



**Defending Liberty  
Pursuing Justice**

**EVALUATING FAIRNESS AND ACCURACY IN  
STATE DEATH PENALTY SYSTEMS:  
The Pennsylvania Death Penalty Assessment Report**

An Analysis of Pennsylvania's Death Penalty Laws, Procedures, and Practices

*"A system that takes life must first give justice."  
John J. Curtin, Jr., Former ABA President*

October 2007

AMERICAN BAR ASSOCIATION



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In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to Pennsylvania's death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.



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## EXECUTIVE SUMMARY

### INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Pennsylvania assessment, the Project has released state assessments in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, and Tennessee. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal *habeas corpus* proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and

interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focus exclusively on capital punishment laws and processes and do not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Pennsylvania Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Pennsylvania Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the death penalty in Pennsylvania. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

## II. HIGHLIGHTS OF THE REPORT

### *A. Overview of the Pennsylvania Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Pennsylvania's death penalty system, the Pennsylvania Death Penalty Assessment Team<sup>1</sup> researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's

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<sup>1</sup> The membership of the Pennsylvania Death Penalty Assessment Team is included *infra* on pages 3-5 of the Pennsylvania Death Penalty Assessment Report.

capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.<sup>2</sup> Following a preliminary chapter on Pennsylvania’s death penalty law, the Pennsylvania Death Penalty Assessment Report devotes a chapter to each of these issues. Each chapter begins with a discussion of the relevant law and concludes with a discussion of the extent to which the Commonwealth of Pennsylvania is in compliance with the ABA’s Recommendations.

Members of the Pennsylvania Death Penalty Assessment Team have varying perspectives on the death penalty. Nonetheless, the Team has concluded that the Commonwealth of Pennsylvania fails to comply or only partially complies with the many of the ABA’s Recommendations and that many of these shortcomings are substantial. Certain of the need to improve the fairness and accuracy of Pennsylvania’s death penalty system, the Pennsylvania Death Penalty Assessment Team unanimously agrees to endorse a series of proposals aimed at addressing these shortcomings. The following section first highlights the Team’s most pertinent findings and then summarizes the Team’s recommendations and observations.

### *B. Areas for Reform*

The Pennsylvania Death Penalty Assessment Team has identified a number of areas in which Pennsylvania’s death penalty system falters in affording each capital defendant fair and accurate procedures.<sup>3</sup> While the Team has identified a series of individual problems within Pennsylvania’s death penalty system, we caution that their harms are cumulative. The capital system has a host of interconnected parts; problems in one area can undermine sound procedures in others. The Pennsylvania Death Penalty Assessment Team also notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. With this in mind, the Pennsylvania Death Penalty Assessment Team considers the following areas as most in need of reform:

- ***Inadequate Procedures to Protect the Innocent*** (see Chapters 2, 3, & 4) – Since the death penalty’s reinstatement, the Commonwealth of Pennsylvania has exonerated at least death-row inmates, including Nicholas Yarris, Neil Ferber, William Nieves, Thomas Kimbell, Jr., and Harold Wilson. Despite these exonerations, the Commonwealth of Pennsylvania has not implemented any policies or procedures that would render the conviction of an innocent

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<sup>2</sup> This report is not intended to cover all aspects of Pennsylvania’s capital punishment system and, as a result, it does not address a number of important issues, including for example, cost and deterrence.

<sup>3</sup> Although some counties may be in compliance with some or even many of the recommendations contained in this report, the report focused on assessing laws and practices on a statewide basis. Consequently, while the report may highlight county rules and practices, and while individual counties may comply with various recommendations, the Commonwealth of Pennsylvania, as a state, may be in partial compliance or fail to comply with those recommendations. Furthermore, some of the “Areas for Reform” and “Recommendations” found in the Executive Summary may not be pertinent to certain counties.

person less likely, including (1) mandating the preservation of biological evidence for as long as the defendant remains incarcerated, (2) mandating the audio or videotaping of all interrogations in potential capital cases, and (3) implementing lineup procedures that protect against false eyewitness identification.

- ***Failure to Protect Against Poor Defense Lawyering*** (see Chapter 6) – Pennsylvania law fails to guarantee the appointment of two attorneys at all stages of a capital case and the compensation afforded capital attorneys is inadequate for counsel to meet their obligations under the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (ABA Guidelines)*. Additionally, Pennsylvania lacks a statewide independent appointing authority responsible for training, selecting, and monitoring capital defense attorneys to ensure that competent representation is provided to each capital defendant.
- ***No State Funding of Capital Indigent Defense Services*** (see Chapter 6) – The Commonwealth of Pennsylvania provides no funding for indigent defense services, opting instead to rely on county-funded indigent defense systems. As a result, Pennsylvania’s capital indigent defense system fails to afford uniform, quality representation to many capital defendants.
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6 and 13) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants and death-row inmates, including those with mental disabilities, are denied these necessary resources.
- ***Lack of Data on Death-Eligible Cases***<sup>4</sup> (see Chapter 7) – Without a statewide entity that collects data on all death-eligible cases in the Commonwealth, Pennsylvania cannot ensure that its system ensures proportionality in charging or sentencing, or determine the extent of racial or geographic bias in its capital system.
- ***Significant Limitations on Post-Conviction Relief*** (Chapter 8) – Pennsylvania law imposes numerous restrictions on state post-conviction proceedings that seriously impede the adequate development and judicial consideration of a death-row inmate’s claims. For instance, on a successive post-conviction petition, the petitioner is afforded only sixty days to file the petition. Given that the court will not appoint counsel unless the judge determines that an evidentiary hearing is warranted, the harm of this short time period is exacerbated.
- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are intolerable, yet research establishes that the overwhelming majority of Pennsylvania capital jurors fail to understand their roles and responsibilities when deciding whether to impose a death sentence. Specifically, studies reveal that an astonishing 98.6 percent of Pennsylvania capital jurors failed to understand “at least some” portion of the jury instructions. Of those questioned, 82.8 percent of Pennsylvania capital jurors did not believe “that a life sentence really meant life in prison.”

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<sup>4</sup> It should be noted that the Criminal Justice Committee of the Interbranch Commission for Gender, Racial, and Ethnic Fairness has undertaken “the development of a system of data collection on death sentences,” but no state law yet mandates the collection of data in death penalty cases.

Additionally, 58.7 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the trial; 68 percent failed to understand that they need not be unanimous in finding the existence of mitigating circumstances; and 32 percent erroneously believed that the defense had to prove mitigating circumstances beyond a reasonable doubt. Similarly, despite the fact that Pennsylvania law expressly prohibits consideration of future dangerousness as an aggravating circumstance, 37 percent of interviewed Pennsylvania capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to impose the death penalty.

- ***Racial and Geographical Disparities in Pennsylvania’s Capital Sentencing*** (see Chapter 12) – The Pennsylvania Supreme Court’s Committee on Racial and Gender Bias in the Justice System concluded that there existed “strong indications” that Pennsylvania’s death penalty system did not “operate in an evenhanded manner.” Specifically, the Committee found that “although Pennsylvania’s minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities,” and that Pennsylvania was “second only to Louisiana in the percentage of African Americans on death row.” In its final report, the Committee noted that African American defendants in Philadelphia County were sentenced at a “significantly higher rate” than similarly situated non-African American defendants. In fact, the Committee found that one third of the African American death-row inmates in Philadelphia County would have received sentences of life imprisonment if they had not been African American.

### *C. Pennsylvania Death Penalty Assessment Team Recommendations*

Although a perfect system may not be possible, the following recommendations would improve Pennsylvania’s death penalty proceedings significantly. Our recommendations seek to ensure fairness at all stages, while emphasizing the importance of resolving key issues at the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Pennsylvania Death Penalty Assessment Team makes the following recommendations:

- (1) To help protect the innocent, the Commonwealth of Pennsylvania should
  - (a) require all law enforcement agencies to videotape the entirety of custodial interrogations or, where videotaping is impractical, audiotape the entirety of the custodial interrogation;
  - (b) implement mandatory lineup procedures, utilizing national best practices that protect against false eyewitness identifications;
  - (c) mandate that all biological evidence be preserved for as long as the defendant remains incarcerated.
- (2) The Commonwealth should establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to the Pennsylvania Supreme Court for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines.
- (3) The Commonwealth of Pennsylvania should adopt uniform statewide indigent defense standards that conform to the *ABA Guidelines*, including

establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a capital case, and establishing minimum rates for attorney compensation. The Commonwealth also should ensure that the salaries of attorneys in the county public defender offices are commensurate with those of the district attorneys' offices.

- (4) The Commonwealth of Pennsylvania should create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. The organization should serve as a statewide resource center to assist defense attorneys with capital trials, appeals, post-conviction, and clemency proceedings.
- (5) The Commonwealth of Pennsylvania should provide statewide funding for capital indigent defense services.
- (6) The Commonwealth of Pennsylvania should ensure that all death-row inmates receive meaningful review in state post-conviction proceedings. At a minimum, the sixty day deadline to file successive petitions should be extended and exceptions should be added to the statute to ensure that petitions asserting claims of innocence and/or serious constitutional deficiencies will be considered by the court.
- (7) The Commonwealth of Pennsylvania should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature. In addition, the Commonwealth should mandate that all capital juries be instructed on the definition of life imprisonment.
- (8) The Commonwealth of Pennsylvania should sponsor a comprehensive study to determine the existence or non-existence of unacceptable disparities, whether racial, socio-economic, geographic, or otherwise, in its death penalty system, and should develop and implement proposals to eliminate any such disparities.
- (9) The Commonwealth of Pennsylvania should ensure that the defense has access to sufficient investigative and expert resources to investigate and fully develop its claims, including potential mental retardation and mental disability claims.

Despite the best efforts of the many principled and thoughtful actors who play roles in the criminal justice process in the Commonwealth of Pennsylvania, our research establishes that, at this point in time, Pennsylvania cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. It is therefore the conclusion of the members of the Pennsylvania Death Penalty Assessment Team that, in order to ensure fairness and accuracy in its death penalty system, the

Commonwealth must appropriately address the issues and recommendations of this Report, and in particular the Executive Summary.

### III. SUMMARY OF THE REPORT

#### Chapter One: An Overview of Pennsylvania's Death Penalty System

In this chapter, we examined the demographics of Pennsylvania's death row, the statutory evolution of Pennsylvania's death penalty scheme, and the progression of an ordinary death penalty case through Pennsylvania's death penalty system from arrest to execution.

#### Chapter Two: Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proven to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depend on the state's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, we examined Pennsylvania's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether Pennsylvania complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

The following chart summarizes Pennsylvania's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.<sup>5</sup>

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<sup>5</sup> Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the "Analysis" section of each chapter.

<b>Collection, Preservation, and Testing of DNA and Other Types of Evidence</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> The State should preserve all biological evidence for as long as the defendant remains incarcerated.				X		
<b>Recommendation #2:</b> Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.			X			
<b>Recommendation #3:</b> Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.			X			
<b>Recommendation #4:</b> Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.			X			
<b>Recommendation #5:</b> The state should ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.					X	
<b>Recommendation #6:</b> The state should provide adequate funding to ensure the proper preservation and testing of biological evidence.					X	

The Commonwealth of Pennsylvania does not require the preservation of biological evidence for as long as a death-row inmate remains incarcerated. The only uniform preservation rule that exists in Pennsylvania is triggered when a death-sentenced inmate applies for post-conviction DNA testing and requires preservation only through the duration of the post-conviction DNA testing proceedings.

Pennsylvania courts have held that police and prosecutors have a duty to preserve “material exculpatory evidence,” which is evidence that possesses an “exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Pennsylvania courts also have held, however, that the destruction of evidence that is merely “potentially useful” is not a due process violation unless the defendant can demonstrate bad faith on the part of the police or prosecutor.

Although Pennsylvania does not require the preservation of all physical evidence for the duration of an inmate’s incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery, and (2) seek post-conviction DNA testing. Strict pleading requirements, however, have the potential to preclude inmates from obtaining post-conviction DNA testing. Notably, there is no statutory requirement

that the court hold an evidentiary hearing on a petitioner’s motion requesting post-conviction DNA testing. Rather, the court may simply make a decision regarding the sufficiency of the motion on the pleadings of both parties.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendation, previously discussed on page vi of the Executive Summary, that all biological evidence in potential capital cases be preserved for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of wrongful convictions and ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and false confessions must be reduced. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices on law enforcement identifications and interrogations and assessed their level of compliance with the ABA’s policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations.

<b>Law Enforcement Identifications and Interrogations</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA’s Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
<b>Recommendation #2:</b> Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.				X	
<b>Recommendation #3:</b> Law enforcement agencies and prosecutors’ offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
<b>Recommendation #4:</b> Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations				X	

<b>Law Enforcement Identifications and Interrogations (Con't.)</b>						
<b>Compliance</b>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #5:</b> The state should ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.					X	
<b>Recommendation #6:</b> Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.				X		
<b>Recommendation #7:</b> Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.			X			

The Commonwealth of Pennsylvania has implemented some measures that reduce the risk of inaccurate eyewitness identifications and false confessions. For example, the basic training curriculum that all law enforcement officers must complete includes instruction on a number of topics relating to identifications, ranging from increasing the reliability of identifications to defining the civil and criminal ramifications of an unconstitutional pre-trial identification. Along with training on conducting pre-trial identifications, the curriculum encompasses training on custodial interrogations, including instruction on the advisement of *Miranda rights* and the criminal and civil liability for violating an individual's right against self-incrimination and his/her right to counsel. In total, Pennsylvania law enforcement officers receive eight hours of instruction on "interviewing and interrogations," two hours of instruction on the "identification of suspects," and two hours of instruction on "admissions and confessions." However, the Commonwealth of Pennsylvania does not require law enforcement agencies to adopt specific procedures governing identifications and interrogations.

In the effort to protect against false or coerced confessions by recording custodial interrogations, Pennsylvania law enforcement agencies fall dramatically short. As of 2005, only two law enforcement agencies in Pennsylvania— the Bethlehem and Whitehall Police Departments— regularly recorded custodial interrogations.

In order to ensure that all enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the Commonwealth of Pennsylvania should implement mandatory lineup procedures, utilizing national best practices that protect against false eyewitness identifications. In addition, the Commonwealth should mandate that all law enforcement agencies videotape the entirety of custodial interrogations or, where videotaping is impractical, to audiotape the entirety of the custodial interrogation,

as recommend by the Pennsylvania Death Penalty Assessment Team on page vi of the Executive Summary.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Pennsylvania and assessed whether Pennsylvania’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices.

<b>Crime Laboratories and Medical Examiner Offices</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.			X			
<b>Recommendation #2:</b> Crime laboratories and medical examiner offices should be adequately funded.					X	

Pennsylvania law does not require crime laboratories to be accredited, but all seven of the Pennsylvania State Police crime laboratories and a handful of local and private crime laboratories have voluntarily obtained national accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As a prerequisite for ASCLD/LAB accreditation, laboratories must enact certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

A noteworthy incident, however, at the Bethlehem Regional Laboratory, a laboratory accredited by the ASCLD/LAB, underscores the need for stricter accreditation standards and quality control. An annual audit at the Bethlehem lab revealed a number of errors in the work of serologist Ranae Houtz, including that she had failed to note a semen stain, raising serious concerns about the reliability and accuracy of Houtz’s work. By the time Houtz was forced to resign in April of 2003, she had analyzed evidence in 615 cases, spanning twenty-seven counties over the course of three years.

Unfortunately, the Ranae Houtz incident was not an isolated occurrence. The work of former Pennsylvania State Police chemist Janice Roadcap has also been challenged, raising serious questions as to the integrity of criminal lab work in Pennsylvania. In 1988, Barry Laughman was convicted and sentenced to life imprisonment for the rape and murder of his elderly neighbor. At trial, Roadcap testified that, although the semen on the victim's body belonged to an individual with Type A blood, it still could have originated from Barry Laughman, who has Type B blood. Even more disturbing is evidence that Roadcap altered her lab notes in a murder case which resulted in then-fourteen year old Steven Crawford serving twenty-eight years in prison before being freed in 2002. Roadcap served as a chemist at the Pennsylvania State Police's Harrisburg Regional Laboratory for almost twenty-five years, handling an untold number of cases in eighteen counties, before retiring in 1991.

As with its crime laboratories, the Commonwealth of Pennsylvania does not require county coroner or medical examiner offices to be accredited. To date, no Pennsylvania county coroner office or medical examiner office has obtained voluntary accreditation through the National Association of Medical Examiners (NAME). While Pennsylvania does not require such accreditation, it has established the Coroner's Education Board to create minimum training standards and continuing education requirements for newly elected coroners and deputy coroners. In the few counties, such as Allegheny and Delaware Counties, which instead employ a medical examiner, qualifications for the position appear to vary, although all require that the medical examiner be a pathologist.

#### Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where the prosecutor has enormous discretion in deciding whether or not to seek the death penalty. In this chapter, we examined Pennsylvania's laws, procedures, and practices relevant to prosecutorial professionalism and assessed their compliance with the ABA's policies on prosecutorial professionalism.

The following chart summarizes Pennsylvania's overall compliance with the ABA's policies on prosecutorial professionalism.

<b>Prosecutorial Professionalism</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				X	
<b>Recommendation #2:</b> Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.				X	
<b>Recommendation #3:</b> Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
<b>Recommendation #4:</b> Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.		X			
<b>Recommendation #5:</b> Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
<b>Recommendation #6:</b> The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.		X			

The Commonwealth of Pennsylvania does not require district attorneys' offices to establish policies on the exercise of prosecutorial discretion. Nor does it require that these offices establish policies on evaluating cases that rely upon eyewitness identifications, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

Furthermore, the Commonwealth does not require that prosecutors handling capital cases receive any special training. Presently, training requirements for prosecutors vary from county to county.

Pennsylvania, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Commonwealth has entrusted the Office of the Disciplinary Counsel, the Disciplinary Board of the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court with investigating grievances and disciplining prosecutors; and
- The Pennsylvania Supreme Court has adopted the Pennsylvania Rules of Professional Conduct, which require prosecutors to, among other things, disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to the lawyers who undertake capital cases, and resources for defense investigators and experts. States must address capital representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this chapter, we examined Pennsylvania’s laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA’s policies on defense services.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on defense services.

<b>Defense Services</b>						
		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>	<i>Compliance</i>					
<b>Recommendation #1:</b> Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)—The Defense Team and Supporting Services				X		
<b>Recommendation #2:</b> Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel			X			
<b>Recommendation #3:</b> Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency				X		
<b>Recommendation #4:</b> Guideline 9.1 of the ABA Guidelines—Funding and Compensation				X		
<b>Recommendation #5:</b> Guideline 8.1 of the ABA Guidelines—Training			X			

Pennsylvania has no statewide system for providing indigent defense services. Instead, trial, appellate, and post-conviction counsel are provided on a county-by-county basis with judges generally having the primary authority to appoint counsel. Pennsylvania does not provide for the appointment of counsel in clemency proceedings, nor on a successive petition for post-conviction relief unless the court determines that the petition warrants an evidentiary hearing.

The Pennsylvania indigent defense system falls far short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) for a number of reasons, including:

- The Commonwealth of Pennsylvania does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony;
- The Commonwealth of Pennsylvania provides no state funding for indigent defense services, as numerous counties fail to provide adequate funding for defense counsel, experts, and investigators in death penalty cases; and
- Pennsylvania law does not guarantee the appointment of two attorneys at all stages of the legal proceedings, nor does it guarantee access to investigators and mitigation specialists.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team's recommendations, previously discussed on pages vii-viii of the Executive Summary, to:

- (1) Adopt uniform statewide indigent defense standards that conform to the *ABA Guidelines*, including establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a capital case, and establishing minimum rates for attorney compensation. The Commonwealth also should ensure that the salaries of attorneys in the county public defender offices are commensurate with those of the district attorneys' offices.
- (2) Create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. The organization should serve as a statewide resource center to assist defense attorneys with capital trials, appeals, post-conviction, and clemency proceedings; and
- (3) Provide statewide funding for capital indigent defense services.

Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and penalty phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the primary method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Pennsylvania’s laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with ABA policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on the direct appeal process.

<b>Direct Appeal Process</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.				X		

The Pennsylvania Supreme Court is no longer statutorily required to conduct proportionality review in capital cases. In 1997, the Pennsylvania Legislature specifically repealed the statutory requirement that the Pennsylvania Supreme Court undertake proportionality review when reviewing a death sentence on direct appeal.

To ensure that a death sentence is not excessively severe or an abuse of discretion and that prosecutorial discretion to seek the death penalty is evenhandedly exercised across the Commonwealth, Pennsylvania should immediately implement meaningful proportionality review that includes a review of cases in which the death penalty was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Based on this information, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendations, previously discussed on pages vi and vii of the Executive Summary, that the Commonwealth should

establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to the Pennsylvania Supreme Court for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because some capital defendants may receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Pennsylvania’s laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA’s policies on state post-conviction.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on state post-conviction proceedings.

<b>State Post-Conviction Proceedings</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.				X		
<b>Recommendation #2:</b> The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X		
<b>Recommendation #3:</b> Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X		

State Post-Conviction Proceedings (Con't.)						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	<b>Recommendation #4:</b> When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.					X
<b>Recommendation #5:</b> On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.				X		
<b>Recommendation #6:</b> When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in a capital case.				X		
<b>Recommendation #7:</b> The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
<b>Recommendation #8:</b> The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.					X	
<b>Recommendation #9:</b> State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.			X			
<b>Recommendation #10:</b> State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.		X				

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<b>Recommendation #11:</b> In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.			X			
<b>Recommendation #12:</b> During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.						X

The Commonwealth of Pennsylvania has adopted a post-conviction framework which impedes the adequate development and judicial consideration of a death-row inmate’s post-conviction claims. For example, the Commonwealth allows the post-conviction judge numerous opportunities to summarily deny the petition without an evidentiary hearing. Furthermore, under Pennsylvania law, the petitioner does not have a right to post-conviction discovery but, to obtain discovery, must demonstrate good cause on his/her initial petition or exceptional circumstances on any successive petition. In practice, Pennsylvania judges far too often exercise their discretion to severely limit the scope of post-conviction discovery or to deny discovery altogether. Additionally, on a successive post-conviction petition, the petitioner is afforded only sixty days to file the petition. Given that the court will not appoint counsel unless the judge determines that an evidentiary hearing is warranted, the harm of this short time period is exacerbated.

Based on this information, the Commonwealth of Pennsylvania should adopt the Pennsylvania Death Penalty Assessment Team’s recommendation, as detailed on page vii, that the Commonwealth ensure that all death-row inmates receive meaningful review in state post-conviction proceedings. At a minimum, the sixty-day deadline to file successive petitions should be extended and exceptions should be added to the statute to ensure that petitions asserting claims of innocence and/or serious constitutional deficiencies will be heard by the court.

### Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court’s or jury’s decision-making. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices concerning the clemency process and assessed whether they comply with the ABA’s policies on clemency.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on clemency.

Clemency						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	<b>Recommendation #1:</b> The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
<b>Recommendation #2:</b> The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.				X		
<b>Recommendation #3:</b> Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.					X	
<b>Recommendation #4:</b> Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.					X	
<b>Recommendation #5:</b> Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.					X	
<b>Recommendation #6:</b> Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .				X		
<b>Recommendation #7:</b> Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.				X		
<b>Recommendation #8:</b> Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.			X			
<b>Recommendation #9:</b> If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.			X			
<b>Recommendation #10:</b> Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.					X	
<b>Recommendation #11:</b> To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.					X	

The Pennsylvania Constitution grants the Governor the sole authority to grant reprieves, commutations, and pardons in all criminal cases, except impeachment. However, the Governor is prohibited from granting a pardon or commuting a sentence without a unanimous recommendation from the Pennsylvania Board of Pardons (Board).

Under Pennsylvania law, neither the Governor nor the Board of Pardons is required to conduct any specific type of review or consider any specific factors when considering a petition for clemency on behalf of a death-row inmate. Indeed, the Governor's discretion in granting or denying clemency is virtually unfettered, so long as s/he has the unanimous recommendation of the Board in support of clemency. Similarly, the Board, in deciding to recommend a grant of clemency to the Governor, has "no objective criteria" to which it must adhere. Rather, each Board member is "free to rely upon the information that he/she feels is most important" in his/her decision-making.

The Board, however, has stated that it will not review the guilt or innocence of a death-row inmate. Indeed, "if there is some legal technicality [which bears on guilt or innocence], such as the introduction of hearsay evidence, [an] illegal confession, [or an] illegal search and seizure," the Board has eschewed any responsibility of reviewing such claims, claiming that responsibility lies with the courts to "resolve those matters," and not the Board itself.

Since the re-enactment of the death penalty in Pennsylvania, no Governor has granted clemency to a death-row inmate. In fact, the Board has not even considered a pardon or commutation application for a death-row inmate since 1967.

#### Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, the jury instructions must present fully and accurately the law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, confusing jurors about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Pennsylvania's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies on capital jury instructions.

The following chart summarizes Pennsylvania's overall compliance with the ABA's policies on capital jury instructions.

<b>Capital Jury Instructions</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.		X			
<b>Recommendation #2:</b> Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.			X		
<b>Recommendation #3:</b> Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.				X	
<b>Recommendation #4:</b> Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.		X			
<b>Recommendation #5:</b> 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.			X		
<b>Recommendation #6:</b> Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
<b>Recommendation #7:</b> In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	X				

Jurors in Pennsylvania, as in many states, appear to have difficulty understanding their roles and responsibilities, as described by trial judges in their jury instructions. In fact, an

astonishing 98.6 percent of Pennsylvania capital jurors have failed to understand “at least some” jury instructions.

More specifically, research illustrates a startling amount of misunderstanding among Pennsylvania jurors in regard to mitigation evidence. In a study conducted by the Capital Jury Project, 58.7 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the trial; 68 percent failed to understand that they need not be unanimous in finding the existence of any particular mitigating circumstance; and 32 percent erroneously believed that the defense had to prove mitigating circumstances beyond a reasonable doubt. In another study conducted by Professor Wanda Foglia of Rowan University, only 42 percent of interviewed Pennsylvania capital jurors understood that they could consider any mitigating factor while only 30 percent understood that it was not necessary for all jurors to agree on the presence of individual mitigating factors.

In addition to mitigation evidence, capital jurors also often have difficulty understanding the bifurcated nature of a death penalty case. For example, an overwhelming 83.3 percent of interviewed Pennsylvania capital jurors indicated that they had discussed the defendant’s appropriate punishment “a great deal” or a “fair amount,” even before the sentencing phase had begun, despite the fact that this is prohibited by law. Similarly, despite the fact that Pennsylvania law expressly prohibits consideration of future dangerousness as an aggravating circumstance, 37 percent of interviewed Pennsylvania capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death.

Another major source of juror miscomprehension appears to lie with the meaning of life imprisonment. Nearly 83 percent of Pennsylvania capital jurors did not believe “that a life sentence really meant life in prison.” Significantly, over 20 percent of jurors actually believed that if the defendant was not sentenced to death, s/he would be released from prison in nine years or less.

Given the alarming rate of juror miscomprehension, the Commonwealth of Pennsylvania should, at a minimum, adopt the Pennsylvania Death Penalty Assessment Team’s recommendations previously discussed on page vii of the Executive Summary, which provide that (1) the Commonwealth should redraft its capital jury instructions with the objective of preventing common juror misconception that have been identified, and (2) that the Commonwealth should mandate that all capital juries be instructed on the meaning of life imprisonment.

The lack of clear and comprehensible sentencing instructions in the Commonwealth of Pennsylvania creates a palpable risk that jurors will misconstrue the law and impose a sentence that does not accurately reflect the jury’s determination of the proper sentence.

### Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases

sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society’s confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices on the judicial election/appointment and decision-making processes and assessed whether they comply with the ABA’s policies on judicial independence.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on judicial independence.

<b>Judicial Independence</b>							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>							
<b>Recommendation #1:</b> States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.				X			
<b>Recommendation #2:</b> A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.						X	
<b>Recommendation #3:</b> Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.						X	
<b>Recommendation #4:</b> A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.						X	

<b>Judicial Independence (Con't.)</b>							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>							
<b>Recommendation #5:</b> A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.						X	
<b>Recommendation #6:</b> Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.						X	

Pennsylvania’s partisan judicial election format, combined with its retention election format, for Supreme Court Justices and the judges of the Superior Court, Commonwealth Court, and Courts of Common Pleas create serious concerns about the fairness of the judicial election process in Pennsylvania. Elections, whether partisan or not, raise significant questions about both the fairness of the judicial selection process and the independence of judges. By maintaining general partisan elections and retention elections for all state judges, the Commonwealth of Pennsylvania has left its judiciary particularly vulnerable to political sway.

Alarming, during the past two decades, the costs of judicial elections in Pennsylvania have steadily risen. Between 1989 and 1999, thirty Supreme Court candidates garnered \$13 million in campaign contributions. In 2001, two Supreme Court candidates amassed more than \$1 million each in campaign funds, and, in 2003, another six Supreme Court candidates amassed more than \$3.3 million in contributions. And judicial campaign contributions continue to rise, despite the fact that 88 percent of Pennsylvania voters believe that campaign contributions influence judges’ decisions “at least some of the time.”

The 2002 amendments to the Pennsylvania Code of Judicial Conduct, which permit judges and judicial candidates to announce their views on certain issues so long as they do not commit or appear to commit to a specific position on a case or issue that is likely to come before the court, also have changed the landscape of Pennsylvania’s judicial elections. During the 2003 Supreme Court judicial elections, the two candidates, Joan Orié Melvin and Max Baer, adopted decidedly different approaches in their campaigns. Melvin refused to announce her views, expressing concern that it would affect her impartiality in future cases should she be elected. Baer, on the other hand, candidly discussed his general views on legal issues, announcing general positions on abortion and the death penalty, and ultimately won the election.

While the Code now permits candidates to express their views on disputed legal and political issues, some comments risk amounting to pre-judgments and blur the boundaries of appropriate judicial conduct. For instance, when a candidate expresses support for the

death penalty, s/he creates the perception that the judicial candidate will be more likely to uphold the death penalty, regardless of whether or not it is warranted.

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Pennsylvania’s laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA’s policies.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty.

<b>Racial and Ethnic Minorities</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.			X			
<b>Recommendation #2:</b> Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.			X			
<b>Recommendation #3:</b> Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.			X			
<b>Recommendation #4:</b> Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X			

Racial and Ethnic Minorities (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<p><b>Recommendation #5:</b> Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the state should have the burden of rebutting it by substantial evidence.</p>				X		
<p><b>Recommendation #6:</b> Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.</p>			X			
<p><b>Recommendation #7:</b> Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during <i>voir dire</i>.</p>					X	
<p><b>Recommendation #8:</b> Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.</p>				X		
<p><b>Recommendation #9:</b> Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.</p>					X	
<p><b>Recommendation #10:</b> States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.</p>				X		

The Commonwealth of Pennsylvania has taken some steps to explore the impact of race on Pennsylvania's criminal justice system, but has not yet done so in a comprehensive manner.

In 1999, the Pennsylvania Supreme Court established the Committee on Racial and Gender Bias in the Justice System (Committee) to “determine whether racial or gender bias plays a role in the justice system.” Following its review, the Committee concluded that there existed “strong indications” that Pennsylvania’s death penalty system did not “operate in an evenhanded manner.” For example, the Committee found that African American defendants in Philadelphia County were sentenced at a “significantly higher rate” than similarly situated non-African American defendants. Specifically, the Committee found that “although Pennsylvania’s minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities,” and that Pennsylvania was “second only to Louisiana in the percentage of African Americans on death row.” In fact, the Committee concluded that one third of the African American death-row inmates in Philadelphia County would have received sentences of life imprisonment if they had not been African American.

In response to their findings, the Committee issued 173 recommendations, twenty-three of which dealt specifically with the administration of the death penalty. The twenty-three recommendations ranged from reducing the number of peremptory strikes in capital cases to having district attorney’s offices adopt written standards and procedures for deciding in which cases to seek the death penalty. Most notably, the Committee recommended a “large-scale, state-sponsored and state-funded research effort” to evaluate Pennsylvania’s death penalty. The Committee declared that:

Not until the Commonwealth undertakes a comprehensive data collection effort and subjects the data to rigorous analysis, can the question of the role of race and ethnicity in capital cases be fully addressed.

Less than two years later, after the Committee issued its recommendations, the Pennsylvania Supreme Court created the Interbranch Commission for Gender, Racial, and Ethnic Fairness to implement the Committee’s recommendations. One of the remedial strategies pursued by the Commission is the development of a data collection system for death penalty cases. Another strategy pursued by the Commission is ethnically diversifying juries as well as court staff. The Commission, however, has yet to implement the vast majority of the Committee’s recommendations.

Because Pennsylvania has not conducted a more comprehensive study designed to determine the extent to which racial and ethnic bias exists in Pennsylvania’s capital punishment system, the full extent of the issue cannot be known nor can steps be taken effectively to eliminate the role of race in capital sentencing. The Commonwealth of Pennsylvania should therefore adopt, at a minimum, the Pennsylvania Death Penalty Assessment Team’s recommendation, found on page vii of the Executive Summary, to complete a study to determine the existence or non-existence of unacceptable disparities—racial, socio-economic, geographic, or otherwise—in its death penalty system and to develop and implement proposals to eliminate any such disparities.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant was mentally retarded at the time of the offense. In this chapter, we reviewed Pennsylvania’s laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental retardation and the death penalty.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on mental retardation.

<b>Mental Retardation</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Jurisdictionsshould bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.	X				
<b>Recommendation #2:</b> All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.		X			
<b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client’s mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	

Mental Retardation (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<b>Recommendation #4:</b> For cases commencing after <i>Atkins v. Virginia</i> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.		X				
<b>Recommendation #5:</b> The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.		X				
<b>Recommendation #6:</b> During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.					X	
<b>Recommendation #7:</b> The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.		X				

Five years after *Atkins v. Virginia*, the Pennsylvania Legislature has yet to adopt a statute banning the execution of mentally retarded individuals. Nonetheless, in accordance with *Atkins*, Pennsylvania law permits a death-row inmate to raise a claim of mental retardation as a bar to execution either pre-trial or post-conviction.

Pennsylvania comports with some of the ABA recommendations on mental retardation, including that:

- Pennsylvania courts adhere to the American Association on Intellectual and Developmental Disabilities (AAIDD) definition of mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills [that] . . . originates before age 18”; and
- While the burden of proof is on the defendant to prove mental retardation, s/he is only required to prove mental retardation by a preponderance of the evidence.

We also reviewed Pennsylvania's laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the

ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

The following chart summarizes Pennsylvania’s overall compliance with the ABA’s policies on mental illness.

<b>Mental Illness</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.		X			
<b>Recommendation #2:</b> During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X	
<b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	

<b>Mental Illness (Con't.)</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #4:</b> Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.				X	
<b>Recommendation #5:</b> Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.				X	
<b>Recommendation #6:</b> Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
<b>Recommendation #7:</b> The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		

<b>Mental Illness (Con't.)</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #8:</b> To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
<b>Recommendation #9:</b> Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.			X		
<b>Recommendation #10:</b> The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.	X				
<b>Recommendation #11:</b> The jurisdiction should stay post-conviction proceedings where 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 such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.			X		

<b>Mental Illness (Con't.)</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #12:</b> The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.			X			
<b>Recommendation #13:</b> Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.				X		

The Commonwealth of Pennsylvania has taken limited steps to protect the rights of individuals with mental disorders or disabilities by educating law enforcement officials and prison authorities about mental illness and by adopting certain relevant court procedures. For example, as part of their basic training curriculum, all law enforcement officers receive instruction on identifying individuals with mental illness, including the characteristics of schizophrenia, bipolar disorder, depression, personality disorders, impulse control disorders and paraphilias. Additionally, Pennsylvania has adopted some mechanisms, such as the provision for the filing of “next friend” petitions, to protect individuals with mental disorders or disabilities from waivers that are a product of their mental or disability.

Despite these steps, the Commonwealth of Pennsylvania fails to provide a system in which the rights of individuals with mental illness are fully protected:

- The Commonwealth of Pennsylvania does not formally commute a death sentence upon a finding that the inmate is incompetent to proceed on factual matters requiring the prisoner’s input;
- The Commonwealth of Pennsylvania does not permit the courts to stay post-conviction proceedings for an incompetent death-row inmate and instead may appoint a “next friend” to pursue post-conviction relief on behalf of the inmate; and

- The Commonwealth of Pennsylvania does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing, nor does it have a pattern jury instruction on the administration of medication for a mental disorder or disability.

Based on this information, the Commonwealth of Pennsylvania should adopt the Pennsylvania Death Penalty Assessment Team's recommendation, as detailed on page vii, that the Commonwealth ensure that the defense has access to sufficient investigative and expert resources to investigate and fully develop its claims, including potential mental retardation and mental disability claims.



## INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project has conducted state assessments in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, and Tennessee. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practices use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal *habeas corpus*, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been conducted by a state-based Assessment Team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings of each team provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Pennsylvania death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Pennsylvania Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions, including their belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Pennsylvania's capital punishment system.

## **Members of the Pennsylvania Death Penalty Assessment Team**

### **Chair, Professor Anne Bowen Poulin**

Professor Poulin is a Professor of Law at Villanova University School of Law. Professor Poulin teaches Criminal Procedure, Evidence, and Trial Practice. Professor Poulin also has taught at the Illinois Institute of Technology/Chicago-Kent College of Law, served as Assistant United States Attorney in Chicago, Illinois, and taught at the Wayne State University Law School. Professor Poulin's scholarly work includes: *Party Admissions in Criminal Cases: Should the Government Have to Eat its Words?*, 87 Minn. L. Rev. 401 (2002) and *Prosecutorial Inconsistency, Estoppel and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423 (2001). Professor Poulin received her B.A. from Radcliffe College at Harvard University, J.D. from the University of Maine School of Law, and LL.M. from the University of Michigan Law School.

### **Hon. Frank T. Hazel**

Judge Hazel was appointed to the Court of Common Pleas in Delaware County in 1981 by Gov. Dick Thornburgh and was recently elected to his third ten-year term commencing in 2002. Prior to his elevation to the Bench, Judge Hazel served as District Attorney of Delaware County for six years. During his tenure as District Attorney, Judge Hazel served as President of the Pennsylvania District Attorneys' Association and Chairman of the Pennsylvania District Attorneys' Association's Task Force on Wire-tapping and Electronic Surveillance. He has been a member of several committees of the Pennsylvania Supreme Court and was a member of the Pennsylvania Commission on Sentencing. Judge Hazel is a graduate of St. Joseph's University and Villanova School of Law.

### **Mary MacNeil Killinger**

Ms. Killinger is the Deputy District Attorney for Montgomery County, Pennsylvania. She has been the Chief of the Appellate Division since 1985, and previously was the former Chief of Sex Crimes and former Chief of Trials for Montgomery County. Ms. Killinger clerked for the Honorable Horace A. Davenport on the Common Court of Pleas of Montgomery County. She is a member of Order of the Coif and the Villanova J. Willard O'Brien American Inn of Court. She received her B.A. from Notre Dame of Maryland, her M.Litt. from the University of Pittsburgh and her J.D. from Villanova University School of Law.

### **Gregory P. Miller**

Mr. Miller is a founding shareholder at Miller, Alfano & Raspanti, P.C. His areas of concentration include complex commercial litigation in securities, insurance, reinsurance, employment, and mass tort areas, as well as white-collar criminal defense. Mr. Miller's past positions include Chief of the Criminal Division of the United States Attorney's Office in Philadelphia from 1983 to 1985, Assistant United States Attorney at the same office from 1979 to 1983, and Lieutenant in the United States Navy, JAGC, from 1976 to 1979. Recently, Pennsylvania Law Weekly identified Mr. Miller as one of the 50 most influential minority attorneys in the Commonwealth of Pennsylvania. Mr. Miller received his B.A. from Mount Union College and his J.D. from Case Western Reserve University Law School.

**David Rudovsky**

Mr. Rudovsky is a Senior Fellow at the University of Pennsylvania Law School teaching Criminal Law, Evidence, and Constitutional Criminal Procedure. Professor Rudovsky is a Founding Partner of Kairys, Rudovsky, Messing & Feinberg, LLP, a public interest firm that is nationally recognized for civil rights litigation. He also served in several capacities at the Defender Association of Philadelphia. Professor Rudovsky is the author of *The Law of Arrest, Search and Seizure in Pennsylvania* (2003) and co-author of *Criminal Law in Pennsylvania* (2001). He received his B.A. from Queens College and LL.B. from New York University School of Law.

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## CHAPTER ONE

### AN OVERVIEW OF PENNSYLVANIA'S DEATH PENALTY SYSTEM

#### I. DEMOGRAPHICS OF PENNSYLVANIA'S DEATH ROW

##### A. *Historical Perspective*

Since the death penalty's reinstatement in 1978, the Commonwealth of Pennsylvania has executed three death-row inmates—Keith Zettlemyer and Leon Moser in 1995, and Gary Heidnick in 1999.<sup>6</sup> All three inmates “volunteered” for execution, forgoing the right to appeal their death sentence.<sup>7</sup> All three inmates also were white males; two were executed for the murder of a white victim and one was executed for the murder of a black victim.<sup>8</sup>

During this same period, the Commonwealth has exonerated at least five death-row inmates.<sup>9</sup>

##### B. *A Current Profile of Pennsylvania's Death Row*

As of September 4, 2007, there were 228 inmates on Pennsylvania's death row.<sup>10</sup> Of these 225 inmates, 137 are black, 71 are white, 18 are Hispanic, and two are Asian.<sup>11</sup> Only five are women.<sup>12</sup> Their ages range from 25 to 71 years old.<sup>13</sup>

Over half of the inmates—118 to be exact—were sentenced to death in Philadelphia County.<sup>14</sup> Of these 118 inmates, 97 are black, 10 are white, seven are Hispanic, and two are Asian.<sup>15</sup>

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<sup>6</sup> See Death Penalty Information Center, Searchable Database of Executions, available at <http://www.deathpenaltyinfo.org/executions.php> (last visited Sept. 27, 2007) (Search only “State” scroll box for “PA”).

<sup>7</sup> See Amnesty International USA, The Death Penalty Can Never Be Voluntary, available at [http://www.amnestyusa.org/Fact\\_Sheets/The\\_Death\\_Penalty\\_Can\\_Never\\_be\\_Voluntary/page.do?id=1101092&n1=3&n2=28&n3=99](http://www.amnestyusa.org/Fact_Sheets/The_Death_Penalty_Can_Never_be_Voluntary/page.do?id=1101092&n1=3&n2=28&n3=99) (last visited Sept. 27, 2007).

<sup>8</sup> *Id.*

<sup>9</sup> See Death Penalty Information Center, Innocence: List of Those Freed from Death Row, The Innocence List, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109#25> (last visited Sept. 27, 2007). The five individuals exonerated include: Neil Ferber, William Nieves, Thomas H. Kimbell, Jr., Nicholas Yarris, and Harold Wilson. The definition of innocence used by the Death Penalty Information Center in placing defendants on the list of exonerated individuals is that they “must have been convicted, sentenced to death and subsequently either—(a) their conviction was overturned and they were acquitted at re-trial or all charges were dropped; or (b) they were given an absolute pardon by the Governor based on new evidence of innocence.” *Id.*

<sup>10</sup> PENNSYLVANIA DEP'T OF CORRECTIONS, PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF SEPTEMBER 4, 2007, available at [http://www.cor.state.pa.us/portal/lib/portal/Execution\\_List.pdf](http://www.cor.state.pa.us/portal/lib/portal/Execution_List.pdf) (last visited Sept. 27, 2007).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## II. STATUTORY EVOLUTION OF PENNSYLVANIA’S DEATH PENALTY SCHEME

### A. 1974 Death Penalty Statute

Shortly after the United States Supreme Court’s 1972 decision in *Furman v. Georgia*,<sup>16</sup> the Pennsylvania Supreme Court declared the Commonwealth’s death penalty statute<sup>17</sup> unconstitutional.<sup>18</sup> Consequently, in 1974, the Pennsylvania Legislature passed a series of amendments to the Pennsylvania Consolidated Statutes, aimed at restoring the death penalty in the Commonwealth while avoiding the constitutional infirmities of the original statute.

The 1974 death penalty statute, section 1311 of the Pennsylvania Consolidated Statutes, limited imposition of the death penalty to cases of first-degree murder.<sup>19</sup> Prior to the 1974 statute, “murder of the first degree” was defined as:

A criminal homicide . . . committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing . . . if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.”<sup>20</sup>

In 1974, the Pennsylvania Legislature amended the definition of first-degree murder to state: “A criminal homicide constitutes murder of the first degree when . . . it is committed by an intentional killing.”<sup>21</sup> The new statute defined “intentional killing” as “killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”<sup>22</sup>

The 1974 death penalty statute also set forth sentencing provisions for the offense of murder, including first-degree murder. Under the statute, if a defendant was convicted of first-degree murder, the court was required to hold a sentencing hearing.<sup>23</sup> The jury impaneled for the criminal trial would remain the same at the sentencing hearing, unless the defendant pled guilty or waived his/her right to a jury trial.<sup>24</sup> At the sentencing hearing, the imposition of a death sentence was to be based on the presence or absence of any aggravating circumstances proven beyond a reasonable doubt and/or mitigating circumstances proven by a preponderance of the evidence.<sup>25</sup>

The 1974 statute identified the following nine factors as aggravating circumstances:

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<sup>16</sup> 408 U.S. 238 (1972).

<sup>17</sup> Act of June 24, 1939, P.L. 872, § 701, as amended, 18 P.S. § 4701. This Act was originally passed in 1939.

<sup>18</sup> *Commonwealth v. Bradley*, 295 A.2d 842 (Pa. 1972).

<sup>19</sup> 18 PA. CONS. STAT. § 1311(d).

<sup>20</sup> 1972 P.L. 1482, No. 334, §1, effective June 6, 1973.

<sup>21</sup> 1974 P.L. 213, No. 46, § 4(a).

<sup>22</sup> *Id.* at § 4(d).

<sup>23</sup> *Id.* at § 3(c).

<sup>24</sup> *Id.* at § 3(e).

<sup>25</sup> *Id.* at § 3(c).

- (1) The victim was a fireman, peace officer or public servant concerned in official detention . . . , who was killed in the performance of his[/her] duties;
- (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 [the] defendant was engaged in the hijacking of an aircraft;
- (5) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his[/her] 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; and
- (9) 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.<sup>26</sup>

The 1974 statute recognized the following three factors as mitigating circumstances:

- (1) The age, lack of maturity, or youth of the defendant at the time of the killing;
- (2) The victim was a participant in or consented to the defendant's conduct . . . or was a participant in or consented to the killing; and
- (3) The defendant was under duress although not such duress as to constitute a defense to prosecution.<sup>27</sup>

At the sentencing hearing, each party was permitted to present oral arguments and to introduce evidence relevant to any aggravating and mitigating circumstances that had not been raised at trial.<sup>28</sup> If at least one aggravating circumstance was found, but no mitigating circumstances, the court was required to sentence the defendant to death.<sup>29</sup> Alternatively, if no aggravating circumstances were found or if at least one mitigating circumstance was found, the jury was required to sentence the defendant to life imprisonment.<sup>30</sup> If the jury could not reach agreement on the aggravating and mitigating

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<sup>26</sup> *Id.* at § 3(d)(1).

<sup>27</sup> *Id.* at § 3(d)(2).

<sup>28</sup> *Id.* at § 3(c).

<sup>29</sup> *Id.* at § 3(d).

<sup>30</sup> *Id.*

circumstances and the court believed that further deliberations would not result in agreement, the court could discharge the jury and, if no retrial was directed, sentence the defendant to life imprisonment.<sup>31</sup> Any disagreement by the jury as to the aggravating and mitigating circumstances did not “impeach” or affect the validity of the guilty verdict.<sup>32</sup>

Within ten days of the defendant’s sentencing, the 1974 statute required the court clerk to “transmit a full and complete record of the trial to the Governor.”<sup>33</sup> The statute also required the Pennsylvania Supreme Court to automatically review the death sentence within sixty days after the sentencing court certified the record.<sup>34</sup> If the Court invalidated the death sentence, the defendant had to be sentenced to life imprisonment.<sup>35</sup>

### *B. 1978 Amendment to the Death Penalty Statute*

In November 1977, in the wake of the United States Supreme Court’s decision in *Gregg v. Georgia*<sup>36</sup> and a number of other death penalty decisions,<sup>37</sup> the Pennsylvania Supreme Court declared the Commonwealth’s 1974 death penalty statute unconstitutional, finding that the statute “so narrowly limits the circumstances which the jury may consider mitigating that it precludes the jury from a constitutionally adequate consideration of the character and record of the defendant.”<sup>38</sup> In response to the Court’s decision, the Pennsylvania General Assembly adopted new legislation, effectively replacing the Commonwealth’s 1974 death penalty statute.<sup>39</sup>

Where the 1974 statute dealt with sentencing procedures for murder in general, including first-degree murder, the 1978 statute amended the sentencing procedures to specifically address first-degree murder. The amended death penalty statute, however, continued to limit the imposition of the death penalty to cases of first-degree murder,<sup>40</sup> and to require a separate sentencing hearing in the event the defendant was convicted of first-degree murder.<sup>41</sup> In the case of a guilty plea or a trial by the judge, the court was required to impanel a jury for the sentencing hearing, unless the defendant waived his/her right to a jury with the consent of the Commonwealth, in which case the trial judge would determine the penalty in the same manner as a jury.<sup>42</sup>

The 1978 amendment also retained provisions allowing counsel to present evidence and arguments for or against a death sentence.<sup>43</sup> However, under the 1978 statute such

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<sup>31</sup> *Id.* at § 3(c).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at § 3(f).

<sup>34</sup> *Id.* at § 3(g).

<sup>35</sup> *Id.*

<sup>36</sup> 428 U.S. 153 (1976).

<sup>37</sup> *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>38</sup> *Commonwealth v. Moody*, 382 A.2d 442, 447 (Pa. 1977), *cert. denied*, 438 U.S. 914 (1978).

<sup>39</sup> 1978 P.L. 756, No. 1978-141. The 1978 statute was upheld by the United States Supreme Court in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

<sup>40</sup> 1978 P.L. 756, No. 141.

<sup>41</sup> 1978 P.L. 756, No. 141, § 1(a)(1).

<sup>42</sup> 1978 P.L. 756, No. 141, § 1(b).

<sup>43</sup> *Id.* at § 1(a)(2)-(3).

evidence could pertain to any matter deemed relevant and admissible as to “the question of the sentence to be imposed,” including “matters relating to any of the [statutory] aggravating or mitigating circumstances.”<sup>44</sup>

Additionally, the 1978 amendment revised the aggravating and mitigating circumstances and provided that a defendant’s “significant history of felony convictions involving the use or threat of violence to the person” constituted a separate aggravating circumstance.<sup>45</sup> However, the 1978 amendment ceased to recognize the killing of a non-prosecution witness to a felony committed by the defendant for the purpose of preventing testimony as an aggravating circumstance, limiting the aggravating circumstance to killings where the victim was a prosecution witness.<sup>46</sup>

The 1978 amendment substantially revised the list of mitigating circumstances to include:

- (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[/her] conduct or to conform his[/her] 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 . . . , or acted in 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; and
- (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his[/her] offense.<sup>47</sup>

Under the 1978 amendment, the imposition of a death sentence continued to hinge on the presence or absence of any aggravating circumstances, which had to be proven beyond a reasonable doubt, and/or mitigating circumstances, which had to be proven by a preponderance of the evidence.<sup>48</sup> The amended statute also continued to require a death sentence if the jury found at least one aggravating circumstance but no mitigating circumstances.<sup>49</sup> However, under the 1978 amendment, the jury was required to reach a unanimous decision as to each aggravating circumstance.<sup>50</sup> In addition, if the jury found that the aggravating circumstances outweighed the mitigating circumstances, the court

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<sup>44</sup> *Id.* at § 1(a)(2).

<sup>45</sup> *Id.* at § 1(d)(9).

<sup>46</sup> *Id.* at § 1(d)(5).

<sup>47</sup> *Id.* at § 1(e).

<sup>48</sup> *Id.* at § 1(c)(1).

<sup>49</sup> *Id.* at § 1(c)(1)(iv).

<sup>50</sup> *Id.*

was required to sentence the defendant to death.<sup>51</sup> In all other cases, the verdict had to be life imprisonment.<sup>52</sup>

The 1978 statute also established procedures by which the jury had to render its sentencing decision. After deliberating and rendering its verdict, the jury had to set forth in writing whether its sentence was death or life imprisonment.<sup>53</sup> If the sentence was death, the jury had to designate on a court-issued form the findings upon which the sentence was based.<sup>54</sup> The court was required to record its sentence and “thereafter impose upon the defendant the sentence fixed by the jury.”<sup>55</sup> However, if the court was “of the opinion that further deliberation [would] not result in a unanimous agreement as to the sentence,” it could discharge the jury, “in which case the court [had to] sentence the defendant to life imprisonment.”<sup>56</sup>

The 1978 statute also retained the requirement that the Pennsylvania Supreme Court automatically review the death sentence.<sup>57</sup> However, the 1978 amendment removed the sixty-day deadline for such review, and required the Court to affirm the sentence unless it determined that (a) the sentence was the “product of passion, prejudice or any other arbitrary factor;” (b) the evidence failed to support the finding of an aggravating circumstance; or (c) the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the defendant’s character and record.<sup>58</sup> If the Court did not affirm the death sentence, it could vacate the sentence and impose a sentence of life imprisonment.<sup>59</sup> If the Court upheld the death sentence, the court clerk was required to transmit to the Governor a full and complete record of the trial, the sentencing hearing, the imposition of the sentence, and the Court’s review.<sup>60</sup>

### *C. Subsequent Amendments to Pennsylvania’s Death Penalty Statute*

#### 1. 1980 Recodification

In 1980, the Pennsylvania General Assembly adopted legislation transferring Chapter 13 of Title 18 of the Pennsylvania Code to Chapter 97 of Title 42 of the Pennsylvania Code. As transferred, the death penalty statute, section 1311 of the Pennsylvania Consolidated Statutes, was renumbered as Section 9711.<sup>61</sup>

#### 2. 1986 Amendment

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at § 1(f).

<sup>54</sup> *Id.* at § 1(f)(1).

<sup>55</sup> *Id.* at § 1(g).

<sup>56</sup> *Id.* at § 1(c)(1)(v).

<sup>57</sup> *Id.* at § 1(h)(1).

<sup>58</sup> *Id.* at § 1(h)(3).

<sup>59</sup> *Id.* at § 1(h)(2).

<sup>60</sup> 1980 P.L. No. 142.

<sup>61</sup> 1980 P.L. 693, No. 142, § 401(a). Minor edits also were made to the statutory aggravating circumstances so that any references to other parts of the Pennsylvania Code corresponded to the new ones.

In 1986, the General Assembly amended the death penalty statute to expand the list of aggravating circumstances, adding the following:

- (1) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue; and
- (2) The defendant has been convicted of voluntary manslaughter, . . . committed either before or at the time of the offense at issue.<sup>62</sup>

### 3. 1988 Amendment

In 1988, the General Assembly amended the death penalty statute to provide that if the Pennsylvania Supreme Court reviewed the case and decided to vacate the death sentence because (1) there was insufficient evidence to support the aggravating circumstances or (2) the death sentence was disproportionate to the penalty imposed in similar cases, then the court was required to impose a sentence of life imprisonment on remand. If, however, the Pennsylvania Supreme Court vacated the death sentence for any other reason, the case had to be remanded for a new sentencing hearing.<sup>63</sup> The 1988 amendment maintained the same three instances in which the Supreme Court could not affirm a death sentence, but for the second provision, stated that it could not affirm a death sentence if the evidence failed to support the finding of “at least one” aggravating circumstance.<sup>64</sup>

### 4. 1989 Amendment

In 1989, the General Assembly amended the death penalty statute to expand the list and scope of the aggravating circumstances. Changes made to the first statutory aggravating circumstance included expanding the range of individuals encompassed by the statute and applying the statute to killings which were not only “in the performance” of the public servant’s duties, but also which were “a result of his[/her] official position.”<sup>65</sup> The amended provision read as follows:

The victim was a fireman, police officer, public servant concerned in official detention, 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[/her] duties, who was killed in the performance of his[/her] duties or as a result of his[/her] official position.<sup>66</sup>

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<sup>62</sup> 1986 P.L. No. 87, § 1.

<sup>63</sup> S.B. 1304, § 2, 172d Leg., Reg. Sess. (Pa. 1988).

<sup>64</sup> *Id.*

<sup>65</sup> S.B. 940, 173d Leg., Reg. Sess. (Pa. 1989).

<sup>66</sup> *Id.*

In addition, the General Assembly added the following four aggravating circumstances:

- (1) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa. Cons. Stat. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa. Cons. Stat. § 7508 (relating to drug trafficking sentencing and penalties);
- (2) 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. Cons. Stat. § 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;
- (3) 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. Cons. Stat. § 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; and
- (4) The victim was a child under 12 years of age.<sup>67</sup>

##### 5. 1995 Amendments

In 1995, the General Assembly amended the death penalty statute on three occasions. The first 1995 amendment provided that evidence may be presented at the sentencing hearing concerning the victim and the impact of the victim's death on his/her family.<sup>68</sup> The amendment also required the court to instruct the jury that if it found at least one aggravating circumstance and one mitigating circumstance, it must consider, in weighing the aggravating and mitigating circumstances, "any evidence presented about the victim and the impact of the murder on the victim's family."<sup>69</sup>

The second 1995 amendment included several changes. In addition to minor editorial revisions to the list of aggravating circumstances,<sup>70</sup> the amendment broadened the two aggravating circumstances added in 1986 to include convictions for murder in

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<sup>67</sup> *Id.*

<sup>68</sup> S.B. 54, 179th Leg., 1st Spec. Sess. (Pa. 1995).

<sup>69</sup> *Id.*

<sup>70</sup> H.B. 1, § 1, 179th Leg., 1st Spec. Sess. (Pa. 1995). For example, in section 9711(d)(1), the word "fireman" was replaced with "firefighter." *Id.*

Pennsylvania and in “any” other jurisdiction and convictions for voluntary manslaughter “or a substantially equivalent crime in any other jurisdiction.”<sup>71</sup>

Additionally, the amendment established a number of post-conviction procedures for carrying out a death sentence.<sup>72</sup> Under the new amendment, the Pennsylvania Supreme Court Prothonotary was required to transmit the record to the Governor within ninety days of the Court upholding the death sentence.<sup>73</sup> Within ninety days after receipt of the record, the Governor was required to pardon the inmate, commute the sentence, or issue to the Secretary of Corrections a warrant setting forth the week for execution, which was to be no later than thirty days after the date the warrant was signed.<sup>74</sup> In the event of a reprieve or judicial stay of the execution, the Governor was required to issue a new warrant within thirty days after the termination of the reprieve or judicial stay of execution.<sup>75</sup> If the Governor failed to issue a warrant, the Secretary of Corrections was required to schedule and carry out the execution no later than sixty days from the date by which the Governor was required to sign the warrant.<sup>76</sup>

The third 1995 amendment added a seventeenth aggravating circumstance: “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.”<sup>77</sup>

## 6. 1997 Amendments

In 1997, the General Assembly amended the death penalty statute twice.

The first 1997 amendment added an eighteenth aggravating circumstance, which provided: “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 . . . 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.”<sup>78</sup>

The second time, the General Assembly amended the statute to remove one of the bases by which the Pennsylvania Supreme Court could vacate the death sentence (i.e., a death sentence could be vacated if the Court determined that the sentence was excessive or disproportionate to the penalty imposed in similar cases).<sup>79</sup> Accordingly, under the second 1997 amendment, the Court was only permitted to vacate a death sentence if it determined that (a) the sentence was the product of passion, prejudice or any other

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<sup>71</sup> *Id.* at § 1(d)(11)-(12).

<sup>72</sup> In addition to the changes that will be discussed, the Pennsylvania Legislature adopted procedures governing the method and process for execution within the death sentencing statute, which were amended and transferred in 1998 to different sections of the Pennsylvania Statutes. *Id.*

<sup>73</sup> H.B. 1, § 1(i), 179th Leg., 1st Spec. Sess. (Pa. 1995).

<sup>74</sup> *Id.* at § 1(j).

<sup>75</sup> *Id.* at § 1(j)(1).

<sup>76</sup> *Id.* at § 1(j)(3).

<sup>77</sup> S.B. 72, § 1, 179th Leg., 1st Spec. Sess. (Pa. 1995).

<sup>78</sup> H.B. 12, § 1, 181st Leg., Reg. Sess. (Pa. 1997).

<sup>79</sup> S.B. 423, 181st Leg., Reg. Sess. (Pa. 1997).

arbitrary factor; or (b) the evidence failed to support the finding of at least one of the aggravating circumstances enumerated in the death penalty statute.<sup>80</sup>

### 7. 1998 Amendment

In 1998, the General Assembly repealed the provisions of the second 1995 amendment relating to post-conviction procedures for the imposition of the death sentence, and adopted new legislation in differing sections of the Pennsylvania Consolidated Statutes to address those same matters, as well as methods of execution.<sup>81</sup>

### 8. 1999 Amendment

In 1999, the General Assembly amended the death penalty statute to modify the deadline by which the Pennsylvania Supreme Court Prothonotary had to transmit the record to the Governor. Instead of ninety days after the Court upheld the death sentence as had been required under a 1995 amendment to the provision, the transmission was required to be provided within thirty days of (a) “the expiration of the time period for filing a petition for writ of *certiorari* or extension thereof where neither [was] filed” within such period, (b) “the denial of a petition for writ of *certiorari*,” or (c) “the disposition of the appeal by the United States Supreme Court, if that Court grant[ed] the petition for writ of *certiorari*.”<sup>82</sup> In addition to transmitting a complete record of the trial, sentencing hearing, and imposition of sentence, the Prothonotary was also required to transmit the opinion and order of the Pennsylvania Supreme Court.<sup>83</sup>

## III. THE PROGRESSION OF A DEATH PENALTY CASE FROM ARREST TO EXECUTION

### A. *The Pre-Trial Process*

#### 1. The Commencement of a Capital Prosecution

The Commonwealth of Pennsylvania defines murder of the first-degree, the Commonwealth’s only capital offense, as “a criminal homicide [which is] . . . committed by an intentional killing.”<sup>84</sup> The law further defines an “intentional killing” as a “killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”<sup>85</sup>

Under Pennsylvania law, a capital prosecution may be commenced by (1) the filing of a written complaint, followed by the issuance of an arrest warrant; or (2) a warrantless arrest, followed by the filing of a written complaint.<sup>86</sup> The complaint must denote “a summary of the facts sufficient to advise the defendant of the nature of the offense

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<sup>80</sup> *Id.*

<sup>81</sup> For example, one new section required that the warrant specify an exact date for the execution, rather than a week under the prior formulation, and allowing the date to be any time within sixty (rather than thirty) days after the date the warrant was signed. S.B. 252, 182d Leg., Reg. Sess. (Pa. 1998).

<sup>82</sup> H.B. 963, 183d Leg., Reg. Sess. (1999).

<sup>83</sup> *Id.*

<sup>84</sup> 18 PA. CONS. STAT. § 2502(a) (2006).

<sup>85</sup> 18 PA. CONS. STAT. § 2502(d) (2006).

<sup>86</sup> PA. R. CRIM. P. 502 cmt.

charged.”<sup>87</sup> When the complaint charges a capital offense that is supported by probable cause, the court must issue an arrest warrant.<sup>88</sup>

## 2. Preliminary Arraignment

Generally, each defendant is entitled to a preliminary arraignment.<sup>89</sup> At the preliminary arraignment, a copy of the complaint must be provided to the defendant.<sup>90</sup> If the defendant was arrested pursuant to a warrant, the court also must provide the defendant with a copy of the warrant and any supporting affidavits.<sup>91</sup>

During the arraignment, the judge must read the complaint alleging the capital offense to the defendant,<sup>92</sup> and notify the defendant of: (1) his/her right to counsel, be it court-appointed or otherwise, (2) his/her right to a preliminary hearing, and (3) the conditions of bail, if any.<sup>93</sup> So long as the defendant does not waive the preliminary hearing, the judge also must set a date for a preliminary hearing.<sup>94</sup>

## 3. Preliminary Hearing

The purpose of the preliminary hearing is to determine whether the Commonwealth can establish a *prima facie* case of the defendant’s guilt.<sup>95</sup> The defendant generally is permitted to attend the hearing and may be represented by counsel.<sup>96</sup> The defendant also may present evidence and witnesses, cross-examine witnesses, inspect physical evidence offered against him/her, and testify on his/her own behalf.<sup>97</sup>

If the Commonwealth does not establish a *prima facie* case of the defendant’s guilt, the defendant will be discharged.<sup>98</sup> Conversely, if the Commonwealth does establish a *prima facie* case of the defendant’s guilt, the Commonwealth will file an information (i.e., a formal charge) with the court of common pleas and the defendant will proceed to his/her arraignment.<sup>99</sup>

## 4. The Arraignment and the Notice of Aggravating Circumstances

The defendant’s arraignment must be held no later than ten days after the filing of the information.<sup>100</sup> During the arraignment, the court must advise the defendant of (1) his/her right to counsel, (2) the nature of the charges found in the information, and (3)

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<sup>87</sup> PA. R. CRIM. P. 504(6)(a).

<sup>88</sup> PA. R. CRIM. P. 509, 513(B).

<sup>89</sup> PA. R. CRIM. P. 519(A)(1).

<sup>90</sup> PA. R. CRIM. P. 540(B).

<sup>91</sup> PA. R. CRIM. P. 540(C).

<sup>92</sup> PA. R. CRIM. P. 540(E).

<sup>93</sup> PA. R. CRIM. P. 540(E)(1)-(3).

<sup>94</sup> PA. R. CRIM. P. 540(F).

<sup>95</sup> PA. R. CRIM. P. 543

<sup>96</sup> PA. R. CRIM. P. 542(C)(1).

<sup>97</sup> PA. R. CRIM. P. 542(C)(2)-(4).

<sup>98</sup> PA. R. CRIM. P. 543(B).

<sup>99</sup> PA. R. CRIM. P. 543(B), 560(A), 571(A).

<sup>100</sup> PA. R. CRIM. P. 571(A).

his/her right to file motions, including those requesting discovery.<sup>101</sup> A defendant may waive his/her appearance at the arraignment.<sup>102</sup>

At or before the arraignment, the Commonwealth must file and provide a copy of the “Notice of Aggravating Circumstances,” which sets forth the aggravating circumstances that the Commonwealth intends to prove at the sentencing hearing.<sup>103</sup> However, for cause shown or if the Commonwealth becomes aware of an aggravating circumstance after arraignment, the deadline for providing notice may be extended.<sup>104</sup>

## 5. Pleas and Plea Agreements

Before trial, the defendant must plead in open court. The defendant may plead not guilty, guilty, or *nolo contendere*.<sup>105</sup> In order for the defendant to plead *nolo contendere*, s/he must obtain the consent of the court.<sup>106</sup> If the defendant refuses to enter a plea, the court is required to enter a plea of not guilty on the defendant’s behalf.<sup>107</sup> When a defendant pleads guilty or *nolo contendere* to the capital offense, the court, before accepting the plea, must determine that the plea is “voluntarily and understandingly tendered.”<sup>108</sup>

The parties are free to enter into a plea agreement. If the parties reach a plea agreement, they must state “on the record in open court, in the presence of the defendant, the terms of the agreement.”<sup>109</sup> Only for good cause and with the consent of all parties may the specific conditions of the agreement be kept confidential.<sup>110</sup> Before accepting a plea agreement, the judge must determine whether the defendant “understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or the plea of *nolo contendere* is based.”<sup>111</sup>

## 6. Notice of the Defendant’s Intention to Offer an Alibi Defense

When the defendant intends to offer evidence of an alibi in his/her defense, s/he must file with the court and serve on the Commonwealth a written notice of this intent.<sup>112</sup> The notice must detail the location the defendant claims to have been at the time of the offense and the names and address of any witnesses the defendant intends to present in support of the alibi at trial.<sup>113</sup> Within ten days of receiving the notice, the Commonwealth must file and provide the defense with the names and addresses of any witnesses who may refute the defendant’s alibi.<sup>114</sup>

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<sup>101</sup> PA. R. CRIM. P. 571(C)(1)-(3).

<sup>102</sup> PA. R. CRIM. P. 571(D).

<sup>103</sup> PA. R. CRIM. P. 802 cmt.

<sup>104</sup> PA. R. CRIM. P. 802.

<sup>105</sup> PA. R. CRIM. P. 590(A)(1).

<sup>106</sup> PA. R. CRIM. P. 590(A)(2).

<sup>107</sup> *Id.*

<sup>108</sup> PA. R. CRIM. P. 590(A)(3).

<sup>109</sup> PA. R. CRIM. P. 590(B)(1).

<sup>110</sup> *Id.*

<sup>111</sup> PA. R. CRIM. P. 590(B)(2).

<sup>112</sup> PA. R. CRIM. P. 567(A).

<sup>113</sup> PA. R. CRIM. P. 567(A)(2).

<sup>114</sup> PA. R. CRIM. P. 567(C).

Failure of either party to comply with this notice requirement may result in the court excluding evidence, granting a continuance, or issuing any order “as the interests of justice require.”<sup>115</sup>

#### 7. Notice of the Defendant’s Intention to Raise the Issue of Insanity or Mental Infirmity or to Provide Expert Evidence of a Mental Condition

When the defendant intends to rely on an insanity or mental infirmity defense, s/he must file with the court and provide written notice of this intent to the Commonwealth.<sup>116</sup> The notice must specify the nature and extent of the alleged insanity or infirmity, its duration, and the names and addresses of any witnesses, including experts, the defendant plans to have testify in support of the defense.<sup>117</sup>

Similarly, if the defendant intends to introduce expert evidence of a mental condition at either the guilt or sentencing phase of the capital trial, s/he must file with the court and provide the Commonwealth with written notice of this intent.<sup>118</sup> Again, the notice must specify the nature and extent of the alleged disease, defect, or mental condition, its duration, and the names and addresses of any expert witnesses whose evidence the defendant plans to introduce.<sup>119</sup>

Within ten days of receiving notice of the defendant’s insanity or mental infirmity defense, or the defendant’s intent to introduce expert evidence of a mental condition, the Commonwealth must file and provide the defense with the names and addresses of any witnesses it plans to call to refute the defendant’s claims.<sup>120</sup>

If the defendant or Commonwealth fails to comply with these notice requirements, the court may exclude such evidence, grant a continuance, or issue any other order required in “the interest of justice.”<sup>121</sup>

#### 8. Pre-Trial Conference

Anytime after the information has been filed, the court, on its own motion or in response to a motion by either party, may order a pre-trial conference.<sup>122</sup> During the pre-trial conference, the parties may consider:

- (1) The terms and procedures for pre-trial discovery;
- (2) The simplification or stipulation of factual issues, including admissibility of evidence;
- (3) The qualification of exhibits as evidence to avoid unnecessary delay;

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<sup>115</sup> PA. R. CRIM. P. 567(B)(1), (D)(1).

<sup>116</sup> PA. R. CRIM. P. 568(A)(1).

<sup>117</sup> PA. R. CRIM. P. 568(A)(1)(b).

<sup>118</sup> PA. R. CRIM. P. 568(A)(2).

<sup>119</sup> PA. R. CRIM. P. 568(A)(2)(b).

<sup>120</sup> PA. R. CRIM. P. 568(C).

<sup>121</sup> PA. R. CRIM. P. 568(B)(1), (D)(1).

<sup>122</sup> PA. R. CRIM. P. 570(A).

- (4) The number of witnesses who are to give testimony of a cumulative nature;
- (5) The defenses of alibi and insanity, as to which appropriate rulings may be made; and
- (6) Such other matters as may aid in the disposition of the proceeding.<sup>123</sup>

The parties are entitled to object on the record to any rulings issued by the court during the conference.<sup>124</sup>

### *B. The Capital Trial*

Capital trials are held in the court of common pleas and conducted in two phases: the guilt/innocence proceeding and, if the defendant is found guilty, the sentencing proceeding.

#### 1. The Guilt/Innocence Proceeding

All individuals charged with a capital crime possess the right to a trial by jury, although the defendant may “knowingly and intelligently” waive this right.<sup>125</sup> If the defendant waives his/her right to a jury trial, the case will be heard by the trial judge.<sup>126</sup> If, however, the defendant does not waive his/her right to a jury trial, the court, in conjunction with the Commonwealth and defense, will select twelve jurors to hear the case.<sup>127</sup> In selecting the jury for a capital trial, the Commonwealth and the defendant are each entitled to twenty preemptory challenges.<sup>128</sup>

Once empanelled, the jury’s duty is to determine whether the Commonwealth has proven that the defendant is guilty of the capital offense beyond a reasonable doubt. During the guilt/innocence phase, both the State and defense may present opening and closing arguments, as well as witnesses and other evidence.<sup>129</sup> After both sides have presented their closing arguments, the court must instruct the jury as to the law to be applied in the case.<sup>130</sup>

In rendering a verdict, the jury must do so unanimously and before the judge in open court.<sup>131</sup> If the jury finds the defendant guilty of the capital offense, the case will proceed to the second phase of a capital trial, the sentencing proceeding.<sup>132</sup>

#### 2. The Sentencing Proceeding

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<sup>123</sup> PA. R. CRIM. P. 570(A)(1)-(6).

<sup>124</sup> PA. R. CRIM. P. 570(B).

<sup>125</sup> PA. R. CRIM. P. 620.

<sup>126</sup> PA. R. CRIM. P. 621.

<sup>127</sup> PA. R. CRIM. P. 634. The defendant may waive the requirement that s/he be tried by twelve jurors. In such event, the defendant cannot be tried by less than six jurors. PA. R. CRIM. P. 641.

<sup>128</sup> PA. R. CRIM. P. 634(A)(3).

<sup>129</sup> PA. R. CRIM. P. 604(A), (B).

<sup>130</sup> PA. R. CRIM. P. 647(A).

<sup>131</sup> PA. R. CRIM. P. 648(B).

<sup>132</sup> 42 PA. CONS. STAT. 9711(a)(1) (2007).

The purpose of the sentencing proceeding is to determine whether the appropriate penalty for a defendant convicted of a capital felony is death or life imprisonment.<sup>133</sup> If the defendant was tried by a jury during the guilt/innocence proceeding, the sentencing proceeding will be conducted before the same trial judge and jury. If the defendant waived the right to a jury trial or pled guilty, the court will impanel a jury for the sentencing proceeding, unless the defendant waives his/her right to a jury trial, in which case the trial judge will determine the appropriate sentence.<sup>134</sup>

In the sentencing proceeding, any evidence deemed “relevant and admissible” to the issue of the defendant’s sentence may be presented.<sup>135</sup> This includes evidence relating to any statutory aggravating or mitigating circumstances, as well as the impact of the victim’s death on his/her family.<sup>136</sup> As in the guilt/innocence proceeding, both parties are afforded the opportunity to present closing arguments.<sup>137</sup>

Before a death sentence may be imposed, the Commonwealth must prove beyond a reasonable doubt the existence of at least one of the following statutory aggravating circumstances:

- (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[/her] duties, who was killed in the performance of his[/her] duties or as a result of his[/her] 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[/her] 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;

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<sup>133</sup> *Id.*

<sup>134</sup> 42 PA. CONS. STAT. 9711(b) (2007).

<sup>135</sup> 42 PA. CONS. STAT. 9711(a)(2) (2007).

<sup>136</sup> *Id.*

<sup>137</sup> 42 PA. CONS. STAT. 9711(a)(3) (2007).

- (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 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 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 has knowledge of the victim's pregnancy; or
- (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.<sup>138</sup>

If the jury unanimously finds at least one aggravating circumstance, the jury may consider any mitigation circumstance that has been proven by the defendant by a preponderance of the evidence. The statutory mitigating circumstances include:

- (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[/her] conduct or to conform his[/her] 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; and
- (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.<sup>139</sup>

In weighing the aggravating and mitigating circumstances, the jury must be instructed to consider "any evidence presented about the victim and about the impact of the murder on the victim's family."<sup>140</sup> If the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, it must sentence the defendant to death.<sup>141</sup> Similarly, if the jury unanimously finds that the aggravating circumstances outweigh the mitigating circumstances, it also must sentence the defendant to death.<sup>142</sup> In all other cases, the jury must impose a sentence of life imprisonment.<sup>143</sup>

The jury must set forth in writing its sentence, be it death or life imprisonment.<sup>144</sup> If the sentence is death, the jury also must set forth the bases for the sentence.<sup>145</sup> If the jury cannot reach a unanimous decision as to the sentence, the court, in its discretion, may discharge the jury and sentence the defendant to life imprisonment.<sup>146</sup>

### *C. The Direct Appeal*

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<sup>138</sup> 42 PA. CONS. STAT. 9711(d) (2007).

<sup>139</sup> 42 PA. CONS. STAT. 9711(e) (2007).

<sup>140</sup> 42 PA. CONS. STAT. 9711(c)(2) (2007).

<sup>141</sup> 42 PA. CONS. STAT. 9711(c)(1)(iv) (2007).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> 42 PA. CONS. STAT. 9711(f)(2) (2007).

<sup>145</sup> 42 PA. CONS. STAT. 9711(f)(1) (2007).

<sup>146</sup> 42 PA. CONS. STAT. 9711(c)(1)(v) (2007).

An individual who is sentenced to death receives an automatic appeal to the Pennsylvania Supreme Court.<sup>147</sup> After entry of the death sentence, the trial court clerk must transmit the record to the Supreme Court Prothonotary's Office.<sup>148</sup>

Once the Prothonotary receives the record, s/he must immediately (1) enter the matter upon the docket, (2) file the record in the Pennsylvania Supreme Court, and (3) provide notice to all parties and the Administrative Office of the docketing and the date on which the record was filed.<sup>149</sup> If the case is deferred, the Prothonotary also must provide notice to the parties of the date by which the appellant must file his/her brief.<sup>150</sup> Otherwise, the appellant must serve his/her brief within forty days of the filing of the record.<sup>151</sup> The Commonwealth then has thirty days to file its brief.<sup>152</sup>

Neither party has a right to oral argument, and oral argument will only be allowed "to the extent necessary for the appellate court to acquire an understanding of the issues presented."<sup>153</sup> However, even if the parties mutually agree to submit the case for a decision on the briefs, the court still may order the case to be argued.<sup>154</sup>

In all capital cases, regardless of whether the appellant raises these issues, the Pennsylvania Supreme Court is obligated to:

- (1) Determine whether a sentence of death is the product of passion, prejudice, or some other arbitrary factor;
- (2) Review the record for sufficiency of the evidence in support of aggravating circumstances.<sup>155</sup>

Following its review, the Pennsylvania Supreme Court is authorized to correct any errors, affirm or vacate the death sentence, or remand the case to the trial court.<sup>156</sup> The Pennsylvania Supreme Court must affirm the death sentence unless the sentence is "the product of passion, prejudice, or any other arbitrary factor," or the evidence fails to support the finding of at least one statutory aggravating circumstance.<sup>157</sup> If the Court finds that no aggravating circumstance is supported by sufficient evidence, the defendant must be sentenced to life imprisonment.<sup>158</sup> If the Court vacates the sentence for any other reason, the case will be remanded for a new sentencing hearing.<sup>159</sup>

#### *D. State Post-Conviction Relief*

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<sup>147</sup> 42 PA. CONS. STAT. 9711(h)(1) (2007).

<sup>148</sup> PA. R. APP. P. 1941(a).

<sup>149</sup> PA. R. APP. P. 1941(b)(1)-(4).

<sup>150</sup> PA. R. APP. P. 1941(b)(4).

<sup>151</sup> PA. R. APP. P. 2185(a).

<sup>152</sup> *Id.*

<sup>153</sup> PA. R. APP. P. 2315(a).

<sup>154</sup> PA. R. APP. P. 2311(a).

<sup>155</sup> 42 PA. CONS. STAT. § 9711(h)(3) (2007); *see also* Commonwealth v. Zettlemyer, 455 A.2d 937, 955 n.19 (Pa. 1982).

