	X	X	X	Governor; applications made to Board of Pardons and Paroles, board makes non-binding recommendations	Governor; applications made to Board of Pardons and Paroles, board makes non-binding recommendations	Governor; applications made to Board of Pardons and Paroles, board makes non-binding recommendations
Nebraska	Neb. Const. art. IV, § 13	X	X	X	Governor, Attorney General and Secretary of State, sitting as a board; Board of Parole may give non-binding advice	Governor, Attorney General and Secretary of State, sitting as a board; Board of Parole may give non-binding advice	Governor, Attorney General and Secretary of State, sitting as a board; Board of Parole may give non-binding advice
Nevada	Nev. Const. art. V § 13; Nev. Rev. Stat. § 213.010 <i>et seq.</i>	X	X	X	State Board of Pardons Commissioners (Governor, justices of the Supreme Court and Attorney General)	State Board of Pardons Commissioners (Governor, justices of the Supreme Court and Attorney General)	State Board of Pardons Commissioners (Governor, justices of the Supreme Court and Attorney General)

**State-by-State Survey of
State Clemency Process in Death Penalty Sentences
April 2018**

State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com-mutation	Reprieve	Pardon	Commutation	Reprieve
New Hampshire	N.H. Const. Part 2 nd arts. 52, 60; N.H. Rev. Stat. § 4:21 <i>et seq.</i>	X	X	X	Governor with advice of Executive Council (five-person elected body)	Governor with advice of Executive Council (five-person elected body)	Governor with advice of Executive Council (five-person elected body)
New Mexico***	N.M. Const. art. V § 6; N.M. Stat. § 31-21-17	X	X	X	Governor; Governor may consult Parole Board	Governor; Governor may consult Parole Board	Governor; Governor may consult Parole Board
North Carolina	N.C. Const. art. III § 5; N.C. Gen. Stat. § 143B-720	X	X	X	Governor; Post-Release Supervision and Parole Commission may assist Governor	Governor; Post-Release Supervision and Parole Commission may assist Governor	Governor; Post-Release Supervision and Parole Commission may assist Governor
Ohio	Ohio Const. § 3.11; Ohio Rev. Code §§ 2967.01 <i>et seq.</i> , 5149.10	X	X	X	Governor; Adult Parole Authority/Parole Board may make recommendations	Governor; Adult Parole Authority/Parole Board may make recommendations	Governor; Adult Parole Authority/Parole Board may make recommendations
Oklahoma	Ok. Const. § VI-10; Okla. Stat. § 57-332	X	X	X	Pardon and Parole Board makes affirmative recommendation to Governor	Pardon and Parole Board makes affirmative recommendation to Governor	Pardon and Parole Board makes affirmative recommendation to Governor
Oregon	Or. Const. art. V § 14; Or. Rev. Stat. §§ 144.649 to 144.670	X	X	X	Governor	Governor	Governor
Pennsylvania	Pa. Const. art. IV § 9; Administrative Code of 1929, §§ 403 and 909 (71 P.S. §§ 113 and 299)	X	X	X	Board of Pardons makes recommendations to Governor	Board of Pardons makes recommendations to Governor	Board of Pardons makes recommendations to Governor

**State-by-State Survey of
State Clemency Process in Death Penalty Sentences
April 2018**

State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com-mutation	Reprieve	Pardon	Commutation	Reprieve
South Carolina	S.C. Const. art. IV, § 14; S.C. Code §§ 24-21-910 <i>et seq.</i>	X	X	X	Board of Probation, Parole and Pardon Services by 2/3rds vote	Governor; Board of Probation, Parole and Pardon Services may make non-binding recommendations	Governor; Board of Probation, Parole and Pardon Services may make non-binding recommendations
South Dakota	S.D. Const. art. 4 § 3; S.D. Codified Laws Ch. 24-14-1 <i>et seq.</i>	X	X	X	Governor; Governor may ask Board of Pardons and Paroles to review applications and make non-binding recommendations	Governor; Governor may ask Board of Pardons and Paroles to review applications and make non-binding recommendations	Governor; Governor may ask Board of Pardons and Paroles to review applications and make non-binding recommendations
Tennessee	Tenn. Const. art. III § 6; Tenn. Code § 40-27-101 <i>et seq.</i> ; § 40-28-104	X	X	X	Governor; Board of Parole may make nonbinding recommendations upon the request of the Governor	Governor –on his own or upon certificate from the Supreme Court re extenuating circumstances; Board of Parole may make nonbinding recommendations upon the request of the Governor	Governor; Board of Parole may make nonbinding recommendations upon the request of the Governor
Texas	Tex. Const. art. 4 § 11; Tex. Code Crim. Proc. art. 48.01 <i>et seq.</i>	X	X	X	Boards of Pardons and Paroles makes affirmative recommendation to Governor	Boards of Pardons and Paroles makes affirmative recommendation to Governor	Boards of Pardons and Paroles makes affirmative recommendation to Governor; one 30-day reprieve permitted
Utah	Utah Const. art. VII § 12; Utah Code § 77-27-1 <i>et seq.</i>	X	X	X	Board of Pardons and Parole	Board of Pardons and Parole	Governor; reprieves may not extend beyond the next session of the Board of Pardons and Parole
Virginia	Va. Const. art. V § 12; Va. Code §§	X	X	X	Governor; Parole Board may be consulted	Governor; Parole Board may be consulted	Governor; Parole Board may be consulted

State-by-State Survey of State Clemency Process in Death Penalty Sentences April 2018							
State	Citation	Clemency Options Available			Decision-Maker		
		Pardon	Com- mutation	Reprieve	Pardon	Commutation	Reprieve
	53.1-229 to 53.1-231						
Washington	Wash. Const. art. III § 9; Wash. Rev. Code §§ 9.94a.885 and 10.01.120	X	X	X	Governor; Clemency and Pardons Board to review petitions and make recommendations	Governor; Clemency and Pardons Board to review petitions and make recommendations	Governor
Wyoming	Wyo. Const. art. 3 §53 and Art. 4 § 5; Wyo. Stat. § 7-13-801 et seq.	X	X	X	Governor	Governor; death penalty may be commuted to life imprisonment without parole, but LWOP cannot be further commuted	Governor

* *Connecticut*: “[F]ollowing its prospective abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. For these reasons, execution of those offenders who committed capital felonies prior to April 25, 2012, would violate the state constitutional prohibition against cruel and unusual punishment.” *Conn. v. Santiago*, 122 A.3d 1, 10 (Conn. 2015).

** *Delaware*: The Delaware Supreme Court declared the state death penalty statute unconstitutional. *Rauf v. Del.*, 145 A.3d 430 (Del. 2016). Legislators in Delaware are attempting to amend the death penalty statute to meet constitutional muster. House Bill 125 (2017) passed the House of Representatives by a vote of 24-16 on May 9, 2017 and was referred to the Senate Judiciary and Community Affairs Committee on May 10, 2017.

*** *New Mexico*: Death penalty repealed prospectively only, leaving two inmates on death row (eff. 7.1.2009; 2009 H.B. 285). The New Mexico Supreme Court heard oral arguments on April 10, 2018 on the men’s petitions for *habeas corpus*. *Fry v. Lopez* (N.M. S-1-SC-34372, filed Oct. 22, 2013) and *Allen v. LeMaster* (N.M. S-1-SC-34386, filed Oct. 28, 2013).

Note: Nebraska abolished the death penalty in 2015, but it was reinstated following a statewide referendum in 2016. A lawsuit challenging the referendum was dismissed in 2018.

APPENDIX E

State-by-State Survey of Clemency Actions - Commutation in Capital Cases During the Time Period 1977-2018 April 2018																							
Grounds	AL	AR	DE	FL	GA	ID	IL	IN	KY	LA	MD	MO	MT	NV	NJ	NM	NC	OH	OK	TN	TX	VA	Total
Possible innocence/doubt about guilt				2		1	4	2		1	2	1					2	5	1		1	4	24
Disproportionate sentence		1		4	3		1												1	2	1	1	12
Governor's position on death penalty																5							5
Inmate illness													1										1
Inmate rehabilitation					1																	1	2
Inmate mental illness					1			1														3	4
Inmate intellectual disability												1		1				1					3
Death penalty abolished							15				4				8								27
Ineffective counsel									1									1	1	1			4
Flawed process							167										1	1					169
No reason given	1				2							1											4
Other		1	1		2				1			1					3	12	1		1	1	23
Total*	1	2	1	6	9	1	187	3	2	1	6	4	1	1	8	5	6	20	4	3	3	10	284

Source: Death Penalty Information Center, "Clemency." www.deathpenaltyinfo.org/clemency.

* Excludes three persons on federal or military death row whose sentences were commuted.