<sup>156</sup> 42 PA. CONS. STAT. § 9711(h)(2) (2007).

<sup>157</sup> 42 PA. CONS. STAT. § 9711(h)(3) (2007).

<sup>158</sup> 42 PA. CONS. STAT. § 9711(h)(4) (2007).

<sup>159</sup> 42 PA. CONS. STAT. § 9711(h)(4) (2007).

In order to seek state post-conviction relief, a death-row inmate must file a petition for post-conviction relief within one year of his/her judgment becoming final on direct appeal.<sup>160</sup> A petition filed after this specified period may still be considered when:

- (1) The failure to raise the claim previously was the result of interference by government officials and the claim is in violation of the Constitution or laws of Pennsylvania or the United States;
- (2) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (3) The right asserted is a constitutional right that was recognized by the U.S. or Pennsylvania Supreme Court after the one-year deadline for filing and has been held by that court to apply retroactively.<sup>161</sup>

The petition for post-conviction relief must state all claims and factual allegations for granting post-conviction relief and, when necessary, explain why the claims were not previously raised.<sup>162</sup> If the petitioner fails to state a ground for relief, it will be deemed waived.<sup>163</sup>

The Commonwealth must file its response to the death-row inmate's petition within 120 days after the petition is filed and served on the prosecution, unless the court grants an extension upon a showing of good cause.<sup>164</sup> At any time, the court may allow the inmate and the Commonwealth to amend their petition or answer.<sup>165</sup>

Within twenty days after the Commonwealth files its answer, the court must review the petition, the answer, and any parts of the record relating to the petitioner's claim(s) in order to determine whether an evidentiary hearing is warranted.<sup>166</sup> The court may summarily dispose of the petition, without an evidentiary hearing, if it finds:

- (1) The claims were either previously litigated or waived;
- (2) The supporting factual allegations in the petition are "either patently frivolous or without a trace of support in the record or from other evidence submitted by the petitioner;" or
- (3) A full and fair evidentiary hearing on the issue was held at trial or any other proceeding.<sup>167</sup>

Additionally, if the judge finds that no genuine issues of material fact exist, the death-row inmate is not entitled to post-conviction relief.<sup>168</sup> In such a case, the judge must provide

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<sup>160</sup> 42 PA. CONS. STAT. § 9545(b)(1) (2007); PA. R. CRIM. P. 901(A).

<sup>161</sup> 42 PA. CONS. STAT. § 9545(b)(1)(i)-(iii) (2007). It is important to note that the Pennsylvania Supreme Court has held that the PCRA's time restrictions are jurisdictional, prohibiting "equitable tolling" of the deadline, unless one of the exceptions delineated in section 9545(b)(1)(i)-(iii) is satisfied. *Commonwealth v. Smith*, 818 A.2d 494, 499 (Pa. 2003).

<sup>162</sup> PA. R. CRIM. P. 902(A)(11)-(13).

<sup>163</sup> PA. R. CRIM. P. 902(B).

<sup>164</sup> PA. R. CRIM. P. 906(E)(1)(a)-(b).

<sup>165</sup> PA. R. CRIM. P. 905(A), 906(E)(3).

<sup>166</sup> PA. R. CRIM. P. 909(B)(1).

<sup>167</sup> PA. R. CRIM. P. 908(A)(2).

notice of its intention to dismiss the petition, stating also the reasons for its dismissal.<sup>169</sup> The petitioner may respond within twenty days of the notice.<sup>170</sup> Within ninety days of the notice or of the petitioner's response, the judge must (1) dismiss the petition, (2) allow the defendant to amend the petition, or (3) order that an evidentiary hearing be held.<sup>171</sup>

At the conclusion of the hearing, the judge must determine all material issues raised by the petitioner and the Commonwealth.<sup>172</sup> The court must issue its ruling on the petition within ninety days of the hearing, unless good cause warrants an extension.<sup>173</sup> The court's order granting, denying, dismissing, or otherwise disposing of a post-conviction petition is an appealable final order. Either party may directly appeal the court's order to the Pennsylvania Supreme Court.<sup>174</sup>

If the Pennsylvania Supreme Court affirms the lower court's denial of the petition, the petitioner may file a request for *certiorari* with the U.S. Supreme Court.<sup>175</sup> If the U.S. Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

#### *E. Federal Habeas Corpus*

A petitioner wishing to challenge a conviction or death sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* with the federal district court in Pennsylvania having jurisdiction over the case. The petitioner may be entitled to appointed counsel to prepare the petition if the petitioner "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."<sup>176</sup>

The petitioner must have raised all relevant federal claims in state court before filing the petition for a writ of *habeas corpus*.<sup>177</sup> The petitioner's failure to exhaust all state remedies available on appeal and collateral review could result in the federal court denying the petition on the merits.<sup>178</sup>

The petitioner must identify and raise all possible grounds for relief and summarize the facts supporting each ground.<sup>179</sup> If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are

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<sup>168</sup> PA. R. CRIM. P. 909(B)(2).

<sup>169</sup> PA. R. CRIM. P. 909(B)(2)(a).

<sup>170</sup> PA. R. CRIM. P. 909(B)(2)(b).

<sup>171</sup> PA. R. CRIM. P. 909(B)(2)(c)(i)-(iii).

<sup>172</sup> PA. R. CRIM. P. 908(D)(1).

<sup>173</sup> PA. R. CRIM. P. 909(B)(3), (4).

<sup>174</sup> See Pennsylvania Supreme Court Order of Aug. 11, 1997.

<sup>175</sup> 28 U.S.C. § 1257 (2004).

<sup>176</sup> 18 U.S.C. § 3599(a)(2) (2007); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (citing 21 U.S.C. § 848(q)(4)(B), which has since been repealed.)

<sup>177</sup> 28 U.S.C. § 2254(b)(1) (2007).

<sup>178</sup> 28 U.S.C. § 2254(b)(2) (2007).

<sup>179</sup> RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

correct.<sup>180</sup> Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court’s decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.<sup>181</sup> In addition to the petition, the petitioner may, but is not required to, attach certified copies of the indictment, plea, and judgment to the petition.<sup>182</sup> If the petitioner does not include these documents with the petition, the respondent must promptly file copies of those documents with the court.<sup>183</sup>

The petition must be filed in the federal district court where the petitioner is in custody or where the petitioner was convicted and sentenced.<sup>184</sup> The deadline for filing the petition is one year<sup>185</sup> from the date on which (1) the judgment became final; (2) the state impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.<sup>186</sup> The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.<sup>187</sup>

Once filed, a district court judge reviews the petition to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.<sup>188</sup> If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.<sup>189</sup> In contrast, if the judge finds that the petitioner may be entitled to relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.<sup>190</sup> In addition to the answer, the respondent must furnish all portions of the

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<sup>180</sup> 28 U.S.C. § 2253(e)(1) (2007).

<sup>181</sup> 28 U.S.C. § 2253(d) (2007).

<sup>182</sup> 28 U.S.C. § 2249 (2007).

<sup>183</sup> *Id.*

<sup>184</sup> 28 U.S.C. §§ 2254, 2241(d); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

<sup>185</sup> In states that have “opted-in” to the “Special Habeas Corpus Procedures in Capital Cases,” 28 U.S.C. §§ 2261-2266, the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2007). However, a state may only “opt-in” to these expedited procedures if (1) the Attorney General of the United States certifies that the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petition retained counsel, or petition was found not to be indigent. *See* 28 U.S.C. § 2261(b) (2007). The mechanism for appointing, compensating, and reimbursing competent counsel must: (1) offer counsel to all state prisoners under capital sentence, and (2) provide the court of record the opportunity to enter an order-(a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent. *See* 28 U.S.C. § 2261(c) (2007).

<sup>186</sup> 28 U.S.C. § 2244(d)(1) (2007).

<sup>187</sup> 28 U.S.C. § 2244(d)(2) (2007).

<sup>188</sup> RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>189</sup> *Id.*

<sup>190</sup> RULES 4 and 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

state court transcripts s/he deems relevant to the petition.<sup>191</sup> The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.<sup>192</sup>

Additionally, either party may submit a request for the invocation of the discovery process.<sup>193</sup> The judge may grant such request if the requesting party establishes “good cause.”<sup>194</sup> The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.<sup>195</sup> This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.<sup>196</sup>

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.<sup>197</sup> The judge may not hold an evidentiary hearing on a claim that was not factually developed during the state court proceedings unless (1) it is necessary to find facts underlying a newly recognized constitutional law or newly discovered, previously unavailable evidence, or (2) the facts underlying the claim would be sufficient to establish that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.<sup>198</sup> If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.<sup>199</sup> However, if an evidentiary hearing is required, the judge should appoint the petitioner counsel<sup>200</sup> and conduct the hearing as promptly as possible.<sup>201</sup>

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner’s claims. Based on the evidence presented, the judge may grant the petitioner a new trial, a new penalty phase, a new direct appeal, or deny relief.

In order to appeal the district court judge’s decision, a notice of appeal must be filed with the district court within thirty days after the judgment.<sup>202</sup> The petitioner must request a “certificate of appealability” from either a district or circuit court judge.<sup>203</sup> A judge may issue a “certificate of appealability” only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.<sup>204</sup> If the “certificate of appealability” is granted, the appeal will proceed to the United States Court of Appeals for the Third Circuit.

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<sup>191</sup> RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>192</sup> *Id.*

<sup>193</sup> RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>194</sup> RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>195</sup> RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>196</sup> RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>197</sup> RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>198</sup> 28 U.S.C. § 2253(e)(2) (2007).

<sup>199</sup> RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>200</sup> RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C.A. § 3006A(g) (2007) (denoting the qualifications for federal habeas corpus counsel).

<sup>201</sup> RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>202</sup> FED. R. APP. P. 4(a)(1)(A).

<sup>203</sup> 28 U.S.C.A. § 2253(c)(1) (2007); FED. R. APP. P. 22(b)(3).

<sup>204</sup> 28 U.S.C.A. § 2253(c)(2) (2007)

In rendering its decision, the Third Circuit Court of Appeals may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Third Circuit may order a rehearing in the federal district court or the state court, an evidentiary hearing by the federal district court, or a new guilt/innocence or sentencing phase in the state court.

Both parties may then seek review of the Third Circuit Court of Appeals' decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.<sup>205</sup> The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence phase, a new penalty phase, or a new appeal.

If the petitioner wishes to file a second or successive *habeas corpus* petition, s/he must submit a motion to the Third Circuit Court of Appeals requesting an order authorizing the petitioner to file the petition and the district court to consider it.<sup>206</sup> A three-judge panel of the Third Circuit Court of Appeals must consider the motion.<sup>207</sup> The panel specifically must assess whether the petition makes a *prima facie* showing that the claims presented in the second or successive petition were not previously raised and that the new claims (1) rely on a new, previously unavailable constitutional rule, or (2) rely on newly discovered, previously unascertainable facts that, if proven, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.<sup>208</sup> Claims of factual innocence ("actual innocence") must meet the requirements of the latter provision.<sup>209</sup> Any second or successive petition that presents a claim raised in a prior petition will be dismissed.<sup>210</sup>

If the Third Circuit Court of Appeals denies the motion, the petitioner may not appeal the decision.<sup>211</sup> If the Third Circuit Court of Appeals grants the motion, then the second or successive motion will continue through the same process as the initial petition. The petitioner may seek final review of his/her conviction and sentence by pursuing clemency relief.

#### *F. Clemency*

Under the Pennsylvania Constitution, the Governor has the sole power to grant reprieves, commutations, and pardons in all criminal cases, except impeachment.<sup>212</sup> The Governor, however, is prohibited from granting a pardon or commuting a sentence without a unanimous recommendation from the Pennsylvania Board of Pardons (Board).<sup>213</sup> In death penalty cases, the Board will only consider and recommend a reprieve or the

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<sup>205</sup> 28 U.S.C.A. § 1254(1) (2007).

<sup>206</sup> 28 U.S.C.A. § 2244(b)(3)(A) (2007).

<sup>207</sup> 28 U.S.C.A. § 2244(b)(3)(B) (2007).

<sup>208</sup> 28 U.S.C.A. § 2244(b)(2) (2007).

<sup>209</sup> 28 U.S.C.A. § 2244(b)(2)(B) (2007).

<sup>210</sup> 28 U.S.C.A. § 2244(b)(1) (2007).

<sup>211</sup> 28 U.S.C.A. § 2244(b)(3)(E) (2007).

<sup>212</sup> PA. CONST. art. 4, § 9.

<sup>213</sup> *Id.*

commutation of a death sentence to life imprisonment.<sup>214</sup> The Governor retains sole discretion in granting reprieves.<sup>215</sup>

To initiate the clemency process, a death-row inmate or his/her representative may submit to the Board an “Application for Clemency” within ten days of the Governor issuing the inmate’s warrant of execution.<sup>216</sup> A death-row inmate seeking a commutation of his/her sentence is automatically entitled to a public hearing before the Board, although the inmate is not permitted to appear at the hearing.<sup>217</sup> Following the hearing, the Board will render a decision as to whether clemency should be recommended or denied.<sup>218</sup> If the Board unanimously recommends clemency, the Board must provide the Governor a written recommendation, detailing the reasons supporting its recommendation.<sup>219</sup> The final decision as to whether clemency will be granted rests with the Governor.<sup>220</sup>

### *G. Execution*

After the Governor issues the execution warrant, the death-row inmate will be placed in solitary confinement.<sup>221</sup> At this time, only counsel, a spiritual adviser, immediate family members, and correctional staff may have access to the inmate.<sup>222</sup>

An inmate’s death sentence will be carried out by lethal injection at the State Correctional Institute at Rockview under the supervision of the Institute’s Superintendent or designee.<sup>223</sup> The following people may be present at the execution:

- (1) The Superintendent or his/her designee of the institution where the execution takes place;
- (2) Six reputable adult citizens selected by the Secretary of Corrections;
- (3) One spiritual adviser, when requested and selected by the inmate;
- (4) No more than six duly accredited representatives of the news media;
- (5) Such staff of the department as may be selected by the Secretary of Corrections; and
- (6) No more than four victims registered with and selected by the victim advocate.<sup>224</sup>

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<sup>214</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>215</sup> 37 PA. CODE § 81.303 (2007).

<sup>216</sup> 37 PA. CODE § 81.231(b) (2007); 71 PA. CONS. STAT. § 299(c) (2006).

<sup>217</sup> 37 PA. CODE §§ 81.231(b), 81.281 (2007).

<sup>218</sup> 37 PA. CODE § 81.302 (2007); *see also* Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>219</sup> PA. CONST. art. 4, § 9.

<sup>220</sup> *Id.*

<sup>221</sup> 61 PA. CONS. STAT. § 3003 (2007).

<sup>222</sup> *Id.*

<sup>223</sup> 61 PA. CONS. STAT. § 3004(a) (2007); *see also* COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, VISITING RULES FOR PHASE III CAPITAL CASE INMATES (2000), *available at* <http://www.cor.state.pa.us/deathpenalty/lib/deathpenalty/visitingrulesforphaseiiicapitalcaseinmate.pdf> (last visited Sept. 27, 2007).

<sup>224</sup> 61 PA. CONS. STAT. § 3005(a) (2007).

After the execution, the Superintendent of the institution must certify in writing that the inmate was duly executed in accordance with Pennsylvania law.<sup>225</sup>

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<sup>225</sup> 61 PA. CONS. STAT. § 3006 (2007).

## CHAPTER TWO

### COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

#### INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.<sup>1</sup> Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.<sup>2</sup> However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving, and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.<sup>3</sup> The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.<sup>4</sup>

Thoroughness in criminal investigations also should be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,<sup>5</sup> and through the priorities and practices of other law enforcement oversight groups.<sup>6</sup>

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<sup>1</sup> See ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115> (last visited Sept. 27, 2007).

<sup>2</sup> See National Conference of State Legislatures, DNA & Crime, *at* <http://www.ncsl.org/programs/health/genetics/dna.htm> (last visited Sept. 27, 2007); *see also* Innocence Project, Fix the System, Access to DNA Testing, *at* <http://www.innocenceproject.org/fix/DNA-Testing-Access.php> (last visited Sept. 27, 2007) (noting that forty-two states have some form of law permitting inmates access to DNA testing).

<sup>3</sup> See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *Id.* (Standard 1-5.1) (police should be “made fully accountable” to their supervisors and to the public for their actions).

<sup>4</sup> See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

<sup>5</sup> Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

<sup>6</sup> Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies,

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person.<sup>7</sup>

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of prior training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or state law are unavailable.<sup>8</sup> Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice calls for them.<sup>9</sup>

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Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all 50 states. Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. *See* CALEA Online, at <http://www.calea.org/> (last visited Sept. 27, 2007). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, at <http://www.asclcd-lab.org> (last visited Sept. 27, 2007); NFSTC, at <http://www.nfstc.org/> (last visited Sept. 27, 2007).

<sup>7</sup> Standard 1-7.3 provides:

- (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
- (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

Standard 1-7.3; *see also* Standard 1-5.2(a) (noting value of “education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society”).

<sup>8</sup> *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) (“Adequate Police Resources”).

<sup>9</sup> *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

## I. FACTUAL DISCUSSION

At least five Pennsylvania death-row inmates have been exonerated since Pennsylvania's reinstatement of the death penalty.<sup>10</sup> In 2002, in order to provide greater access to DNA testing and analysis, the Pennsylvania Legislature adopted title 42, section 9543.1 of the Pennsylvania Consolidated Statutes, providing the means by which individuals may challenge their convictions and sentences by seeking DNA testing of evidence.<sup>11</sup>

### A. *Preservation of DNA Evidence and Other Types of Evidence*

The Commonwealth of Pennsylvania does not statutorily require the preservation of evidence, biological or otherwise, except for the period between the initiation and completion of post-conviction DNA testing proceedings.<sup>12</sup>

#### 1. Procedures for Pre-Trial Preservation of Evidence

Pennsylvania law enforcement agencies that collect evidence during a criminal investigation are responsible for holding and maintaining that evidence throughout the pre-trial phase. All law enforcement agencies in Pennsylvania that are certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)<sup>13</sup> and the

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<sup>10</sup> See Death Penalty Information Center, Innocence: List of Those Freed from Death Row, The Innocence List, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Sept. 27, 2007). The Death Penalty Information Center lists individuals on its "Innocence List" if they had "been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id.* In Pennsylvania, the exonerated individuals are Neil Ferber (charges dismissed in 1986), William Nieves (acquitted at re-trial in 2000), Thomas Kimbell, Jr. (acquitted at re-trial in 2002), Nicholas Yarris (charges dismissed in 2003), and Harold Wilson (acquitted at re-trial in 2005). *Id.* Nicholas Yarris was exonerated following DNA testing which proved he was not the perpetrator of the capital murder and rape for which he was convicted. See Innocence Project, Know the Cases, Nicholas Yarris, at <http://innocenceproject.org/Content/302.php> (last visited July 15, 2007).

<sup>11</sup> 42 PA. CONS. STAT. § 9543.1 (2007).

<sup>12</sup> 42 PA. CONS. STAT. § 9543.1(b)(2) (2007).

<sup>13</sup> Eleven municipal police departments, state police departments, capitol police departments, and university/college police departments in Pennsylvania have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 27, 2007) (use second search function, designating "U.S."; "PA"; and "Law Enforcement Accreditation" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 27, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of: (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission; and (6) a hearing where a final decision on accreditation is rendered. See CALEA Online, The Law Enforcement Accreditation Process, at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Sept. 27, 2007).

Pennsylvania Law Enforcement Accreditation Commission (PLEAC)<sup>14</sup> are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.<sup>15</sup>

Furthermore, all law enforcement candidates must complete a basic training course administered by the Municipal Police Officers' Education and Training Commission (Commission).<sup>16</sup> The curriculum for this course consists of 341 educational hours<sup>17</sup> and encompasses instruction in such relevant areas as Pennsylvania criminal law and investigations.<sup>18</sup> Specifically, the basic recruit curriculum includes instruction on the appropriate action by the first-responding officer to a crime scene, securing the crime

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<sup>14</sup> The Pennsylvania Law Enforcement Accreditation Commission (PLEAC) was created by the Pennsylvania Chiefs of Police Association in July 2001 to establish a set of standards under which law enforcement agencies can voluntary comply and become eligible for accreditation. *See* Pennsylvania Law Enforcement Accreditation Commission, What is Accreditation?, available at <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007); Pennsylvania Law Enforcement Accreditation Commission, By-Laws, art. 6, § 1, available at <http://www.pachiefs.org/accreditation%20pleac%20by-laws.htm> (last visited Sept. 27, 2007). Presently, forty-seven law enforcement agencies have obtained PLEAC certification while another 250 agencies are in the process of obtaining accreditation. Pennsylvania Law Enforcement Accreditation, What is Accreditation?, available at <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007). The PLEAC website is in the process of being updated. *See* E-mail from Andrea Sullivan, Pennsylvania Law Enforcement Accreditation Commission, to Joshua Lipman, Project Attorney, American Bar Association (June 20, 2007) (on file with author). In order to obtain accreditation from PLEAC, a law enforcement agency is required to: (1) submit an application; (2) conduct an internal self-assessment of the agency, which involves comparing the agency's current policies with the 123 PLEAC standards to determine compliance; and (3) participate in a two day on-site assessment by the PLEAC assessors. *See* Pennsylvania Law Enforcement Accreditation Commission, Three Phases, available at <http://www.pachiefs.org/accreditation3.htm> (last visited Sept. 27, 2007). PLEAC accreditation is valid for three years. *Id.*

<sup>15</sup> COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1); PENNSYLVANIA LAW ENFORCEMENT ACCREDITATION COMM'N, STANDARDS MANUAL 44-46 (2007) (Standards 3.5.1-.2 and 3.6.1-.6) [hereinafter PLEAC STANDARDS],

<sup>16</sup> 53 PA. CONS. STAT. §§ 2161(a), 2167(a) (2007). However, the Commission may waive the basic training requirements. 37 PA. CODE § 203.12 (2007). Law enforcement officers also must satisfy minimum qualifications. 37 PA. CODE § 203.11(a) (2007). Some of the minimum qualifications that a law enforcement officer must satisfy include, but are not limited to: (1) being eighteen years of age; (2) possessing a high school diploma or GED equivalent; (3) a citizen of the United States; (4) free from convictions of disqualifying criminal offenses; (5) being able to read at no less than a ninth grade level; (6) being personally examined by a licensed physician; (7) being personally examined by a licensed psychologist and found to be capable of exercising appropriate judgment or restraint in performing the duties of a law enforcement officer; (8) being evaluated to determine physical fitness; (9) being subject to a thorough background investigation; and (10) successfully completing a basic training course given by a Commission-certified school or obtaining a waiver of training. *Id.*

<sup>17</sup> *See* Municipal Police Officers' Education & Training Commission, Certification Procedures, Curriculum Sections Tested, available at [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test\\_items\\_per\\_section.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test_items_per_section.pdf) (last visited Sept. 27, 2007).

<sup>18</sup> 37 PA. CODE § 203.51(b) (2007).

scene, identifying, collecting and processing evidence, and on handling injury and death cases.<sup>19</sup>

Additionally, all crime laboratories that are accredited through certain voluntary accreditation boards are required to adopt or abide by procedures relating to the preservation of evidence.<sup>20</sup> Currently, all seven Pennsylvania State Police criminal laboratories and a handful of local and private crime laboratories<sup>21</sup> have voluntarily obtained national accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy* Program (ASCLD/LAB),<sup>22</sup> although such accreditation is not required. ASCLD/LAB specifically requires laboratories to have a written or secure electronic chain of custody record with all necessary data and a secure area for overnight and/or long-term storage of evidence.<sup>23</sup> All evidence also must be marked for identification, stored under proper seal, meaning that the contents cannot readily escape, and be protected from loss, cross-transfer, contamination and/or deleterious change.<sup>24</sup>

## 2. Procedures for Preservation of Evidence During and After Trial

The Commonwealth of Pennsylvania does not have any uniform procedures for the preservation of evidence during a capital trial or any uniform requirements for how long evidence must be preserved after the conclusion of the trial. Furthermore, Pennsylvania courts have held that the destruction of “potentially useful evidence” is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.<sup>25</sup> Despite this, Pennsylvania courts have held that police and prosecutors have a duty to preserve “material exculpatory evidence,” that is, evidence that possesses an “exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”<sup>26</sup>

## 3. Preservation of Evidence During Post-Conviction DNA Testing Proceedings

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<sup>19</sup> See MUNICIPAL POLICE OFFICERS’ EDUCATION & TRAINING COMMISSION, BASIC RECRUIT CURRICULUM LEARNER OBJECTIVES STUDY MANUAL 85-88, 90-91, 95 [hereinafter BASIC RECRUIT STUDY MANUAL], *available at* [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner\\_objectives\\_june\\_04.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner_objectives_june_04.pdf) (last visited Sept. 27, 2007).

<sup>20</sup> ASCLD/LAB, LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

<sup>21</sup> These labs include Mitotyping Technologies, LLC, National Medical Services, Inc., and the Forensic Laboratory Division (Biology) of the Allegheny County Office of the Medical Examiner. *Id.*

<sup>22</sup> The names of accredited crime laboratories are found on the accrediting organizations’ websites. See e.g., American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy*, Laboratories Accredited by ASCLD/LAB, *at* <http://www.asclclab.org/legacy/aslablegacylaboratories.html#PA> (last visited Sept. 27, 2007).

<sup>23</sup> ASCLD/LAB 2003 MANUAL, *supra* note 20, at 20-23.

<sup>24</sup> *Id.*

<sup>25</sup> Commonwealth v. Free, 902 A.2d 565, 569, 573 (Pa. Super. Ct. 2006) (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988) and holding that “potentially useful evidence” is defined as “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant”).

<sup>26</sup> *Id.* at 568 (citing California v. Trombetta, 467 U.S. 479, 489 (1984)).

After a death-sentenced inmate initiates a post-conviction DNA testing proceeding, the court and the Commonwealth must take reasonable steps to preserve any biological material in the possession of the Commonwealth that relates to the inmate's case pending the completion of the post-conviction DNA testing proceedings.<sup>27</sup> Apart from this requirement, no other uniform procedure exists for preserving evidence, biological or otherwise, during the death-sentenced inmate's incarceration through his/her execution.

## *B. Post-Conviction DNA Testing*

Title 42, section 9543.1 of the Pennsylvania Consolidated Statutes provides inmates in Pennsylvania, death-sentenced or otherwise, the ability to obtain post-conviction DNA testing to prove their innocence.<sup>28</sup>

### 1. Eligibility for Post-Conviction DNA Testing

Any individual convicted of a criminal offense in a Pennsylvania court and sentenced to death as a result of that conviction may file a motion with the sentencing court seeking post-conviction DNA testing of evidence relating to the investigation and prosecution that resulted in the individual's conviction and death sentence.<sup>29</sup> There is no time limit for filing a motion seeking post-conviction DNA testing.<sup>30</sup> Additionally, the requesting inmate has no right to counsel during a post-conviction DNA testing proceeding.<sup>31</sup>

### 2. Filing a Motion for Post-Conviction DNA Testing

#### a. Pleading Requirements

A motion for post-conviction DNA testing must be sworn under penalty of perjury,<sup>32</sup> and must sufficiently allege:

- (1) The specific evidence to be DNA tested and acknowledge that if the motion is granted, the inmate will be required to submit to the collection of an inmate reference sample and any data gained from the testing may be entered into law enforcement databases, used in investigations of other crimes, and used against the inmate in other cases;<sup>33</sup>

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<sup>27</sup> 42 PA. CONS. STAT. § 9543.1(b)(2) (2007).

<sup>28</sup> 42 PA. CONS. STAT. § 9543.1 (2007).

<sup>29</sup> 42 PA. CONS. STAT. § 9543.1(a)(1) (2007).

<sup>30</sup> *Commonwealth v. Weeks*, 831 A.2d 1194, 1196 (Pa. Super. Ct. 2003) (holding that merely filing a post-conviction DNA motion does not directly toll the one-year time limit to file a general post-conviction petition under the PCRA and the inmate must first obtain DNA testing which then yields sufficient excluding results to establish the necessary new facts in order to satisfy the exception to the PCRA one-year time limit); *Commonwealth v. Brooks*, 875 A.2d 1141, 1146 (Pa. Super. Ct. 2005); *Commonwealth v. McLaughlin*, 835 A.2d 747, 750 (Pa. Super. Ct. 2003). One court, however, has in fact found that because the inmate waited over twenty-eight months after the enactment of the post-conviction DNA testing statute to file his motion seeking such testing, such a motion must be dismissed. *See Commonwealth v. Davis*, 2005 WL 4001285 (Pa. Ct. Common Pleas Mar. 23 2005).

<sup>31</sup> *Brooks*, 875 A.2d at 1147.

<sup>32</sup> 42 PA. CONS. STAT. § 9543.1(c) (2007).

<sup>33</sup> 42 PA. CONS. STAT. § 9543.1(c)(1)(i)-(iii) (2007); *see also* 42 PA. CONS. STAT. § 9543.1(g)(1)-(2) (2007).

- (2) The inmate's actual innocence of the offense for which s/he was convicted<sup>34</sup> and either:
  - (a) Assert his/her actual innocence of the charged or uncharged conduct constituting a statutory aggravating circumstance<sup>35</sup> if the inmate's exoneration of that conduct would result in a vacation of his/her death sentence;<sup>36</sup> or
  - (b) Assert that the outcome of the DNA testing would establish a statutory mitigating circumstance<sup>37</sup> if that mitigating circumstance was presented in the penalty phase and the facts as to that issue were in dispute at the penalty phase;<sup>38</sup>
- (3) A *prima facie* case demonstrating that the identity of or the participation of the perpetrator was at issue during the inmate's trial<sup>39</sup> and that DNA testing of the specifically alleged evidence, assuming exculpatory results, would establish:
  - (a) The inmate's actual innocence of the offense for which s/he was convicted;
  - (b) The inmate's actual innocence of the charged or uncharged conduct constituting a statutory aggravating circumstance if the inmate's exoneration of that conduct would result in a vacation of his/her death sentence;<sup>40</sup> or
  - (c) A statutory mitigating circumstance.<sup>41</sup>

#### b. Bars to Obtaining Post-Conviction DNA Testing

While the evidence sought to be tested by the death-sentenced inmate may have been discovered either before or after his/her conviction, such biological evidence must be

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<sup>34</sup> 42 PA. CONS. STAT. § 9543.1(c)(2)(i) (2007). *Commonwealth v. Young*, 873 A.2d 720, 727 (Pa. Super. Ct. 2005) (holding that because the inmate gave an uncoerced, voluntary confession to the murder spelling out the details of the offense, he could not make a *prima facie* showing of actual innocence); *Brooks*, 875 A.2d at 1146 (holding that the inmate did not establish a *prima facie* case of actual innocence because, although he claims that testing would demonstrate that his DNA was not in the blood found at the crime scene or on the victim, the evidence indicates that the victim was shot twice, that there was no sign of a physical struggle or sexual assault that would leave DNA from the perpetrator and that all the blood likely came only from the victim); *Commonwealth v. Heilman*, 867 A.2d 542, 546 (Pa. Super. Ct. 2005) (holding that the inmate could not make a *prima facie* case of actual innocence based on the mere absence of his DNA at the murder scene, as it would not prove his lack of presence at the scene; even if the semen found on the victim would prove to be from a third party other than the instant inmate, it does not provide a *prima facie* case of actual innocence because the victim was a prostitute).

<sup>35</sup> See 42 PA. CONS. STAT. § 9711(d) (2007).

<sup>36</sup> 42 PA. CONS. STAT. § 9543.1(c)(2)(ii)(A) (2007).

<sup>37</sup> See 42 PA. CONS. STAT. § 9711(e)(7) (2007).

<sup>38</sup> 42 PA. CONS. STAT. § 9543.1(c)(2)(ii)(B) (2007).

<sup>39</sup> 42 PA. CONS. STAT. § 9543.1(c)(3)(i) (2007); see, e.g., *Williams v. Erie County Dist. Attorney's Office*, 848 A.2d 967, 972 (Pa. Super. Ct. 2004) (holding that the entry of a guilty plea by the inmate seeking post-conviction DNA testing logically negated the inmate's ability to meet the pleading requirement that identity was an issue at his/her trial); *Commonwealth v. Williams*, 909 A.2d 383, 386 (Pa. Super. Ct. 2006) (holding that because the inmate used a consent defense to the charge of rape at his trial, he could not make a *prima facie* case as required by the post-conviction DNA testing statute as identity was no at issue at his trial).

<sup>40</sup> See 42 PA. CONS. STAT. § 9711(d) (2007).

<sup>41</sup> 42 PA. CONS. STAT. § 9543.1(c)(3)(ii)(A)-(C) (2007).

available for testing as of the date of the motion for post-conviction DNA testing.<sup>42</sup> Additionally, if the evidence was discovered before the conviction, the inmate is still eligible for post-conviction DNA testing so long as:

- (1) The evidence was not subject to the type of DNA testing requested in the motion because that type of technology was not in existence at the time of the trial;
- (2) Trial counsel did not seek such testing at that time, provided that the trial was on or before January 1, 1995; or
- (3) DNA testing was not permitted by the court, despite the inmate's request for funds for that testing based on his/her indigent status.<sup>43</sup>

While the post-conviction DNA testing statute does not have an explicit waiver provision, at least one Pennsylvania court has held that the refusal to submit to DNA testing at the time of trial will bar the inmate from obtaining post-conviction DNA testing.<sup>44</sup> Another Pennsylvania court concluded that, despite the lack of any explicit language in the statute, the post-conviction DNA testing statute "clearly precludes" the ability of inmates to seek post-conviction DNA testing in cases where the inmate entered a guilty plea.<sup>45</sup> Furthermore, although a confession does not *per se* bar a motion for post-conviction DNA testing, a confession that has been litigated and found to be valid, knowingly and voluntarily given, and not coerced, bars such a motion.<sup>46</sup>

### c. Post-Filing Procedures

When the court receives the motion, it must allow the Commonwealth an opportunity to respond.<sup>47</sup> Furthermore, once a post-conviction DNA testing proceeding is initiated, the court and the Commonwealth must take reasonable steps to preserve any biological material in the possession of the Commonwealth that relates to the inmate's case pending the completion of the post-conviction DNA testing proceedings.<sup>48</sup>

### 3. Disposition of the Inmate's Motion for Post-Conviction DNA Testing

The court must grant the death-sentenced inmate's motion for post-conviction DNA testing if the court determines that:

- (1) The pleading requirements discussed above have been met;<sup>49</sup>

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<sup>42</sup> 42 PA. CONS. STAT. § 9543.1(a)(1) (2007). The destruction of evidence prior to the initiation of post-conviction DNA proceedings will bar the receipt of such testing. *See, e.g.*, *Commonwealth v. Watson*, 927 A.2d 274 (Pa. Super. Ct. 2007) (holding that because evidence from the law enforcement evidence custodian was admitted at the evidentiary hearing proving that all evidence in the inmate's case was destroyed, no DNA evidence existed to test and the inmate's request for such testing was properly denied as being logically impossible).

<sup>43</sup> *Id.*

<sup>44</sup> *Commonwealth v. McLaughlin*, 835 A.2d 747, 750-51 (Pa. Super. Ct. 2003).

<sup>45</sup> *Williams*, 848 A.2d at 972.

<sup>46</sup> *Commonwealth v. Young*, 873 A.2d 720, 727 (Pa. Super. Ct. 2005).

<sup>47</sup> 42 PA. CONS. STAT. § 9543.1(b)(1) (2007).

<sup>48</sup> 42 PA. CONS. STAT. § 9543.1(b)(2) (2007).

<sup>49</sup> 42 PA. CONS. STAT. § 9543.1(d)(1)(i) (2007).

- (2) The evidence to be tested has been subject to a chain of custody sufficient to establish its integrity,<sup>50</sup> and
- (3) The motion was made in a timely manner and for the purpose of demonstrating the inmate's actual innocence, rather than to delay his/her execution,<sup>51</sup>

The court, however, may not grant the motion and order the requested DNA testing if, after a review of the trial record, it determines that there is no reasonable possibility that the requested DNA testing would produce exculpatory evidence that would establish:

- (1) The inmate's actual innocence of the offense for which s/he was convicted;
- (2) The inmate's actual innocence of charged or uncharged conduct constituting a statutory aggravating circumstance<sup>52</sup> if the inmate's exoneration of that conduct would result in a vacation of his/her death sentence; or
- (3) A statutory mitigating circumstance.<sup>53</sup>

#### 4. Testing Procedures Following an Order Granting Post-Conviction DNA Testing

Post-Conviction DNA testing ordered by the court may only be conducted at either:

- (1) A laboratory agreed upon by the inmate and the Commonwealth;
- (2) A laboratory designated by the court that ordered the post-conviction DNA testing in the absence of such agreement; or
- (3) A Pennsylvania State Police laboratory<sup>54</sup> or a laboratory designated by the State Police at its sole discretion if the inmate is indigent.<sup>55</sup>

The death-sentenced inmate must generally bear the burden of the cost of post-conviction DNA testing.<sup>56</sup> When the inmate is indigent, however, the burden of paying for the testing shifts to the Commonwealth.<sup>57</sup>

#### 5. Post-Testing Procedures

Following the completion of DNA testing by the laboratory, the applicant may file a general post-conviction petition under the PCRA on the basis of exclusionary DNA test results within sixty days of being notified of those results.<sup>58</sup> The court must consider the

<sup>50</sup> 42 PA. CONS. STAT. § 9543.1(d)(1)(ii) (2007).

<sup>51</sup> 42 PA. CONS. STAT. § 9543.1(d)(1)(iii) (2007).

<sup>52</sup> See 42 PA. CONS. STAT. § 9711(d) (2007).

<sup>53</sup> 42 PA. CONS. STAT. § 9543.1(d)(2)(i)-(iii) (2007).

<sup>54</sup> Any testing performed by the Pennsylvania State Police must be performed in accordance with the protocols and procedures established by the Pennsylvania State Police. 42 PA. CONS. STAT. § 9543.1(e)(3) (2007).

<sup>55</sup> 42 PA. CONS. STAT. § 9543.1(e)(1)(i)-(iii) (2007).

<sup>56</sup> 42 PA. CONS. STAT. § 9543.1(e)(2)(i) (2007).

<sup>57</sup> 42 PA. CONS. STAT. § 9543.1(e)(2)(ii) (2007).

<sup>58</sup> 42 PA. CONS. STAT. §§ 9543(a)(2)(vi), 9543.1(f)(1), 9545(b)(2) (2007).

petition along with any answer filed by the Commonwealth and must conduct an evidentiary hearing.<sup>59</sup> During the hearing, the court ultimately must determine whether the exculpatory DNA test results would have changed the outcome of the inmate's original trial had they been available at that time.<sup>60</sup>

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<sup>59</sup> 42 PA. CONS. STAT. § 9543.1(f)(2) (2007).

<sup>60</sup> 42 PA. CONS. STAT. §§ 9543(a)(2)(vi), 9543.1(f)(3) (2007).

## II. ANALYSIS

### A. Recommendation #1

**Preserve all biological evidence<sup>61</sup> for as long as the defendant remains incarcerated.**

The Commonwealth of Pennsylvania does not have a law requiring all government entities to preserve physical evidence in death penalty cases, at all stages of the case, for as long as the defendant remains incarcerated. Pennsylvania's only uniform preservation rule is triggered when a death-sentenced inmate applies for post-conviction DNA testing and lasts only through the duration of the post-conviction DNA testing proceedings.<sup>62</sup>

Pennsylvania courts have held that police and prosecutors have a duty to preserve "material exculpatory evidence," which is evidence that possesses an "exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."<sup>63</sup> Pennsylvania courts also have held, however, that the destruction of evidence that is merely "potentially useful" is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.<sup>64</sup>

While the Commonwealth of Pennsylvania makes some limited efforts to preserve evidence, it does not ensure that all biological evidence is preserved for as long as the defendant is incarcerated and consequently is not in compliance with Recommendation #1.

The Pennsylvania Death Penalty Assessment Team, therefore, recommends that all biological evidence be preserved for as long as the defendant remains incarcerated.

### B. Recommendation #2

**All biological evidence should be made available to defendants and convicted persons upon request, and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.**

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<sup>61</sup> "Biological evidence" includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* [http://www.innocenceproject.org/docs/Model\\_Statute.html](http://www.innocenceproject.org/docs/Model_Statute.html) (last visited Sept. 27, 2007).

<sup>62</sup> 42 PA. CONS. STAT. § 9543.1(b)(2) (2007).

<sup>63</sup> *Commonwealth v. Free*, 902 A.2d 565, 568 (Pa. Super. Ct. 2006) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)).

<sup>64</sup> *Id.* at 569, 573 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) and holding that "potentially useful evidence" is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant").

The Commonwealth of Pennsylvania provides two potential opportunities for individuals to obtain DNA testing of biological evidence in their case: (1) during pre-trial discovery<sup>65</sup> and/or (2) during post-conviction proceedings.<sup>66</sup>

### DNA Testing During Pre-Trial Discovery

Pennsylvania law provides that the defendant may obtain discovery of, among other things, tangible evidence material to the case,<sup>67</sup> and that the defendant may inspect and copy any results or reports of scientific tests or expert opinions, which are within the possession or control of the attorney for the Commonwealth.<sup>68</sup>

Based on the discovery rules, a defendant has the right to inspect and test evidence that is in the possession of the prosecution and is “material” to the preparation of the defense, which could include biological evidence collected from the defendant, co-defendant, and victim. Under the rules, the defendant also clearly has the right to inspect and copy reports containing the results of DNA testing already performed in the case.

### Post-Conviction DNA Testing

Any death-sentenced individual in Pennsylvania may submit a written motion with the trial court requesting post-conviction DNA testing.<sup>69</sup>

Notably, there is no statutory requirement that the court hold an evidentiary hearing on a petitioner’s motion requesting post-conviction DNA testing. Rather, the court may simply make a decision regarding the sufficiency of the motion on the pleadings of both parties. Regardless of whether the court holds an evidentiary hearing, Pennsylvania law imposes many restrictions on the granting of post-conviction DNA testing motions. For example, the court may reject an application for testing if the court finds that the applicant does not meet one or more of the pleading requirements. Disturbingly, the court may reject an application by finding that the biological evidence requested to be tested does not exist,<sup>70</sup> even though Pennsylvania law does not require proof of the non-existence of the evidence in the form of a contemporaneously-made destruction order. Thus, an inmate may be denied DNA testing without reliable proof that the evidence sought to be tested no longer exists.

Moreover, where the inmate is indigent, post-conviction DNA testing is generally performed at the Pennsylvania State Police laboratory.<sup>71</sup> Such an inmate would likely not have the benefit of the most discriminating and exacting methods of DNA testing, such as Mitochondrial DNA testing of hair without roots or Y-Chromosome STR testing,

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<sup>65</sup> See PA. R. CRIM. P. 573.

<sup>66</sup> 42 PA. CONS. STAT. § 9543.1 (2007).

<sup>67</sup> PA. R. CRIM. P. 573(B)(1)(f).

<sup>68</sup> PA. R. CRIM. P. 573(B)(1)(e).

<sup>69</sup> 42 PA. CONS. STAT. § 9543.1(a)(1) (2007).

<sup>70</sup> *Id.*

<sup>71</sup> 42 PA. CONS. STAT. § 9543.1(e)(1)(iii) (2007). Any testing performed by the Pennsylvania State Police must be performed in accordance with the protocols and procedures established by the Pennsylvania State Police. 42 PA. CONS. STAT. § 9543.1(e)(3) (2007).

both of which are especially effective for obtaining conclusive DNA profiles from old, degraded biological samples, which are routinely performed at private laboratories.

Case law further obstructs the availability of DNA testing, holding that the entering of a guilty plea<sup>72</sup> or a knowing and voluntary confession<sup>73</sup> removes identity as an issue in the inmate's case, a necessary pleading requirement to obtain post-conviction DNA testing. Thus, no death-row inmate who was convicted after entering a guilty plea or who confessed to a crime is eligible for post-conviction DNA testing. Even in cases where DNA evidence would not, by itself, clear the defendant, there is still good reason to allow DNA testing to proceed. In these cases, of course, the defendant still would have to satisfy the post-conviction statute to secure relief.

Given the numerous ways in which a court can reject a meritorious application for post-conviction DNA testing, it is questionable whether death-sentenced inmates are given sufficient access to biological evidence during the post-conviction stage to prove their innocence or mitigate their sentence through DNA testing.

### Conclusion

Although defendants in Pennsylvania appear to have the ability to inspect and test certain evidence in the possession of the Commonwealth, death-sentenced post-conviction litigants in Pennsylvania seeking DNA testing must comply with extremely stringent pleading requirements in order to receive DNA testing. The Commonwealth of Pennsylvania, therefore, is only in partial compliance with Recommendation #2.

#### *C. Recommendation #3*

##### **Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.**

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) and the Pennsylvania Law Enforcement Accreditation Commission (PLEAC) both require accredited law enforcement agencies to adopt written directives establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing, and avoiding contamination of physical evidence.<sup>74</sup> Eleven law enforcement agencies in Pennsylvania have obtained or are in the process of obtaining accreditation by CALEA,<sup>75</sup> and forty-seven Pennsylvania law enforcement agencies have obtained certification by PLEAC.<sup>76</sup> All Pennsylvania accredited agencies should therefore have written directives establishing procedures governing the preservation of biological evidence, but the extent to which these procedures comply with Recommendation #3 is unknown.

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<sup>72</sup> Williams v. Erie County Dist. Attorney's Office, 848 A.2d 967, 972 (Pa. Super. Ct. 2004)

<sup>73</sup> Commonwealth v. Young, 873 A.2d 720, 727 (Pa. Super. Ct. 2005).

<sup>74</sup> CALEA STANDARDS, *supra* note 15, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1); PLEAC STANDARDS, *supra* note 15, at 44-46 (Standards 3.5.1-.2 and 3.6.1-.6).

<sup>75</sup> See *supra* note 13.

<sup>76</sup> Pennsylvania Law Enforcement Accreditation Commission, What is Accreditation?, *available at* <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007).

Additionally, all seven Pennsylvania State Police criminal laboratories and a handful of local and private crime laboratories<sup>77</sup> accredited by the American Society of Crime Lab Directors Laboratory Accreditation Board (ASCLD/LAB)<sup>78</sup> are required, as a prerequisite to accreditation, to adopt specific procedures relating to the preservation of evidence.<sup>79</sup>

In conclusion, although all certified crime laboratories have written procedures and policies that govern the preservation of biological evidence, it is unclear how many Pennsylvania law enforcement agencies, certified or otherwise, have implemented such procedures. Therefore, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #3.

#### *D. Recommendation #4*

**Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.**

In order to be certified as a law enforcement officer in the Commonwealth of Pennsylvania, a candidate must complete 341 hours of basic training at a school administered by the Municipal Police Officers' Education and Training Commission (Commission).<sup>80</sup> The basic training curriculum of every Pennsylvania law enforcement candidate includes, among other subjects, instruction on criminal law and investigations.<sup>81</sup> Specifically, the basic recruit curriculum includes instruction in the following relevant areas: (1) appropriate action by the first-responding officer to a crime scene, (2) securing the crime scene, (3) identifying, collecting and processing evidence, and (4) handling injury and death cases.<sup>82</sup> We were unable, however, to obtain the training materials to determine whether this mandatory training course ensures that investigative personnel are prepared and accountable for their performance.

In addition, law enforcement agencies in Pennsylvania certified under CALEA and/or PLEAC are required to establish written directives requiring a basic recruit training

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<sup>77</sup> These labs include Mitotyping Technologies, LLC, National Medical Services, Inc., and the Forensic Laboratory Division (Biology) of the Allegheny County Office of the Medical Examiner. *Id.*

<sup>78</sup> The names of accredited crime laboratories are found on the accrediting organizations' websites. *See e.g.*, American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy, Laboratories Accredited by ASCLD/LAB, at* <http://www.asclclab.org/legacy/asclclablegacylaboratories.html#PA> (last visited Sept. 27, 2007).

<sup>79</sup> ASCLD/LAB 2003 MANUAL, *supra* note 20, at 20-23; General Requirements for Accreditation (5.8.1).

<sup>80</sup> 53 PA. CONS. STAT. §§ 2161(a), 2167(a) (2007). However, the Commission may waive the basic training requirements. 37 PA. CODE § 203.12 (2007). Law enforcement officers also must satisfy minimum qualifications. 37 PA. CODE § 203.11(a) (2007).

<sup>81</sup> 37 PA. CODE § 203.51(b) (2007).

<sup>82</sup> *See* BASIC RECRUIT STUDY MANUAL, *supra* note 19, at 85-88, 90-91, 95.

program,<sup>83</sup> in-service training,<sup>84</sup> and an annual, documented performance evaluation of each employee.<sup>85</sup>

Based on this information, it appears that law enforcement investigative personnel do receive mandatory basic training. However, the extent to which the training courses and the CALEA and/or PLEAC certification programs comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Therefore, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.**

Law enforcement agencies in Pennsylvania certified under CALEA are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.<sup>86</sup> Additionally, law enforcement agencies accredited by PLEAC are required to adopt a written directive requiring the review of citizen complaints and concerns that have been received.<sup>87</sup> It appears, therefore, that certified law enforcement agencies should have adopted written directives governing complaints against the agency and/or its employees. However, the extent to which these procedures comply with Recommendation #5 and the number of law enforcement agencies in the Commonwealth of Pennsylvania that have adopted such directives is unknown. We therefore are unable to determine whether the Commonwealth of Pennsylvania is in compliance with Recommendation #5.

*F. Recommendation #6*

**Provide adequate funding to ensure the proper preservation and testing of biological evidence.**

Funding for the Preservation of Biological Evidence

Although the Commonwealth of Pennsylvania clearly provides funding to all seven Pennsylvania State Police criminal laboratories through its annual appropriation<sup>88</sup> to the Pennsylvania State Police, it is unclear what portion of this funding goes to the preservation of biological evidence in the possession of those crime laboratories. Furthermore, we were unable to obtain the necessary information to determine whether local law enforcement agencies are provided with adequate funding for the preservation of biological evidence in their custody.

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<sup>83</sup> CALEA STANDARDS, *supra* note 15, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2); PLEAC STANDARDS, *supra* note 15, at 16-17 (Standards 1.10.3 and 1.10.4).

<sup>84</sup> PLEAC STANDARDS, *supra* note 15, at 16-17 (Standards 1.10.5 and 1.10.6).

<sup>85</sup> CALEA STANDARDS, *supra* note 15, at 35-1 (Standard 35.1.2).

<sup>86</sup> CALEA STANDARDS, *supra* note 15, at 52-1 (Standard 52.1.1).

<sup>87</sup> PLEAC STANDARDS, *supra* note 15, at 14 (Standards 1.8.3).

<sup>88</sup> In fiscal year 2006-2007, the Pennsylvania legislature provided funding totaling \$189,912,000 to the Pennsylvania State Police.

## Funding for DNA Testing of Biological Evidence

The amount of funding specifically dedicated to the preservation and testing of biological evidence in Pennsylvania is unknown. However, the Commonwealth of Pennsylvania has received federal funding to support its performance of DNA testing. For example, the United States Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively, awarded the Pennsylvania State Police \$871,914 in 2006.<sup>89</sup> Similarly, the Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases, awarded the Pennsylvania State Police \$136,308 in fiscal year 2005. However, it provided no funding to the Pennsylvania State Police in fiscal year 2006 to reduce continued backlogs.<sup>90</sup> It is unclear whether this infusion of federal money has eliminated or even reduced existing backlogs in the processing of DNA cases at Pennsylvania laboratories.

## Conclusion

Because we were unable to ascertain whether the Commonwealth of Pennsylvania is providing adequate funding to ensure the proper preservation and testing of biological evidence, we are unable to appropriately assess whether the Commonwealth is in compliance with Recommendation #6.

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<sup>89</sup> See President's DNA Initiative, Capacity Enhancement Funding Chart, *available at* <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Sept. 27, 2007).

<sup>90</sup> See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, *available at* <http://www.dna.gov/funding/casework/fcfunding/> (last visited Sept. 27, 2007).

## CHAPTER THREE

### LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

#### INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1989 and 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.<sup>1</sup> In about 50 percent of these cases, there was at least one eyewitness misidentification, and 20 percent involved false confessions.<sup>2</sup>

#### Lineups and Showups

Numerous studies have shown that the *manner* in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, a lineup should include foils who resemble the individual described by the eyewitness, and the administering officer should be unaware of the suspect’s identity. Caution in administering lineups and showups is especially important because flaws can easily taint later lineup and at-trial identifications.<sup>3</sup>

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.<sup>4</sup> In the sequential approach, the witness views one person at a time and is unaware of the number of individuals s/he will see.<sup>5</sup> As each person is presented, the eyewitness states whether or not that person is the perpetrator.<sup>6</sup> The witness thus is encouraged to compare the features of each person viewed to the witness’ recollection of the perpetrator’s, rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the “best match.”

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness’ statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

#### Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset— not just from when the suspect has agreed to confess— can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those police departments who make

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<sup>1</sup> See Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 2 J. CRIM. L. & CRIMINOLOGY 523, 528-29 (2004), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (last visited Sept. 27, 2007).

<sup>2</sup> *Id.* at 544

<sup>3</sup> See BRYAN CUTLER, *EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES* 13-17, 42-44 (2002).

<sup>4</sup> *Id.* at 39.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

complete recordings have found the practice beneficial to law enforcement.<sup>7</sup> Complete recordings may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

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<sup>7</sup> See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

## I. FACTUAL DISCUSSION

The Commonwealth of Pennsylvania does not require law enforcement agencies to adopt specific standard operating procedures on conducting identifications and interrogations. The standard operating procedures used by law enforcement agencies across the Commonwealth to conduct identifications and interrogations are not readily available to the public, rendering it difficult to assess how these practices are conducted on a regular basis. Yet, there remain some available sources that shed light on these practices. A review, for instance, of (1) the basic training course established by the Municipal Police Officers' Education and Training Commission, (2) pertinent case law, and (3) the law enforcement accreditation process, allows us to gain some understanding of pre-trial identification and interrogation procedures in Pennsylvania.

### A. Law Enforcement Training Relevant to Interviews and Interrogations

The Municipal Police Officers' Education and Training Commission (Commission) is primarily responsible for establishing education and training programs,<sup>8</sup> including the "basic recruit curriculum," which all Pennsylvania law enforcement candidates must complete in order to be certified as officers.<sup>9</sup> The basic recruit curriculum consists of 341 educational hours<sup>10</sup> and encompasses instruction in such relevant areas as Pennsylvania criminal law, human relations skills, investigations, communications, and custody.<sup>11</sup> The basic recruit curriculum also includes instruction on the identification of suspects, interview and interrogation techniques, and admissions and confessions.<sup>12</sup>

Specifically, with respect to identifying suspects, the basic recruit curriculum includes instruction on:

- (1) Identifying the general unreliability of eyewitness identification and steps that can be taken to make identifications more reliable;

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<sup>8</sup> 53 PA. CONS. STAT. § 2164 (2007). However, the Commission may waive the basic training requirements. 37 PA. CODE § 203.12 (2007).

<sup>9</sup> 53 PA. CONS. STAT. § 2161(a), 2167 (2007). Law enforcement officers also must satisfy minimum qualifications. 37 PA. CODE § 203.11(a) (2007). Some of the minimum qualifications that a law enforcement officer must satisfy include, but are not limited to: (1) being eighteen years of age; (2) possessing a high school diploma or GED equivalent; (3) being a citizen of the United States; (4) being free from convictions of disqualifying criminal offenses; (5) being able to read at no less than a ninth grade level; (6) being personally examined by a licensed physician; (7) being personally examined by a licensed psychologist and found to be capable of exercising appropriate judgment or restraint in performing the duties of a law enforcement officer; (8) being evaluated to determine physical fitness; (9) being subject to a thorough background investigation; and (10) successfully completing a basic training course given by a Commission-certified school or obtaining a waiver of training. *Id.*

<sup>10</sup> See MUNICIPAL POLICE OFFICERS' EDUCATION & TRAINING COMMISSION, BASIC RECRUIT CURRICULUM LEARNER OBJECTIVES STUDY MANUAL 85-88, 90-91, 95 [hereinafter BASIC RECRUIT STUDY MANUAL], *available* at [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner\\_objectives\\_june\\_04.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner_objectives_june_04.pdf) (last visited Sept. 27, 2007).

<sup>11</sup> 37 PA. CODE § 203.51(b) (2007).

<sup>12</sup> See BASIC RECRUIT STUDY MANUAL, *supra* note 10, at 25-26, 69-70.

- (2) Defining the proper use of eyewitness identification within the context of constitutional considerations;
- (3) Defining the ramifications, both civil and criminal, of pre-trial identifications that violate the Constitution;
- (4) Identifying methods of arriving at a suspect identification;
- (5) Identifying uses of physical descriptions in the identification of a suspect;
- (6) Defining the scope of conducting pre-trial identification procedures in the “least suggestive manner;”
- (7) Identifying the circumstances under which an on-the-scene suspect identification is permissible, and the procedures for conducting such an identification;
- (8) Identifying proper procedures for conducting a photo array and a lineup; and
- (9) Identifying the circumstances under which a suspect can be compelled to appear in a lineup.<sup>13</sup>

Additionally, the basic recruit curriculum provides training on how to properly question a suspect while protecting his/her constitutional rights, including the proper advisement of *Miranda* rights during interrogations. The curriculum provides further training on the proper procedures for recording a confession in writing or on video/audiotape and details ethical considerations related to conducting and recording law enforcement interviews and interrogations. More specifically, the basic training relevant to admission and confession procedures includes instruction on:

- (1) Defining “admissions,” “confessions,” “custody,” and “interviewer;”
- (2) Identifying proper procedures for instructing a suspect on the process of obtaining a lawyer;
- (3) Identifying the legal requirements pertaining to admissions and confessions;
- (4) Identifying criminal and civil liability for violating an individual’s right against self-incrimination and the right of counsel;
- (5) Identifying ethical issues related to obtaining an admission and confession;
- (8) Identifying factors which limit an individual’s ability to provide an accurate account of events;
- (9) Identifying ineffective interviewing techniques;
- (10) Demonstrating interview practices designed to test the truthfulness or stability of the interviewee;
- (11) Identifying basic body language elements which contribute to a successful interview;
- (12) Demonstrating interview techniques which test interviewee comprehension;
- (13) Demonstrating interview control techniques;
- (14) Identifying behaviors/characteristics indicative of addiction or psychological problems relating to interviewing;
- (15) Defining interviewer behaviors which may adversely affect an interview;

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<sup>13</sup> *Id.* at 69-70.

- (16) Identifying issues of cultural diversity which may adversely impact successful interviewing;
- (17) Identifying/recognizing common manipulation techniques a person may use;
- (18) Defining the implications of the constitutional requirement that a confession must be voluntary for interrogation procedures; and
- (19) Identifying the implications of the *Miranda* decision for interrogation purposes.<sup>14</sup>

### B. Constitutional Standards and Case Law Relevant to Pre-Trial Identifications

Pre-trial witness identifications, such as those taking place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.<sup>15</sup>

A due process violation occurs if the identification procedure used by law enforcement was impermissibly suggestive<sup>16</sup> and, under the totality of the circumstances,<sup>17</sup> the suggestiveness gave rise to a substantial likelihood of irreparable misidentification.<sup>18</sup> In assessing the totality of the circumstances, the court must examine: “(1) the suggestive factors involved in the identification process, and (2) whether or not, despite the suggestive factors involved in the process, other factors are present which clearly and convincingly establish that the witness’s identification has an ‘independent origin’ in the witness’s observations at the time of the crime.”<sup>19</sup> The trial court considers the following “other factors” as an independent basis for the reliability of the identification: (1) the opportunity of the witness to view the criminal at the time of the offense, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated by the witness at the identification, and (5) the length of time between the crime and the identification.<sup>20</sup>

Under Pennsylvania law, it is not automatically considered to be an inadmissible, suggestive pre-trial identification to show a single photograph of a suspect to a witness.<sup>21</sup>

<sup>14</sup> *Id.* at 25-26.

<sup>15</sup> *See* *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-99 (1972); *Commonwealth v. Fowler*, 352 A.2d 17, 19 (Pa. 1976).

<sup>16</sup> *See* *Neil*, 409 U.S. at 196-97; *Commonwealth v. Martin*, 393 A.2d 23, 25 (Pa. 1978); *Commonwealth v. Linder*, 425 A.2d 1126, 1131 (Pa. Super. Ct. 1981).

<sup>17</sup> *See* *Neil*, 409 U.S. at 196 (noting that whether the impermissible suggestiveness of a pre-trial identification gave rise to a very substantial likelihood of misidentification must be “determined ‘on the totality of the circumstances’”); *Linder*, 425 A.2d at 1131.

<sup>18</sup> *See* *Neil*, 409 U.S. at 196-97; *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Commonwealth v. Pierce*, 786 A.2d 203, 217 (Pa. 2001), *abrogated on other grounds by* *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002).

<sup>19</sup> *Fowler*, 352 A.2d at 20.

<sup>20</sup> *Pierce*, 786 A.2d at 217; *see also* *Commonwealth v. Abdul-Salaam*, 678 A.2d 342, 349 (Pa. 1996).

<sup>21</sup> *Commonwealth v. Bradford*, 451 A.2d 1035, 1036-37 (Pa. Super. Ct. 1982). The *Bradford* court “deplore[d] the single photograph procedure” used in the case when the police officer displayed a single photograph of the suspect to the victim and a witness. *Id.* at 1036. Both the victim and the witness viewed the suspect during the crime for a few seconds and the victim’s view of the suspect was limited to a profile. *Id.* Yet, despite the improper identification procedure, the court held that it would permit the identification if the Commonwealth established “by clear and convincing evidence that the totality of the circumstances affecting the witness’s identification did not involve a substantial likelihood of misidentification.” *Id.* at 1037.

Moreover, one-on-one identifications are generally permitted if they are conducted promptly after the commission of the crime.<sup>22</sup> In addition, photographs used in a lineup are not unduly suggestive if the “suspect’s picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics.”<sup>23</sup>

Once a defendant is in custody, s/he has the right to have an attorney present during a post-arrest identification.<sup>24</sup> However, a defendant is not entitled to counsel at a one-on-one identification that is conducted promptly at the scene of the crime.<sup>25</sup>

### C. Constitutional Standards and Case Law Relevant to Interrogations

A custodial interrogation involves police conduct that is “calculated to, expected to, or likely to evoke admission.”<sup>26</sup> Prior to a custodial interrogation, a suspect is entitled to *Miranda*<sup>27</sup> warnings.<sup>28</sup> A suspect can only waive his/her right to a *Miranda* warning through a knowing and voluntary waiver.<sup>29</sup>

To be admissible at trial, a confession must have been voluntary.<sup>30</sup> Determining whether a confession is voluntary is not based on “whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his[/her] ability to make a free and unconstrained decision to confess.”<sup>31</sup> Under Pennsylvania law, tactics that do not have a “tendency to produce a false confession” are permissible during an interrogation.<sup>32</sup>

When determining the voluntariness of a confession, the court considers the totality of the circumstances.<sup>33</sup> Several of the factors considered by the court in assessing the totality

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<sup>22</sup> See *Commonwealth v. Turner*, 314 A.2d 496, 498-99 (Pa. 1974) (holding that a one-on-one identification was not unduly suggestive when less than fifteen minutes had elapsed between the time of the crime and the identification); *Commonwealth v. Moye*, 836 A.2d 973, 976-77 (Pa. Super. Ct. 2003) (holding that one-on-one lineup was not suggestive because it was conducted within minutes of the crime being committed and the witnesses had an opportunity to watch the suspect commit the crime).

<sup>23</sup> *Commonwealth v. Fisher*, 769 A.2d 1116, 1126-27 (Pa. 2001). One example of a photographic display that was deemed not unduly suggestive involved, among other things: (1) 231 photographs; (2) all of the photographs were of black males; (3) the photographs had been randomly organized in the photographic display book; (4) all of the photographs in the display book were the same size; (5) there were no names or dates on any of the photographs; and (6) there was only one picture of the suspect in the display book. See *Commonwealth v. Harris*, 533 A.2d 727, 730 (Pa. Super. Ct. 1987).

<sup>24</sup> See *Commonwealth v. Melson*, 556 A.2d 836, 848 (Pa. Super. Ct. 1989).

<sup>25</sup> See *Commonwealth v. Santiago*, 323 A.2d 826, 828-29 (Pa. Super. Ct. 1974).

<sup>26</sup> *Commonwealth v. Brown*, 711 A.2d 444, 451 (Pa. 1998) (quoting *Commonwealth v. Brantner*, 406 A.2d 1011, 1016 (Pa. 1979)).

<sup>27</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

<sup>28</sup> See *Commonwealth v. Chacko*, 459 A.2d 311, 314 (Pa. 1983). A “custodial interrogation” which requires a *Miranda* warning occurs when “[s/]he is physically deprived of his[/her] freedom in any significant way or is placed in a situation in which [s/]he reasonably believes that his[/her] freedom of action or movement is restricted by such interrogation”).

<sup>29</sup> See *Commonwealth v. Bomar*, 826 A.2d 831, 846 (Pa. 2003).

<sup>30</sup> See *Commonwealth v. Schroth*, 435 A.2d 148, 151 (Pa. 1981).

<sup>31</sup> *Commonwealth v. Nester*, 709 A.2d 879, 882 (Pa. 1998).

<sup>32</sup> *Commonwealth v. Baity*, 237 A.2d 172, 177 (Pa. 1968).

<sup>33</sup> See *Commonwealth v. Templin*, 795 A.2d 959, 963-64 (Pa. 2002).

of the circumstances include “the duration and means of the interrogation; the defendant’s physical and psychological state; the conditions surrounding the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one’s powers of resistance to suggestion and coercion.”<sup>34</sup> Additionally, the court will consider the length of time between the arrest and the arraignment, specifically whether there was an unnecessary delay before the accused was arraigned.<sup>35</sup>

The due process requirements of the Pennsylvania Constitution do not require law enforcement officers to record custodial interrogations.<sup>36</sup>

#### *D. Law Enforcement Accreditation Programs*

##### 1. Commission on Accreditation for Law Enforcement Agencies, Inc.

The Commission on the Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent accrediting authority established by the four major law enforcement membership associations in the United States.<sup>37</sup> Ten law enforcement agencies in Pennsylvania have been accredited by CALEA, while another one is in the process of obtaining accreditation.<sup>38</sup>

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<sup>34</sup> Commonwealth v. Perez, 845 A.2d 779, 787 (Pa. 2004). Other factors the courts have considered include, but are not limited to: the age of the accused, his/her education and intelligence, the extent of his/her previous experience with the police, the repeated and prolonged nature of the questioning, and the length of the detention prior to the confession. Commonwealth v. Sepulveda, 855 A.2d 783, 793 n.14 (Pa. 2004).

For example, in *Commonwealth v. Schroth*, the case was remanded to the trial court to consider suppressing the defendant’s confession as involuntary because he was: (1) sick and intoxicated, which impaired his ability to answer questions, (2) not permitted to use the bathroom facilities until he confessed, (3) refused access to an attorney and the police continued to question him, and (4) shown a written confession that was inconsistent with everything he had stated orally and he refused to sign. See *Schroth*, 435 A.2d at 150.

<sup>35</sup> See Commonwealth v. D’Amato, 526 A.2d 300, 304-05 (Pa. 1987). However, the Pennsylvania Supreme Court has ruled that voluntary statements by the accused, “given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible *per se*.” Commonwealth v. Perez, 845 A.2d 779, 787 (Pa. 2004). When considering the admissibility of a statement by the defendant given more than six hours after arrest and not having been arraigned, Pennsylvania courts must consider the totality of the circumstances surrounding the confession to determine its admissibility. *Id.*

<sup>36</sup> Commonwealth v. Craft, 669 A.2d 394 (Pa. Super. Ct. 1995).

<sup>37</sup> CALEA Online, About CALEA, available at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 27, 2007) (noting that CALEA was established by the International Association of Chiefs of Police(IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriff’s Association (NSA), and Police Executive Research Forum (PERF)).

<sup>38</sup> CALEA Online, Agency Search, available at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 27, 2007) (using second search function and designating “U.S.,” “Pennsylvania,” and “Law Enforcement Accreditation” as search criteria). The following law enforcement agencies have been awarded certification by CALEA: Abington Township Police Department, Baldwin Borough Police Department, Bethlehem Police Department, Derry (Township of) Police Department, Findlay Township Police Department, Harrisburg Bureau of Police, Lower Allen Township Police Department, Pennsylvania State Police, Pennsylvania Capitol Police, and the University of Pennsylvania Police Department. *Id.* The following law enforcement agency is in the process of being accredited by CALEA: Bensalem Township Police Department. *Id.*

To obtain accreditation, a law enforcement agency must complete a comprehensive process that consists of: (1) enrolling in the program by completing an Agency Profile Questionnaire; (2) completing a self-assessment to determine whether the law enforcement agency complies with the accreditation standards and, if not, developing a plan for compliance; and (3) participating in an on-site assessment by CALEA.<sup>39</sup> After completing these steps, the Commission will hold a hearing to render a final decision on the agency's accreditation.<sup>40</sup>

The CALEA standards are used to “certify various functional components within a law enforcement agency — Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training.”<sup>41</sup> Specifically, CALEA Standard 42.2.3 requires the creation of a written directive that “establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects,”<sup>42</sup> which means that the eight CALEA-accredited law enforcement agencies in Pennsylvania should have adopted such directives.

## 2. Pennsylvania Law Enforcement Accreditation Commission

The Pennsylvania Law Enforcement Accreditation Commission (PLEAC) was created by the Pennsylvania Chiefs of Police Association in July 2001<sup>43</sup> to establish a set of standards under which law enforcement agencies can voluntarily comply and become eligible for accreditation.<sup>44</sup> Presently, forty-seven law enforcement agencies have obtained PLEAC certification while another 250 agencies are in the process of obtaining accreditation.<sup>45</sup>

In order to obtain accreditation from PLEAC, a law enforcement agency is required to: (1) submit an application; (2) conduct an internal self-assessment of the agency, which involves comparing the agency's current policies with the 123 PLEAC standards to determine compliance; and (3) participate in a two day on-site assessment by the PLEAC assessors.<sup>46</sup> PLEAC accreditation is valid for three years.<sup>47</sup> Specifically, PLEAC

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<sup>39</sup> CALEA Online, The Law Enforcement Accreditation Process, *available at* <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Sept. 27, 2007).

<sup>40</sup> *Id.*

<sup>41</sup> COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

<sup>42</sup> *Id.* at 42-3 (Standard 42.2.3).

<sup>43</sup> *See* Pennsylvania Law Enforcement Accreditation Commission, What is Accreditation?, *available at* <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007).

<sup>44</sup> Pennsylvania Law Enforcement Accreditation Commission, By-Laws Article 6, § 1, *available at* <http://www.pachiefs.org/accreditation%20pleac%20by-laws.htm> (last visited Sept. 27, 2007).

<sup>45</sup> *See* Pennsylvania Law Enforcement Accreditation, What is Accreditation?, *available at* <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007). The PLEAC website is in the process of being updated. *See* E-mail from Andrea Sullivan, Pennsylvania Law Enforcement Accreditation Commission, to Joshua Lipman, Project Attorney, American Bar Association (June 20, 2007) (on file with author).

<sup>46</sup> *See* Pennsylvania Law Enforcement Accreditation, Three Phases, *available at* <http://www.pachiefs.org/accreditation3.htm> (last visited Sept. 27, 2007).

<sup>47</sup> *Id.*

standard 1.2.2 requires accredited law enforcement agencies to have a “written directive governing procedures for assuring compliance with all applicable constitutional requirements for in-custody situations, including . . . interviews and interrogations.”<sup>48</sup>

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<sup>48</sup> PENNSYLVANIA LAW ENFORCEMENT ACCREDITATION COMMISSION, ACCREDITATION MANUALS, STANDARDS MANUAL 2 (2006) [hereinafter PLEAC STANDARDS MANUAL], *available at* <http://www.pachiefs.org/Standards%20Manual%20August%202007.pdf> (last visited Sept. 27, 2007).

## II. ANALYSIS

### A. Recommendation #1

**Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (which has been reproduced below, in relevant part and with slight modifications).**

In 1981, a study of 205 wrongful conviction cases revealed that 52% were associated with mistaken eyewitness identification.<sup>49</sup> DNA exoneration cases have demonstrated that “eyewitness evidence has been largely responsible for false conviction in more than 70% of cases.”<sup>50</sup> And in a study examining the first forty cases in which DNA was used to exonerate convicted individuals, including several capital cases, thirty-six of the cases involved at least one false eyewitness identification of the suspect.<sup>51</sup> These statistics underlie the importance of law enforcement agencies adopting guidelines for conducting lineups and photospreads in a manner that maximizes their accuracy.

Ten Pennsylvania law enforcement agencies have been accredited by the Commission on the Accreditation for Law Enforcement Agencies, Inc. (CALEA), an independent accrediting authority, and one law enforcement agency is in the process of obtaining accreditation.<sup>52</sup> CALEA, however, does not require certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. In fact, the standards grant the agencies latitude in determining how they will achieve compliance with each applicable CALEA standard. For example, Standard 42.2.3 of CALEA requires law enforcement agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects,<sup>53</sup> but provides no guidance as to the contents of the directive.

While an individual law enforcement agency could create specific guidelines that mirror the requirements of the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (ABA Best Practices) in order to comply with CALEA Standard 42.2.3, we were unable to obtain sufficient information to ascertain whether Pennsylvania law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices.

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<sup>49</sup> G. L. Wells & E. P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL., PUB. POL’Y & L. 765 (1995).

<sup>50</sup> Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in HANDBOOK OF EYEWITNESS PSYCHOLOGY 1 (2007).

<sup>51</sup> Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUMAN BEHAVIOR 1 (1998).

<sup>52</sup> CALEA Online, Agency Search, available at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 27, 2007); see *supra* notes 37-38 and accompanying text (description of CALEA).

<sup>53</sup> CALEA STANDARDS, *supra* note 41, at 42-3 (Standard 42.2.3).

Regardless of whether a law enforcement agency has obtained certification or has adopted relevant standard operating procedures, all pre-trial identification procedures administered by law enforcement agencies are subject ultimately to constitutional due process limitations. In assessing compliance with each ABA Best Practice, we therefore draw upon case law relating to the administration of pre-trial identification procedures.

### **1. General Guidelines for Administering Lineups and Photospreads**

- a. The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

Pennsylvania law does not require, whenever practicable, that the person conducting a lineup or photospread be unaware as to which participant is the suspect. Furthermore, we were unable to ascertain whether Pennsylvania law enforcement agencies, certified by CALEA, PLEAC or otherwise, have adopted guidelines consistent with this particular ABA Best Practice.

- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

A 1981 study conducted by Roy Malpass and Patricia Devine demonstrated that when eyewitnesses were not informed that the suspect may not be in the lineup, 78 percent of eyewitnesses made an identification from a lineup with no suspect.<sup>54</sup> Despite these findings, Pennsylvania law does not mandate that eyewitnesses be instructed that the perpetrator may or may not be in the lineup. Nor does it mandate that eyewitnesses be told to assume that the person administering the lineup knows which individual is the suspect and that the eyewitnesses need not identify anyone. We were unable to determine whether law enforcement officers, as a matter of course, request that eyewitnesses state a level of certainty in their identifications.

### **2. Foil Selection, Number, and Presentation Methods**

- a. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
- b. The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

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<sup>54</sup> Wells & Seelau, *supra* note 49, at 769 (referencing a study conducted by psychologists Roy Malpass and Patricia Devine, published in the *Journal of Applied Psychology* in 1981).

Pennsylvania law does not mandate that lineups and photospreads use a select number of foils or that foils be chosen for their similarity to the witness' description of the perpetrator. Moreover, we were unable to determine whether Pennsylvania law enforcement agencies have adopted guidelines in compliance with this particular ABA Best Practice.

It is important to note that when conducting lineups, the Philadelphia Police Department allows suspects at its detention center to choose their own foils as a matter of course.<sup>55</sup> In fact, the suspect is "allowed to select anyone of their fellow prisoners who is willing to appear" at the line-up.<sup>56</sup> This is a potential problem because this practice can match foils to the suspect's appearance and not necessarily to the witness's description of the perpetrator.<sup>57</sup>

In conducting lineups, Pennsylvania courts have held that while one-on-one showups are "highly suggestive and . . . viewed with strong disfavor,"<sup>58</sup> they are permissible if conducted promptly at the scene of the crime.<sup>59</sup> The Municipal Police Officers' Education and Training Commission (Commission) even provides basic training instruction for law enforcement officers on identifying "the circumstances under which on-the-scene suspect identification is permissible, and the procedures for conducting such identification."<sup>60</sup>

While the procedures used by law enforcement officials throughout the Commonwealth to conduct identifications remain unclear, procedures such as those used by the Philadelphia Police Department certainly do not comply with the ABA Best Practices requiring that the foils resemble the witness' description as closely as possible.

### 3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**

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<sup>55</sup> Commonwealth v. McKnight, 457 A.2d 931, 935 (Pa. 1983).

<sup>56</sup> *Id.*

<sup>57</sup> M. Kimberly MacLin et al., *The Science of Collecting Eyewitness Evidence: Recommendations and an Argument for Collaborative Efforts Between Researchers and Law Enforcement*, POLICE PRACTICE & RESEARCH, at 8 (forthcoming January 2008), available at [http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1030&context=christian\\_meissner](http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1030&context=christian_meissner) (last visited Sept. 27, 2007).

<sup>58</sup> Commonwealth v. Jenkins, 335 A.2d 463, 466 (Pa. Super. Ct. 1975).

<sup>59</sup> See Commonwealth v. Moye, 836 A.2d 973, 976-78 (Pa. Super. Ct. 2003) (holding that one-on-one lineup was not suggestive because it was conducted within minutes of the crime being committed and the witnesses had an opportunity to watch the suspect commit the crime); *Jenkins*, 335 A.2d at 466 ("The one-to-one identifications most commonly held admissible involve prompt on-the-scene identifications.").

<sup>60</sup> BASIC RECRUIT STUDY MANUAL, *supra* note 10, at 70.

Pennsylvania law does not require that lineup procedures be recorded in any manner. The Commission's basic recruit curriculum provides training relating to the proper procedures for conducting photo arrays and lineups, the unreliability of eyewitness identifications, and steps that can be taken to ensure that identifications are more reliable.<sup>61</sup> Such basic training could instruct law enforcement officers conducting lineups to videotape or digitally record the procedure, including any witness confidence statements. However, we were unable to ascertain the specific contents of this training.

- c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

Pennsylvania law does not specifically require that law enforcement agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of certainty in the identification or ensure that the response is accurately documented. However, Pennsylvania courts have recognized that the witness' level of certainty in identifying a suspect is a factor that should be weighed in determining whether there is an independent basis for a suggestive identification.<sup>62</sup> When considering the reliability of a suggestive identification, courts have addressed the witness' level of certainty by noting that s/he expressed his/her identification of the suspect "in a certain and unhesitating fashion,"<sup>63</sup> that the witness "remained steadfast in [his/]her identification" of the suspect both in and out of court,<sup>64</sup> or that the witness expressed that s/he was 90 percent sure of the suspect's identity or "expressed absolute certainty."<sup>65</sup>

Moreover, as discussed above, the Commission's basic recruit curriculum provides training relating to the proper procedures for conducting photo arrays and lineups as well as identifying "steps that can be taken to make identifications more reliable."<sup>66</sup> While such instruction may include procedures for a non-suggestive manner of requesting a witness to indicate his/her level of confidence in an identification, we were unable to ascertain the specific contents of this training.

#### **4. Immediate Post-Lineup or Photospread Procedures**

- a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.**

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<sup>61</sup> *Id.* at 69-70.

<sup>62</sup> *Commonwealth v. Spiegel*, 457 A.2d 531, 536 (Pa. Super. Ct. 1983).

<sup>63</sup> *Id.* at 536.

<sup>64</sup> *Commonwealth v. Scaine*, 486 A.2d 486, 488 (Pa. Super. Ct. 1984).