APPENDIX F

Pennsylvania Capital Cases									
Year	2011	2012	2013	2014	2015	2016	2017	total	%
Total Resolved Annually (no. of defendants)	107	94	64	54	48	35	28	430	100
Notice of Aggravating Circumstances withdrawn	63	56	29	27	26	17	20	238	55.3
Pled Guilty to 1 st Degree Murder	11	11	8	8	8	7	3	56	13
Pled Guilty to < 1 st Degree Murder	9	13	12	11	7	5	1	58	13.5
Capitally tried	18	6	11	4	5	5	2	51	11.9
Other Non-Capital Disposition	2	1	0	0	0	0	0	3	0.7
Death Sentence	4	7	4	4	2	1	2	24	5.6
Source: Atl. Ctr. for Capital Representation									

APPENDIX G

State-by-State Survey of Prohibition against Capital Punishment for Defendants with Intellectual Disabilities					
State	Citation	Primary Fact Finder	Timing of Determination	Burden of Proof	Evidentiary Standard
Alabama	<i>Morrow v. State</i> , 928 So.2d 315, 322-24 (Ala. Crim. App. 2004); Ala. R. Crim. P. 32; Ala. Code § 15-24-1 to -24-7	Trial judge	At any time during trial; preference for pre-trial hearing	Defendant	Preponderance
Arizona	Ariz. Rev. Stat. § 13-753	Trial judge	Pre-trial*	Defendant	Clear and convincing; IQ of 75 or lower gets expert exam; 65 or lower creates rebuttable presumption of ID
Arkansas	Ark. Code § 5-4- 618	Trial judge	Pre-trial*	Defendant	Preponderance; IQ of 65 or lower creates rebuttable presumption of ID
California	Cal. Penal Code § 1376	Trial judge or jury	At Defendant's option, pre-trial by judge, post-trial by jury	Defendant	Preponderance
Colorado	Colo. Rev. Stat. § 18-1.3-1101 to - 1.3-1105	Trial judge	Pre-trial	Defendant	Clear and convincing
Florida	Fla. Stat. § 921.137	Trial judge	Post-trial	Defendant	Clear and convincing
Georgia	Ga. Code § 17-7- 131	Trial judge or jury	Verdict of "guilty but w/intellectual disability"	Not stated	Beyond a reasonable doubt
Idaho	Idaho Code § 19- 2515A	Trial judge	Pre-trial	Defendant	Preponderance
Indiana	Ind. Code §§ 35- 36-9-1 to -36-9-7	Trial judge	Pre-trial	Defendant	Preponderance ¹⁴⁶³
Kansas	Kan. Stat. § 21- 6622	Trial judge	Post-trial	Not stated	Not stated

¹⁴⁶³ The statute says, clear & convincing; however, the judiciary concluded "as a matter of federal constitutional law . . . that the state may not require proof of mental retardation by clear and convincing evidence." *Pruitt v. Ind.*, 834 N.E.2d 90, 103 (Ind. 2005).

**State-by-State Survey of
Prohibition against Capital Punishment for Defendants with Intellectual Disabilities**

State	Citation	Primary Fact Finder	Timing of Determination	Burden of Proof	Evidentiary Standard
Kentucky	Ky. Rev. Stat. §§ 532.135, 532.140	Trial judge	Pre-trial	Not stated	Not stated
Louisiana	La. Code Crim. Proc. art. 905.5.1	Trial judge or jury	Pre-trial (judge) or during sentencing hearing (jury)	Defendant	Preponderance
Mississippi	<i>Chase v. Miss.</i> , 873 So.2d 1013, 1029-30 (Miss. 2004)	Trial judge	Pre-trial	Defendant	Preponderance
Missouri	Mo. Rev. Stat. § 565.030	Trial judge or jury	Sentencing phase; may be pre-trial upon agreement of parties and court	Not stated	Preponderance
Montana	No specific statute or case found	--	--	--	--
Nebraska	No specific statute or case found	--	--	--	--
Nevada	Nev. Rev. Stat. § 174.098	Trial judge	Pre-trial	Defendant	Preponderance
New Hampshire	No specific statute or case found	--	--	--	--
North Carolina	N.C. Gen. Stat. § 15A-2005	Trial judge or jury	Pre-trial by court, if court does not find pre-trial, can be decided by jury during sentencing	Defendant	If judge, clear and convincing; if jury, preponderance
Ohio	<i>Ohio v. Lott</i> , 779 N.E.2d 1011, 1014-15 (Ohio 2002)	Trial judge	Pre-trial	Defendant	Preponderance
Oklahoma	Okla. Stat. tit. 21, § 701.10b	Trial judge or jury	Pre-trial by court, if court does not find pre-trial, can be decided by jury during sentencing	Defendant	If judge, clear and convincing; if jury, preponderance
Oregon	<i>Or. v. Agee</i> , 364 P.3d 971, 982-83, 996 n.28 (Or. 2015)	Trial judge or jury	Pre-trial by court or post-trial by jury	Defendant	Preponderance
Pennsylvania	Pa. R. Crim. P. 840-845	Jury or judge	During sentencing unless parties agree to pre-trial w/the latter being decided by the judge	Defendant	Preponderance

State-by-State Survey of Prohibition against Capital Punishment for Defendants with Intellectual Disabilities					
State	Citation	Primary Fact Finder	Timing of Determination	Burden of Proof	Evidentiary Standard
South Carolina	<i>Franklin v Maynard</i> , 588 S.E.2d 604, 606 (S.C. 2003)	Trial judge	Pre-trial ¹⁴⁶⁴	Defendant	Preponderance
South Dakota	S.D. Codified Laws §§ 23A-27A-26.1 to 23A-27A-26.5	Trial judge	Pre-trial	Defendant	Preponderance
Tennessee	Tenn. Code § 39-13-203	Trial judge	Pre-trial (or trial)	Defendant	Preponderance
Texas	<i>Ex parte Briseno</i> , 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); ¹⁴⁶⁵ <i>Neal v. Tex.</i> , 256 S.W.3d 264, 272 (Tex. Crim. App. 2008)	Trial judge or jury ¹⁴⁶⁶	During sentencing	Defendant	Preponderance
Utah	Utah Code §§ 77-15a-101 to -15a-106	Trial judge	Pre-trial on defendant's motion; any time by court order	Proponent of defense (usually defendant)	Preponderance
Virginia	Va. Code § 19.2-264.3:1.1	Trier of fact	During sentencing	Defendant	Preponderance
Washington	Wash. Rev. Code § 10.95.030	Trial judge	During sentencing	Defendant	Preponderance
Wyoming	No specific statute or case found	--	--	--	--

* Defendant may raise the issue *de novo* to the jury during sentencing

¹⁴⁶⁴ “If, however, the judge finds the defendant is *not* mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. If the jury finds this mitigating circumstance, then a death sentence will not be imposed.” *Franklin v Maynard*, 588 S.E.2d 604, 606 (S.C. 2003) (citation omitted).

¹⁴⁶⁵ *Abrogated on other grounds, Moore v. Tex.*, 137 S.Ct. 1039 (U.S. 2017).

¹⁴⁶⁶ *Gallo v. Tex.*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).

**Report to the Joint State Government Commission
Pursuant to Pennsylvania Senate Resolution 6 (SR6), Session of 2011**

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December 2013

Introduction

The following report is prepared in response to the Pennsylvania Senate Resolution 6 (SR6), Session of 2011, pertaining to a study of capital punishment in Pennsylvania. SR6 calls for research on 17 topics related to the death penalty. The following report addresses Topics 5 and 6 from SR6:

(5) Mental retardation: Whether, in light of the Supreme Court ruling in *Atkins v. Virginia*, there are adequate procedural protections in place to assure that people with mental retardation are not in fact being sentenced to death and executed;

(6) Mental illness: Whether persons suffering from mental illness constitute a disproportionate number of those on death row, what criteria should be used in judging the level of mental illness involved and whether people with mental illness who are convicted of murder should be executed;

Before presenting the findings from our investigation of these two topics, several methodological caveats, limitations and conditions must be noted. The data used in this analysis consisted of the mental health and mental retardation status of all Pennsylvania state inmates serving a death sentence or a term of life imprisonment without parole for a conviction of Murder 1 as of February 2013. This data was supplied to us by the Bureau of Planning, Research and Statistics of the Pennsylvania Department of Corrections (PADOC). No personal/individual identifiers for the inmates in this sample were included in this dataset, and were not needed for our analysis in any event.

The death row group consisted of all 195 inmates (192 males; 3 females) who were on death row in February of 2013. More than half of the sample was Black (55.4%), while 34.4% was White. The Murder 1 Life Without Parole (M1 LWOP) group consisted of all 3396 inmates serving under this status in February 2013. This group was also predominantly male (96%), 63.7% were Black, 26.7% White, and 8.3% Hispanic. Other races reported included Asian, Indian, and “other.” The M1 LWOP group serves as a rough comparison group for the death row inmates, to address issues of disproportionality surfaced in Question 6. The M1 LWOP likely present the most comparable offense types and sentencing circumstances to the death row inmates. We should note that we made no attempt to statistically match the two groups; instead we simply report population means and distributions on the variables discussed below.

Mental retardation status was inferred from the IQ score provided in the PADOc dataset. This score represents the inmate’s status at the time of commitment to the PADOc, and not at the time of his/her crime or trial. IQ is a reasonably static individual characteristic and thus the score generated on the inmate within the PADOc should be representative of the inmate’s level of cognitive functioning at the time of the crime and trial. The primary caveat here is that mental retardation is a mental disorder codified by the Diagnostic and Statistical Manual of Mental Disorders (Version IV was controlling as of the time of this analysis). IQ level is one criteria for mental retardation within the DSM-IV, but IQ level itself is not sufficient to support a diagnosis of mental retardation. Various other factors, including level of adaptive social functioning, also contribute to a final diagnosis of mental retardation. But, IQ score was readily available to us from the PADOc. Thus, IQ serves here as the best proxy for mental retardation. The IQ cut-off for mental retardation in the DSM-IV is somewhat imprecise, indicating a threshold IQ of *approximately* 70 or below. Thus, we used a score of 70 or lower in our analyses.

Turning to mental illness, the PADOc conducts a thorough mental health screening and assessment of inmates beginning with initial intake to the prison system. Initial screening on the first day of intake is done by psychiatric nurses, using key indicators of mental health need such as history of mental health problems and treatment (based upon both self-reports and official records transmitted from the courts), medication use, as well as observations of behaviors demonstrated by inmates during intake (signs and symptoms). This screening directs a given inmate as needed to further assessment by staff psychologists (under the direction of a licensed psychologist manager), as well as psychiatrists. If the inmate is on psychiatric medications, a referral is immediately made to a staff psychiatrist for additional specialized assessment. Standardized tools used as part of this assessment include the *Personality Assessment Inventory* (Morey, 1991), and all clinical assessment and treatment activities follow DSM-IV and ICD9 standards. Based upon these assessments, an inmate’s mental health status is coded as: (A) no current mental health issues and no treatment history for the past 5 years; (B) no current need for treatment, but with some indication of recent need; (C) active mental health needs with treatment indicated; (D) serious mental health issues requiring close monitoring by Psychiatric Review Team. The A and B categories represent the less serious cases, presenting fewer symptoms and requiring less monitoring.

The C and D categories represent the more serious cases, presenting more significant symptoms and requiring closer monitoring. Inmates falling into category C are placed on the institutional Mental Health Roster, and their treatment plans are reviewed quarterly. Inmates in category D are reviewed monthly or more often as needed and are closely followed by staff psychiatrists. Inmates can move between codes during their incarceration (esp. codes B, C & D) and reassessments are done as needed. As with the IQ data discussed above, the data used here on mental health status reflects the assessment done by the PADOc at the time of commitment to prison. Given that mental health status is a more dynamic variable than IQ, the mental health status reflected in the PADOc data may or may not be representative of the inmates' mental health status at the time of the crime and/or trial. Again, the PADOc data was the best source of information available to us about the mental health status of these two populations.

Question 5: Mental Retardation

The core issue raised in Question 5 – whether there are adequate procedural protections in place to assure that people with mental retardation are not in fact being sentenced to death and executed – is one that can be answered only imperfectly with the data presented here. Ultimately, adequate procedural protections are a matter of law. But, the analysis presented below does indicate that very few mentally retarded inmates seem to be present in either of the groups explored here.

The average IQ score for the death row inmates was 89 (*Standard Deviation* = 16). Only 4.1% of the death row inmates had an IQ of 70 or lower, classifying them as potentially mentally retarded. Given a total population of 195 inmates, this translates to 8 inmates on death row who may be potentially mentally retarded (recall the caveat noted earlier about the diagnostic criteria for mental retardation requiring more than a simple IQ score of 70 or below). Of these 8, 5 had scores of either 70 or 69, thus just barely meeting the IQ cutoff for potential retardation.

The average IQ score for the M1 LWOP group was 90 (*Standard Deviation* = 16). In this group, 8.7% had an IQ of 70 or lower, classifying them as potentially mentally retarded.

Thus, mean IQ for both groups of inmates is about 10 points below the normatively established “average” IQ of 100 for the general human population. The proportion of inmates in both groups with IQ's that meet the diagnostic criteria for mental retardation (70 and below) is very low, but considerably lower in the death row group. A chi square test revealed that the proportion of inmates in the death row group with an IQ of 70 and lower is significantly less than the proportion of inmates in the M1 LWOP group with an IQ of 70 and lower, $X^2 (1, N = 3578) = 4.90, p = .03$.

ADDENDUM – JULY 2015: Subsequent to the preparation of this original report, both the United States Supreme Court and the Pennsylvania Supreme Court issued rulings that would seem to allow a higher IQ threshold (75) to be set for the diagnosis of intellectual disability. The links below direct the reader to the relevant cases:

http://www.supremecourt.gov/opinions/14pdf/13-1433_bpm1.pdf

<http://www.pacourts.us/assets/opinions/Supreme/out/J-108-2014mo%20-%201022524584896858.pdf?cb=1>

Considering this, we re-analyzed the data discussed above to determine what impact a cut off of 75 might have on the findings. Using a cut off score of 75, 14% of the death row group and 15% of the M1 LWOP group would fall into the category of mental retardation/intellectual disability. This difference is not significant. So, even with relaxing the IQ cut off to 75, we find little practical difference between the two groups, and in both sets of analyses, the death row group nominally has a lower proportion of individuals who could potentially be diagnosed with intellectual disability. We include both sets of analyses here to illustrate the evolving standards for the assessment of intellectual disability. We also reiterate the strong caveats from the DSM-IV as discussed above, and reinforced through the recently released DSM-V, that intellectual disability is not diagnosed solely by means of IQ score. This diagnosis is driven much more by a broader and more comprehensive assessment of adaptive and social functioning that is beyond the dataset available to the analysis conducted here. This is to say that IQ score can be *suggestive* of potential intellectual disability, but is by no means definitive.

Question 6: Mental Health

Question 6 regarding the mental health status of death row inmates actually includes several sub questions, some of which cannot be answered empirically. First, Question 6 asks what criteria should be used in judging the level of mental illness involved. The point of this question is somewhat unclear, but as noted above, the standard source of diagnostic criteria for mental disorders is the DSM-IV, which guides most mental health assessments in the U.S., including those done within the PADO. It is not our purpose to reinvent this wheel here. Next, Question 6 asks whether people with mental illness who are convicted of murder should be executed. This is much more a moral/normative than empirical question, and is beyond the scope of the analysis presented here. The primary concern of Question 6 for the purposes of this report is the issue of whether persons suffering from mental illness constitute a disproportionate number of those on death row. Of course, “disproportionate” is itself a normative term and we do not attempt to define it here. But, the analysis presented below does offer insight into differences in the numbers of mentally ill inmates on death row versus M1 LWOP, from which the reader may draw their own conclusions about disproportionality.

In the death row group, 38.5% of the inmates had a mental health status of “A,” 52.3% were classified as “B,” and only 9.2% of the sample were identified as having a “C” status. There were no inmates classified as “D”, the most serious mental health status. Thus, fewer than 10% of the death row group was classified as having any sort of current and active mental disorder. The slight majority of the overall death row group was assessed as having had some sort of mental health issue in the past, but with no current treatable needs.

In the M1 LWOP group, 50.4% were rated as “A,” 30.0% as “B,” 17.1% as “C,” and 2.5% as “D.” Thus, nearly 20% of this group was classified as having any sort of current and active mental disorder, double the proportion for the death row group. The slight majority of the M1 LWOP group was assessed as having no current or recent mental health issues.

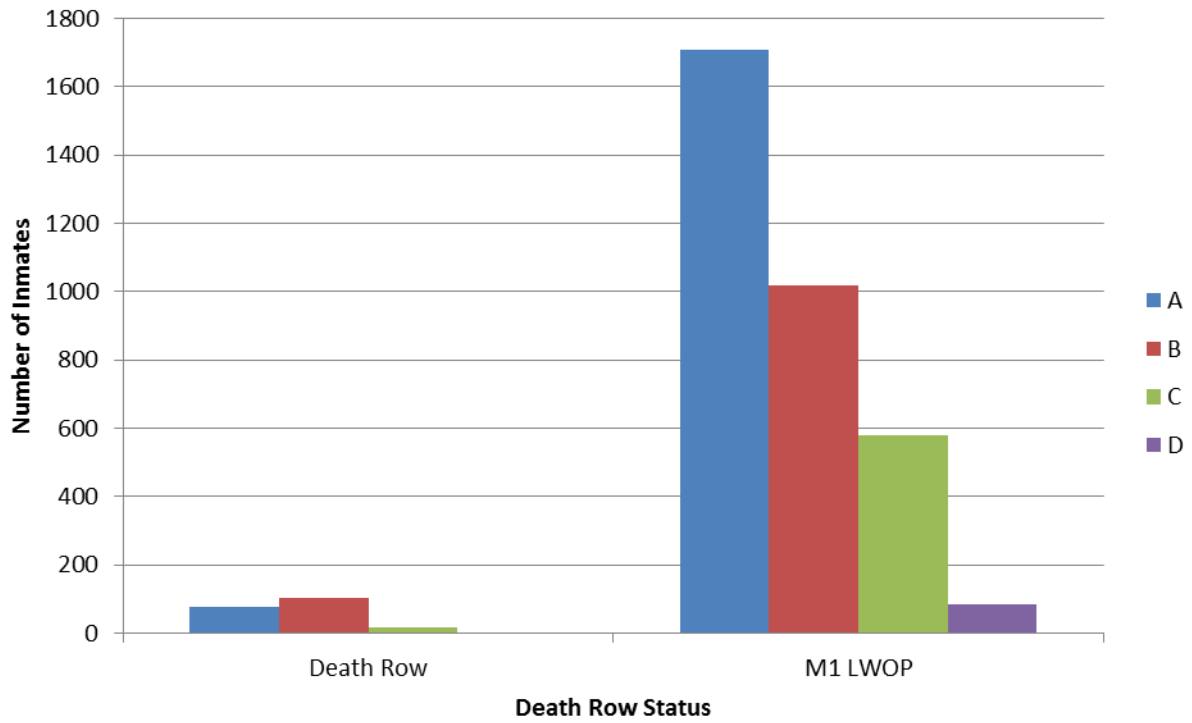
The data is mixed on whether the death row group is disproportionately mentally ill, compared to the M1 LWOP group. On the one hand, a far smaller percentage of the death row group is assessed as having an active, current mental disorder. At the same time, considerably fewer of the death row group are assessed as having no current or recent mental health issues at all. The primary difference between the two groups lies in their past mental health issues (Category B). One possible conclusion is that the death row inmates have a higher lifetime prevalence of some sort of mental disorder, but a lower point prevalence than the M1 LWOP group.