<sup>65</sup> *Moye*, 836 A.2d at 977.

<sup>66</sup> BASIC RECRUIT STUDY MANUAL, *supra* note 10, at 69.

Providing a witness feedback on whether s/he selected the “right man” may improperly influence the identification process. Pennsylvania law does not specifically prohibit police and prosecutors from providing feedback to the witness on whether s/he selected the “right man,” and we were unable to ascertain whether Pennsylvania law enforcement agencies have adopted such guidelines. While the basic recruit curriculum for law enforcement candidates addresses “conducting pre-trial identification procedures in the ‘least suggestive manner,’”<sup>67</sup> we were unable to ascertain the scope of this training.

### Conclusion

In conclusion, although some law enforcement agencies may have adopted written directives in compliance with the ABA Best Practices, we were unable to obtain these directives to assess whether they comply with each particular aspect of Recommendation #1. We, therefore, are unable to assess if the Commonwealth of Pennsylvania is in compliance with Recommendation #1.

Based on this information, the Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth implement mandatory lineup procedures, utilizing national best practices that protect against false eyewitness identifications.

#### *B. Recommendation #2*

**Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.**

The Municipal Police Officers’ Education & Training Commission (Commission) mandates each law enforcement officer to complete basic training relating to interviewing and interrogation techniques and skills.<sup>68</sup> Interviewing and interrogation techniques and skills is an “objective” in the basic recruit curriculum, meaning that this will be “knowledge/information or skill [the law enforcement candidate] will have at the conclusion” of the basic training course.<sup>69</sup> Numerous topics relating to the identification of suspects are covered by the basic recruit curriculum, ranging from learning to make identifications more reliable to defining the ramifications, both civil and criminal, of pre-trial identifications that violate the Constitution.<sup>70</sup> Along with training on conducting pre-trial identifications, the Commission mandates training on custodial interrogations, including advising suspects of their *Miranda* rights, proper procedures, the criminal and civil liability for violating the individual’s rights against self-incrimination and the right to counsel.<sup>71</sup> In total, law enforcement candidates receive eight classroom hours of instruction on interviewing and interrogation, two hours of instruction on the

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<sup>67</sup> *Id.* at 70.

<sup>68</sup> See Municipal Police Officers’ Education and Training Commission, Certification Procedures, Curriculum Sections Tested, *at* [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test\\_items\\_per\\_section.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test_items_per_section.pdf) (last visited Sept. 27, 2007).

<sup>69</sup> BASIC RECRUIT STUDY MANUAL, *supra* note 10, at 1.

<sup>70</sup> *Id.* at 69-70.

<sup>71</sup> *Id.* at 25.

“identification of suspects,” and two hours of instruction on “admissions and confessions.”<sup>72</sup>

In addition to the basic training, every two years, law enforcement officers must complete a mandatory in-service education program consisting of at least twelve hours of annual training.<sup>73</sup> While training on identifications and interrogations is not required to meet this obligation, the Commission, in the past, has offered academic in-service training courses, such as “Interview and Interrogations”<sup>74</sup> and “Interviewing Victims and Witnesses Using a Cognitive Approach.”<sup>75</sup>

Moreover, CALEA Standard 33.5.1 requires the eight accredited law enforcement agencies in Pennsylvania to establish a “written directive that requires each sworn officer [to] receive annual training on legal updates.”<sup>76</sup> A law enforcement agency complying with this CALEA standard could create a training program that complies with Recommendation #2. However, we were unable to obtain any relevant law enforcement agency directives to ascertain whether these CALEA accredited agencies are in compliance with Recommendation #2.

Because we were unable to sufficiently ascertain whether law enforcement agencies, certified by CALEA or otherwise, are complying with this particular Recommendation, we cannot assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #2.

### *C. Recommendation #3*

**Law enforcement agencies and prosecutors’ offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.**

We were unable to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Pennsylvania periodically update their guidelines for conducting pre-trial identifications. We, therefore, are unable to conclude whether the Commonwealth of Pennsylvania is in compliance with Recommendation #3.

### *D. Recommendation #4*

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<sup>72</sup> See Municipal Police Officers’ Education and Training Commission, Certification Procedures, Curriculum Sections Tested, at [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test\\_items\\_per\\_section.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/test_items_per_section.pdf) (last visited Sept. 27, 2007).

<sup>73</sup> 37 PA. CODE §§ 203.13(c)(1)-2, 203.52(b)(2) (2007).

<sup>74</sup> Municipal Police Officers’ Education & Training Commission, All Mandatory In-Service Training Topics, available at <http://www.mpoetc.state.pa.us/mpotrs/cwp/view.asp?a=1133&q=440898> (last visited Sept. 27, 2007). The course number is 97-406. This course was offered in 1997 and, therefore, is not necessarily available as a current in-service training course. *Id.*

<sup>75</sup> *Id.* The course number 95-403. This course was offered in 1995 and, therefore, may not be available currently as an in-service training course. *Id.*

<sup>76</sup> CALEA STANDARDS, *supra* note 41 (Standard 33.5.1).

**Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.**

Pennsylvania courts have specifically recognized that the due process provisions of its Constitution do not require the recording of custodial interrogations.<sup>77</sup> As of 2005, only two law enforcement agencies in Pennsylvania– the Bethlehem and Whitehall Police Departments– regularly recorded custodial interrogations.<sup>78</sup>

However, two of the objectives in the Commission’s *Basic Recruit Curriculum Learner Objectives Study Manual* involve: (1) “[i]dentify[ing] proper procedures for recording a confession in writing or on video or audiotape”<sup>79</sup> and (2) “[i]dentify[ing] ethical considerations related to conducting and recording law enforcement interviews and interrogations.”<sup>80</sup> We were unable to ascertain the specific training methods used by the Commission to accomplish these objectives. We also were unable to determine if any additional Pennsylvania law enforcement agencies have adopted policies requiring law enforcement officers to videotape the entirety of an interrogation.

As a result, we are unable to determine if the Commonwealth of Pennsylvania is in compliance with Recommendation #4.

The Pennsylvania Death Penalty Assessment Team recommends that all law enforcement agencies videotape the entirety of custodial interrogations or, where videotaping is impractical, audiotape the entirety of the custodial interrogation.

*E. Recommendation #5*

**Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.**

We were unable to ascertain whether the Commonwealth of Pennsylvania provides adequate funding to ensure the proper development, implementation, and updating of procedures for identifications and interrogations. We, therefore, cannot determine whether the Commonwealth of Pennsylvania is in compliance with Recommendation #5.

*F. Recommendation #6*

**Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.**

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<sup>77</sup> See *Commonwealth v. Craft*, 669 A.2d 394, 397 (Pa. Super. Ct. 1995).

<sup>78</sup> See Thomas P. Sullivan, *Departments that Currently Record a Majority of Custodial Interrogations* (Mar. 22, 2007) (on file with author).

<sup>79</sup> See BASIC RECRUIT STUDY MANUAL, *supra* note 10, at 66.

<sup>80</sup> *Id.* at 67.

Pennsylvania courts have determined that expert testimony concerning the credibility of eyewitness testimony is inadmissible.<sup>81</sup> In providing its rationale, the Court reasoned that “[e]xpert opinion may not be allowed to intrude upon the jury’s basic function of deciding [witness] credibility.”<sup>82</sup>

The Commonwealth of Pennsylvania, therefore, is not in compliance with Recommendation #6.

#### *G. Recommendation #7*

**Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.**

If identification is a material issue in a case— i.e., the defendant places identity at issue or the eyewitness testimony is uncorroborated by circumstantial evidence— Pennsylvania courts may instruct the jury on the factors to be considered in gauging lineup accuracy. In such cases, *The Pennsylvania Suggested Standard Criminal Jury Instructions* recommends providing the following instruction to the jury:

1. In [his] [her] testimony, [*name of witness*] has identified the defendant as the person who committed the crimes. In evaluating [his] [her] testimony, in addition to the other instructions I will have provided to you for judging the testimony of witnesses, you should consider the additional following factors:

- a. Did the witness have a good opportunity to observe the perpetrator of the offense?
- b. Was there sufficient lighting for [him] [her] to make [his] [her] observations?
- c. Was [he] [she] close enough to the individual to note [his] [her] facial and other physical characteristics, as well as any clothing [he] [she] was wearing?
- d. Has [he] [she] made a prior identification of the defendant as the perpetrator of these crimes at any other proceeding?
- e. Was [his] [her] identification positive or was it qualified by any hedging or inconsistencies?
- f. During the course of this case, did the witness identify anyone else as the perpetrator?

2. In considering whether or not to accept the testimony of [*name of witness*], you should consider all of the circumstances under which the

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<sup>81</sup> See generally *Commonwealth v. Seese*, 517 A.2d 920, 921 (Pa. 1986) (explaining that “expert opinion testimony is proper only where formation of an opinion on a subject requires knowledge, information, or skill beyond what is possessed by the ordinary juror”).

<sup>82</sup> *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993); see also *Commonwealth v. Gallagher*, 547 A.2d 355, 358 (Pa. 1988) (holding that expert testimony addressing witness accuracy would “invest the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the faculty of the ordinary juror to assess”).

identifications were made. Furthermore, you should consider all evidence relative to the question of who committed the crime, including the testimony of any witness from which identity, or non-identity of the perpetrator of the crime, may be inferred. You cannot find the defendant guilty unless you are satisfied beyond reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.<sup>83</sup>

However, if there is a question as to the accuracy of the identification, *The Pennsylvania Suggested Standard Criminal Jury Instructions* has adopted a different, cautionary instruction. The cautionary instruction is appropriate only when (1) the witness did not clearly observe the actor; (2) the witness is equivocal in his/her identification; or (3) the witness failed to identify the defendant on one or more prior occasions.<sup>84</sup> The Pennsylvania Supreme Court has “specifically approved” this instruction,<sup>85</sup> which states:

In [his] [her] testimony, [*name of witness*] has identified the defendant as the person who committed the crime. There is a question of whether this identification is accurate.<sup>86</sup>

A victim or other witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it with caution. Identification testimony must be received with caution [if the witness because of bad position, poor lighting, or other reasons did not have a good opportunity to observe the criminal][if the witness in [his] [her] testimony is not positive as to identity][if the witness’s positive testimony as to identity is weakened [by qualifications, hedging, or inconsistencies in the rest of [his] [her] testimony][by [his] [her] not identifying the defendant, or identifying someone else, as the criminal [at a lineup][when shown photographs][*give specifics*] before the trial][if, before the trial, the defendant’s request for a [lineup][*specify request*] to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification][*give specifics*]].<sup>87</sup>

If the trial court determines as a matter of law that the jury must exercise caution in considering the eyewitness testimony, the judge will further instruct the jury that the evidence demonstrates that the witness “could not see the criminal clearly” and therefore the jury must use caution when considering the “testimony identifying the defendant as

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<sup>83</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07A (2006).

<sup>84</sup> Commonwealth v. Rios, 920 A.2d 790, 804 (Pa. 2007).

<sup>85</sup> See Commonwealth v. Trivigno, 750 A.2d 243, 253 (Pa. 2000) (citing Commonwealth v. Henderson, 438 A.2d 951, 958 (Pa. 1981)); see also Commonwealth v. Kloiber, 106 A.2d 820, 826-27 (Pa. 1954) (holding that “where the witness is not in a position to clearly observe the assailant, or [s/]he is not positive as to identity, or his[her] positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution”).

<sup>86</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07B(1) (2006).

<sup>87</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07B(2) (2006).

the person who committed the crime.”<sup>88</sup> Conversely, if the jury must decide whether to use caution when considering the reliability of the identification testimony, the judge will advise the jury that if one of the above factors, such as the witness having identified another individual at the lineup, is present then it should consider the witness’s testimony with caution.<sup>89</sup> The judge also will instruct the jury that it “cannot find the defendant guilty unless you [jury] are satisfied beyond a reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.”<sup>90</sup>

While the instructions caution jurors to consider a number of factors in gauging lineup accuracy, they fail to caution jurors to consider other factors, such as the reliability of the lineup procedure itself or instances where the witness has given a description of the perpetrator that does not match the defendant. Significantly, the court may instruct the jurors that if they find none of the factors discussed above, they may “treat the identification as a ‘statement of fact.’”<sup>91</sup> However, the absence of these factors do not necessarily equate to an accurate identification.

Based on the foregoing, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #7.

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<sup>88</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07B(3) (2006).

<sup>89</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07B(3)-(4) (2006).

<sup>90</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.07B(4) (2006).

<sup>91</sup> Commonwealth v. Trivigno, 750 A.2d 243, 253 (Pa. 2000).



## CHAPTER FOUR

### CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

#### INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.<sup>1</sup> While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, lack of testing procedures or the failure to follow procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

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<sup>1</sup> See Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence of Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Fredric Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Fredric Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

## I. FACTUAL DISCUSSION

### A. *Crime Laboratories*

#### 1. Pennsylvania's System of Crime Laboratories

The Pennsylvania State Police's Bureau of Forensic Services is responsible for overseeing the Commonwealth's seven crime laboratories. The Bureau of Forensic Services offers forensic assistance and consulting services to other law enforcement agencies as well as training on the collection and preservation of evidence and crime scene preservation.<sup>2</sup> In addition, the Bureau conducts research to improve and develop new forensic procedures and techniques.<sup>3</sup>

The laboratories operated by the Pennsylvania State Police include: the Bethlehem Regional Laboratory, Erie Regional Laboratory, Greensburg Regional Laboratory, Lima Regional Laboratory, Harrisburg Regional Laboratory, Wyoming Regional Laboratory, and the DNA Laboratory in Greensburg, PA. These crime labs each provide an array of services, including drug chemistry, serology/DNA, evidence receiving, latent print examination, firearms identification, microanalysis, and toxicology. All seven state crime laboratories have received national accreditation from the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).<sup>4</sup>

Additionally, Pennsylvania has several independent crime laboratories that are housed in local law enforcement departments and medical examiner offices across the Commonwealth. While some are accredited, others, such as The RJ Lee Group, Inc. and the Forensic Science Laboratory of the Philadelphia Police Department, are not.<sup>5</sup>

The procedures for the collection, preservation, and testing of evidence adopted by the Pennsylvania State Police crime laboratories and local and private laboratories are not readily available to the public. To gain some understanding of the procedures and standards employed by certain Pennsylvania crime laboratories, it is instructive to review the requirements of the ASCLD/LAB accreditation program through which some Pennsylvania crime laboratories have voluntarily obtained national accreditation.

#### 2. Crime Laboratory Accreditation

The Commonwealth of Pennsylvania does not require criminal laboratories to be accredited. However, all seven Pennsylvania State Police criminal laboratories and a handful of local and private crime laboratories<sup>6</sup> have voluntarily obtained national

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<sup>2</sup> PENNSYLVANIA STATE POLICE 2003 ANNUAL REPORT.

<sup>3</sup> *Id.*

<sup>4</sup> American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy, Laboratories Accredited by ASCLD/LAB, at* <http://www.ascl-lab.org/legacy/aslblegacylaboratories.html#PA> (last visited Sept. 27, 2007).

<sup>5</sup> *Id.*

<sup>6</sup> These labs include Mitotyping Technologies, LLC, National Medical Services, Inc., and the Forensic Laboratory Division (Biology) of the Allegheny County Office of the Medical Examiner. *Id.*

accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board-*Legacy* Program.<sup>7</sup>

a. ASCLD/LAB-*Legacy* Program Accreditation

The ASCLD/LAB is “a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and health and safety procedures meet established standards.”<sup>8</sup> The ASCLD/LAB-*Legacy* Program requires crime laboratories to demonstrate compliance with a number of established standards.<sup>9</sup>

i. Application Process for ASCLD/LAB-*Legacy* Accreditation

To obtain *Legacy* accreditation, a laboratory must submit an “Application for Accreditation,” documenting the organization of the laboratory; the laboratory mission statement, objectives, and budget; qualifications of staff; the existence of laboratory quality manuals; procedures for handling and preserving evidence; procedures on case records; security procedures; and management/training courses taken by laboratory managers.<sup>10</sup> In addition to the application, the laboratory must submit a “Grade Computation” and “Summation of Criteria Ratings;” both of which are based on the laboratory’s self-evaluation of whether it complies with all of the criteria contained in the 2005 ASCLD/LAB Laboratory Accreditation Board Manual (Manual).<sup>11</sup>

ii. ASCLD/LAB-*Legacy* Accreditation Standards and Criteria

The Manual contains various standards and criteria, each of which is assigned a rating of “Essential,” “Important,” or “Desirable.”<sup>12</sup> In order to obtain accreditation, the “laboratory must achieve 100% of the Essential,<sup>13</sup> 75% of the Important,<sup>14</sup> and 50% of the Desirable<sup>15</sup> criteria.”<sup>16</sup> Some of the Essential criteria contained in the Manual require:

- (1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, maintenance

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<sup>7</sup> *Id.*

<sup>8</sup> ASCLD/LAB-*LEGACY*, LABORATORY ACCREDITATION BOARD 2005 MANUAL, 1 (on file with author) [hereinafter ASCLD/LAB-*LEGACY* 2005 MANUAL].

<sup>9</sup> *Id.* at 13-60.

<sup>10</sup> *Id.* at 69-74, app. 1.

<sup>11</sup> *Id.* at 3; 77-84, app. 3.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> The *Manual* defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence. *Id.*”

<sup>14</sup> The *Manual* defines “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence. *Id.*”

<sup>15</sup> The *Manual* defines “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory. *Id.*”

<sup>16</sup> *Id.* at 2.

- and calibration of equipment and instruments, and operation of individual characteristic databases;<sup>17</sup>
- (2) A training program to develop the technical skills of employees in each applicable discipline and subdiscipline;<sup>18</sup>
  - (3) A chain of custody record that provides a comprehensive, documented history of each evidence transfer over which the laboratory has control;<sup>19</sup>
  - (4) The proper storage of evidence to protect the integrity of the evidence;<sup>20</sup>
  - (5) A comprehensive quality manual;<sup>21</sup>
  - (6) The performance of an annual review of the laboratory's quality system;<sup>22</sup>
  - (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;<sup>23</sup>
  - (8) The performance and documentation of administrative reviews of all reports issued;<sup>24</sup>
  - (9) The monitoring of each examiner's testimony at least annually;<sup>25</sup> and
  - (10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.<sup>26</sup>

The Manual also contains Essential criteria on personnel qualifications, requiring examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.<sup>27</sup> Additionally, the Manual requires examiners to successfully complete a competency test prior to assuming casework and annual proficiency exams thereafter.<sup>28</sup>

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.<sup>29</sup>

#### On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviews with analysts and a review of case files, including all notes and data, generated by each analyst.<sup>30</sup> The inspection team will also interview all trainees to evaluate the laboratory's training program.<sup>31</sup> At the conclusion of the inspection, the team will meet with the laboratory director to review the findings and discuss any deficiencies.<sup>32</sup>

<sup>17</sup> *Id.* at 14 (Standards 1.1.2.3 through 1.1.2.8).

<sup>18</sup> *Id.* at 18 (Standard 1.3.3.1).

<sup>19</sup> *Id.* at 20 (Standard 1.4.1.1).

<sup>20</sup> *Id.* at 20-22 (Standards 1.4.1.2 through 1.4.1.5).

<sup>21</sup> *Id.* at 24 (Standard 1.4.2.1).

<sup>22</sup> *Id.* at 28 (Standard 1.4.2.4).

<sup>23</sup> *Id.* (Standard 1.4.2.5).

<sup>24</sup> *Id.* at 35 (Standard 1.4.2.23).

<sup>25</sup> *Id.* at 36 (Standard 1.4.2.24).

<sup>26</sup> *Id.* at 37 (Standard 1.4.3.1).

<sup>27</sup> *Id.* at 42 (Standards 2.2.1, 2.2.2).

<sup>28</sup> *Id.* (Standards 2.2.3 through 2.2.4).

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 7.

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the “audit committee,” which is comprised of an ASCLD/LAB Board member, the Executive Director, at least three staff Inspectors, and the inspection team captain.<sup>33</sup> Decisions on accreditation must be made within twelve months of “the date of the laboratory’s first notification of an audit committee’s consideration of the draft inspection report.”<sup>34</sup> During this period, the laboratory may correct any deficiencies identified by the inspection team.<sup>35</sup>

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years, “provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs.”<sup>36</sup> After five years, the laboratory must apply for reaccreditation and undergo another on-site inspection.<sup>37</sup>

### *B. County Coroner and Medical Examiner Offices*

All sixty-seven counties throughout the Commonwealth retain either a county coroner office or a medical examiner office.

#### 1. County Coroner Offices

##### a. Coroners’ Education Board and Training Requirements

The Coroners’ Education Board (Board) oversees the instruction of coroners throughout the Commonwealth.<sup>38</sup> The Board, which is housed in the Office of the Attorney General, is comprised of the Commissioner of the Pennsylvania State Police, the Attorney General, the Secretary of Health, and three individuals appointed by the Governor— a forensic pathologist licensed to practice in Pennsylvania, an elected coroner who also is a physician, and an elected coroner who is not a physician.<sup>39</sup> Once elected, each member serves a four-year term.<sup>40</sup>

Newly elected county coroners generally are required to complete a training course established by the Coroners’ Education Board.<sup>41</sup> Specifically, the coroners must complete at least thirty-two hours of training between the date of their election and the close of the year.<sup>42</sup> At the end of the training, each newly elected coroner is required to pass an examination.<sup>43</sup> However, if the elected coroner is licensed and certified as a Pennsylvania physician, the Board may waive these training requirements.<sup>44</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.*

<sup>38</sup> 16 PA. CONS. STAT. §§ 9525.1, 9525.2 (2007).

<sup>39</sup> 16 PA. CONS. STAT. § 9525.1(a) (2007).

<sup>40</sup> 16 PA. CONS. STAT. § 9525.1(b) (2007).

<sup>41</sup> 16 PA. CONS. STAT. § 9525.2(a) (2007).

<sup>42</sup> 16 PA. CONS. STAT. § 9525.2(b) (2007).

<sup>43</sup> 16 PA. CONS. STAT. § 9525.3(a) (2007).

<sup>44</sup> 16 PA. CONS. STAT. § 9525.2(d) (2007).

Similarly, chief deputy coroners and full-time deputy coroners must complete a training course established by the Board within six months of their appointment.<sup>45</sup> Again, however, if the chief deputy coroner or a full-time deputy coroner is licensed and certified as a Pennsylvania physician, the Board may waive this training requirement.<sup>46</sup>

In addition to the initial training, each coroner, chief deputy coroner, and full-time deputy coroner, must complete at least eight hours of continuing education a year.<sup>47</sup>

#### b. Powers and Duties of the Coroner

The county coroner serves as the head of the morgue.<sup>48</sup> S/he is responsible for establishing the rules and regulations of the office and, in addition to hiring general personnel, has the power to appoint deputy coroners “to act in his[her] stead” whenever it is deemed “proper and necessary.”<sup>49</sup>

The coroner also must investigate the facts and circumstances of any case in which the death of the individual:

- (1) Is sudden and not caused by readily recognizable disease, or where the cause of death cannot be properly certified by a physician on the basis of prior (recent) medical attendance;
- (2) Occurs under suspicious circumstances, including those where alcohol, drugs or other toxic substances may have had a direct bearing on the outcome;
- (3) Occurs as a result of violence or trauma, whether apparently homicidal, suicidal or accidental (including, but not limited to, those due to mechanical, thermal, chemical, electrical or radiational injury, drowning, cave-ins, and subsidences);
- (4) Is caused by trauma, chemical injury, drug overdose or reaction to drugs or medication or medical treatment—be it a primary or secondary, direct or indirect, contributory, aggravating or precipitating cause of death; or
- (5) Is operative or peri-operative and not readily explainable on the basis of prior disease;
- (6) Is of an unidentified or unclaimed body;
- (7) Is known or suspected as due to contagious disease and constituting a public hazard;
- (8) Occurs in prison or a penal institution or while in police custody;
- (9) Will result in the body being cremated, buried at sea, or otherwise disposed of so as to be later unavailable for examination;
- (10) Results from sudden infant death syndrome; or
- (11) Is a still birth.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 16 PA. CONS. STAT. § 9525.5(a) (2007).

<sup>48</sup> *See* 16 PA. CONS. STAT. § 1232 (2007).

<sup>49</sup> 16 PA. CONS. STAT. §§ 1231, 1232 (2007).

<sup>50</sup> 16 PA. CONS. STAT. § 1237(a)(1)-(11) (2007).

The purpose of the coroner’s investigation is to determine the cause of death and to determine whether “sufficient reason” exists for the coroner to believe that the death may have resulted from a criminal act or neglect.<sup>51</sup> If the coroner cannot determine the cause and manner of death, s/he must either order or perform an autopsy.<sup>52</sup> If, after the autopsy, the coroner still cannot determine the cause and manner of death, s/he may conduct an inquest.<sup>53</sup>

During the inquest, the coroner has a duty to uncover the cause of death, to ascertain whether another individual was criminally responsible for the death, and if so, the perpetrator’s identity, as well as to examine any additional evidence pertaining to the cause of death.<sup>54</sup> At his/her discretion, the coroner may convene a panel of six jurors “to determine the manner of death and whether any criminal act or neglect of persons known or unknown caused such death.”<sup>55</sup> The coroner also has authority to issue subpoenas and compel the production of all papers and evidence relevant to the inquest.<sup>56</sup>

The coroner has the discretion to admit or exclude members of the public, as well as any interested parties, from the inquest.<sup>57</sup> An individual who is required to attend the inquest is permitted counsel.<sup>58</sup>

In exercising these duties, the coroner must consult and advise the district attorney to the extent “practicable.”<sup>59</sup> By law, the district attorney serves as counsel to the coroner in matters relevant to the inquest.<sup>60</sup>

Within thirty days of the year’s end, all coroners must submit their official records and papers from that year to the Office of the Prothonotary for inspection.<sup>61</sup>

## 2. Medical Examiner Offices

In place of county coroner offices, several Pennsylvania counties—including Allegheny, Delaware, and Philadelphia counties— have created medical examiner offices. The rules and procedures followed by each medical examiner office vary among the counties.

For example, in 2006, Allegheny County abolished its coroner office and created the Office of the Medical Examiner.<sup>62</sup> Unlike county coroners, the Allegheny County

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<sup>51</sup> 16 PA. CONS. STAT. § 1237(b) (2007).

<sup>52</sup> 16 PA. CONS. STAT. § 1238(a) (2007). It appears that only coroners who also are pathologists may perform autopsies. Interview with Duty Investigator, Office of the Medical Examiner, Delaware County, Pa. (June 13, 2007).

<sup>53</sup> 16 PA. CONS. STAT. § 1238(b) (2007).

<sup>54</sup> *Id.*

<sup>55</sup> 16 PA. CONS. STAT. § 1245.1(a), (b) (2007).

<sup>56</sup> 16 PA. CONS. STAT. § 1245 (2007).

<sup>57</sup> 16 PA. CONS. STAT. § 1248 (2007).

<sup>58</sup> *Id.*

<sup>59</sup> 16 PA. CONS. STAT. § 1242 (2007).

<sup>60</sup> *Id.*

<sup>61</sup> 16 PA. CONS. STAT. § 1251 (2007).

<sup>62</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(A), (B).

Medical Examiner is appointed by the Mayor for a term of five years and may be reappointed at the end of his/her term.<sup>63</sup> However, the Allegheny County Court of Common Pleas may remove the medical examiner for cause after providing the medical examiner with a written copy of the charges and a full hearing before the court.<sup>64</sup>

To qualify for the Office of Medical Examiner in Allegheny County, an individual must: (1) possess a Medical Doctor degree or a Doctor of Osteopathy from an accredited institution; (2) possess a valid license to practice medicine in Pennsylvania; (3) be board certified, or board eligible, by the American Board of Pathology in forensic pathology; and (4) have at least five years of experience as a practicing pathologist.<sup>65</sup>

The Allegheny County Medical Examiner has “all of the powers, functions, and duties” of a coroner as established in sections 4232 through 4238 and 4250 of the Pennsylvania Consolidated Statutes, including the power to subpoena and conduct an inquest “without limitation.”<sup>66</sup>

Similarly, in 1979, Delaware County converted its coroner office to a medical examiner office.<sup>67</sup> The Office of the Medical Examiner in Delaware County is comprised of a medical examiner, an assistant medical examiner, an investigative supervisor, medical legal investigators, a secretary, and an autopsy technician.<sup>68</sup> The Office of the Medical Examiner is charged with investigating all unnatural deaths in the county and determining the cause and manner of such deaths.<sup>69</sup> The Office also conducts autopsies and assists law enforcement in the investigation of homicides.<sup>70</sup> In addition to preparing reports on the deaths of individuals, the medical examiner may provide expert witness testimony at legal proceedings.<sup>71</sup>

### 3. Accreditation of County Coroner and Medical Examiner Offices

The Commonwealth of Pennsylvania does not require county coroner or medical examiner offices to receive accreditation, although, as discussed above, newly-elected coroners are generally required to receive at least thirty-two hours of instruction prior to assuming office and all coroners, once in office, are required to complete eight hours of continuing education each year.<sup>72</sup> No county coroner or medical examiner office in Pennsylvania has received voluntary accreditation through the National Association of

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<sup>63</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(B), (D).

<sup>64</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(E).

<sup>65</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(C).

<sup>66</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(G).

<sup>67</sup> Delaware County, Pennsylvania, Office of the Medical Examiner, at <http://www.co.delaware.pa.us/ome/index.html> (last visited Sept. 27, 2007).

<sup>68</sup> *Id.*

<sup>69</sup> Delaware County, Pennsylvania, Office of the Medical Examiner, Function of the Office, at <http://www.co.delaware.pa.us/ome/function.html> (last visited Sept. 27, 2007).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 16 PA. CONS. STAT. § 9525.2(b), 9525.5(a) (2007).

Medical Examiners (NAME), the leading national accreditation agency for coroners and medical examiners.<sup>73</sup>

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<sup>73</sup> National Association of Medical Examiners (NAME), NAME Accredited Offices, *available at* [http://thename.org/index.php?option=com\\_content&task=view&id=67&Itemid=69](http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69) (last visited Sept. 27, 2007).

## II. ANALYSIS

### A. Recommendation #1

**Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.**

#### Crime Laboratories

The Commonwealth of Pennsylvania does not require the accreditation of crime laboratories. However, all seven Pennsylvania State Police crime laboratories are currently accredited by the Legacy Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).<sup>74</sup> While a number of local and private crime laboratories also have attained accreditation by the ASCLD/LAB, a greater number have not.<sup>75</sup>

As a prerequisite for accreditation, ASCLD's *Legacy* Program requires laboratories to take measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the ASCLD/LAB-*Legacy* Program requires the laboratory to have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.<sup>76</sup> The *Legacy* Program requires these procedures to be included in the laboratory's quality manual, although crime laboratories are not explicitly required to publish these procedures.<sup>77</sup>

The *Legacy* Program also requires laboratory personnel to possess certain qualifications. The *ASCLD/LAB Laboratory Accreditation Board 2005 Manual*, for example, requires examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.<sup>78</sup> The examiners also must successfully complete a competency test prior to assuming casework responsibility and annual proficiency tests.<sup>79</sup>

Although all seven state crime laboratories as well as a handful of local and private laboratories have voluntarily obtained accreditation by the ASCLD/LAB, at least three

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<sup>74</sup> American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy*, Laboratories Accredited by ASCLD/LAB, at <http://www.asclclab.org/legacy/aslablegacylaboratories.html#PA> (last visited Sept. 27, 2007).

<sup>75</sup> *Id.*

<sup>76</sup> ASCLD/LAB-*LEGACY* 2005 MANUAL, *supra* note 8, at 13-60.

<sup>77</sup> *Id.* at 78. The ASCLD/LAB-*Legacy* Program requires a crime lab's quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to, the following: (1) control and maintenance of documentation of case records and procedure manuals, (2) validation of test procedures used, (3) handling evidence, (4) use of standards and controls in the laboratory, (5) calibration and maintenance of equipment, (6) practices for ensuring continued competence of examiners, and (7) taking corrective action whenever analytical discrepancies are detected. *Id.* at 3.

<sup>78</sup> *Id.* at 37-46.

<sup>79</sup> *Id.*

crime laboratories in the Commonwealth of Pennsylvania remain unaccredited.<sup>80</sup> Notably, at least two laboratories at the Police Department in Philadelphia are unaccredited.<sup>81</sup> The RJ Lee Group, Inc., a private criminal laboratory headquartered in Monroeville, Pennsylvania, also operates without any nationally recognized accreditation.<sup>82</sup>

For the majority of accredited crime laboratories in Pennsylvania, accreditation by the ASCLD/LAB-Legacy program alone cannot ensure the validity, reliability, and timely analysis of forensic evidence. Only 59 percent of the ASCLD/LAB-Legacy Manual requirements are considered mandatory for accreditation.<sup>83</sup> Furthermore, the ASCLD/LAB-Legacy delegate assembly is comprised solely of laboratory directors from ASCLD/LAB accredited laboratories, effectively making any inspection of a Pennsylvania laboratory a peer review by other accredited laboratory directors,<sup>84</sup> which, in turn, threatens the impartiality of the accreditation process.

It is clear that crime laboratories can and do make critical errors. One noteworthy incident at the Bethlehem Regional Laboratory—a laboratory accredited by the ASCLD/LAB—underscores the need for stricter accreditation standards. An annual audit revealed a number of errors in the work of serologist Ranae Houtz, including her having failed to note a semen stain.<sup>85</sup> Over a course of three years, Houtz had analyzed evidence in 615 cases, spanning twenty-seven counties.<sup>86</sup> Initially, Houtz was provided six months of remedial training, but errors persisted in her work, forcing her to resign in April of 2003.<sup>87</sup> As Houtz's errors raised serious questions as to the validity of her testimony, the Bureau of Forensic Services received requests from prosecutors to re-examine analyses in four murder cases and three rape cases.<sup>88</sup> It is unclear what action, if any, has been taken by prosecutors to re-evaluate the over 600 hundred other cases in which Houtz provided assistance.

The work of former Pennsylvania State Police chemist Janice Roadcap also has been plagued with error. In 1988, Barry Laughman was convicted and sentenced to life imprisonment for the rape and murder of his elderly neighbor.<sup>89</sup> At trial, Roadcap claimed that although the semen on the victim's body belonged to an individual with Type A blood, it still could have originated from Barry Laughman, who has Type B blood.<sup>90</sup> Even more disturbing is evidence showing that Roadcap altered her lab notes in a murder case which resulted in then-fourteen year old Steven Crawford serving twenty-

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<sup>80</sup> American Society of Crime Laboratory Directors/Laboratory Accreditation Board—*Legacy*, Laboratories Accredited by ASCLD/LAB, at <http://www.ascldlab.org/legacy/aslablegacylaboratories.html#PA> (last visited Sept. 27, 2007).

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> ASCLD/LAB-*LEGACY* 2005 MANUAL, *supra* note 8, at 84, app. 3.

<sup>84</sup> Arvizu, *supra* note 1, at 21.

<sup>85</sup> Marc Levy, *District Attorneys Double-Checking Work of State Police Scientist*, ASSOCIATED PRESS, June 21, 2003.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Mark Scolforo, *Man Released on Bail After 16 Years in Prison for Murder*, ASSOCIATED PRESS, Nov. 21, 2003.

<sup>90</sup> *Id.*

eight years in prison before being freed in 2002.<sup>91</sup> Roadcap served as a chemist at the Pennsylvania State Police's Harrisburg Regional Laboratory for almost twenty-five years, handling an untold number of cases in eighteen counties, before retiring in 1991.<sup>92</sup>

### County Coroner and Medical Examiner Offices

As with its crime laboratories, the Commonwealth of Pennsylvania does not require county coroner or medical examiner offices to be accredited. None of Pennsylvania's county coroner offices or medical examiner offices have obtained voluntarily accreditation through the National Association of Medical Examiners (NAME).<sup>93</sup>

The Pennsylvania Consolidated Statutes does set forth minimum training standards for newly-elected coroners. Generally, newly-elected county coroners are required to complete at least thirty-two hours of training,<sup>94</sup> at the end of which, each coroner is required to pass an examination.<sup>95</sup> Chief deputy coroners and full-time deputy coroners also must complete a training course within six months of their appointment.<sup>96</sup> However, if an elected coroner, chief deputy coroner, or full-time deputy coroner is licensed and certified as a Pennsylvania physician, the Coroner's Education Board may waive these training requirements.<sup>97</sup> Each coroner, chief deputy coroner, and full-time deputy coroner—regardless of their professional status—must complete at least eight hours of continuing education a year.<sup>98</sup>

Apart from these general training requirements, the Commonwealth of Pennsylvania has established no further qualifications for coroners. In fact, coroners in smaller counties, like Washington and Butler Counties, are not physicians.<sup>99</sup>

For those counties which instead employ a medical examiner, qualifications for the position appear to vary. For instance, in Allegheny county, to qualify for the office of medical examiner, an individual must: (1) possess a Medical Doctor degree or a Doctor of Osteopathy from an accredited institution; (2) possess a valid license to practice medicine in Pennsylvania; (3) be board certified, or board eligible, by the American

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<sup>91</sup> Jack Scherzer, *Ex-lab Chemist Defends Notes in Crawford Case*, PATRIOT NEWS, June 16, 2006, at B1.

<sup>92</sup> Pete Shellem, *Chemist Roadcap Provided Evidence in Both Homicides*, PATRIOT NEWS, Nov. 11, 2003.

<sup>93</sup> Only National Medical Services, Inc., a private agency, has obtained accreditation through the American Board of Forensic Toxicologists (ABFT). Am. Bd. of Forensic Toxicology, Laboratories, available at <http://www.abft.org> (last visited Sept. 27, 2007). As a prerequisite for accreditation, ABFT requires medical examiner offices to adopt and implement standardized procedures to ensure the validity, reliability, and timely analysis of forensic evidence. NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, NAME ACCREDITATION CHECKLIST 5-27 (2004) [hereinafter NAME ACCREDITATION CHECKLIST], available at [http://thename.org/index.php?option=com\\_docman&task=doc\\_download&gid=27&Itemid=26&mode=view](http://thename.org/index.php?option=com_docman&task=doc_download&gid=27&Itemid=26&mode=view) (last visited Sept. 27, 2007).

<sup>94</sup> 16 PA. CONS. STAT. § 9525.2(b) (2007).

<sup>95</sup> 16 PA. CONS. STAT. § 9525.3(a) (2007).

<sup>96</sup> 16 PA. CONS. STAT. § 9525.2(d) (2007).

<sup>97</sup> *Id.*

<sup>98</sup> 16 PA. CONS. STAT. § 9525.5(a) (2007).

<sup>99</sup> Telephone Interview with Gerald Gilchrist, Allegheny County Medical Examiner Office (June 8, 2007).

Board of Pathology in forensic pathology; and (4) have at least five years of experience as a practicing pathologist.<sup>100</sup> Meanwhile, in Delaware County, the county board has mandated that the medical examiner and assistant medical examiner be board-certified pathologists.<sup>101</sup>

### Conclusion

The Commonwealth of Pennsylvania does not require crime laboratories and coroner/medical examiner offices to obtain accreditation. Although all Pennsylvania State Police crime laboratories have been accredited by the ASCLD/LAB, no public county coroner or medical examiner office has obtained national accreditation. The Commonwealth, however, has established training and continuing education requirements for coroners. Accordingly, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #1.

#### *B. Recommendation #2*

##### **Crime laboratories and medical examiner offices should be adequately funded.**

Proper funding is needed to ensure that crime laboratories and coroner/medical examiner offices maintain the state-of-art equipment needed to develop accurate and reliable results and to hire and retain a sufficient number of competent forensic scientists and staff to timely analyze forensic evidence.

### Crime Laboratories

In fiscal year 2006-2007, the Pennsylvania legislature provided funding totaling \$189,912,000 to the Pennsylvania State Police. However, the exact amount of funding appropriated exclusively to the Pennsylvania State Police's seven crime laboratories is unknown.

In addition to state funds, the state crime laboratories also received federal funding in 2006. The United States Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively, awarded the Pennsylvania State Police \$871,914 in 2006.<sup>102</sup> The Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases, awarded the Pennsylvania State Police \$136,308 in

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<sup>100</sup> ADMIN. CODE OF ALLEGHENY COUNTY art. 201, § 5-201.05(C).

<sup>101</sup> Telephone Interview with Jerry Durt, Duty Investigator, Office of the Medical Examiner, Delaware County, Pa. (June 13, 2007).

<sup>102</sup> See President's DNA Initiative, Capacity Enhancement Funding Chart, available at <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Sept. 27, 2007).

fiscal year 2005. However, it provided no funding to the Pennsylvania State Police in fiscal year 2006.<sup>103</sup>

### County Coroner and Medical Examiner Offices

County coroner and medical examiner offices throughout Pennsylvania are supported primarily by county funds. For example, in 2006, the Allegheny County Medical Examiner Office received \$2,850,000 from the general county fund and \$1,500,000 from the Commonwealth's Public Safety Grant.<sup>104</sup> The coroner's offices in Montgomery and York Counties were allotted \$991,200 and \$354,023, respectively, in 2006.<sup>105</sup>

### Conclusion

We were unable to obtain sufficient information to appropriately assess the adequacy of funding provided to both crime laboratories and medical examiner/coroner offices in the Commonwealth of Pennsylvania and, therefore, cannot assess whether Pennsylvania is in compliance with Recommendation #2.

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<sup>103</sup> See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, available at <http://www.dna.gov/funding/casework/fcfunding> (last visited Sept. 27, 2007).

<sup>104</sup> Telephone Interview with Mark Lucas, Deputy Director of Budget and Finance, Allegheny County, Pa. (Sept. 27, 2006).

<sup>105</sup> Telephone Interview with Beth Tobin, Administrative Assistance to the Director of Finance, Montgomery County, Pa. (Sept. 27, 2006).

## CHAPTER FIVE

### PROSECUTORIAL PROFESSIONALISM

#### INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.<sup>1</sup>

Prosecutorial misconduct can encompass various actions, including but not limited to, failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.<sup>2</sup> The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

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<sup>1</sup> See STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, *BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT?* (2003), available at <http://www.publicintegrity.org/pm/> (last visited Sept. 27, 2007).

<sup>2</sup> *Id.*; see also Innocence Project, *Know the Causes, Government Misconduct*, available at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Sept. 27, 2007).

## I. FACTUAL DISCUSSION

### A. Prosecution Offices

#### 1. District Attorneys

Each of Pennsylvania's sixty-seven counties has a district attorney;<sup>3</sup> each of whom serves as the chief law enforcement officer for the county in which s/he is elected or appointed.<sup>4</sup> A district attorney must be at least twenty-five years of age; a citizen of the United States; admitted to practice law before the Pennsylvania Supreme Court for at least one year prior to taking the oath of office; and have resided in the county in which s/he will serve for at least one year.<sup>5</sup> Once elected, the district attorney serves a four-year term.<sup>6</sup>

Under Pennsylvania law, a district attorney may appoint as many assistant, special assistant or deputy assistant district attorneys as are authorized by the county salary board,<sup>7</sup> to assist in the discharge of the district attorney's duties.<sup>8</sup> In addition, a district attorney may enter into contracts with temporary assistants, special assistants, or deputy assistant district attorneys without approval from the county salary board.<sup>9</sup> A district attorney also may appoint county detectives, as authorized by the county salary board,<sup>10</sup> to investigate and obtain evidence for criminal cases.<sup>11</sup>

#### a. Responsibilities of District Attorneys and Assistant District Attorneys

A district attorney's powers are limited to the county in which s/he is elected or appointed.<sup>12</sup> Specifically, a district attorney has the power to "conduct in court all criminal and other prosecutions" in the name of the Commonwealth or when the

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<sup>3</sup> See RICHARD S. WASSERBLY & BETSY MOORE, 16 WEST'S PENNSYLVANIA PRACTICE SERIES, CRIMINAL PRACTICE § 3:1 (2006).

<sup>4</sup> 71 PA. CONS. STAT. § 732-206(a) (2007).

<sup>5</sup> 16 PA. CONS. STAT. § 1401(a) (2007).

<sup>6</sup> PA. CONST. art. 9, § 4; 16 PA. CONS. STAT. § 401 (2007).

<sup>7</sup> PA. CONST. art. 9, § 4; 16 PA. CONS. STAT. § 401 (2007). The "county salary board" was created so that funding of the judicial districts would become primarily the responsibility of the counties. See CHRISTINE M. GIMENO, 22A SUMMARY OF PENNSYLVANIA JUR., MUNICIPAL AND LOCAL LAW § 10:4 (2d ed. 2006). The responsibilities of the county salary boards include "the funding of salaries, services and accommodations for the judicial system." *Id.* This system, however, has been found to violate the Pennsylvania constitutional requirement of a unified judicial system. *Id.*; see also *Allegheny County v. Commonwealth*, 534 A.2d 760, 765 (Pa. 1987), *enforcement denied by County of Allegheny v. Commonwealth*, 626 A.2d 492 (Pa. 1993). Despite the unconstitutionality of this funding system, the Pennsylvania Supreme Court continues to maintain the system. See *County of Allegheny*, 626 A.2d at 492-93.

<sup>8</sup> 16 PA. CONS. STAT. § 1420(a) (2007).

<sup>9</sup> 16 PA. CONS. STAT. § 1420(b) (2007); see also *Yost v. McKnight*, 865 A.2d 979, 985-86 (Pa. Commw. 2005).

<sup>10</sup> 16 PA. CONS. STAT. § 1440 (2007). The number of detectives appointed by the district attorney depends upon the class of the county. 16 PA. CONS. STAT. §§ 1440(a)-(b), 4440(a), 7741 (2007).

<sup>11</sup> 16 PA. CONS. STAT. § 1440(c) (2007). Under Pennsylvania law, county detectives are general police officers and possess the same powers that a constable exercises regarding criminal law and procedure. 16 PA. CONS. STAT. § 1440(d) (2007).

<sup>12</sup> 71 PA. CONS. STAT. § 732-206(a) (2007).

Commonwealth is a party.<sup>13</sup> The responsibilities of the district attorney also include “sign[ing] all bills of indictment and conduct[ing] in court all criminal and other prosecutions.”<sup>14</sup> However, the district attorney does not have the authority to enter *nolle prosequi*<sup>15</sup> in a criminal case, to discharge a prisoner from custody without the court’s written consent,<sup>16</sup> or to subpoena witnesses.<sup>17</sup>

In cases in which more than one assistant district attorney has been appointed, the district attorney must designate one of the assistants as first assistant.<sup>18</sup> If the district attorney is absent from the jurisdiction due to health, disability, or other causes, the first assistant district attorney or the assistant district attorney, if there is only one assistant district attorney in the county, may perform the duties of the absent district attorney.<sup>19</sup>

#### b. Funding of District Attorney Offices and Salaries

District attorney offices are funded by the county in which the offices are located with partial reimbursement from state funds. The Commonwealth reimburses the counties for sixty-five percent of the salary of each full-time district attorney.<sup>20</sup> Under Pennsylvania law, the salary of a full-time district attorney is set at \$1,000 less than the common pleas court judge of that county.<sup>21</sup> The salaries of assistant, special assistant and deputy assistant district attorneys are determined by the county salary board.<sup>22</sup>

Additionally, “[a]ll necessary expenses incurred by the district attorney or his[her] assistants or any office directed by him[her] in the investigation of crime and the apprehension and prosecution of persons charged with or suspected of the commission of crime . . . shall be paid by the county from the general funds of the county.”<sup>23</sup>

### 2. Office of the Attorney General

The Attorney General serves as the chief law enforcement officer of the Commonwealth.<sup>24</sup> The Attorney General is elected to serve a four-year term,<sup>25</sup> but s/he is not permitted to serve more than two consecutive terms.<sup>26</sup> Under section 732-205 of

<sup>13</sup> 16 PA. CONST. STAT. § 9952 (2007).

<sup>14</sup> 16 PA. CONS. STAT. § 1402(a) (2007).

<sup>15</sup> A “*nolle prosequi*” is when a prosecutor voluntarily withdraws proceedings on a particular criminal bill or information. It acts as neither an acquittal nor a conviction and can be lifted at anytime to permit a revival of the original criminal proceedings. *See Commonwealth v. Ahearn*, 670 A.2d 133, 135 (Pa. 1996).

<sup>16</sup> *Id.*; *see also Commonwealth ex rel. Thor v. Ashe*, 11 A.2d 173, 175 (Pa. Super. Ct. 1940).

<sup>17</sup> *See In re Reyes*, 387 A.2d 1011, 1012 (Pa. Commw. 1978).

<sup>18</sup> 16 PA. CONS. STAT. § 1421 (2007).

<sup>19</sup> *Id.*

<sup>20</sup> *See Commonwealth of Pennsylvania, Governor’s Office of the Budget, 2007-08 Proposed Governor’s Executive Budget, at E4.6, available at* [http://www.budget.state.pa.us/budget/lib/budget/budget\\_presentation/2007\\_08\\_budget\\_document.2.pdf](http://www.budget.state.pa.us/budget/lib/budget/budget_presentation/2007_08_budget_document.2.pdf) (last visited Sept. 27, 2007).

<sup>21</sup> *Id.*

<sup>22</sup> 16 PA. CONS. STAT. § 1420(a) (2007).

<sup>23</sup> 16 PA. CONS. STAT. § 1403 (2007).

<sup>24</sup> 71 PA. CONS. STAT. § 732-206(a) (2007).

<sup>25</sup> PA. CONST. art. 4, § 4.1.

<sup>26</sup> *Id.*

the Pennsylvania Statutes, the Attorney General is limited to prosecuting and investigating<sup>27</sup> cases.<sup>28</sup>

- (1) Originating from criminal charges against Commonwealth officials or employees affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such Commonwealth officials or employees or benefit from such influence or attempt to influence;
- (2) Originating from criminal charges involving corrupt organizations;
- (3) Upon the request of a district attorney who lacks the resources to conduct an adequate investigation, or when there is the potential for a conflict of interest involving the district attorney office;
- (4) Where the Attorney General petitions the court having jurisdiction over any criminal proceeding to permit him/her to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings;<sup>29</sup>
- (5) When the president judge in the district having jurisdiction of any criminal proceeding believes that intervention of the Commonwealth is proper;
- (6) Originating from criminal charges upon an investigation and referral by a Commonwealth agency to the Attorney General based on provisions of a statute charging the agency with a duty to enforce the statute; and
- (7) Originating from indictments returned by an investigating grand jury.<sup>30</sup>

Additionally, the Attorney General has the authority, upon the request of the district attorney, to prosecute criminal appeals.<sup>31</sup> The Attorney General also may convene and conduct multi-county investigating grand juries.<sup>32</sup>

When prosecuting a criminal case, the Attorney General may employ as many special deputies as are needed.<sup>33</sup>

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<sup>27</sup> 71 PA. CONS. STAT. § 732-206(a) (2007); *see also* Commonwealth v. Goodman, 500 A.2d 1117, 1123 (Pa. Super. Ct. 1985).

<sup>28</sup> Section 732-205 is “the sole grant of authority to the Attorney General.” Commonwealth v. Usa, 601 A.2d 1265, 1268 (Pa. Super. Ct. 1991); *see also* Commonwealth v. Carsia, 491 A.2d 237, 246 (Pa. Super. Ct. 1985).

<sup>29</sup> Supersession will be ordered if the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute a case and such failure or refusal constitutes an abuse of the district attorney’s discretion. 71 PA. CONS. STAT. § 732-205(a)(4) (2007).

<sup>30</sup> 71 PA. CONS. STAT. § 732-205(a) (2007); *see also* Carsia, 491 A.2d at 248. An additional responsibility of the Attorney involves brining criminal charges arising out of the State Medicaid Fraud Control Unit. 71 PA. CONS. STAT. § 732-205(a)(8) (2007).

<sup>31</sup> 71 PA. CONS. STAT. § 732-205(c) (2007).

<sup>32</sup> 71 PA. CONS. STAT. § 732-206(b) (2007); 42 PA. CONS. STAT. § 4544(a) (2007). Despite section 4544’s language limiting the convening of a multicounty grand jury to cases involving organized crime and/or public corruption involving more than one county, the courts have determined that the statute does “not place a limitation on the grand jury’s authority to investigate other crimes committed in a county,” including murder. Commonwealth v. McCauley, 588 A.2d 941, 945 (Pa. Super. Ct. 1991).

<sup>33</sup> 71 PA. CONS. STAT. § 732-205(d) (2007); *see also* Carsia, 491 A.2d at 241. A deputy may only be delegated an authority that the Attorney General is provided under section 732-205 of the Pennsylvania Statutes. *Id.* at 241.

## B. *The Pennsylvania District Attorneys Association*

The Pennsylvania District Attorneys Association (Association) is a non-profit organization, which was founded in 1912 to “provide uniformity and efficiency in the discharge of duties and functions” for district attorneys and assistant district attorneys.<sup>34</sup> The Association also provides support for training programs and reports on legal and legislative developments that impact district attorneys and their assistants.<sup>35</sup>

In 1983, an education and training division of the Association was founded called the Pennsylvania District Attorneys Institute (Institute).<sup>36</sup> The Institute develops and provides educational materials and training seminars for district attorneys and their staffs, as well as training courses for Pennsylvania law enforcement.<sup>37</sup> Additionally, every other year, the Institute holds a one-and-a-half day training program entitled the *Newly Elected District Attorney Seminar* for newly elected or appointed district attorneys.<sup>38</sup> In 1992, the Institute was accredited by the Continuing Legal Education Board as a CLE provider.<sup>39</sup>

## C. *Disciplining Prosecutors*

### 1. The Pennsylvania Rules of Professional Conduct

The Pennsylvania Supreme Court adopted the Pennsylvania Rules of Professional Conduct to address the professional and ethical responsibilities of all attorneys, including prosecutors.<sup>40</sup>

#### a. Professional and Ethical Responsibilities of Prosecutors

The Comment to the Pennsylvania Rules of Professional Conduct states that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>41</sup> To ensure this responsibility is satisfied, Rule 3.8 of the Pennsylvania Rules of Professional Conduct requires a prosecutor in a criminal case to comply with a number of rules, such as:

- (1) Refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) Making reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and that the accused has been given reasonable opportunity to obtain counsel;
- (3) Not seeking to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

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<sup>34</sup> Pennsylvania District Attorneys Association, History, available at <http://www.pdaa.org/history.html> (last visited Sept. 27, 2007).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> PA. RULES OF PROF'L CONDUCT R. 3.8 (2006).

<sup>41</sup> PA. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2006).

- (4) Making timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclosing to the defense and to the court all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the court; and
- (5) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refraining from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercising reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under the Rules of Professional Conduct.<sup>42</sup>

The Pennsylvania Rules of Professional Conduct require all attorneys, including prosecutors, to report certain professional misconduct.<sup>43</sup> Under Rule 8.3 of the Pennsylvania Rules of Professional Conduct, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, [must] inform the appropriate professional authority.”<sup>44</sup>

## 2. Investigating Prosecuting Attorneys and Disciplining Members of the Bar

### a. The Disciplinary Board of the Pennsylvania Supreme Court

The Disciplinary Board of the Pennsylvania Supreme Court (Board) has the authority to investigate and recommend discipline for members of the Pennsylvania Bar, including prosecuting attorneys. The Board is composed of fourteen members appointed by the Pennsylvania Supreme Court; twelve of whom are attorneys and two of whom are non-attorneys.<sup>45</sup> Board members serve three-year terms and cannot serve more than two consecutive terms.<sup>46</sup>

One of the Board’s main responsibilities includes considering and investigating, in accordance with the Pennsylvania Disciplinary Board Rules and Procedures (Disciplinary Rules), the conduct of attorneys subject to the Pennsylvania Rules of Professional Conduct.<sup>47</sup>

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<sup>42</sup> PA. RULES OF PROF’L CONDUCT R. 3.8 (2006).

<sup>43</sup> PA. RULES OF PROF’L CONDUCT R. 8.3(a) (2006).

<sup>44</sup> *Id.*

<sup>45</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.21 (2006). The Pennsylvania Supreme Court also designates one member to serve as Chairman and another member to serve as Vice Chairman. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.23(b) (2006); *see also* 1 RACHEL M. KANE & ERIKA BACHIOCHI, STANDARD PENNSYLVANIA PRACTICE § 4:154 (2d ed. 2006); Office of Disciplinary Counsel v. Surrick, 555 A.2d 883, 886 (Pa. 1989).

<sup>46</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.21 (2006).

<sup>47</sup> The investigation may commence upon the filing of a complaint or upon the Board’s own motion. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.23 (2006); *see also* PA. RULES OF DISCIPLINARY

The Board also is responsible for appointing the Chief Disciplinary Counsel and assistant disciplinary counsel for the Office of the Disciplinary Counsel (Office), the investigative and prosecutorial division of the Commonwealth's disciplinary system.<sup>48</sup> The Office of the Disciplinary Counsel is comprised of a main headquarters and four disciplinary district offices which house the assistant disciplinary counsel.<sup>49</sup> The Office has the power to prosecute all disciplinary proceedings before hearing committees, special masters, and the Board.<sup>50</sup> District offices of the Disciplinary Counsel generally investigate all matters involving alleged attorney misconduct, complaints against the Office, and complaints against Board members.<sup>51</sup>

b. Procedure for Investigating and Disciplining Attorney Misconduct

i. Investigation by the Office of Disciplinary Counsel

A complaint alleging attorney misconduct must be in writing, signed by the complainant, and contain a brief statement of the facts upon which the complaint is based.<sup>52</sup> Grounds for filing a complaint seeking discipline include:

- (1) Acting or omitting to act by a person which violates the Disciplinary Rules, whether or not the act or omission occurred in the course of an attorney-client relationship;
- (2) Conviction of a crime which under the Rules of Professional Conduct could result in suspension;
- (3) Willfully failing to appear before the Pennsylvania Supreme Court, the Disciplinary Board of the Pennsylvania Supreme Court, or Disciplinary Counsel for censure, private reprimand, or informal admonition;

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ENFORCEMENT R. 205(c) (2006). Additional responsibilities of the Board include (1) adopting rules of procedure, (2) taking the testimony relating to formerly admitted attorneys; (3) petitioning the Pennsylvania Supreme Court to determine whether an attorney is incapacitated by reason of mental infirmity or illness or because of addiction to drugs or intoxicants; and (4) recommending the temporary suspension of an attorney pursuant to emergency temporary suspension orders. *See* PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.23 (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 205(c) (2006).

<sup>48</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.23(a)(2) (2006).

<sup>49</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES §§ 85.5, 93.1 (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 202(a) (2006); Disciplinary Board of the Supreme Court of Pennsylvania, Report an Attorney, *available at* [http://www.padisiplinaryboard.org/faqs/report\\_consumer.php](http://www.padisiplinaryboard.org/faqs/report_consumer.php) (last visited Sept. 27, 2007). The Office of the Disciplinary Counsel is comprised of the Chief Disciplinary Counsel, assistant disciplinary counsel, investigators, and other staff members as determined by the head of the Board. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.61(a) (2006).

<sup>50</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.63(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 207(b) (2006). Disciplinary Counsel also are to appear at hearings deciding whether an attorney should be reinstated, cross-examine witnesses testifying in support, and to marshal available evidence, if any, in opposition. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.63(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 207(b) (2006).

<sup>51</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.63(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 207(b) (2006). The disciplinary district in which the person accused of misconduct maintains an office or in which the conduct that is under investigation occurred has jurisdiction over disciplinary complaints and investigations. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.2 (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 202(b) (2006).

<sup>52</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.2 (2006).

- (4) Willfully violating any other provision of the Pennsylvania Rules of Disciplinary Enforcement (Enforcement Rules);<sup>53</sup>
- (5) Failing without good cause to comply with any order under the Enforcement Rules of the Pennsylvania Supreme Court, the Disciplinary Board, a hearing committee or special master; and
- (6) Ceasing to meet the requirements for licensure as a foreign legal consultant.<sup>54</sup>

No recommendation or action can be taken by the Disciplinary Counsel on a complaint until notice has been provided to the attorney accused of misconduct, unless the complaint is frivolous or outside the jurisdiction of the Board, in which case the complaint will be dismissed.<sup>55</sup> The notice must state: (1) the nature of the grievance and if the Office of Disciplinary Counsel did not initiate the investigation, the name and address of the complainant; and (2) the right of the attorney to state a position with respect to the allegations raised in the complaint.<sup>56</sup>

Upon completion of the investigation, the assistant disciplinary counsel must report the disposition of the matter to the Chief Disciplinary Counsel.<sup>57</sup> The action taken or recommended should include one of the following: (1) dismissal of the complaint; (2) a conditional or unconditional informal admonition; (3) a conditional or unconditional private reprimand by the Board; or (4) prosecution of formal charges before a hearing committee or special master.<sup>58</sup>

#### ii. Review by Hearing Committee Member

The Office of Disciplinary Counsel will submit a request to have a hearing committee member review the Disciplinary Counsel's recommendation.<sup>59</sup> Except where the complaint is dismissed, the reviewing hearing committee member can approve or modify the recommendation of the Disciplinary Counsel.<sup>60</sup> If the reviewing hearing committee member modifies the recommendation, s/he must provide a rationale for the

<sup>53</sup> The "Enforcement Rules" govern the discipline of attorneys in Pennsylvania. *See* 1 RACHEL M. KANE & ERIKA BACHIOCHI, STANDARD PENNSYLVANIA PRACTICE § 4:148 (2d ed. 2006).

<sup>54</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 85.7(a)-(b) (2006).

<sup>55</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.7(a) (2006).

<sup>56</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.7(b)(1)-(2) (2006). Unless a shorter time frame is established by the Chief Disciplinary Counsel, the attorney accused of misconduct has twenty days from the date of the notice within which to file a statement position with the Office of the Disciplinary Counsel. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.7(b)(2) (2006).

<sup>57</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.8(b) (2006). During any stage of the proceedings, the Chief Disciplinary Counsel can apply for leave to withdraw a petition for discipline if it appears that the petition was "improvidently filed." PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.32(a) (2006).

<sup>58</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.8(b) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(a)(2) (2006).

<sup>59</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.31 (2006).

<sup>60</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.32(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(a)(3) (2006). If the reviewing hearing committee fails to modify a recommendation within ten days of receiving it from the Office of Disciplinary Counsel, the recommendation is considered approved. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.32(b)(1) (2006).

modification, which, in turn, is limited to the hearing committee member (1) dismissing the complaint, (2) issuing a conditional or unconditional informal admonition, (3) issuing a conditional or unconditional private reprimand; or (4) commencing prosecution of formal charges.<sup>61</sup>

The Office of Disciplinary Counsel can appeal the reviewing committee member's determination to a three member panel of the Board.<sup>62</sup> The panel will determine if the matter should be dismissed or if the attorney should be: (1) admonished; (2) reprimanded; or (3) brought to a formal hearing proceeding before a hearing committee or special master.<sup>63</sup>

### iii. Formal Disciplinary Proceedings

To commence formal disciplinary proceedings, the Office of Disciplinary Counsel must file a petition for discipline with the Board.<sup>64</sup> The petition for discipline must "set forth with specificity the charges of misconduct" alleged against the attorney and the Disciplinary Rule that has been violated.<sup>65</sup> A copy of the petition must be served on the attorney, who will then have twenty days to respond.<sup>66</sup> The petition for discipline and the attorney's answer are the only pleadings that may be filed in a formal disciplinary proceeding.<sup>67</sup> Any formal disciplinary proceedings before a hearing committee, special master,<sup>68</sup> or the Board adhere to the Pennsylvania Rules of Civil Procedure.<sup>69</sup>

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<sup>61</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.32(c) (2006).

<sup>62</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.33(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(a)(4) (2006). The appeal must state briefly the grounds relied upon by the Disciplinary Counsel for recommending modification of the reviewing committee member's determination. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.33(a) (2006). Copies of the appeal are only made available to the Board, and are not available to the attorney accused of misconduct or the reviewing committee member. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.33(b) (2006). The attorney accused of misconduct and the hearing committee have no right to be heard on appeal. *Id.*

<sup>63</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 87.33(c) (2006). *See supra* note 62 and accompanying text.

<sup>64</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.51 (2006). The petition for discipline may also be initiated upon a referral by the Pennsylvania Supreme Court following the conviction of an attorney for a crime. *Id.*

<sup>65</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.52(b) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(b)(1) (2006). The petition also may contain a recommended disciplinary action that "may be just and proper in the circumstances." PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.52(c) (2006).

<sup>66</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.53-54(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(b)(2)-(3) (2006). An attorney's failure to timely answer any factual allegation(s) "shall be deemed admitted." PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(b)(3) (2006).

<sup>67</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.55 (2006).

<sup>68</sup> Instead of a hearing committee, the Board may appoint a special master to conduct an investigatory hearing or formal proceeding where it appears that the hearing or proceeding will be "protracted and should be conducted continuously from day to day" until it is concluded. PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 93.91(a) (2006).

<sup>69</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.2 (2006).

After the filing of the answer, the Board will assign the case to a hearing committee or special master.<sup>70</sup> At the hearing, the parties are permitted to present evidence, cross-examine witnesses, object, file motions, and present arguments.<sup>71</sup> Within sixty days of the hearing's conclusion, the hearing committee or special master must submit a report to the Board with its findings and recommendations.<sup>72</sup>

iv. Determination by the Disciplinary Board of the Pennsylvania Supreme Court

Once the proceedings are before the Board, the accused attorney may submit briefs and present oral arguments to a panel of at least three Board members.<sup>73</sup> Within sixty days of the hearing, the Board must meet and decide whether to affirm or modify the hearing committee or special master's recommendation to: (1) dismiss the proceeding; (2) arrange for an informal admonition or private reprimand of the attorney; or (3) pursue other discipline, including probation, censure, suspension, or disbarment of the attorney.<sup>74</sup> If the Board concludes that the attorney should receive probation, censure, suspension, or disbarment, or if the attorney contests the informal admonition or private reprimand, the Board must file its findings, recommendations, briefs, and the record of the hearing with the Pennsylvania Supreme Court.<sup>75</sup>

v. Review and Imposition of Sanctions by the Pennsylvania Supreme Court

The Pennsylvania Supreme Court will review the Board's decision *de novo*.<sup>76</sup> Upon reviewing the Board's decision, the Court can affirm the Board's decision or impose a sanction that is "greater or less" than the sanction decided by the Board.<sup>77</sup> Generally, it is within the discretion of the Pennsylvania Supreme Court to grant oral arguments to the attorney.<sup>78</sup> However, if the Board has recommended a "sanction less than disbarment" and the Pennsylvania Supreme Court, after considering the Board's recommendation, determines that the attorney should be disbarred, the attorney will have an "absolute

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<sup>70</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.56(a) (2006). The Secretary of the Board appoints the members of the hearing committee and determines the date, time and location of the formal hearing. PA. DISCIPLINARY BOARD RULES AND PROCEDURES §§ 89.56(b)-89.57 (2006).

<sup>71</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.93(a) (2006). Evidence addressing the type of discipline that should be imposed is not admissible until the hearing committee or special master has "found that the evidence establishes a *prima facie* violation of at least one of the disciplinary rules." PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.151(a) (2006).

<sup>72</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.171 (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(c) (2006).

<sup>73</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.201(b) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(d)(1) (2006).

<sup>74</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.203 (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(d) (2006).

<sup>75</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.206(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(d)(2)(iii) (2006).

<sup>76</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.207(a) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(d)(2)(iii) (2006).

<sup>77</sup> *Id.*

<sup>78</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.207(d) (2006).

right” to request oral argument in front of the Court.<sup>79</sup> If the Board has recommended disbarment, the attorney may request, but is not guaranteed, oral argument before the Pennsylvania Supreme Court.<sup>80</sup>

If the Court finds the attorney guilty of misconduct, an attorney may be disbarred; suspended for no more than five years; publicly censured with or without probation; placed under probation by the Board; privately reprimanded by the Board with or without probation; or informally admonished in private by the Disciplinary Counsel.<sup>81</sup>

### 3. Removal of District Attorneys from Office Under the Pennsylvania Constitution and Section 1405 of the Pennsylvania Statutes

A district attorney may be removed from office upon “conviction of misbehavior in office or of any infamous crime.”<sup>82</sup> A district attorney also may be removed from office by the Governor for reasonable cause, after being provided notice and a full hearing, on the vote of two-thirds of the Pennsylvania Senate.<sup>83</sup>

Alternatively, an individual in Pennsylvania can seek to remove a district attorney from office if s/he is “guilty of willful and gross negligence in the execution of the duties of his[her] office.”<sup>84</sup> When seeking to remove a district attorney from office, the individual must file a complaint, verified under oath or affirmation by the individual, with the court in which the district attorney prosecutes cases.<sup>85</sup> Upon its receipt, the court must provide notice of the complaint to the district attorney and schedule a hearing on the matter.<sup>86</sup> At the hearing, the court will determine if there exists probable cause for the allegations.<sup>87</sup> If the court finds there is no probable cause to support the allegations raised in the complaint, the complaint will be dismissed.<sup>88</sup> If the court finds that probable cause exists, the district attorney must answer the complaint.<sup>89</sup> If the court finds the district attorney guilty of willful and gross negligence, s/he will be guilty of a misdemeanor and “be sentenced to pay a fine not exceeding one thousand dollars and to undergo imprisonment not exceeding one year, and his[her] office [will] be declared vacant.”<sup>90</sup>

#### *D. Relevant Prosecutorial Responsibilities*

##### 1. Prosecutorial Discretion

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<sup>79</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.207(c) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(e)(3) (2006).

<sup>80</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 89.207(b) (2006); *see also* PA. RULES OF DISCIPLINARY ENFORCEMENT R. 208(e)(2) (2006).

<sup>81</sup> PA. DISCIPLINARY BOARD RULES AND PROCEDURES § 85.8(a) (2006).

<sup>82</sup> PA. CONST. art. 6, § 7.

<sup>83</sup> *Id.*

<sup>84</sup> 16 PA. CONS. STAT. § 1405(a) (2007).

<sup>85</sup> 16 PA. CONS. STAT. § 1405(b) (2007).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> 16 PA. CONS. STAT. § 1405(a) (2007).

While Pennsylvania law recognizes that a prosecutor “possesses the initial discretion” in deciding to seek the death penalty,<sup>91</sup> this discretion is “not unfettered.”<sup>92</sup> Pennsylvania courts have determined that prosecutorial discretion to seek the death penalty in a given case is guided by the seriousness of the offense and the level of proof against the defendant.<sup>93</sup> A prosecutor could, in very limited circumstances, violate a defendant’s constitutional rights if s/he abuses his/her discretion in selecting cases in which to seek the death penalty.<sup>94</sup>

In order to show that the prosecutor has abused his/her discretion, the defendant must demonstrate that no evidence exists to support the alleged aggravating circumstances.<sup>95</sup> When assessing the defendant’s claim that the prosecutor abused his/her discretion, the court’s inquiry is focused “solely” upon whether the case is properly designated as a capital case, not whether each of the alleged aggravating circumstances is supported by evidence.<sup>96</sup>

If the defendant makes a showing that no evidence exists to support the alleged aggravating circumstance, then the trial court has the discretion to require the prosecutor to make a minimal disclosure of the evidence supporting the alleged aggravating circumstance.<sup>97</sup> If the prosecutor is unable to produce evidence “in support of *any* aggravating circumstance,” the trial court can determine that the case will proceed as a non-capital case.<sup>98</sup> However, if there is evidence creating a factual dispute as to the existence of any aggravating circumstance, the defendant’s claim will be dismissed and the case will proceed as a capital case.<sup>99</sup>

The process used to determine whether a prosecutor will seek the death penalty differs from county to county. For example, in Montgomery County, the district attorney decides whether to seek the death penalty based upon an assessment completed by the office’s deputy district attorneys and assistant district attorneys.<sup>100</sup> The assessment considers the aggravating and mitigating circumstances of the crime and then determines if there is a reasonable chance of success in obtaining the death penalty.<sup>101</sup>

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<sup>91</sup> *Commonwealth v. Buck*, 709 A.2d 892, 896 (Pa. 1998). In fact, the Pennsylvania Supreme Court has recognized that a trial court may not make a pretrial determination as to whether a reasonable jury could find the death penalty applicable in a murder case. *See Commonwealth v. Buonopane*, 599 A.2d 681, 682 (Pa. Super. Ct. 1991).

<sup>92</sup> *Buck*, 709 A.2d at 896.

<sup>93</sup> *Buonopane*, 599 A.2d at 683; *Commonwealth v. DeHart*, 516 A.2d 656, 670 (Pa. 1986).

<sup>94</sup> *DeHart*, 516 A.2d at 670.

<sup>95</sup> *See Buck*, 709 A.2d at 896-97.

<sup>96</sup> *Id.* at 896.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 897. Such a ruling by the trial court should be made without prejudice to the prosecutor, permitting the prosecutor to file an amended notice to seek the death penalty if s/he becomes aware of evidence supporting an aggravating circumstance. *Id.*

<sup>99</sup> *Id.* at 896.

<sup>100</sup> Telephone Interview with Bruce Castor, District Attorney, Montgomery County, Pa. (Aug. 10, 2005).

<sup>101</sup> *Id.*

In Dauphin County, the district attorney also ultimately decides whether to seek the death penalty in a case.<sup>102</sup> Prior to the defendant's arraignment, the district attorney consults with the Chief Deputy District Attorney and several first assistant district attorneys to informally discuss whether to seek the death penalty.<sup>103</sup> As in Montgomery County, this consultation involves a weighing of the aggravating and mitigating circumstances.<sup>104</sup>

Similarly, the district attorney in Lebanon County decides whether to seek the death penalty by considering the aggravating circumstances, the wishes of the victim's family, the public's safety, and the risks to society.<sup>105</sup> However, the district attorney indicated that if the facts of the case led her to believe there was a valid reason to seek the death penalty, then she would seek the death penalty even if the victim's family wished otherwise.<sup>106</sup>

#### b. Notice of Aggravating Circumstances

If a prosecutor decides to seek a death sentence, s/he must file a written notice of the aggravating circumstances that the prosecutor will seek to establish during the sentencing hearing of the capital trial.<sup>107</sup> The prosecutor must provide a copy of the notice to the defendant<sup>108</sup> at or before the arraignment<sup>109</sup> in order "to give the defendant sufficient time and information to prepare for the sentencing hearing."<sup>110</sup> However, even if the prosecution fails to provide a notice of the aggravating circumstances, the Pennsylvania Supreme Court has held that constructive notice of aggravating circumstances (i.e., the aggravating circumstances are inherent within the offense charged) is adequate and does not constitute failure to provide timely or accurate notice.<sup>111</sup>

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<sup>102</sup> Telephone Interview with Edward Marsico, Jr., District Attorney, Dauphin County, Pa. (Aug. 17, 2005).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Telephone Interview with Deidre Eshleman, District Attorney, Lebanon County, Pa. (Aug. 17, 2005).

<sup>106</sup> *Id.*

<sup>107</sup> PA. R. CRIM. P. 802; *see also* Commonwealth v. Wesley, 753 A.2d 204, 210 (Pa. 2000) (holding that the prosecutor must give a defendant written notice of any aggravating circumstance it intends to prove at sentencing); Commonwealth v. Buck, 709 A.2d 892, 896 (Pa. 1998) (finding that the Commonwealth is required to file a notice of the alleged aggravating circumstances.).

<sup>108</sup> PA. R. CRIM. P. 802.

<sup>109</sup> *Id.*

<sup>110</sup> PA. R. CRIM. P. 802, cmt.

<sup>111</sup> *See* Commonwealth v. Edwards, 903 A.2d 1139, 1161 (Pa. 2006) (holding that notice was sufficient when the prosecutor provided the defendant general notice of the aggravating circumstance that would be pursued and constructive notice that the prosecutor intended to pursue the requirements of the aggravating circumstance). For example, in *Commonwealth v. Crews* the defendant was charged with two murders and was notified prior to the arraignment that the prosecutor would seek the death penalty. *See* Commonwealth v. Crews, 640 A.2d 395, 403 (Pa. 1994). However, the defendant was not provided the required written notice until three days prior to trial. *Id.* The Court ruled that there was no prejudice to the defendant for the prosecutor failing to provide written notice to the defendant prior to the arraignment of the aggravating circumstances that would be sought and that the aggravating circumstances sought by the prosecutor were "inherent" in the charges against the defendant. *Id.* "Torture" was the only aggravator found by the Court to not be inherent in the charges, but the prosecutor discovered evidence supporting torture after the arraignment. *Id.*

Moreover, if the prosecutor becomes aware of the aggravating circumstance after the arraignment, the prosecutor is permitted to provide “prompt notice” of such aggravating circumstance to the defendant.<sup>112</sup> When providing notice after the arraignment, the prosecutor must demonstrate that s/he was not aware of the facts supporting the particular aggravating circumstance and that the defendant has sufficient time to prepare a defense.<sup>113</sup> The court also can extend the time frame for providing notice of the aggravating circumstances if cause is shown.<sup>114</sup>

If the prosecutor is aware of an aggravating circumstance and fails to provide notice to the defendant, the court could subject the prosecution to sanctions, including but not limited to: excluding evidence of the aggravator, granting a continuance to the defendant,<sup>115</sup> or vacating a death sentence and remanding the case for a new sentencing hearing.<sup>116</sup>

A notice to seek the death penalty can be withdrawn if the prosecutor no longer has sufficient evidence of an aggravating circumstance or if evidence of a mitigating circumstance is later discovered.<sup>117</sup>

## 2. Plea Agreements

A defendant has no federal or state constitutional right to a plea negotiation.<sup>118</sup> In fact, the prosecutor has the discretion to enter plea negotiations with a defendant, and this discretion is not reviewable by a court unless the decision was based upon invidious classifications such as race, religion, or national origin.<sup>119</sup>

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<sup>112</sup> PA. R. CRIM. P. 802, cmt.

<sup>113</sup> See 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST’S PENNSYLVANIA PRACTICE, CRIMINAL PROCEDURE § 15.5 (2d. ed. 2007). The Pennsylvania Supreme Court, however, has reversed a death sentence and remanded a case for a new sentencing hearing when the trial court permitted the Commonwealth to amend its death penalty notice with a new aggravating circumstance—significant history of felony convictions involving the use or threat of violence to the person—one year after the arraignment and two days into jury selection. See *Commonwealth v. Williams*, 650 A.2d 420, 428 (Pa. 1994). The Court determined that the prosecutor should have submitted the aggravating circumstance prior to the arraignment because “the information already exist[ed], [wa]s easily available to the prosecutor by the exercise of reasonable diligence and because the intent of the rule is to give the defendant notice *as soon as possible* of circumstances which the Commonwealth intends to submit at the sentencing hearing.” *Id.* at 429.

<sup>114</sup> PA. R. CRIM. P. 802. In Lebanon County, the District Attorney makes an agreement with the defense waiving the requirement for providing formal notice of aggravating circumstances at the arraignment. Telephone Interview with Deidre Eshleman, District Attorney, Lebanon County, Pa. (Aug. 17, 2005).

<sup>115</sup> See *Crews*, 640 A.2d at 404.

<sup>116</sup> See *Williams*, 650 A.2d at 428; *Commonwealth v. Wesley*, 753 A.2d 204, 214 (Pa. 2000). If the prosecutor knew of an aggravating circumstance(s) that was not inherent in the crime at the time of the arraignment and failed to provide the defendant with notice, the case can be remanded for a new sentencing hearing limited to evidence addressing the aggravating circumstance(s) raised in the initial notice. See *Edwards*, 903 A.2d at 1161-62; *Wesley*, 753 A.2d at 216.

<sup>117</sup> Telephone Interview with Bruce Castor, District Attorney, Montgomery County, Pa. (Aug. 10, 2005).

<sup>118</sup> See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.”); *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Commonwealth v. Stafford*, 416 A.2d 570, 510 (Pa. Super. Ct. 1979).