This begs the question of how the inmates in these two groups compare to the overall human population with respect to prevalence of mental disorder. It is reasonably well established that prison inmates in general have higher levels of many mental disorders than is the case for the general human population (Fazel and Danesh, 2002). A recent study estimated that approximately half of the American population will manifest some sort of mental disorder during their lifetime, although much more research is needed on this issue (Kessler, et al, 2005). Recall that we found that among the M1 LWOP group, about half were coded as “A” (no current or recent mental health issues), with the other half having some indication of current or recent mental health problem. Thus, the M1 LWOP group would seem to roughly mirror the overall American population with respect to lifetime prevalence of mental disorders. Conversely, the lifetime prevalence of mental disorder for the death row group (c. 60%) would seem to be somewhat higher than for the overall American population. We urge caution with these comparisons, though, in that the M1 LWOP and death row inmates are not necessarily representative of the overall PADOC inmate population (both groups combined represent only about 7% of the total PADOC population), nor of the overall general population of Americans.

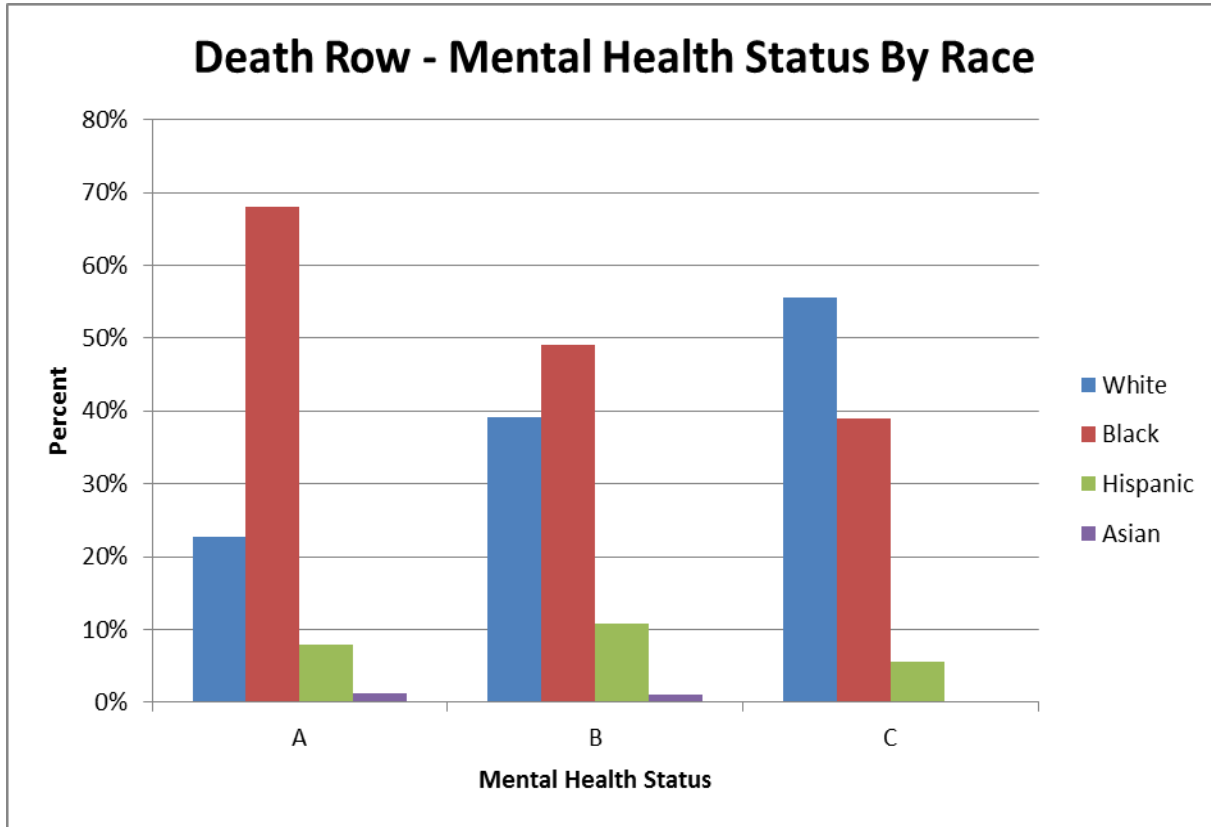
The following five tables present some additional analysis of the mental health status of the death row and M1 LWOP groups.

To test whether there were significant differences in the proportions of individuals in each mental health status category based on their death row status, we conducted a chi square analysis. There was a significant relationship between death row status and mental health status, $\chi^2(3, N = 3590) = 46.38, p < .001$. Further significance testing revealed that the observed frequency for death row inmates classified as mental health status “B” was significantly higher than expected, $z = 5.30, p < .001$. Again, this would support a conclusion of a higher lifetime (but not necessarily current) prevalence of mental illness for the death row group.

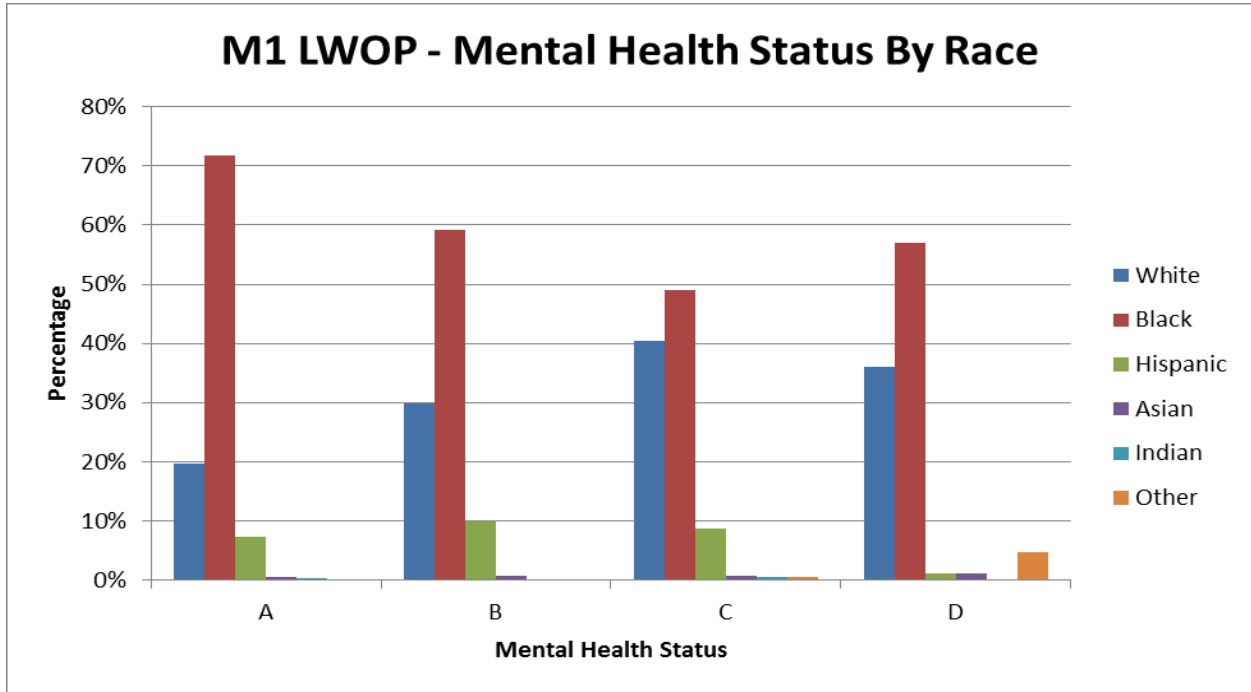
Death Row Status by Mental Health Status



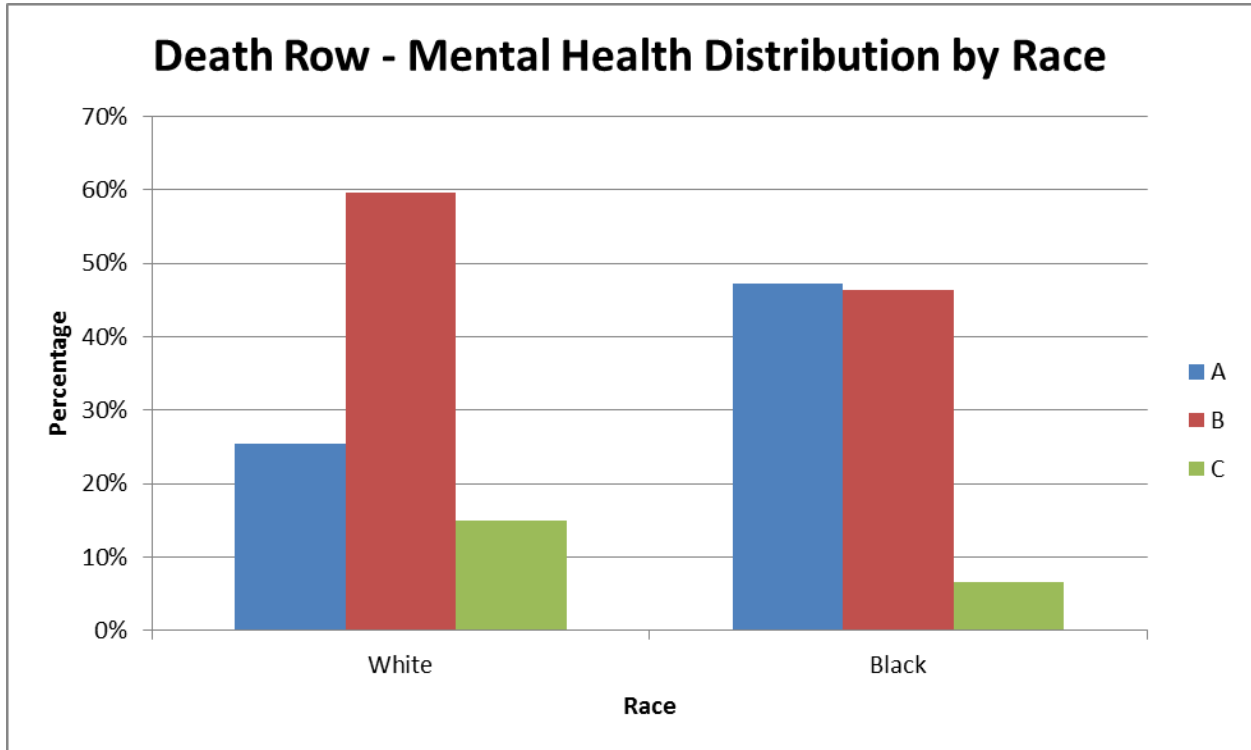
Within the death row group, we examined the distribution of race by mental health status. Under the category of “A,” 68.0% of subjects were Black and 22.7% were White. This distribution was more even under the mental health status category of “B” with 49.0% of the group identifying as Black and 39.2% as White. Finally, in the “C” category, 38.9% were Black and 55.6% were White.

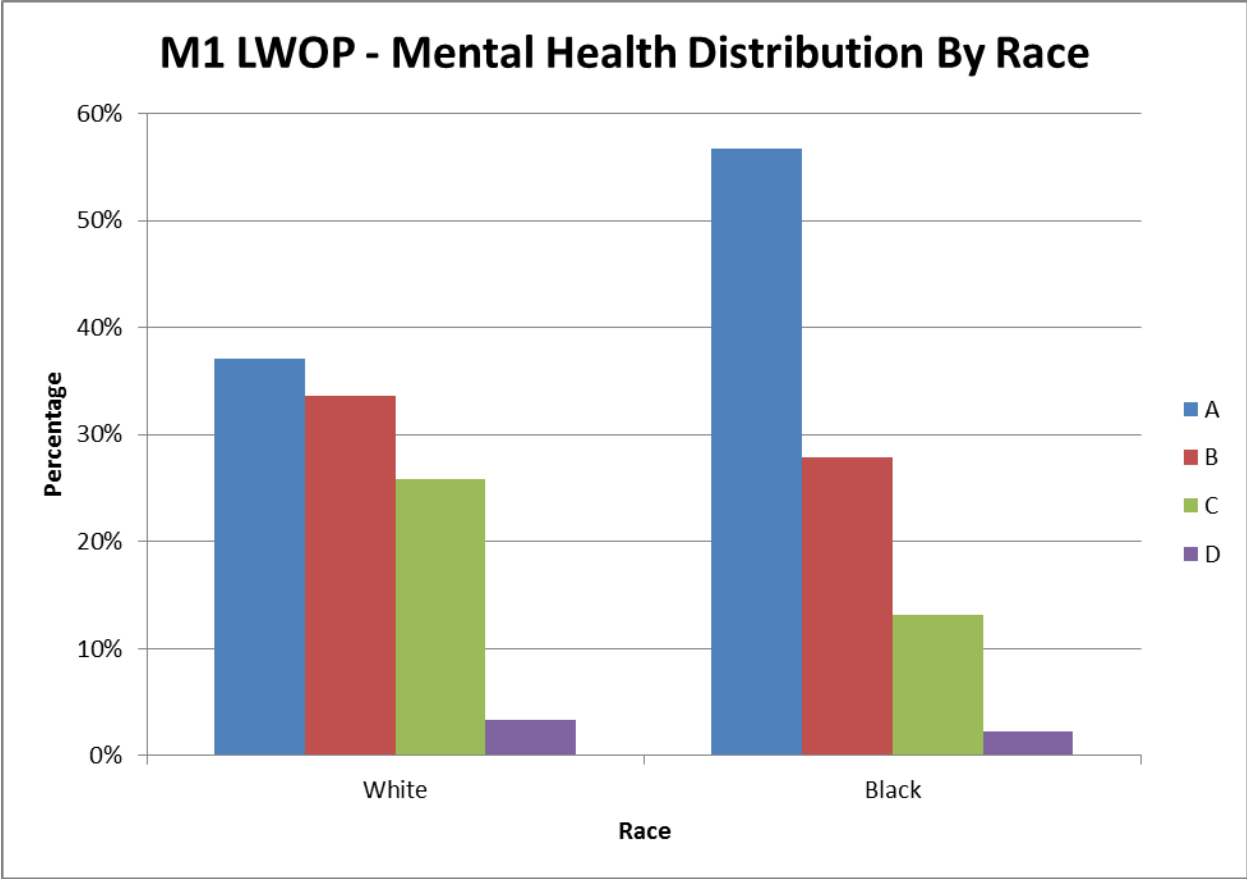


Within the M1 LWOP group, there was a similar racial pattern for the mental health statuses of “A” and “B.” Under the category of “A,” 71.7% were Black and 19.7% were White. In Category B, 59.2% were Black and 29.9% were White. For status “C,” 49.0% were Black and 40.5% were White. Finally, in Category D, 57.0% of subjects were Black and 36.0% were White.



The following graphs show the distribution of the various mental health status for Black and White inmates in the two groups.





The data presented in these tables is mixed, but on the whole this analysis suggests that the white inmates in both groups have a higher rate of current or recent mental health problems than do the black inmates. This corresponds to research on the overall American population (offender and non-offender), which finds higher rates of lifetime prevalence of many mental disorders for whites than for blacks (Kessler, et al, 2005).

Conclusion

This report examined the rates of mental retardation and mental disorder among two groups of inmates within the Pennsylvania Department of Corrections – those on death row and those serving a sentence of Life without Parole for Murder 1, both groups as of February 2013. There is no difference in average IQ score between the death row inmates and the M1 LWOP inmates. For both groups, a small percentage of inmates met the IQ cutoff of 70 or below that is associated with a diagnosis of mental retardation. But, the death row group has a statistically significant lower proportion of inmates in this category than does the M1 LWOP group. With respect to mental illness, a far greater proportion of the inmates in the M1 LWOP group have a current mental health diagnosis, but a larger proportion of the death penalty group have had an indication of mental illness at some point in their lifetimes. Results by race are mixed, but on balance white inmates in both groups seem to report a somewhat higher rate of current or recent mental disorder. Lifetime prevalence rates of mental disorder for the M1 LWOP group seem to mirror rates for the overall American population, while the rate for the death row group seems to be somewhat higher than for the overall American population. The reader is again cautioned to consider the caveats and limitations to this data noted earlier.