<sup>119</sup> See *Commonwealth v. Smith*, 664 A.2d 622, 627 (Pa. Super. Ct. 1995); *Stafford*, 416 A.2d at 510. There is concern that in capital prosecutions, a plea offer of life imprisonment without parole is generally

When reviewing a plea agreement, the court must conduct a separate inquiry on the record to determine “whether the defendant understands and voluntarily accepts the terms of the plea agreement.”<sup>120</sup> This inquiry can be conducted by the court, defense counsel, the prosecuting attorney, or as a written document.<sup>121</sup>

### 3. Discovery

#### a. Discovery Requirements

There is no federal constitutional right to discovery in a criminal case.<sup>122</sup> However, state and federal law entitles a defendant to receive all exculpatory information<sup>123</sup> and impeachment evidence,<sup>124</sup> even if there has been no request from the defendant.<sup>125</sup> The prosecutor “is not required to deliver his[/her] entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”<sup>126</sup> This includes the disclosure of impeachment evidence which could be used to show bias or interest on the part of a key prosecution witness.<sup>127</sup> Accordingly, the prosecution is under a duty to reveal any deal or agreement, even an informal one, with a witness concerning pending criminal charges.<sup>128</sup>

In all criminal cases, and upon the defendant’s request, the prosecutor must disclose and permit the defendant’s attorney to “inspect and copy or photograph” the following:

- (1) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the prosecutor;
- (2) Any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the prosecutor;
- (3) The defendant's prior criminal record;

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offered to the defendant, creating the impression that the death penalty is being used as a bargaining tool for prosecutors.

<sup>120</sup> PA. R. CRIM. P. 590(B)(2).

<sup>121</sup> PA. R. CRIM. P. 590 cmt.

<sup>122</sup> See *Commonwealth v. Murphy*, 425 A.2d 352, 357 (Pa. 1981).

<sup>123</sup> This is known as *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963); see also PA. R. CRIM. P. 573(B)(1)(a); *Commonwealth v. Sullivan*, 820 A.2d 795, 803 n.7 (Pa. Super. Ct. 2003).

<sup>124</sup> See *Commonwealth v. Ulen*, 650 A.2d 416, 418 (Pa. 1994) (“Our cases have made it clear that, as a matter of due process, it is error to fail to provide evidence that will be used to impeach the credibility of defense witnesses.”).

<sup>125</sup> See *Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa. 2001).

<sup>126</sup> *United States v. Bagley*, 473 U.S. 667, 675 (1985); see also *Commonwealth v. Appel*, 689 A.2d 891, 907 (Pa. 1997).

<sup>127</sup> See *Commonwealth v. Simmons*, 804 A.2d 625, 636 (Pa. 2001); *Burke*, 781 A.2d at 1141; *Commonwealth v. Burkhardt*, 833 A.2d 233, 241 (Pa. Super. Ct. 2003) (“Any implication, promise or understanding that the government would extend leniency in exchange for a witness’s testimony is relevant to the witness’s credibility.”).

<sup>128</sup> See *Commonwealth v. Spatz*, 896 A.2d 1191, 1214 (Pa. 2006); *Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000) (“Any implication, promise or understanding that the government would extend leniency in exchange for a witness’s testimony is relevant to the witness’s credibility.”).

- (4) The circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;
- (5) Any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the prosecutor;
- (6) Any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and
- (7) The transcripts and recordings of any electronic surveillance, and the authority by which the transcripts and recordings were obtained.<sup>129</sup>

Additionally, if the defendant files a motion for pre-trial discovery, demonstrating that the requested items are “material to the preparation of the defense” and that the request is reasonable, the court may order the Commonwealth to allow the defendant’s attorney to inspect and copy or photograph the following requested items:

- (1) The names and addresses of eyewitnesses;
- (2) All written or recorded statements, and substantially verbatim oral statements, of witnesses the prosecution intends to call at trial and of co-defendants; and
- (3) Any other evidence specifically identified by the defendant, provided the defendant can establish that its disclosure is in the interests of justice.<sup>130</sup>

The prosecution also has an obligation to disclose “exculpatory evidence in the files of police agencies of the same government bringing the prosecution.”<sup>131</sup> However, the prosecution does not have to disclose any reports, memoranda, or other internal state documents made by the district attorney, other state agents, or law enforcement officers in connection with investigating or prosecuting the case.<sup>132</sup>

The prosecution is under a continuing duty to make additional disclosures whenever new or additional information subject to disclosure is discovered or the identity of an additional witness materializes.<sup>133</sup>

#### b. Challenges to Discovery Violations

If either the prosecution or defense fails to comply with its discovery obligations, “[t]he trial court is accorded broad discretion in deciding the appropriate remedy.”<sup>134</sup> Rule 573 of the Pennsylvania Rules of Criminal Procedure provides sanctions that may be imposed

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<sup>129</sup> PA. R. CRIM. P. 573(B).

<sup>130</sup> PA. R. CRIM. P. 573(B)(2)(a).

<sup>131</sup> *Burke*, 781 A.2d at 1142.

<sup>132</sup> PA. R. CRIM. P. 573(G); *see also* *Commonwealth v. Appel*, 689 A.2d 891, 907 (Pa. 1997) (“The prosecution is not required under *Brady* to “make a complete and detailed accounting to the defense of all police investigatory work on a case,” nor must the prosecutor “disclose possible theories of the defense to the defendant.”) (citation omitted).

<sup>133</sup> PA. R. CRIM. P. 573(D).

<sup>134</sup> *Commonwealth v. Counterman*, 719 A.2d 284, 298 (Pa. 1998); *see also* *Commonwealth v. Lignons*, 773 A.2d 1231, 1237 (Pa. 2001).

by the court when either party fails to adhere to a discovery order.<sup>135</sup> When fashioning a remedy the trial court may: (1) order the party to permit discovery or inspection; (2) grant a continuance; (3) prohibit the party from introducing evidence not disclosed, other than the defendant's testimony; or (4) enter any order that the court deems just under the circumstances.<sup>136</sup>

Usually, an adequate remedy for the prosecution's failure to comply with discovery requirements is to issue a continuance.<sup>137</sup> Specifically, a continuance is appropriate "where the undisclosed statement or other evidence is admissible and the defendant's only prejudice is surprise."<sup>138</sup> However, a mistrial may be an appropriate remedy "when a discovery violation is of such a nature as to deprive the defendant of a fair trial."<sup>139</sup>

Following the trial, a defendant also may obtain relief for the prosecution's failure to disclose evidence which is exculpatory as to guilt or punishment, known as *Brady*<sup>140</sup> material, by proving that: (1) the prosecution suppressed the evidence, either willfully or inadvertently; (2) the suppressed evidence was favorable to the accused because it was exculpatory or because it can be used for impeachment purposes; and (3) the suppressed evidence was material to the issues at trial.<sup>141</sup> Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>142</sup> Reasonable probability is "a probability sufficient to undermine confidence in the outcome."<sup>143</sup>

The prosecution's failure to disclose *Brady* evidence that is material to guilt will result in a new trial.<sup>144</sup> However, in rare circumstances, where the prosecutor's tactics in a case were "intended to prejudice the defendant to the point of the denial of a fair trial," the defendant could be discharged on the basis that his/her double jeopardy rights under the Pennsylvania Constitution would be violated by conducting a second trial.<sup>145</sup>

#### 4. Limitations on Arguments

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<sup>135</sup> PA. R. CRIM. P. 573(E).

<sup>136</sup> *Id.*; see also *Commonwealth v. Chambers*, 599 A.2d 630, 637 (Pa. 1991).

<sup>137</sup> See *Commonwealth v. Crossley*, 653 A.2d 1288, 1291 (Pa. Super. Ct. 1995); *Commonwealth v. Thiel*, 470 A.2d 145, 150 (Pa. Super. Ct. 1983).

<sup>138</sup> *Thiel*, 470 A.2d at 150.

<sup>139</sup> *Counterman*, 719 A.2d at 298; see also *Thiel*, 470 A.2d at 150.

<sup>140</sup> *Brady v. Maryland* held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>141</sup> See *Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa. 2001); *Commonwealth v. Simmons*, 804 A.2d 625, 636-37 (Pa. 2001).

<sup>142</sup> *Burke*, 781 A.2d at 1141 (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)); see also *Counterman*, 719 A.2d at 297 ("Materiality is satisfied when there is a 'reasonable probability' of a different result if the evidence had been disclosed.") (citations omitted).

<sup>143</sup> *Commonwealth v. Santiago*, 654 A.2d 1062, 1069 (Pa. Super. Ct. 1994) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)).

<sup>144</sup> See *id.* at 1084.

<sup>145</sup> *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992); see also *Commonwealth v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999) (holding that the double jeopardy clause of the Pennsylvania Constitution applies when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial and the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to deny him/her of a fair trial).

### a. Substantive Limitations

A prosecutor's statements are improper if the "unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict."<sup>146</sup> The improper remarks must be "examined in light of the case as a whole and in the context of the aggravating and mitigating circumstances."<sup>147</sup> Yet, even if the prosecutor's comments are "intemperate, uncalled for and improper, a new trial is not necessarily required."<sup>148</sup> The court generally can cure any prejudicial effect caused by the prosecutor's statement by providing a cautionary instruction to the jury that the prosecutor's comments are not evidence.<sup>149</sup>

During the guilt phase, courts have determined that a prosecutor may not rely in any manner upon the Bible or other religious writings in support of imposing the death penalty,<sup>150</sup> comment on the defendant's right against self-incrimination,<sup>151</sup> or reference his/her personal opinions during opening and closing statements.<sup>152</sup>

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<sup>146</sup> Commonwealth v. Fisher, 813 A.2d 761, 768 (Pa. 2002); *see also* Commonwealth v. Williams, 896 A.2d 523, 542 (Pa. 2006); Commonwealth v. Stokes, 839 A.2d 226, 230 (Pa. 2003).

<sup>147</sup> *Fisher*, 813 A.2d at 768; *see also* Commonwealth v. Green, 611 A.2d 1294, 1298 (Pa. Super. Ct. 1992) (citing Commonwealth v. Williams, 499 A.2d 1089, 1091 (Pa. 1985)) ("In reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they were made.")

<sup>148</sup> Commonwealth v. Stoltzfus, 337 A.2d 873, 882 (Pa. 1975). During closing statements, the prosecutors in *Stoltzfus* commented on the defendant's story by stating:

If it weren't for the tragedy of the situation, I would sometimes picture a Keystone Cop's testimony' and 'If it weren't for the tragedy of this case, those lines would be some of the funniest lines in the court room, because they are utterly unbelievable.

*Id.* at 881-82. The court stated that the comments were "improper and should not have been uttered by the district attorney" but did not warrant a mistrial. *Id.* at 882.

<sup>149</sup> *See* Commonwealth v. Hawkins, 701 A.2d 492, 503 (Pa. 1997). Indeed, it is presumed in Pennsylvania that "juries follow the court's instructions as to the applicable law." *Id.*

<sup>150</sup> *See* Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991). The *Chambers* decision adopting a *per se* rule that prosecutorial comments addressing the Bible are improper and reversible error does not apply retroactively. *See* Commonwealth v. Stokes, 839 A.2d 226, 231 (Pa. 2003); Commonwealth v. Hughes, 865 A.2d 761, 808 (Pa. 2004) (determining that there was no prejudicial effect from prosecutor's use of Biblical references during the penalty phase of the trial because the trial occurred before the adoption of the *per se* rule against biblical references). Prior to the *Chambers* ruling, the Pennsylvania Supreme Court permitted closing statements by prosecutors including:

But I say to you [the jury] that you must acknowledge that in our world, ever since history has been recorded, there have been people who do evil. There are people who are evil. The Bible speaks of the Prince of Darkness. The personification of evil. We have read of the contract killer, the killer for hire. The people responsible for the Holocaust, Charles Manson, and many, many others. These are different people from you and me.

Commonwealth v. Henry, 569 A.2d 929, 939-40 (Pa. 1990), *abrogated on other grounds*.

<sup>151</sup> *See* Commonwealth v. Fletcher, 861 A.2d 898, 917-18 (Pa. 2004). This also applies to a prosecutor's comments during the penalty phase of a trial. *Id.*

<sup>152</sup> *See* United States v. Young, 470 U.S. 1, 9 (1989); *see also* Commonwealth v. Baker, 614 A.2d 663, 671 (Pa. 1992) (citing Commonwealth v. Cronin, 346 A.2d 59, 62 (Pa. 1975)) (stating that a prosecutor

During the penalty phase, a prosecutor is permitted “reasonable latitude in arguing his[her] [prosecutorial] position to the jury and [s/]he may employ oratorical flair in arguing in favor of the death penalty.”<sup>153</sup> In fact, the prosecutor may state his/her belief in the defendant’s guilt,<sup>154</sup> that the defendant “showed no sympathy or mercy to his victims,”<sup>155</sup> and that the death penalty “would be the only way to protect society” from the defendant.<sup>156</sup> A prosecutor’s comments in the penalty phase will warrant reversal only if they are “so inflammatory as to have caused the jury’s sentencing verdict to be the product of passion, prejudice or other arbitrary factors.”<sup>157</sup> However, if the “court expressly exhorts the jury to decide the case dispassionately based on the evidence and the law,” improper comments by the prosecutor during the penalty phase will not affect sentencing.<sup>158</sup>

#### b. Challenges to Prosecutorial Arguments

It is well-accepted by Pennsylvania courts that “one must object to errors, improprieties or irregularities at the earliest possible stage of the criminal or civil adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.”<sup>159</sup> Under Pennsylvania case law, an immediate objection by defense counsel permits the trial court to remove any prejudice to the defendant by promptly providing a “specific instruction to the jury to disregard the challenged statement.”<sup>160</sup>

If the prosecutorial misconduct did not undermine the integrity of the trial court and was not intentionally done to prevent a fair trial, a mistrial is a proper remedy.<sup>161</sup> However, should the court determine that the prosecutor intentionally acted to deprive the defendant

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“may not indulge in personal assertions of guilt of a defendant either by direct statement or indirectly by figure of speech”).

<sup>153</sup> Commonwealth v. Stokes, 839 A.2d 226, 231-32 (Pa. 2003). The Pennsylvania Supreme Court has determined that “[a]t the penalty phase, where the presumption of innocence is no longer applicable, the prosecutor is permitted even greater latitude in presenting argument.” Commonwealth v. Travaglia, 661 A.2d 352, 362 (Pa. 1995); *see also* Commonwealth v. Fletcher, 861 A.2d 898, 917 (Pa. 2004). In fact, the prosecutor is permitted to “employ oratorical license and impassioned argument.” *Travaglia*, 661 A.2d at 362.

<sup>154</sup> *See* Commonwealth v. Basemore, 582 A.2d 861, 869 (Pa. 1990).

<sup>155</sup> Commonwealth v. Baker, 614 A.2d 663, 671-72 (Pa. 1992) (citing Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987)).

<sup>156</sup> *Travaglia*, 661 A.2d at 366.

<sup>157</sup> Commonwealth v. Cox, 686 A.2d 1279, 1288 (Pa. 1996).

<sup>158</sup> *Id.* at 1288. During the penalty phase, the prosecutor stated: “Russell Cox, you deserve to die.” *Id.* The Pennsylvania Supreme Court determined that this statement was not improper because the trial court “cautioned the jury not to consider the remark as constituting an expression of personal opinion regarding punishment but a recommendation on behalf of the Commonwealth that the relevant evidence and law warranted death penalty verdicts.” *Id.*

<sup>159</sup> Commonwealth v. English, 667 A.2d 1123, 1126 (Pa. Super. Ct. 1995).

<sup>160</sup> Commonwealth v. Davenport, 342 A.2d 67, 75 (Pa. 1975).

<sup>161</sup> Commonwealth v. Chmiel, 777 A.2d 459, 466-67 (Pa. Super. Ct. 2001) (holding that a mistrial was appropriate when a prosecutor made repeated references to charges that were not filed and not supported by evidence and biblical references in closing statements).

of a fair trial or to subvert the truth-determining process, then the court can implicate the double jeopardy clause and prevent the retrial of the defendant.<sup>162</sup>

Improper statements by a prosecutor during the penalty phase of the trial can result in a new penalty hearing.<sup>163</sup>

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<sup>162</sup> *Id.* at 466.

<sup>163</sup> *See* Commonwealth v. Brown, 786 A.2d 961, 968 (Pa. 2001) (holding that a prosecutor's reference to "ancient law" during the penalty phase of the trial could result in a new penalty hearing).

## II. ANALYSIS

### A. Recommendation #1

**Each prosecutor’s office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.**

The Commonwealth of Pennsylvania does not require district attorney offices to have written policies governing the exercise of prosecutorial discretion.

In 2003, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (Committee) found that “[n]o county prosecutor’s office in Pennsylvania employs public guidelines defining standards and procedures for seeking the death penalty.”<sup>164</sup> While Committee members attempted to learn of internal procedures guiding prosecutors’ decision to seek the death penalty, they “were rebuffed by the Pennsylvania District Attorneys Association, which advised member counties not to cooperate with the Committee on this point.”<sup>165</sup>

In its Final Report, the Committee therefore recommended that:

- (1) District attorney offices adopt written standards and procedures for making decisions about whether to seek the death penalty; and
- (2) The Attorney General empanel a statewide committee of county district attorneys to review each district attorney’s decision to seek the death penalty with the goal of ensuring geographic consistency in the application of the death penalty.<sup>166</sup>

The Committee further recommended that local district attorneys “ensure that defense counsel has an opportunity to argue and present evidence as to why the death penalty should not be sought.”<sup>167</sup> However, to the best of our knowledge, none of these recommendations have been implemented.

Although Pennsylvania does not appear to have adopted the Committee’s recommendations, the Pennsylvania Supreme Court adheres to the Pennsylvania Rules of Professional Conduct (the Rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.<sup>168</sup> Under the Rules, the prosecutor is “a minister of justice”<sup>169</sup> and has an obligation to ensure that each “defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”<sup>170</sup> The

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<sup>164</sup> NICHOLAS P. CAFARDI ET. AL., PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 216 (2003).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 221.

<sup>167</sup> *Id.* at 218.

<sup>168</sup> PA. RULES OF PROF’L CONDUCT R. 3.8 (2006).

<sup>169</sup> PA. RULES OF PROF’L CONDUCT R. 3.8 cmt 1 (2006).

<sup>170</sup> *Id.*

Rules specifically require prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>171</sup>

Furthermore, while Pennsylvania law recognizes that a prosecutor “possesses the initial discretion” in deciding to seek the death penalty,<sup>172</sup> this discretion is “not unfettered.”<sup>173</sup> Prosecutorial discretion to seek the death penalty is guided by the seriousness of the offense and the level of proof against the defendant.<sup>174</sup> Indeed, in rare circumstances, a defendant’s constitutional rights may be violated if a prosecutor abuses his/her discretion in selecting cases in which to seek the death penalty.<sup>175</sup> In order to show the prosecutor has abused his/her discretion, the defendant must demonstrate that no evidence exists to support any alleged aggravating circumstance.<sup>176</sup>

Additionally, in order to seek the death penalty, a prosecutor must provide written notice of the aggravating circumstances that will be sought during the sentencing hearing.<sup>177</sup> Generally, this notice must be provided to the defendant at or before the arraignment.<sup>178</sup> However, if the prosecutor becomes aware of an aggravating circumstance after the arraignment, s/he still may seek the death penalty by providing “prompt notice” of the aggravating circumstance to the defendant.<sup>179</sup> The Pennsylvania Supreme Court has further diluted this written notice requirement by holding that constructive notice of the aggravating circumstances may be sufficient.<sup>180</sup> And at least one district attorney office circumvents the formal notice requirement entirely by having defense counsel agree to waive the requisite notice at arraignment.<sup>181</sup>

Nonetheless, if the prosecutor is aware of an aggravating circumstance and fails to provide notice to the defendant, the court could subject the prosecution to sanctions, including but not limited to: excluding evidence, granting the defendant a continuance,<sup>182</sup> or vacating a death sentence and remanding the case for a new sentencing hearing.<sup>183</sup>

In sum, although Pennsylvania law outlines some general parameters for prosecutors seeking the death penalty, the Commonwealth does not require district attorney offices to have written policies governing the exercise of prosecutorial discretion in capital cases. Furthermore, because we were unable to determine whether any district attorney offices have adopted such policies, we are unable to assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #1.

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<sup>171</sup> PA. RULES OF PROF’L CONDUCT R. 3.8(a) (2006).

<sup>172</sup> *Commonwealth v. Buck*, 709 A.2d 892, 896 (Pa. 1998).

<sup>173</sup> *Id.*

<sup>174</sup> *See Commonwealth v. Buonopane*, 599 A.2d 681, 683 (Pa. Super. Ct. 1991); *Commonwealth v. DeHart*, 516 A.2d 656, 670 (Pa. 1986).

<sup>175</sup> *DeHart*, 516 A.2d at 670.

<sup>176</sup> *See Buck*, 709 A.2d at 896-97.

<sup>177</sup> PA. R. CRIM. P. 802; *See Commonwealth v. Wesley*, 753 A.2d 204, 210 (Pa. 2000).

<sup>178</sup> *Id.*

<sup>179</sup> PA. R. CRIM. P. 802, cmt.

<sup>180</sup> *See Commonwealth v. Edwards*, 903 A.2d 1139, 1161 (Pa. 2006).

<sup>181</sup> Telephone Interview with Deidre Eshleman, District Attorney, Lebanon County, Pa. (Aug. 17, 2005).

<sup>182</sup> *See Commonwealth v. Crews*, 640 A.2d 395, 404 (Pa. 1994).

<sup>183</sup> *See Commonwealth v. Williams*, 650 A.2d 420, 428 (Pa. 1994); *Commonwealth v. Wesley*, 753 A.2d 204, 214 (Pa. 2000).

Based on this information, the Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to prosecutors for use in making charging decisions and setting charging guidelines.

*B. Recommendation #2*

**Each prosecutor’s office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.**

The Commonwealth of Pennsylvania does not require each district attorney office to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or testimony of jailhouse snitches, informants and other witnesses who receive a benefit.<sup>184</sup> Each office may have such procedures and policies, but we did not obtain copies of any of these policies and procedures. We are, therefore, unable to ascertain whether the Commonwealth of Pennsylvania is in compliance with Recommendation #2.

We also note that Pennsylvania has established some trial procedures relevant to the admissibility and/or reliability of certain types of evidence. For example, the Pennsylvania Supreme Court has recognized that “[a]ny implication, promise or understanding that the government would extend leniency in exchange for a witness’ testimony is relevant to the witness’ credibility.”<sup>185</sup> Additionally, Pennsylvania courts have adopted a framework for juries to consider when assessing the reliability of confessions and testimony from snitches, informants and other witnesses who receive a benefit. Section 4.17 of the *Pennsylvania Suggested Standard Criminal Jury Instructions* directs the jury to consider these specific factors when assessing the reliability of such witnesses’ testimony:<sup>186</sup>

As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony. The following are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe testimony:

- (1) Was the witness able to see, hear, or know the things about which s/he testified?
- (2) How well could the witness remember and describe the things about which s/he testified?

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<sup>184</sup> See Chapter Three: Law Enforcement Identifications and Interrogations for a discussion of Pennsylvania’s law enforcement procedures on eyewitness identifications and custodial interrogations.

<sup>185</sup> *Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000); see also *Commonwealth v. Burkhardt*, 833 A.2d 233, 241 (Pa. Super. Ct. 2003).

<sup>186</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 4.17 (2005).

(3) Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth, old age, or by any physical, mental, or intellectual deficiency?

(4) Did the witness testify in a convincing manner? How did s/he look, act, and speak while testifying? Was his/her testimony uncertain, confused, self-contradictory, or evasive?

(5) Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?

(6) How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony and evidence? Does it make sense?<sup>187</sup>

### C. Recommendation #3

**Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.**

State and federal law requires prosecutors to disclose all exculpatory information<sup>188</sup> and impeachment evidence.<sup>189</sup> This evidence must be disclosed by the prosecutor even if there has been no request from the defendant.<sup>190</sup>

When disclosing evidence, Rule 573 of the Pennsylvania Rules of Criminal Procedure requires prosecutors to permit the defense to “inspect and copy or photograph” discoverable evidence that is within the Commonwealth’s possession or control.<sup>191</sup> Such evidence that is subject to this requirement includes, but is not limited to: any evidence that is favorable to the defendant and that is material either to guilt or punishment; any written or oral confessions or inculpatory statements; the defendant’s prior criminal record; any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and any “results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical examinations.”<sup>192</sup>

Prosecutors also have an ethical obligation to make “timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclosing to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.”<sup>193</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *See* *Brady v. Maryland*, 373 U.S. 83 (1963); PA. R. CRIM. P. 573(B)(1)(a); *Commonwealth v. Sullivan*, 820 A.2d 795, 803 n.7 (Pa. Super. Ct. 2003).

<sup>189</sup> *See* *Commonwealth v. Ulen*, 650 A.2d 416, 418 (Pa. 1994).

<sup>190</sup> *See* *Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa. 2001).

<sup>191</sup> PA. R. CRIM. P. 573(B).

<sup>192</sup> *Id.*

<sup>193</sup> PA. RULES OF PROF’L CONDUCT R. 3.8(d) (2006).

Despite these obligations, some Pennsylvania prosecutors still fail to comply with discovery requirements. In cases where the prosecutor purposefully concealed exculpatory evidence “to secure a conviction,” the Pennsylvania Constitution’s double jeopardy clause bars the defendant’s retrial.<sup>194</sup> In one capital case, *Commonwealth v. Smith*, the prosecution knowingly denied the existence of an agreement granting its key witness favorable sentencing treatment in exchange for his testimony and knowingly withheld potentially exculpatory physical evidence.<sup>195</sup> The Pennsylvania Supreme Court found that the prosecutor’s misconduct “violate[d] all principles of justice and fairness embodied in the Pennsylvania Constitution’s double jeopardy clause.”<sup>196</sup> Accordingly, the Court ruled that the defendant had to be released and could not be retried for the crime on the basis that a second trial would violate his state constitutional rights under the double jeopardy clause.<sup>197</sup>

In another capital case, an individual sentenced to death was exonerated after serving four years on death row. The Court of Common Pleas of Pennsylvania has described the case of Neil Ferber, who was convicted of murder and sentenced to death, as “a Kafkaesque nightmare of the sort which we normally would characterize as being representative of the so-called judicial system of a totalitarian state.”<sup>198</sup> The case was riddled with prosecutorial misconduct; after Ferber had been sentenced to death, it was revealed that a jailhouse informant had provided perjured testimony and that exculpatory evidence had not been disclosed to the defense.<sup>199</sup>

However, these cases are not the only ones in which prosecutorial misconduct has been alleged and proven in Pennsylvania. In reviewing both capital and non-capital cases from 1970 to June 2003, the Center for Public Integrity’s study of Pennsylvania criminal appeals revealed 523 cases in which the defendant alleged prosecutorial error or misconduct.<sup>200</sup> In sixty-seven of these cases, judges reversed or remanded a defendant’s conviction, sentence, or indictment due to a prosecutor’s conduct.<sup>201</sup> Of those cases in which the prosecutor’s conduct prejudiced the defendant, eight involved the prosecution withholding evidence from the defense.<sup>202</sup> In Philadelphia County alone, there were 287 cases in which a defendant alleged prosecutorial error or misconduct.<sup>203</sup> In forty-one of these cases, judges reversed or remanded a defendant’s conviction, sentence or indictment due to prosecutorial misconduct.<sup>204</sup> Of those cases in which the prosecutor’s misconduct prejudiced the defendant, two involved the prosecution withholding evidence from the defense.<sup>205</sup>

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<sup>194</sup> *Commonwealth v. Smith*, 615, A.2d 321, 322 (Pa. 1992).

<sup>195</sup> *Id.* at 322.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 325.

<sup>198</sup> *Neil Ferber v. City of Philadelphia*, 1994 WL 1251179, \*272 (Pa. Ct. Com. Pl. 1994), *aff’d in part, rev’d in part*, 661 A.2d 470 (Pa. Commw. 1995).

<sup>199</sup> *Id.*

<sup>200</sup> Center for Public Integrity, *Harmful Error*, available at <http://www.publicintegrity.org/pm/search.aspx?st=PA> (last visited Sept. 27, 2007).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

One of the two Philadelphia cases, a non-capital case, in which the court ruled that the prosecutor's withholding of evidence deprived the defendant of a fair trial, involved Edward Ryder. Ryder was convicted of first-degree murder and conspiracy in 1974 for stabbing a prisoner in a cell.<sup>206</sup> He was sentenced to life in prison.<sup>207</sup> In preparing for trial, Ryder's defense counsel requested all exculpatory information, but was informed by the prosecutor that there was nothing exculpatory.<sup>208</sup> Twenty-one years after the trial,<sup>209</sup> it was revealed that the police had taken 142 statements, none of which were ever disclosed to the defense and eight of which proved exculpatory.<sup>210</sup> Ryder's conviction was later overturned.<sup>211</sup>

Although Pennsylvania has the necessary framework in place to permit prosecutors to fully and timely disclose evidence, they do not always do so. Unfortunately, these failures have resulted in several defendants being convicted of crimes they did not commit. At best, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #3.

#### *D. Recommendation #4*

**Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.**

The Commonwealth of Pennsylvania has entrusted the Office of the Disciplinary Counsel, the Disciplinary Board of the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court with investigating complaints and disciplining practicing attorneys.<sup>212</sup> All attorneys, including prosecutors, are required to report certain professional misconduct of other attorneys to the appropriate professional authority.<sup>213</sup>

In 2002, the organization HALT, which evaluates lawyer discipline systems across the country, ranked Pennsylvania as the worst lawyer discipline system in the nation.<sup>214</sup> However, since 2002, "the Disciplinary Board has dramatically improved its system,"<sup>215</sup> and has imposed "[s]ignificant reforms includ[ing] the development of the disciplinary system's first Web site, a more organized staff that now provides the American Bar

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<sup>206</sup> See Commonwealth v. Ryder, 1996 WL 1358443 (Pa. Ct. Com. Pl. 1996).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See Center for Public Integrity, Actual Innocence, available at <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=38> (last visited April 5, 2007).

<sup>212</sup> PA. RULES OF DISCIPLINARY ENFORCEMENT R. 103 (2006).

<sup>213</sup> PA. RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

<sup>214</sup> HALT, LAWYER DISCIPLINE 2006 REPORT CARD, PENNSYLVANIA, at [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card\\_2006/pdf/PA\\_LDRC\\_06.pdf](http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/PA_LDRC_06.pdf) (last visited Sept. 27, 2007).

<sup>215</sup> HALT noted that improvements in the Pennsylvania Disciplinary System have made the system one of the top five scorers on their Report Card in 2006. *Id.*

Association with statistics related to its case processing and added transparency in the disciplinary process.”<sup>216</sup> In 2006, Pennsylvania was assigned a grade of “C+,” based on an assessment of the adequacy of the discipline imposed, its publicity and responsiveness efforts, the openness of the disciplinary process, the fairness of disciplinary procedures, the amount of public participation, and the promptness of follow-up on complaints.<sup>217</sup> One of the reasons cited for Pennsylvania’s low grade included the fact that the Disciplinary Board has imposed disciplinary sanctions in less than five percent of investigated cases.<sup>218</sup> Additionally, the Disciplinary Board was cited as processing cases “less efficiently than most states, taking over a year and a half to impose sanctions after a complaint is received.”<sup>219</sup> Despite these problems, HALT gave Pennsylvania “top honors for Most Improved” in 2006.<sup>220</sup>

According to the American Bar Association Center for Professional Responsibility, the State Bar of Pennsylvania received 4,891 complaints of alleged attorney misconduct in 2004, in addition to 1,003 complaints which were pending from prior years.<sup>221</sup> Of these cases, 1,027 were summarily dismissed for lack of jurisdiction, 4,867 were investigated, 3,241 were dismissed after investigation, 351 complaints warranted the filing of formal charges, and 297 attorneys were formally charged.<sup>222</sup> Furthermore, ninety-one lawyers were publicly sanctioned in 2004.<sup>223</sup> Of the ninety-one lawyers who were publicly sanctioned, ten of them were disbarred, thirty-eight were suspended, fourteen were suspended on an interim basis (for risk of harm or criminal conviction), two were publicly reprimanded and/or censured, and seven were transferred to disability/inactive status.<sup>224</sup> We were unable to determine how many, if any, of these attorneys were or are prosecutors.

Moreover, as discussed under Recommendation #3, the Center for Public Integrity’s study of Pennsylvania’s criminal appeals, including both death and non-death cases, from 1970 to June 2003, revealed 523 cases in which the defendant alleged prosecutorial error or misconduct.<sup>225</sup> In sixty-seven of these, courts reversed or remanded a defendant’s conviction, sentence, or indictment due to prosecutorial misconduct.<sup>226</sup> In an additional thirty-five cases, at least one dissenting judge believed the prosecutor’s misconduct prejudiced the defendant.<sup>227</sup> Of those cases in which the court ruled the prosecutor’s conduct prejudiced the defendant, forty-nine involved improper trial behavior while questioning witnesses or during opening or closing arguments.<sup>228</sup> Eight involved the

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2004) (Part 1), available at <http://www.abanet.org/cpr/discipline/sold/04-ch1.xls> (last visited Sept. 27, 2007).

<sup>222</sup> *Id.*

<sup>223</sup> ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2004) (Part 2), available at <http://www.abanet.org/cpr/discipline/sold/04-ch2.xls> (last visited March 2, 2007).

<sup>224</sup> *Id.*

<sup>225</sup> Center for Public Integrity, Harmful Error, available at <http://www.publicintegrity.org/pm/states.aspx?st=PA> (last visited Sept. 27, 2007).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

prosecutor withholding evidence from the defense,<sup>229</sup> four involved pre-trial tactics, two involved issues with speedy trial, one involved endorsing perjury, one involved trying to influence a defense witness, one involved manipulating the sentencing calendar, and one involved discrimination in jury selection.<sup>230</sup> Significantly, two defendants who alleged prosecutorial misconduct later proved their innocence.<sup>231</sup> We were unable to determine how many of these prosecutors were referred to the State Bar for discipline.

In addition, the Center for Public Integrity's study of Philadelphia County's criminal appeals, including both death and non-death cases, from 1970 to 2003, revealed 287 cases in which the defendant alleged prosecutorial error or misconduct.<sup>232</sup> In forty-one of these, judges reversed or remanded the defendant's conviction, sentence, or indictment.<sup>233</sup> Of those cases in which the judge ruled that the prosecutor's conduct prejudiced the defendant, thirty-four involved improper trial behavior, three involved discrimination in jury selection, two involved the prosecutor withholding exculpatory evidence from the defense, one involved the use of perjured testimony, and one involved the denial of a speedy trial.<sup>234</sup> Again, we were unable to determine how many of these prosecutors were referred to the State Bar for discipline.

To remedy the prejudicial impact of prosecutorial misconduct, Pennsylvania courts have, in rare circumstances, applied the Commonwealth Constitution's double jeopardy clause to prevent the retrial of a defendant when a prosecutor's actions are "intended to provoke the defendant into moving for a mistrial" and also "when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial."<sup>235</sup> For example, in *Commonwealth v. Martorano*, the prosecutor "acted in bad faith throughout the trial, consistently making reference to evidence that the trial court had ruled inadmissible, continually defying the trial court's rulings on objections, and, in a tactic that can only be described as Machiavellian, repeatedly insisting that there was fingerprint evidence linking [the defendant] to the crime when the prosecutor knew for a fact that no such evidence existed."<sup>236</sup> Because the actions of the prosecutor denied the defendant a right to a fair trial, the defendant was discharged on double jeopardy grounds.<sup>237</sup>

Thus, although the Commonwealth of Pennsylvania has established a procedure by which grievances are investigated and members of the Pennsylvania Bar are disciplined, the Pennsylvania lawyer discipline agency does not adequately investigate and impose timely discipline on lawyers. The Commonwealth of Pennsylvania, therefore, is only in partial compliance with Recommendation #4.

#### *E. Recommendation #5*

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*; see discussion *supra* Recommendation #3 (discussion of Edward Ryder's case).

<sup>232</sup> Center for Public Integrity, Harmful Error, available at <http://www.publicintegrity.org/pm/states.aspx?st=PA> (last visited Sept. 27, 2007).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992).

<sup>236</sup> 741 A.2d 1221, 1223 (Pa. 1999).

<sup>237</sup> *Id.*

**Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.**

Under Rule 573 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth is required to disclose “[a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the prosecutor.”<sup>238</sup> The United States Supreme Court has further held that a prosecutor is required to disclose not only evidence of which s/he is aware, but also any “favorable evidence known to others acting on the government’s behalf.”<sup>239</sup> However, the United States Supreme Court has recognized that there is no constitutional requirement that the Commonwealth make available a “complete and detailed accounting” of the entire police investigation to the defendant.<sup>240</sup> In addition, the Pennsylvania Supreme Court has determined that the Commonwealth does not have to disclose police reports, any reports, memoranda, or other internal Commonwealth documents made by a prosecuting attorney, other Commonwealth agents, or law enforcement officers in connection with investigating or prosecuting the case.<sup>241</sup>

Following trial, if the Commonwealth has failed to disclose evidence to the defendant that is material either to guilt or punishment, then the defendant must satisfy the *Brady*<sup>242</sup> requirements, which include showing that: (1) the Commonwealth suppressed the evidence, either willfully or inadvertently; (2) the suppressed evidence was favorable to the accused because it was exculpatory or impeaches a witness; and (3) the suppressed evidence was material to the issues at trial.<sup>243</sup>

One sanction that can be imposed upon a finding of willful prosecutorial misconduct for failing to disclose *Brady* evidence involves vacating the defendant’s sentence and remanding the case for a new trial, as well as referring the matter to the Disciplinary Board.<sup>244</sup> An “extreme sanction that should be imposed sparingly” for discovery violations and should be imposed “only in cases of blatant prosecutorial misconduct” is an outright dismissal of the charges.<sup>245</sup> Moreover, in rare cases, if the Commonwealth fails to disclose evidence material at trial with the intent to provoke the defendant to seek a mistrial, the court can release the defendant under the double jeopardy clause of the

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<sup>238</sup> PA. R. CRIM. P. 573(B)(1)(a).

<sup>239</sup> *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *see also* *Commonwealth v. Burke*, 781 A.2d 1136, 1142 (Pa. 2001) (requiring the prosecutor to disclose “exculpatory evidence in the files of police agencies of the same government bringing the prosecution”).

<sup>240</sup> *Moore v. Illinois*, 408 U.S. 786, 795 (1972).

<sup>241</sup> *See* *Commonwealth v. Appel*, 689 A.2d 891, 907 (Pa. 1997) (“The prosecution is not required under *Brady* to “make a complete and detailed accounting to the defense of all police investigatory work on a case,” nor must the prosecutor “disclose possible theories of the defense to the defendant.”) (citation omitted); *see also* PA. R. CRIM. P. 573(G).

<sup>242</sup> *See supra* note 140 and accompanying text (discussing *Brady*).

<sup>243</sup> *See Burke*, 781 A.2d at 1141; *Commonwealth v. Simmons*, 804 A.2d 625, 636-37 (Pa. 2001).

<sup>244</sup> *Commonwealth v. Moose*, 602 A.2d 1265, 1276, n.12 (Pa. 1992).

<sup>245</sup> *Burke*, 781 A.2d at 1144.

Pennsylvania Constitution.<sup>246</sup> These potential outcomes encourage all law enforcement agencies, laboratories, and other experts under the control of the prosecutor to comply with their obligation to inform the prosecutor of any potentially exculpatory or mitigating evidence.

Given that a prosecutor is responsible for disclosing favorable evidence that s/he is not personally aware of but is known to others acting on the government's behalf, it is in the best interest of all prosecutors to ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence. While we are aware of several instances in which police agencies have failed to disclose material evidence to the prosecutor, this information is insufficient to assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #5.

*F. Recommendation #6*

**The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.**

The Pennsylvania District Attorneys Association (Association) is a non-profit organization, which was founded in 1912 to “provide uniformity and efficiency in the discharge of duties and functions” for the Commonwealth's district attorneys and assistants.<sup>247</sup> In 1983, the Association established an education and training division called the Pennsylvania District Attorneys Institute (Institute).<sup>248</sup> Some of the education and training programs that are provided include: a basic prosecutor's course, capital litigation training, investigative techniques, training on mental health issues and crime victims, and law enforcement training.<sup>249</sup> It is unclear if the Commonwealth of Pennsylvania provides funds to pay for the costs of any relevant training programs.

Significantly, the Commonwealth of Pennsylvania does not require any formal training programs for prosecutors handling capital cases.<sup>250</sup> In addition, the Pennsylvania State Bar does not offer prosecutor training specifically focused on litigating capital cases.<sup>251</sup> Training for prosecutors participating in capital cases varies from county to county. For example, in Montgomery County, there are no specific training programs offered to prosecutors handling capital cases.<sup>252</sup> Instead, a prosecutor must serve as second chair in a capital case before being assigned as the lead prosecutor.<sup>253</sup> A similar system is used in Dauphin County, requiring a prosecutor to serve as second chair for one or two capital

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<sup>246</sup> Commonwealth v. Smith, 615 A.2d 321, 324 (Pa. 1992).

<sup>247</sup> Pennsylvania District Attorneys Association, History, *available at* <http://www.pdaa.org/history.html> (last visited Sept. 27, 2007).

<sup>248</sup> *Id.*

<sup>249</sup> Pennsylvania District Attorneys Association, 2007 Training Courses and Other Events, *available at* <http://www.pdaa.org/training%20events.html> (last visited Sept. 27, 2007).

<sup>250</sup> Telephone Interview with Beth Lawson, Coordinator of Legal Research and Appellate Review, Pennsylvania District Attorneys' Association (Aug. 11, 2005).

<sup>251</sup> *Id.*

<sup>252</sup> Telephone Interview with Bruce Castor, District Attorney, Montgomery County, Pa. (Aug. 10, 2005).

<sup>253</sup> *Id.*

cases before being assigned as the lead prosecutor.<sup>254</sup> In Lebanon County, there are no formal training programs provided to prosecutors.<sup>255</sup> In fact, in August 2005, there was only one attorney in the Lebanon District Attorney's Office who was qualified to handle a death penalty case.<sup>256</sup>

Based on this information, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #6.

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<sup>254</sup> Telephone Interview with Edward Marsico, Jr., District Attorney, Dauphin County, Pa. (Aug. 17, 2005).

<sup>255</sup> Telephone Interview with Deidre Eshleman, District Attorney, Lebanon County, Pa. (Aug. 17, 2005).

<sup>256</sup> *Id.*



## CHAPTER SIX

### DEFENSE SERVICES

#### INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study<sup>1</sup> shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.<sup>2</sup> The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.<sup>3</sup> In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

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<sup>1</sup> JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html> (last visited Sept. 27, 2006).

<sup>2</sup> Strickland v. Washington, 466 U.S. 668 (1984).

<sup>3</sup> LIEBMAN ET AL., *supra* note 1.

## I. FACTUAL DISCUSSION

### A. *Pennsylvania's Indigent Legal Representation System*

Pennsylvania's indigent legal representation system for capital defendants and death-row inmates is comprised primarily of county public defender offices, independent non-profit corporations, and private court-appointed counsel.

#### 1. County Public Defender Offices

All sixty-seven counties in Pennsylvania, with the exception of Philadelphia, provide indigent representation through county public defender offices. By statute, a public defender must be appointed by the Board of County Commissioners of each individual county.<sup>4</sup> Apart from being an attorney admitted to practice before the Supreme and Superior Courts of Pennsylvania, the Pennsylvania Legislature has mandated no other qualification requirements for the office of public defender.<sup>5</sup> Once appointed, however, a public defender is barred from holding any publicly elected office for which compensation is provided by the Commonwealth, with the exception of an office or commission in the Commonwealth's militia.<sup>6</sup>

Under Pennsylvania law, county public defenders have the responsibility of furnishing legal counsel to all individuals who are unable to obtain counsel because of insufficient funds, during:

- (1) Critical pretrial identification procedures;
- (2) Preliminary hearings;
- (3) State *habeas corpus* proceedings;
- (4) State trials, including pretrial and post-trial motions;
- (5) Superior Court and Pennsylvania Supreme Court appeals;
- (6) Post-conviction hearings, including proceedings at the trial and appellate levels;
- (7) Criminal extradition hearings; and
- (8) Production and parole proceedings and revocations thereof.<sup>7</sup>

In addition, the public defender has the responsibility of furnishing counsel to an indigent individual when the individual is charged with juvenile delinquency or when representation is constitutionally mandated.<sup>8</sup>

To assist in these duties, the public defender, with the approval of the county board of commissioners, may employ full or part-time assistant public defenders, clerks, investigators, stenographers, or any other employees deemed necessary.<sup>9</sup> In addition to or in place of paid assistant public defenders, the public defender may use volunteer

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<sup>4</sup> 16 PA. CONS. STAT. § 9960.4 (2007).

<sup>5</sup> 16 PA. CONS. STAT. § 9960.5(c) (2007).

<sup>6</sup> 16 PA. CONS. STAT. § 9960.10 (2007).

<sup>7</sup> 16 PA. CONS. STAT. § 9960.6(a) (2007).

<sup>8</sup> *Id.*

<sup>9</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

assistant public defenders.<sup>10</sup> Assistant public defenders, whether volunteer or compensated, must be attorneys admitted to practice before the Supreme and Superior Courts.<sup>11</sup>

a. Funding of the County Public Defender Offices

The Commonwealth of Pennsylvania provides no state funding of indigent defense. Funding for each public defender office therefore varies, as each public defender office is dependent on county funds. For example, Allegheny County appropriated \$7,331,157 for its public defender department in 2006. Dauphin County provided its public defender office with \$2,516,743 of funding in 2006, and nearly an additional \$350,000 in funding has been approved for 2007.<sup>12</sup> Meanwhile, Butler County appropriated \$648,000 for the public defender in 2006 and \$687,166.00 for 2007.<sup>13</sup>

By statute, the salary board of each county is responsible for establishing the salary of the public defender and any staff.<sup>14</sup> The county board of commissioners is responsible for providing office space, furniture, equipment and supplies for the public defender.<sup>15</sup>

2. The Defender Association of Philadelphia

Instead of a county district public defender office, Philadelphia utilizes the Defender Association of Philadelphia, an independent non-profit, to provide representation to indigent criminal defendants.<sup>16</sup> Established in 1934, the Defender Association of Philadelphia (Association) represents nearly 70 percent of all individuals arrested in Philadelphia<sup>17</sup> and boasts “the largest criminal defense appellate practice in Pennsylvania handling misdemeanor, felony, homicide, and death penalty cases.”<sup>18</sup>

The Association is not a city or state agency, although funding is provided by the City of Philadelphia, and is under the governorship of a Board of Directors that, in turn, selects the Chief Defender and First Assistant Defender.<sup>19</sup> The Association employs approximately 215 full-time assistant defenders to represent clients in state and federal trial and appellate courts, civil and criminal mental health hearings, and state and county violation of probation/parole hearings.<sup>20</sup> Association attorneys also serve as the Child Advocate in neglect and dependency court.<sup>21</sup>

a. Funding of the Defender Association of Philadelphia

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<sup>10</sup> 16 PA. CONS. STAT. § 9960.5(b) (2007).

<sup>11</sup> 16 PA. CONS. STAT. § 9960.5(c) (2007).

<sup>12</sup> DAUPHIN COUNTY 2007 APPROVED BUDGET (2006) (on file with author).

<sup>13</sup> BUTLER COUNTY 2007 BUDGET PROPOSAL 34 (2006) (on file with author).

<sup>14</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

<sup>15</sup> 16 PA. CONS. STAT. § 9960.9 (2007).

<sup>16</sup> Phila.gov/Defender Association, Welcome, at <http://www.phila.gov/defender/> (last visited Sept. 27, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The Defender Association of Philadelphia receives its primary funding from the City of Philadelphia.<sup>22</sup> In 2006, the City provided \$33,609,195 in funding to the Legal Department, which includes funding for the Defender Association.<sup>23</sup> However, it is unclear how much of this sum was earmarked for the Defender Association.<sup>24</sup> In 2007, the City allocated \$34,268,833 in funding for the Legal Department, but actual expenditures are expected to total \$35,401,003.<sup>25</sup> Again, it is unclear how much of this sum was earmarked for the Defender Association.

### 3. Private Court-Appointed Attorneys

For good cause, the court of common pleas may appoint a private attorney to represent the defendant at any stage of the proceedings.<sup>26</sup> Generally, indigent defendants may be represented by court-appointed counsel if the local public defender has a conflict of interest.<sup>27</sup>

By statute, the attorney must be awarded “reasonable compensation and reimbursement for expenses necessarily incurred,” as determined by the court of common pleas.<sup>28</sup> Individual counties fund the costs of court-appointed counsel.<sup>29</sup>

#### *B. Qualifications, Appointment, and Compensation of and Resources Available to Capital Defense Counsel at Trial, on Appeal, and in Post-Conviction Proceedings*

##### 1. Qualifications of Defense Counsel in Capital Cases

In 2004, the Pennsylvania Supreme Court adopted Rule 801 of the Pennsylvania Rules of Criminal Procedure, establishing a uniform set of qualification standards for trial, appellate, and post-conviction counsel in capital cases.<sup>30</sup> All capital defense counsel, whether retained or appointed, must adhere to the qualification standards.<sup>31</sup>

Under Rule 801, defense counsel must be a member in good standing of the Pennsylvania Bar or be admitted *pro hac vice* following a motion to court.<sup>32</sup> Counsel also must be a practicing trial attorney with at least five years of experience in criminal litigation.<sup>33</sup> Additionally, s/he must have experience as lead or co-counsel in at least eight “significant” jury trials, meaning the trials stemmed from a charge of murder,

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<sup>22</sup> *Id.*

<sup>23</sup> CITY OF PHILADELPHIA, FY 2008-2012 FIVE YEAR FINANCIAL PLAN, GENERAL FUND, SUMMARY BY DEPARTMENT at 111 (2007).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 16 PA. CONS. STAT. § 9960.7 (2007).

<sup>27</sup> FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 167 (2003) [hereinafter FINAL REPORT].

<sup>28</sup> 16 PA. CONS. STAT. § 9960.7 (2007).

<sup>29</sup> FINAL REPORT, *supra* note 27, at 167; *see also* 16 PA. CONS. STAT. § 9960.7 (2007).

<sup>30</sup> PA. R. CRIM. P. 801 cmt.

<sup>31</sup> PA. R. CRIM. P. 801.

<sup>32</sup> PA. R. CRIM. P. 801(1)(a), (b). If the court is satisfied the attorney has equivalent experience and educational qualifications, it may allow representation by an out-of-state attorney *pro hac vice*. *Id.* at cmt.

<sup>33</sup> PA. R. CRIM. P. 801(1)(a), (b).

manslaughter, vehicular homicide, or a felony with a maximum penalty of ten years or more.<sup>34</sup> If, however, defense counsel is to represent the defendant in appellate proceedings, prior appellate or post-conviction experience in at least eight “significant” cases will suffice.<sup>35</sup>

Within three years of any capital appointment, counsel also must have completed at least eighteen hours of capital defense training approved by the Pennsylvania Continuing Legal Education Board.<sup>36</sup> The requisite training must encompass the following subjects:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pre-trial investigation, preparation, strategy, and theory regarding guilty and penalty phases;
- (4) Jury selection;
- (5) Trial preparation and presentation;
- (6) Presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (7) Ethical considerations particular to capital defense representation;
- (8) Preservations of the record and issues for post-conviction review;
- (9) Post-conviction litigation in state and federal courts;
- (10) Unique issues relating to those charged with capital offenses when under the age of eighteen; and
- (11) Counsel’s relationship with the client and family.<sup>37</sup>

No court may waive the educational and experience requirements of Rule 801.<sup>38</sup> Yet, an attorney who does not satisfy these requirements may serve as “second chair” in a capital case.<sup>39</sup> Counsel serving as “second chair” cannot have “primary responsibility for the presentation of significant evidence or argument,” but can, in the court’s discretion, present minor or perfunctory evidence or argument.”<sup>40</sup>

## 2. Appointment of Counsel in Capital Cases

Prior to the preliminary hearing, the court must appoint counsel for all capital defendants who “are without financial resources or . . . otherwise unable to employ counsel.”<sup>41</sup> The court also has the discretion to appoint counsel, regardless of the defendant’s financial status, if such appointment is mandated by the “interests of justice.”<sup>42</sup>

Appointed counsel is required to represent the capital defendant through trial and direct appeal proceedings.<sup>43</sup> At the conclusion of the direct appeal, the trial court is required to

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<sup>34</sup> PA. R. CRIM. P. 801(1)(c).

<sup>35</sup> *Id.*

<sup>36</sup> PA. R. CRIM. P. 801(2)(a).

<sup>37</sup> PA. R. CRIM. P. 801(2)(b).

<sup>38</sup> PA. R. CRIM. P. 801 cmt.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> PA. R. CRIM. P. 122(A)(2).

<sup>42</sup> PA. R. CRIM. P. 122(A)(3).

<sup>43</sup> *Id.*

appoint new counsel to represent the death-row inmate in state post-conviction proceedings.<sup>44</sup> The court, however, will not appoint new counsel if: (1) the inmate has chosen to proceed *pro se* or waive post-conviction proceedings; (2) the defendant requests continued representation by his/her counsel, or (3) the defendant has procured counsel who has entered, or will promptly enter, an appearance.<sup>45</sup> Appointed post-conviction counsel must represent the inmate throughout the entirety of the post-conviction proceedings, including any appeals.<sup>46</sup>

Because statewide rules on the appointment of defense counsel in capital cases are limited, appointment procedures vary among the counties. For example, in Dauphin, York, and Lebanon counties, the Chief Public Defender is responsible for appointing counsel from his/her office to represent a capital defendant.<sup>47</sup> Alternatively, in Allegheny County, the trial court assigns counsel at his/her discretion, while in Montgomery County, responsibility falls to the Criminal Administrative Judge, who then circulates his/her appointment to the other judges for approval.<sup>48</sup>

Pennsylvania law does not mandate the appointment of two attorneys at any stage of the proceedings, including trial, direct appeal, and post-conviction proceedings.

Pennsylvania has no statewide standards for determining indigency, leaving the determination within the sole discretion of the county. Under the Public Defender Act, an individual requesting counsel is required to sign an affidavit that s/he is unable to “procure sufficient funds to obtain legal counsel.”<sup>49</sup> So long as the public defender is “satisfied of the person’s inability to procure sufficient funds,” the defender or a court-appointed attorney must provide representation.<sup>50</sup> The Pennsylvania Supreme Court has refused to allow the county court of common pleas to establish financial eligibility requirements that prohibit a public defender from representing a defendant who the public defender might otherwise deem eligible.<sup>51</sup>

### 3. Compensation of and Resources Available to Defense Counsel in Capital Cases

#### a. Compensation of Defense Counsel

The salary board of a county is charged with determining the salary of each public defender and any office personnel.<sup>52</sup> In counties with a population greater than 100,000,

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<sup>44</sup> PA. R. CRIM. P. 904(H)(1).

<sup>45</sup> PA. R. CRIM. P. 904(H)(1)(a)-(c).

<sup>46</sup> PA. R. CRIM. P. 904(H)(2)(b).

<sup>47</sup> Telephone Interview with George Schultz, Chief Public Defender, Dauphin County, Pa. (July 14, 2005); Telephone Interview with Charlie Jones, Chief Public Defender, Lebanon County, Pa. (July 25, 2005); Telephone Interview with Suzanne Smith, Attorney, Kearney & Marshall (July 13, 2005).

<sup>48</sup> Administrative Orders of Allegheny’s Criminal Division (I)(D); Telephone Interview with Thomas Eagan, Attorney, Montgomery County, Pa. (July 6, 2005).

<sup>49</sup> 16 PA. CONS. STAT. § 9960.6(b) (2007).

<sup>50</sup> Dauphin County Public Defender’s Office v. Court of Common Pleas of Dauphin County, 849 A.2d 1145 (Pa. 2004).

<sup>51</sup> *Id.*

<sup>52</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

the average salary for a chief public defender was \$59,030 in 2000, ranging in scale from \$34,726 to \$93,000.<sup>53</sup> The average salary for a full-time assistant public defender was \$42,807, with salaries in some counties as low as \$28,000 and in others as high as \$51,000.<sup>54</sup> The average salary for a part-time assistant public defender was \$24,728.<sup>55</sup>

In counties with a population less than 100,000, the average salary for a chief public defender was \$34,342 in 2000, ranging in scale from \$17,708 to \$50,000.<sup>56</sup> The average salary for a full-time assistant public defender was \$32,000, differing in range from \$28,500 to \$38,500.<sup>57</sup> The average salary for a part-time assistant public defender was \$25,272, with some salaries as low as \$11,975 and others as high as \$42,000.<sup>58</sup>

Compensation rates for private court-appointed counsel also vary among the counties, as no statewide compensation rates have been established. For example, the fee paid to private court-appointed counsel in capital cases include:

- (1) *Philadelphia* - \$400 per day after the first half day or \$60 per hour for in-court work and \$50 per hour for out-of-court work (lead counsel);<sup>59</sup>
- (2) *Dauphin* - Flat fee of \$6,000;<sup>60</sup>
- (3) *Lebanon* - Flat fee of \$5,000 and an additional \$5,000 for appellate proceedings;<sup>61</sup>
- (4) *Montgomery* - At least \$5,000, but no more than \$15,000;<sup>62</sup> and
- (5) *York* - \$55 per hour for in- and out-of-court work.<sup>63</sup>

As another example, Allegheny County has implemented a fee structure allowing a maximum compensation rate of \$3,000 for preparation, \$250 for the preliminary hearing, \$500 for a full day in court, and \$350 for a half day in court.<sup>64</sup> For post-conviction and appellate proceedings, the County has set a maximum rate of \$3,000 and any court time.<sup>65</sup> With the exception of “very complex cases,”<sup>66</sup> Allegheny County will not reimburse an attorney for any fees submitted in excess of these maximums, considering them *pro bono* work instead.<sup>67</sup>

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<sup>53</sup> FINAL REPORT, *supra* note 27, at 175.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Telephone Interview with George Newman, Attorney, Philadelphia County, Pa. (Jan. 26, 2006).

<sup>60</sup> Telephone Interview with George Schultz, Chief Public Defender, Lebanon County, Pa. (July 25, 2005).

<sup>61</sup> Telephone Interview with Keith Kilgore, Partner, Spitler & Kilgore (July 28, 2005).

<sup>62</sup> Telephone Interview with Thomas Eagan, Attorney, Montgomery County, Pa. (July 6, 2005).

<sup>63</sup> Telephone Interview with Bruce Blocher, Chief Public Defender, York County, Pa. (July 13, 2005).

<sup>64</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006)

<sup>65</sup> *Id.*

<sup>66</sup> Exceptions for “very complex cases” will be made only if: (1) the attorney files a motion requesting that the case be considered complex and stating the reasons in support of that assertion; and (2) the motion is filed within thirty days of the attorney’s appointment or by the pre-trial conference, whichever occurs last.

<sup>67</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006).

## b. Resources Available to Defense Counsel

Public defenders, with the approval of the county board of commissioners, may employ full or part-time assistant public defenders, clerks, investigators, stenographers, or any other employees deemed necessary to assist in their duties.<sup>68</sup> In 2003, when the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System issued its final report, the Committee noted “public defenders have had neither the material resources nor the time to prepare cases adequately with the assistance of support services,” as well as a “wide disparity” among the counties in the resources public defenders have available to them.<sup>69</sup>

Additionally, the court may, in its discretion, authorize funds for investigative or expert services. Pennsylvania law specifically provides a capital defendant with the right “to the assistance of experts necessary to prepare a defense.”<sup>70</sup> However, such assistance will not be granted when the defendant fails to “identify a particularized need for such assistance related to a colorable issue presented in his[her] defense . . . or where an adequate alternative to the requested form of professional assistance is available.”<sup>71</sup>

The Commonwealth has no statewide fee schedules and instead relies on the counties to establish compensation rates for experts and investigators. For example, Allegheny County sets a maximum compensation rate of \$500 for an investigator and \$2,000 for an expert witness.<sup>72</sup> In Montgomery County, compensation for all investigator and expert fees cannot exceed \$1,500 without court approval.<sup>73</sup>

## C. Appointment, Qualifications, and Resources Available to Attorneys Handling Capital Federal Habeas Corpus Petitions

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal *habeas corpus* in one of Pennsylvania’s three federal judicial districts—the Eastern, Middle, or Western—is entitled to appointed counsel and other resources if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”<sup>74</sup> In Pennsylvania, attorneys from the Capital Habeas Units of the Federal Public Defender for the Western and Middle Districts of Pennsylvania and the Federal Community Defender Office for the Eastern District of Pennsylvania are appointed to handle these cases.<sup>75</sup> All three offices are comprised of the Federal Public Defender, assistant federal public defenders, and a team of investigators.

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<sup>68</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

<sup>69</sup> FINAL REPORT, *supra* note 27, at 185.

<sup>70</sup> *Com v. Serge*, 896 A.2d 1170, 1185 (Pa. 2006); *Commonwealth v. Carter*, 643 A.2d 61, 73 (Pa. 1994).

<sup>71</sup> *Serge*, 896 A.2d at 1185.

<sup>72</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006)

<sup>73</sup> Telephone Interview with Leigh Narducci, Partner, Narducci Moore Fleisher & Roeberg (July 6, 2005).

<sup>74</sup> 18 U.S.C. § 3599(a)(2) (2006).

<sup>75</sup> Federal Public Defender of Western District of Pennsylvania, About the Federal Public Defender’s Office, *available at* <http://paw.fd.org/about.htm> (last visited Sept. 27, 2007); Federal Community Defender Office for the Eastern District of Pennsylvania, *at* <http://www.paefd.org> (last visited Sept. 27, 2007).

According to section 3599 of Title 18 of the United States Code, inmates entitled to a court-appointed attorney must be provided “one or more” qualified attorneys prior to the filing of a formal, legally sufficient federal *habeas* petition.<sup>76</sup> To qualify for appointment, at least one attorney must have been admitted to practice in the United States Court of Appeals for the Third Circuit for at least five years, and have had at least three years of experience in handling felony appeals in the Third Circuit.<sup>77</sup> For good cause, the court may appoint another attorney “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”<sup>78</sup> Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than \$125 per hour for both in-court and out-of-court work.<sup>79</sup>

In addition to counsel, the court may authorize investigative, expert, or other services as are reasonably necessary for representation.<sup>80</sup> The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.<sup>81</sup>

*D. Appointment and Qualifications of Attorneys Representing Death-Sentenced Clemency Petitioners*

The Commonwealth of Pennsylvania does not require that counsel be appointed to death-row inmates seeking clemency. Under Pennsylvania law, a death-row inmate may obtain private legal counsel or request “representation” from the Pennsylvania Department of Corrections.<sup>82</sup> Upon the inmate’s request, the Department of Corrections will appoint the Pardons Case Specialist— a corrections official who is *not* an attorney—to represent the death-sentenced inmate at the clemency hearing.<sup>83</sup>

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<sup>76</sup> 18 U.S.C. § 3599(a)(2) (2006); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

<sup>77</sup> 18 U.S.C. § 3599(c) (2006).

<sup>78</sup> 18 U.S.C. § 3599(d) (2006).

<sup>79</sup> 18 U.S.C. § 3599(g)(1) (2006).

<sup>80</sup> 18 U.S.C. § 3599(f) (2006).

<sup>81</sup> 21 U.S.C. § 3599(g)(2) (2006).

<sup>82</sup> 37 PA. CODE § 81.282 (2007).

<sup>83</sup> Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

## II. ANALYSIS

### A. Recommendation #1

**In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At a minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):**

Under state and federal law, indigent capital defendants in the Commonwealth of Pennsylvania are guaranteed counsel during pre-trial, trial, direct appeal, state post-conviction, and federal *habeas*, but not clemency proceedings. Additionally, while counsel is guaranteed during post-conviction proceedings on the initial petition, counsel will be granted on a successive petition only if the court determines that the petition warrants an evidentiary hearing.<sup>84</sup>

The court must appoint counsel prior to the preliminary hearing, whereas counsel who qualifies for appointment in a capital case need only be appointed when the prosecutor has filed a “Notice of Aggravating Circumstances.”<sup>85</sup> Appointed counsel is required to represent the capital defendant through trial and direct appeal proceedings.<sup>86</sup> Once the direct appeal is complete, the trial court must appoint new counsel to represent the death-row inmate in state post-conviction proceedings.<sup>87</sup> Appointed post-conviction counsel must represent the inmate throughout the entirety of the post-conviction proceedings, including any appeals.<sup>88</sup> If new counsel is permitted for *habeas corpus* proceedings, s/he must be appointed prior to the filing of a formal, legally sufficient *habeas* petition.<sup>89</sup>

The adequacy of compensation provided to defense counsel in capital cases will be discussed in Recommendation #4.

- a. **At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

Neither Pennsylvania nor federal law guarantee the appointment of two attorneys at all stages of the legal proceeding, nor does it guarantee access to investigators and mitigation

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<sup>84</sup> PA. R. CRIM. P. 904 cmt.

<sup>85</sup> PA. R. CRIM. P. 122(A)(2), (3), 801.

<sup>86</sup> PA. R. CRIM. P. 122(A)(2), (3).

<sup>87</sup> PA. R. CRIM. P. 904(H)(1).

<sup>88</sup> PA. R. CRIM. P. 904(H)(2)(b).

<sup>89</sup> See *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

specialists. The qualification requirements for appointed counsel will be discussed below in Recommendation #2.

### Appointment of Counsel

Pennsylvania law does not mandate the appointment of two attorneys to represent the defendant at trial, on appeal, or in post-conviction proceedings. However, in some counties, such as York and Philadelphia, two attorneys are routinely appointed to represent a capital defendant,<sup>90</sup> while in other counties, such as Lebanon and Montgomery, the court may elect to appoint an additional attorney upon counsel's request.<sup>91</sup>

Similarly, indigent death-row inmates seeking federal *habeas corpus* relief are not entitled to two attorneys; federal law only mandates that an indigent inmate be represented by "one or more attorneys."<sup>92</sup>

### Access to Investigators and Mitigation Specialists

Attorneys appointed to represent indigent capital defendants or death-row inmates may have, but are not guaranteed, access to investigators and mitigations specialists at trial, on appeal, during state post-conviction proceedings, and during federal *habeas corpus* proceedings. Significantly, in its 2003 final report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System concluded that "public defenders have had neither the material resources nor the time to prepare cases adequately with the assistance of support services."<sup>93</sup> While many counties do not even have one investigator on staff in their public defender office, the Defender Association of Philadelphia appoints a fact-investigator and mitigation specialist to each capital case.<sup>94</sup> Generally, private court-appointed attorneys in Philadelphia also are appointed an investigator and mitigations specialist, upon request.<sup>95</sup>

The procedures for obtaining such investigators and experts and their availability in the Commonwealth will be discussed below in Subsection c.

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

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<sup>90</sup> Telephone Interview with Suzanne Smith, Attorney, Kearney & Marshall (July 13, 2005).

<sup>91</sup> Telephone Interview with Keith Kilgore, Partner, Spitler & Kilgore (July 28, 2005); Telephone Interview with Leigh Narducci, Partner, Narducci Moore Fleisher & Roeberg (July 6, 2005).

<sup>92</sup> 18 U.S.C. § 3599(a)(2) (2007).

<sup>93</sup> FINAL REPORT, *supra* note 27, at 185.

<sup>94</sup> Telephone Interview with Marc Bookman, Assistant Defender, Homicide Unit of the Defender Association of Philadelphia (Aug. 20, 2007); FINAL REPORT, *supra* note 27, at 176.

<sup>95</sup> Telephone Interview with Marc Bookman, Assistant Defender, Homicide Unit of the Defender Association of Philadelphia (Aug. 20, 2007); FINAL REPORT, *supra* note 27, at 176. It is important to note that the investigators and mitigations specialists appointed by the courts in Philadelphia are restricted in the amount of time they may expend on the case.

The Commonwealth of Pennsylvania does not require any member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Rather, Rule 801 of the Pennsylvania Rules of Criminal Procedure requires all counsel in death penalty cases to have completed within three years of the appointment at least eighteen hours of capital defense training, including training on the “presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts.”<sup>96</sup> We were unable to ascertain whether this training also includes instruction specifically related to identifying mental retardation in capital defendants and death-row inmates.

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
  - i. Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.**
  - ii. Counsel should have the right to have such services provided by persons independent of the government.**
  - iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

The court may, in its discretion, authorize funds for expert and investigative services for trial, appellate, and/or post-conviction proceedings. Pennsylvania law specifically provides a capital defendant with the right “to the assistance of experts necessary to prepare a defense.”<sup>97</sup> However, such assistance will not be granted where the defendant fails to “identify a particularized need for such assistance related to a colorable issue presented in his defense . . . or where an adequate alternative to the requested form of professional assistance is available.”<sup>98</sup> When approved, the costs associated with retaining investigators, experts, and other resources are covered by county funds. The Pennsylvania Supreme Court has recognized that “no obligation [exists] on the part of the Commonwealth to pay for the services of an investigator.”<sup>99</sup>

Unfortunately, because no statewide procedures exist on the appointment of investigative and/or expert services in Pennsylvania, and as these procedures vary among the counties, we were unable to determine (1) whether counsel has the right to seek such services through *ex parte* proceedings; (2) whether counsel has the right to experts and investigators independent of the state or federal government; and (3) whether communications between the counsel and the expert and/or investigator remain confidential.

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<sup>96</sup> PA. R. CRIM. P. 801(2)(b)(vi).

<sup>97</sup> Commonwealth v. Serge, 896 A.2d 1170, 1185 (Pa. 2006); Commonwealth v. Carter, 643 A.2d 61, 73 (Pa. 1994).

<sup>98</sup> Serge, 896 A.2d at 1185.

<sup>99</sup> Commonwealth v. Williams, 561 A.2d 714, 718 (1989).

By law, public defenders, with the approval of the county board of commissioners, may employ full or part-time assistant public defenders, clerks, investigators, stenographers, or any other employees deemed necessary to assist in their duties.<sup>100</sup> While public defender offices can employ investigators and experts, they sometimes do not. In fact, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (Committee) has criticized the lack of resources afforded public defenders, and the great variances in the resources county public defenders have available to them.<sup>101</sup> For instance, the Defender Association of Philadelphia has at its disposal at least “265 support staff, including paralegals, legal secretaries, social workers investigators, and other administrative staff.”<sup>102</sup> In contrast, fewer than half of the 38 Pennsylvania counties surveyed by The Spangenberg Group in 2000 employed an investigator,<sup>103</sup> and in its 2002 report to the Committee, The Spangenberg Group noted that a single case in Erie County that required a psychologist and forensic expert could exhaust the entire public defender’s budget for experts.<sup>104</sup> In Dauphin County, the public defender, which handles nearly all capital cases, is allotted only \$20,000 per year for all expert services in all criminal cases.<sup>105</sup>

Pennsylvania also has not established any statewide standards on compensation rates for experts and investigators, leaving the counties to set various compensation rates for experts and investigators. Allegheny County, for example, sets a maximum compensation rate of \$500 for an investigator and \$2,000 for an expert witness.<sup>106</sup> In Montgomery County, compensation for all investigator and expert fees cannot exceed \$1,500 without court approval.<sup>107</sup>

### Conclusion

While a capital defendant in Pennsylvania must be appointed counsel at trial, on appeal, on an initial post-conviction petition, and during federal *habeas*, s/he is not guaranteed counsel on a successive post-conviction petition or during clemency proceedings. Significantly, Pennsylvania law does not require the appointment of two qualified attorneys at any stage of a capital proceeding nor the appointment of a mitigation specialist or investigator as members of the defense team. Under Pennsylvania law, no member of the defense team is required to be qualified by experience or training to screen for mental or psychological disorders or conditions in a capital case, and many defense attorneys, including public defenders, appear not to be provided with the resources necessary to provide high quality legal representation.

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<sup>100</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

<sup>101</sup> FINAL REPORT, *supra* note 27, at 185.

<sup>102</sup> *Id.* at 174 (2003).

<sup>103</sup> *Id.* at 176 (2003).

<sup>104</sup> *Id.* at 185 (2003); THE SPANGENBERG GROUP, A STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA 42 (2002).

<sup>105</sup> Telephone Interview with George Schultz, Chief Public Defender, Dauphin County, Pa. (July 14, 2005).

<sup>106</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006).

<sup>107</sup> Telephone Interview with Leigh Narducci, Partner, Narducci Moore Fleisher & Roeberg (July 6, 2005).

The Commonwealth of Pennsylvania therefore is not in compliance with Recommendation #1.

As a result, the Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth of Pennsylvania adopt uniform statewide indigent defense standards that conform to the *ABA Guidelines*, including establishing maximum workloads for capital defense attorneys, mandating the appointment of two attorneys at every stage of a capital case, and establishing minimum rates for attorney compensation. The Pennsylvania Death Penalty Assessment Team further recommends that the Commonwealth ensure that the defense has access to sufficient investigative and expert resources to investigate and fully develop its claims, including potential mental retardation and mental disability claims.

*B. Recommendation #2*

**Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)**

- a. **The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- b. **In formulating qualification standards, the jurisdiction should insure:**
  - i. **That every attorney representing a capital defendant has:**
    - (a) **Obtained a license or permission to practice in the jurisdiction;**
    - (b) **Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;**  
and
    - (c) **Satisfied the training requirements set forth in Guideline 8.1.**
  - ii. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**
    - (a) **Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
    - (b) **Skill in the management and conduct of complex negotiations and litigation;**
    - (c) **Skill in legal research, analysis, and the drafting of litigation documents;**
    - (d) **Skill in oral advocacy;**
    - (e) **Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;**
    - (f) **Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;**
    - (g) **Skill in the investigation, preparation, and presentation of mitigating evidence; and**
    - (h) **Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.**

Pennsylvania Rule of Criminal Procedure 801 provides a uniform set of qualification standards for trial, appellate, and post-conviction counsel in capital cases.<sup>108</sup> The Pennsylvania Supreme Court adopted Rule 801 in 2004 to ensure that capital defense counsel “possess the ability, knowledge, and experience to provide representation in the most competent and professional manner possible.”<sup>109</sup>

Under Rule 801, capital defense counsel must be a member in good standing of the Pennsylvania Bar or be admitted *pro hac vice* following a motion to the court.<sup>110</sup> Defense counsel also must be a practicing trial attorney with at least five years of experience in criminal litigation.<sup>111</sup> Additionally, s/he must have experience as lead or co-counsel in at least eight “significant” jury trials, meaning that the trials stemmed from a charge of murder, manslaughter, vehicular homicide, or a felony with a maximum penalty of ten years or more.<sup>112</sup> If, however, defense counsel is to represent the defendant in capital appellate proceedings, there is no requirement that the attorney have experience in eight significant jury trials; prior appellate or post-conviction experience in at least eight “significant” cases will suffice.<sup>113</sup>

These requirements, in accord with ABA Guideline 5.1, mandate that counsel in capital cases be a member of the Pennsylvania Bar or be admitted *pro hac vice*, but fail to mandate that attorneys handling death penalty cases demonstrate a specific commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases.

Commendably, in accordance with this Recommendation, Rule 801 satisfies the training requirements set forth in ABA Guideline 8.1. Rule 801 specifically mandates that counsel complete at least eighteen hours of capital defense training approved by the Pennsylvania Continuing Legal Education Board, within three years prior to an appointment in a capital case.<sup>114</sup> The requisite training encompasses each of the subjects delineated in ABA Guideline 8.1, including:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pre-trial investigation, preparation, strategy, and theory regarding guilty and penalty phases;
- (4) Jury selection;
- (5) Trial preparation and presentation;
- (6) Presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (7) Ethical considerations particular to capital defense representation;

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<sup>108</sup> PA. R. CRIM. P. 801 cmt.

<sup>109</sup> *Id.*

<sup>110</sup> PA. R. CRIM. P. 801(1)(a), (b). If the court is satisfied the attorney has equivalent experience and educational qualifications, it may allow representation by an out-of-state attorney *pro hac vice*. *Id.* at cmt.

<sup>111</sup> PA. R. CRIM. P. 801(1)(a), (b).

<sup>112</sup> PA. R. CRIM. P. 801(1)(c).

<sup>113</sup> *Id.*

<sup>114</sup> PA. R. CRIM. P. 801(2)(a).

- (8) Preservations of the record and issues for post-conviction review;
- (9) Post-conviction litigation in state and federal courts;
- (10) Unique issues relating to those charged with capital offenses when under the age of eighteen; and
- (11) Counsel's relationship with the client and family.<sup>115</sup>

No court may waive the educational and experience requirements of Rule 801,<sup>116</sup> and lead defense counsel, whether retained or appointed, must adhere to these qualification standards.<sup>117</sup> However, an attorney who fails to meet these requisites may serve as “second chair” in a capital case.<sup>118</sup>

While Pennsylvania has adopted stringent qualification standards, the Commonwealth does not have a sufficient pool of qualified defense attorneys who can ensure high quality legal representation to each capital defendant. Alarming, in twenty counties— Bedford, Cameron, Elk, Forest, Fulton, Huntington, Indiana, Montour, McKean, Mifflin, Perry, Potter, Snyder, Sullivan, Susquehanna, Tioga, Venago, Warren, Wayne, and Wyoming— there is not a single attorney who qualifies for appointment in a capital case.<sup>119</sup> In another seven counties, including Carbon, Columbia, Franklin, Juniata, Pike, Schuylkill, and Union, only one attorney in each county meets the educational qualifications established under Rule 801.<sup>120</sup>

At all levels—at trial, on appeal, and during post-conviction proceedings in Pennsylvania—the main criteria for qualification of counsel is experience and training. But neither experience nor training automatically translates into high quality legal representation. Without a demonstration of the skills delineated in this Recommendation, Pennsylvania cannot guarantee that each capital defendant is afforded quality defense.

It also is important to note that all but 15 of the 225 inmates currently awaiting execution in Pennsylvania were tried and sentenced to death prior to Rule 801's adoption.<sup>121</sup> Consequently, the overwhelming majority of Pennsylvania's death-row inmates did not have the benefit of this Rule.

In conclusion, we commend the Commonwealth of Pennsylvania for developing and publishing qualification standards for defense counsel, but advise that these standards, as currently written, are not enough to ensure high quality legal representation in capital cases. Accordingly, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #2.

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<sup>115</sup> PA. R. CRIM. P. 801(2)(b).

<sup>116</sup> PA. R. CRIM. P. 801 cmt.

<sup>117</sup> PA. R. CRIM. P. 801.

<sup>118</sup> PA. R. CRIM. P. 801 cmt.

<sup>119</sup> See Supreme Court of Pennsylvania Continuing Legal Education Board, PA CLE Qualify Capital Counsel, at [https://www.pacle.org/services/cap\\_counsel.asp](https://www.pacle.org/services/cap_counsel.asp) (last visited Sept. 27, 2007) (searching individual counties for qualified counsel).

<sup>120</sup> *Id.*

<sup>121</sup> See PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF AUGUST 1, 2007 (on file with author).

*C. Recommendation # 3*

**The selection and evaluation process should include:**

- a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:**
  - i. A defender organization that is either:**
    - (a) A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
    - (b) A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
  - ii. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.**

The Commonwealth of Pennsylvania does not have a statewide independent appointing authority responsible for training, selecting, and monitoring attorneys who represent indigent capital defendants and death-row inmates. Indeed, the Commonwealth provides virtually no oversight of indigent services, but simply mandates that each county either appoint a public defender or private attorney to represent an indigent defendant in death penalty cases.

The training, selection, and monitoring of counsel will be discussed in detail in subparts b and c.

- b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.**

As indicated above, the Commonwealth of Pennsylvania does not have a statewide independent appointing authority responsible for developing and maintaining a registry of qualified capital defense attorneys. The Supreme Court of Pennsylvania Continuing Legal Education Board, however, does maintain a roster of attorneys who meet the educational requirements of Rule 801, but not the experiential requirements, to qualify for appointment in a capital case.<sup>122</sup> Under Rule 801, the experiential standards are to be enforced by the “appointing or admitting court, by colloquy or otherwise.”<sup>123</sup>

Even on the county level, there may be no entity responsible for maintaining a roster of attorneys qualified to represent a capital defendant. Specifically, a brief survey of six

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<sup>122</sup> The Supreme Court of Pennsylvania Continuing Legal Education Board, PA CLE Qualifying Capital Counsel, at [https://www.pacle.org/services/cap\\_counsel.asp](https://www.pacle.org/services/cap_counsel.asp) (last visited Sept. 27, 2007); see also PA. R. CRIM. P. 801(2)(c).