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APPENDIX I

Profile of Pennsylvania Inmates Under Death Sentence

Year	Number and Percentage by Race								Grand Total	Number by Age*				Average	Number by Gender			
	White	% total	Black	% total	Hispanic	% total	Asian	% total		18-29	30-39	40-49	50+		Male	% total	Female	% total
1990	44	37.0%	74	62.2%	0	0.0%	1	1.0%	119	34	53	27	5	34.6	118	99.2%	1	0.8%
1991	53	38.7%	82	59.8%	0	0.0%	2	1.5%	137	33	61	35	7	35.2	136	99.3%	1	0.7%
1992	n.d.	-	n.d.	-	n.d.	-	n.d.	-	151	n.d.	n.d.	n.d.	n.d.	-	n.d.	-	n.d.	-
1993	60	35.5%	103	60.9%	4	2.0%	2	1.2%	169	39	77	37	16	35.8	166	98.2%	3	1.8%
1994	60	33.5%	109	60.9%	8	4.5%	2	1.1%	179	40	81	42	16	38.2	176	98.3%	3	1.7%
1995	65	33.0%	122	61.9%	8	4.1%	2	1.0%	197	44	89	47	17	38.5	193	98.0%	4	2.0%
1996	65	31.7%	128	62.4%	10	4.9%	2	1.0%	205	51	95	44	17	37.5	201	98.0%	4	2.0%
1997	70	32.9%	131	61.5%	10	4.7%	2	1.0%	213	41	95	55	24	38.5	209	98.1%	4	1.9%
1998	73	32.4%	137	60.9%	13	5.8%	2	1.0%	225	39	93	65	28	38.8	221	98.2%	4	1.8%
1999	70	30.4%	144	62.6%	14	6.1%	2	1.0%	230	38	91	69	32	39.1	227	98.7%	3	1.3%
2000	72	30.1%	150	62.8%	15	6.3%	2	1.0%	239	27	93	81	38	38.4	235	98.3%	4	1.7%
2001	74	30.6%	150	62.0%	16	6.6%	2	1.0%	242	30	89	85	38	39.0	238	98.3%	4	1.7%
2002	74	30.5%	151	62.1%	16	6.6%	2	1.0%	243	26	89	85	45	40.0	238	97.9%	5	2.1%
2003	69	30.1%	139	60.7%	19	8.3%	2	1.0%	229	15	57	74	83	41.7	224	97.8%	5	2.2%
2004	68	30.2%	137	60.9%	18	8.0%	2	1.0%	225	25	70	85	45	41.6	220	97.8%	5	2.2%
2005	70	31.3%	134	59.8%	18	8.0%	2	1.0%	224	25	62	87	50	41.6	219	97.8%	5	2.2%
2006	70	31.4%	133	59.6%	18	8.1%	2	1.0%	223	20	62	86	55	43.1	218	97.8%	5	2.2%
2007	73	32.2%	134	59.0%	18	7.9%	2	1.0%	227	16	60	91	60	44.0	222	97.8%	5	2.2%
2008	72	32.0%	133	59.1%	18	8.0%	2	1.0%	225	17	52	87	69	44.0	220	97.8%	5	2.2%
2009	71	32.3%	129	58.6%	18	8.2%	2	1.0%	220	13	52	82	73	45.0	216	98.2%	4	1.8%
2010	69	31.4%	127	57.7%	18	8.2%	2	1.0%	216	13	44	82	77	45.8	213	98.8%	3	1.4%
2011	67	32.7%	117	57.1%	19	9.3%	2	1.0%	205	10	44	75	76	46.0	202	98.5%	3	1.5%
2012	68	34.5%	109	55.3%	18	9.1%	2	1.0%	197	10	42	74	71	46.0	194	98.5%	3	1.5%
2013	68	34.5%	103	52.3%	18	9.1%	1	1.0%	190	9	40	62	79	47.0	187	98.4%	3	1.6%
2014	68	36.6%	98	52.7%	18	9.7%	2	1.1%	186	9	39	57	81	47.0	183	98.4%	3	1.6%
2015	66	36.5%	95	52.5%	18	9.9%	2	1.1%	181	9	37	51	84	48.0	179	98.9%	2	1.1%
2016	64	36.8%	90	51.7%	17	9.8%	3	1.7%	174	5	33	51	85	49.0	173	99.4%	1	0.6%
Average	67	32.9%	122	59.4%	14	6.5%	2	1.0%	204	25	67	67	47	41.7	201	98.3%	4	1.7%

Information compiled from Pennsylvania Department of Corrections Annual Statistical Reports from years 1990-2016.

<http://www.cor.pa.gov/About%20Us/Statistics/Pages/Reports.aspx>

APPENDIX J

Amounts appropriated to supplement the sum appropriated for Pa. Commission on Crime & Delinquency		
Fiscal Year	Fed. funding	Commw. appropriation
2017-18 ¹⁴⁶⁷	\$8,500,000 (crime victims' compensation servs.) \$85,000,000 (crime victims' assist.) \$4,000,000 (VOCA admin./ops.) \$900,000 (VOCA training)	\$1,300,000 (victims of juvenile offenders) \$500,000 (victim servs.)
2016-17 ¹⁴⁶⁸	\$8,500,000 (crime victims' compensation servs.) \$80,000,000 (crime victims' assist.) \$4,000,000 (VOCA admin./ops.)	\$1,300,000 (victims of juvenile offenders) \$1,000,000 (victim servs.)
2015-16 ¹⁴⁶⁹	\$8,500,000 (crime victims' compensation servs.) \$40,000,000 (crime victims' assist.) \$2,000,000 (VOCA admin./ops.)	\$1,300,000 (victims of juvenile offenders) \$1,000,000 (victim servs.)
2014-15 ¹⁴⁷⁰	\$8,500,000 (crime victims' compensation servs.) \$20,000,000 (crime victims' assist.) \$1,400,000 (VOCA admin./ops.) \$500,000 (Statewide automated victim info)	\$1,300,000 (victims of juvenile offenders)
2013-14 ¹⁴⁷¹	\$7,500,000 (crime victims' compensation servs.) \$20,000,000 (crime victims' assist.) \$1,300,000 (VOCA admin./ops.) \$1,000,000 (Statewide automated victim info) \$250,000 (crime victims' compensation initiative) \$375,000 (Pa. capital litigation training program)	\$1,300,000 (victims of juvenile offenders)

¹⁴⁶⁷ Act of July 11, 2017 (P.L. , No.1A), §§ 202, 1801-D.

¹⁴⁶⁸ Act of July 12, 2016 (P.L.1577, No.16A), §§ 202, 1801-D.

¹⁴⁶⁹ Act of Dec. 29, 2015 (P.L.621, No.10A), §§ 202, 1801-D.

¹⁴⁷⁰ Act of July 10, 2014 (P.L.3051, No.1A), § 202.

¹⁴⁷¹ Act of June 30, 2013 (P.L.1277, No.1A), § 202.

**Amounts appropriated to supplement the sum appropriated for
Pa. Commission on Crime & Delinquency**

Fiscal Year	Fed. funding	Commw. appropriation
2012-13 ¹⁴⁷²	\$7,500,000 (crime victims' compensation servs.) \$20,000,000 (crime victims' assist.) \$100,000 (ARRA-crime victims' assist.) \$1,300,000 (VOCA admin./ops.) \$1,000,000 (Statewide automated victim info) \$250,000 (crime victims' compensation initiative) \$375,000 (Pa. capital litigation training program)	\$1,300,000 (victims of juvenile offenders)
2011-12 ¹⁴⁷³	\$7,500,000 (crime victims' compensation servs.) \$75,000 (ARRA- crime victims' compensation servs.) \$100,000 (ARRA- crime victims' compensation servs. admin.) \$20,000,000 (crime victims' assist.) \$600,000 (ARRA-crime victims' assist.) \$1,300,000 (VOCA admin./ops.) \$1,500,000 (Statewide automated victim info)	--
2010-11 ¹⁴⁷⁴	\$7,500,000 (crime victims' compensation servs.) \$100,000 (ARRA- crime victims' compensation servs.) \$100,000 (ARRA- crime victims' compensation servs. admin.) \$20,000,000 (crime victims' assist.) \$1,400,000 (ARRA-crime victims' assist.) \$1,094,000 (VOCA admin./ops.) \$2,000,000 (Statewide automated victim info)	\$718,000 (victims of juvenile crime)
2009-10 ¹⁴⁷⁵	\$5,073,000 (crime victims' compensation servs.) \$2,000,000 (ARRA- crime victims' compensation servs.) \$100,000 (ARRA- crime victims' compensation servs. admin.) \$20,000,000 (crime victims' assist.) \$2,000,000 (ARRA-crime victims' assist.) \$1,094,000 (VOCA admin./ops.) \$100,000 (ARRA-crime victims' assist. admin.) \$2,000,000 (Statewide automated victim info) \$200,000 (victims' rights compliance project)	\$1,798,000 (victims of juvenile crime)
2008-09 ¹⁴⁷⁶	\$5,134,000 (crime victims' compensation servs.) \$20,000,000 (crime victims' assist.) \$1,094,000 (VOCA admin./ops.) \$2,000,000 (Statewide automated victim info) \$200,000 (victims' rights compliance project)	\$3,389,000 (victims of juvenile crime)

¹⁴⁷² Act of June 30, 2012 (P.L.1740, No.9A), § 202.

¹⁴⁷³ Act of June 30, 2011 (P.L.633, No.1A), § 202. ARRA is Am. Recovery & Reinvestment Act.

¹⁴⁷⁴ Act of July 6, 2010 (P.L.1367, No.1A), § 202. ARRA is Am. Recovery & Reinvestment Act.

¹⁴⁷⁵ Act of Aug. 5, 2009 (P.L.607, No.1A), § 202; Act of Oct. 9, 2009 (P.L.779, No.10A), § 202. ARRA is Am. Recovery & Reinvestment Act.

¹⁴⁷⁶ Act of July 4, 2008 (P.L.1735, No.38A), § 202.

**Amounts appropriated to supplement the sum appropriated for
Pa. Commission on Crime & Delinquency**

Fiscal Year	Fed. funding	Commw. appropriation
2007-08 ¹⁴⁷⁷	\$4,628,000 (crime victims' compensation servs.) \$18,000,000 (crime victims' assist.) \$1,148,000 (VOCA admin./ops.) \$1,500,000 (Statewide automated victim info) \$175,000 (victims' rights compliance project)	\$3,462,000 (victims of juvenile crime)
2006-07 ¹⁴⁷⁸	\$6,101,000 (crime victims' compensation servs.) \$18,000,000 (crime victims' assist.) \$1,148,000 (VOCA admin./ops.) \$1,250,000 (Statewide automated victim info) \$100,000 (victims' rights compliance project)	\$3,450,000 (victims of juvenile crime)
2005-06 ¹⁴⁷⁹	\$8,053,000 (crime victims' compensation servs.) \$18,000,000 (crime victims' assist.) \$1,148,000 (VOCA admin./ops.) \$75,000 (victims' rights compliance project)	\$3,450,000 (victims of juvenile crime)
2004-05 ¹⁴⁸⁰	\$6,000,000 (crime victims' compensation servs.) \$18,000,000 (crime victims' assist.) \$1,148,000 & \$888,000 (VOCA admin./ops.) \$60,000 (victim assist. training acad.)	\$3,668,000 (victims of juvenile crime)
2003-04 ¹⁴⁸¹	\$4,000,000 (crime victims' compensation servs.) \$18,000,000 (crime victims' assist.) \$600,000 (VOCA admin./ops.) \$1,200,000 (victim assist. training acad.)	\$3,647,000 (victims of juvenile crime)
2002-03 ¹⁴⁸²	\$5,000,000 & \$3,144,000 (crime victims' compensation servs.) \$18,000,000 & \$15,600,000 (crime victims' assist.) \$600,000 (VOCA admin./ops.) \$120,000 (victim assist. training acad.)	\$3,760,000 (victims of juvenile crime)

¹⁴⁷⁷ Act of July 17, 2007 (P.L.499, No.8A), § 202.

¹⁴⁷⁸ Act of July 2, 2006 (P.L.1640, No.2A), § 202.

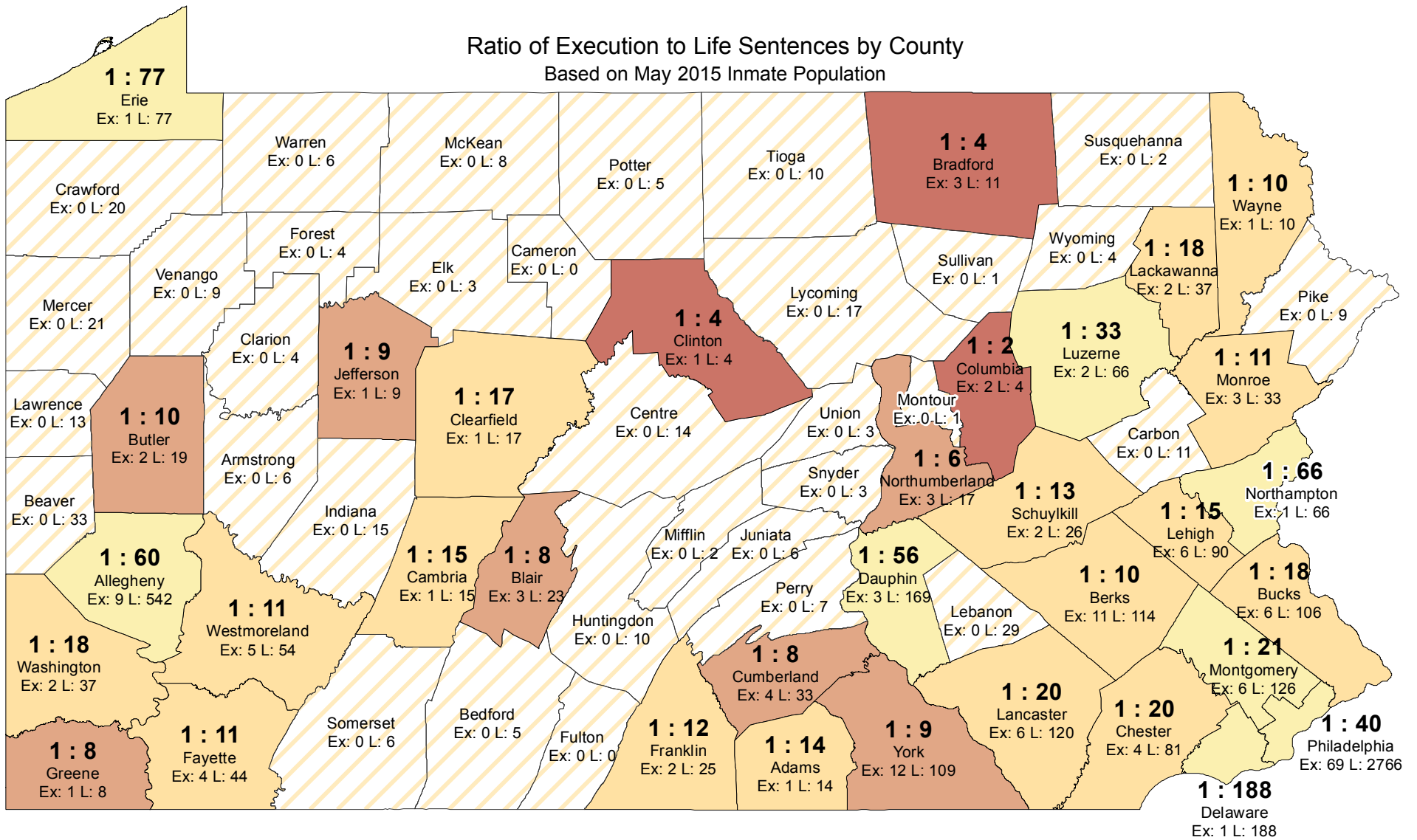
¹⁴⁷⁹ Act of July 7, 2005 (P.L.487, No.1A), § 202.

¹⁴⁸⁰ Act of July 4, 2004 (P.L.1837, No.7A), §§ 202, 1811.

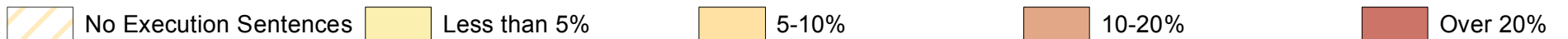
¹⁴⁸¹ Act of Mar. 20, 2003 (P.L.463, No.1A), § 202.

¹⁴⁸² Act of June 29, 2002 (P.L.2106, No.7A), §§ 202, 1811.