<sup>123</sup> PA. R. CRIM. P. 801 cmt.

counties conducted in conjunction with this report revealed that no lists of qualified attorneys were maintained in four of the six counties surveyed, including Allegheny, Dauphin, Montgomery, and York.<sup>124</sup>

**c. The statewide independent appointing authority should perform the following duties:**

Because the Commonwealth of Pennsylvania has no statewide independent appointing authority responsible for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony, this portion of the Recommendation will address the extent (if any) to which other state entities are performing the following duties.

**i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**

To the best of our knowledge, no state entity is charged with recruiting and certifying attorneys as qualified for appointment in death penalty cases.

**ii. Draft and periodically publish rosters of certified attorneys;**

No state entity drafts and periodically publishes rosters of certified attorneys. The Supreme Court of Pennsylvania Continuing Legal Education Board (PACLE) only maintains a roster of attorneys who have satisfied the educational requirements of Rule 801 for appointment in a death penalty case.<sup>125</sup> Although this roster is publicly available on the PACLE's website and is regularly updated, it does not include a list of those attorneys who also have met the experiential requirements of Rule 801 to qualify for appointment in a death penalty case.<sup>126</sup>

**iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**

The Pennsylvania Supreme Court— rather than a statewide independent appointing authority— has adopted qualification standards for attorneys handling death penalty cases. Specifically, the Pennsylvania Supreme Court promulgated Rule 801 of the Pennsylvania Rules of Criminal Procedure, which delineates qualification standards for counsel at trial, on appeal, and on post-conviction review in death penalty cases.<sup>127</sup>

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<sup>124</sup> Administrative Orders of Allegheny's Criminal Division (I); Telephone Interview with George Schultz, Chief Public Defender, Dauphin County, Pa. (July 14, 2005); Interview with the Court Administrator's Office of York County, Pa. (2005); Interview with the Court Administrator's Office of Montgomery County, Pa. (2005). Of the six counties surveyed, only Philadelphia maintained a list of qualified capital defense attorneys. We were unable to confirm whether or not Lebanon County maintained such a list.

<sup>125</sup> The Supreme Court of Pennsylvania Continuing Legal Education Board, PA CLE Qualifying Capital Counsel, at [https://www.pacle.org/services/cap\\_counsel.asp](https://www.pacle.org/services/cap_counsel.asp) (last visited Sept. 27, 2007); see also PA. R. CRIM. P. 801(2)(c).

<sup>126</sup> *Id.*

<sup>127</sup> PA. R. CRIM. P. 801.

As statewide standards on the appointment of defense counsel in capital cases are virtually non-existent, appointment procedures vary among the counties. In some counties, such as Allegheny, the court is entrusted with assigning counsel at its discretion.<sup>128</sup> Other counties, such as York, Lebanon, and Dauphin, vest the responsibility of appointing counsel to the Chief Public Defender, who, in turn, appoints the case to an attorney within his/her office or when a conflict of interest exists within the public defender office to private counsel.<sup>129</sup> In Dauphin County, the President Judge of the Court of Common Pleas has been said to appoint private counsel, on the basis of “experience and past favors to the President Judge.”<sup>130</sup>

**iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;**

By statute, the county public defenders must represent indigent defendants in death penalty cases.<sup>131</sup> For good cause, the court of common pleas may appoint a private attorney to represent the defendant at any stage of the proceedings.<sup>132</sup> Generally, indigent defendants may be represented by private counsel if the public defender has a conflict of interest.<sup>133</sup>

In actuality, capital defense representation is not always provided by public defenders, and some public defender offices in the Commonwealth do not even handle death penalty cases. For example, the Montgomery County Public Defender does not handle any capital cases, while the Allegheny County Public Defender does not handle any capital cases at the trial level.<sup>134</sup> In Philadelphia, the Defender Association handles only 20 percent of death penalty cases.<sup>135</sup>

Significantly, the Commonwealth has established no statewide standards for maximum workloads, allowing assignments to be made without consideration of an attorney’s caseload. In its final report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System cited “exploding and unmanageable caseloads” as one reason for the “serious deficiencies” in indigent defense services in Pennsylvania.<sup>136</sup>

**v. Monitor the performance of all attorneys providing representation in capital proceedings;**

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<sup>128</sup> Administrative Order of Allegheny’s Criminal Division (I)(D).

<sup>129</sup> Telephone Interview with George Schultz, Chief Public Defender, Dauphin County, Pa. (July 14, 2005); Telephone Interview with Charlie Jones, Chief Public Defender, Lebanon County, Pa. (July 25, 2005); Telephone Interview with Suzanne Smith, Attorney, Kearney & Marshall (July 13, 2005).

<sup>130</sup> Telephone Interview with George Schultz, Chief Public Defender, Dauphin County, Pa. (July 14, 2005).

<sup>131</sup> 16 PA. CONS. STAT. § 9960.6(a) (2007).

<sup>132</sup> 16 PA. CONS. STAT. § 9960.7 (2007).

<sup>133</sup> FINAL REPORT, *supra* note 27, at 167.

<sup>134</sup> Letter from Judge Robert E. Colville, Allegheny County, Court of Common Pleas, to Matthew Levine, Research Assistant, Villanova Law School (July 18, 2005); Telephone Interview with Thomas Eagan, Attorney, Montgomery County, Pa. (July 6, 2005).

<sup>135</sup> Interview with Bruce Blocher, Chief Public Defender, York County, Pa. (July 13, 2005).

<sup>136</sup> FINAL REPORT, *supra* note 27, at 168.

No state agency has the responsibility of monitoring the performance of counsel in capital proceedings. If a judge is aware of a lawyer's "unprofessional conduct," a judge "should take or initiate appropriate disciplinary measures," including reporting the conduct to the appropriate authority.<sup>137</sup>

**vi. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;**

While the Supreme Court of Pennsylvania Continuing Legal Education Board (PACLE) monitors the compliance of attorneys in completing their annual CLE requirements as a member of the Pennsylvania Bar,<sup>138</sup> no similar oversight has been established by PACLE for monitoring capital defense attorneys' compliance with the educational standards set forth in Rule 801. As noted earlier, the experiential standards set forth in Rule 801 are to be enforced by the "appointing or admitting court, by colloquy or otherwise."<sup>139</sup>

**vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and**

The Pennsylvania Bar Institute (PBI), the legal education arm of the Pennsylvania Bar, offers a host of specialized training programs for attorneys representing capital defendants, including "Handling Capital Cases," "A View from the Bench— Common Problems & Best Practices in Capital Cases," "Appellate and Post-Conviction Representation in Capital Cases," "Mistaken Identification and Confessions in Capital Cases," and "Your Ethical Obligations in a Capital Case."<sup>140</sup> In addition to the PBI, the Defender Association of Philadelphia and some county public defender offices offer specialized training programs for capital defense attorneys.<sup>141</sup>

The Supreme Court of Pennsylvania Continuing Legal Education Board is responsible for approving the courses that meet Rule 801's training requirements for capital defense attorneys.<sup>142</sup>

**viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**

There is no one entity that is responsible for investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases.

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<sup>137</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3).

<sup>138</sup> See The Supreme Court of Pennsylvania Continuing Legal Education Board, About PACLE, Rules and Regulations, *available at* <https://www.pacle.org/about/rulesregs.asp> (last visited Sept. 27, 2007).

<sup>139</sup> PA. R. CRIM. P. 801 cmt.

<sup>140</sup> See The Supreme Court of Pennsylvania Continuing Legal Education Board, Approved Courses, *at* <https://www.pacle.org/search/search.asp#> (searching "capital case" for type of law) (last visited Sept. 27, 2007).

<sup>141</sup> For a more detailed discussion of these training programs, see *infra* Recommendation #5.

<sup>142</sup> PA. R. CRIM. P. 801(2)(a).

As discussed above, the Pennsylvania Code of Judicial Conduct advises judges to “take or initiate appropriate action” when they become aware of a lawyer’s unprofessional conduct.<sup>143</sup> The Code further provides that appropriate action may include reporting a lawyer’s misconduct to the proper disciplinary body.<sup>144</sup> Pennsylvania has entrusted the Office of the Disciplinary Counsel, the Disciplinary Board of the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court with investigating complaints and disciplining practicing attorneys.<sup>145</sup>

### Conclusion

In sum, the Commonwealth of Pennsylvania has not vested with one or more independent entities all of the responsibilities contained in Recommendation #3 and has failed to remove the judiciary from the attorney appointment process. Furthermore, no state entity reviews the quality of the representation provided by defense attorneys, or monitors attorney caseloads. Because the Commonwealth has no statewide appointing authority, its ability to protect against the appointment or retention of an attorney for reasons other than his/her qualifications is severely comprised. Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #3.

The Pennsylvania Death Penalty Assessment Team therefore recommends that the Commonwealth create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. This organization should serve as a statewide resource center to assist defense attorneys with capital trials, appeals, post-conviction, and clemency proceedings.

#### *D. Recommendation # 4*

##### **Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):**

- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by the ABA Guideline 9.1, by the defense team and outside experts selected by counsel.**<sup>146</sup>

Counties in Pennsylvania are responsible for funding the cost of legal representation for indigent capital defendants at trial, on appeal, and in state post-conviction proceedings, as

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<sup>143</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3).

<sup>144</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3) cmt.

<sup>145</sup> PA. RULES OF DISCIPLINARY ENFORCEMENT R. 103 (2006).

<sup>146</sup> In order for a state to ensure funding for the “full cost of high quality legal representation,” it must be responsible for “paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g. Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5]).” See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

the Commonwealth of Pennsylvania provides no state funding for indigent defense services. In Fiscal Year 2000, the estimated cost of capital and non-capital indigent services was \$79,043,169;<sup>147</sup> in Fiscal Year 2005, the estimated costs of indigent services in Pennsylvania had risen to \$100,652,582.<sup>148</sup>

The funding provided for indigent services in Pennsylvania has fallen short of the amounts needed to assure high quality legal representation. In its final report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (Committee) found indigent defense attorneys, including public defenders, wrestling with “exploding and unmanageable caseloads,” as criminal cases increased but staffing numbers remained stagnant.<sup>149</sup> For example, while the Bucks County Public Defender’s caseload had nearly doubled from 4,173 cases in 1980 to about 8,000 cases in 2000, the number of attorneys within the Office had stayed the same.<sup>150</sup> Similarly, staff numbers remained unchanged in the Monroe County Public Defender’s Office, where the Office’s caseload had increased nearly 40 percent in three years, from 1,984 cases in 1998 to 2,782 in 2000.<sup>151</sup> The Committee also remarked on the “dearth of expert assistance” and lack of investigative services in Pennsylvania’s indigent defense system,<sup>152</sup> further indicating that Pennsylvania counties have fallen short of ensuring funding for the full cost of high quality legal representation.

Another indication of this shortcoming is evidenced by the discrepancy in funding between the county public defender offices and district attorney offices. For instance, in 2006, Allegheny County provided \$12,042,756 in funding for the district attorney’s office, but only \$7,331,157 for the public defender office.<sup>153</sup> These expenditures resulted in the district attorney benefiting from 197 employees (including 186 full-time staff), while the public defender had at its disposal only 126 employees (all full-time). This imbalance of funding not only means a disparity in the number of staff attorneys, experts, and investigators, but also likely results in a disparity in the quality of representation provided. In order to ensure high quality representation for all capital defendants and a fair, equitable justice system, the Commonwealth must ensure equal funding of both offices.

- b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
  - i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
  - ii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**

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<sup>147</sup> FINAL REPORT, *supra* note 27, at 181.

<sup>148</sup> THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005, at 36 (2006).

<sup>149</sup> FINAL REPORT, *supra* note 27, at 168, 188.

<sup>150</sup> *Id.* at 188.

<sup>151</sup> *Id.* at 168, 188.

<sup>152</sup> *Id.* at 185.

<sup>153</sup> Allegheny County 2006 Operating Budget (on file with author).

- iii. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The amount of compensation provided for representing a capital defendant or death-row inmate depends not only on whether the attorney is a public defender or a private court-appointed attorney, but also on the individual county.

The salary board of each county is responsible for establishing the salary of the public defender and the other attorneys within that office.<sup>154</sup> In counties with a population of more than 100,000, the average salary of the chief public defender was \$59,030 in 2000, ranging in scale from \$34,726 to \$93,000.<sup>155</sup> The average salary of a full-time assistant public defender was \$42,807, with salaries in some counties as low as \$28,000 and in others as high as \$51,000.<sup>156</sup> The average salary of a part-time assistant public defender was \$24,728.<sup>157</sup>

In counties with a population of fewer than 100,000, the average salary of the chief public defender was \$34,342 in 2000, ranging in scale from \$17,708 to \$50,000.<sup>158</sup> The average salary of a full-time assistant public defender was \$32,000, differing in range from \$28,500 to \$38,500.<sup>159</sup> The average salary of a part-time assistant public defender was \$25,272, with some salaries as low as \$11,975 and others as high as \$42,000.<sup>160</sup> In its 2003 final report, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System deemed the salaries of public defenders “seriously inadequate.” It is unclear to what extent, if any, the salaries of public defenders have since increased.

Notably, while the salary scale between the public defender and district attorney offices may be commensurate in a few counties, there exists a stark contrast between these salaries in the majority of counties.<sup>161</sup> A striking example of this disparity is Centre County where the district attorney’s salary of \$116,000 more than doubles the chief public defender’s salary of \$57,000.<sup>162</sup>

Compensation rates for private court-appointed counsel also vary among the counties, as minimum statewide rates have not been established. The amount paid to private court-appointed counsel in capital cases include:

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<sup>154</sup> 16 PA. CONS. STAT. § 9960.5(a) (2007).

<sup>155</sup> FINAL REPORT, *supra* note 27, at 175.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 187.

<sup>162</sup> *Id.* at 175.

- (1) *Philadelphia* - \$400 per day after the first half day or \$60 per hour for in-court work and \$50 per hour for out-of-court work (lead counsel);<sup>163</sup>
- (2) *Dauphin* - Flat fee of \$6,000;<sup>164</sup>
- (3) *Lebanon* - Flat fee of \$5,000 and an additional \$5,000 for appellate proceedings;<sup>165</sup>
- (4) *Montgomery* - At least \$5,000, but no more than \$15,000;<sup>166</sup>
- (5) *York* - \$55 per hour for in and out-of-court work.<sup>167</sup>

In contrast to the requirements of this Recommendation, many Pennsylvania counties not only distinguish between rates for work performed in-court and out-of-court, but permit flat fees, caps on compensation, and lump-sum contracts. As another example, Allegheny County has implemented a fee structure allowing a maximum compensation rate of \$3,000 for trial preparation, \$250 for the preliminary hearing, \$500 for a full day in court, and \$350 for a half day in court.<sup>168</sup> For post-conviction and appellate proceedings, the County has set a maximum rate of \$3,000 and court time.<sup>169</sup> With the exception of “very complex cases,” Allegheny County will not reimburse an attorney for any fees submitted in excess of these maximums, considering them *pro bono* work instead.<sup>170</sup>

By establishing flat fees for private attorneys, Pennsylvania counties have created “a disincentive for counsel to devote time to a particular case.”<sup>171</sup> In fact, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System found that, as a result, defense attorneys sometimes are not visiting their clients in prison, filing motions, conducting effective investigations, or even responding to their clients.<sup>172</sup>

- c. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
  - i. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
  - ii. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
  - iii. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained**

<sup>163</sup> Telephone Interview with George Newman, Attorney, Philadelphia County, Pa. (Jan. 26, 2006).

<sup>164</sup> Telephone Interview with George Schultz, Chief Public Defender, Lebanon County, Pa. (July 25, 2005).

<sup>165</sup> Telephone Interview with Keith Kilgore, Partner, Spitler & Kilgore (July 28, 2005).

<sup>166</sup> Telephone Interview with Thomas Eagan, Attorney, Montgomery County, Pa. (July 6, 2005).

<sup>167</sup> Telephone Interview with Bruce Blocher, Chief Public Defender, York County, Pa. (July 13, 2005).

<sup>168</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006)

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> FINAL REPORT, *supra* note 27, at 189.

<sup>172</sup> *Id.* at 175.

**counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

Pennsylvania counties may provide resources to attorneys appointed in death penalty cases for investigators, experts, and other services, but the exact levels of compensation for these services are unknown. The Commonwealth has no statewide fee schedules and instead relies on the counties to establish compensation rates for any experts and investigators. Allegheny County, for example, sets a maximum compensation rate of \$500 for an investigator and \$2,000 for an expert witness.<sup>173</sup> In Montgomery County, compensation for all investigator and expert fees cannot exceed \$1,500 without court approval.<sup>174</sup>

In federal *habeas corpus* proceedings, the court may authorize appointed counsel to obtain investigative, expert, or other services that are reasonably necessary for representation.<sup>175</sup> The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.<sup>176</sup>

**d. Additional compensation should be provided in unusually protracted or extraordinary cases.**

Additional compensation for attorneys is not provided in cases in which a district public defender office is providing representation, as these attorneys are salaried employees. With respect to private attorneys, many counties, including Allegheny, Dauphin, Lebanon, and Montgomery, have established set fees for death penalty cases. Apart from Allegheny County, we were unable to determine whether these other counties allowed further compensation in unusually protracted or extraordinary cases. Allegheny County, however, will reimburse an attorney for any excess fees in “very complex cases.”<sup>177</sup> To qualify as a very complex case, the attorney must file a motion within thirty days of his/her appointment or the pre-trial conference detailing the reasons why the case is complex.<sup>178</sup>

**e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.**

The issue of compensation for reasonable incidental expenses should generally not be an issue in cases where a public defender is providing representation, as these attorneys are salaried employees and their offices are provided with resources for funding the costs associated with a death penalty case. In some offices, however, there may be subtle pressure by the County Board of Commissioners to maintain minimal expense.<sup>179</sup>

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<sup>173</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006)

<sup>174</sup> Telephone Interview with Leigh Narducci, Partner, Narducci Moore Fleisher & Roeberg (July 6, 2005).

<sup>175</sup> 18 U.S.C. § 3599(f) (2006).

<sup>176</sup> 18 U.S.C. § 3599(g)(2) (2006).

<sup>177</sup> In re: Court Appointed Counsel Fee Policy, Order, Admin Docket No. 2 of 2006 (Jan. 31, 2006).

<sup>178</sup> *Id.*

<sup>179</sup> *See* FINAL REPORT, *supra* note 27, at 168, 190, 192.

We were unable to determine whether private court-appointed counsel is generally reimbursed for incidental expenses. By statute, such counsel must be awarded “reasonable compensation and reimbursement for expenses necessarily incurred,” as determined by the court of common pleas.<sup>180</sup>

### Conclusion

The Commonwealth of Pennsylvania provides absolutely no funding for indigent defense representation, including death penalty cases. Across the Commonwealth, counties do not appear to be providing adequate funding for defense counsel, experts, and investigators in death penalty cases. Disturbingly, numerous counties also have established set fees in death penalty cases, discouraging many attorneys from investing time and resources in these cases. In many instances, attorneys handling death penalty cases are not being fully compensated at a rate that is commensurate with the provision of high quality legal representation.

Based on this information, the Commonwealth of Pennsylvania is not in compliance with Recommendation #4. The Pennsylvania Death Penalty Assessment Team therefore recommends that the Commonwealth provide statewide funding for capital indigent defense services.

#### *E. Recommendation #5*

##### **Training (Guideline 8.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*)**

- a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

All attorneys admitted to the Pennsylvania Bar must complete twelve hours of continuing legal education credit each year, including one hour of instruction in ethics. Within three years of any capital appointment, an attorney also must complete at least eighteen hours of capital defense training, as approved by the Pennsylvania Continuing Legal Education Board.<sup>181</sup>

To the best of our knowledge, the Commonwealth of Pennsylvania provides no funding for the training, professional development, and continuing education of any members of the defense team.

The Pennsylvania Bar Institute (PBI), “a fully self-supporting” non-profit and the legal education arm of the Pennsylvania Bar, offers numerous educational courses for attorneys representing capital defendants.<sup>182</sup> Some of the CLE courses provided by the PBI include: “Handling Capital Cases,” “A View from the Bench– Common Problems & Best Practices in Capital Cases,” “Appellate and Post-Conviction Representation in Capital

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<sup>180</sup> 16 PA. CONS. STAT. § 9960.7 (2007).

<sup>181</sup> PA. R. CRIM. P. 801(2)(a).

<sup>182</sup> PBI.org, About the Pennsylvania Bar Institute, at <http://www.pbi.org/aboutpbi/aboutpbi.html> (last visited Sept. 27, 2007).

Cases,” “Mistaken Identification and Confessions in Capital Cases,” and “Your Ethical Obligations in a Capital Case.”<sup>183</sup> The costs of these courses range from \$19 to \$179, but the PBI does offer some scholarships.<sup>184</sup>

In addition to the PBI, some counties also offer attorneys capital defense training. Distinguished in this field is the Defender Association of Philadelphia. In addition to offering general CLE courses, the Defender Association has its own training unit, equipped with a full-time Director of Training.<sup>185</sup> Each new attorney who arrives at the Defender Association undergoes a full-year training program, including an initial three-week intensive training period.<sup>186</sup> The training unit also creates various resources, such as manuals and booklets “on defender practices and procedure, substantive statutory, case and suppression law, [and] sentencing law and practice.”<sup>187</sup> In 1987, the American Bar Association and the National Legal Aid and Defender Association, in naming the Defender Association as “the most outstanding” public defender office nationwide, specifically recognized the Association’s training program.<sup>188</sup> Notably, not a single capital defendant represented by the Defender Association has been sentenced to death.

- b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
  - i. Relevant state, federal, and international law;**
  - ii. Pleading and motion practice;**
  - iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
  - iv. Jury selection;**
  - v. Trial preparation and presentation, including the use of experts;**
  - vi. Ethical considerations particular to capital defense representation;**
  - vii. Preservation of the record and of issues for post-conviction review;**
  - viii. Counsel’s relationship with the client and his family;**
  - ix. Post-conviction litigation in state and federal courts;**
  - x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science; and**
  - xi. The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

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<sup>183</sup> See The Supreme Court of Pennsylvania Continuing Legal Education Board, Approved Courses, at <https://www.pacle.org/search/search.asp#> (searching “capital case” for type of law) (last visited Sept. 27, 2007).

<sup>184</sup> PBI.org, Catalog: Capital Cases, available at <http://www.legalspan.com/pbi/catalog.asp?CategoryID=20060901-150226-638040&UGUID> (last visited Sept. 27, 2007).

<sup>185</sup> See Phila.gov/Defender Association, Welcome, at <http://www.phila.gov/defender/> (last visited Sept. 27, 2007); SPANGENBERG GROUP, *supra* note 104, at 10.

<sup>186</sup> See Phila.gov/Defender Association, Welcome, at <http://www.phila.gov/defender/> (last visited Sept. 27, 2007); SPANGENBERG GROUP, *supra* note 104, at 10.

<sup>187</sup> SPANGENBERG GROUP, *supra* note 104, at 10.

<sup>188</sup> See Phila.gov/Defender Association, Welcome, at <http://www.phila.gov/defender/> (last visited Sept. 27, 2007).

In addition to the general CLE requirements mandated by Pennsylvania law, an attorney who wishes to qualify for appointment in a capital case must have completed at least eighteen hours of capital defense training within three years of his/her appointment.<sup>189</sup> Pursuant to Pennsylvania Rule of Criminal Procedure 801, this requisite training must encompass the following subjects:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pre-trial investigation, preparation, strategy, and theory regarding guilty and penalty phases;
- (4) Jury selection;
- (5) Trial preparation and presentation;
- (6) Presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (7) Ethical considerations particular to capital defense representation;
- (8) Preservations of the record and issues for post-conviction review;
- (9) Post-conviction litigation in state and federal courts;
- (10) Unique issues relating to those charged with capital offenses when under the age of eighteen; and
- (11) Counsel's relationship with the client and family.<sup>190</sup>

Although no court may waive the educational requirements of Rule 801,<sup>191</sup> an attorney who fails to satisfy this training requirement may serve as "second chair" in a capital case.<sup>192</sup>

- c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

Attorneys seeking to remain on the PACLE's roster of attorneys who meet the educational requirements of Rule 801 must complete at least eighteen hours of capital defense training every three years.<sup>193</sup>

- d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

The Commonwealth of Pennsylvania does not require non-attorneys who wish to participate on defense teams to receive any professional education or training appropriate to their areas of expertise.

## Conclusion

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<sup>189</sup> PA. R. CRIM. P. 801(2)(a).

<sup>190</sup> PA. R. CRIM. P. 801(2)(b).

<sup>191</sup> PA. R. CRIM. P. 801 cmt.

<sup>192</sup> *Id.*

<sup>193</sup> PA. R. CRIM. P. 801(2)(a); Telephone Interview with Staff Member, Supreme Court of Pennsylvania Continuing Legal Education Board (Aug. 21, 2007).

The Commonwealth of Pennsylvania provides no funding for the training of any capital defense members. While some offices provide funding for the training, professional development, and continuing legal education of its public defenders, others do not. Commendably, the Commonwealth has established minimum training requirements for all defense attorneys, which require training on all of the subjects outlined in the ABA Guidelines. Accordingly, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #5.



## CHAPTER SEVEN

### THE DIRECT APPEAL PROCESS

#### INTRODUCTION

Every death-row inmate must be afforded at least one level of judicial review.<sup>1</sup> This process of judicial review is called the direct appeal. As the United States Supreme Court stated in *Barefoot v. Estelle*, “direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”<sup>2</sup> The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they neither are equipped nor have the information necessary to evaluate the propriety of that sentence in light of sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or the decision could be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought, but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

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<sup>1</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>2</sup> *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

## I. FACTUAL DISCUSSION

On direct appeal, an individual who is convicted of first-degree murder and sentenced to death will have his/her conviction and sentence reviewed automatically by the Pennsylvania Supreme Court.<sup>3</sup>

### *A. Review of the Defendant's Conviction and Death Sentence by the Pennsylvania Supreme Court*

After being sentenced to death, a death-row inmate is not required to file a notice of appeal.<sup>4</sup> Instead, the clerk must give immediate written notice of the entry of the death sentence to the Pennsylvania Supreme Court Prothonotary's Office<sup>5</sup> and the Administrative Office of the Pennsylvania Courts.<sup>6</sup> In addition to the notice, the clerk must duplicate and file eight copies of the entire record with the Prothonotary.<sup>7</sup>

Upon receipt of the record, the Prothonotary will immediately:

- (1) Enter the matter upon the docket as an appeal;
- (2) File the record in the Pennsylvania Supreme Court;
- (3) Provide written notice of the docket number assignment to the trial court clerk; and
- (4) Provide notice of the docket number and the date on which the record was filed with the Pennsylvania Supreme Court to the parties and the Administrative Office of the Pennsylvania Courts, and provide notice to the parties of the date, if any, specially fixed by the Prothonotary for the filing of the appellant's brief.<sup>8</sup>

After the Pennsylvania Supreme Court receives the record, the direct appeal will proceed in the same manner as a non-capital appeal.<sup>9</sup> If it chooses, the trial court can order the appellant to file "a concise statement of the matters" that were raised in the appeal; failure to comply with the court's order can be considered a waiver of all objections by

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<sup>3</sup> 42 PA. CONS. STAT. § 9711(h) (2007); *see also* Commonwealth v. Miller, 819 A.2d 504, 509 (Pa. 2002) (citing Commonwealth v. Zettlemyer, 454 A.2d 937 (Pa. 1982), *abrogated on other grounds by* Commonwealth v. Freeman, 927 A.2d 385 (Pa. 2003)) ("This Court is required to review the sufficiency of the evidence to sustain a conviction of first-degree murder in every case in which the trial court imposes a sentence of death.").

<sup>4</sup> PA. R. APP. P. 1941.

<sup>5</sup> The Prothonotary Office is responsible for maintaining a docket of pending and decided cases which are before the court. 210 PA. CODE § 3113 (2007).

<sup>6</sup> PA. R. APP. P. 1941(a).

<sup>7</sup> PA. R. APP. P. 2189(a). The Pennsylvania Supreme Court can order the filing of a lesser number of copies of the record. *Id.* The death-row inmate is responsible for any copying costs, unless s/he is permitted to proceed *in forma pauperis*, in which case the county where the prosecution was commenced will pay for the copying costs. PA. R. APP. P. 2189(b).

<sup>8</sup> PA. R. APP. P. 1941(b).

<sup>9</sup> PA. R. APP. P. 1941(c). In addition, once the record has been filed with the Pennsylvania Supreme Court, the Prothonotary must estimate the date on which the case will be argued before or submitted to the Court. PA. R. APP. P. 2185(b). This estimate is based upon the "nature of the case and the status of the calendar of the court." *Id.*

the Pennsylvania Supreme Court.<sup>10</sup> Unless ordered otherwise, the appellant must serve his/her brief within forty days of the filing of the record.<sup>11</sup> A “statement of questions,” which provides the issues being raised on appeal and states whether the question was answered affirmatively, negatively, qualified or not answered by the trial court, must accompany the appellant’s brief.<sup>12</sup> The Commonwealth then has thirty days to file its brief.<sup>13</sup>

Neither the appellant nor the Commonwealth has a right to oral argument, and oral arguments are permitted only “to the extent necessary to enable the appellate court to acquire an understanding of the issues presented.”<sup>14</sup> Even if the parties mutually agree to submit the case for a decision on the briefs, the Court still may order the case to be argued.<sup>15</sup>

### 1. Scope of Review

On the mandatory direct appeal of a death sentence, the Pennsylvania Supreme Court is required to review the sufficiency of the evidence underlying the first-degree murder conviction.<sup>16</sup> The Court also is required to conduct a statutory review of the death sentence to determine: (1) whether the sentence was the product of passion, prejudice, or any other arbitrary factor, and (2) whether the evidence adduced at trial was sufficient to support the aggravating circumstance(s) found by the jury.<sup>17</sup>

In addition to this mandatory review, the Pennsylvania Supreme Court is required to review any trial court errors that have been properly preserved.<sup>18</sup>

#### a. Review of Sufficiency of the Evidence

The Pennsylvania Supreme Court must review the sufficiency of the evidence supporting a first-degree murder conviction,<sup>19</sup> even if the appellant fails to raise the issue<sup>20</sup> or waives his/her right to appeal the conviction.<sup>21</sup> When reviewing the sufficiency of the evidence, the Court will determine if “all reasonable inferences deducible from [the

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<sup>10</sup> PA. R. APP. P. 1925(b); *see also* Commonwealth v. Mitchell, 902 A.2d 430, 458 (Pa. 2006). The concise statement should be provided to the trial court no later than fourteen days after the entry of the order. PA. R. APP. P. 1925(b).

<sup>11</sup> PA. R. APP. P. 2185(a).

<sup>12</sup> PA. R. APP. P. 2116(a). This statement of questions is “considered in the highest degree mandatory, admitting of no exception.” *Id.*

<sup>13</sup> PA. R. APP. P. 2185(a).

<sup>14</sup> PA. R. APP. P. 2315(a).

<sup>15</sup> PA. R. APP. P. 2311(a).

<sup>16</sup> *See* Commonwealth v. Dowling, 883 A.2d 570, 573 (Pa. 2005); Commonwealth v. Freeman, 827 A.2d 385, 402 (Pa. 2003).

<sup>17</sup> 42 PA. CONS. STAT. § 9711(h)(3)(i)-(ii) (2007); *see also* Freeman, 827 A.2d at 402-03.

<sup>18</sup> *See infra* notes 27-29.

<sup>19</sup> The evidence must establish that a human-being was unlawfully killed, that the appellant did the killing, and that the killing was done in an intentional, deliberate, premeditated manner. *See* Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005).

<sup>20</sup> *See* Yarris v. Horn, 230 F. Supp. 2d 577, 589 (E.D. Pa. 2002); *see also* Davido, 868 A.2d at 435.

<sup>21</sup> *See* Commonwealth v. Fiebiger, 810 A.2d 1233, 1235 (Pa. 2002).

evidence], viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt.”<sup>22</sup>

b. Review of Passion, Prejudice, or Any Other Arbitrary Factor and Sufficiency of the Aggravating Circumstances

On direct appeal, the Pennsylvania Supreme Court must review whether the death sentence was a “product of passion, prejudice or any other arbitrary factor.”<sup>23</sup> When making this determination, the Court reviews the record from the trial court and the sufficiency of the evidence supporting the conviction.<sup>24</sup>

The Pennsylvania Supreme Court also must review whether the evidence supports the “finding of at least one aggravating circumstance,” enumerated in the Pennsylvania Consolidated Statutes.<sup>25</sup> In conducting this review, the Court will consider the evidence presented at trial to determine if it was sufficient to support the aggravating circumstance(s) found by the jury.<sup>26</sup>

c. Review of Trial Error

A trial court’s error may be reviewed by the Pennsylvania Supreme Court on direct appeal, and relief may be granted if the error was not harmless and “may have contributed to the verdict.”<sup>27</sup> The Pennsylvania Supreme Court “will find an error harmless where the uncontradicted evidence of guilt is overwhelming, so that by comparison the error is insignificant.”<sup>28</sup>

However, if a defendant fails to contemporaneously object to the error at trial, s/he waives the right to raise the issue on direct appeal.<sup>29</sup> Only if the appellant demonstrates that the “particular waived claim is of . . . primary constitutional magnitude” can the issue be considered on appeal by the Pennsylvania Supreme Court.<sup>30</sup> Yet, errors that are “fundamental and plainly meritorious constitutional issues” are rare.<sup>31</sup>

Prior to 2003, the Pennsylvania Supreme Court permitted claims which could be reviewed upon the record to be raised on direct appeal in death penalty cases.<sup>32</sup> This “relaxed waiver” rule was created to prevent the Court from “being instrumental in an

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<sup>22</sup> Commonwealth v. Bridges, 757 A.2d 859, 864 (Pa. 2000), *abrogated on other grounds by* Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); *see also* Commonwealth v. Robinson, 864 A.2d 460, 478 (Pa. 2004).

<sup>23</sup> 42 PA. CONS. STAT. § 9711(h)(3)(i) (2007).

<sup>24</sup> *See* Commonwealth v. Mitchell, 902 A.2d 430, 468 (Pa. 2006) (“The record discloses no indicia of arbitrariness and does not suggest that the sentence of death was the product of passion or prejudice.”); *Davido*, 868 A.2d at 445; Commonwealth v. Jones, 668 A.2d 491, 521 (Pa. 1995).

<sup>25</sup> 42 PA. CONS. STAT. § 9711(h)(3)(ii) (2007).

<sup>26</sup> *See* Commonwealth v. Singley, 868 A.2d 403, 415 (Pa. 2005); Commonwealth v. Hutchinson, 811 A.2d 556, 562 (Pa. 2002); *Jones*, 668 A.2d at 521.

<sup>27</sup> *Mitchell*, 902 A.2d at 452.

<sup>28</sup> *Id.* On direct appeal, the Commonwealth must demonstrate that the trial court error was harmless. *Id.*

<sup>29</sup> PA. R. APP. P. 302(a) (2007); *see also* Commonwealth v. May, 887 A.2d 750, 761 (Pa. 2005).

<sup>30</sup> *See* Commonwealth v. Freeman, 827 A.2d 385, 402 (Pa. 2003).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

unconstitutional execution.”<sup>33</sup> Although the Pennsylvania Supreme Court has abandoned this rule,<sup>34</sup> the relaxed waiver rule still applies to those pending cases whose briefs were not due to be filed until fewer than thirty days after May 30, 2003, the date the rule was abandoned.<sup>35</sup>

## 2. Disposition of a Direct Appeal in the Pennsylvania Supreme Court

When reviewing a death sentence on direct appeal, the Pennsylvania Supreme Court has the authority to correct any errors that occurred at trial.<sup>36</sup> Additionally, if the Pennsylvania Supreme Court determines that the death sentence must be vacated because none of the aggravating circumstances are supported by sufficient evidence, the case will be remanded to the trial court and a sentence of life imprisonment will be imposed.<sup>37</sup> If the Court determines that the death penalty should be vacated for any other reason, the case must be remanded for a new sentencing hearing.<sup>38</sup>

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<sup>33</sup> Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998).

<sup>34</sup> Freeman, 827 A.2d at 402; see also Commonwealth v. Taylor, 876 A.2d 916, 929 n.11 (Pa. 2005); Commonwealth v. Roney, 866 A.2d 351, 357 (Pa. 2005).

<sup>35</sup> See Freeman, 827 A.2d at 403; Commonwealth v. Williams, 896 A.2d 523, 535 (Pa. 2006).

<sup>36</sup> 42 PA. CONS. STAT. § 9711(h)(2) (2007).

<sup>37</sup> 42 PA. CONS. STAT. § 9711(h)(4) (2007); see also Commonwealth v. Boczkowski, 846 A.2d 75, 102-03 (Pa. 2004) (holding that the prosecutor improperly and arbitrarily created an aggravating circumstance which was the only aggravating circumstance supporting the death sentence, therefore, requiring the Court to vacate the death sentence and remand for imposition of life imprisonment).

<sup>38</sup> 42 PA. CONS. STAT. § 9711(h)(4) (2007)

## II. ANALYSIS

### A. Recommendation #1

**In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.**

The Pennsylvania Supreme Court is no longer statutorily required to conduct proportionality review in capital cases. In 1997, the Pennsylvania Legislature specifically repealed the statutory requirement that the Pennsylvania Supreme Court undertake proportionality review when reviewing a death sentence on direct appeal.<sup>39</sup>

Prior to 1997, the Pennsylvania Supreme Court conducted proportionality review, which required trial judges to complete murder review forms for all first-degree murder convictions.<sup>40</sup> The President Judge of each county then was required to supply the information pertaining to each conviction to the Administrative Office of the Pennsylvania Courts.<sup>41</sup> Information submitted to the Administrative Office of the Pennsylvania Courts included: (1) the facts and circumstances of the crimes, (2) the aggravating and mitigating circumstances supported by the evidence, (3) the defendant and victim's gender and race, and (4) other information pertaining to the conduct and prosecution of the case.<sup>42</sup> The submitted data was compiled and monitored by the Administrative Office of the Pennsylvania Courts to ensure that the "body of 'similar cases'" was complete.<sup>43</sup> When the Pennsylvania Supreme Court conducted its statutorily required proportionality review, the Court reviewed the data compiled by the

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<sup>39</sup> See *Commonwealth v. Spatz*, 896 A.2d 1191, 1249 n.44 (Pa. 2006); see also *Commonwealth v. Gribble*, 703 A.2d 426, 439 (Pa. 1997), *abrogated on other grounds by Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001). However, the Pennsylvania Supreme Court continues to conduct proportionality review on the direct appeal of death sentences imposed prior to June 25, 1997, the date the review was repealed. See *Spatz*, 896 A.2d at 1249 n.44.

<sup>40</sup> See *Commonwealth v. Frey*, 475 A.2d 700, 711-13 app. (Pa. 1997). The murder review form requested the following information: (1) the race and sex of the defendant; (2) the race and sex of the victim; (3) whether guilt was determined by the jury, trial court, or a guilty plea; (4) whether the death penalty was sought and if it was sought, whether the defendant was sentenced to death or life imprisonment; (5) whether the sentence was determined by the jury or the judge; (6) a list of the aggravating and mitigating circumstance(s) presented at the sentencing hearing and a brief description of the facts and evidence relevant to each circumstance; (7) a list of all offenses which were tried at the same trial, which offenses stemmed from a first-degree murder charge, and whether the defendant was convicted or acquitted of the other offenses; and (8) the name, indictment, and charges of any co-defendants involved in the case. *Id.* Additionally, any opinions that were written in the case had to be attached to the murder review form and the transcript of the sentencing hearing also should be attached. *Id.*

<sup>41</sup> See *Gribble*, 703 A.2d at 440.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (citing *Commonwealth v. Frey*, 475 A.2d 700, 707-08 (Pa. 1984), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003)).

Administrative Office of the Pennsylvania Courts and the review forms submitted by the President Judge.<sup>44</sup>

Because Pennsylvania no longer mandates proportionality review in death penalty cases, the Commonwealth is not in compliance with Recommendation #1.

The Pennsylvania Death Penalty Assessment Team, therefore, recommends that the Commonwealth establish a statewide clearinghouse to collect data on all death-eligible cases, which, in turn, should be made available to the Pennsylvania Supreme Court for use in conducting meaningful proportionality review.

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<sup>44</sup> See *Gribble*, 703 A.2d at 441; see also *Commonwealth v. Marshall*, 568 A.2d 590, 600 (Pa. 1989) (conducting proportionality review of all convictions of first-degree murder prosecuted under the death penalty sentencing act aided by a comprehensive study that was ordered by the court to be prepared by the Administrative Office of the Pennsylvania Courts).



## CHAPTER EIGHT

### STATE POST-CONVICTION PROCEEDINGS

#### INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal *habeas corpus* relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; claims of unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal *habeas corpus* proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal *habeas corpus* proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal *habeas* proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal *habeas corpus* relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal *habeas* that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal *habeas* proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings do not guarantee that *any* court, state or federal, ever rules on the merits of the inmate's claims—even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

## I. FACTUAL DISCUSSION

### A. Overview of State Post-Conviction Proceedings

The Post-Conviction Relief Act (PCRA), codified at sections 9541 through 9546 of title 42 in the Pennsylvania Consolidated Statutes, governs all state post-conviction proceedings, including those initiated by death-row inmates.<sup>1</sup>

Upon the conclusion of a death-row inmate's direct appeal, the Prothonotary of the Pennsylvania Supreme Court must send the inmate a copy of the opinion affirming his/her conviction and sentence and the date the judgment was entered.<sup>2</sup> The clerk must also inform the death-row inmate of:

- (1) The deadline for filing a post-conviction petition;<sup>3</sup>
- (2) The method for calculating the deadline;<sup>4</sup>
- (3) The consequences for not adhering to the deadline;<sup>5</sup>
- (4) The fact that the petitioner must raise all available claims in the petition or face waiver of any unraised claims;<sup>6</sup> and
- (5) The availability, with exceptions, of appointed counsel if the petitioner is indigent.<sup>7</sup>

#### 1. The Filing and Contents of a Post-Conviction Petition

A death-row inmate may initiate proceedings for post-conviction relief by filing three copies of his/her verified post-conviction petition with the clerk of the court of common pleas<sup>8</sup> in which s/he was convicted and sentenced.<sup>9</sup> The petition must contain a number of informational items<sup>10</sup> and demonstrate, by a preponderance of the evidence, that:<sup>11</sup>

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<sup>1</sup> 42 PA. CONS. STAT. §§ 9541-9546 (2007). Actions authorized by the PCRA are the "sole means of obtaining collateral relief and encompass[ ] all other common law and statutory remedies for the same purpose . . . , including habeas corpus and coram nobis." 42 PA. CONS. STAT. § 9542 (2007). The writ of *habeas corpus* does, however, continue to exist as a separate remedy "in cases in which there is no remedy under the PCRA." *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). The PCRA governs both capital and non-capital post-conviction proceedings. 42 PA. CONS. STAT. § 9542 (2007).

<sup>2</sup> PA. R. CRIM. P. 900(B); PA. R. APP. P. 2521(b).

<sup>3</sup> PA. R. CRIM. P. 900(B)(1); PA. R. APP. P. 2521(b)(1).

<sup>4</sup> PA. R. CRIM. P. 900(B)(2); PA. R. APP. P. 2521(b)(2).

<sup>5</sup> PA. R. CRIM. P. 900(B)(3)(a); PA. R. APP. P. 2521(b)(3)(A).

<sup>6</sup> PA. R. CRIM. P. 900(B)(3)(b); PA. R. APP. P. 2521(b)(3)(B).

<sup>7</sup> PA. R. CRIM. P. 900(B)(4); PA. R. APP. P. 2521(b)(4).

<sup>8</sup> 42 PA. CONS. STAT. § 9545(a) (2007).

<sup>9</sup> PA. R. CRIM. P. 901(B).

<sup>10</sup> PA. R. CRIM. P. 902(A)(1)-(16). These may include, but are not limited to: (1) the petitioner's name; (2) where s/he is confined; (3) the offenses of which s/he has been convicted and sentenced; (4) the date of sentencing; (5) whether the petitioner had a jury trial or entered a plea; (6) the name of the judge who presided at trial or plea and imposed the sentence; (8) the court, caption, term, and number of any proceedings instituted by the defendant to obtain relief from conviction or sentence; and (9) the name of each lawyer who represented the petitioner at any time after arrest. *Id.*

<sup>11</sup> 42 PA. CONS. STAT. § 9543(a) (2007).

- (1) The petitioner has been convicted of a crime under the laws of the Commonwealth of Pennsylvania and is awaiting execution of a sentence of death for that crime;<sup>12</sup>
- (2) The petitioner is entitled to relief on one or more of the following grounds:
  - (a) A violation of the Pennsylvania Constitution or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;<sup>13</sup>
  - (b) Ineffective assistance of counsel, which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;<sup>14</sup>
  - (c) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent;<sup>15</sup>
  - (d) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court;<sup>16</sup>
  - (e) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;<sup>17</sup>
  - (f) The imposition of a sentence greater than the lawful maximum;<sup>18</sup>  
or
  - (g) The sentence was given in a tribunal without jurisdiction;<sup>19</sup>
- (3) The claims alleged were not previously litigated or waived;<sup>20</sup> and

<sup>12</sup> 42 PA. CONS. STAT. § 9543(a)(1) (2007).

<sup>13</sup> 42 PA. CONS. STAT. § 9543(a)(2)(i) (2007).

<sup>14</sup> 42 PA. CONS. STAT. § 9543(a)(2)(ii) (2007).

<sup>15</sup> 42 PA. CONS. STAT. § 9543(a)(2)(iii) (2007).

<sup>16</sup> 42 PA. CONS. STAT. § 9543(a)(2)(iv) (2007).

<sup>17</sup> 42 PA. CONS. STAT. § 9543(a)(2)(vi) (2007). New information concerning a witness's credibility will not generally be considered as a valid claim of newly discovered evidence. *See Commonwealth v. Galloway*, 640 A.2d 454, 456 (Pa. Super. Ct. 1994) (citing *Commonwealth v. Conley*, 335 A.2d 721, 722 (1975)); *see also Commonwealth v. Favinger*, 516 A.2d 1386, 1389 (Pa. 1986) (holding that new evidence used solely for impeaching the credibility of a witness will not warrant a new trial). Furthermore, Pennsylvania courts have repeatedly held that the Baldus-Woodworth study, which showed racial bias in the application of the death penalty, is not newly discovered evidence because the information had been available in public records. *See Commonwealth v. Whitney*, 817 A.2d 473, 476 (Pa. 2003); *Commonwealth v. Lark*, 746 A.2d 585, 588 n.4 (Pa. 2000) (holding that the Baldus-Woodworth study is not "newly discovered evidence" for purposes of the PCRA because "the statistics which comprise the study were of public record and cannot be said to have been 'unknown' to Appellant"). New evidence obtained through the post-conviction DNA procedures outlined in the PCRA is considered newly discovered evidence. 42 PA. CONS. STAT. § 9543.1(f)(1) (2007) (allowing the filing of a newly discovered evidence claim for post-conviction relief based on post-conviction DNA testing results and stipulating that such claim must be filed within sixty days of the petitioner being notified of the results).

<sup>18</sup> 42 PA. CONS. STAT. § 9543(a)(2)(vii) (2007).

<sup>19</sup> 42 PA. CONS. STAT. § 9543(a)(2)(viii) (2007).

<sup>20</sup> 42 PA. CONS. STAT. § 9543(a)(3) (2007).

- (4) The failure to litigate the issue prior to or during trial, or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.<sup>21</sup>

The petitioner must raise each available ground for relief in the petition.<sup>22</sup> Grounds for relief that are not raised in the petition are waived and may not be raised at an evidentiary hearing, or in any subsequent post-conviction proceedings.<sup>23</sup> Each raised ground for relief cannot merely be a conclusory allegation and the petitioner must support each ground with facts from the record or facts which are demonstrated through affidavits, documents, or other evidence.<sup>24</sup> The petition should also contain requests, if necessary, for:

- (1) Post-conviction discovery;<sup>25</sup>
- (2) An evidentiary hearing, including notice of the witnesses the petitioner intends to have testify and the substance of their testimony;<sup>26</sup> and
- (3) The appointment of counsel if the petitioner is indigent and has no representation.<sup>27</sup>

The court may allow the petitioner to amend or withdraw the petition at any time,<sup>28</sup> and Pennsylvania law stipulates that amendments “be freely allowed to achieve substantial justice.”<sup>29</sup> If the court determines that a petition for post-conviction relief is defective,<sup>30</sup> the judge must: (1) order the petitioner to amend the petition, (2) identify the nature of the defects, and (3) specify the time within which the amended petition must be filed.<sup>31</sup> A petition may be dismissed without a hearing if the petitioner fails to comply with an order directing him/her to amend the petition.<sup>32</sup>

## 2. Time Limit for Filing a Post-Conviction Petition

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<sup>21</sup> 42 PA. CONS. STAT. § 9543(a)(4) (2007).

<sup>22</sup> PA. R. CRIM. P. 902(B).

<sup>23</sup> *Id.*

<sup>24</sup> PA. R. CRIM. P. 902(A)(12)(a)-(b). If such portions of the record, affidavits, documents, or other evidence are not attached to the petition, the petition should explain why they are not attached. PA. R. CRIM. P. 902(D). Each claim in the petition must contain a statement describing what is required for that particular claim to be cognizable under the PCRA and an argument that fully supports each of the required elements. *Commonwealth v. Simmons*, 804 A.2d 625, 632 n.2 (Pa. 2001). The petitioner may not rely on statements made in another part of his/her petition as partially or fully meeting the requirements of the claim at issue. *Id.*

<sup>25</sup> PA. R. CRIM. P. 902(A)(16), (E).

<sup>26</sup> PA. R. CRIM. P. 902(A)(15); 42 PA. CONS. STAT. § 9545(d)(1) (2007). Failure to include this information will render the proposed witness’s testimony inadmissible. *Id.*

<sup>27</sup> PA. R. CRIM. P. 902(C). If the petitioner is already represented by counsel, s/he should identify his/her counsel in the petition. *Id.*

<sup>28</sup> PA. R. CRIM. P. 905(A).

<sup>29</sup> *Id.*

<sup>30</sup> A “defective” petition includes those “that are inadequate, insufficient, or irregular for any reason,” such as petitions that lack particularity, petitions that appear to be patently frivolous, petitions that do not allege facts that would support relief, or petitions that raise issues the petitioner did not preserve properly or were finally determined at prior proceedings. PA. R. CRIM. P. 905 cmt.

<sup>31</sup> PA. R. CRIM. P. 905(B), (C).

<sup>32</sup> PA. R. CRIM. P. 905(B), (D).

A death-row inmate must file his/her initial or successive post-conviction petition within one year of a final judgment on direct appeal.<sup>33</sup> However, the inmate may file a post-conviction petition after the one-year deadline if s/he satisfies one or more of the following exceptions:

- (1) The failure to raise the claim previously was the result of interference by government officials<sup>34</sup> and the claim is in violation of the Constitution or laws of Pennsylvania or the United States;<sup>35</sup>
- (2) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;<sup>36</sup> or
- (3) The right asserted is a constitutional right that was recognized by the United States or Pennsylvania Supreme Courts after the one-year deadline for filing and has been held by that Court to apply retroactively.<sup>37</sup>

If the petitioner wishes to assert one of these exceptions to overcome the one-year time limitation for filing a post-conviction petition, s/he must do so within sixty days of being able to invoke the exception.<sup>38</sup> In fact, the Pennsylvania Supreme Court has held that the PCRA's time restrictions are jurisdictional, prohibiting “equitable tolling” of the deadline, unless one of the exceptions delineated in section 9545(b)(1)(i)-(iii) is satisfied.<sup>39</sup>

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<sup>33</sup> 42 PA. CONS. STAT. § 9545(b)(1) (2007); PA. R. CRIM. P. 901(A). An individual’s conviction and sentence become final at the conclusion of direct review, including discretionary review in the United States and Pennsylvania Supreme Courts, or at the expiration of time for seeking such review. 42 PA. CONS. STAT. § 9545(b)(3) (2007).

<sup>34</sup> The term “government official” does not include defense counsel, whether appointed or retained. 42 PA. CONS. STAT. § 9545(b)(4) (2007). *But see* Commonwealth v. Fahy, 737 A.2d 214, 223 (Pa. 1999) (explaining how ineffectiveness of counsel does not prevent a post-conviction petition from being time-barred).

<sup>35</sup> 42 PA. CONS. STAT. § 9545(b)(1)(i) (2007).

<sup>36</sup> 42 PA. CONS. STAT. § 9545(b)(1)(ii) (2007).

<sup>37</sup> 42 PA. CONS. STAT. § 9545(b)(1)(iii) (2007).

<sup>38</sup> 42 PA. CONS. STAT. § 9545(b)(1)(ii) (2007). Prior to the 1996 PCRA amendments, Pennsylvania adhered to a “relaxed waiver” doctrine in capital cases. The Pennsylvania Supreme Court had held that “where an overwhelming public interest is involved but is not addressed by the parties, [it] has a duty to transcend procedural rules which are not, in spirit, applicable, to the end that the public interest may be vindicated.” Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978); *see also* Commonwealth v. Spatz, 716 A.2d 580, 591 (Pa. 1998) (allowing review of a waived claim pursuant to the “practice to relax waiver rules in capital cases”); Commonwealth v. Brown, 711 A.2d 444, 455 (Pa. 1998) (noting that the Pennsylvania Supreme Court “generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty”); Commonwealth v. Jermyn, 709 A.2d 849, 856 n.20 (Pa. 1998) (noting that the Supreme Court of Pennsylvania “has addressed all issues arising in death penalty cases, irrespective of a finding of waiver”).

In 1999, the Pennsylvania Supreme Court rescinded the “relaxed waiver” rule, stating that “[t]he gravity of the sentence imposed upon a defendant does not give us liberty to ignore” the PCRA’s statutory time limitations. Commonwealth v. Banks, 726 A.2d 374, 376 (Pa. 1999); *see also* Commonwealth v. Yarris, 731 A.2d 581, 586-87 (Pa. 1999) (holding that the petition was procedurally time-barred, although DNA testing later exonerated the petitioner).

<sup>39</sup> Commonwealth v. Smith, 818 A.2d 494, 499 (Pa. 2003). The court may appoint counsel to an indigent defendant to determine if his/her time-barred post-conviction petition falls under an enumerated exception. *See id.*

After the initial counseled petition for post-conviction relief is filed and served on the prosecution, the Commonwealth has 120 days to file an answer.<sup>40</sup> The court retains the discretion to order extensions of up to ninety days upon a showing of good cause.<sup>41</sup> If the petitioner files a subsequent petition, the Commonwealth is not required to file an answer unless ordered to do so by the judge.<sup>42</sup> If the court orders the Commonwealth to answer or if the Commonwealth chooses voluntarily to answer the petition, it must do so within 120 days of the filing and service of the subsequent petition.<sup>43</sup> For good cause shown, the court has discretion to provide the Commonwealth with extensions of up to ninety days.<sup>44</sup>

The court may grant the Commonwealth leave to amend an answer at anytime and, as with the petitioner, amendments must “be freely allowed to achieve substantial justice.”<sup>45</sup> Amendments to answers must be filed and served on the petitioner within the time specified by the court.<sup>46</sup>

### 3. Appointment of Post-Conviction Counsel

At the conclusion of the direct appeal, the trial judge must appoint new counsel for the purpose of post-conviction collateral review, unless:

- (1) The petitioner has elected to proceed *pro se* or has waived the right to post-conviction collateral proceedings, and the judge finds, after a colloquy on the record, that the petitioner is competent and is making a knowing, intelligent, and voluntary waiver;
- (2) The petitioner requests continued representation by the original trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the petitioner has made a knowing, intelligent, and voluntary waiver of a claim that counsel was ineffective; or
- (3) The judge finds, after a colloquy on the record, that the petitioner has engaged private counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings.<sup>47</sup>

Pennsylvania Rule of Criminal Procedure 904 intends that counsel be appointed in all cases in which an individual files an initial petition for post-conviction relief and is unable to afford<sup>48</sup> or otherwise procure counsel.<sup>49</sup> Rule 904, however, limits the appointment of counsel on second or subsequent petitions, allowing counsel to be

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<sup>40</sup> PA. R. CRIM. P. 906(E)(1)(a)-(b).

<sup>41</sup> *Id.*

<sup>42</sup> PA. R. CRIM. P. 906(E)(2)(a).

<sup>43</sup> PA. R. CRIM. P. 906(E)(2)(a)-(b).

<sup>44</sup> *Id.*

<sup>45</sup> PA. R. CRIM. P. 906(E)(3).

<sup>46</sup> *Id.*

<sup>47</sup> PA. R. CRIM. P. 904(H)(1)(a)-(c).

<sup>48</sup> “When the judge is satisfied that the petitioner is unable to pay the costs of the post-conviction proceedings, the judge must designate the petitioner indigent and permit him/her to proceed *in forma pauperis*.” PA. R. CRIM. P. 904(H)(3).

<sup>49</sup> PA. R. CRIM. P. 904 cmt.

appointed only if the judge determines that an evidentiary hearing is required.<sup>50</sup> The judge also has discretion to appoint counsel in any collateral proceeding when the interests of justice require it.<sup>51</sup>

#### 4. Types of Claims Usually Raised in a Post-Conviction Petition

Claims of ineffective assistance of trial counsel form the bulk of claims in post-conviction proceedings.

##### a. Ineffective Assistance of Trial Counsel

Pennsylvania law explicitly allows a death-row inmate to raise claims of “ineffective assistance of counsel” in a petition for post-conviction relief.<sup>52</sup>

In order to make a legally sufficient claim of ineffective assistance of trial counsel under the United States Supreme Court’s decision in *Strickland v. Washington*, the petitioner first must demonstrate that his/her counsel’s deficient performance “fell below an objective standard of reasonableness” and that by making such serious errors, counsel was “not functioning as the ‘counsel’ guaranteed the [petitioner] by the Sixth Amendment.”<sup>53</sup> The petitioner then must demonstrate the prejudicial effect of that deficient performance by proving that a reasonable probability exists that, but for the trial counsel’s deficient performance, the result of the proceeding would have been different.<sup>54</sup>

While some Pennsylvania appellate decisions have dealt with claims of ineffective assistance of counsel exclusively under the *Strickland* standard,<sup>55</sup> Pennsylvania courts generally review claims of ineffective assistance of counsel pursuant to a test set forth in *Commonwealth v. Pierce*,<sup>56</sup> which functions similarly to the *Strickland* test. When proving a claim of ineffective assistance of counsel under the *Pierce* test, the petitioner must demonstrate, by a preponderance of the evidence, that (1) the claim of

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 42 PA. CONS. STAT. § 9543(a)(2)(ii) (2007). At one time, individuals were required to raise claims of ineffective assistance of trial counsel at the earliest possible opportunity. *Commonwealth v. Hubbard*, 372 A.2d 687, 695 (Pa. 1977). The Pennsylvania Supreme Court and the Legislature have since changed this requirement, determining that individuals “should wait to raise claims of ineffective assistance of trial counsel until collateral review.” *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002).

<sup>53</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also* *Commonwealth v. Cousin*, 888 A.2d 710, 715 (Pa. 2005).

<sup>54</sup> *Strickland*, 466 U.S. at 694. A “reasonable probability” is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.*; *see also* *Commonwealth v. Kimball*, 724 A.2d 326, 332-33 (Pa. 1999). The PCRA states that the ineffective assistance of counsel must have “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 PA. CONS. STAT. § 9543(a)(2)(ii) (2007). Although this language differs from the Constitutional standard articulated in *Strickland v. Washington*, the Pennsylvania Supreme Court has held that the language simply represents a statutory adoption of the prejudice standard articulated in *Strickland* for Sixth Amendment ineffective assistance of counsel claims. *See* *Commonwealth ex rel. Dadario v. Goldberg*, 773 A.2d 126, 130 (Pa. 2001); *Kimball*, 724 A.2d at 332.

<sup>55</sup> *See Cousin*, 888 A.2d at 715; *Goldberg*, 773 A.2d at 130.

<sup>56</sup> 786 A.2d 203 (Pa. 2001).

ineffectiveness is of arguable merit; (2) counsel had no reasonable strategic basis for his/her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different, rendering unreliable any adjudication of guilt or innocence that could have taken place.<sup>57</sup>

#### b. Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel also can be raised in a petition for post-conviction relief. The standard applied to these claims mirrors the standard applied to claims involving the ineffectiveness of trial counsel as described above.<sup>58</sup>

If the petitioner presents a layered claim of ineffectiveness (i.e., appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness), s/he must first preserve the layered claim by pleading in his/her post-conviction petition that appellate counsel was ineffective for failing to raise the ineffectiveness of all prior counsel.<sup>59</sup> The petitioner must then present the claim of ineffectiveness of appellate counsel through the three-pronged *Pierce* test.<sup>60</sup> Because it is a layered claim, in order to establish the first prong of the *Pierce* test (that the underlying claim is of arguable merit) as to the performance of appellate counsel, a petitioner is required to establish all three prongs of the *Pierce* test demonstrating trial counsel's ineffectiveness before the question of appellate counsel's ineffectiveness can be addressed.<sup>61</sup>

#### c. Ineffective Assistance of Prior Post-Conviction Counsel

Because Pennsylvania law provides the right to appointed post-conviction counsel in an initial petition,<sup>62</sup> the petitioner has an enforceable right to effective post-conviction counsel.<sup>63</sup> Ineffective assistance claims with respect to post-conviction counsel are permitted on appeal, as it is the petitioner's first opportunity to raise this claim.<sup>64</sup> When such a claim is raised, the petitioner must use the aforementioned standard for ineffectiveness, layered or otherwise.<sup>65</sup>

### 5. Decisions on Post-Conviction Petitions

Within twenty days after the Commonwealth files its answer, or if no answer is filed within twenty days after the expiration of the time for answering, the judge must review the petition, the Commonwealth's answer (if any), and other portions of the record

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<sup>57</sup> Commonwealth v. Pierce, 786 A.2d 203 (Pa. 2001); *Kimball*, 724 A.2d at 333.

<sup>58</sup> Commonwealth v. Jones, 815 A.2d 598, 613 (Pa. 2002) (citing Smith v. Robbins, 528 U.S. 259, 289 (2000)).

<sup>59</sup> Commonwealth v. Washington, 880 A.2d 536, 540 (Pa. 2005) (citing Commonwealth v. McGill, 832 A.2d 1014 (2003)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (citing *McGill*, 832 A.2d at 1022-23).

<sup>62</sup> PA. R. CRIM. P. 904.

<sup>63</sup> Commonwealth v. Albrecht, 720 A.2d 693, 700-01 (Pa. 1998).

<sup>64</sup> *Id.* at 700-01.

<sup>65</sup> Commonwealth v. Hawkins, 787 A.2d 292, 296 (Pa. 2001) (citing Commonwealth v. Holloway, 739 A.2d 1039, 1044 (1999)).

relating to the petitioner’s claims in order to determine whether an evidentiary hearing is required.<sup>66</sup>

a. Summary Disposition of a Post-Conviction Petition without an Evidentiary Hearing

The court may summarily dispose of a petition if it determines that (1) the claims in the petition have been previously litigated or waived;<sup>67</sup> (2) the petition is untimely and does not meet any of the enumerated exceptions to the timeliness requirements;<sup>68</sup> (3) the supporting factual allegations in the petition are “either patently frivolous or without a trace of support in the record or from other evidence submitted by the petitioner;”<sup>69</sup> or (4) although an issue of fact exists, a full and fair evidentiary hearing on that issue has been held at trial or at another proceeding.<sup>70</sup>

Even if the petitioner meets all of the requirements<sup>71</sup> for a legally sufficient post-conviction petition, the petition must be dismissed if it appears at any time that a delay in filing the petition caused the Commonwealth to be prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner.<sup>72</sup>

Additionally, if the judge finds (1) that no genuine issues of material fact exist, (2) that the petitioner is not entitled to post-conviction relief, and (3) that no legitimate purpose would be served by any further proceedings,<sup>73</sup> the judge must provide notice to the parties of its intention to dismiss the petition, stating also the reasons for the dismissal.<sup>74</sup> Within twenty days of the notice, the petitioner may respond.<sup>75</sup> Within ninety days of the notice or of the petitioner’s response, the judge must dismiss the petition, allow the petitioner to file an amended petition, or schedule an evidentiary hearing.<sup>76</sup>

b. The Post-Conviction Evidentiary Hearing

There is no absolute right to a post-conviction evidentiary hearing.<sup>77</sup> The court, however, must hold an evidentiary hearing when:

- (1) The Commonwealth moves to dismiss the petition for reasons of delay;<sup>78</sup>  
or

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<sup>66</sup> PA. R. CRIM. P. 909(B)(1).

<sup>67</sup> 42 PA. CONS. STAT. § 9543(a)(3) (2007); *see also infra* notes 91-94 and accompanying text.

<sup>68</sup> *See supra* notes 33-38 and accompanying text.

<sup>69</sup> Commonwealth v. Lewis, 634 A.2d 633, 635 (Pa. Super. Ct. 1993) (overruled on other grounds).

<sup>70</sup> PA. R. CRIM. P. 908(A)(2).

<sup>71</sup> *See* 42 PA. CONS. STAT. § 9543(a)(1)-(4) (2007)

<sup>72</sup> 42 PA. CONS. STAT. § 9543(b) (2007).

<sup>73</sup> PA. R. CRIM. P. 909(B)(2).

<sup>74</sup> PA. R. CRIM. P. 909(B)(2)(a).

<sup>75</sup> PA. R. CRIM. P. 909(B)(2)(b).

<sup>76</sup> PA. R. CRIM. P. 909(B)(2)(c)(i)-(iii).

<sup>77</sup> *See* Commonwealth v. Granberry, 644 A.2d 204, 208 (Pa. Super. Ct. 1994); Commonwealth v. Box, 451 A.2d 252, 253 (Pa. Super. Ct. 1982).

<sup>78</sup> PA. R. CRIM. P. 908(A)(1); 42 PA. CONS. STAT. § 9543(b) (2007). The petition can avoid dismissal based on this ground if the petitioner demonstrates that s/he could not have avoided the delay, as his/her

- (2) The petition or the Commonwealth's answer, if any, raises material issues of fact.<sup>79</sup>

If the judge concludes that an evidentiary hearing is required, s/he must enter an order setting a date for the hearing, which must occur no sooner than ten days and no later than forty-five days from the date of the order.<sup>80</sup> However, the judge may grant leave to continue the hearing upon a showing of good cause.<sup>81</sup>

Generally, the judge must allow the petitioner to appear at the hearing with counsel.<sup>82</sup> In death penalty cases, unless the court finds good cause has been shown, no discovery may be permitted on the first post-conviction counseled petition.<sup>83</sup> For all subsequent petitions, post-conviction discovery is permitted only after a showing of exceptional circumstances.<sup>84</sup>

### c. Decisions on Post-Conviction Petitions after an Evidentiary Hearing

At the conclusion of the hearing, the court must resolve all material issues raised by the petition and by the Commonwealth's answer or motion to dismiss.<sup>85</sup> The court then will issue a written order denying relief or granting a specific form of relief, and issue any supplementary orders appropriate for the proper disposition of the case.<sup>86</sup>

The court must render a final decision on the petition within ninety days of the evidentiary hearing.<sup>87</sup> However, for good cause, the court may extend the ninety-day period by an additional thirty days.<sup>88</sup>

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petition is based on grounds which s/he could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth. *Id.*

<sup>79</sup> PA. R. CRIM. P. 908(A)(2); *Commonwealth v. Stanley*, 632 A.2d 871, 872 (Pa. 1993) (holding that if a "substantive question concerning the merits of a collateral claim [exists], the trial court shall receive evidence on the matter").

<sup>80</sup> PA. R. CRIM. P. 909(B)(3).

<sup>81</sup> *Id.*

<sup>82</sup> PA. R. CRIM. P. 908(C). *But see Commonwealth v. Moss*, 689 A.2d 259, 262 (Pa. Super. Ct. 1997) (holding that an evidentiary hearing without the petitioner was permissible when the petitioner failed to prove that s/he was prejudiced by the hearing being held in his/her absence).

<sup>83</sup> PA. R. CRIM. P. 902(E)(2). A showing of good cause requires more than just a general demand for possible exculpatory evidence. *See Commonwealth v. Bryant*, 855 A.2d 726, 750 (Pa. 2004).

<sup>84</sup> PA. R. CRIM. P. 902(E)(1); *see Commonwealth v. Lark*, 746 A.2d 585, 591 (Pa. 2000) (holding that the lower court correctly denied a discovery request which was not supported by any evidence); *Commonwealth v. Williams*, 732 A.2d 1167, 1175 (Pa. 1999) (holding that there was no abuse of discretion in denying general claim of necessity for discovery).

<sup>85</sup> PA. R. CRIM. P. 908(D)(1).

<sup>86</sup> PA. R. CRIM. P. 908(D)(2); 42 PA. CONS. STAT. § 9545(a) (2007). If the judge enters a written order denying the petition, s/he must notify the petitioner of his/her "right to appeal the final order disposing the petition and of the time within which the appeal must be taken." PA. R. CRIM. P. 908(E), 909(B)(7)(b).

<sup>87</sup> PA. R. CRIM. P. 909(B)(3). If the judge does not act within the original or extended time period for entering its order on the post-conviction petition, the clerk of courts must send a notice to the judge that the time period for disposing of the petition has expired. PA. R. CRIM. P. 909(B)(5). If the judge still does not rule on the petition within 30 days of the clerk of courts' notice, the clerk immediately must send a notice of the judge's non-compliance to the Pennsylvania Supreme Court. PA. R. CRIM. P. 909(B)(6).

<sup>88</sup> PA. R. CRIM. P. 909(B)(4).

## 6. Appealing Decisions on Post-Conviction Petitions

The court's order granting, denying, dismissing, or otherwise disposing of a post-conviction petition may be appealed directly to the Pennsylvania Supreme Court.<sup>89</sup>

If the Pennsylvania Supreme Court affirms the lower court's denial of the petition, the death-row inmate may file a request for *certiorari* with the United States Supreme Court.<sup>90</sup> If the United States Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

### *B. Procedural Restrictions on Post-Conviction Petitions*

#### 1. Previously Litigated Claims and Waiver

A petitioner will be precluded from relief on post-conviction claims that were previously litigated or waived.<sup>91</sup> A "previously litigated" claim is one that "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue,"<sup>92</sup> or that has already been "raised and decided in a proceeding collaterally attacking the conviction or sentence."<sup>93</sup> A claim is waived "if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state post-conviction proceeding."<sup>94</sup>

Claims that were waived, however, may be raised on post-conviction review as claims stemming from trial counsel's ineffectiveness or, if applicable, as a statutory exception to the Post-Conviction Relief Act's waiver provision.<sup>95</sup>

#### 2. Second or Successive Post-Conviction Petitions

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<sup>89</sup> PA. R. CRIM. P. 910; Pa. Sup. Ct. Order of Aug. 11, 1997.

<sup>90</sup> 28 U.S.C. § 1257 (2004).

<sup>91</sup> 42 PA. CONS. STAT. § 9543(a)(3) (2007).

<sup>92</sup> 42 PA. CONS. STAT. § 9544(a)(2) (2007).

<sup>93</sup> 42 PA. CONS. STAT. § 9544(a)(3) (2007).

<sup>94</sup> 42 PA. CONS. STAT. § 9544(b) (2007); *see also* Commonwealth v. Brown, 872 A.2d 1139, 1145 (Pa. 2005) (holding that the petitioner's claim for relief based on grounds that he wore shackles during trial and that there was a large police presence in courtroom was waived because the issues were not properly raised on appeal); Commonwealth v. Santiago, 855 A.2d 682, 706 (Pa. 2004) (Castille, J., concurring) (asserting that any claim not raised in the lower court is waived because "Pennsylvania affords ample opportunity to raise claims of incompetence both at trial and upon direct appeal"); Commonwealth v. Bond, 819 A.2d 33, 39 (Pa. 2002) (holding that the theories presented were waived because they could have been raised on direct appeal); Commonwealth v. Bracey, 795 A.2d 935, 941 (Pa. 2001); Commonwealth v. Beasley, 678 A.2d 773, 778 (Pa. 1996) (holding that the petitioner must demonstrate that the claim has not been waived before the PCRA allows the court to rule on the merits).

Moreover, Pennsylvania has abolished the plain error doctrine as an exception to the waiver of claims, determining that unpreserved claims, including constitutional ones such as those based on federal due process, "can more properly be remedied by a claim of ineffective assistance of counsel," in the post-conviction review process. Commonwealth v. Clair, 326 A.2d 272, 274 (Pa. 1974); *see also* Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002).

<sup>95</sup> Commonwealth v. Freeman, 827 A.2d 385, 403 (Pa. 2003); *see also* 42 PA. CONS. STAT. § 9543(a)(2)(ii) (2007).

Pennsylvania courts will only consider second or successive post-conviction petitions if:

- (1) The petition is filed within the one-year time limitation applicable to initial petitions or meets one of the statutory exceptions to the timeliness requirement in the Post-Conviction Relief Act;<sup>96</sup> and
- (2) The petition complies with the pleading requirements of the Post-Conviction Relief Act.<sup>97</sup>

### C. Stay of Execution

A stay of execution should be requested in the petition for post-conviction relief.<sup>98</sup> Such a request may only be granted if:

- (1) The petition for post-conviction relief is timely<sup>99</sup> and is currently pending; and
- (2) The petitioner makes a strong showing of a likelihood of success on the merits.<sup>100</sup>

Where the applicant has met these requirements, the court “should grant a stay in order to ensure that the petitioner is afforded the opportunity to address the underlying merits of the appeal.”<sup>101</sup> However, if the court denies the stay on the basis that the petitioner has failed to demonstrate a likelihood of prevailing on the merits, the petitioner may successfully appeal the decision by demonstrating that reasonable jurists would find it debatable whether the petition should have been resolved in a different manner.<sup>102</sup>

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<sup>96</sup> 42 PA. CONS. STAT. § 9545(b)(1) (2007).

<sup>97</sup> 42 PA. CONS. STAT. § 9543(a)(1)-(4) (2007).

<sup>98</sup> PA. R. CRIM P. 909(A)(1). However, a failure to request a stay of execution in the petition is not considered a waiver and the petitioner may file a separate request for a stay. PA. R. CRIM P. 909 cmt; *see also* Commonwealth v. Morris (Morris I), 771 A.2d 721, 741 (Pa. 2001) (holding that when a request to stay the execution is not included in the petition, “the applicant needs to set forth his argument in favor of the stay in greater detail in the stay application itself”).

<sup>99</sup> Additionally, in order for the request for a stay of execution to be valid, the petition must be timely filed or meet one of the exceptions to the timeliness requirement delineated in the PCRA. 42 PA. CONS. STAT. § 9545(b) (2007). Thus, because timeliness is a jurisdictional requirement, a court is without jurisdiction to grant a request for a stay of execution contained in an untimely petition which does not meet one of the valid exceptions. *Morris I*, 771 A.2d at 734-35.

<sup>100</sup> 42 PA. CONS. STAT. § 9545(c)(2) (2007). Although this standard for obtaining a stay seems to apply to almost all petitions for post-conviction relief, there is some support for the notion that these requirements for obtaining a stay of execution only apply to second or successive petitions, and not to the initial timely post-conviction petition. *Morris I*, 771 A.2d at 735. The Pennsylvania Supreme Court makes clear that unlike on direct appeal, where stays of execution are granted as a matter of course, once the direct appeal stage ends and the post-conviction proceeding begins, a presumption of finality and legality of the conviction and sentence attaches. *Id.* at 741. Thus, for every subsequent petition, there is a greater interest in achieving finality to avoid serial filing for the purpose of delay. *Id.* at 739 (noting that at some point in a death penalty proceeding, the interest in finality becomes overarching). At least one Justice has noted that the “stay standard was intended to apply only to serial petitions for collateral review and to first petitions in cases where the affirmance of sentence pre-dated January 1, 1994. The General Assembly expressed no intention to have the new standard apply to timely-filed first petitions for collateral review.” *Id.* at 746 (Castille, J., concurring). This view, however, has not been adopted by a majority of the Pennsylvania Supreme Court.

<sup>101</sup> *Morris I*, 771 A.2d at 735.

<sup>102</sup> *Id.* at 741.

#### D. Review of Error

If the court finds error, it may deny the post-conviction petition on the ground that the error was harmless.<sup>103</sup>

Generally, errors involving a petitioner's federal constitutional and state law rights are harmless only if the errors are harmless beyond a reasonable doubt.<sup>104</sup> If there is "reasonable possibility" that an error "might have contributed to the conviction, the error is not harmless."<sup>105</sup> The Commonwealth generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.<sup>106</sup>

Although adequately preserved trial errors would generally implicate a burden on the part of the government to establish that the errors were harmless, the *Strickland* and *Pierce* standards for ineffective assistance of counsel firmly establish that the one seeking relief from a conviction or sentence based upon a claim of ineffective assistance of counsel bears the burden of establishing prejudice.<sup>107</sup> For example, if the petitioner raises a claim of ineffective assistance of counsel, s/he bears the burden to demonstrate a "reasonable probability" that counsel's deficient performance affected the outcome of the proceeding,<sup>108</sup> rather than the Commonwealth bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt.

Similarly, in asserting a *Brady* violation—wherein the Commonwealth failed to disclose favorable evidence and this failure was unknown to the petitioner on direct appeal—the burden again rests with the petitioner to demonstrate a "reasonable probability" that the disclosure of the evidence would have affected the outcome of the proceeding.<sup>109</sup>

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<sup>103</sup> See *Commonwealth v. Mitchell*, 839 A.2d 202, 215 (Pa. 2003) (noting that "there is no impediment to considering the uncontradicted circumstantial evidence when conducting a harmless error analysis"); *Commonwealth v. Carter*, 861 A.2d 957, 964 (Pa. Super. Ct. 2004) (finding an error harmless "where the uncontradicted evidence of guilt is overwhelming, so that by comparison the error is insignificant"); *Commonwealth v. Drummond*, 775 A.2d 849, 853 (Pa. Super. Ct. 2001) ("The harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial."); *Commonwealth v. Fewell*, 654 A.2d 1109, 1115 (Pa. Super. Ct. 1995) (noting that the harmless error doctrine is "designed to advance judicial economy by obviating the necessity for retrial where the appellate court is convinced that the trial error was harmless beyond a reasonable doubt").

<sup>104</sup> See, e.g., *Commonwealth v. Appel*, 689 A.2d 891, 900 (Pa. 1997) (citing *Commonwealth v. Story*, 383 A.2d 155, 162 (Pa. 1978) (holding that where a trial court violates the federal constitution, the reviewing court must employ the federal harmless error rule and must determine whether the error was harmless beyond a reasonable doubt)).

<sup>105</sup> *Story*, 383 A.2d at 164 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>106</sup> *Id.* at 162 n.11 (citing *Chapman*, 386 U.S. at 24); *Commonwealth v. Davis*, 305 A.2d 715 (1973).

<sup>107</sup> *Commonwealth v. Lambert*, 797 A.2d 232, 245 (Pa. 2001) (distinguishing the "prejudice standard" used for claims of ineffectiveness of counsel from the harmless error standard); *Commonwealth v. Williams*, 782 A.2d 517, 524-25 (Pa. 2001) (detailing differences between ineffectiveness of counsel prejudice standard and harmless error standard).

<sup>108</sup> *Commonwealth v. Kimball*, 724 A.2d 326, 332-33 (Pa. 1999).