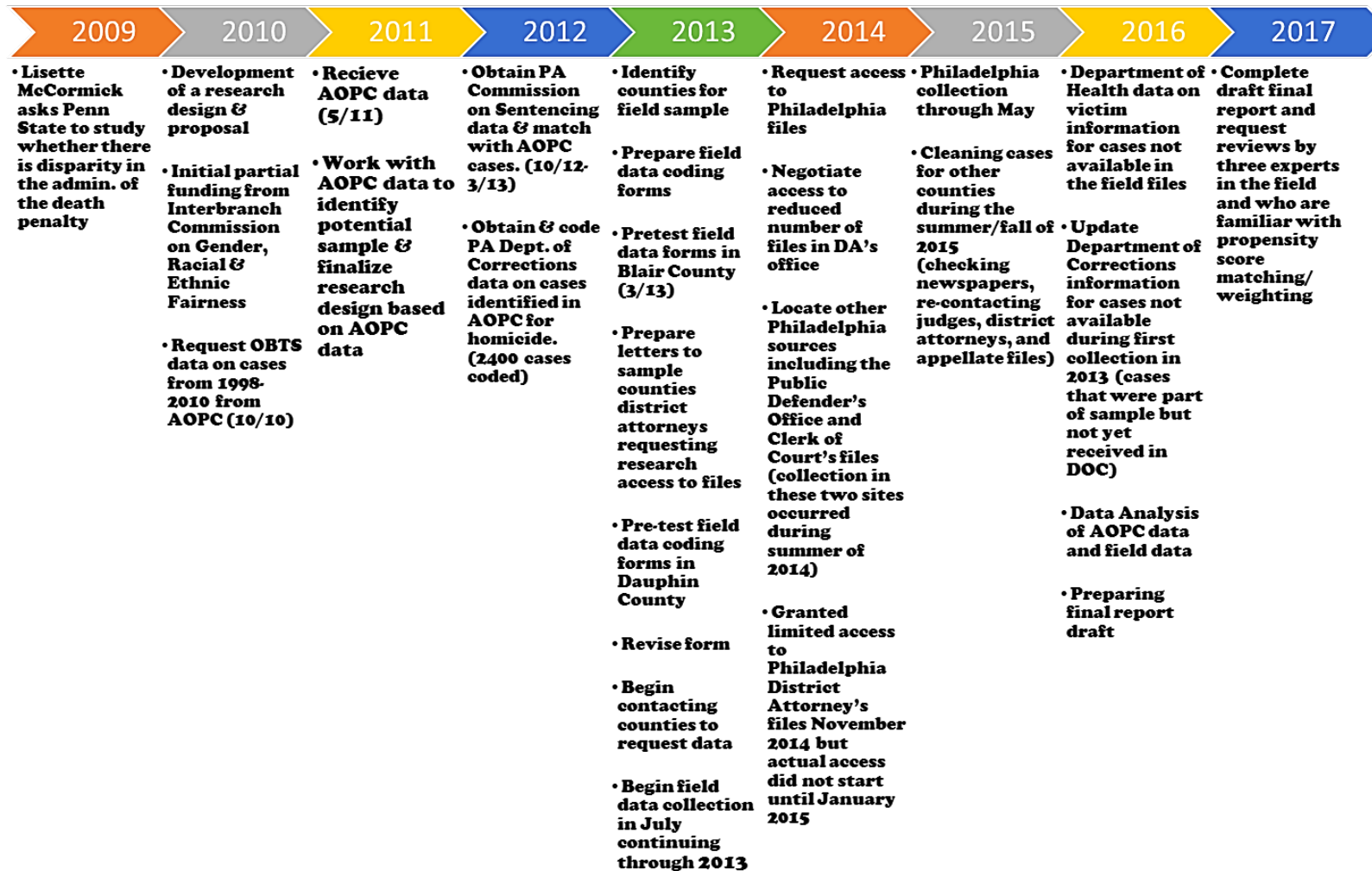
Ratio of Execution to Life Sentences by County
Based on May 2015 Inmate Population



Percentage of Execution to Life Sentences



APPENDIX L



APPENDIX M

Chapters 4, 5 and 6 recommendations of the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Include programs on the impact of race, ethnicity, and gender bias in sentencing at judicial training sessions.⁸⁶
2. Include in such judicial training sessions, education on how the use of specific offender characteristics, such as employment, family responsibilities, and role in the offense, can potentially contribute to unwarranted racial, ethnic, and gender disparities in sentencing.⁸⁷
3. Strengthen the formal standards of accountability to which sentencing judges are held through adoption of a broader standard of appellate review for sentencing decisions.
4. Strengthen and expand the collection of data on sentencing decisions.⁸⁸

TO DISTRICT ATTORNEYS

The Committee recommends that district attorney's offices:

1. Institute training programs for prosecuting attorneys on the influence of race, ethnicity, and gender bias on charging and plea bargaining decisions.⁸⁹

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Develop uniform binding indigent defense standards to meet indigent defense quality concerns regarding conflicts of interest, contracting for services, attorney eligibility, training, and workload.⁵⁵
2. Direct court administrators to explore innovative programs that seek to resolve cases earlier or to divert non-violent defendants into counseling or other alternative programs instead of the court system.

TO TRIAL COURTS

The Committee recommends that the trial courts:

1. Refrain from moving cases through the system at the expense of proper legal defense for indigent persons.⁵⁶

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards. The Commission should report to the Court one year from the date of appointment.⁵⁷
2. Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.⁵⁸

TO COUNTY PUBLIC DEFENDER OFFICES

The Committee recommends that the public defender offices:

1. Increase diversity of staff, particularly attorneys, and establish clear anti-bias policies for personnel.⁵⁹
2. Develop relationships with local law schools and initiate cooperative arrangements to attract law students to public defense work early in their careers.⁶⁰
3. Along with the Pennsylvania Defenders Association, investigate whether applicable student loan programs, including the Perkins program, permitting student loan forgiveness for prosecutors, can be extended to public defenders.

RECOMMENDATIONS

TO THE SUPREME COURT OF PENNSYLVANIA

The Committee recommends that the Court:

1. Pursuant to its inherent power to issue temporary stays of execution, declare a moratorium on the imposition of the death penalty in any case where the defendant's direct appeal has resulted in affirmation by the Supreme Court of Pennsylvania, pending the completion of a study investigating the impact of the race of the defendant and of the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes. The moratorium should continue until policies and procedures intended to ensure that the death penalty is administered fairly and impartially are implemented.
2. Empanel a special commission to study the impact of the race of the defendant and of the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes.
3. Direct the AOPC, or alternatively appoint a master, to undertake a comprehensive data collection effort covering all stages of capital litigation, including responsibility for completing the data collection instruments and maintaining the database and all supporting documentation. The Court should direct the AOPC, or master, to retain a principal investigator to review data collection efforts undertaken in other states and develop a research design and a plan to implement data collection. The cases to be reviewed should include those in which the death penalty was sought or could have been sought in all cases where the defendant was held for court on first-degree murder or murder generally.
4. Amend Rule 801 (former Rule 352) to require that a copy of the prosecutor's notice of intention to seek death be filed with the AOPC as well as the trial court to facilitate tracking of death-noticed cases.
5. Amend Rule 632 (former Rule 1107) to require retention of the jury questionnaire utilized at trial, which indicates the race and gender of the jurors, for the duration of the defendant's incarceration.
6. Mandate statewide standards for an independent appointment process of selecting capital counsel for all stages of the prosecution, including trial, appeal, and post-conviction hearings. The standards, at a minimum, should incorporate those recommended by the American Bar Association in its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.

7. Require that all capital counsel successfully complete, at a minimum, an annual continuing legal educational component specifically focusing on capital representation.
8. Promulgate reasonable minimum compensation standards for capital counsel throughout Pennsylvania and ensure that sufficient resources for experts and investigators are made available to counsel.
9. Require trial courts during *voir dire* in capital cases to explore fully, when requested by either party, views about race held by prospective jurors.
10. Promulgate a rule that allows for reasonable latitude by defense counsel and the Commonwealth to explore all potential sources of racial bias in *voir dire* of prospective capital jurors.
11. Require trial courts to charge capital juries, when requested by either party, that they may not consider the race of the defendant or victim in determining the appropriate sentence for the defendant.
12. Promulgate a rule that should a *prima facie* case of discrimination in the use of peremptory challenges be established, reasons invoked for the exclusion of the juror that do not substantially relate to his or her qualifications, fitness, or bias shall be viewed as presumptively pretextual.
13. Reduce the number of peremptory strikes in capital cases.
14. Promulgate a jury instruction stating “life means life with no possibility of parole” and require that it be given in all capital cases.

TO THE LEGISLATURE

The Committee recommends that the Legislature:

1. Enact a Racial Justice Act, like that of other states, that allows for the admission of evidence of a pattern and practice of disparate treatment in both the prosecutorial decision to seek the death penalty and in sentencing outcomes.
2. Enact a proportionality provision requiring the Supreme Court to review death sentences for proportionality.
3. Create and adequately fund a statewide independent Capital Resource 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. The assistance and/or representation should extend from arrest through trial and, if the defendant is sentenced to death, through the state and federal appeal and post-conviction process. The Capital Resource Center also should be charged with the responsibility of maintaining court

appointment lists of qualified capital counsel and of overseeing ongoing training programs for capital counsel.

4. Appropriate adequate funds to the Supreme Court for the administration of a comprehensive data collection effort covering all stages of capital litigation.
5. Enact legislation declaring a moratorium on the death penalty until such time as policies and procedures are implemented to ensure that the death penalty is being administered fairly and impartially throughout the Commonwealth.

TO THE ATTORNEY GENERAL AND DISTRICT ATTORNEYS

The Committee recommends that:

1. District attorney's offices adopt written standards and procedures for making decisions about whether to seek the death penalty.
2. The Attorney General empanel a statewide committee of county district attorneys to review each decision by a district attorney to seek the death penalty with the goal of ensuring geographic consistency in the application of the death penalty. The committee's review should commence as soon as possible after each filing of a notice of intention to seek the death penalty, and the result of its review should not be binding. The review committee should include, at a minimum, the Attorney General, the district attorneys of Philadelphia and Allegheny counties and the current president of the Pennsylvania District Attorneys Association, but otherwise be geographically representative of the Commonwealth.

TO THE GOVERNOR OF PENNSYLVANIA

The Committee recommends that the Governor of Pennsylvania:

1. Pursuant to his constitutional authority to grant temporary reprieves, declare a moratorium on the imposition of the death penalty in any case where the defendant's direct appeal has resulted in affirmation by the Supreme Court of Pennsylvania, pending the completion of a study investigating the impact of the race of the defendant, and of the victim, in prosecutorial decisions to seek the death penalty and in death sentencing outcomes. The moratorium should continue until policies and procedures intended to ensure that the death penalty is administered fairly and impartially are implemented.
2. Empanel a special commission to study the impact of the race of the defendant and the victim in prosecutorial decisions to seek the death penalty and in death sentencing outcomes.