<sup>109</sup> *Commonwealth v. Copenhefer*, 719 A.2d 242, 259 (Pa. 1998) (citing *Brady*, 373 U.S. at 87); *Commonwealth v. Buehl*, 658 A.2d 771, 775 (Pa. 1995) (holding that when a *Brady* claim is advanced under the PCRA, a petitioner can only obtain relief by establishing that the violation of his/her Constitutional right to due process "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place").

### E. Retroactivity of Rules

The PCRA provides an exception to the one-year time limitation for filing a petition where the right asserted in the petition is a constitutional right that was recognized by the United States or Pennsylvania Supreme Court after the one-year deadline for filing and “has been held”<sup>110</sup> by that Court to apply retroactively.<sup>111</sup>

The United States Supreme Court has held that new rulings involving substantive criminal law are always applied retroactively on post-conviction review. Pennsylvania law follows federal law on this question.<sup>112</sup>

New procedural rules are less often retroactive. A “new”<sup>113</sup> procedural ruling of federal constitutional dimension applies only to cases on direct review or not yet final, and not to cases which have become final before the announcement of the new rule.<sup>114</sup> The Court has defined two exceptions. New federal rules of criminal procedure will retroactively apply in collateral post-conviction proceedings only if the court determines either (1) that the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe or prohibits a certain punishment for a specific class of defendants because of their status or offense;<sup>115</sup> or (2) that the new rule is a “watershed” rule of criminal procedure, the non-application of which would “seriously diminish the likelihood of obtaining an accurate conviction”<sup>116</sup> and which “alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”<sup>117</sup>

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<sup>110</sup> The language “has been held” means that “the ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review.” *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002).

<sup>111</sup> 42 PA. CONS. STAT. § 9545(b)(1)(iii) (2007).

<sup>112</sup> *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)) (holding that a new rule is one of substance only “if it alters the range of conduct or the class of persons that the law punishes”).

<sup>113</sup> A “new” ruling “breaks new ground or imposes a new obligation on the States or Federal Government,” or is where “the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* at 780 (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989)). In determining whether a rule is new, the court must examine it in the context of the legal setting existing at the time the conviction became final “to determine whether a state court considering [the] claim . . . would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution.” *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Under this standard, “gradual developments in the law over which reasonable jurists may disagree” are treated as new. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). However, a change in the law, which clarifies an existing standard is not “new” and, therefore, applies to all cases on post-conviction review. *See Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999) (holding that “[b]ecause [the *Albrecht* standard] represents a clarification of our existing standard for reviewing appeals from the denial of post-conviction petitions in capital cases, we apply the *Albrecht* standard to all similar cases currently under [post-conviction] review”).

<sup>114</sup> *Hughes*, 865 A.2d at 780 (citing *Teague*, 489 U.S. at 310; *Commonwealth v. Blystone*, 725 A.2d 1197, 1203 (Pa. 1999)). For purposes of retroactivity analysis, the definition of procedural has been broadly interpreted to encompass rulings “that regulate only the *manner of determining* the defendant’s culpability.” *Id.*

<sup>115</sup> *Id.* at 781.

<sup>116</sup> *Id.* (citing *Saffle*, 494 U.S. at 495).

<sup>117</sup> *Id.* (emphasis omitted) (citing *Tyler v. Cain*, 533 U.S. 656, 665 (2001)).

Pennsylvania courts, however, have held that this federal retroactivity analysis does not apply to new state procedural rules.<sup>118</sup> Thus, a decision to apply a new state law in a post-conviction proceeding in Pennsylvania is subject to judicial discretion.<sup>119</sup> In determining whether to apply a new state procedural rule retroactively, a court should consider (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice by the retroactive application of the new state rule.<sup>120</sup>

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<sup>118</sup> Commonwealth v. Grant, 813 A.2d 726, 738 n.15 (Pa. 2002) (“[T]he effect of the [*Teague*] retroactivity analysis is not relevant” to an issue of state law.).

<sup>119</sup> *Id.* at 738.

<sup>120</sup> *Id.*

## II. ANALYSIS

### A. Recommendation #1

**All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.**

Pennsylvania law imposes numerous restrictions on the adequate development and judicial consideration of grounds for post-conviction relief. For example, Pennsylvania law (1) provides only a short period of time to file a post-conviction petition, especially any successive petitions; (2) provides limited bases for the filing of a successive post-conviction petition; (3) allows the post-conviction judge to summarily deny the petition without an evidentiary hearing; (4) provides for post-conviction discovery only in extremely limited circumstances; and (5) does not automatically stay a petitioner's execution upon the filing of a post-conviction petition.

#### Filing Deadlines and the Post-Conviction Evidentiary Hearing

A death-row petitioner must file his/her post-conviction petition within one year of the judgment becoming final on direct appeal.<sup>121</sup> While a one year-time frame for filing a post-conviction petition may not grant the petitioner sufficient time to adequately develop his/her claims, more worrisome are the strict restrictions the Commonwealth has imposed on the filing of a successive petition. Under Pennsylvania law, an inmate may file a successive post-conviction petition after the one-year deadline only if:

- (1) The failure to raise the claim previously was the result of interference by government officials and the claim is in violation of the Constitution or laws of Pennsylvania or the United States;
- (2) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (3) The right asserted is a constitutional right that was recognized by the United States or Pennsylvania Supreme Court after the one-year deadline for filing and has been held by that Court to apply retroactively.<sup>122</sup>

The Commonwealth not only has impeded the development and judicial consideration of claims by limiting the bases for filing a successive petition, but also by imposing severe time restrictions on the filing of the petition. If a death-row inmate wishes to assert one

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<sup>121</sup> 42 PA. CONS. STAT. § 9545(b)(1) (2007); PA. R. CRIM. P. 901(A). There are limited exceptions to this filing deadline, which if asserted, must be done so within sixty days of when the ability to invoke the exception becomes available. 42 PA. CONS. STAT. § 9545(b)(2) (2007).

<sup>122</sup> 42 PA. CONS. STAT. § 9545(b)(1)(i)-(iii) (2007).

of the above exceptions to overcome the one-year time limitation for filing the petition, s/he must file the petition within sixty days from the date of being able to invoke the exception—a difficult task for even the most seasoned defense attorney.<sup>123</sup>

Additionally, a post-conviction court in Pennsylvania can dispose of a petition without an evidentiary hearing if it determines that: (1) the claims in the petition have been previously litigated or waived;<sup>124</sup> (2) the petition is untimely and does not meet any of the enumerated exceptions to the timeliness requirements;<sup>125</sup> (3) the supporting factual allegations in the petition are “either patently frivolous or without a trace of support in the record or from other evidence submitted by the petitioner;”<sup>126</sup> or (4) although an issue of fact exists, a full and fair evidentiary hearing on the issue has already been held.<sup>127</sup> The court need only hold an evidentiary hearing when the allegations in the post-conviction petition raise an issue of material fact<sup>128</sup> or the court wishes to dismiss the petition because of a delay caused by the petitioner that has prejudiced the Commonwealth.<sup>129</sup>

Given the multiple ways the court may dispose of a post-conviction petition without holding an evidentiary hearing, it is even more imperative that petitioners be afforded adequate time to fully develop their claims.

### Limited Post-Conviction Discovery

As noted below in Recommendation #2, post-conviction discovery is not permitted as a matter of right and, to obtain discovery, the petitioner must demonstrate good cause on the first petition or exceptional circumstances on any successive petitions.<sup>130</sup> In practice,

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<sup>123</sup> 42 PA. CONS. STAT. § 9545(b)(1)(ii) (2007). Prior to the 1996 PCRA amendments, Pennsylvania adhered to a “relaxed waiver” doctrine in capital cases. The Pennsylvania Supreme Court had held that “where an overwhelming public interest is involved but is not addressed by the parties, [it] has a duty to transcend procedural rules which are not, in spirit, applicable, to the end that the public interest may be vindicated.” *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978); *see also* *Commonwealth v. Spatz*, 716 A.2d 580, 591 (Pa. 1998) (allowing review of a waived claim pursuant to the “practice to relax waiver rules in capital cases”); *Commonwealth v. Brown*, 711 A.2d 444, 455 (Pa. 1998) (noting that the Pennsylvania Supreme Court “generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty”); *Commonwealth v. Jermyn*, 709 A.2d 849, 856 n.20 (Pa. 1998) (noting that the Supreme Court of Pennsylvania “has addressed all issues arising in death penalty cases, irrespective of a finding of waiver”).

In 1999, the Pennsylvania Supreme Court rescinded the “relaxed waiver” rule, stating that “[t]he gravity of the sentence imposed upon a defendant does not give us liberty to ignore” the PCRA’s statutory time limitations. *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999); *see also* *Commonwealth v. Yarris*, 731 A.2d 581, 586-87 (Pa. 1999) (holding that the petition was procedurally time-barred, although DNA testing later exonerated the petitioner).

<sup>123</sup> 42 PA. CONS. STAT. § 9545(b)(2) (2007).

<sup>124</sup> 42 PA. CONS. STAT. § 9543(a)(3) (2007); *see also supra* notes 91-94 and accompanying text.

<sup>125</sup> *See supra* notes 33-38 and accompanying text.

<sup>126</sup> *Commonwealth v. Lewis*, 634 A.2d 633, 635 (Pa. Super. 1993) (overruled on other grounds).

<sup>127</sup> PA. R. CRIM. P. 908(A)(2).

<sup>128</sup> *Id.*; *see also* *Commonwealth v. Stanley*, 632 A.2d 871, 872 (Pa. 1993) (holding that if a “substantive question concerning the merits of a collateral claim [exists], the trial court shall receive evidence on the matter”).

<sup>129</sup> PA. R. CRIM. P. 908(A)(1); 42 PA. CONS. STAT. § 9543(b) (2007).

<sup>130</sup> *See infra* notes 133-136 and accompanying text.

judges often exercise their discretion to severely limit the scope of discovery or to deny discovery altogether.<sup>131</sup> Such limitations impede the petitioner's ability to adequately develop his/her claims.

### Stay of Execution

Pennsylvania law also appears to expedite capital post-conviction proceedings and impede a petitioner's ability to adequately develop claims by not requiring an automatic stay of execution when an inmate files an initial or successive post-conviction petition. A stay of execution may be granted only if:

- (1) The petition for post-conviction relief is timely and is currently pending; and
- (2) The petitioner makes a strong showing of a likelihood of success on the merits.<sup>132</sup>

The short length of time the petitioner has to develop claims before filing the petition burdens the petitioner's ability to file claims which demonstrate a likelihood of success on the merits, the threshold standard for obtaining a stay in order to receive full consideration of those claims.

### Conclusion

In conclusion, the Commonwealth of Pennsylvania provides a post-conviction framework that inhibits the full development and judicial consideration of post-conviction claims by providing as little as sixty days to develop and file a petition, limiting or denying post-conviction discovery, expediting the proceedings by not requiring an automatic stay of execution, and allowing petitions to be disposed without the court ever holding an evidentiary hearing. The Commonwealth of Pennsylvania, therefore, is not in compliance with Recommendation #1.

Based on this information, the Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth ensure that all death-row inmates receive meaningful review in state post-conviction proceedings. At a minimum, the sixty day deadline to file successive petitions should be extended and exceptions should be added to the statute to ensure that petitions asserting claims of innocence and/or serious constitutional deficiencies will be considered by the court.

#### *B. Recommendation #2*

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<sup>131</sup> *Id.*

<sup>132</sup> 42 PA. CONS. STAT. § 9545(c)(2) (2007). At least one Pennsylvania Supreme Court Justice has noted that the "stay standard was intended to apply only to serial petitions for collateral review and to first petitions in cases where the affirmance of sentence pre-dated January 1, 1994," rather than to timely-filed first petitions for collateral review. *Commonwealth v. Morris (Morris I)*, 771 A.2d 721, 746 (Pa. 2001) (Castille, J., concurring). This view, however, has not been adopted by a majority of the Pennsylvania Supreme Court.

**The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.**

Although a request for discovery in post-conviction proceedings must be included in the post-conviction petition, no discovery is permitted on the first petition in a capital case, except upon leave of the court after a showing of good cause.<sup>133</sup> For all subsequent petitions, discovery is permitted only after a showing of exceptional circumstances.<sup>134</sup> This provides the post-conviction judge great authority not only to limit the scope of discovery, but also to deny the petitioner post-conviction discovery altogether. Significantly, a number of Pennsylvania post-conviction courts have exercised this discretion to either limit<sup>135</sup> or deny<sup>136</sup> discovery entirely.

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #2.

*C. Recommendation #3*

**Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.**

In those instances that the court permits discovery, Pennsylvania law does not provide a specific time limit for post-conviction discovery. However, if the judge determines that an evidentiary hearing is required, s/he must set a date for the hearing, which may not be earlier than ten days or later than forty-five days from the date of the order.<sup>137</sup> While discovery may be permitted during this time, even forty-five days is an insufficient timeframe to perform full and meaningful discovery in preparation for a capital post-conviction evidentiary hearing.

The Commonwealth of Pennsylvania, therefore, is not in compliance with the requirements of Recommendations #3.

*D. Recommendation #4*

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<sup>133</sup> PA. R. CRIM. P. 902(A)(16), (E)(2). A showing of good cause requires more than just a general demand for possibly exculpatory evidence. *See* Commonwealth v. Bryant, 855 A.2d 726, 750 (Pa. 2004) (“[U]nfocused and unsubstantiated speculation cannot satisfy Rule 902(E)(2)’s ‘good cause’ requirement.”).

<sup>134</sup> PA. R. CRIM. P. 902(E)(1).

<sup>135</sup> *See, e.g.*, Commonwealth v. Chester, 733 A.2d 1242, 1252 (Pa. 1999) (holding no abuse of discretion occurred in denying appointment of experts because this ruling “is addressed to the discretion of the court”); Commonwealth v. Albrecht, 720 A.2d 693, 706-08 (Pa. 1998) (concluding that denying funds for an expert was not a due process violation); Commonwealth v. Abu-Jamal, 720 A.2d 79, 91 (Pa. 1998) (holding that the petitioner is not entitled to wholesale discovery of information s/he believes to exist or to gain access to the prosecution’s entire file to determine truth of his/her assertions).

<sup>136</sup> *See* Commonwealth v. Lark, 746 A.2d 585, 591 (Pa. 2000) (holding that lower court correctly denied discovery request because request was not supported by any evidence); Commonwealth v. Williams, 732 A.2d 1167, 1175 (Pa. 1999) (holding that there was no abuse of discretion in denying general claim of necessity for discovery).

<sup>137</sup> PA. R. CRIM. P. 909(B)(3).

**When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.**

Capital petitioners may appeal the denial of their post-conviction petition to the Pennsylvania Supreme Court.<sup>138</sup> The Pennsylvania Supreme Court may issue “*per curiam*” orders in certain circumstances,<sup>139</sup> and in some instances such an order may be issued without an opinion.<sup>140</sup> While the Pennsylvania Supreme Court generally does not issue *per curiam* orders without an opinion in death penalty cases, we were unable to ascertain whether the Court issues opinions that address each issue raised on appeal while fully explaining the bases for the disposition of those claims in post-conviction proceedings.

Based on this information, we are unable to determine whether the Commonwealth of Pennsylvania meets the requirements of Recommendation #4.

*E. Recommendation #5*

**On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.**

*Recommendation #6*

**When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.**

Pennsylvania post-conviction courts, including the trial court considering an initial post-conviction petition and the appellate court hearing an appeal from the denial of a post-conviction petition, do not use a “knowing, understanding, and voluntary” standard for determining whether the petitioner has waived a claim of constitutional error not properly raised at trial or on direct appeal.

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<sup>138</sup> 42 PA. CONS. STAT. § 9546(d) (2007).

<sup>139</sup> PA. SUP. CT. INTERNAL OPERATING PROCEDURES, § 3(B)(5). A *per curiam* order is one that may be issued without an opinion. *Id.* Such an order may be issued when the Pennsylvania Supreme Court decides such an order is appropriate or when the Supreme Court's decision:

- (1) Does not establish a new rule of law;
- (2) Does not alter, modify, criticize or clarify an existing rule of law;
- (3) Does not apply an established rule of law to a novel fact situation;
- (4) Does not constitute the only, or only recent binding precedent on a particular point of law; or
- (5) Does not involve a legal issue of continuing public interest.

PA. SUP. CT. INTERNAL OPERATING PROCEDURES, § 3(B)(5)(a)-(f).

<sup>140</sup> *See* Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996).

Under Pennsylvania law, a petitioner generally will be precluded<sup>141</sup> from receiving consideration of post-conviction claims, which could have been raised at trial or on direct appeal, but were not.<sup>142</sup>

Moreover, while Pennsylvania previously applied a “relaxed waiver rule” to consider defaulted claims, including those of plain error, in death penalty cases due to the irrevocable nature of an execution,<sup>143</sup> Pennsylvania has abolished the relaxed waiver rule and no longer entertains plain error as an exception to the waiver of claims.<sup>144</sup> Accordingly, claims that were not properly raised and preserved in the trial court can only be raised on post-conviction review through an ineffective assistance of counsel claim.<sup>145</sup>

Because Pennsylvania law does not require a “knowing, understanding, and voluntary” waiver of claims, constitutional or otherwise, and does not apply a “plain error” exception with respect to errors of state law in capital cases, the Commonwealth of Pennsylvania is not in compliance with the requirements of Recommendations #5 and #6.

#### *F. Recommendation #7*

**The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.**

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<sup>141</sup> The following are exceptions to the preclusion of claims that could have been raised at trial or direct appeal, but were not so raised:

- (1) The failure to raise the claim previously was the result of interference by government officials and the claim is in violation of the Constitution or laws of Pennsylvania or the United States;
- (2) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (3) The right asserted is a constitutional right that was recognized by the United States or Pennsylvania Supreme Courts after the one-year deadline for filing and has been held by that Court to apply retroactively.

42 PA. CONS. STAT. § 9545(b)(1)(i)-(iii) (2007).

<sup>142</sup> 42 PA. CONS. STAT. §§ 9543(a)(3), 9544(b) (2007); *see also* Commonwealth v. Bracey, 795 A.2d 935, 941 (Pa. 2001); Commonwealth v. Brown, 872 A.2d 1139, 1145 (Pa. 2005) (holding that the petitioner’s claim for relief based on grounds that he wore shackles during trial and that there was a large police presence in courtroom was waived because s/he did not properly raise these issues on appeal); Commonwealth v. Santiago, 855 A.2d 682, 706 (Pa. 2004) (Castille, J., concurring) (asserting that any claim not raised in the lower court is waived because “Pennsylvania affords ample opportunity to raise claims of incompetence both at trial and upon direct appeal”); Commonwealth v. Bond, 819 A.2d 33, 39 (Pa. 2002) (holding that the theories presented were waived because they could have been raised on direct appeal); Commonwealth v. Beasley, 678 A.2d 773, 778 (Pa. 1996) (holding that the petitioner must demonstrate that the claim has not been waived before the PCRA allows the court to rule on merits).

<sup>143</sup> *See supra* note 38.

<sup>144</sup> *Id.*

<sup>145</sup> *See* Commonwealth v. Freeman, 827 A.2d 385, 403 (Pa. 2003); Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002); Commonwealth v. Clair, 326 A.2d 272, 274 (Pa. 1974).

There is no Commonwealth-wide system of indigent defense services in capital cases, similar in nature to the capital resources de-funded by Congress, to represent capital defendants in state post-conviction, federal *habeas corpus*, and clemency proceedings. However, the federal public defender offices in the Eastern, Middle, and Western Districts of Pennsylvania represent death-row inmates in federal *habeas corpus* proceedings.

Accordingly, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #7.

*G. Recommendation #8*

**For state post-conviction proceedings, the State should appoint counsel whose qualifications are consistent with the recommendations in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The State should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.**

Appointment and Qualifications of Post-Conviction Counsel

Pennsylvania law provides appointed counsel in every capital case in which an individual files an initial petition for post-conviction relief and is unable to afford counsel or otherwise procure counsel.<sup>146</sup> A petitioner, however, is not entitled to appointed counsel on a second or subsequent petition, and may only be appointed counsel if the judge determines that the petition warrants an evidentiary hearing.<sup>147</sup> In addition, the judge retains discretion to appoint counsel in any collateral proceeding when required by the interests of justice.<sup>148</sup> Significantly, two attorneys need not be appointed to represent a death-row inmate in post-conviction proceedings as mandated by the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*.

Any attorney, retained or appointed, who wishes to represent a capital litigant at all stages of a case, including post-conviction proceedings, must be a member in good standing of the Pennsylvania Bar, have a minimum of five years of experience with criminal litigation, and have “served as lead or co-counsel in a minimum of [eight] significant<sup>149</sup> cases.”<sup>150</sup> In addition, capital counsel is required to complete a minimum of eighteen hours of capital representation training within the three-year period preceding the appointment.<sup>151</sup> Training areas include, but are not limited to: relevant state, federal, and international law; pretrial investigation, preparation, strategy, and theory regarding the

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<sup>146</sup> PA. R. CRIM. P. 904 cmt.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> A “significant case” may be a murder, including manslaughter and vehicular homicide, or a felony of the first or second degree. PA. R. CRIM. P. 801(1)(c).

<sup>150</sup> PA. R. CRIM. P. 801(1)(a)-(c).

<sup>151</sup> PA. R. CRIM. P. 801(2)(a).

guilt and penalty phases; jury selection; ethical considerations relevant to capital defense representation; and post-conviction litigation in state and federal courts.<sup>152</sup>

While these minimum qualifications may include training in some of the demonstrated skill areas required by Guidelines 5.1 and 8.1 of the *ABA Guidelines*, Pennsylvania law does not require that capital post-conviction counsel demonstrate the skills required in Guideline 5.1.<sup>153</sup> Moreover, the required eighteen hours of continuing legal education is unlikely to allow enough time to guarantee familiarity with all or even most of the required training areas in Guideline 8.1.<sup>154</sup>

As a result, capital petitioners are likely to receive inadequate representation at the post-conviction stage.

#### Compensation for Post-Conviction Counsel

To the extent that county public defenders handle capital post-conviction proceedings, these attorneys are compensated through a government-paid salary.

There is no statewide hourly fee requirement for private appointed counsel in capital post-conviction proceedings. Rather, the fee paid to private appointed attorneys to represent inmates during capital post-conviction proceedings under the PCRA vary from county to county.<sup>155</sup> In Allegheny County, for example, counsel is entitled to only a flat fee of \$3,000 and any court-time— \$500 for a full day and \$250 for a half day.<sup>156</sup> This flat fee is inadequate to sufficiently represent a death-row inmate in post-conviction proceedings. As capital post-conviction proceedings can take hundreds or even thousands of hours to complete, private attorneys will likely be hesitant to undertake post-conviction cases at such rates.

#### Funding for Investigators and Experts

We were unable to determine whether funds were provided to capital post-conviction attorneys to satisfy their investigative needs for providing adequate post-conviction representation.

#### Conclusion

As the minimum qualifications for post-conviction representation in capital cases do not satisfy the requirements of the *ABA Guidelines* and compensation for capital post-

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<sup>152</sup> PA. R. CRIM. P. 801(2)(b)(i)-(xi).

<sup>153</sup> See Chapter Six: Defense Services *supra* at pp. 124-26 (Recommendation #2).

<sup>154</sup> Email from Matthew Stiegler, Opt-in Attorney, American Civil Liberties Union Capital Punishment Project, to Deborah Fleischaker, Director, ABA Death Penalty Moratorium Implementation Project (May 15, 2007) (on file with author); see Chapter Six: Defense Services *supra* at pp. 136-39 (Recommendation #5).

<sup>155</sup> For a more detailed discussion of defense counsel compensation, see *supra* Chapter Six: Defense Services.

<sup>156</sup> In Re: Court Appointed Counsel Fee Policy, Order of Court, Admin. Docket No. 2 of 2006. Fees submitted in excess of these amounts will be considered pro bono work by the court, unless the case is “very complex.” *Id.*

conviction attorneys appears to be inadequate, the Commonwealth of Pennsylvania is not in compliance with the first two requirements of Recommendation #8. As we are unable to determine the sufficiency of funding for experts and investigators, we are unable to determine whether the Commonwealth of Pennsylvania is in compliance with the last portion of Recommendation #8.

#### *H. Recommendation #9*

**State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.**

Post-conviction courts in Pennsylvania give full retroactive effect to new federal constitutional rights recognized by the United States Supreme Court, but only in limited circumstances.<sup>157</sup> However, post-conviction courts do not give retroactive effect to new rules recognized by federal appeals and district courts.

Post-conviction courts always give retroactive effect to new federal rulings involving substantive criminal law.<sup>158</sup> New rules of criminal procedure implicating a federal constitutional right apply retroactively in collateral post-conviction proceedings only when the court determines that: (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe or prohibits a certain punishment for a specific class of defendants because of their status or offense;<sup>159</sup> or (2) the new rule is a “watershed” rule of criminal procedure, the non-application of which would “seriously diminish the “likelihood of an accurate conviction”<sup>160</sup> and which “alter[s] our understanding of the bedrock procedural elements essential to the fairness of the proceeding.”<sup>161</sup>

All other new rules of criminal procedure, including those recognized by the United States Supreme Court, will be applied retroactively only to cases still on direct appeal.<sup>162</sup>

Because Pennsylvania law only gives retroactive effect in limited circumstances to changes in the law decided by the United States Supreme Court, and does not appear to extend the retroactivity standard to new rules recognized by the federal appeals and

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<sup>157</sup> 42 PA. CONS. STAT. § 9545(b)(1)(iii) (2007). The PCRA provides an exception to the one-year time limitation for filing of a petition where the right asserted in the petition is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the one-year deadline for filing and “has been held” by that court to apply retroactively. *Id.* The language “has been held” means that “the ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review.” *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002).

<sup>158</sup> *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)) (holding that a new rule is one of substance only “if it alters the range of conduct or the class of persons that the law punishes”).

<sup>159</sup> *Id.* at 781.

<sup>160</sup> *Id.* (citing *Saffle*, 494 U.S. at 495).

<sup>161</sup> *Id.* (emphasis omitted) (citing *Tyler v. Cain*, 533 U.S. 656, 665 (2001)).

<sup>162</sup> *Id.* at 780 (citing *Teague*, 489 U.S. at 310); *Commonwealth v. Blystone*, 725 A.2d 1197, 1203 (Pa. 1999)).

district courts, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #9.

*I. Recommendation #10*

**State courts should permit second and successive post-conviction proceedings in capital cases where counsel’s omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.**

Pennsylvania law allows a court to address second or successive post-conviction petitions when:

- (1) The petition is filed within the one-year time limitations applicable to initial petitions;<sup>163</sup> and
- (2) The petition complies with the pleading requirements of the PCRA.<sup>164</sup>

In the second or successive petition, the petitioner may assert one or more of the enumerated claims cognizable in a post-conviction proceeding, including ineffective assistance of counsel.<sup>165</sup> The petitioner also may raise a claim outside of the one-year time limitation, if the claim is based on a new constitutional right recognized by the United States or Pennsylvania Supreme Courts, provided the right was held by that Court to apply retroactively.<sup>166</sup>

Thus, both exceptions to the bar against successive petitions required by this Recommendation—some deficiency or omission by post-conviction counsel or an intervening court decision that changed the law subsequent to the first petition, resulting in a meritorious claim not being raised and litigated in the first petition—are contemplated by these bases for relief.

The Commonwealth of Pennsylvania, therefore, is in compliance with Recommendation #10.

*J. Recommendation #11*

**In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.**

In *Chapman v. California*, the United States Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>167</sup> The burden to show that the error was

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<sup>163</sup> 42 PA. CONS. STAT. § 9545(b)(1) (2007).

<sup>164</sup> 42 PA. CONS. STAT. § 9543(a)(1)-(4) (2007).

<sup>165</sup> 42 PA. CON. STAT. § 9543(a)(2)(ii) (2007); *see also supra* notes 62-65 and accompanying text.

<sup>166</sup> 42 PA. CONS. STAT. § 9545(b)(1)(iii) (2007).

<sup>167</sup> 386 U.S. 18, 24 (1967).

harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”<sup>168</sup>

During post-conviction proceedings in Pennsylvania, error involving a petitioner’s federal constitutional or state rights is generally not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.<sup>169</sup> Specifically, whenever there is a “reasonable possibility” that an error “might have contributed to the conviction, the error is not harmless.”<sup>170</sup> The Commonwealth generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.<sup>171</sup>

Where a trial error has not been adequately preserved, making it necessary to present the error under a claim of ineffective assistance of counsel, the petitioner must satisfy the *Strickland* or *Pierce* standard by establishing that s/he was prejudiced by counsel’s deficient performance.<sup>172</sup> Similarly, when asserting a *Brady* violation—wherein the Commonwealth failed to disclose favorable evidence—the burden again rests with the petitioner to show that the disclosure would have affected the outcome of the proceeding.<sup>173</sup>

The Commonwealth of Pennsylvania is, therefore, only in partial compliance with Recommendation #11.

#### *K. Recommendation #12*

**During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.**

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the Commonwealth of Pennsylvania at this time.

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<sup>168</sup> *Id.*

<sup>169</sup> *See, e.g.*, *Commonwealth v. Appel*, 689 A.2d 891, 900 (Pa. 1997) (citing *Commonwealth v. Story*, 383 A.2d 155, 162 (Pa. 1978) (holding that where a trial court violates the federal constitution, the reviewing court must employ the federal harmless error rule and must determine whether the error was harmless beyond a reasonable doubt)).

<sup>170</sup> *Story*, 383 A.2d at 164 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>171</sup> *Id.* at 162 n.11 (citing *Chapman*, 386 U.S. at 24); *Commonwealth v. Davis*, 305 A.2d 715 (1973).

<sup>172</sup> *See Commonwealth v. Pierce*, 786 A.2d 203 (Pa. 2001); *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999); *see also Commonwealth v. Howard*, 645 A.2d 1300, 1307-08 (Pa. 1994); *Commonwealth v. Lambert*, 797 A.2d 232, 245 (Pa. 2001) (distinguishing the “prejudice standard” used for claims of ineffectiveness of counsel from the harmless error standard); *Commonwealth v. Williams*, 782 A.2d 517, 524-25 (Pa. 2001) (detailing differences between ineffectiveness of counsel prejudice standard and harmless error standard).

<sup>173</sup> *See Commonwealth v. Copenhefer*, 719 A.2d 242, 259 (Pa. 1998) (citing *Brady*, 373 U.S. at 87); *Commonwealth v. Buehl*, 658 A.2d 771, 775 (Pa. 1995) (holding that when a *Brady* claim is brought under the PCRA, a petitioner can only obtain relief by establishing that the violation of his Constitutional right to due process “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place”).



## CHAPTER NINE

### CLEMENCY

#### INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, a state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."<sup>1</sup>

Since 1972, when the U.S. Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through May 2006, clemency has been granted on humanitarian grounds 229 times in 19 of the 38 death penalty states and the federal government.<sup>2</sup> One hundred sixty-seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.<sup>3</sup>

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the Commonwealth's only opportunity to prevent miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions, meaningful

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<sup>1</sup> Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

<sup>2</sup> See Death Penalty Information Center, Clemency, available at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Sept. 27, 2007).

<sup>3</sup> *Id.*

review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

## I. FACTUAL DISCUSSION

### A. Clemency Decision-Makers

#### 1. Authority of the Governor

Under the Pennsylvania Constitution, the Governor has the sole power to grant reprieves, commutations, and pardons in all criminal cases, except impeachment.<sup>4</sup> However, the Governor is prohibited from granting a pardon or commuting a sentence without a unanimous recommendation from the Pennsylvania Board of Pardons (Board).<sup>5</sup>

Since the re-enactment of the death penalty in Pennsylvania, no Governor has granted clemency to a death-row inmate.<sup>6</sup>

#### 2. Authority, Appointment, and Composition of the Pennsylvania Board of Pardons

Under Pennsylvania law, the Board has the authority to hold hearings and act on applications addressing the “granting of reprieves, commutations of sentence, and pardons in all cases except those involving impeachment.”<sup>7</sup> Nonetheless, in death penalty cases, the Board will consider and recommend only reprieves or commutations of death sentences to life imprisonment.<sup>8</sup>

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<sup>4</sup> PA. CONST. art. 4, § 9(a). A “reprieve” is a “temporary suspension of the execution of a sentence.” 32 Pa. Op. Att’y Gen., 1983 WL 44382, \*1 (1983). The Governor can grant a reprieve for a “defined purpose or period” without approval by the Board of Pardons. *Morganelli v. Casey*, 646 A.2d 744, 747 (Pa. Commw. 1994). A “commutation” is a change of the criminal punishment from a greater sentence to a lesser sentence. See 12 TIMOTHY P. WILE, WEST’S PENNSYLVANIA PRACTICE, LAW OF PROBATION & PAROLE § 6:4 (2006). A “pardon” frees an offender from the control of the Commonwealth “exempt[ing] him[her] from further punishment” and “relieve[ing] him[her] from all the legal disabilities resulting from his[her] conviction” so that “[s/he] is thereafter as innocent as if [s/he] had never committed the offense.” Commonwealth *ex rel.* Banks v. Cain, 28 A.2d 897, 899 (Pa. 1942).

<sup>5</sup> PA. CONST. art. 4, § 9(a). Prior to 1997, individuals were eligible for a pardon or commutation upon a recommendation by a majority of the Board. *Id.* In November 1997, Pennsylvania voters chose to amend the Pennsylvania Constitution so as to require a unanimous recommendation by the Board before allowing the Governor to grant or deny clemency. See *Pennsylvania Prison Society v. Rendell*, 419 F. Supp. 2d 651, 653 (M.D. Pa. 2006). The United States District Court for the Middle District of Pennsylvania has held that retroactive application of this amendment to an inmate serving a life sentence violates the *ex post facto* clause of the Pennsylvania Constitution. *Id.* at 662. Therefore, life-sentenced inmates convicted before the amendment’s adoption still need only a clemency recommendation from a majority of the Board. *Id.* As the district court did not address whether this decision applied to death-row inmates, it is unclear if a unanimous recommendation by the Board is needed for a death-row inmate who is seeking clemency and was sentenced to death prior to the amendment’s adoption. This district court’s decision holding that retroactive application of the amendment violates the *ex post facto* rights of life-sentenced inmates is currently on appeal to the Third Circuit Court of Appeals. Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>6</sup> See Death Penalty Information Center, Clemency, Clemency Process by State, available at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#process> (last visited Sept. 27, 2007).

<sup>7</sup> 71 PA. CONS. STAT. 299(a) (2007); see also 37 PA. CODE § 81.211 (2007).

<sup>8</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

The Board is composed of five members: the Lieutenant Governor, who by law serves as the Chairman, the Attorney General, and three individuals appointed by the Governor.<sup>9</sup> The three members appointed by the Governor must include: (1) a crime victim, (2) a corrections expert, and (3) a physician, psychiatrist or psychologist.<sup>10</sup> Each member serves a six-year term.<sup>11</sup>

### *B. Pardons*

Under the Pennsylvania Administrative Code and the Board's "Application for Clemency," a death-row inmate may request a pardon and the Board may hear and act upon such a request.<sup>12</sup> However, any inmate who is confined to a correctional facility is deemed to be ineligible for a pardon and may only be considered for a commutation of his/her sentence.<sup>13</sup> Accordingly, the Board will treat a clemency application requesting a pardon on behalf of a death-row inmate as an application for a commutation.<sup>14</sup>

### *C. Commutations*

#### 1. Eligibility, Application, and Public Notice for Commutations of Death Sentences

Within ten days of the Governor issuing a death-row inmate's warrant of execution, the inmate or his/her representative may file an "Application for Clemency" with the Board.<sup>15</sup> In Pennsylvania, a death-row inmate who files a clemency application is limited to only one form of relief, a commutation of the death sentence to life imprisonment.<sup>16</sup>

The clemency application must be submitted on the forms prescribed by the Board.<sup>17</sup> In the application, the inmate must detail: (1) the crime(s) for which s/he is seeking clemency; (2) why the plea for mercy should be granted; (3) why s/he needs clemency; and (4) any rehabilitative efforts s/he has made.<sup>18</sup> The applicant also must note the sentences of any accomplices, any probation or parole violations, and his/her educational history.<sup>19</sup> Additionally, the inmate must provide the name, address, and telephone

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<sup>9</sup> PA. CONST. art. 4, § 9(b). The three members appointed by the Governor must be approved by majority consent of the Pennsylvania Senate. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* These three members must be citizens of Pennsylvania. *Id.*

<sup>12</sup> See 37 PA. CODE § 81.211(1) (2007); Commonwealth of Pennsylvania Application for Clemency, available at [www.cjpf.org/clemency/PennsylvaniaApp.PDF](http://www.cjpf.org/clemency/PennsylvaniaApp.PDF) (last visited Sept. 27, 2007) (emphasis in original).

<sup>13</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 10, 2007).

<sup>14</sup> *Id.*

<sup>15</sup> 37 PA. CODE § 81.231(b) (2007); 71 PA. CONS. STAT. § 299(c) (2007); See BOARD OF PARDONS, INSTRUCTIONS FOR SUBMITTING AN APPLICATION FOR CLEMENCY (on file with author).

<sup>16</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 10, 2007).

<sup>17</sup> 37 PA. CODE § 81.221 (2007).

<sup>18</sup> See Commonwealth of Pennsylvania Application for Clemency, available at [www.cjpf.org/clemency/PennsylvaniaApp.PDF](http://www.cjpf.org/clemency/PennsylvaniaApp.PDF) (last visited Sept. 27, 2007) (emphasis in original).

<sup>19</sup> *Id.*

number of the individual who will represent him/her at the clemency hearing, if any.<sup>20</sup> All application questions must be answered by the applicant in his/her “own words” and the applicant must personally sign and date the application.<sup>21</sup>

The death-row inmate is permitted to attach to the application as many documents in support of the clemency application as s/he desires.<sup>22</sup> After the death-row inmate completes the application, s/he must file the original application, along with ten copies, with the Board.<sup>23</sup> Although a filing fee of \$25 usually is required for a clemency application,<sup>24</sup> this filing fee is waived for death-row applicants.<sup>25</sup> The application, along with any attached documents, become public record.<sup>26</sup>

Upon receiving an inmate’s clemency application, the Board must provide notice of a public hearing in a newspaper of general circulation in the county where the offense occurred.<sup>27</sup> Generally, the Board’s notice should provide:

- (1) The applicant’s true name and other names by which the applicant is or has been known;
- (2) The crimes for which the applicant has applied for clemency;
- (3) The institution in which the applicant is confined; and
- (4) The time and place of the public hearing.<sup>28</sup>

In non-capital cases, this notice must be provided at least one week prior to the hearing.<sup>29</sup> However, given the time restriction in death penalty cases, the Board may have to meet in an “emergency session,” thus rendering it impossible to provide notice one week prior to the hearing.<sup>30</sup> Consequently, the Board is obligated to provide only twenty-four hours notice in advance of the hearing in death penalty cases.<sup>31</sup>

## 2. Review of the Clemency Application by the Board of Pardons

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<sup>20</sup> *Id* (emphasis in original). One of the two clemency applications filed in a death penalty case since the re-instatement of the death penalty was denied because the death-row inmate failed to designate a lawyer to appear on his/her behalf at the Board’s public hearing. Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author). However, the denial of this clemency application seems to be in contradiction with the Board’s practice of permitting Board hearings to proceed without counsel or a representative appearing on behalf of the applicant.

<sup>21</sup> Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>22</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>23</sup> 37 PA. CODE § 81.222(a) (2007).

<sup>24</sup> See Pennsylvania Board of Pardons, Confined Application Process Information, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/confinedinstructions.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/confinedinstructions.doc) (last visited Sept. 27, 2007).

<sup>25</sup> 37 PA. CODE § 81.225(a) (2007).

<sup>26</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>27</sup> 37 PA. CODE § 81.233(a), (b) (2007).

<sup>28</sup> 37 PA. CODE § 81.233(a) (2007).

<sup>29</sup> 37 PA. CODE § 81.233(b) (2007).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

After the clemency application has been filed, each Board member must interview the applicant.<sup>32</sup> If a Board member fails to interview the applicant, s/he will not be permitted to vote on the clemency recommendation.<sup>33</sup>

The interview of the applicant is conducted “at a time, place, and in a manner that is convenient to the Board.”<sup>34</sup> The interview is conducted in private either by the Board as a group or by individual Board members.<sup>35</sup> Only the applicant’s attorney or representative is permitted to attend the interview.<sup>36</sup> All interviews are recorded and may later be used by the Board in its sole discretion.<sup>37</sup>

In addition, the Board will send the clemency application to the trial court, the district attorney, and the correctional facility where the death-row inmate is housed “to obtain expressions of opinions as to the merits of the application.”<sup>38</sup> The Board also will notify victims of the inmate’s application, and they, in turn, may provide oral or written comments to the Board prior to the public hearing.<sup>39</sup>

### 3. Clemency Hearings

A death-row inmate applying for a commutation of his/her sentence automatically receives a public hearing before the Board.<sup>40</sup> However, the death-row inmate is not permitted to appear at the hearing.<sup>41</sup> Instead, the death-row inmate is permitted to have a representative appear on his/her behalf.<sup>42</sup> Under the Pennsylvania Administrative Code, if the inmate is indigent, s/he can receive free representation at the hearing from the Pardons Case Specialist at the Pennsylvania Department of Corrections.<sup>43</sup> However, there is no requirement that the death-row inmate be represented by counsel or a representative at the Board hearing.<sup>44</sup>

In capital cases, the Board permits a maximum of thirty minutes for the entire presentation in support of the death-row inmate’s clemency application and a maximum of thirty minutes for the entire presentation opposing the application.<sup>45</sup> The applicant is

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<sup>32</sup> 37 PA. CODE § 81.232(a) (2007).

<sup>33</sup> 37 PA. CODE § 81.232(b) (2007).

<sup>34</sup> 37 PA. CODE § 81.232(c) (2007).

<sup>35</sup> *Id.*; 71 PA. CONS. STAT. § 299(e) (2007).

<sup>36</sup> 37 PA. CODE § 81.232(c) (2007).

<sup>37</sup> *Id.*

<sup>38</sup> 37 PA. CODE § 81.226(a) (2007).

<sup>39</sup> 37 PA. CODE § 81.226(d) (2007).

<sup>40</sup> 37 PA. CODE § 81.231(b) (2007).

<sup>41</sup> 37 PA. CODE § 81.281 (2007).

<sup>42</sup> *See* 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST’S PENNSYLVANIA PRACTICE SERIES, CRIMINAL PROCEDURE § 20.1 (2d ed. 2007).

<sup>43</sup> 37 PA. CODE § 81.282 (2007); *see also* 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST’S PENNSYLVANIA PRACTICE SERIES, CRIMINAL PROCEDURE § 20.1 (2d ed. 2007); Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>44</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007). *But see supra* note 40.

<sup>45</sup> 37 PA. CODE § 81.292(b) (2007).

not permitted an opportunity for rebuttal.<sup>46</sup> Additionally, while the Board may subpoena an individual to appear at the hearing as a witness,<sup>47</sup> witnesses are not sworn-in and cannot be cross-examined.<sup>48</sup>

#### 4. Clemency Decisions

When making its decision, the Board reviews the clemency application, along with all reports and opinions gathered from the court and district attorney where the applicant was sentenced, the correctional institute where the applicant is confined, and the victim and any other individuals who provided information addressing the merits of the application.<sup>49</sup> The Board also receives a one-page executive summary prepared by the Secretary of the Board which includes the facts of the crime, a summary of the death-row applicant's incarceration, his/her medical history, and conduct.<sup>50</sup>

Pennsylvania law “does not establish a specific list of factors that the Board must consider in evaluating applications” for clemency.<sup>51</sup> In fact, “no objective criteria [are] imposed” upon the Board in its assessment.<sup>52</sup> Rather, each Board member is “free to rely upon the information that [s/]he feels is most important” in deciding to recommend or deny clemency.<sup>53</sup>

Within fourteen days of the public hearing, the Board may notify the death-row inmate and all other parties involved in the case of its decision.<sup>54</sup> The Board's decision is “announced by a public vote at a public hearing.”<sup>55</sup> All actions taken by the Board at the public hearing must be recorded and those records must “be open to the public for inspection at all times.”<sup>56</sup>

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<sup>46</sup> Telephone Interview with John L. Heaton, Board of Pardons, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>47</sup> 37 PA. CODE § 81.293 (2007).

<sup>48</sup> Board of Pardons, About BOP, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/about/function.htm](http://sites.state.pa.us/PA_Exec/BOP/about/function.htm) (last visited Sept. 27, 2007).

<sup>49</sup> 37 PA. CODE § 81.226(b), 81.294 (2007).

<sup>50</sup> Telephone Interview with John Heaton, Secretary, Pennsylvania Board of Pardons (Aug. 8, 2005).

<sup>51</sup> Pennsylvania Board of Pardons, Factors Considered by the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FactorsPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FactorsPardon.doc) (last visited Sept. 27, 2007); *see also* Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>52</sup> *See* Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>53</sup> Pennsylvania Board of Pardons, Factors Considered by the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FactorsPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FactorsPardon.doc) (last visited Sept. 27, 2007); *see also* Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>54</sup> 37 PA. CODE § 81.302 (2007).

<sup>55</sup> Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>56</sup> *The Morning Call, Inc. v. Commonwealth of Pennsylvania, Board of Pardons*, 580 A.2d 1183, 1185 (Pa. Commw. 1990).

If the Board denies the clemency application, the death-row inmate can request a reconsideration of the decision, but generally only if new information arises.<sup>57</sup> The Board need not explain its rationale in denying the clemency application.<sup>58</sup>

The Board's recommendation of a commutation of a sentence must be recorded and made available to the public, but the reasons underlying the action do not have to be recorded or made public.<sup>59</sup> If the Board unanimously recommends clemency,<sup>60</sup> the Board must submit a written recommendation to the Governor, detailing the reasons supporting its recommendation.<sup>61</sup> Only after the Governor has acted on the application will the Board's written recommendation, including the reasons underlying its action, become public record.<sup>62</sup>

The Board's recommendation is non-binding on the Governor.<sup>63</sup> In fact, once the Board recommends clemency, the Governor has unlimited discretion in determining whether clemency should be granted.<sup>64</sup> If the Governor adopts the Board's recommendation, a "Warrant of Commutation" will be prepared for the Governor to sign.<sup>65</sup>

#### *D. Reprieves*

Under the Pennsylvania Constitution, the Governor has "unfettered discretion" to grant a reprieve.<sup>66</sup> The Governor thus has the authority to grant a reprieve, without Board approval, for a defined purpose or specified period of time.<sup>67</sup> To grant a reprieve, the Governor must articulate the actual act;<sup>68</sup> the Governor's failure to issue an execution warrant does not constitute a reprieve.<sup>69</sup>

The Board is limited to making a written request that the Governor consider an application for a reprieve.<sup>70</sup> Although section 299 of the Pennsylvania Consolidated Statutes grants the Board authority to hear an application for a reprieve and make a written recommendation to the Governor concerning the disposition of the application,<sup>71</sup> the Pennsylvania Attorney General has opined that "no real authority" has been vested in

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<sup>57</sup> Telephone Interview with John Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>58</sup> *See* *Senk v. Commonwealth of Pennsylvania*, Board of Pardons, 521 A.2d 532, 533 (Pa. Commw. 1987).

<sup>59</sup> PA. CONST. art. 4, § 9(a); 37 PA. CODE § 81.303 (2007); *see also* 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST'S PENNSYLVANIA PRACTICE SERIES, CRIMINAL PROCEDURE § 20.1 (2d ed. 2007).

<sup>60</sup> *See supra* note 5.

<sup>61</sup> PA. CONST. art. 4, § 9; Telephone Interview with John Heaton, Secretary, Pennsylvania Board of Pardons (Aug. 8, 2005). A copy of the recommendation must be kept on file in the Lieutenant Governor's Office. PA. CONST. art. 4, § 9(a).

<sup>62</sup> 37 PA. CODE § 81.304(b) (2007).

<sup>63</sup> PA. CONST. art. 4, § 9(a); 37 PA. CODE § 81.303 (2007); *see also* 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST'S PENNSYLVANIA PRACTICE SERIES, CRIMINAL PROCEDURE § 20.1 (2d ed. 2007).

<sup>64</sup> PA. CONST. art. 4, § 9(a).

<sup>65</sup> 37 PA. CODE § 81.303 (2007).

<sup>66</sup> 32 Pa. Op. Att'y Gen., 1983 WL 44382, \*2 (1983).

<sup>67</sup> *See* *Morganelli v. Casey*, 646 A.2d 744, 747 (Pa. Commw. 1994).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 32 Pa. Op. Att'y Gen., 1983 WL 44382, \*2 (1983).

<sup>71</sup> 71 PA. CONS. STAT. § 299(a) (2007).

the Board by this statute to grant a reprieve, much less hear an application for reprieve.<sup>72</sup> The Board specifically has no power to grant a reprieve in order to have additional time to consider a death-row inmate's clemency application.<sup>73</sup>

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<sup>72</sup> See 32 Pa. Op. Att'y Gen., 1983 WL 44382, \*2 (1983). The Pennsylvania Attorney General's Opinion was based on the fact that the Pennsylvania Constitution does not provide any authority to the Board to grant a reprieve. *Id.*

<sup>73</sup> *Id.*

## II. ANALYSIS

### A. Recommendation #1

**The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts.**

Under Pennsylvania law, neither the Governor nor the Board of Pardons is required to conduct any specific type of review when considering a petition for clemency on behalf of a death-row inmate. Indeed, the Governor's discretion in granting or denying clemency is virtually unfettered, so long as s/he has the unanimous recommendation of the Board supporting clemency. Similarly, the Board, in deciding to recommend a grant of clemency to the Governor, has "no objective criteria" to which it must adhere.<sup>74</sup> Rather, each Board member is "free to rely upon the information that s/he feels is most important" in his/her decision-making.<sup>75</sup>

The Board, however, has tailored the scope of the clemency decision-making process by articulating that it will not review the guilt or innocence of a death-row inmate.<sup>76</sup> In fact, "if there is some legal technicality [which bears on guilt or innocence], such as the introduction of hearsay evidence, [an] illegal confession, [or an] illegal search and seizure," the Board claims that responsibility lies with the courts to "resolve those matters," and not the Board itself.<sup>77</sup>

As the Board's recommendation regarding whether clemency should be granted is premised on the fact that the courts have reached the merits of all issues bearing on the death sentence, the Commonwealth of Pennsylvania is not in compliance with Recommendation #1.

### B. Recommendation #2

**The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.**

This recommendation requires the Governor and the Board of Pardons to consider "all factors" which may lead them to conclude that a death sentence is not warranted. The American Bar Association has identified "all factors" as including, but not limited to the following:

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<sup>74</sup> See Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>75</sup> Pennsylvania Board of Pardons, Factors Considered by the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FactorsPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FactorsPardon.doc) (last visited Sept. 27, 2007); *see also* Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>76</sup> See Pennsylvania Board of Pardons, About BOP, Function of the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/about/function.htm](http://sites.state.pa.us/PA_Exec/BOP/about/function.htm) (last visited Sept. 27, 2007).

<sup>77</sup> *Id.*

- (1) Constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court rulings;
- (2) Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) Lingering doubts of guilt (as discussed in Recommendation #4);
- (4) Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) The inmate’s mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) The inmate’s age at the time of the offense (as discussed in Recommendation #4).<sup>78</sup>

Pennsylvania law does not “establish a specific list of factors” that the Board or the Governor must consider in evaluating clemency applications.<sup>79</sup> As discussed under Recommendation #1, the Board has “no objective criteria” to which it must adhere in deciding whether to recommend clemency to the Governor.<sup>80</sup> Instead, each Board member is “free to rely upon information that [s/]he feels is most important” in rendering his/her clemency recommendation to the Governor.<sup>81</sup> Significantly, the Board will not review the guilt or innocence of a death-row inmate.<sup>82</sup> In fact, the Board will not review any “legal technicality, such as the introduction of hearsay evidence, [an] illegal confession, [or an] illegal search and seizure,” opting instead to delegate this responsibility to the courts.<sup>83</sup> Given that judicial review of capital cases is severely limited by state post-conviction and federal *habeas* laws, it is imperative that the Board and the Governor assume responsibility for thoroughly examining “all factors,” including claims of innocence.

The clemency application does request the death-row inmate to describe: (1) the crime(s) for which s/he is seeking a commutation; (2) why s/he should be granted mercy; (3) why

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<sup>78</sup> AMERICAN BAR ASSOCIATION, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

<sup>79</sup> Pennsylvania Board of Pardons, *Factors Considered by the Board of Pardons in Evaluating Pardon/Commutation Requests*, available at [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FactorsPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FactorsPardon.doc) (last visited Sept. 27, 2007).

<sup>80</sup> See Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>81</sup> Pennsylvania Board of Pardons, *Factors Considered by the Board of Pardons in Evaluating Pardon/Commutation Requests*, available at [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FactorsPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FactorsPardon.doc) (last visited Sept. 27, 2007).

<sup>82</sup> See Pennsylvania Board of Pardons, *About BOP, Function of the Board*, available at [http://sites.state.pa.us/PA\\_Exec/BOP/about/function.htm](http://sites.state.pa.us/PA_Exec/BOP/about/function.htm) (last visited Sept. 27, 2007).

<sup>83</sup> *Id.*

s/he needs clemency; and (4) any rehabilitative efforts.<sup>84</sup> While the Board may consider this information, which also could encompass a number of the ABA factors enumerated above, Pennsylvania law does not explicitly require the Board to consider this information.

When considering commutation applications for inmates serving life sentences, the Board has adopted, but is not limited to, the following criteria:

- (1) The nature and character of the offense committed;
- (2) The general character and history of the offender; and
- (3) The recommendations of the trial judge, district attorney, and the official who has had charge of the offender.<sup>85</sup>

It is unclear if the Board considers the same or similar criteria when assessing the clemency application of an inmate sentenced to death.

As with the Board, the criteria used by the Governor in deciding to grant or deny clemency are unknown. Once the Board recommends clemency, the Governor has unlimited discretion in determining whether clemency should be granted.<sup>86</sup>

A review of Pennsylvania's past clemency decisions does not illuminate further the factors considered by either the Governor or the Board in determining whether death is an appropriate punishment. Since Pennsylvania re-enacted the death penalty, only two clemency applications have been filed by death-row inmates;<sup>87</sup> neither of which even garnered a hearing before the Board.<sup>88</sup>

In sum, while we were unable to determine the factors actually considered by the Board and the Governor in their decision-making process, we do know that the Board will not consider any legal issues that could have been or were addressed by the courts. As the Board fails to consider "all factors," the Commonwealth of Pennsylvania is not in compliance with Recommendation #2.

### *C. Recommendation #3*

**Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographical disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.**

### *Recommendation #4*

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<sup>84</sup> See Commonwealth of Pennsylvania Application for Clemency, available at [www.cjpf.org/clemency/PennsylvaniaApp.PDF](http://www.cjpf.org/clemency/PennsylvaniaApp.PDF) (last visited Sept. 27, 2007).

<sup>85</sup> See *Hennessey v. Pennsylvania Board of Pardons*, 655 A.2d 218, 226 n.18 (Pa. Commw. 1995).

<sup>86</sup> PA. CONST. art. 4, § 9(a).

<sup>87</sup> See Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>88</sup> *Id.*

**Clemency decision-makers should consider as factors in their deliberations the inmate’s mental retardation, mental illness, or mental competency, if applicable, the inmate’s age at the time of the offense, and any evidence relating to a lingering doubt about the inmate’s guilt.**

*Recommendation #5*

**Clemency decision-makers should consider as factors in their deliberations an inmate’s possible rehabilitation or performance of significant positive acts while on death row.**

As discussed under Recommendation #2, Pennsylvania law “does not establish a specific list of factors that the Board must consider in evaluating applications.”<sup>89</sup> In fact, “no objective criteria [are] imposed” upon the Board;<sup>90</sup> rather, each Board member is “free to rely upon information that [s/]he feels is most important” in deciding to recommend clemency to the Governor.<sup>91</sup>

In its review of a clemency application, the Board receives a one-page executive summary prepared by the Secretary of the Board which includes, among other things, the inmate’s medical history.<sup>92</sup> However, because these summaries are confidential, we were unable to ascertain if the inmate’s medical history includes information on mental retardation, mental illness, or the inmate’s mental competency.<sup>93</sup>

It should be noted that the clemency application does request that the applicant describe any efforts s/he has made to rehabilitate and improve him/herself.<sup>94</sup> However, the extent that the Board and/or the Governor rely on this factor in their deliberations is unknown.

As clemency has never been granted to a Pennsylvania death-row inmate since the death penalty was reinstated, past decisions fail to provide any additional insight on the factors considered by the Board and the Governor in their deliberations. In fact, since the death penalty’s reinstatement, there has not even been a single Board hearing addressing a clemency application for a death-row inmate.<sup>95</sup>

Although the Board and Governor may be provided with information relevant to Recommendations #4 and #5, the Board and the Governor’s decision-making process is subjective. Furthermore, because we were unable to obtain sufficient information to assess whether the Board and Governor routinely consider the factors highlighted in Recommendations #3 through #5, we are unable to determine if the Commonwealth of Pennsylvania is in compliance with these Recommendations.

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<sup>89</sup> Pennsylvania Board of Pardons, Factors Considered by the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/ref\\_lib/FacotrPardon.doc](http://sites.state.pa.us/PA_Exec/BOP/ref_lib/FacotrPardon.doc) (last visited Sept. 27, 2007).

<sup>90</sup> See Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>91</sup> *Id.*

<sup>92</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Aug. 8, 2005).

<sup>93</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>94</sup> See Commonwealth of Pennsylvania Application for Clemency, *available at* [www.cjpf.org/clemency/PennsylvaniaApp.PDF](http://www.cjpf.org/clemency/PennsylvaniaApp.PDF) (last visited Sept. 27, 2007) (emphasis in original).

<sup>95</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

*D. Recommendation #6*

**In clemency proceedings, death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.**

The Commonwealth of Pennsylvania does not guarantee an indigent death-row inmate the right to counsel in clemency proceedings.<sup>96</sup> Under Pennsylvania law, a death-row inmate may obtain private legal counsel or request “representation” from the Pennsylvania Department of Corrections.<sup>97</sup> Upon the inmate’s request, the Department of Corrections will appoint the Pardons Case Specialist—a corrections official who is *not* an attorney—to represent the death-sentenced inmate at the clemency hearing.<sup>98</sup>

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #6.

*E. Recommendation #7*

**Prior to clemency hearings, death-row inmates’ counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.**

The Commonwealth of Pennsylvania does not have any laws, rules, procedures, standards, or guidelines entitling a death-row inmate’s counsel to compensation or access to investigative and expert resources.<sup>99</sup>

Furthermore, a death-row inmate has only ten days from when the Governor issues a warrant of execution to complete and file his/her clemency application.<sup>100</sup> Ten days can hardly constitute sufficient time to develop the basis for any factors upon which clemency may be granted, much less sufficient time to investigate and gather evidence in support of the clemency application.

A death-row inmate also lacks sufficient time to rebut any evidence that the Commonwealth may present in opposing clemency. At the clemency hearing, which the death-row inmate is not allowed to attend, the inmate’s counsel or representative has only thirty minutes to present his/her case.<sup>101</sup> The opposing parties then have thirty minutes to present their case.<sup>102</sup> The death-row inmate’s counsel or representative is not

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<sup>96</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).

<sup>97</sup> 37 PA. CODE § 81.282 (2007).

<sup>98</sup> Letter from John L. Heaton, Secretary, Pennsylvania Board of Pardons, to Michelle J. Anderson, Professor of Law, Villanova University School of Law (Aug. 8, 2005) (on file with author).

<sup>99</sup> *Id.*

<sup>100</sup> 37 PA. CODE § 81.231(b) (2007).

<sup>101</sup> 37 PA. CODE § 81.292(b) (2007).

<sup>102</sup> *Id.*

permitted to rebut the evidence presented at the clemency hearing,<sup>103</sup> nor is s/he permitted to cross-examine witnesses.<sup>104</sup>

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #7.

*F. Recommendation #8*

**Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.**

All clemency hearings presided over by the Board of Pardons are “informal” proceedings.<sup>105</sup> Witnesses are not sworn and cannot be cross-examined.<sup>106</sup> Each hearing, however, is considered an “open session,” which occurs “upon due public notice.”<sup>107</sup>

The death-row inmate’s application and any documents attached in support of the application are public record.<sup>108</sup> Additionally, all Board votes must be conducted in public and recorded for public inspection.<sup>109</sup> If the Board recommends commuting a death sentence, the Board must submit a written recommendation to the Governor, including a description “at length” as to the basis for its decision.<sup>110</sup> Only after the Governor has acted on the application will the Board’s written recommendation, including its rationale, become public record.<sup>111</sup> However, if the Board denies the clemency application, it need not explain its reasoning.<sup>112</sup>

Unlike the Board, the Governor grants or denies clemency in a process that appears to be shielded from public scrutiny. No Pennsylvania law requires the Governor to publicly explain his/her reasoning in granting or denying clemency. Furthermore, as clemency has never been granted to a death-row inmate since the death penalty’s reinstatement in Pennsylvania, it is unclear whether the Governor would explain his/her reasoning in deciding to grant or deny clemency to a death-row inmate.

Based on this information, the Commonwealth of Pennsylvania is only in partial compliance with the requirements of Recommendation #8.

*G. Recommendation #9*

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<sup>103</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).  
<sup>104</sup> See Commonwealth of Pennsylvania, Function of the Board of Pardons, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP/about/function.htm](http://sites.state.pa.us/PA_Exec/BOP/about/function.htm) (last visited Sept. 27, 2007).  
<sup>105</sup> See *id.*  
<sup>106</sup> *Id.*  
<sup>107</sup> PA. CONST. art. 4, § 9(a).  
<sup>108</sup> Telephone Interview with John L. Heaton, Secretary, Pennsylvania Board of Pardons (Apr. 9, 2007).  
<sup>109</sup> See *The Morning Call, Inc. v. Commonwealth of Pennsylvania Board of Pardons*, 580 A.2d 1183, 1185-86 (Pa. Commw. 1990).  
<sup>110</sup> PA. CONST. art. 4, § 9.  
<sup>111</sup> 37 PA. CODE § 81.304(b) (2007).  
<sup>112</sup> See *Senk v. Commonwealth of Pennsylvania, Board of Pardons*, 521 A.2d 532, 533 (Pa. Commw. 1987).

**If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.**

In capital cases, each member of the Board of Pardons is required to interview the death-row inmate before determining whether to recommend clemency to the Governor.<sup>113</sup> If a member fails to interview the inmate, s/he will be prohibited from voting on the clemency recommendation.<sup>114</sup>

The interview with the death-row inmate may be conducted by individual Board members or the Board as a group.<sup>115</sup> The interview must occur before the public hearing addressing the application<sup>116</sup> “at a time, place, and manner that is convenient for the Board.”<sup>117</sup> Although the interview is private, the inmate’s lawyer or representative is permitted to attend.<sup>118</sup> All interviews are recorded and may be used later at the sole discretion of the Board.<sup>119</sup>

Unlike the Board, the Governor has no obligation to meet in-person with the inmate petitioning for clemency. Once the Governor has received the Board’s recommendation, the Governor, as the ultimate decision-maker, can be insulated from the inmate, rendering it possible that the Governor will grant or deny clemency without ever meeting the inmate.

Although the Governor’s Office is not mandated to meet in-person with a death-row inmate, each member of the Board is required to interview, either individually or as a group, a death-sentenced clemency applicant. The Commonwealth of Pennsylvania, therefore, is in partial compliance with Recommendation #9.

#### *H. Recommendation #10*

**Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system’s ability to grant relief under circumstances that might warrant grants of clemency.**

Under Pennsylvania law, the Board of Pardons is composed of the Lieutenant Governor, the Attorney General, and three members appointed by the Governor with majority consent of the Pennsylvania Senate.<sup>120</sup> The three members of the Board appointed by the Governor must include: (1) a crime victim, (2) a corrections expert, and (3) a physician,

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<sup>113</sup> 37 PA. CODE § 81.232(a) (2007).

<sup>114</sup> 37 PA. CODE § 81.232(b) (2007).

<sup>115</sup> 37 PA. CODE § 81.232(c) (2007).

<sup>116</sup> 37 PA. CODE § 81.232(a) (2007).

<sup>117</sup> 37 PA. CODE § 81.232(c) (2007).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> PA. CONST. art. 4, § 9(b).

psychiatrist, or psychologist.<sup>121</sup> Apart from being citizens of the Commonwealth,<sup>122</sup> no additional requirements are provided for the Board members under Pennsylvania law. We were unable to determine whether Board members received any special training on the nature of clemency powers or on the limitations of the judicial system after being appointed.

Furthermore, the Commonwealth of Pennsylvania does not have any laws, rules, procedures, standards, or guidelines requiring the Board or the Governor to encourage the education of the public concerning the nature of clemency powers or on the limitations of the judicial system's ability to grant relief under circumstances that may warrant clemency.

Based on this information, it is unclear if the Commonwealth of Pennsylvania is in compliance with Recommendation #10.

### *I. Recommendation #11*

**To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.**

In Pennsylvania, the Governor cannot commute a death sentence without a unanimous recommendation from the Board of Pardons.<sup>123</sup> In accordance with the Pennsylvania Constitution, the Board is composed of five members: the Lieutenant Governor, the Attorney General, and three individuals appointed by the Governor.<sup>124</sup> Because the Lieutenant Governor and the Attorney General are publicly elected officials, the possibility that political considerations may impact clemency determinations increases. The fact that the Board must conduct all clemency votes in public also may lead Board members, especially the Lieutenant Governor and the Attorney General, to be held individually accountable for their decisions and thus more vulnerable to political sway.<sup>125</sup>

If the Board unanimously recommends granting clemency, it is within the sole discretion of the Governor to grant or deny clemency. Notably, no Pennsylvania law requires the Governor to explain publicly his/her rationale in electing to grant or deny clemency.

The confidentiality surrounding the clemency decision-making process and the Governor's reliance on a unanimous Board recommendation tend to insulate the Governor from direct criticism associated with a particular clemency decision. These factors also tend to insulate the Governor from being held individually accountable for the decision. Yet, at the same time, because the Governor's decision-making process is shielded from public scrutiny, s/he could grant or deny clemency on grounds unrelated to the interests of justice.

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> PA. CONST. art. 4, § 9(a).

<sup>124</sup> PA. CONST. art. 4, § 9(b). The three members appointed by the Governor must be approved by majority consent of the Pennsylvania Senate. *Id.*

<sup>125</sup> *See* *The Morning Call, Inc. v. Commonwealth of Pennsylvania Board of Pardons*, 580 A.2d 1183, 1185 (Pa. Commw. 1990).

While the Commonwealth of Pennsylvania has taken steps to ensure that the Governor's decision-making process is insulated from political considerations, some parts of the process remain susceptible to such considerations. Nonetheless, it is impossible to determine the extent to which inappropriate political considerations impact clemency determinations. We are, therefore, unable to ascertain if the Commonwealth of Pennsylvania is in compliance with Recommendation #11.



## CHAPTER TEN

### CAPITAL JURY INSTRUCTIONS

#### INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.<sup>1</sup> Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision-making. Often, however, jury instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his/her life. Such jurors may vote to impose a death sentence because they erroneously believe that otherwise, the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment. Unfortunately, jurors often believe that mitigation is the same as aggravation, or that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

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<sup>1</sup> Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

## I. FACTUAL DISCUSSION

### A. *Promulgation of Standard Jury Instructions and Revisions to the Instructions as Requested by the Parties*

In 1968, the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions created the *Pennsylvania Suggested Standard Criminal Jury Instructions* (standard jury instructions).<sup>2</sup> Thirty-five years later, in the spring of 2003, the Pennsylvania Bar Institute commenced a major revision of the standard jury instructions.<sup>3</sup> Today, the standard jury instructions “bear no official imprimatur” from either the Pennsylvania Supreme Court or the General Assembly and are considered only “*suggested* instructions.”<sup>4</sup>

The Pennsylvania Rules of Criminal Procedure allow the Commonwealth and the defense to tailor the standard jury instructions or design new instructions for individual cases. In each capital case, both parties may, within a “reasonable time” before closing arguments, submit to the court their own written requests for jury instructions.<sup>5</sup> The party filing the request also must provide a copy of the requested jury instructions to the opposing party.<sup>6</sup> The court is required to rule on the requested jury instructions prior to closing arguments.<sup>7</sup>

If either party disagrees with the court’s ruling, that party must specifically object to the jury charge before the jury retires to deliberate.<sup>8</sup> However, the court has “broad discretion in phrasing instructions to the jury and can choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for consideration.”<sup>9</sup>

### B. *Capital Felonies in Pennsylvania and the Applicable Standard Jury Instructions*

In the Commonwealth of Pennsylvania, murder in the first degree is the only crime that is punishable by death.<sup>10</sup> An individual convicted of first degree murder will be sentenced

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<sup>2</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, PREFACE (2005).

<sup>3</sup> *Id.* The Pennsylvania Bar Institute is a non-profit organization that is the continuing legal education branch of the Pennsylvania Bar Association. See Pennsylvania Bar Institute, Who We Are, available at <http://www.pbi.org/aboutpbi/aboutpbi.html> (last visited Sept. 27, 2007).

<sup>4</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND DEDICATION OF THE SECOND EDITION (2005) (emphasis in original); see also *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by* *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003); *Commonwealth v. Porter*, 728 A.2d 890, 899 (Pa. 1999) (holding that although the Pennsylvania Supreme Court has used the standard jury instructions as an aid in their review, the Court has never placed its imprimatur on the standard jury instructions).

<sup>5</sup> PA. R. CRIM. P. 647(A).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Commonwealth v. Pressley*, 887 A.2d 220, 223 (Pa. 2005); see also PA. R. CRIM. P. 647(B). Objections to a jury instruction must be made outside the presence of the jury. PA. R. CRIM. P. 647(B).

<sup>9</sup> *Commonwealth v. Davis*, 861 A.2d 310, 323 (Pa. Super. Ct. 2004).

<sup>10</sup> 18 PA. CONST. STAT. § 1102(a)(1) (2006); see also *Commonwealth v. Caye*, 290 A.2d 244, 246 (Pa. 1972). To prove first degree murder, the Commonwealth must demonstrate that: (1) a human being has unlawfully been killed; (2) the defendant did the killing; and (3) the killing was done in an intentional, deliberate, and premeditated manner. See *Commonwealth v. Mitchell*, 902 A.2d 430, 444 (Pa. 2006);

pursuant to section 9711 of title 42 of the Pennsylvania Consolidated Statutes, which details the aggravating and mitigating circumstances that may be considered in capital cases as well as the procedures for determining the defendant's sentence.<sup>11</sup> Sections 15.2502E through 15.2502H of the *Pennsylvania Suggested Standard Criminal Jury Instructions*, which are derived in part from section 9711, provide the suggested jury charges for sentencing a capital defendant.<sup>12</sup>

### C. *The Standard Jury Instructions and Case Law Interpretations of the Instructions*

#### 1. Preliminary Standard Jury Instructions

The preliminary standard jury instructions provided at the outset of the sentencing hearing commence by stating that the defendant has been found guilty of first degree murder and that the jury will reconvene for a separate sentencing proceeding.<sup>13</sup> The instructions also state that counsel may present additional evidence and arguments during the sentencing hearing, at the conclusion of which the jury will decide whether to sentence the defendant to death or life imprisonment.<sup>14</sup>

Lastly, the preliminary instructions direct the jury to consider those aggravating circumstances identified by the judge<sup>15</sup> and any mitigating circumstances that are relevant to the case,<sup>16</sup> including “any other mitigating matters concerning the character, background, and record of the defendant or the circumstances of [his/her] offense.”<sup>17</sup>

#### 2. Sentencing Phase Instructions

After the parties present their sentencing arguments, but before the jury begins its deliberations, the court will provide final instructions to the jury.<sup>18</sup> Section 9711 of title 42 of the Pennsylvania Consolidated Statutes requires the court to address the following in its final instructions:

- (1) The statutory aggravating and mitigating circumstances which are supported by some evidence;
- (2) That aggravating circumstances must be proven by the Commonwealth beyond a reasonable doubt, and that mitigating circumstances must be proven by the defendant by a preponderance of the evidence;
- (3) That the verdict must be a sentence of death if the jury unanimously finds (a) at least one aggravating circumstance and no mitigating circumstances, or (b) if the jury unanimously finds one or more aggravating

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Commonwealth v. Fiebigler, 810 A.2d 1233, 1235 (Pa. 2002); Commonwealth v. Fisher, 769 A.2d 1116, 1123 (Pa. 2001).

<sup>11</sup> 42 PA. CONST. STAT. § 9711 (2006).

<sup>12</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS §§ 15.2502E-15.2502H.1 cmt. (2005).

<sup>13</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502E(1) (2005).

<sup>14</sup> *Id.*

<sup>15</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502E(3) (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F cmt. (2005).

- circumstances which outweigh any mitigating circumstances; and that in all other cases, the verdict must be a sentence of life imprisonment; and
- (4) That the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in unanimous agreement as to the sentence, in which case the court will sentence the defendant to life imprisonment.<sup>19</sup>

The standard jury instructions begin by informing the jury that it must base its sentence on the aggravating and mitigating circumstances established.<sup>20</sup> In accordance with section 9711, the instructions state that death must be imposed if: (1) the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance; or (2) the jury unanimously finds that one or more aggravating circumstances outweigh any mitigating circumstances.<sup>21</sup> If the jury does not unanimously agree on either of these findings, the instructions direct the jury to sentence the defendant to life imprisonment.<sup>22</sup>

The standard jury instructions provide that the defendant must prove any mitigating circumstances by a preponderance of the evidence.<sup>23</sup> Preponderance of the evidence is defined in the standard jury instructions to mean “by the greater weight of the evidence.”<sup>24</sup> In other words, the “evidence shows that it is more likely than not that the facts are true.”<sup>25</sup>

The standard jury instructions then detail the aggravating and mitigating circumstances that the jury may consider.<sup>26</sup> The instructions direct the jurors to consider the evidence and arguments offered by both parties, including evidence that was “heard during the earlier trial” and any testimony by the defendant, in determining whether any aggravating and mitigating circumstances exist and whether the aggravating circumstances outweigh the mitigating circumstances.<sup>27</sup>

The standard jury instructions also instruct the jury that in deciding if the aggravating circumstances outweigh the mitigating circumstances, the jury should “not simply count their number,” but should “[c]ompare the seriousness and importance of the aggravating with the mitigating circumstance[(s)].”<sup>28</sup> The instructions reiterate that if the jury finds at least one aggravating circumstance and no mitigating circumstance, or that one or more

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<sup>19</sup> 42 PA. CONS. STAT. § 9711(c)(1) (2007).

<sup>20</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(1) (2005).

<sup>21</sup> *Id.*; *see also* 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2007); PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(2) (2005).

<sup>22</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(1) (2005).

<sup>23</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(3) (2005); *see also* 42 PA. CONS. STAT. § 9711(c)(1)(iii) (2007).

<sup>24</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(3) (2005); *see also* 42 PA. CONS. STAT. § 9711(c)(1)(iii) (2007).

<sup>25</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(3) (2005); *see also* 42 PA. CONS. STAT. § 9711(c)(1)(iii) (2007).

<sup>26</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(4)-(5) (2005).

<sup>27</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(6) (2005). This suggested jury instruction should only be used if the sentencing jury is the same as the trial jury. *See* PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(6) cmt. (2005).

<sup>28</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(2) (2005). These are discretionary instructions.

aggravating circumstances outweigh the mitigating circumstances, then the jury “must sentence the defendant to death.”<sup>29</sup>

The standard jury instructions further state that if the jury unanimously agrees that the prosecution has proven a particular aggravating factor beyond a reasonable doubt, it should regard that particular aggravating factor as established.<sup>30</sup> In contrast, the jury is instructed that when considering mitigating circumstances, each juror is “free” to regard the presence of a particular mitigating factor even if other jurors believe otherwise.<sup>31</sup>

The standard jury instructions again remind the jury that it must unanimously agree to sentence the defendant to life imprisonment or death, provided there is at least one aggravating circumstance and no mitigating circumstances or if the aggravating circumstances outweigh the mitigating circumstances.<sup>32</sup> If the jury cannot unanimously agree on a death sentence, the instructions direct the jury to: (1) continue deliberating the possibility of death; or (2) if all the jurors agree to stop deliberating, sentence the defendant to life imprisonment.<sup>33</sup> However, if the jury has “deliberated conscientiously and thoroughly and still cannot all agree” on either sentence, the jury should inform the judge, and if the judge believes that the jury is “hopelessly deadlocked,” the judge will sentence the defendant to life imprisonment.<sup>34</sup>

In closing, the instructions explain that the jury’s decision must be made in accordance with the law provided by the judge and not based upon sympathy, prejudice, emotion, public opinion, or “solely” on victim impact testimony.<sup>35</sup> The instructions also state that the jury’s verdict is not “merely” a recommendation to the judge, but is determinative of the defendant’s sentence— death or life imprisonment.<sup>36</sup> The instructions conclude by iterating that the verdict must be unanimous and the verdict of “each and every one” of the jurors.<sup>37</sup>

### 3. Aggravating Circumstances in a Capital Murder Case

#### a. Pattern Jury Instructions

The standard jury instructions direct the jury to consider only those aggravating circumstances that have been identified by the judge and delineated in the Pennsylvania Consolidated Statutes, including:<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(3) (2005).

<sup>31</sup> *Id.* The additional instructions explain that “[t]his different treatment of aggravating and mitigating circumstances is one of the law’s safeguards against unjust death sentences” because “[i]t gives a defendant the full benefit of any mitigating circumstances.” *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(4) (2005).

<sup>34</sup> *Id.*; *see also* 42 PA. CONS. STAT. § 9711(c)(1)(v) (2007). At the conclusion of these instructions, the general instructions suggest that the court can provide any further explanations describing the using and completing the verdict slip “that [the court] thinks are necessary.” PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(4) (2005).

<sup>35</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(10) (2005).

<sup>36</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(11) (2005).

<sup>37</sup> *Id.*

<sup>38</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502E(3) (2005).

- (1) The victim was a firefighter, peace officer, public servant concerned in official detention, judge of any court in Pennsylvania, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, Treasurer, Pennsylvania 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/her duties, who was killed in the performance of his/her duties or as a result of his/her 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 the 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/her 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, 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, while in the perpetration of a felony;
- (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, 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, 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 twelve 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; and
  - (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 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.<sup>39</sup>

b. Burden of Proof and Unanimity of Finding as to Statutory Aggravating Circumstances

To impose a sentence of death, the standard jury instructions, in accordance with Pennsylvania law, require the jury to unanimously find beyond a reasonable doubt at least one aggravating circumstance.<sup>40</sup> The standard jury instructions provide two alternative explanations of reasonable doubt.<sup>41</sup>

The first explanation of reasonable doubt instructs the jury that reasonable doubt:

[D]oes not mean that the Commonwealth must prove the aggravating circumstance beyond all doubt and to a mathematical certainty. A reasonable doubt is the kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon an important matter in his or her own affairs. A reasonable doubt must be a real doubt; it may not be one that a juror imagines or makes up to avoid carrying out an unpleasant duty.<sup>42</sup>

The second explanation of reasonable doubt provided in the standard jury instructions states:

To prove the aggravating circumstance beyond a reasonable doubt means that the Commonwealth must convince you of its existence to a level of certainty that the law requires before a sentence of death may be imposed.

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<sup>39</sup> 42 PA. CONST. STAT. § 9711(d) (2007).

<sup>40</sup> 42 PA. CONST. STAT. § 9711(c)(1)(iv) (2007). The standard jury instructions reflect this statutory requirement. PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(2) (2005).

<sup>41</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(2) (2005).

<sup>42</sup> *Id.*

To find that an aggravating circumstance exists beyond a reasonable doubt, you must be convinced of it to the same degree you would be convinced about a matter of importance in your own life in which you would act with confidence and without restraint or hesitation.

Understand that in making decision[s] of importance in our own lives, we can never act with mathematical certainty. Also, we must recognize that sometimes, simply out of fear of making those important decisions, we may imagine doubts that are based on virtually anything. It is important that we make sure that doubts that we allow to affect our decisions are only those that are based upon facts and reason.

The same considerations apply here. The simple but important question you must decide is whether the evidence convinces you of [the] existence of the aggravating circumstance to the degree that if this were a matter of importance in your own life, you would act on that matter confidently, without hesitation or restraint. The answer to that question must arise from your conscientious review of the facts and law, the application of your good common sense, and your recognition of the importance of the oath you took as a juror to try this case fairly, impartially, and honorably.<sup>43</sup>

Pennsylvania courts have held that an instruction defining “reasonable doubt” must be provided to the jury, unless the trial court has recently explained the term to the jury.<sup>44</sup>

The standard jury instructions state that the jurors must unanimously agree on the presence of each individual aggravating circumstance.<sup>45</sup> In addition, the standard jury instructions, in conformance with Pennsylvania law, inform the jury that it must be unanimous in their finding of at least one aggravating circumstance and no mitigating circumstances or of the aggravating circumstances outweighing any mitigating circumstances before recommending a death sentence.<sup>46</sup>

#### c. Requirement that Aggravating Circumstances Be Set Forth in Writing

Rule 808 of the Pennsylvania Rules of Criminal Procedure provides a verdict slip that can be used by jury to record its sentencing decision and the basis for its decision.<sup>47</sup> On the verdict slip, the judge must list in writing each aggravating circumstance that is supported

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<sup>43</sup> *Id.*

<sup>44</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F cmt. (2005); *see also* Commonwealth v. Jasper, 587 A.2d 705, 710 (Pa. 1991) (holding that the trial did not have to redefine “reasonable doubt” in the penalty phase after the court had defined the term in the guilt phase, twenty-four hours prior to the jury’s penalty phase deliberations.).

<sup>45</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(3) (2005).

<sup>46</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(1) (2005); 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2007).

<sup>47</sup> PA. R. CRIM. P. 808.

by the evidence.<sup>48</sup> The jury, in turn, is required to list the aggravating circumstances found.<sup>49</sup>

#### 4. Mitigating Circumstances in a Capital Murder Case

##### a. Standard Jury Instructions

The standard jury instructions advise that in arriving at a sentence, the jury must consider any mitigating circumstances raised by the evidence.<sup>50</sup> Neither section 9711 nor the pattern jury instructions define mitigating circumstances explicitly, but the instructions indicate that the jury may consider those mitigating circumstances enumerated in section 9711 of the Pennsylvania Consolidated Statutes and raised by the evidence<sup>51</sup> as well as “any other mitigating matters concerning the character, background, and record of the defendant or the circumstances of [his][her] offense.”<sup>52</sup>

The mitigating circumstances listed in section 9711 are:

- (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/her conduct or to conform his/her conduct to the requirements of the law was substantially impaired;
- (4) The age of the defendant at the time of the crime;
- (5) The defendant acted under extreme 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/her sentence.<sup>53</sup>

This list is not exhaustive, as the eighth statutory mitigating circumstance acts as a catch-all provision,<sup>54</sup> and the Pennsylvania Supreme Court has considered a host of non-statutory mitigating circumstances, including:

- (1) The defendant’s childhood and family;<sup>55</sup>

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<sup>48</sup> PA. R. CRIM. P. 808(I)(B)(1),

<sup>49</sup> PA. R. CRIM. P. 808(II)(B).

<sup>50</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(2) (2005).

<sup>51</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502E(3) (2005).

<sup>52</sup> *Id.*

<sup>53</sup> 42 PA. CONS. STAT. § 9711(e) (2006).

<sup>54</sup> 42 PA. CONS. STAT. § 9711(e)(8) (2006); *see also* Commonwealth v. Lopez, 854 A.2d 465, 471 (Pa. 2004); Commonwealth v. Holcomb, 498 A.2d 833, 857 (Pa. 1985).

<sup>55</sup> *See* Commonwealth v. May, 898 A.2d 559, 574 (Pa. 2006) (holding that it is of “paramount importance” that juries have knowledge of a defendant’s childhood when deciding whether to impose the death penalty); Commonwealth v. Ford, 809 A.2d 325, 333-34 (Pa. 2002) (holding that defendant’s trial counsel was ineffective for failing to raise history of abuse during the sentencing hearing); Commonwealth

- (2) The moral values held by a religious defendant;<sup>56</sup>
- (3) The defendant's good behavior and that s/he has done well in the structured environment of prison;<sup>57</sup>
- (4) Despite the defendant's difficult history, the fact that s/he has helped others in need;<sup>58</sup> and
- (5) The fact that the defendant is a talented artist and writer.<sup>59</sup>

While the Pennsylvania Supreme Court has stated that a defendant must be permitted "wide latitude" to present evidence concerning his/her character and record and the circumstances of the offense,<sup>60</sup> evidence demonstrating the victim family's opposition to the death penalty will not be permitted.<sup>61</sup>

#### b. Case Law Interpretation and Use of the Term Mitigating Circumstances

The United States Constitution requires the sentencing judge and jury to consider as mitigation any aspect of the defendant's character or record and any of the circumstances of the offense which the defendant offers as a basis for a sentence less than death,<sup>62</sup> regardless of whether or not it is enumerated in section 9711 of the Pennsylvania Consolidated Statutes. The United States Supreme Court has ascribed the relevance of mitigation evidence to society's belief that a defendant's criminal actions can be attributed to "a disadvantaged background, or to emotional and mental problems" which render the individual less culpable than others for his/her actions.<sup>63</sup>

The standard jury instructions do not explicitly define mitigating circumstances. However, the Pennsylvania Supreme Court has determined that an adequate layman's definition for a jury addressing the difference between mitigating and aggravating circumstances is that mitigating circumstances "are those things which make the case less terrible and less deserving of the death penalty."<sup>64</sup>

#### c. Case Law Interpretation Regarding the Unanimity of Mitigation Findings

Each juror is not required to find that the same mitigating circumstances exist<sup>65</sup> and should be instructed to weigh the mitigating circumstances that s/he believes have been established by the evidence, regardless of whether or not other jurors believe that those

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v. Gibson, 720 A.2d 473, 483 (Pa. 1998) (instructing jury that defendant's upbringing, and "how he may have been affected by parent's alcoholism and lack of nurturing or attention" can be considered mitigating).

<sup>56</sup> See Commonwealth v. Reid, 642 A.2d 453, 459 (Pa. 1994).

<sup>57</sup> See Commonwealth v. Hughes, 639 A.2d 763, 774-75 (Pa. 1994).

<sup>58</sup> See Commonwealth v. Spatz, 759 A.2d 1280, 1288 (Pa. 2000).

<sup>59</sup> *Id.*

<sup>60</sup> Commonwealth v. Daniels, 644 A.2d 1175, 1183 (Pa. 1994).

<sup>61</sup> See Commonwealth v. Bomar, 826 A.2d 831, 852 (Pa. 2003).

<sup>62</sup> See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); see also Commonwealth v. Blystone, 549 A.2d 81, 92 (Pa. 1988), *abrogated on other grounds by* Commonwealth v. Fowler, 703 A.2d 1027 (Pa. 1997).

<sup>63</sup> Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

<sup>64</sup> Commonwealth v. Stevens, 739 A.2d 507, 527 (Pa. 1999).

<sup>65</sup> See Mills v. Maryland, 486 U.S. 367, 376 (1988); McKoy v. North Carolina, 494 U.S. 433, 439-44 (1990); Commonwealth v. Cox, 863 A.2d 536, 553 (Pa. 2004) (holding that "single jurors may find mitigating circumstances individually and personally").

same mitigating circumstances have been established.<sup>66</sup> The standard jury instructions explicitly state that each juror “is free to regard a particular *mitigating* circumstance as present despite what other jurors may believe.”<sup>67</sup> However, Pennsylvania courts are not required to specifically instruct the jury that it “need not be unanimous in finding mitigating circumstances.”<sup>68</sup>

#### d. Stipulation to Existence of Mitigating Circumstances

The Pennsylvania Supreme Court has recognized that the parties may stipulate to the existence of mitigating factors.<sup>69</sup> Once the existence of a mitigating factor has been stipulated, the jury must “engage in the process of weighing this factor against any aggravating factor found.”<sup>70</sup> If the jury fails to consider the stipulated mitigating factor in its deliberations, the court must vacate the death sentence and conduct a new sentencing hearing.<sup>71</sup>

Standard jury instructions have been specifically created for instances in which the existence of a mitigating circumstance has been stipulated.<sup>72</sup> These instructions explain to the jury that the parties have agreed to the existence of the mitigating circumstance and thus the jury may only sentence the defendant to death if it unanimously finds that one or more aggravating circumstances outweigh the stipulated mitigating circumstance and any other mitigating circumstances found by the jury.<sup>73</sup> Otherwise, the instructions direct the jury to impose a sentence of life imprisonment.<sup>74</sup>

#### e. Residual Doubt as a Mitigating Circumstance

Residual doubt refers to lingering doubt about the defendant’s guilt of intentional murder.<sup>75</sup> The Pennsylvania Supreme Court has ruled that “residual doubt” cannot be introduced by the defendant as a non-statutory mitigating circumstance during the sentencing phase.<sup>76</sup>

### 5. Availability and Definitions of the Sentencing Options

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<sup>66</sup> *Id.*; *Commonwealth v. Begley*, 780 A.2d 605, 645 (Pa. 2001) (holding that “where a jury has been instructed that unanimity was required when finding mitigating circumstances, a death sentence must be vacated”).

<sup>67</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(3) (2005).

<sup>68</sup> *Commonwealth v. Banks*, 656 A.2d 467, 472 (Pa. 1995); *see also Commonwealth v. Chambers*, 807 A.2d 872, 882 (Pa. 2002).

<sup>69</sup> *See Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2002), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1089.

<sup>72</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F.1 (2005).

<sup>73</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F.1(1) (2005).

<sup>74</sup> *Id.*

<sup>75</sup> *See Commonwealth v. Edmiston*, 851 A.2d 883, 893 (Pa. 2004); *see also* 2 DAVID RUDOVSKY & LEONARD SOSNOV, WEST’S PENNSYLVANIA PRACTICE § 15.7 (2d ed. 2007).

<sup>76</sup> *See Edmiston*, 851 A.2d at 895; *Commonwealth v. Fletcher*, 750 A.2d 261, 277 (Pa. 2000), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003) (holding that it was proper for trial court to prevent defendant from presenting evidence during the penalty phase that he was not guilty of crime).

### a. Case Law and the Standard Jury Instructions

The standard jury instructions explain that the jury may impose a sentence of death only if it unanimously finds at least one aggravating circumstance and no mitigating circumstance or if it unanimously finds that one or more aggravating circumstances outweigh the mitigating circumstances.<sup>77</sup> If the jury cannot unanimously agree on either of these findings, it must impose a sentence of life imprisonment.<sup>78</sup>

The standard jury instructions do not define the term life imprisonment. However, if the prosecutor raises the defendant's future dangerousness during the penalty phase of the trial, the jury should be instructed on the meaning of a life sentence and the Governor's power to grant clemency.<sup>79</sup> Yet, such an instruction is only required if the defendant specifically requests it.<sup>80</sup> In this situation, the Pennsylvania Supreme Court has suggested the following jury instruction:

A life sentence means that a defendant is not eligible for parole, but that the Governor has the power to grant a commutation of a sentence of life or death if based on the recommendation of the Board of the Pardons following a public hearing.<sup>81</sup>

In addition to the above instruction, the Pennsylvania Supreme Court also recommends that the trial court "relay any available statistical information relating to the percentage of life sentences that have been commuted within the last several years."<sup>82</sup>

Similarly, the standard jury instructions explain that an individual convicted of first-degree murder and serving a life sentence is ineligible for parole and that the Parole Board does not have the power to release the inmate.<sup>83</sup> The instructions inform the jury that the "only" way the inmate may be released is through the Governor commuting the life sentence.<sup>84</sup> The commutation process, as explained in the standard jury instructions, involves: (1) the inmate convincing the Board of Pardons that his/her sentence should be shortened; (2) the Board of Pardons making a unanimous recommendation to the Governor to shorten the sentence; and (3) the Governor following the Board of Pardon's

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<sup>77</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(1) (2005).

<sup>78</sup> *Id.*

<sup>79</sup> *See* Commonwealth v. Trivigno, 750 A.2d 243, 256 (Pa. 2000). Such a jury instruction has been deemed consistent with the United States Supreme Court's decision in *Simmons v. South Carolina*, finding that when a prosecutor raises a defendant's future dangerousness during the trial, the defendant has a due process right to have the jury informed that the "true meaning" of the non-capital sentencing alternative is life imprisonment without parole. *Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994); *see also* *Trivigno*, 750 A.2d at 254 (Pa. 2000).

<sup>80</sup> *See* Commonwealth v. Freeman, 827 A.2d 385, 407 (Pa. 2003); Commonwealth v. Chmiel, 889 A.2d 501, 535 (Pa. 2005); Commonwealth v. Rompilla, 721 A.2d 786, 795 (Pa. 1998). The standard jury instructions advise the Pennsylvania trial courts that they should consider providing this instruction in every capital case. PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(9) (2005).

<sup>81</sup> *Trivigno*, 750 A.2d at 256.

<sup>82</sup> *Id.*

<sup>83</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(9) (2005).

<sup>84</sup> *Id.*

recommendation.<sup>85</sup> The instructions provide that, if this occurs, the inmate is eligible for an early release.<sup>86</sup> The standard jury instructions assure the jury that a commutation of a life sentence “rarely” occurs and that the Board of Pardons and the Governor will “act responsibly and will not commute the sentence of a life prisoner who they believe is dangerous.”<sup>87</sup>

## 6. Form of Jury Instructions

During deliberations, the jury is permitted a verdict slip,<sup>88</sup> but no written jury instructions.<sup>89</sup> In fact, the Pennsylvania Supreme Court has stated that courts cannot provide jurors with written instructions, unless the written instructions “merely” explain how to complete the verdict slip.<sup>90</sup>

The verdict slip provided in Rule 808 of the Pennsylvania Rules of Criminal Procedure instructs jurors to “[r]ead through the entire verdict slip before beginning deliberations.”<sup>91</sup> The verdict slip first lists the aggravating circumstances sought by the prosecutor and the mitigating circumstances sought by the defendant.<sup>92</sup> In addition, the verdict slip informs the jury that it can consider “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of the defendant’s offense.”<sup>93</sup> The verdict slip then instructs the jury that the form should not be completed until the end of the deliberations and that the form is “*only* to be used to record [the] sentencing verdict and the findings upon which it is based.”<sup>94</sup> However, there is no requirement that the jury specify the mitigating circumstance(s) found.<sup>95</sup>

## 7. Victim Impact Evidence

In *Payne v. Tennessee*,<sup>96</sup> the United States Supreme Court ruled that the admission of victim impact evidence is not unconstitutional.<sup>97</sup> Accordingly, during the sentencing

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> PA. R. CRIM. P. 807; *see also* Commonwealth v. Freeman, 827 A.2d 385, 408 (Pa. 2003); Commonwealth v. Morales, 494 A.2d 367, 377-78 (Pa. 1985). Rule 808 of the Pennsylvania Rules of Criminal Procedure provides a verdict slip to be used by juries in capital cases. PA. R. CRIM. P. 808.

<sup>89</sup> PA. CRIM. P. R. 646(B)(4); *see also* Commonwealth v. Karaffa, 709 A.2d 887, 890 (Pa. 1998) (holding that the use of written jury instructions is intrinsically prejudicial).

<sup>90</sup> *See* Commonwealth v. Johnson, 815 A.2d 563, 583 (Pa. 2002); Commonwealth v. DeHart, 650 A.2d 38, 48 (Pa. 1994); Commonwealth v. Oleynik, 568 A.2d 1238, 1241 (Pa. 1990).

<sup>91</sup> PA. R. CRIM. P. 808(A).

<sup>92</sup> PA. R. CRIM. P. 808(I)(B). The juror is reminded that the aggravating circumstance(s) must be “proved by the Commonwealth *beyond a reasonable doubt*.” PA. R. CRIM. P. 808(I)(B)(1) (emphasis in original). While the mitigating circumstances submitted to the jury must be “proved by the defendant by a *preponderance of the evidence*.” PA. R. CRIM. P. 808(I)(B)(2) (emphasis in original).

<sup>93</sup> PA. R. CRIM. P. 808(B)(2).

<sup>94</sup> PA. R. CRIM. P. 808(C) (emphasis in original).

<sup>95</sup> *See* Commonwealth v. Frey, 554 A.2d 27, 32 (Pa. 1989); Commonwealth v. Carpenter, 515 A.2d 531, 539 (Pa. 1986) (holding that there is no statutory requirement that the jury specify the mitigating circumstances it found).

<sup>96</sup> 501 U.S. 808 (1991).

<sup>97</sup> *Id.* at 827.

hearing, the Commonwealth may present evidence concerning the victim and the impact of the victim's death on his/her family.<sup>98</sup>

Before introducing victim impact evidence at trial, the prosecutor must provide notice to the defendant.<sup>99</sup> This pre-trial notice “enables the defendant to investigate the background of the decedent, and prepare for potential victim impact testimony prior to jury selection.”<sup>100</sup> The prosecutor also must demonstrate that the “victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large.”<sup>101</sup>

Once the prosecutor has satisfied these requirements, the trial court has discretion to determine the “appropriate nature and extent” of the victim impact evidence presented to the jury.<sup>102</sup> Specifically, the court is responsible for “overseeing” the presentation of victim impact evidence so that “overtly passionate, intentionally biased, and inflammatory evidence is kept out of the courtroom.”<sup>103</sup>

When presenting victim impact evidence, there is no limit to the number of witnesses who can testify at trial.<sup>104</sup>

a. Victim Impact Evidence Jury Instruction

After victim impact evidence has been presented to the jury, the Pennsylvania Supreme Court has suggested the following jury instruction:

The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not evidence of a statutory aggravating circumstance and it cannot be a reason by itself to impose the death penalty. The introduction of victim impact evidence does not in any way relieve the Commonwealth of its burden to prove beyond a reasonable doubt at least one aggravating circumstance. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt independent from the victim impact evidence, and if one or more jurors has found that one or more mitigating circumstances have been established by a preponderance of the evidence. Victim impact evidence is simply another

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<sup>98</sup> 42 PA. CONS. STAT. § 9711(a)(2) (2007); 42 PA. CONST. STAT. § 9738(a) (2007).

<sup>99</sup> See *Commonwealth v. Natividad*, 773 A.2d 167, 178 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

<sup>100</sup> *Id.* In *Natividad*, the defendant was provided a written statement addressing the victim impact testimony to be presented at trial and was permitted to redact portions of the proposed testimony before the witness testified. *Id.* at 179. The written statement was provided to the defendant twenty-four hours prior to the witness testifying. *Id.* The Pennsylvania Supreme Court ruled that this was sufficient time for the defendant to investigate information relevant to the witness's credibility and to investigate specific information addressing the content of the victim impact testimony. *Id.* at 179-80.

<sup>101</sup> *Commonwealth v. Eichinger*, 915 A.2d 1122, 1139 (Pa. 2007).

<sup>102</sup> *Commonwealth v. Taylor*, 876 A.2d 916, 935 (Pa. 2005).

<sup>103</sup> *Commonwealth v. Means*, 773 A.2d 143, 158 (Pa. 2001); see also *Eichinger*, 915 A.2d at 1139.

<sup>104</sup> See *Commonwealth v. Williams*, 854 A.2d 440, 447 (Pa. 2004).

method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, the victim impact shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion or public opinion and not based solely on victim impact.<sup>105</sup>

Additionally, the court can instruct the jury on two “special” rules that apply to victim impact testimony– (1) the jury cannot regard the victim impact testimony as an aggravating circumstance; and (2) if the jury finds at least one aggravating circumstance and at least one mitigating circumstance, the jury is permitted to consider the victim impact testimony when deciding whether the aggravating circumstances outweigh the mitigating circumstances.<sup>106</sup> The instructions state that the jury may choose to give favorable or unfavorable weight to the victim impact testimony, but that it may not consider the evidence with an emotional response.<sup>107</sup>

#### 8. Additional Instructions After Jury Deliberations Have Begun

The United States Supreme Court, in *Allen v. United States*,<sup>108</sup> authorized courts to provide the following instructions to jurors after deliberations have begun:<sup>109</sup>

[I]n substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, [upon] the other hand, the majority [was] for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.<sup>110</sup>

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<sup>105</sup> *Means*, 773 A.2d at 158-59; *see also Natividad*, 773 A.2d at 180 n.4; *Commonwealth v. Rice*, 795 A.2d 340, 353 n.14 (Pa. 2002), *declined to follow on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

<sup>106</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(7) (2005); *see also* 42 PA. CONS. STAT. § 9711(c)(2) (2007); *see also Natividad*, 773 A.2d at 181.

<sup>107</sup> *Id.*

<sup>108</sup> *Allen v. United States*, 164 U.S. 492 (1896).

<sup>109</sup> *Id.* at 501.

<sup>110</sup> *Id.*

The Pennsylvania Supreme Court, in *Commonwealth v. Spencer*,<sup>111</sup> prohibited courts from providing *Allen*-type charges when a jury is deadlocked or unable to reach a decision.<sup>112</sup> The Court concluded that the impermissible implications of *Allen* were “(1) a minority juror should yield to the majority, and that (2) those with no reasonable doubt, i.e., the majority, need not re-examine their position despite the existence of a reasonable doubt in the mind of a minority juror.”<sup>113</sup> Therefore, the *Spencer* Court adopted Standard 15-5.4 of the American Bar Association standard instructions for use when a jury is deadlocked, which provides:<sup>114</sup>

- (1) That in order to return a verdict, each juror must agree to the verdict;
- (2) That jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (3) That each juror must decide the case for himself/herself, but only after an impartial consideration of the evidence with his/her fellow jurors;
- (4) That in the course of deliberations, a juror should not hesitate to re-examine his/her own views and change his/her opinion if convinced it is erroneous; and
- (5) That no juror should surrender his/her honest conviction as to the weight or effect of the evidence solely because of the opinion of his/her fellow jurors, or for the mere purpose of returning a verdict.<sup>115</sup>

However, the court can deny a request to provide the *Spencer* instruction if the instruction will be “unduly coercive at that point in the jury’s deliberations.”<sup>116</sup>

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<sup>111</sup> 275 A.2d 299 (Pa. 1971).

<sup>112</sup> See *Commonwealth v. Spencer*, 275 A.2d 299, 304 (Pa. 1971). In *Spencer* the Pennsylvania Supreme Court held that the decision to not permit *Allen*-type charges applies retroactively. *Id.*

<sup>113</sup> *Commonwealth v. Hill*, 301 A.2d 587, 591 (Pa. 1973).

<sup>114</sup> *Spencer*, 275 A.2d at 305 n.7; see also *Commonwealth v. Greer*, 895 A.2d 553, 556-57 (Pa. Super. Ct. 2006); *Commonwealth v. Turner*, 568 A.2d 622, 624 (Pa. Super. Ct. 1989) (“The American Bar Association standards are to be followed when giving jury instructions to deadlocked jurors”).

<sup>115</sup> *Spencer*, 275 A.2d at 305 n.7.

<sup>116</sup> See *Commonwealth v. Santiago*, 424 A.2d 870, 873 (Pa. 1981).

## II. ANALYSIS

### A. Recommendation #1

**Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.**

In 2003, the Pennsylvania Bar Institute commenced a major revision of the *Pennsylvania Suggested Standard Criminal Jury Instructions*.<sup>117</sup> The revisions were facilitated by Duquesne University School of Law, which provided assistance to an advisory committee of judges and attorneys from across the Commonwealth.<sup>118</sup> It is unclear to what extent, if any, the committee evaluated jurors' understanding of capital jury instructions and, to the best of our knowledge, the advisory committee did not include any linguists, social scientists, psychologists, or jurors.

Currently, the Pennsylvania Bar Institute revises the standard jury instructions as new court decisions are announced and new statutes are passed.<sup>119</sup> In addition to ensuring that the instructions are "a proper statement of law," the Institute also ensures that the instructions "are conveyed in language accessible" to jurors.<sup>120</sup> However, the extent to which the Institute monitors jurors' understanding of capital jury instructions remains unclear.

Because the Commonwealth of Pennsylvania revises the standard jury instructions on a somewhat regular basis, but fails to monitor juror understanding of the instructions or include linguists, social scientists, psychologists, or jurors in its revision process, the Commonwealth is only in partial compliance with Recommendation #1.

### B. Recommendation #2

**Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.**

This recommendation is supported by a myriad of studies finding that jurors provided with written court instructions pose fewer questions during deliberations, express less confusion about the instructions, use less time trying to decipher the meaning of the instructions, and spend less time inappropriately applying the law.<sup>121</sup> Written instructions, therefore, result in more efficient and worthwhile deliberations.<sup>122</sup>

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<sup>117</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND DEDICATION OF THE SECOND EDITION (2005).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> The Honorable B. Michael Dann, 'Lessons Learned' and 'Speaking Rights': Creating Educated and Democratic Juries, 68 IND. L.J. 1229, 1259 (1993); Judge Roger M. Young, *Using Social Science to Assess*

However, in Pennsylvania, the jury is only provided a verdict slip, and is not allowed written jury instructions while being instructed by the court or during deliberations.<sup>123</sup> The only exception to this is that Pennsylvania courts allow written jury instructions during deliberations if the instructions “merely” explain how to complete the verdict slip.<sup>124</sup>

The Commonwealth of Pennsylvania, therefore, is not in compliance with Recommendation #2.

### C. Recommendation #3

**Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.**

Research indicates that capital jurors commonly have difficulty understanding jury instructions<sup>125</sup> and an astonishing 98.6 percent of Pennsylvania capital jurors have failed to understand “at least some” jury instructions.<sup>126</sup> This difficulty can be attributed to a number of factors, including, but not limited to: the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.<sup>127</sup> Given this alarming rate of juror miscomprehension, Pennsylvania judges must respond meaningfully to jurors' requests for clarification. Such responses not only ensure that jurors understand the applicable law, but more importantly, ensure that the jurors impose a just and proper sentence.

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*the Need for Jury Reform in South Carolina*, 52 S.C. L. Rev. 135, 177, 178 (2000) (noting that 69.0% of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

<sup>122</sup> Dann, *supra* note 121, at 1259; Young, *supra* note 121, at 162-63.

<sup>123</sup> PA. R. CRIM. P. 646(B)(4); *see also* Commonwealth v. Karaffa, 709 A.2d 887, 890 (Pa. 1998) (holding that the use of written jury instructions is intrinsically prejudicial).

<sup>124</sup> *See* Commonwealth v. Johnson, 815 A.2d 563, 583 (Pa. 2002); Commonwealth v. DeHart, 650 A.2d 38, 48 (Pa. 1994).

<sup>125</sup> Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

<sup>126</sup> *See* Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Discretion on Pennsylvania Capital Cases*, 20 JUST. Q. 187, 199 (2003).

<sup>127</sup> James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

At the jury's request, Pennsylvania trial courts can provide "additional or correctional instructions" after deliberations have begun.<sup>128</sup> The trial court has a "duty to give such additional instructions on the law" as the court believes is necessary to clarify the jury's doubt or confusion.<sup>129</sup>

Capital jurors in Pennsylvania often have difficulty understanding the bifurcated nature of a death penalty case. For example, an overwhelming 83.3 percent of interviewed Pennsylvania capital jurors indicated that they had discussed the "right punishment" "a great deal" or a "fair amount," even before the sentencing proceeding had begun,<sup>130</sup> despite the fact that this is not allowed.<sup>131</sup> And nearly 51 percent of the jurors indicated that they had discussed whether the defendant "would or should" get the death penalty during the guilt/innocence phase.<sup>132</sup>

Capital jurors in Pennsylvania also have difficulty understanding the concept of mitigation evidence.<sup>133</sup> The Pennsylvania Supreme Court has determined that an adequate layman's definition of the difference between mitigating and aggravating circumstances is that mitigating circumstances "are those things which make the case less terrible and less deserving of the death penalty."<sup>134</sup> Yet, the courts are not required to provide such an instruction to jurors, and in a study conducted by the Capital Jury Project, 58.7 percent of interviewed Pennsylvania capital jurors failed to understand that they could consider any mitigating evidence during the penalty phase of the trial;<sup>135</sup> 68 percent failed to understand that they need not be unanimous in finding the existence of mitigating circumstances;<sup>136</sup> and 32 percent erroneously believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.<sup>137</sup> In another study conducted by Professor Wanda Foglia of Rowan University, only 42 percent of interviewed Pennsylvania capital jurors understood that they could consider any mitigating factor while only 30 percent understood that it was not necessary for all jurors

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<sup>128</sup> PA. R. CRIM. P. 647(C); *see also* Commonwealth v. Davalos, 779 A.2d 1190, 1195 (Pa. Super. Ct. 2001) ("The scope of supplemental instructions given in response to a jury's request rests within the sound discretion of the trial judge."). For example, if the jury requests that the court reread a witness's testimony from the trial to refresh its memory, then the court must reread the testimony in open court in the presence of both parties and their counsel. *See* Commonwealth v. Peterman, 244 A.2d 723, 726 (Pa. 1968). However, if the court were to send the requested testimony to the jury for their review, then this would constitute reversible error. *Id.*

<sup>129</sup> *Davalos*, 779 A.2d at 1195; *see also* Commonwealth v. Tolassi, 413 A.2d 1003, 1011 (Pa. 1980).

<sup>130</sup> Foglia, *supra* note 126, at 198.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003).

<sup>134</sup> Commonwealth v. Stevens, 739 A.2d 507, 527 (Pa. 1999). The Pennsylvania Supreme Court has determined that an adequate jury instruction defining aggravating circumstances "are things about the killing and the killer which make a first degree murder case more terrible and deserving of the death penalty." *Id.*; *see also* Commonwealth v. Marinelli, 910 A.2d 672, 687 (Pa. 2006).

<sup>135</sup> *See* Bowers & Foglia, *supra* note 133, at 68. This statistic is troubling in light of the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating circumstances." *Id.* at 608.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

to agree on the presence of individual mitigating factors.<sup>138</sup> In addition, 94.2 percent of Pennsylvania capital jurors indicated that they believed “the punishment should be determined by what the defendant did, not what kind of person he or she was.”<sup>139</sup> These statistics clearly demonstrate that Pennsylvania jurors are confused about mitigation evidence.

Similarly, despite the fact that Pennsylvania law expressly prohibits consideration of future dangerousness as an aggravating circumstance,<sup>140</sup> 37 percent of interviewed Pennsylvania capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death.<sup>141</sup> A full 69 percent of Pennsylvania capital jurors indicated that the discussion among jurors during deliberations focused on the defendant’s future dangerousness if s/he were released.<sup>142</sup>

Pennsylvania capital jurors also have tremendous difficulty understanding the meaning of life imprisonment. In fact, 82.8 percent of Pennsylvania capital jurors did not believe “that a life sentence really meant life in prison.”<sup>143</sup> Moreover, 21.6 percent believed that if a defendant was not sentenced to death, s/he would be released from prison in nine years or less.<sup>144</sup> Significantly, it has been found that “[t]here was a higher risk of a final vote for death among jurors who estimated that the time served by defendants who receive a life sentence would be 15 or fewer years.”<sup>145</sup>

Despite overwhelming evidence that capital jurors in Pennsylvania are woefully unknowledgeable about the rules relevant to capital sentencing, we are unable to assess whether Pennsylvania trial courts, as a whole, are exercising their discretion to respond meaningfully to jurors’ questions in practice. We are, therefore, unable to assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #3.

The Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature. In addition, the Team recommends that the Commonwealth mandate that all capital juries be instructed on the definition of life imprisonment.

#### *D. Recommendation #4*

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<sup>138</sup> Foglia, *supra* note 126, at 199.

<sup>139</sup> *Id.* at 198.

<sup>140</sup> See 42 PA. CONS. STAT. § 9711(d) (2007); see also *Commonwealth v. Marrero*, 687 A.2d 1102, 1108 n.19 (Pa. 1996) (“In Pennsylvania, however, future dangerousness is not an aggravating circumstance under Pennsylvania’s death penalty statute, and therefore is not a valid factor to be considered by the jury.”); *Commonwealth v. Edmiston*, 851 A.2d 883, 897 (Pa. 2004) (noting that defendant is correct in claiming that future dangerousness is not a valid aggravating circumstance in Pennsylvania); *Commonwealth v. Christy*, 656 A.2d 877, 884 n.7 (Pa. 1995), *abrogated on other grounds by Commonwealth v. Speight*, 677 A.2d 317 (Pa. 1996) (“It is noted that “future dangerousness” is not a valid aggravating circumstance in Pennsylvania.”).

<sup>141</sup> *Bowers & Foglia, supra* note 133, at 73.

<sup>142</sup> Foglia, *supra* note 126, at 197.

<sup>143</sup> *Id.* at 199.

<sup>144</sup> *Id.* at 196.

<sup>145</sup> *Id.* at 201.

**Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request.

### Alternative Punishments

A defendant convicted of a capital offense may be sentenced to life imprisonment or death. Under Pennsylvania law, the court is required to instruct the jury that the verdict must be death if the jury unanimously finds (1) at least one aggravating circumstance and no mitigating circumstance, or (2) the jury unanimously finds one or more aggravating circumstances outweigh the mitigating circumstances. In all other cases, the jury must be directed to return a sentence of life imprisonment.

Significantly, Pennsylvania law does not require that the jury be instructed on the definition of life imprisonment. Only if the prosecutor raises the issue of future dangerousness at trial and the defendant specifically requests an instruction will the court instruct the jury on the meaning of life imprisonment.<sup>146</sup> A sentence of life imprisonment is described by the standard jury instructions as when a prisoner is "not eligible for parole" and the "parole board has no power to release the prisoner from prison."<sup>147</sup> However, in addition to this definition, the court, under the standard jury instructions, also must provide the jury with the following instruction, explaining the clemency process:

The only way such a prisoner [serving a life sentence] can attain release is by a commutation granted by the governor. Pennsylvania has a board of pardons, as well as a parole board. If a life prisoner can convince the board of pardons that his or her sentence should be commuted, that is, made shorter, and the board of pardons unanimously recommends this to the governor, the governor has the power to shorten the sentence. If the governor follows the pardon board's recommendation and commutes the sentence, the prisoner may be released early or become eligible for parole in the future.

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<sup>146</sup> See *Commonwealth v. Carson*, 913 A.2d 220, 273 (Pa. 2006); *Commonwealth v. Chandler*, 721 A.2d 1040, 1046 (Pa. 1998). A failure to instruct the jury in such a situation constitutes a denial of due process. *Id.* at 1047.

<sup>147</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(9) (2005). However, if the capital defendant was sentenced prior to the United States Supreme Court's 1994 decision in *Simmons v. United States*, 512 U.S. 154 (1994), then the Pennsylvania Supreme Court has determined that the defendant is not entitled to this instruction. See *Commonwealth v. Stevens*, 739 A.2d 507, 527 (Pa. 1999).

I'll tell you that the governor and the board of pardons rarely commute a sentence of life imprisonment. [You can assume that whenever they do so, they will act responsibly and will not commute the sentence of a life prisoner who they believe is dangerous].<sup>148</sup>

Although an instruction describing life imprisonment and the clemency process is only required in capital cases when the future dangerousness of the defendant has been raised as an issue, the Pennsylvania Supreme Court has recommended that the “better approach” is to provide this jury instruction in all capital cases, regardless of whether the issue of future dangerousness is raised at trial.<sup>149</sup>

### Parole Practices

Defendants convicted of first degree murder in Pennsylvania are sentenced either to life imprisonment or death. However, data compiled by the Capital Jury Project demonstrates that Pennsylvania capital jurors estimate the median time served in prison by defendants convicted of first degree murder is fifteen years.<sup>150</sup> This figure underscores the importance of allowing judges to explain that parole is not an option in a capital case and should not be a consideration in jurors’ sentencing determination.

After a thorough review of Pennsylvania case law, we were unable to determine whether the court permitted parole or pardon officials or other knowledgeable witnesses to testify about parole practices in the Commonwealth, nor were we able to identify any instances of such evidence being admitted in a capital sentencing proceeding.

### Conclusion

Because the Pennsylvania Supreme Court recommends that all trial courts provide the jury with an instruction describing life imprisonment and the clemency process and is mandated to define life imprisonment when the future dangerousness of the defendant is raised, the Commonwealth of Pennsylvania is in partial compliance with the first part of Recommendation #4. However, we are unable to assess if the Commonwealth of Pennsylvania is in compliance with the second part of Recommendation #4.

#### *E. Recommendation #5*

**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.**

Pennsylvania law does not require the judge to instruct jurors that if they unanimously find the existence of at least one aggravating circumstance and no mitigating circumstance, then they may sentence the defendant to life imprisonment. In fact,

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<sup>148</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(9) (2005).

<sup>149</sup> *Chandler*, 721 A.2d 1040, 1047 n.10 (Pa. 1998).

<sup>150</sup> Bowers & Foglia, *supra* note 133, at 82.

Pennsylvania law mandates a death sentence if the jury finds at least one aggravating circumstance and no mitigating circumstance.<sup>151</sup>

The Commonwealth of Pennsylvania, therefore, is not in compliance with Recommendation #5.

*F. Recommendation #6*

**Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should implement the provision of Model Penal Code Section 210.6(1)(f),<sup>152</sup> under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.**

Pennsylvania law prohibits a defendant from presenting evidence addressing “residual doubt” during the penalty phase of a capital trial.<sup>153</sup> Pennsylvania courts are therefore

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<sup>151</sup> 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2007). Although the sentencing statute instructs the jury that it “must” sentence the defendant to death if there is at least one aggravating circumstance and no mitigating circumstance, the Pennsylvania Supreme Court has determined that this instruction does not “unconstitutionally limit the jury’s discretion nor constitute a mandatory directive or conclusive presumption that death is the appropriate punishment.” *Commonwealth v. O’Shea*, 567 A.2d 1023, 1035 (Pa. 1989), *cert. denied* 498 U.S. 881 (1990); *see also* *Commonwealth v. Cox*, 863 A.2d 536, 554-55 (Pa. 2004). Furthermore, the Pennsylvania Supreme Court has recognized that the Third Circuit Court of Appeals has “questioned the continuing constitutionality of jury instructions mirroring” Pennsylvania’s sentencing statute. However, the Pennsylvania Supreme Court has “specifically declined to accept the Third Circuit’s interpretation on this issue.” *Cox*, 863 A.2d at 555 n.10; *see also* *Commonwealth v. Breakiron*, 729 A.2d 1088, 1097 (Pa. 1999). In fact, the Court has determined that it is “not bound to follow the decisions of the Third Circuit interpreting federal law on issues of federal constitutional dimension.” *Cox*, 863 A.2d at 555 n.10.

<sup>152</sup> Section 210.6(1) of the Model Penal Code states as follows:

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

*See* MODEL PENAL CODE § 210.6(1); *see also* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-13 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

<sup>153</sup> *See* *Commonwealth v. Fletcher*, 750 A.2d 261, 277 (Pa. 2000), *abrogated on other grounds by* *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

prohibited from instructing the jury that “residual doubt” of the defendant’s guilt is a mitigating factor.

Pennsylvania has no state law requiring the imposition of a sentence less than death in cases in which residual doubt concerning the defendant’s guilt is present.

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #6.

*G. Recommendation #7*

**In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.**

Pennsylvania is a weighing state, requiring the jury to assess whether the aggravating circumstances outweigh the mitigating circumstances.<sup>154</sup>

Under Pennsylvania law, “the weighing of mitigating circumstances is a qualitative and not quantitative procedure.”<sup>155</sup> The standard jury instructions provide that the court may instruct the jury to “not simply count” the number of aggravating and mitigating circumstances, but to “[c]ompare the seriousness and importance” of the aggravating and mitigating circumstances.<sup>156</sup> This qualitative evaluation of the aggravating and mitigating circumstances requires the jury to “know more than the mere existence of the circumstance; it [jury] needs some idea of the underlying facts in the matter.”<sup>157</sup>

Because the Commonwealth of Pennsylvania allows trial courts to provide capital jury instructions clarifying that the death penalty should not be imposed simply because the number of aggravating circumstances outweigh the mitigating circumstances, the Commonwealth is in compliance with Recommendation #7.

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<sup>154</sup> 42 PA. CONS. STAT. § 9711(c)(2) (2006).

<sup>155</sup> Commonwealth v. Miller, 819 A.2d 504, 518 (Pa. 2002); see also Commonwealth v. Brown, 648 A.2d 1177, 1186 (Pa. 1994).

<sup>156</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502H(2)(2005). This instruction is discretionary.

<sup>157</sup> Brown, 648 A.2d at 1186.

## CHAPTER ELEVEN

### JUDICIAL INDEPENDENCE

#### INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. Judicial independence increasingly is undermined by judicial elections, appointments, and confirmation proceedings that are affected by nominees or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be tough on crime, that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, making it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

## I. FACTUAL DISCUSSION

### A. *Selection of Judges*

All Pennsylvania Supreme Court Justices, Superior and Commonwealth Court judges, and Courts of Common Pleas judges are selected in partisan elections.<sup>1</sup> Once elected, each justice or judge serves a ten-year term.<sup>2</sup> If a judicial vacancy arrives before the term has expired, the Governor may appoint a replacement from a list of nominees submitted by the Judicial Qualifications Commission (JQC).<sup>3</sup>

The JQC is composed of seven members— four non-lawyers who are appointed by the Governor and three non-judges who are appointed by the Pennsylvania Supreme Court; each member serves a term of seven years.<sup>4</sup> The JQC is responsible for compiling between ten and twenty nominees for each judicial vacancy.<sup>5</sup> The Governor then will appoint one of the nominees, with the advice and consent of the Pennsylvania Senate, to serve until the next election.<sup>6</sup>

To serve an additional term, all Pennsylvania state court judges are subject to retention elections.<sup>7</sup> Pennsylvania employs a “merit retention” model, where elected judges seeking to remain in office file “a declaration of candidacy for retention election.”<sup>8</sup> At the general election, the judge’s name will appear on a ballot without any partisan designation<sup>9</sup> and voters will cast a “yes” or “no” vote to decide whether the judge should retain his/her office.<sup>10</sup> If the incumbent judge fails to receive a majority vote for retention or fails to file a declaration of candidacy for retention election, the Governor will appoint, with Senate approval, a judge to fill the vacancy upon the expiration of the judge’s term.<sup>11</sup> If the judge receives a majority vote in favor of retention, s/he will serve another ten-year term.<sup>12</sup>

#### 1. The Pennsylvania Bar Association’s Judicial Evaluation Commission

The Judicial Evaluation Commission (JEC) was established by the Pennsylvania Bar Association to provide the general public with “an objective evaluation” of judicial

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<sup>1</sup> PA. CONST. art. V, § 13; Pennsylvania Unified Judicial System, Judicial Qualifications, Election, Tenure, Vacancies, <http://www.courts.state.pa.us/Index/UJS/judquals.asp> (last visited Sept. 27, 2007).

<sup>2</sup> PA. CONST. art. V, § 15(a).

<sup>3</sup> PA. CONST. art. V, § 14(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at § 13(b).

<sup>7</sup> *Id.* at § 15(b).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

candidates running for election or retention at the appellate level.<sup>13</sup> The Commission is comprised of eighteen members, including twelve lawyers and six non-lawyers.<sup>14</sup>

In evaluating appellate judicial candidates who are up for election, the JEC first has an investigative panel interview the candidate and any individuals with whom the candidate has had professional or personal relations.<sup>15</sup> On the basis of these interviews, as well as a questionnaire completed by the candidate, the panel will provide the JEC with a confidential report.<sup>16</sup> After reviewing the panel's report, the JEC will conduct its own interview of the candidate, engage in a discussion of the candidate's qualifications, and ultimately rate each candidate as being "Highly Recommended," "Recommended," or "Not Recommended."<sup>17</sup>

Similarly, when evaluating appellate judges sitting for retention, the JEC has an investigative panel review the candidate's completed questionnaire and writing samples.<sup>18</sup> After the investigative panel interviews the candidate and any other individuals, the panel must submit a confidential report to the Commission.<sup>19</sup> Upon reviewing the questionnaire, writing samples, and the panel's report, the JEC will issue the judge a rating of either "Recommended" or "Not Recommended" for retention.<sup>20</sup>

The JEC's judicial ratings are disseminated to the public through news releases and the Pennsylvania Bar Association's website.<sup>21</sup>

## *B. Conduct of Judicial Candidates and Judges*

### 1. Requisite Conduct of Judicial Candidates and Judges

The Pennsylvania Constitution sets forth rules governing the behavior of sitting judges. The Constitution prohibits sitting judges from holding an office in a political party or a political organization, or any federal, state, or local government.<sup>22</sup> The Pennsylvania Constitution further prohibits judges from accepting compensation outside of their government salary for performing their judicial duties.<sup>23</sup> In accordance with the Constitution, all judges must comport with the ethical and judicial rules decreed by the Pennsylvania Supreme Court.<sup>24</sup>

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<sup>13</sup> Pennsylvania Bar Association, About the Commission, *available at* <http://www.pabar.org/public/committees/JEC/about/mission.asp> (last visited Sept. 27, 2007).

<sup>14</sup> See Pennsylvania Bar Association, PBA JEC Members 2006-07, *available at* <http://www.pabar.org/public/committees/JEC/members0607.pdf> (last visited Sept. 27, 2007).

<sup>15</sup> The PBA Judicial Evaluation Commission's Evaluation Procedures, *available at* <http://www.pavotesmart.com/aboutJEC.pdf> (last visited Sept. 27, 2007).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> PA. CONST. art. V, § 17(a).

<sup>23</sup> *Id.* at § 17(c).

<sup>24</sup> *Id.* at § 15(b). These standards include the Pennsylvania Code of Judicial Conduct, the Rules of Conduct, Office Standards and Civil Procedures for District Justices, and other rules and regulations

However, the main source guiding appropriate judicial behavior is the Pennsylvania Code of Judicial Conduct (Code).<sup>25</sup> Based in large part on the 1972 American Bar Association’s Model Code of Judicial Conduct, the Code was last amended in 2005 to reflect recent United States Supreme Court decisions governing judicial behavior. The Code’s primary purpose is to provide ethical guidelines that enable judges to maintain and uphold the “integrity and [the] independence of the judiciary.”<sup>26</sup>

The Code includes a number of standards of conduct to which judges are required to adhere. This discussion, however, will focus on the standards of conduct pertaining to four issues: (1) judicial impartiality, (2) public commentary on cases, (3) the conduct of prosecutors and defense attorneys, and (4) judicial campaigns.

#### a. Judicial Impartiality

Under the Code, judges “should participate in establishing, maintaining, and enforcing... high standards of conduct” and should observe these standards personally so that the “integrity and independence of the judiciary may be preserved.”<sup>27</sup> Specifically, judges should be “faithful to the law” and be “unswayed by partisan interests, public clamor, or fear of criticism.”<sup>28</sup> Judges should perform their judicial duties without influence from their family, social, or other relationships.<sup>29</sup>

Judges may participate in civic and charitable activities, so long as their participation “do[es] not reflect adversely upon their impartiality or interfere with the performance of their judicial duties.”<sup>30</sup> Judges also may serve as officers or directors of a civic, educational or religious organization, with the caveat that their participation is not undertaken for the economic or political gain of the organization.<sup>31</sup>

If a judge’s impartiality “might reasonably be questioned” in a proceeding, the judge should recuse him/herself from the case.<sup>32</sup>

#### b. Public Commentary on Cases

Judges should refrain from publicly commenting on a case pending in any court and should require that court personnel under their direction and control refrain from making any such comments.<sup>33</sup> Judges, however, may issue “public statements in the course of their official duties” and may explain court procedures to the public.<sup>34</sup>

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pronounced by the Supreme Court. Pennsylvania Unified Judicial System, Judicial Qualifications, Election, Tenure, Vacancies, <http://www.courts.state.pa.us/Index/UJS/judquals.asp> (last visited Sept. 27, 2007).

<sup>25</sup> PA. CODE OF JUD. CONDUCT.

<sup>26</sup> PA. CODE OF JUD. CONDUCT, Canon 1.

<sup>27</sup> *Id.*

<sup>28</sup> PA. CODE OF JUD. CONDUCT, Canon 3(A)(1).

<sup>29</sup> PA. CODE OF JUD. CONDUCT, Canon 2(B).

<sup>30</sup> *Id.* at Canon 5.

<sup>31</sup> *Id.*

<sup>32</sup> PA. CODE OF JUD. CONDUCT, Canon 3(C)(1).

<sup>33</sup> PA. CODE OF JUD. CONDUCT, Canon 3(A)(6).

<sup>34</sup> *Id.*

Similarly, while campaigning, judicial candidates should refrain from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,” or making statements that “commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>35</sup>

#### c. Conduct of Prosecutors and Defense Attorneys

Judges should require that lawyers act in a “patient, dignified, and courteous” manner to litigants, jurors, witnesses, and others with whom they interact in their official capacity.<sup>36</sup> When a judge becomes aware of a lawyer’s unprofessional conduct, s/he should “take or initiate appropriate disciplinary against the lawyer.”<sup>37</sup> Disciplinary measures may include reporting a lawyer’s misconduct to the appropriate disciplinary body.<sup>38</sup>

#### d. Judicial Campaigns

All judicial candidates, including incumbent judges, should maintain a certain standard of conduct during their campaigns. Judicial candidate are specifically prohibited from:

- (1) Acting as a leader or holding any office in a political organization;
- (2) Making speeches for a political organization or candidate; and
- (3) Publicly endorsing a candidate for public office.<sup>39</sup>

Judicial candidates also are prohibited from raising money for, or making a contribution to, a political organization or candidate, attending political gatherings, or purchasing tickets for political party dinners.<sup>40</sup> Although judicial candidates cannot personally solicit or accept campaign funds or support, they may establish campaign committees and hire a staff to manage their campaign and financial contributions.<sup>41</sup>

## 2. The Judicial Conduct Board

In 1993, the Legislature amended the Pennsylvania Constitution, creating the Judicial Conduct Board (Board) to investigate allegations of ethical misconduct against judges.<sup>42</sup> The Board is comprised of twelve members: three judges, three lawyers, and six non-lawyers; each of whom is appointed by either the Governor or the Supreme Court to

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<sup>35</sup> PA. CODE OF JUD. CONDUCT, Canon 7(B)(1)(c).

<sup>36</sup> PA. CODE OF JUD. CONDUCT, Canon 3(A)(3).

<sup>37</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3).

<sup>38</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3) cmt.

<sup>39</sup> Judges may speak publicly on their own behalf as a candidate for election or retention and publicly endorse a candidate for judicial office, so long as the judge currently holds, or is running for, a position obtained via public election. PA. CODE OF JUD. CONDUCT, Canon 7.

<sup>40</sup> *Id.* However, Canon 7(A)(2) of the Code permits judges to identify with a political party and contribute to such an organization so long as their actions comport with Pennsylvania law. *Id.*

<sup>41</sup> PA. CODE OF JUD. CONDUCT, Canon 7(B)(1), (2).

<sup>42</sup> The Judicial Conduct Board of Pennsylvania, Homepage, available at <http://www.judicialconductboardofpa.org/> (last visited Sept. 27, 2007).

serve a four-year term.<sup>43</sup> No more than six members of the Board may be registered with the same political party,<sup>44</sup> and of the members appointed individually by the Governor and the Pennsylvania Supreme Court, no more than three may be registered with the same political party.<sup>45</sup>

The Board may investigate judicial complaints made by the public or initiate its own investigations.<sup>46</sup> Upon commencing an investigation, the Board will conduct a preliminary inquiry, which may consist of interviews with the complainant, attorneys, and other witnesses as well as a review of any relevant documents.<sup>47</sup> Generally, if the Board clearly finds that the allegations do not warrant any disciplinary action, it will dismiss the complaint.<sup>48</sup> Otherwise, the Board will authorize a full investigation to determine whether “clear and convincing evidence” of misconduct exists.<sup>49</sup>

In conducting a full investigation, the Board has the authority to issue subpoenas and compel testimony and the production of any documents.<sup>50</sup> If the Board finds no probable cause to support the allegation of judicial misconduct, it will dismiss the complaint.<sup>51</sup> When the Board dismisses a complaint, the complainant has no right to appeal, barring any misrepresentation by the accused.<sup>52</sup> Alternatively, if the Board finds probable cause exists to support the allegation of judicial misconduct, the Board will file formal charges with the Court of Judicial Discipline (CJD).<sup>53</sup>

### 3. The Court of Judicial Discipline

The Court of Judicial Discipline (CJD) was established by Constitutional amendment in 1993 and is charged with hearing and resolving all formal charges filed against judges. The CJD is composed of eight members, including three judges, one justice of the peace, two non-judge members of the Supreme Court bar, and two non-lawyers.<sup>54</sup> One half of the CJD is appointed by the Supreme Court, while the other half is appointed by the Governor.<sup>55</sup>

Whenever the Board determines there is probable cause to support an allegation of judicial misconduct, it files a formal complaint with the CJD.<sup>56</sup> Unlike the initial

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at § 18(a)(3). Board members are prohibited from holding an office in a political party or organization. *Id.* at § 18(a)(4).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 18(a)(7)-(8).

<sup>47</sup> PENNSYLVANIA JUDICIAL CONDUCT BOARD, 2006 ANNUAL REPORT 14 (2006).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Judicial Conduct Board of Pennsylvania, Frequently Asked Questions, at <http://www.judicialconductboardofpa.org/FAQ.html> (last visited Sept. 27, 2007).

<sup>53</sup> *Id.* at § 18(a)(7).

<sup>54</sup> PA. CONST. art. V, § 18(b)(1).

<sup>55</sup> *Id.* Senior judges may not be appointed to the CJD and no more than two of the three members appointed by either the Supreme Court or the Governor may be registered with the same political party. *Id.* at § 18(b)(1)-(2).

<sup>56</sup> *Id.* at § 18(a)(9), (b)(5).

complaint lodged with the Board, the formal complaint filed is a matter of public record.<sup>57</sup> After the complaint is filed, a public hearing, which is similar to a trial in that parties may offer testimony and compel discovery and witnesses, will be held.<sup>58</sup> The Board carries the burden of proving the charges by clear and convincing evidence.<sup>59</sup>

At the conclusion of the hearing, the CJD issues an official opinion. The CJD may dismiss the complaint because of a lack of clear and convincing evidence of judicial misconduct or, if the charges are proven, “may order [the judge’s] removal from office, suspension, or other discipline as authorized” by the Pennsylvania Constitution.<sup>60</sup> The judge, however, may appeal an adverse decision.<sup>61</sup> Specifically, a Supreme Court Justice may appeal to a special tribunal composed of seven judges chosen from the Superior and Commonwealth Courts, while all other Pennsylvania judges may appeal the adverse ruling to the Pennsylvania Supreme Court.<sup>62</sup>

### *C. Training of Judges Who Handle Capital Cases*

In 2005, Pennsylvania was selected as one of four states to implement a joint pilot program with the National Judicial College (NJC) to train judges who preside over capital cases.<sup>63</sup> The Bureau of Justice Assistance funded this pilot program as part of their Capital Litigation Improvement Initiative.<sup>64</sup> As of May 2007, all judges who presided over capital cases had completed a three day intensive training on handling capital cases.<sup>65</sup> The course “explore[s] the array of motions, hearings and appeals that are unique to death penalty cases.” After which, judges should be able to “summarize the trends in recent U.S. Supreme Court capital cases; ensure that a jury has been properly ‘death qualified’ through voir dire; handle the penalty phase and sentencing efficiently after analyzing what constitutes aggravating and mitigating circumstances; ensure that responses to the media are appropriate and well conceived; and rule effectively on post-trial motions.”<sup>66</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at § 18(b)(5).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at § 18(c)(2)-(3).

<sup>62</sup> *Id.* at § (18)(c)(1).

<sup>63</sup> Press Release, Administrative Office of Pennsylvania Courts (Nov. 4, 2005), *available at* <http://www.courts.state.pa.us/index/aopc/PressReleases/prrel05n04.asp> (last visited Sept. 27, 2007).

<sup>64</sup> Bureau of Justice Assistance, Justice Issues: Adjudication, *available at* <http://www.ojp.usdoj.gov/BJA/topics/adjudication.html> (last visited Sept. 27, 2007).

<sup>65</sup> THE STATE OF THE COMMONWEALTH’S COURTS, AN UPDATED REPORT 7 (2007).

<sup>66</sup> National Judicial College, Courses, Handling Capital Cases, *at* <http://www.judges.org/courses/hcc1107.html> (last visited Sept. 27, 2007).

## II. ANALYSIS

### A. Recommendation #1

**States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.**

All Pennsylvania Supreme Court Justices and judges of the Superior Court, Commonwealth Court, and Courts of Common Pleas are selected in partisan elections.<sup>67</sup> Judicial elections operate in tension with a core principle of the judiciary—namely that “[a]n independent and honorable judiciary is indispensable to justice in our society.”<sup>68</sup> Elections, whether partisan or not, raise significant questions about both the fairness of the judicial selection process and the independence of judges.<sup>69</sup> By maintaining general partisan elections for all state judges, the Commonwealth of Pennsylvania has left its judiciary particularly vulnerable to political sway.

Judicial elections often allow monetary influences to seep into the judicial selection process.<sup>70</sup> During the past two decades, the costs of judicial elections in Pennsylvania have steadily risen. Between 1989 and 1999, thirty Supreme Court candidates garnered \$13 million in campaign contributions.<sup>71</sup> Yet, in 2001, two Supreme Court candidates amassed more than \$1 million each in campaign funds, and, in 2003, another six Supreme Court candidates amassed more than \$3.3 million in contributions.<sup>72</sup>

The accompanying commentary to Canon 1 of the Pennsylvania Code of Judicial Conduct specifically mandates that a judge not only avoid “impropriety,” but also the “appearance of impropriety.”<sup>73</sup> Judicial elections unavoidably foster the impression that a judge’s constituents come before the law. In 1998, the Pennsylvania Supreme Court’s Special Commission to Limit Campaign Expenditures— created to determine whether public perception of judicial elections had diminished confidence in the judiciary— found that 88 percent of Pennsylvania voters believed that campaign contributions influenced judges’ decisions “at least some of the time.”<sup>74</sup> The Special Commission recommended limiting contributions from individuals and legal entities in both statewide and local races as well as setting expenditure limits, such as \$1,000,000 for Pennsylvania Supreme Court

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<sup>67</sup> PA. CONST. art. V, § 13. Justices and judges must retire by age 70, but may serve at the discretion of the Supreme Court as a senior judge until age 75. *Id.* § 16(b); Pennsylvania Unified Judicial System, Judicial Qualifications, Election, Tenure, Vacancies, <http://www.courts.state.pa.us/Index/UJS/judquals.asp> (last visited Sept. 27, 2007).

<sup>68</sup> PA. CODE OF JUD. CONDUCT, Canon 1.

<sup>69</sup> See Mark E. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. OF L. AND PUBLIC POLICY 273, 277 (2002).

<sup>70</sup> Compare JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 13 (2005), with JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002, at 19 (2005), and JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000, at 11 (2005).

<sup>71</sup> James Eisenstein, *Financing Pennsylvania’s Supreme Court Candidates*, 84 JUDICATURE 10 (2000).

<sup>72</sup> JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 60 (2007).

<sup>73</sup> PA. CODE OF JUD. CONDUCT, Canon 1(B) cmt.

<sup>74</sup> REPORT OF THE SPECIAL COMMISSION TO LIMIT CAMPAIGN EXPENDITURES (PENNSYLVANIA) (1998)

racers. As yet, the Pennsylvania Legislature has failed to adopt limits on campaign contributions from individuals and PACs.<sup>75</sup>

Pennsylvania's retention system has also opened its judiciary to political pressures. Under Pennsylvania law, to serve an additional term, each judge must participate in a retention election.<sup>76</sup> The retention system was adopted to ensure that, once elected, judges were not subject to the political pressures traditionally associated with campaigning for an elected office.<sup>77</sup> Ironically, retention elections have recently had the opposite effect, failing to insulate the judicial process from political pressures and campaign demands. In 2005, Justices Russell Nigro and Justice Sandra Schultz Newman raised nearly \$1 million to defend their *unopposed* seats on the Pennsylvania Supreme Court. While Justice Newman retained her seat by a slim margin, Justice Nigro was ousted.

The non-retention of Justice Nigro demonstrates the increasing infusion of politics into Pennsylvania's judicial selection process. Angered because the court upheld a pay raise benefiting judges, legislators, and members of the Governor's Cabinet, special interest groups advanced a "vote no" campaign against Justice Nigro. Despite raising over half a million dollars in campaign funds, giving campaign speeches, and running commercials, Justice Nigro lost his retention election, becoming the first Supreme Court Justice in Pennsylvania's history to lose his seat.<sup>78</sup>

In light of these issues, there has been a robust movement in Pennsylvania to switch to a merit-selection system, whereby qualified candidates nominated by a bi-partisan commission would be appointed by the Governor and approved by the Senate. Indeed, merit selection has received bi-partisan support from Pennsylvania's executive and legislative branches. Pennsylvania's most recent governors have advocated for a switch to merit selection,<sup>79</sup> and for years, bills have been introduced in both the Senate and House advocating the change.<sup>80</sup>

Clearly, Pennsylvania's judicial system is not immune to political pressure. While the Commonwealth has previously examined, in part, the fairness of its judicial selection process through the Pennsylvania Supreme Court's Special Commission to Limit Campaign Expenditures, trends indicate an increasing threat to the judiciary's

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<sup>75</sup> Lynn Marks & Ellen Mattleman Kaplan, *Disorder in the Courts*, PITTSBURGH POST-GAZETTE, Nov. 14, 1993, at B1.

<sup>76</sup> PA. CONST. ART. V, § 15(b). Only if a judicial vacancy arrives before the term has expired or a judge fails to retain his/her seat may the Governor appoint a replacement from a list of nominees submitted by the Judicial Qualifications Commission (JQC). *Id.* at § 14(a). The Governor then will appoint one of the nominees, with the advice and consent of the Pennsylvania Senate, to serve until the next election. *Id.* at § 13(b).

<sup>77</sup> Pennsylvania Unified Judicial System, Judicial Qualifications, Election, Tenure, Vacancies, <http://www.courts.state.pa.us/Index/UJS/judquals.asp> (last visited Sept. 27, 2007).

<sup>78</sup> James Dao, *In Rare Battle, Justices are Fighting for their Seats*, N.Y. TIMES, Nov. 6, 2005, at 125.

<sup>79</sup> See, e.g., James O'Toole, *Rendell, Fisher Agree on Merit Selection for Judges on State Appellate Courts*, PITTSBURGH POST-GAZETTE, Sept. 16, 2002 (noting then-gubernatorial Democratic candidate Ed Rendell and his Republican opponent both supported merit selection); Editorial, *Appoint State Judges*, PHILADELPHIA INQUIRER, Feb. 7, 2001 (supporting Republican Governor Tom Ridge's call for merit selection).

<sup>80</sup> S.B. 100, 2005-2006 Sess. (Pa. 2005).

independence. Accordingly, the Commonwealth of Pennsylvania is only in partial compliance with Recommendation #1.

*B. Recommendation #2*

**A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

Prior to 2003, Pennsylvania prohibited judicial candidates from announcing their views on disputed legal or political issues. After the United States Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, holding that such a prohibition violated judges and judicial candidates' First Amendment Rights,<sup>81</sup> Pennsylvania amended the Pennsylvania Code of Judicial Conduct to comport with the Supreme Court's ruling. As amended, Canon 7(B)(1)(c) of the Code permits judges and judicial candidates to announce their views on certain issues so long as they do not commit or appear to commit to a specific position on a case or issue that is likely to come before the court.<sup>82</sup> Significantly, Canon 7(B)(1)(c) still prohibits judges and judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance" of their duties.<sup>83</sup>

The resulting changes to the Code have impacted the way Pennsylvania candidates conduct themselves in judicial elections. During the 2003 judicial elections, the two Supreme Court candidates, Joan Orié Melvin and Max Baer, adopted decisively different approaches in their campaigns.<sup>84</sup> Melvin refused to announce her views, expressing concern that it would affect her impartiality in future cases should she be elected to the bench.<sup>85</sup> Baer, on the other hand, candidly discussed his general views on legal issues, announcing general positions on abortion and the death penalty.<sup>86</sup> Ultimately, Baer won the election.<sup>87</sup> In fact, the newly elected Justice Baer noted that "being so forthright 'absolutely' won votes,"<sup>88</sup> even though he was careful to explain to voters that his general view on a legal issue did not necessarily dictate how he would rule in a specific case.<sup>89</sup>

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<sup>81</sup> *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

<sup>82</sup> PA. CODE OF JUD. CONDUCT, Canon 7 (B)(1)(c).

<sup>83</sup> PA. CODE OF JUD. CONDUCT, Canon 7 (B)(1)(c). The Code also prohibits judges from publicly commenting on any pending case, but permits judges to issue "public statements in the course of their official duties" and to explain court procedures to the public. PA. CODE OF JUD. CONDUCT, Canon 3(A)(6).

<sup>84</sup> CITIZEN EDUCATION FUND VOTERS GUIDE, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CAMPAIGN 2003 (2003), available at <http://www.lwvlebanon.org/campaign2003.htm> (last visited Sept. 27, 2007)).

<sup>85</sup> George Strawley, *Judicial Hopefuls in Verbal Tightrope*, PITTSBURG POST-GAZETTE, Mar. 24, 2003, at A15.

<sup>86</sup> *Id.*

<sup>87</sup> See Emily Heller, *Electing Judges: The New Freedom, a Candidate's Views on Abortion, Torts*, 26 NAT'L L.J. 8 (Oct. 20, 2003) (hereinafter Heller).

<sup>88</sup> Emily Heller, *He Speaks on Issues, Wins State Court Seat: The Election Tested the New Right to Take Stands*, 26 NAT'L L.J. 11 (Nov. 10, 2003).

<sup>89</sup> Heller, *supra* note 87.

While the Code does permit candidates to express their views on disputed legal and political issues, some comments risk amounting to pre-judgments and blur the boundaries of appropriate judicial conduct. At the very least, when a candidate expresses support for the death penalty, s/he creates the perception that the judicial candidate will be more likely to uphold the death penalty, regardless of whether it is warranted or not. Indeed, one 2003 Superior Court candidate compared announcing his general views on issues, but refraining from committing himself to matters likely to come before the bench, to walking a tightrope.<sup>90</sup>

Most recently, on the eve of the May 2007 judicial elections, Judge Marvin Katz of the Eastern District of Pennsylvania granted a temporary injunction barring enforcement of Canon 7(B)(1)(c), thereby allowing judicial candidates to answer specific questions posed by the Pennsylvania Family Institute without fear of discipline. Some of the questions posed in the questionnaire included:

- (1) Do you believe that *Roe v. Wade*, in so far as it recognizes a “right to privacy” that includes abortion under the U.S. Constitution, was correctly or incorrectly decided?
- (2) Do you believe that the Pennsylvania Constitution permits display of the Ten Commandments in courtrooms?
- (3) Do you believe that the Pennsylvania Constitution recognizes a right to same sex marriage?

To address those instances where less restriction on judicial candidates’ political speech “might threaten the public’s interest in an open-minded, impartial judiciary,” Judge Katz leaned on the Code’s recusal canon. Under Canon 3 of the Code, “judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.”<sup>91</sup> We are unaware of any instance in which a judge has recused himself from a death penalty case and since the creation of the Court of Judicial Discipline in 1993, no judge has been disciplined as a result of comments made during a judicial campaign or their term in office that relate to the death penalty.

Based on this information, it is unclear whether the Commonwealth of Pennsylvania has taken sufficient steps to preclude judges who make promises regarding their prospective decisions on capital cases that amount to prejudgment from presiding over or reviewing capital cases. We, therefore, are unable to assess whether the Commonwealth of Pennsylvania is in compliance with this Recommendation.

### C. Recommendation #3

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<sup>90</sup> Strawley, *supra* note 85. Another candidate compared navigating the new rules to traversing a minefield. *Id.*

<sup>91</sup> PA. CODE OF JUD. CONDUCT, Canon 3(C)(1).

**Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.**

- a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.**
- b. Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.**
- c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.**

Political assaults on judges may not only affect the way judges decide death penalty cases, but may also affect the public’s perception of the judiciary’s proper role. The negative image created by these attacks is exacerbated by the inability of the judiciary to speak in its own defense. It is therefore imperative that bar associations and community leaders publicly defend judges from assaults that undermine the independence of the judiciary.

The Pennsylvania Bar Association has recognized the significance of maintaining an independent judiciary. In 1999, concern over partisan attacks on the judiciary prompted the Pennsylvania Bar Association to create the Council on Judicial Independence (Council).<sup>92</sup> The Council’s main objective is to educate the public and media about the judicial system, the role of judges, and the separation of powers.<sup>93</sup> Importantly, the Council may issue press releases when a judicial opinion prompts a personal attack on the judge’s reputation.<sup>94</sup> In addition to the creation of the Council, the Pennsylvania Bar Association has honored judges who have demonstrated their commitment to the “ideals of judicial independence.” In 2006, the Pennsylvania Bar Association awarded its John Marshall award to Middle District Judge John E. Jones, III, who was vilified by opponents who disagreed with his ruling in a controversial case regarding teaching “intelligent design” in Pennsylvania’s public schools.<sup>95</sup>

Because we did not obtain sufficient information to appropriately assess the role of the bar association and community leaders in speaking out in defense of sitting judges with respect to capital cases, we are unable to determine whether the Commonwealth of Pennsylvania is in compliance with Recommendation #3.

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<sup>92</sup> Pennsylvania Bar Association, State Bar Creates Group to Promote Awareness of Judicial Decisions, *available at* <http://www.pabar.org/public/news%20releases/prpromotejud.asp> (last visited Sept. 27, 2007).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Pennsylvania Bar Association, Judge John E. Jones Receives Pennsylvania Bar Association’s Inaugural Award Recognizing Judicial Independence, *available at* <http://www.pabar.org/public/news%20releases/pr06106b.asp> (last visited Sept. 27, 2007).

*D. Recommendation #4*

**A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.**

*Recommendation #5*

**A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.**

The Pennsylvania Code of Judicial Conduct advises judges to “take or initiate appropriate action” when they become aware of a lawyer’s unprofessional conduct.<sup>96</sup> The Code further provides that appropriate action may include reporting a lawyer’s misconduct to the proper disciplinary body.<sup>97</sup> Pennsylvania has entrusted the Office of the Disciplinary Counsel, the Disciplinary Board of the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court with investigating complaints and disciplining practicing attorneys.<sup>98</sup> We do not have sufficient information to assess how effectively these mechanisms operate and therefore cannot assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #4.

In very rare circumstances, to remedy the prejudicial impact of prosecutorial misconduct, judges have applied the Pennsylvania Constitution’s double jeopardy clause to prevent the retrial of a defendant.<sup>99</sup> Yet, we were unable to ascertain the more general measures taken by individual judges in Pennsylvania to remedy the harm caused by ineffective defense counsel or prosecutorial misconduct. We are therefore unable to assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #5.

*E. Recommendation #6*

**Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.**

Pennsylvania law does not explicitly require judges to ensure that capital defendants are provided with full discovery. However, Canon 3 of the Pennsylvania Code of Judicial Conduct requires judges to be “faithful to the law” and perform their duties impartially, which includes enforcing existing discovery laws.<sup>100</sup>

Under Pennsylvania Rule of Criminal Procedure 574, a judge must enforce disclosure of certain information and materials within the possession or control of the prosecutor so long as the parties have made a good faith effort to resolve discovery issues

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<sup>96</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3).

<sup>97</sup> PA. CODE OF JUD. CONDUCT, Canon 3(B)(3) cmt.

<sup>98</sup> PA. RULES OF DISCIPLINARY ENFORCEMENT R. 103 (2006).

<sup>99</sup> Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992).

<sup>100</sup> PA. CODE OF JUD. CONDUCT, Canon 3(A)(1).

informally.<sup>101</sup> The judge, however, retains discretion in compelling the defense to disclose information to the prosecution as well as discretion in compelling the prosecution to disclose other information, such as the names and addresses of eyewitnesses and any statements made by co-defendants, co-conspirators, or accomplices.<sup>102</sup> Significantly, at any time, the judge, upon a sufficient showing, may deny, restrict, or defer discovery.<sup>103</sup> The judge also has the discretion to issue any other “appropriate” order, which presumably includes enlarging the scope of discovery.<sup>104</sup>

If a party fails to comply with Rule 573, the judge may compel discovery or inspection, grant a continuance, prohibit the introduction of the undisclosed evidence, or enter any other order it “deems just under the circumstances.”<sup>105</sup>

Because we were unable to obtain sufficient information to assess whether Pennsylvania judges, as a whole, are ensuring that defendants are provided with full discovery in capital cases, we are unable to determine whether the Commonwealth of Pennsylvania meets the requirements of this Recommendation.

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<sup>101</sup> PA. R. CRIM. P. 573(A), (B)(1).

<sup>102</sup> PA. R. CRIM. P. 573(B)(2), (C).

<sup>103</sup> PA. R. CRIM. P. 573(F).

<sup>104</sup> *Id.*

<sup>105</sup> PA. R. CRIM. P. 573(E).

## CHAPTER TWELVE

### THE TREATMENT OF RACIAL AND ETHNIC MINORITIES

#### INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*<sup>1</sup> that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that requires that the state identify the various ways in which race affects the administration of the death penalty and that the state devise strategies to root out discriminatory practices.

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<sup>1</sup> 481 U.S. 279 (1987).

## I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp*.<sup>2</sup> Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.<sup>3</sup> The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.<sup>4</sup>

In 1999, over a decade after *McCleskey*, the Pennsylvania Supreme Court established the Committee on Racial and Gender Bias in the Justice System (Committee) to "determine whether racial or gender bias plays a role in the justice system."<sup>5</sup> In its final report, the Committee issued 173 recommendations to redress the inequities found within Pennsylvania's justice system, including its capital system.<sup>6</sup> Less than two years after the release of the final report, the Pennsylvania Supreme Court formed the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness (Commission) to implement the Committee's recommendations.<sup>7</sup>

### *A. The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*

In 2000, the Pennsylvania Supreme Court established the Committee on Racial and Gender Bias in the Justice System to determine whether women and minorities in the Pennsylvania court system received "equal justice."<sup>8</sup> The Committee, which was composed of nine members, conducted a three-year review of the Commonwealth's judicial system.<sup>9</sup> In 2003, the Committee issued the *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System* (Final Report), which detailed its findings and strategies on eliminating racial discrimination within the Pennsylvania criminal justice system.<sup>10</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 291-92.

<sup>4</sup> *Id.* at 297.

<sup>5</sup> *See* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, INTRODUCTION 12 (2003) [hereinafter FINAL REPORT], at <http://www.courts.state.pa.us/Index/Supreme/biasreport.htm> (last visited Sept. 27, 2007).

<sup>6</sup> *See* INTERBRANCH COMMISSION FOR GENDER, RACIAL, AND ETHNIC FAIRNESS, 2005 ANNUAL REPORT 3 (2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Administrative Office of the Pennsylvania Courts, Press Release, Supreme Court Accepts Final Report From Racial and Gender Bias Committee (March 4, 2003), at <http://www.courts.state.pa.us/Index/Aopc/PressReleases/prrel03304.asp> (last visited Sept. 27, 2007).

In addition to examining jury selection, sentencing disparities, indigent defense, and other areas of Pennsylvania’s criminal justice system, the Committee examined racial and ethnic disparities in the imposition of the death penalty and recommended ways to eliminate any identified racial and ethnic discrimination in the imposition of the death penalty.<sup>11</sup> Following its review, the Committee concluded that there existed “strong indications” that Pennsylvania’s death penalty system did not “operate in an evenhanded manner.”<sup>12</sup> For example, the Committee found that African American defendants in Philadelphia County were sentenced at a “significantly higher rate” than similarly situated non-African American defendants.<sup>13</sup> The Committee also noted that one third of the African American death-row inmates in Philadelphia County would have received a sentence of life imprisonment if, in fact, they had not been African American.<sup>14</sup> Professor David C. Baldus of the University of Iowa School of Law testified before the Committee and:

[L]ikened the impact of being African American [in Philadelphia] to being saddled with an extra aggravating factor, that is, on average, being African American increased the chance of a defendant receiving a death sentence to the same degree that the presence of the aggravating circumstance of “torture” or “grave risk of death” increased the chance of a non-African American getting a death sentence.<sup>15</sup>

The Committee also found that race was a “major factor” in the jury selection process in Philadelphia, “with the prosecution striking African Americans from the jury twice as often as non-African Americans” and the defense striking non-African Americans from the jury twice as often as African Americans.<sup>16</sup>

On the basis of these findings, which the Committee considered as evidence of the “substantial” impact of race in Philadelphia, the Committee recommended a “large-scale, state-sponsored and state-funded research effort” of Pennsylvania’s death penalty.<sup>17</sup> The Committee stated:

Not until the Commonwealth undertakes a comprehensive data collection effort and subjects the data to rigorous analysis, can the question of the role of race and ethnicity in capital cases be fully addressed.<sup>18</sup>

The Committee also made a number of other recommendations to the Pennsylvania Supreme Court, the Legislature, Attorney General, District Attorneys, and the Governor to address the racial disparities within the Commonwealth’s death penalty system, including in part:<sup>19</sup>

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<sup>11</sup> FINAL REPORT, *supra* note 5, at. 200.

<sup>12</sup> *Id.* at 201.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 206.

<sup>16</sup> *Id.* at 201.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 219-21.

- (1) Declaring a moratorium on the imposition of the death penalty, pending the completion of a study investigating the role of race in the death penalty system;
- (2) Reducing the number of peremptory strikes in capital cases;
- (3) Enacting a Racial Justice Act to allow evidence of a pattern and practice of disparate treatment in the prosecutor's discretion to seek the death penalty or in the imposition of a death sentence;
- (4) Enacting a law requiring the Pennsylvania Supreme Court to review death sentences for proportionality;
- (5) Having district attorney's offices adopt written standards and procedures for making decisions about whether to seek the death penalty;
- (6) Empanelling 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.<sup>20</sup>

*B. The Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness*

In 2005, less than two years after the Committee released its Final Report, the Pennsylvania Supreme Court established the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness (Commission) to implement the recommendations of the Final Report.<sup>21</sup> The Commission is comprised of twenty-four members, including judges, attorneys, legislators, and community advocates.<sup>22</sup>

One of the Commission's main initiatives has been the development of a data collection system for capital cases.<sup>23</sup> In pursuit of this effort, the Criminal Justice Committee of the Commission has obtained the data collection forms formerly used by the Administrative Office of the Pennsylvania Courts to record information relating to death penalty cases, culled information on other states' death penalty data collection systems, and amassed data on Pennsylvania's new computerized system for collecting data in criminal cases.<sup>24</sup> At the same time, the Criminal Justice Committee has been urging the Commonwealth to conduct a new study on racial and ethnic disparities within Pennsylvania's capital justice system.<sup>25</sup>

The Commission also has undertaken the task of redressing the racial discrepancies found in Pennsylvania's jury selection process through its Jury Service Committee. The Committee, which has been charged with pinpointing best practices in the jury selection process in the hopes of diversifying juries, has compiled its efforts into the *Report on*

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<sup>20</sup> *Id.*

<sup>21</sup> *See* ANNUAL REPORT, *supra* note 6, at 2-3.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.*

<sup>25</sup> INTERBRANCH COMMISSION FOR GENDER, RACIAL, AND ETHNIC FAIRNESS, COMMONWEALTH OF PENNSYLVANIA STATUS REPORT 4 (2007) [hereinafter STATUS REPORT].

*Suggested Standardized Procedures for the Jury Selection Process.*<sup>26</sup> In addition to the report, the Jury Service Committee is holding a series of regional jury diversity seminars throughout the Commonwealth to “provide a forum for local judges and court administrators to share information on successful strategies they have developed [to address diversity], and . . . to advise the [C]ommittee about nuances in the jury selection process in their particular localities.”<sup>27</sup>

Similarly, in an attempt to address the lack of diversity within the Pennsylvania court system, the Commission’s Employment and Appointments Committee has issued the *Diversity Recruitment Resource Manual*, a resource that provides judges and judicial administrators with guidance on diversifying their court appointments.<sup>28</sup> The manual incorporates information on model employee diversity programs from the federal government, courts, and municipalities throughout the country.<sup>29</sup> It also details “Best Practice Tips” for hiring minorities in the Pennsylvania judicial system, such as “target[ing] advertising and recruitment sources to maximize exposure to diverse groups.”<sup>30</sup>

### C. *Non-State Commissioned Studies on Racial and Ethnic Bias in Pennsylvania’s Capital System*

#### 1. The Baldus Studies

In 1998, David C. Baldus and George Woodworth conducted a study entitled *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*.<sup>31</sup> The study found the defendant’s race is a “substantial influence in the Philadelphia capital charging and sentencing system, particularly in jury penalty trials.”<sup>32</sup> The study further found that the “principal source” of racial disparities in Philadelphia’s death penalty derived from jurors, rather than prosecutorial decision-making.<sup>33</sup>

Baldus conducted a second study in 2001 entitled *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*.<sup>34</sup> This study “document[ed] a significant source of injustice in the peremptory strike system currently used in Philadelphia capital trials.”<sup>35</sup> The study found prosecutors disproportionately struck

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<sup>26</sup> *Id.*

<sup>27</sup> ANNUAL REPORT, *supra* note 6, at 11.

<sup>28</sup> See INTERBRANCH COMMISSION FOR GENDER, RACIAL, AND ETHNIC FAIRNESS, DIVERSITY RECRUITMENT RESOURCE MANUAL 2 [hereinafter RESOURCE MANUAL], available at [http://origin-www.courts.state.pa.us/index/InterBranchForFairness/Publications/DiversityManual\\_pgsfinal.pdf](http://origin-www.courts.state.pa.us/index/InterBranchForFairness/Publications/DiversityManual_pgsfinal.pdf) (last visited Sept. 27, 2007).

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 15-16.

<sup>31</sup> David C. Baldus, George Woodworth, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) [hereinafter Baldus & Woodworth].

<sup>32</sup> *Id.* at 1714.

<sup>33</sup> *Id.* at 1715.

<sup>34</sup> David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) [hereinafter Baldus].

<sup>35</sup> *Id.* at 130.

African American venire members. While prosecutors struck on average 51 percent of African American venire members, they struck only 26 percent of non-African American venire members.<sup>36</sup> The study found that the “prime targets and clearest choices” for prosecutorial strikes were young African American women and men, followed by middle-aged African American women.<sup>37</sup> Meanwhile, the study showed that the defense exercised its peremptory challenges to disproportionately strike non-African American venire members.<sup>38</sup> The study concluded that “a relationship existed between the racial composition of juries and the frequency with which death sentences were imposed.”<sup>39</sup>

The study also found that claims addressing a party’s discriminatory use of peremptory challenges were raised in less than 10% of capital cases.<sup>40</sup> Despite “evidence that the discrimination is widespread,” of the twenty-four capital cases in the study involving claims of discriminatory use of peremptory challenges, no cases were granted appellate relief on the claim.<sup>41</sup> The study noted that, as a result, “race and gender discrimination continue to flourish with corrective judicial action likely in only the most extreme circumstances.”<sup>42</sup>

To redress the discrimination in Philadelphia’s capital system, the study recommended: (1) creating a strike rate limit against minority groups, such as 50 percent, that neither side could exceed; and (2) allowing the defense a greater number of peremptory strikes than the prosecution.<sup>43</sup>

## 2. The Foglia Study

Wanda Foglia of Rowan University also prepared a study for the Committee’s Report entitled *Report on Capital Juror Decision-Making in Pennsylvania*.<sup>44</sup> The study, which was based on a survey of seventy-four jurors from twenty-seven capital trials in Pennsylvania, revealed “evidence of discrimination in the decision-making process.”<sup>45</sup> The study found that defendants were more than twice as likely to receive the death penalty when the jury was composed of six or more white male jurors and that jurors were “more likely to prematurely decide the defendant deserves death, before the sentencing phase even begins, when the defendant [was] Black or NonWhite.”<sup>46</sup> In general, Foglia found that African American defendants “[were] more likely” to receive the death penalty than white defendants.<sup>47</sup>

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<sup>36</sup> *Id.* at n.209.

<sup>37</sup> *Id.* at 123. The defense’s “prime targets and clearest choices” were older non-African American men, middle-aged non-African American men, and older non-African American women. *Id.*

<sup>38</sup> *Id.* at 121-22.

<sup>39</sup> FINAL REPORT, *supra* note 5, at 207.

<sup>40</sup> *See* Baldus, *supra* 34, at 123.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 128.

<sup>43</sup> *Id.* at 130.

<sup>44</sup> *See* FINAL REPORT, *supra* note 5, app. 1, ch. 6 (Wanda D. Foglia, *Report on Capital Juror Decision-Making in Pennsylvania*, in FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Foglia also examined lingering doubt in Pennsylvania death penalty cases and found that jurors had a “greater tendency” to have lingering doubt about a defendant’s guilt when the defendant was White rather than African-American.<sup>48</sup> Lingering doubt of the defendant’s guilt, while not a mitigating factor, “may be the strongest ‘operative’ factor in actually reducing the chances the defendant will be sentenced to death.”<sup>49</sup>

In addition to lingering doubt, Foglia examined jurors’ consideration of a defendant’s future dangerousness when deciding whether to sentence the defendant to death or life imprisonment.<sup>50</sup> Nearly eighty percent of interviewed jurors indicated that “keeping [the\ defendant from killing again” was an important factor during the sentencing hearing.<sup>51</sup> In terms of a capital defendant’s race, Foglia noted that research indicated that “black defendants were more likely to be seen as dangerous, especially by white jurors.”<sup>52</sup> Specifically, Foglia’s own research found that when the defendant was African-American, 73.1 percent of jurors considered the defendant’s future dangerousness as an “important consideration” at sentencing. Alternatively, when the defendant was white, only 25 percent of jurors consider the defendant’s future dangerousness an important consideration in deciding whether to sentence the defendant to death or life imprisonment.<sup>53</sup>

Based on the study’s findings, Foglia recommended:

- (1) Informing jurors in every capital trial that a life sentence in Pennsylvania means life without the possibility of parole;
- (2) Intensifying efforts during *voir dire* to minimize the over representation of white males on the jury;
- (3) Intensifying efforts during *voir dire* to reveal juror attitudes towards race and strike for cause any jurors who are suspect;
- (4) Emphasizing at the outset how important it is that jurors wait until the sentencing phase to make their penalty decision; and
- (5) Making sure jurors understand what factors they are supposed to be considering at sentencing in order to minimize their basing decisions on personal prejudice.<sup>54</sup>

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<sup>48</sup> *Id.* Sixteen point seven percent of the Pennsylvania capital jurors indicated that lingering doubt about a white defendant’s guilt was a “very important” consideration during sentencing and 16.7 percent of the capital jurors indicated that such lingering doubt was a “fairly important” consideration for sentencing. *Id.* Meanwhile, 1.9 percent of the capital jurors indicated that lingering doubt was a “very important” consideration in a Black defendant’s sentencing and 11.5 percent of the jurors indicated that lingering doubt was a “fairly important” consideration in a Black defendant’s sentencing. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Foglia’s juror interviews “demonstrate that future dangerousness is nearly always an important consideration when [jurors] decide the sentence.” *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

## II. ANALYSIS

### A. Recommendation #1

**Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.**

The Commonwealth of Pennsylvania has undertaken at least two initiatives that seek to investigate and evaluate the impact of racial discrimination as well as develop strategies that strive to eliminate it in its criminal justice system: (1) the Pennsylvania Supreme Court's Committee on Racial and Gender Bias in the Justice System and (2) the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness.

On October 15, 1999, the Pennsylvania Supreme Court created the Committee on Racial and Gender Bias in the Justice System (Committee) to study "the state court system to determine whether racial or gender bias plays a role in the justice system."<sup>55</sup> In conducting its study, the Committee reviewed existing studies on the death penalty in Pennsylvania and other states, surveyed county public defender offices and court administrators, and conducted public hearings.<sup>56</sup> In 2003, the Committee issued a final report detailing its findings and recommendations to address the racial discrimination apparent in Pennsylvania's criminal justice system.<sup>57</sup>

In its final report, the Committee found that "there are strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner."<sup>58</sup> The Committee concluded that, in at least some counties in Pennsylvania, "race plays a major, if not overwhelming, role in the imposition of the death penalty."<sup>59</sup> In order to eliminate racial discrimination within Pennsylvania's death penalty system, the Committee issued twenty-three recommendations, including in part:

- (1) Declaring a moratorium on the imposition of the death penalty, pending the completion of a study investigating the impact of race in the death penalty;
- (2) Undertaking 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;

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<sup>55</sup> FINAL REPORT, *supra* note 5, at 12. There also have been three independent initiatives that specifically examined racial discrimination in Pennsylvania's death penalty system. See Baldus & Woodworth, *supra* note 31; Baldus, *supra* note 34; Foglia, *supra* note 44.

<sup>56</sup> FINAL REPORT, *supra* note 5, at 201.

<sup>57</sup> See Administrative Office of the Pennsylvania Courts, Press Release, Supreme Court Accepts Final Report From Racial and Gender Bias Committee (March 4, 2003), at <http://www.courts.state.pa.us/Index/Aopc/PressReleases/prrel03304.asp> (last visited Sept. 27, 2007); see also FINAL REPORT, *supra* note 5.

<sup>58</sup> FINAL REPORT, *supra* note 5, at 201.

<sup>59</sup> *Id.* at 218.

- (3) Requiring 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;
- (4) Requiring trial courts during *voir dire* in capital cases to explore fully, when requested by either party, views about race held by prospective jurors;
- (5) Promulgating 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;
- (6) Requiring trial courts to charge capital jurors, 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;
- (7) Promulgating 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/her qualifications, fitness, or bias shall be viewed as presumptively pretextual;
- (8) Reducing the number of peremptory strikes in capital cases;
- (9) Enacting a Racial Justice Act 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;
- (10) Enacting a proportionality provision requiring the Pennsylvania Supreme Court to review death sentences for proportionality;
- (11) Enacting 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;
- (12) Having district attorney's offices adopt written standards and procedures for making decisions about whether to seek the death penalty;
- (13) Empanelling 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; and
- (14) Empanelling 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.<sup>60</sup>

Less than two years after the Committee released its Report, the Pennsylvania Supreme Court created the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness (Commission).<sup>61</sup> The purpose of this commission is, in part, to "evaluate and select for implementation" the recommendations of the Committee.<sup>62</sup>

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<sup>60</sup> *Id.* at 219-221.

<sup>61</sup> See ANNUAL REPORT, *supra* note 6, at 2-3. The Commission is comprised of twenty-four members which includes: judges, attorneys, legislators, and community advocates. *Id.*

<sup>62</sup> See Interbranch Commission for Gender, Racial, and Ethnic Fairness, Mission Statement, *available at* <http://origin-www.courts.state.pa.us/index/InterBranchForFairness/> (last visited Sept. 27, 2007).

Since its establishment, the Commission has begun the development of a data collection system for death penalty cases<sup>63</sup> and has issued the *Diversity Recruitment Resource Manual* to provide judges and judicial administrators with guidance on diversifying court appointments.<sup>64</sup> Significantly, the Commission also has undertaken the task of redressing the racial discrepancies found in Pennsylvania's jury selection process by pinpointing best practices and conducting a host of regional jury diversity seminars throughout the Commonwealth.<sup>65</sup>

While the Commonwealth of Pennsylvania has examined the impact of racial discrimination and made recommendations that strive to eliminate its impact, the vast majority of recommendations have yet to be implemented. The Commonwealth of Pennsylvania, therefore, is only in partial compliance with Recommendation #1.

In light of this, the Pennsylvania Death Penalty Assessment Team recommends that the Commonwealth of Pennsylvania sponsor a comprehensive study to determine the existence or non-existence of unacceptable disparities, whether racial, socio-economic, geographic, or otherwise, in its death penalty system, and develop and implement proposals to eliminate any such disparities.

#### *B. Recommendation #2*

**Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.**

In 2003, after examining racial disparities in the imposition of the death penalty in Pennsylvania, the Committee on Racial and Gender Bias in the Justice System stated that:

The creation and maintenance of a detailed database encompassing all factors which could influence capital decision-making is central to the development of any comprehensive plan to identify possible racial and gender discrimination in capital charging and sentencing.<sup>66</sup>

At that time, the Committee recognized that “no governmental authority is systemically collecting data on capital charging and sentencing in Pennsylvania.”<sup>67</sup>

The Administrative Office of the Pennsylvania Courts (AOPC) did previously collect some information on first-degree murder convictions. Prior to 1998, the Pennsylvania Supreme Court conducted proportionality review, which required trial judges to complete

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<sup>63</sup> See ANNUAL REPORT, *supra* note 6, at 15.

<sup>64</sup> *Id.* at 9.

<sup>65</sup> *Id.* at 11; see also STATUS REPORT, *supra* note 25.

<sup>66</sup> FINAL REPORT, *supra* note 5, at 203.

<sup>67</sup> *Id.*

murder review forms for all first-degree murder convictions.<sup>68</sup> The President Judge of each county was then required to provide information pertaining to each conviction to the AOPC.<sup>69</sup> Information submitted to the AOPC included: (1) “the facts and circumstances of the crimes,” (2) “the aggravating and mitigating circumstances arguably presented by the evidence,” (3) the defendant and victim’s gender and race, and (4) “other information pertaining to the conduct and prosecution of the case.”<sup>70</sup> However, when the Pennsylvania Legislature repealed the statutory requirement that courts conduct proportionality review in capital cases, the Pennsylvania Supreme Court also “rescinded its order to submit the review forms.”<sup>71</sup>

In its final report, the Committee rejected reinstating the prior system of review forms, finding that the system was “inadequate to allow an analysis of race effects.”<sup>72</sup> Specifically, the Committee found that the review forms had been limited to first-degree murder convictions, thereby addressing only a narrow range of cases and preventing analysis of prosecutorial discretion “to plead death-eligible cases to lesser degrees of murder,” and that the forms did not indicate which mitigating factors had been considered or the number of non-statutory factors that may have affected the sentencing decision.<sup>73</sup>

Instead, the Committee recommended that a large-scale, comprehensive data collection effort should be created and administered under the auspices and authority of the Pennsylvania Supreme Court.<sup>74</sup> Since the creation of the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness (Commission), one of its main initiatives has been the development of a data collection system for capital cases.<sup>75</sup> In pursuit of this effort, the Criminal Justice Committee of the Commission has obtained the data collection forms formerly used by the Administrative Office of the Pennsylvania Courts to record information relating to death penalty cases, culled information on other states’ death penalty data collection systems, and amassed data on Pennsylvania’s new

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<sup>68</sup> See *Commonwealth v. Spatz*, 896 A.2d 1191, 1249 n.44 (Pa. 2006); see also *Commonwealth v. Frey*, 475 A.2d 700, 711-13 app. (Pa. 1984) (containing a murder review form). The murder review form requested the following information: (1) the race and sex of the defendant; (2) the race and sex of the victim; (3) whether guilt was determined by the jury, trial court, or a guilty plea; (4) whether the death penalty was sought and if it was sought, whether the defendant was sentenced to death or life imprisonment; (5) whether the sentence was determined by the jury or the judge; (6) a list of the aggravating and mitigating circumstance(s) presented at the sentencing hearing and a brief description of the facts and evidence relevant to each circumstance; (7) a list of all offenses which were tried at the same trial, which offenses stemmed from the first-degree murder charge, and whether the defendant was convicted or acquitted of the other offenses; and (8) the name, indictment, and charges of any co-defendants involved in the case. *Id.* Additionally, any opinions that were written in the case had to be attached to the murder review form as well as the transcript of the sentencing hearing. *Id.*

<sup>69</sup> See *Commonwealth v. Gribble*, 703 A.2d 426, 440 (Pa. 1997), *abrogated on other grounds by*, *Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001).

<sup>70</sup> *Id.*

<sup>71</sup> See FINAL REPORT, *supra* note 5, at 203.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 203-04.

<sup>74</sup> *Id.* at 204. The Committee stated that New Jersey’s system for collecting data on capital cases is a “model state.” *Id.* In New Jersey, the New Jersey Administrative Office of the Courts (AOC) uses a “comprehensive data collection instrument, with mandatory reporting requirements.” *Id.*

<sup>75</sup> See ANNUAL REPORT, *supra* note 6, at 15.

computerized system for collecting data in criminal cases.<sup>76</sup> To the best of our knowledge, the data collection system is not yet complete.

Based on this information, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #2.

*C. Recommendation #3*

**Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.**

On October 15, 1999, the Pennsylvania Supreme Court created the Committee on Racial and Gender Bias in the Justice System (Committee) to study “the state court system to determine whether racial or gender bias plays a role in the justice system.”<sup>77</sup> In conducting its study, the Committee reviewed existing studies on the death penalty in Pennsylvania and other states, including studies conducted by David C. Baldus, Wanda Foglia, and James S. Liebman.<sup>78</sup>

However, in its final report, the Committee recognized the need for further review and recommended that the Commonwealth conduct 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.”<sup>79</sup> Significantly, the Committee noted that:

Not until the Commonwealth undertakes a comprehensive data collection effort and subjects the data to rigorous analysis, can the question of the role of race and ethnicity in capital cases be fully addressed.<sup>80</sup>

Since its creation, the Interbranch Commission for Gender, Racial and Ethnic Fairness has begun developing a data collection system for capital cases.<sup>81</sup> At the same time, the Commission’s Criminal Justice Committee has been urging that the Commonwealth conduct a new study on racial and ethnic disparities within Pennsylvania’s capital justice system. As of this date, no state study has been commenced.

Because the Commonwealth of Pennsylvania has reviewed existing studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and is in the process of collecting the necessary data to conduct further studies, Pennsylvania is in partial compliance with Recommendation #3.

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<sup>76</sup> *Id.*

<sup>77</sup> FINAL REPORT, *supra* note 5, at 12. There also have been three independent initiatives that specifically examined racial discrimination in Pennsylvania’s death penalty system. See Baldus & Woodworth, *supra* note 31; Baldus, *supra* note 34; Foglia, *supra* note 44.

<sup>78</sup> FINAL REPORT, *supra* note 5, at 201, 205, 207, 209.

<sup>79</sup> *Id.* at 219.

<sup>80</sup> *Id.* at 201.

<sup>81</sup> ANNUAL REPORT, *supra* note 6, at 15.

#### D. Recommendation #4

**Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.**

In 2003, the Committee on Racial and Gender Bias in the Justice System (Committee) concluded that “there are strong indications that Pennsylvania’s capital justice system does not operate in an evenhanded manner.”<sup>82</sup> The Committee found that “although Pennsylvania’s minority population is 11 percent, two-thirds (68 percent) of the inmates on death row are minorities,”<sup>83</sup> and that Pennsylvania was “second only to Louisiana in the percentage of African Americans on death row.”<sup>84</sup> In fact, researchers have found that a third of African Americans on death row in Philadelphia County would have received life sentences if, in fact, they had not been African American.<sup>85</sup>

In response, the Committee issued 173 recommendations; twenty-three of which dealt specifically with the administration of the death penalty,<sup>86</sup> ranging from reducing the number of peremptory strikes in capital cases<sup>87</sup> to having district attorney’s offices adopt written standards and procedures for deciding cases in which to seek the death penalty.<sup>88</sup>

After the Committee issued its recommendations, the Pennsylvania Supreme Court created the Interbranch Commission for Gender, Racial, and Ethnic Fairness to implement the Committee’s recommendations.<sup>89</sup> One of the remedial strategies currently being pursued by the Commission is the development of a data collection system for death penalty cases.<sup>90</sup> Another strategy pursued by the Commission is ethnically diversifying juries as well as court staff.<sup>91</sup> The Commission, however, has yet to implement the majority of recommendations.

In addition to the Commonwealth’s own sponsored study, three independent studies, one spearheaded by Wanda Foglia and two by David C. Baldus, have identified patterns of racial discrimination in Pennsylvania’s death penalty system. Foglia’s study, *Report on Capital Juror Decision-Making in Pennsylvania*, revealed evidence of discrimination in jurors’ decision-making process.<sup>92</sup> The study found that defendants were more than twice as likely to receive the death penalty when the jury was composed of six or more white male jurors and that jurors were “more likely to prematurely decide the defendant

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<sup>82</sup> FINAL REPORT, *supra* note 5, at 201.

<sup>83</sup> *Id.* at 200.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 201.

<sup>86</sup> *Id.* at 219-21.

<sup>87</sup> *Id.* at 220.

<sup>88</sup> *Id.* at 221.

<sup>89</sup> See ANNUAL REPORT, *supra* note 6, at 2-3.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *Id.* at 9.

<sup>92</sup> Foglia, *supra* note 44.

deserves death, before the sentencing phase even begins, when the defendant [was] Black or NonWhite.”<sup>93</sup> To resolve this pattern of racial discrimination, Foglia recommended:

- (1) Informing jurors in every capital trial that a life sentence in Pennsylvania means life without the possibility of parole;
- (2) Intensifying efforts during *voir dire* to minimize the over representation of white males on the jury;
- (3) Intensifying efforts during *voir dire* to reveal juror attitudes towards race and strike for cause any jurors who are suspect;
- (4) Emphasizing at the outset the importance of jurors waiting until the sentencing phase to decide the defendant’s sentence;
- (5) Ensuring jurors understand the factors they are to consider at sentencing in order to minimize basing their decisions on personal prejudice.<sup>94</sup>

David C. Baldus conducted two studies addressing patterns of racial discrimination in the death penalty system in Pennsylvania, specifically in Philadelphia County. The first study, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, examined capital charging and sentencing in Philadelphia County.<sup>95</sup> The study disclosed clear patterns “that the race of the defendant is a substantial influence in the Philadelphia capital charging and sentencing system, particularly in jury penalty trials” and that the race of the victim has a “substantial influence in jury sentencing.”<sup>96</sup>

Baldus’ second study addressing the death penalty in Pennsylvania, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, focused on jury selection in capital trials in Philadelphia.<sup>97</sup> The study found that the race of potential jurors “was a major determinant in the use of [peremptory strikes] by both prosecutors and defense counsel, with the prosecution disproportionately striking black venire members and defense counsel disproportionately striking non-blacks.”<sup>98</sup> The study also found that claims relating to the discriminatory use of peremptory strikes during jury selection were raised in fewer than 10% of capital cases.<sup>99</sup> Of the twenty-four capital cases examined in the study in which the defendant had raised a claim of discriminatory use of peremptory challenges, there was not a single case that received relief for the claim on appeal.<sup>100</sup> The study recommended that courts consider creating a strike rate limit against minority groups, possibly 50 percent, that neither side could exceed and that the prosecutor be afforded less peremptory strikes than the defense.<sup>101</sup>

Despite the findings of these studies, it appears that Pennsylvania has taken only limited actions to enact remedial and preventative strategies which address the patterns of racial

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Baldus & Woodworth, *supra* note 31, at 1638.

<sup>96</sup> *Id.* at 1714-15.

<sup>97</sup> Baldus, *supra* note 34.

<sup>98</sup> *Id.* at 121-22.

<sup>99</sup> *Id.* at 123.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 130.

discrimination in the Commonwealth's death penalty system. The Commonwealth of Pennsylvania, therefore, is only in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.**

In its 2003 final report, the Committee on Racial and Gender Bias in the Justice System recommended that the Pennsylvania Legislature enact a Racial Justice Act “to permit proof of an equal protection violation by showing a pattern and practice of discrimination.”<sup>102</sup> To this date, no such law has been enacted.

Because the Commonwealth of Pennsylvania has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or victim, the Commonwealth is not in compliance with Recommendation #5.

*F. Recommendation #6*

**Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.**

In its 2003 final report, the Committee on Racial and Gender Bias in the Justice System recommended that the Pennsylvania Supreme Court “include programs on the impact of race, ethnicity, and gender bias in sentencing at judicial training seminars.”<sup>103</sup> The Committee suggested that these programs include “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.”<sup>104</sup> We were unable to determine whether any of these educational programs have been implemented. Similarly, we were unable to ascertain if the Commonwealth has implemented educational programs for prosecutors and defense attorneys specifically addressing that race should not be a factor in the administration of the death penalty.

Currently, Pennsylvania law mandates that all law enforcement officers complete a basic training course consisting of at least eight hours of instruction in “Cultural Diversity” and

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<sup>102</sup> FINAL REPORT, *supra* note 5, at 215.

<sup>103</sup> *Id.* at 158.

<sup>104</sup> *Id.*

four hours of instruction in “Ethnic Intimidation/Bias Crimes.”<sup>105</sup> Law enforcement officers also are required to renew their certification every two years by completing twelve hours of mandatory in-service training.<sup>106</sup> One in-service training program offered, “Cultural Diversity Awareness,” is aimed at increasing law enforcement awareness of the different cultural groups in Pennsylvania and the impact of such diversity on law enforcement officer’s duties.<sup>107</sup>

Along with the requirements for individual officers, a number of law enforcement certification bodies recommend or require that law enforcement agencies adopt policies on racial sensitivity. For example, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) requires certified law enforcement agencies to each establish a written directive that prohibits bias-based profiling and requires training on how to avoid bias-based profiling.<sup>108</sup> While ten law enforcement agencies in the Commonwealth of Pennsylvania are CALEA accredited,<sup>109</sup> the vast majority are not.

Furthermore, it is unclear whether Pennsylvania has imposed sanctions against Commonwealth actors who have been found to have acted on the basis of race in capital cases. For example, in 1987, Jack McMahon, the former head of the Philadelphia District Attorney’s Office appeared in a training video on jury selection techniques.<sup>110</sup> In the training video, McMahon instructed attorneys in the Philadelphia District Attorney’s Office that:

Voir Dire is to get a competent, fair, and impartial jury.” Well, that’s ridiculous . . .

. . . [T]he blacks from the low-income areas are less likely to convict . . . [Y]ou don’t want those people on your jury . . .

[I]n my experience, black women, young black women, are very bad. There’s an antagonism . . . [T]hey’re women and they’re blacks, so they’re downtrodden in two areas. And they somehow want to take it out on

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<sup>105</sup> 53 PA. CONS. STAT. § 2167(a) (2007); Municipal Police Officers’ Education & Training Commission, Training, *available at* <http://www.mpoetc.state.pa.us/mpotrs/cwp/view.asp?a=1133&q=440401&mpotrsNav=|> (last visited Sept. 27, 2007) (click on Basic Recruit Academy Outline).

<sup>106</sup> 37 PA. CODE § 203.13(c)(1), (2) (2007); 37 PA. CODE § 203.52(b)(2) (2007).

<sup>107</sup> See Municipal Police Officers’ Education & Training Commission, All Mandatory In-Service Training Topics, *available at* <http://www.mpoetc.state.pa.us/mpotrs/cwp/view.asp?a=1133&q=440898> (last visited Sept. 27, 2007).

<sup>108</sup> COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM., at 1-4 (standard 1.2.9) (4th ed. 2001).

<sup>109</sup> See Calea Online, Agency Search, *available at* <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 27, 2007). CALEA-accredited agencies in Pennsylvania include: Abington Township Police Department, Baldwin Borough Police Department, Bethlehem Police Department, Derry (Township of) Police Department, Findlay Township Police Department, Harrisburg Bureau of Police, Lower Allen Township Police Department, Pennsylvania Capitol Police, Pennsylvania State Police, University of Pennsylvania Police Department.

<sup>110</sup> See L. Stuart Ditzen et al., *Avoid Poor Black Jurors, McMahon Said*, PHILADELPHIA INQUIRER, Apr. 1, 1997, at A1.

somebody, and you don't want it to be you. And so younger black women are difficult, I've found.

I've always felt that a jury of like eight whites and four blacks is a great jury, or nine and three.

...

[W]e're all going to have to be aware of [*Batson*], and the best way to avoid any problems with it is to protect yourself. And my advice would be in that situation is when you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate later time if something happens, because if they—because the way the case is stated, that it's only after a *prima facie* showing that you're doing this that it becomes—that the trial judge can then order you to then start showing why you're striking them not on a racial basis.

So sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.<sup>111</sup>

These comments came to light after McMahon had left the District Attorney's Office. McMahon has never been sanctioned for having unlawfully acted on the basis of race in a capital case while he was acting for the Commonwealth.

Because the Commonwealth of Pennsylvania has presented educational programs on eliminating race in the criminal justice system on a limited basis and sanctions do not appear to always be imposed against Commonwealth actors acting on the basis of race in a capital case, the Commonwealth of Pennsylvania, at best, is only in partial compliance with Recommendation #6.

#### *G. Recommendation #7*

**Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.**

The Commonwealth of Pennsylvania does not require defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases, or to identify biased jurors during *voir dire*. However, the Commonwealth does require specialized training for attorneys representing capital defendants.<sup>112</sup> To serve as counsel in a capital case, an attorney must have completed at least eighteen hours of capital defense training through courses approved by the Supreme Court of Pennsylvania Continuing Legal Education Board within three years prior to his/her appointment.<sup>113</sup> Under Rule 801 of

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<sup>111</sup> Commonwealth v. Basmore, 744 A.2d 717, 729-32 (Pa. 2000).

<sup>112</sup> PA. R. CRIM. P. 801.

<sup>113</sup> PA. R. CRIM. P. 801(2)(a).

the Pennsylvania Rules of Criminal Procedure, the training received by each attorney must encompass, at a minimum, the following subjects:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;
- (4) Jury selection;
- (5) Trial preparation and presentation;
- (6) Presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (7) Ethical considerations particular to capital defense representation;
- (8) Preservation of the record and issues for post-conviction review;
- (9) Post-conviction litigation in state and federal courts;
- (10) Issues relating to those charged with capital offenses when under the age of eighteen; and
- (11) Counsel's relationship with the client and family.<sup>114</sup>

In accordance with Rule 801's requirements, the Continuing Legal Education Board has approved numerous training courses in the field of capital defense,<sup>115</sup> yet we were unable to determine if any of these courses include instruction on issues relating to racial discrimination.

Although training for defense lawyers on the issue of race in capital litigation may be available, we were unable to determine if the Commonwealth of Pennsylvania requires defense counsel to participate in training or the identification and development of racial discrimination claims in capital cases or on the identification of biased jurors during *voir dire*. We are, therefore, unable to determine if the Commonwealth of Pennsylvania is in compliance with Recommendation #7.

#### *H. Recommendation #8*

**Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.**

Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502(f) informs jurors that their verdict “must be in accordance with the law . . . and not be based on sympathy, prejudice, emotion, or public opinion, and not based solely on victim impact testimony.”<sup>116</sup> Although consideration of racial factors in the jury's decision-making

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<sup>114</sup> PA. R. CRIM. P. 801(2)(b).

<sup>115</sup> See The Supreme Court of Pennsylvania Continuing Legal Education Board, Capital Counsel Credits, available at [https://www.pacle.org/search/search\\_cap\\_dl.asp](https://www.pacle.org/search/search_cap_dl.asp) (last visited Sept. 27, 2007).

<sup>116</sup> PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502F(10) (2006). This is part of a general instruction for death penalty cases. However, the Pennsylvania Supreme Court has “never adopted or endorsed” the *Pennsylvania Suggested Standard Criminal Jury Instructions* and has stated that “[t]here is no requirement that a trial court instruct the jury by using specific words or phrases.” *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003); see also *Commonwealth v. Porter*, 728 A.2d 890, 899 (Pa. 1999) (stating that

process should be prohibited by this pattern jury instruction, there is no standard jury instruction or law mandating judges to explicitly inform jurors that it is improper to consider any racial factors in their decision-making and that they should report any evidence of racial discrimination in jury deliberations.

The Commonwealth of Pennsylvania, therefore, is not in compliance with the requirements of Recommendation #8.

*I. Recommendation #9*

**Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge’s decision-making could be affected by racially discriminatory factors.**

Canon 3 of the Pennsylvania Code of Judicial Conduct requires a judge to disqualify him/herself if in a proceeding in which the judge has “a personal bias or prejudice concerning a party . . .”<sup>117</sup> However, the number of judges who actually have disqualified themselves due to racial bias or prejudice, if any, is unknown. Consequently, we cannot assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #9.

*J. Recommendation #10*

**States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant has knowingly and intelligently waived the claim.**

The Commonwealth of Pennsylvania does not make any exceptions to the general procedural rules for claims of racial discrimination in the imposition of the death penalty. For example, a claim challenging the prosecution’s use of peremptory challenges on the basis of race is procedurally barred if it could have been raised, but the inmate failed to do so “before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding.”<sup>118</sup>

In an initial and subsequent petition for post-conviction relief, a petitioner may overcome these bars if s/he raises the issue under an effective assistance of counsel claim<sup>119</sup> or meets one of the following exceptions:

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although the Pennsylvania Supreme Court has used the standard jury instructions as an aid in its review, the Court has never placed its imprimatur on the standard jury instructions.).

<sup>117</sup> PA. CODE OF JUD. CONDUCT, Canon 3(C)(1)(a).

<sup>118</sup> 42 PA. CONS. STAT. § 9544(b) (2007); *see also* Commonwealth v. Jones, 876 A.2d 380, 384 (Pa. 2005).

<sup>119</sup> *See* Commonwealth v. Spatz, 896 A.2d 1191, 1211 (Pa. 2006) (despite trial counsel’s failure to raise claim of prosecutor using peremptory strikes improperly against female jurors, the court will consider the issue in light of determining whether trial counsel was ineffective for failing to raise the issue at trial); Commonwealth v. Sneed, 899 A.2d 1067, 1075-76 (Pa. 2006) (holding that death-sentenced inmate could

- (1) The failure to raise the claim previously was the result of interference by government officials and the claim is in violation of the Constitution or the laws of Pennsylvania or the United States;
- (2) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (3) The right asserted is a constitutional right that was recognized by the United States or Pennsylvania Supreme Courts after the one-year deadline for filing and has been held by that Court to apply retroactively.<sup>120</sup>

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #10.

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raise waived *Batson* claim in post-conviction under an ineffective assistance counsel claim for failing to raise the claim at trial and on direct appeal).

<sup>120</sup> 42 PA. CONS. STAT. § 9545(b)(1)(i)-(iii) (2007).

## CHAPTER THIRTEEN

### MENTAL RETARDATION, MENTAL ILLNESS, AND THE DEATH PENALTY

#### INTRODUCTION TO THE ISSUE

##### Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of eighteen. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

##### Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his[/her] conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most

jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study specifically found that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. When the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.

## I. FACTUAL DISCUSSION

### A. Mental Retardation

In 2002, the United States Supreme Court in *Atkins v. Virginia*<sup>1</sup> found the imposition of the death penalty upon mentally retarded offenders to be unconstitutional.<sup>2</sup> Five years later, the Pennsylvania Legislature has not yet adopted a statute banning the execution of mentally retarded individuals,<sup>3</sup> although the Commonwealth remains bound by *Atkins* and has integrated the decision into Pennsylvania case law.<sup>4</sup>

#### 1. Definition of Mental Retardation

The Pennsylvania Legislature has not statutorily defined mental retardation in the context of death penalty cases.<sup>5</sup> Rather, the Pennsylvania Supreme Court has adopted the definitions of mental retardation relied upon by the American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly the American Association on Mental Retardation, or AAMR)<sup>6</sup> and the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed. 1997) (DSM-IV).<sup>7</sup>

The AAIDD defines “mental retardation” as “a ‘disability’ characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.”<sup>8</sup> Meanwhile, the DSM-IV defines “mental retardation” as “significantly subaverage intellectual functioning (an IQ of

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<sup>1</sup> 536 U.S. 304 (2002).

<sup>2</sup> *Id.* at 321.

<sup>3</sup> In 2005, the Pennsylvania Supreme Court noted that the courts “have waited nearly three years” for the Pennsylvania Legislature to define mental retardation consistent with the United States Supreme Court’s *Atkins* decision. *Commonwealth v. Miller*, 888 A.2d 624, 633 (Pa. 2005). Justice Eakin stated:

More than three years have passed since it was announced that each state had to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case. Bills have been introduced, but no legislation has been passed to accomplish this. Meanwhile, cases languish and courts await action which has not been forthcoming.

*Id.* (concurring). Furthermore, Justice Eakin noted that “this is inherently a legislative matter – it is hoped that the legislature would also act without further delay.” *Id.*

In the 2003-04 legislative session, two bills were introduced in the Pennsylvania Legislature that would ban the execution of the mentally retarded. The bills were reintroduced in 2005. A new a bill was introduced in 2007. See S.D. 751, 190th Leg. (Pa. 2007); S.R. 631, 188th Leg. (Pa. 2005).

<sup>4</sup> See generally *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005).

<sup>5</sup> S.D. 751 would be defined as “as person who has a mental disability characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills.” S.D. 751, 190th Leg., (q) (Pa. 2007).

<sup>6</sup> Known before January 1, 2007, as the American Association on Mental Retardation. See [http://www.aamr.org/About\\_AAIDD/name.shtml](http://www.aamr.org/About_AAIDD/name.shtml) (last visited Sept. 27, 2007).

<sup>7</sup> See *Miller*, 888 A.2d at 630. The Pennsylvania Supreme Court was considering the adequacy of the AAIDD and DSM-IV definitions as applied to *Atkins* claims raised in post-conviction proceedings. *Id.*

<sup>8</sup> *Id.* at 630.

approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive function.”<sup>9</sup>

The Pennsylvania Supreme Court has recognized that “subaverage intellectual functioning” generally is defined as an IQ of between 65 and 75,<sup>10</sup> and has declined to adopt a cutoff IQ score. Furthermore, the Court has determined that the tests for mental retardation are an “interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”<sup>11</sup> The Court has defined the term “adaptive behavior” as a “collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives, and limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life.”<sup>12</sup> Consequently, when determining whether an individual is mentally retarded, the courts will consider the adaptive behavior of the individual in conjunction with his/her IQ.<sup>13</sup>

## 2. Procedure for Raising and Considering Mental Retardation Claims

The Pennsylvania Legislature has not adopted a statute delineating the procedures by which a criminal defendant may raise the issue of mental retardation as a bar to execution. Nonetheless, Pennsylvania allows such claims to be made either pre-trial or during post-conviction proceedings.<sup>14</sup>

### a. Pre-Trial Determinations of Mental Retardation

A capital defendant may raise a claim of mental retardation as a bar to execution in a pre-trial motion.<sup>15</sup>

Pursuant to the Pennsylvania Rules of Criminal Procedure, the motion must be in writing and state with particularity the grounds for the motion, the facts in support of each ground, and the relief requested.<sup>16</sup> A request for a hearing and/or argument on the motion must also be stated in the motion.<sup>17</sup> Except where ordered by the court, the Commonwealth need not answer the motion, but may, in its discretion, file a written answer or, if a hearing or argument is to be held, answer orally.<sup>18</sup>

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<sup>9</sup> *Id.* at 630.

<sup>10</sup> *See id.*

<sup>11</sup> *Commonwealth v. Crawley*, 924 A.2d 612 (Pa. 2007).

<sup>12</sup> *Miller*, 888 A.2d at 630.

<sup>13</sup> *See Id.* at 630; Interview with Marc Bookman, Assistant Defender, Defender Association of Philadelphia (Aug. 21, 2007).

<sup>14</sup> *See Crawley*, 924 A.2d at 612; *Miller*, 888 A.2d at 630. The Pennsylvania Supreme Court’s *Miller* decision only addresses petitioners for post-conviction relief. *See id.*

<sup>15</sup> Interview with Marc Bookman, Assistant Defender, Defender Association of Philadelphia (Aug. 21, 2007).

<sup>16</sup> PA. R. CRIM. P. 575(A)(1), (2)(c).

<sup>17</sup> PA. R. CRIM. P. 575(A)(2)(e).

<sup>18</sup> PA. R. CRIM. P. 575(B)(1), (2).

A pre-trial motion raising the issue of a capital defendant's mental retardation will be decided by the court.<sup>19</sup> When raising a claim of mental retardation as a bar to execution, the defendant bears the burden of proving his/her mental retardation by a preponderance of the evidence.<sup>20</sup> But as the Pennsylvania Supreme Court has yet to "develop and adopt universal standards for carrying out the mandate of the *Atkins* decision in Pennsylvania,"<sup>21</sup> it is unclear what exactly the defendant must demonstrate in order to satisfy this burden of proof.<sup>22</sup>

## b. Post-Conviction Determinations of Mental Retardation

Individuals who were sentenced to death before the U.S. Supreme Court decided *Atkins* must raise a claim of mental retardation as a bar to execution during post-conviction proceedings.<sup>23</sup> Specifically, the issue may be raised in post-conviction review under the Post-Conviction Relief Act's provision that the relief was unavailable "at the time of trial [due to] exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced."<sup>24</sup>

As with pre-trial motions, when raising a claim of mental retardation as a bar to execution, the defendant must demonstrate his/her mental retardation by a preponderance of the evidence.<sup>25</sup>

### *B. Mental Conditions Other Than Mental Retardation*

#### 1. Insanity

##### a. Definition

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<sup>19</sup> Interview with Marc Bookman, Assistant Defender, Defender Association of Philadelphia (Aug. 21, 2007).

<sup>20</sup> See *Commonwealth v. Mitchell*, 839 A.2d 202, 211 n.8 (Pa. 2003).

<sup>21</sup> *Id.* at 211.

<sup>22</sup> S.D. 751 would delineate the proof necessary for a defendant to meet a preponderance of the evidence burden in a mental retardation claim. Proof that could be presented by either the defendant or the Commonwealth includes, but is not limited to: expert testimony; an examination by a licensed psychologist; the defendant's medical, corrections, military and scholastic records; information provided by the defendant's previous physicians, teachers and mental health providers; and the defendant's IQ score.

<sup>23</sup> See *Mitchell*, 839 A.2d at 210 ("[C]onsidering the current state of the record and the importance of the claim itself, we find that this claim [of mental retardation on direct appeal] is best suited to full review in the collateral stage."); *Commonwealth v. Williams*, 854 A.2d 440, 449 (Pa. 2004) ("Appellant's *Atkins* claim is best suited for full review upon a collateral challenge."); *Commonwealth v. Taylor*, 876 A.2d 916, 937 (Pa. 2005) ("[I]t would be injudicious at this juncture for this court to pass upon the claim, and the more appropriate avenue for review of the claim is upon collateral attack if appellant so desires."). These cases all concern defendants who were sentenced to death before the *Atkins* decision. However, the reasoning used by the Pennsylvania Supreme Court in these decisions suggests that defendants sentenced to death after the *Atkins* decision also will need to pursue a mental retardation claim through post-conviction review.

<sup>24</sup> See *Williams*, 854 A.2d at 449 (citing 42 PA. CONS. STAT. § 9543(a)(2)(vi) (2007)).

<sup>25</sup> See *Mitchell*, 839 A.2d at 211 n.8.

In the Commonwealth of Pennsylvania, an individual may assert insanity as an affirmative defense to prosecution if, at the time of the offense, s/he “was laboring under such a defect of reason, from disease of mind,” as (1) “not to know the nature and quality of the act [s/]he was doing,” or (2), “if [s/]he did know it, [as not to know]...what [s/]he was doing was wrong.”<sup>26</sup>

A mental state incurred by the voluntary ingestion of alcohol or drugs cannot serve as the basis for an insanity defense.<sup>27</sup>

#### b. Pre-Trial Proceedings

If the defendant wishes to introduce evidence in support of an insanity defense, s/he first must file a written notice of intent to rely on an insanity defense.<sup>28</sup> The notice must contain “specific available information” addressing: (1) the nature and extent of the alleged insanity; (2) its duration; and (3) the names and addresses of witnesses, experts, and others whom the defendant intends to call to establish the defense.<sup>29</sup>

The notice to rely on an insanity defense must be filed no later than the deadline for filing an omnibus pretrial motion, which is typically within thirty days after arraignment.<sup>30</sup> If the defendant fails to file such a notice, the court may exclude any evidence the defendant offers in support of the insanity defense,<sup>31</sup> grant a continuance in order to allow the Commonwealth to investigate the evidence, or issue any other order “as the interests of justice require.”<sup>32</sup> Once a notice to rely on an insanity defense is filed, the defendant waives the right to refuse examination by a prosecution expert.<sup>33</sup>

Within ten days of receiving the defendant’s notice of raising an insanity defense, the Commonwealth must file a reciprocal written notice, delineating the names and addresses of all witnesses the Commonwealth intends to call to “disprove or discredit” the defendant’s claim of insanity.<sup>34</sup> If the Commonwealth fails to file the notice as required, the court may exclude any evidence offered by the Commonwealth, grant a continuance

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<sup>26</sup> 18 PA. CONS. STAT. § 314(c)(2) (2007); *see also* Commonwealth v. Jermyn, 533 A.2d 74, 82 (Pa. 1987). This standard is referred to as the M’Naghten Rule which has been codified in the Pennsylvania Consolidated Statutes Annotated. 18 PA. CONS. STAT. § 314(d) (2007); *see also* Commonwealth v. Moon, 117 A.2d 96, 99 (Pa. 1955).

<sup>27</sup> 18 PA. CONS. STAT. § 308 (2007); *see also* Commonwealth v. Henry, 569 A.2d 929, 935 (Pa. 1990).

<sup>28</sup> PA. R. CRIM. P. 568(A)(1); *see also* Commonwealth v. Sasse, 921 A.2d 1229, 1234 (Pa. Super. Ct. 2007).

<sup>29</sup> PA. R. CRIM. P. 568(A)(1)(b).

<sup>30</sup> PA. R. CRIM. P. 568(A)(1), 579(A).

<sup>31</sup> However, the court cannot exclude testimony by the defendant relating to the insanity defense. PA. R. CRIM. P. 568(B)(1).

<sup>32</sup> PA. R. CRIM. P. 568(B)(1).

<sup>33</sup> *See* Commonwealth v. Morley, 681 A.2d 1254, 1257 (Pa. 1996) (holding “that where a defendant...raises a mental-status defense, then that defendant does not have a right to raise a Fifth Amendment challenge to an examination by a Commonwealth psychiatrist”).

<sup>34</sup> PA. R. CRIM. P. 568(C).

in order to allow the defendant to investigate the evidence, or issue any other order “as the interests of justice require.”<sup>35</sup>

After the reciprocal notice is filed, both parties are “encouraged” to reach an agreement as to the selection of a mental health expert to examine the defendant.<sup>36</sup> If the parties agree on an expert, the trial court, upon the prosecutor’s motion, can order the defendant to “submit to an examination” by one or more mental health experts selected by the prosecutor.<sup>37</sup> The court order must specify the individuals who may be present at the examination and the time within which the mental health expert must submit his/her written report of the examination.<sup>38</sup> Additionally, when the trial court orders a mental health examination, the court must inform the defendant and his/her counsel of: (1) the purpose of the examination and the contents of the court order; (2) that the information obtained from the examination may be used at trial; and (3) the potential consequences of the defendant’s refusal to cooperate with the prosecution’s mental health expert.<sup>39</sup>

In addition, a defendant may be entitled to the appointment of a defense expert if the prosecution raises the issue of the defendant’s future dangerousness at trial.<sup>40</sup> The court also retains the discretion to appoint a defense expert for any other reason.

#### c. Burden of Proof

Pennsylvania law presumes that each individual prosecuted in a criminal case is sane.<sup>41</sup> The defendant therefore bears the burden of overcoming this presumption by proving by a preponderance of the evidence that s/he was legally insane at the time the offense was committed.<sup>42</sup>

#### d. Judgment of Not Guilty by Reason of Insanity

Pennsylvania law allows a jury to decide an insanity claim so long as that jury did not determine the guilt or innocence of the defendant.<sup>43</sup> When a capital defendant asserts an

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<sup>35</sup> PA. R. CRIM. P. 568(D)(1).

<sup>36</sup> PA. R. CRIM. P. 569(A)(1), cmt. The agreement must be in writing and signed by the defendant, defendant’s counsel, and the prosecutor, or stated orally on the record. PA. R. CRIM. P. 569(A)(1)(b).

<sup>37</sup> PA. R. CRIM. P. 569(A)(2)(a).

<sup>38</sup> PA. R. CRIM. P. 569(A)(2)(c).

<sup>39</sup> PA. R. CRIM. P. 569(A)(2)(b).

<sup>40</sup> Commonwealth v. Miller, 746 A.2d 592, 600 (Pa. 2000); *see also* Commonwealth v. Christy, 656 A.2d 877, 883 (Pa. 1995). In *Christy*, the Pennsylvania Supreme Court held that the state-paid psychiatric evidence would not have rebutted the prosecutor’s future dangerousness comments because the psychiatric evidence demonstrated that the defendant was a future danger. *Id.* The Court, therefore, denied the defendant’s request for a state-paid psychiatric expert based on the evidence not being useful. *Id.* at 884.

<sup>41</sup> *See* Commonwealth v. Sohmer, 546 A.2d 601, 605 n.3 (Pa. 1988) (“It is a basic tenet of our criminal jurisprudence that every man is presumed to possess mental faculties sufficient to be responsible for his crimes.”).

<sup>42</sup> 18 PA. CONS. STAT. § 315(a) (2007); *see also* Commonwealth v. Heidnik, 587 A.2d 687, 690-91 (Pa. 1991).

<sup>43</sup> 50 PA. CONS. STAT. § 7404(c) (2007). When considering whether to bifurcate the insanity issue from the determination of guilt/innocence, the court “consider[s] the substantiality of the defense of lack of responsibility and its effect upon other defenses, and the probability of a fair trial.” *Id.*

insanity defense, the trial court will instruct the jury on three possible verdicts: (1) “not guilty by reason of legal insanity,” (2) “guilty,” and (3) “not guilty.”<sup>44</sup> A jury verdict of not guilty by reason of insanity does not mean that the defendant will be released from custody.<sup>45</sup> Instead, the defendant will be subject to further court proceedings to determine whether s/he should be committed to a mental health facility; if committed, the defendant will remain in treatment until s/he is no longer a danger to her/himself or others.<sup>46</sup>

e. Post-Trial Actions Regarding an Individual Found Not Guilty by Reason of Insanity

Upon the jury acquitting a defendant by reason of insanity, the trial court may direct the Commonwealth to initiate commitment proceedings.<sup>47</sup> Commitment proceedings are commenced in the Court of Common Pleas in the county in which the defendant resides.<sup>48</sup>

The court will order the examination of the defendant at a designated facility by one or two physicians.<sup>49</sup> Within sixty days of the court issuing the order to examine the defendant, the facility director or the physician(s) must prepare a report describing the findings of their examination.<sup>50</sup> If the report states that the defendant is “so mentally disabled that it is advisable for his[/her] welfare or [for] the protection of the community that [s/]he be committed to a facility,” then the defendant will be committed in lieu of the sentence for a period of time determined by the court.<sup>51</sup>

2. Mental Illness

In Pennsylvania, an individual is considered mentally ill if s/he “as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his[/her] conduct or to conform his[/her] conduct to the requirements of the law.”<sup>52</sup>

Mental illness is considered to be distinct from insanity. In accordance with the legal definition of mental illness, an individual is mentally ill when s/he “exhibit[s] only a

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<sup>44</sup> PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 5.01A(1) (2005). Generally, the jury also may be instructed on the verdict of “guilty but mentally ill.” However, in capital cases, there is no mental illness defense, and evidence of mental illness can only be used as a mitigating factor in the sentencing phase. *Commonwealth v. Sartin*, 751 A.2d 1140, 1142 (Pa. 2002).

<sup>45</sup> *See Commonwealth v. Gass*, 523 A.2d 741, 742 (Pa. 1987); *Commonwealth v. Mulgrew*, 380 A.2d 349, 351-53 (Pa. 1977).

<sup>46</sup> PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 5.01A(10)(2005).

<sup>47</sup> 50 PA. CONS. STAT. § 4413(b) (2007).

<sup>48</sup> 50 PA. CONS. STAT. § 4406(a) (2007).

<sup>49</sup> 50 PA. CONS. STAT. § 4410(b) (2007).

<sup>50</sup> *Id.*

<sup>51</sup> 50 PA. CONS. STAT. § 4410(c), § 4418 (2007).

<sup>52</sup> 18 PA. CONS. STAT. § 314(c)(1) (2007).

limited understanding that killing is generally agreed to be wrong.”<sup>53</sup> An individual is insane if s/he has “no idea whatsoever that killing is considered to be wrong.”<sup>54</sup>

Under Pennsylvania law, a defendant making a timely claim of insanity can be found “guilty but mentally ill” if the jury finds beyond a reasonable doubt that the individual (1) is guilty of the crime, (2) was mentally ill at the time of the crime’s commission, and (3) was not legally insane at the time of the crime.<sup>55</sup> However, in a capital case, a verdict of “guilty but mentally ill” is unavailable.<sup>56</sup> Instead, the capital defendant may introduce evidence of his/her mental illness as mitigation evidence during the sentencing phase.<sup>57</sup> Such mitigation evidence may be relevant to the statutory mitigating factors: (1) the defendant was under the influence of extreme mental or emotional disturbance; and (2) the capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of the law was substantially impaired.<sup>58</sup>

#### D. “Next Friend” Petitions

During post-conviction proceedings, an individual may have standing as a “next friend”<sup>59</sup> where the “real party in interest is unable to litigate his[/her] own cause due to mental incapacity, lack of access to the court, or other similar disability.”<sup>60</sup> In order to pursue post-conviction relief on behalf of a death-sentenced inmate, a “next friend” must demonstrate that: (1) the death-sentenced inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief; and (2) that s/he is “truly dedicated to the [death-sentenced inmate’s] best interests and shares a significant relationship” with the inmate.<sup>61</sup> The United States Supreme Court has determined that an inmate is competent if “[s/]he appreciate[s] the consequences of [his/her] decision [not to pursue post-conviction relief].”<sup>62</sup> The inmate’s incompetence must be proven by a preponderance of the evidence.<sup>63</sup>

#### E. Competency to Be Executed

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<sup>53</sup> Commonwealth v. Bowers, 583 A.2d 1165, 1175 (Pa. Super. Ct. 1990).

<sup>54</sup> *Id.* at 1175.

<sup>55</sup> 18 PA. CONS. STAT. § 314(a) (2007). A sentence of “guilty but mentally ill” is available to all defendants whose insanity defense does not satisfy the M’Naghten (insanity) standard. *See* Commonwealth v. Henry, 569 A.2d 929, 936 (Pa. 1990) (abrogated cites). Accordingly, if the defendant does not raise a timely insanity defense, s/he cannot be found “guilty but mentally ill.” *Id.*

<sup>56</sup> *See* Commonwealth v. Stevens, 739 A.2d 507, 514 (Pa. 1999).

<sup>57</sup> *See id.*; Commonwealth v. Faulkner, 595 A.2d 28, 37 n.7 (Pa. 1991).

<sup>58</sup> *Faulkner*, 585 A.2d at 37 n.7 (citing PA statutes).

<sup>59</sup> A “next friend” is an individual acting for benefit of a person sui juris, without being a regularly-appointed guardian. A “next friend” is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit they appear. Where permitted, this includes acting to assert claims for a defendant in a capital case who seeks to waive such claims.

<sup>60</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990).

<sup>61</sup> Commonwealth v. Haag, 809 A.2d 271, 280 (Pa. 2002), *cert. denied* 539 U.S. 918 (2003); *see also* Commonwealth v. Bronshtein, 729 A.2d 1102, 1106 (Pa. 1999).

<sup>62</sup> *Whitmore*, 495 U.S. at 165.

<sup>63</sup> *See* Commonwealth v. Zook, 887 A.2d 1218, 1225 (Pa. 2005).

In *Ford v. Wainwright*,<sup>64</sup> the United States Supreme Court determined that it is a violation of the Eighth Amendment of the United States Constitution to execute an individual who is insane at the time of execution.<sup>65</sup> The Pennsylvania Supreme Court has held that a death-row inmate is incompetent to be executed if s/he “is able to comprehend the reasons for the death penalty and its implications.”<sup>66</sup> Pennsylvania law presumes an individual is competent to be executed.

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<sup>64</sup> 477 U.S. 399 (1986).

<sup>65</sup> *Id.*

<sup>66</sup> *See Commonwealth v. Jermyn*, 652 A.2d 821, 823-24 (Pa. 1995).

## II. ANALYSIS - MENTAL RETARDATION

### A. Recommendation #1

**Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.**

The American Association on Intellectual and Developmental Disabilities defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”<sup>67</sup>

While Pennsylvania has not statutorily defined mental retardation as it relates to death penalty cases, the Pennsylvania Supreme Court has adopted the definitions utilized by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed. 1997) (DSM-IV).<sup>68</sup> The AAIDD defines mental retardation as: “a ‘disability’ characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.”<sup>69</sup> The DSM-IV defines mental retardation as: “significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning.”<sup>70</sup>

Under the AAIDD definition of mental retardation, limited intellectual functioning requires that an individual be impaired in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not precise enough to identify the upper boundary of mental retardation.<sup>71</sup> Experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but also includes some individuals with IQ scores in the low to mid-70s.<sup>72</sup> Thus, no state should impose an IQ maximum lower than 75.<sup>73</sup>

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<sup>67</sup> American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited Sept. 27, 2007).

<sup>68</sup> See Commonwealth v. Miller, 888 A.2d 624, 630 (Pa. 2005).

<sup>69</sup> *Id.* at 630.

<sup>70</sup> *Id.*

<sup>71</sup> See American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited Sept. 27, 2007).

<sup>72</sup> See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), available at [www.deathpenaltyinfo.org/MREllisLeg.pdf](http://www.deathpenaltyinfo.org/MREllisLeg.pdf) (last visited Sept. 27, 2007). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 7 n.18; see also

Pennsylvania courts adhere to the AAIDD guidelines. In fact, the Pennsylvania Supreme Court has adopted an IQ of between 65 and 75 when defining “subaverage intellectual” capability.<sup>74</sup> Further, the Pennsylvania Supreme Court has declined to adopt a cutoff IQ score in its definition of mental retardation, having determined that the tests for mental retardation are an “interaction between limited intellectual functioning and deficiencies in adaptive skills.”<sup>75</sup>

In order to ensure that an individual is truly disabled and not simply a poor test-taker, the AAIDD definition of mental retardation includes adaptive behavior limitations, which produce real-world disabling effects on an individual’s life.<sup>76</sup> Under this definition, adaptive behavior is “expressed in conceptual, social, and practical adaptive skills” and focuses on broad categories of adaptive impairment, not service-related skill area.<sup>77</sup> Similarly, the Pennsylvania Supreme Court has defined the term “adaptive behavior” as a “collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.”<sup>78</sup>

The AAIDD also requires that mental retardation be manifested during the developmental period, which is generally defined as up until the age of 18.<sup>79</sup> This does not mean that a person must have been IQ-tested with scores in the mentally retarded range during the developmental period. Rather, there must have been manifestations of mental disability by the age of 18 years, which at an early age generally materialize as problems in the area

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American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited Sept. 27, 2007) (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement,” thus potentially making the IQ ceiling for mental retardation rise to 75. However, “an IQ score is only one aspect in determining if a person has mental retardation.”); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4<sup>th</sup> ed. 2000) (“Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

<sup>73</sup> This fact is reflected in *Atkins v. Virginia*, where the United States Supreme Court noted that “an IQ between 70 and 75” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” 536 U.S. 304, 309 n.5 (2002).

<sup>74</sup> See *Miller*, 888 A.2d at 630.

<sup>75</sup> *Commonwealth v. Crawley*, 2007 WL 1583583 (Pa. 2007).

<sup>76</sup> Ellis, *supra* note 72, at 7 (unpublished manuscript).

<sup>77</sup> *Id.*

<sup>78</sup> *Miller*, 888 A.2d at 630.

<sup>79</sup> See American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited Sept. 27, 2007).

of adaptive functioning.<sup>80</sup> The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.<sup>81</sup> Like the AAIDD definition, the Commonwealth of Pennsylvania requires that a defendant show that his/her mental retardation manifested prior to the age of eighteen or during the developmental period.<sup>82</sup>

Based on this information, the Commonwealth of Pennsylvania is in compliance with Recommendation #1.

*B. Recommendation #2*

**All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.**

Apart from law enforcement officers and certain prison authorities, the Commonwealth of Pennsylvania is not required to provide training to other actors, such as court officers, district attorneys, or judges, on recognizing mental retardation in capital defendants and death-row inmates.

Pennsylvania law does mandate that law enforcement candidates receive some basic training on recognizing individuals with mental retardation. As part of their basic training curriculum, law enforcement candidates in Pennsylvania are required to complete eleven hours of instruction relating to “Recognizing Special Needs.”<sup>83</sup> This entails “listing selected Developmental Disorders and recognizing common characteristics of such disorders as . . . mental retardation.”<sup>84</sup>

Prison authorities in Pennsylvania also receive training on recognizing mentally retarded inmates. Because a receiving officer is the first person to have contact with an inmate entering the Department of Corrections, all receiving officers receive “training in the recognition of the signs and symptoms of mental illness and mental retardation.”<sup>85</sup> Further, each member of the Diagnostic and Classification Center staff, including

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<sup>80</sup> Ellis, *supra* note 72, at 9 n.27.

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *See, e.g., Miller*, 888 A.2d at 630.

<sup>83</sup> MUNICIPAL POLICE OFFICERS’ EDUCATION & TRAINING COMMISSION, CERTIFICATION PROCEDURES, BASIC RECRUIT CURRICULUM LEARNER OBJECTIVES STUDY MANUAL 82-84 [hereinafter BASIC RECRUIT STUDY MANUAL], *available at* [http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner\\_objectives\\_june\\_04.pdf](http://www.mpoetc.state.pa.us/mpotrs/lib/mpotrs/certexam/learner_objectives_june_04.pdf) (last visited Sept. 27, 2007).

<sup>84</sup> *Id.* at 83.

<sup>85</sup> *See* Pennsylvania Department of Corrections, DOC Policies, 13.08.01, at 2-4, *available at* <http://www.cor.state.pa.us/standards/cwp/view.asp?a=463&q=131813&portalNav=|> (last visited Sept. 27, 2007). The receiving officer is the first person to have contact with each inmate entering the Commonwealth’s Department of Corrections. *See id.*

housing unit officers, receives training “in the identification of emotionally disturbed, mentally ill, retarded or suicidal individuals.”<sup>86</sup>

Additionally, pursuant to Rule 801 of the Pennsylvania Rules of Criminal Procedure, appointed lead defense counsel must have completed eighteen hours of training in capital defense litigation within three years prior to the appointment,<sup>87</sup> including training on the “presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts.”<sup>88</sup> We were unable to ascertain whether this training also included instruction specifically related to identifying mental retardation in capital defendants and death-row inmates.

Because some, but not all, Commonwealth actors receive training on issues related to identifying capital defendants and death-row inmates with mental retardation, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #2.

### *C. Recommendation #3*

**The jurisdiction should have in place policies to ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.**

As discussed under Recommendation #2, we were unable to ascertain whether the Commonwealth of Pennsylvania requires attorneys representing capital defendants to participate in any special training on recognizing mental retardation. Pennsylvania law only requires attorneys representing capital defendants to participate in training related to the “presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts,”<sup>89</sup> and we were unable to ascertain the specific content of this training.

The Commonwealth of Pennsylvania may provide some resources, including investigative and expert services, to assist in the defense of a capital defendant who counsel believes may have mental retardation. Under Pennsylvania law, a defendant in a capital case is entitled to the “assistance of experts necessary to prepare a defense.”<sup>90</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> PA. R. CRIM. P. 801(2)(a).

<sup>88</sup> PA. R. CRIM. P. 801(2)(b)(vi).

<sup>89</sup> *Id.*

<sup>90</sup> *See Commonwealth v. Serge*, 896 A.2d 1170, 1185 (Pa. 2006).

However, before the court grants the defendant's request for expert or investigative assistance, the defendant must "identify a particularized need for such assistance related to a colorable issue presented in his[/her] defense, appeal, or petition."<sup>91</sup>

Unfortunately, we were unable to assess whether Pennsylvania courts are exercising their discretion to authorize compensation for necessary expert and investigative services, and whether the compensation, if such services are authorized, is sufficient to accurately evaluate the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation. Consequently, we are unable to determine whether the Commonwealth of Pennsylvania is in compliance with Recommendation #3.

#### *D. Recommendation #4*

**For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*<sup>92</sup> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.**

Although the Pennsylvania Legislature has not adopted a statute establishing the manner by which a capital defendant may raise and adjudicate a claim of mental retardation as a bar to execution,<sup>93</sup> a capital defendant may still raise this claim in a pre-trial motion.<sup>94</sup>

Accordingly, the Commonwealth of Pennsylvania is in compliance with Recommendation #4.

#### *E. Recommendation #5*

**The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.**

Under Pennsylvania law, a capital defendant bears the burden of proving by a preponderance of the evidence his/her mental retardation as a bar to execution.<sup>95</sup>

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<sup>91</sup> Commonwealth v. Howard, 719 A.2d 233, 242 (Pa. 1998).

<sup>92</sup> 536 U.S. 304 (2002).

<sup>93</sup> See generally Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005).

<sup>94</sup> Interview with Marc Bookman, Assistant Defender, Defender Association of Philadelphia (Aug. 21, 2007).

<sup>95</sup> See Commonwealth v. Mitchell, 839 A.2d 202, 211 n.8 (Pa. 2003); see also Commonwealth v. Williams, 854 A.2d 440, 448 (Pa. 2004) ("In *Mitchell*, we decide that when a defendant asserts mental retardation as a bar to the imposition of the death penalty, the defendant carries the burden of proving such an assertion to a preponderance of the evidence.").

The Commonwealth of Pennsylvania, therefore, is in compliance with Recommendation #5.

*F. Recommendation #6*

**During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.**

Under Pennsylvania law, the waiver of a defendant's *Miranda* rights must be a knowing, voluntary, and intelligent waiver.<sup>96</sup> Specifically, the Pennsylvania Supreme Court has stated that a defendant's waiver of his/her *Miranda* rights must be the "product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."<sup>97</sup>

The Commonwealth requires all law enforcement candidates to complete a basic recruit curriculum whose objectives include, in part, "identifying concerns related to the proper application of *Miranda* warnings and the elements of a valid waiver as they apply to people with disabilities."<sup>98</sup> Additionally, police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Pennsylvania certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)<sup>99</sup> and/or the Pennsylvania Law Enforcement Accreditation Commission (PLEAC)<sup>100</sup> are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.<sup>101</sup> Specifically, both CALEA and

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<sup>96</sup> *Id.*

<sup>97</sup> *Commonwealth v. DeJesus*, 787 A.2d 394, 402 (Pa. 2001) (citing *Colorado v. Spring*, 479 U.S. 564, 572 (1987)).

<sup>98</sup> See BASIC RECRUIT STUDY MANUAL, *supra* note 83, at 25-26, 83.

<sup>99</sup> Eight law enforcement agencies in Pennsylvania have been accredited and four law enforcement agencies are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 27, 2007) (use second search function, designating "U.S." and "Pennsylvania" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 27, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

<sup>100</sup> Forty-seven law enforcement agencies in Pennsylvania have obtained accreditation under the PLEAC standards and 250 law enforcement agencies are in the process of being accredited. See Pennsylvania Law Enforcement Accreditation Commission, What is Accreditation?, available at <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007).

<sup>101</sup> See COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4<sup>th</sup> ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1); PENNSYLVANIA LAW ENFORCEMENT ACCREDITATION COMMISSION, STANDARDS MANUAL 2 (2006)

PLEAC require written directives for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations, and access to counsel.<sup>102</sup> Although written directives produced in an effort to comply with the CALEA and PLEAC standards may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, neither standard specifically requires such special procedures.

Because it is unclear whether the Commonwealth of Pennsylvania requires that special steps be taken to ensure that the *Miranda* rights of the mentally retarded are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we are unable to assess whether the Commonwealth is in compliance with Recommendation #6.

#### *G. Recommendation # 7*

**The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.**

Courts can protect against “waivers” of rights, such as the right to counsel, by holding a hearing to determine whether the defendant’s mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant’s mental disability.

The Pennsylvania Supreme Court has refused to adopt a “*per se* rule of inability to waive constitutional rights based on mental deficiencies.”<sup>103</sup> In other words, a low IQ by itself, for example, will not render a suspect’s confession involuntary. Rather, the court will consider the totality of the circumstances—the duration and methods of interrogation, the conditions of detainment, the attitudes of the police toward the defendant, the defendant’s physical and psychological state— to determine if the confession was involuntary.

Significantly, in order for a capital defendant to waive his/her rights, Pennsylvania courts must ascertain on the record whether the defendant has made a “knowing, voluntary, and intelligent” waiver.<sup>104</sup> For instance, in waiving the right to counsel, the trial court must conduct a thorough colloquy to determine if the defendant is knowingly, intelligently, and

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(Standard 1.2.2) [hereinafter PLEAC STANDARDS], available at <http://www.pachiefs.org/accreditation6.htm> (last visited June 27, 2007).

<sup>102</sup> CALEA STANDARDS, *supra* note 101, at 1-3 (Standard 1.2.3); PLEAC STANDARDS, *supra* note 101, at 2 (Standard 1.2.2).

<sup>103</sup> Commonwealth v. Chacko, 459 A.2d 311, 317 (Pa. 1983).

<sup>104</sup> PA. R. CRIM. P. 121(B); *see also* Commonwealth v. DeJesus, 787 A.2d 394, 402 (Pa. 2001); *see* Commonwealth v. Bronshtein, 729 A.2d 1102, 1106 (Pa. 1999) (holding that death-sentenced inmate made a knowing, intelligent, and voluntary waiver of his right to seek post-conviction relief); Commonwealth v. Fahy, 700 A.2d 1256, 1259 (Pa. 1997) (holding that the trial court’s colloquy demonstrated that the death-sentenced inmate made a knowing and voluntary waiver of his right to all collateral proceedings).

voluntarily renouncing his/her constitutionally protected right to counsel.<sup>105</sup> At a minimum, during the colloquy, the court should question whether:

- (1) The defendant understands that s/he has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
- (2) The defendant understands the nature of the charges and the elements of each charge;
- (3) The defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
- (4) The defendant understands that if s/he waives the right to counsel, the defendant will still be found by all the normal rules of procedure and that counsel would be familiar with these rules;
- (5) The defendant understands that there are possible defenses to the charges which counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently;
- (6) The defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.<sup>106</sup>

If the court accepts the defendant's waiver of counsel, the Pennsylvania Rules of Criminal Procedure permits the trial court to appoint "standby counsel."<sup>107</sup> Standby counsel will be available during the course of the trial to provide "consultation and advice" to the defendant.<sup>108</sup> It is important to note that once a capital defendant has waived his/her right to counsel, s/he is prohibited from raising a waived claim under the Post-Conviction Relief Act based upon ineffective assistance of counsel.<sup>109</sup>

Additionally, regardless of whether a capital defendant can make a knowing and voluntary waiver, Pennsylvania law prohibits him/her from waiving a direct appeal.

Based on this information, the Commonwealth of Pennsylvania is in compliance with Recommendation #7.

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<sup>105</sup> See *Commonwealth v. Bryant*, 855 A.2d 726, 736 (Pa. 2004); *Commonwealth v. Saranchak*, 866 A.2d 292, 297 (Pa. 2005) (stating that trial court conducted a thorough colloquy with defendant and determined that his desire to dismiss counsel was knowing, voluntary, and intelligent).

<sup>106</sup> PA. R. CRIM. P. 121, cmt; see also *Commonwealth v. Davido*, 868 A.2d 431, 437 (Pa. 2005) (holding that it is ultimately the judge's responsibility to ensure that the defendant is questioned about the six areas set forth in Rule 121 of the Pennsylvania Rules of Criminal Procedure). The Pennsylvania Rules of Criminal Procedure do not prevent the prosecuting attorney or the already appointed or retained defense counsel from conducted all or part of the examination of the defendant. *Id.*

<sup>107</sup> PA. R. CRIM. P. 121(D).

<sup>108</sup> *Id.*

<sup>109</sup> See *Commonwealth v. Fletcher*, 896 A.2d 508, 518 (Pa. 2006); *Bryant*, 855 A.2d at 736; cf. *Commonwealth v. Williams*, 896 A.2d 523, 535 (Pa. 2006) (holding that *pro se* defendant in capital case would have waived right to raise trial court errors in which he failed to object except that the Pennsylvania Supreme Court had not abolished the relaxed waiver rule at the time his brief was pending).

### III. ANALYSIS - MENTAL ILLNESS

#### A. Recommendation #1

**All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.**

As in the case with mental retardation, the Commonwealth of Pennsylvania does not explicitly require actors in the criminal justice system, apart from law enforcement officers and prison authorities, to participate in training to recognize mental illness in capital defendants and death-row inmates.

Each law enforcement candidate in Pennsylvania is required to complete a basic training curriculum that includes instruction on mental illness.<sup>110</sup> The objectives of the basic training curriculum indicate several topics relating to the identification of mentally ill individuals with mental illness, including teaching candidates to recognize common characteristics of mental illnesses such as: schizophrenia; bipolar disorder; depression; personality disorders including paranoid, antisocial, and borderline personality disorders; impulse control disorders including kleptomania and pyromania; and paraphilias.<sup>111</sup>

Additionally, prison authorities in Pennsylvania receive training related to the identification of inmates with mental illness. Because receiving officers are the “first point of contact” for inmates entering the correctional system,<sup>112</sup> all receiving officers receive “training in the recognition of the signs and symptoms of mental illness.”<sup>113</sup> All staff members working in the Diagnostic and Classification Center<sup>114</sup> also receive training on the identification of mentally ill inmates.<sup>115</sup> Significantly, prison authorities stationed in permanent correctional facilities will receive training on identifying early symptoms of mental illness.<sup>116</sup> Furthermore, permanent correctional facilities have adopted policies by which new inmates are interviewed in order to identify any “possible need for mental health services.”<sup>117</sup>

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<sup>110</sup> See BASIC RECRUIT STUDY MANUAL, *supra* note 83, at 25-26.

<sup>111</sup> See *id.* at 82-84.

<sup>112</sup> Pennsylvania Department of Corrections, DOC Policies, 13.08.01 Access to Mental Health Care, at 2-3 – 2-4 (2004), *available at* <http://www.cor.state.pa.us/standards/cwp/view.asp?a=463&q=131813&portalNav=|> (last visited Sept. 27, 2007).

<sup>113</sup> *Id.* at 2-4.

<sup>114</sup> The Diagnostic and Classification Center is center within the correction institutions that gives every inmate entering the Pennsylvania Department of Corrections a psychological assessment.

<sup>115</sup> Pennsylvania Department of Corrections, DOC Policies, 13.08.01 Access to Mental Health Care, at 2-3 – 2-4 (2004), *available at* <http://www.cor.state.pa.us/standards/cwp/view.asp?a=463&q=131813&portalNav=|> (last visited Sept. 27, 2007).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

Although law enforcement officers and prison authorities receive mandatory training on identifying mentally ill individuals, not all actors within the criminal justice system are required to receive this training. The Commonwealth of Pennsylvania, therefore, is only in partial compliance with Recommendation #1.

*B. Recommendation #2*

**During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.**

To the best of our knowledge, the Commonwealth of Pennsylvania has not adopted any laws, rules, or procedures requiring that special steps be taken to ensure that the *Miranda* rights of mentally ill offenders are sufficiently protected during investigations and interrogations. However, the Commonwealth does require all law enforcement candidates to complete a basic recruit curriculum whose objectives include, in part, to identify “concerns related to the proper application of *Miranda* Warnings and the elements of a valid waiver as they apply to people with disabilities.”<sup>118</sup>

Moreover, law enforcement agencies in Pennsylvania certified by the Pennsylvania Law Enforcement Agency Commission (PLEAC)<sup>119</sup> are required to adopt “[a] written directive governing procedures for assuring compliance with all applicable constitutional requirements for in-custody situations, including, but not limited to . . . interviews and interrogations.”<sup>120</sup> Similarly, law enforcement agencies certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) are required to adopt a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations, and access to counsel.<sup>121</sup> While written directives produced in an effort to comply with the PLEAC or CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally ill individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to assess the extent to which law enforcement agencies, PLEAC or CALEA certified or otherwise, have adopted any such procedures.

Because we were unable to ascertain whether law enforcement agencies in Pennsylvania have adopted directives to ensure the *Miranda* rights of mentally ill individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or

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<sup>118</sup> See BASIC RECRUIT STUDY MANUAL, *supra* note 83, at 25-26, 83.

<sup>119</sup> Currently, forty-seven law enforcement agencies have obtained PLEAC certification and 250 agencies are in the process of obtaining accreditation. See Pennsylvania Law Enforcement Accreditation Commission, What is Accreditation?, *available at* <http://www.pachiefs.org/accreditation2.htm> (last visited Sept. 27, 2007) (PLEAC was created by the Pennsylvania Chiefs of Police Association in July 2001 to establish a set of standards under which law enforcement agencies can voluntarily comply and become eligible for accreditation). The PLEAC website is in the process of being updated. See E-mail from Andrea Sullivan, Pennsylvania Law Enforcement Accreditation Commission, to Joshua Lipman, Project Attorney, American Bar Association (June 20, 2007) (on file with author).

<sup>120</sup> PLEAC STANDARDS, *supra* note 101, at 2 (Standard 1.2.2).

<sup>121</sup> See CALEA STANDARDS, *supra* note 101, at 1-3 (Standard 1.2.3).

used, we are unable to determine if the Commonwealth of Pennsylvania is in compliance with Recommendation #2.

*C. Recommendation #3*

**The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.**

This Recommendation is identical to Recommendation #3 in the Mental Retardation section, except that it pertains to mental illness instead of mental retardation. Like Recommendation #3 in the Mental Retardation section, we are unable to assess whether the Commonwealth of Pennsylvania is in compliance with this Recommendation.

*D. Recommendation #4*

**Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert’s prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert’s current or past status with the State.**

We were unable to obtain information pertaining to district attorneys’ hiring practices for mental health experts to determine whether such offices are hiring these experts based on their qualifications and relevant professional experience. Similarly, we were unable to obtain information on trial judges’ reasoning for appointing certain medical and mental health professionals and not others. We, therefore, are unable to assess whether the Commonwealth of Pennsylvania is in compliance with Recommendation #4.

*E. Recommendation #5*

**Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.**

A capital defendant is “entitled to state-paid psychiatric assistance only where the assistance is needed to rebut the prosecution’s argument of future dangerousness, not to prove mitigating circumstances” during the penalty phase of the trial.<sup>122</sup> Moreover, the Pennsylvania Supreme Court has held that “[w]hile an accused in a capital case is entitled to the assistance of experts necessary to prepare his[/her] defense, there is no obligation on the part of the Commonwealth of Pennsylvania to pay for the services of an expert.”<sup>123</sup>

As in Recommendation #3 of the Mental Retardation Analysis, we were unable to assess whether Pennsylvania courts are exercising their discretion to authorize compensation that is sufficient to attract the services of well-trained experts and to ensure thorough evaluations. We, therefore, are unable to determine whether the Commonwealth of Pennsylvania is in compliance with Recommendation #5.

*F. Recommendation #6*

**The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.**

*Recommendation #7*

**The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's 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 recommendation.]**

The Commonwealth of Pennsylvania prohibits individuals from being executed who have mental retardation at the time of the offense, defined as: (1) significant subaverage intellectual functioning as evidenced by an intelligence quotient score of seventy or below and (2) deficits in adaptive behavior that (3) manifest before the age of 18 eighteen years.<sup>124</sup> This exclusion does not include defendants who have mental disabilities other than mental retardation, such as dementia or traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning, but may manifest after the age of eighteen. This exclusion also does not apply to individuals who, at the time of the offense, had a severe mental disorder or disability that significantly impaired

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<sup>122</sup> Commonwealth v. Miller, 746 A.2d 592, 600 (Pa. 2000); see also Commonwealth v. Christy, 656 A.2d 877, 883 (Pa. 1995).

<sup>123</sup> Commonwealth v. Dupre, 866 A.2d 1089, 1104 (Pa. Super. Ct. 2005).

<sup>124</sup> See Miller, 888 A.2d at 630.

their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to conduct, or to confirm their conduct to the requirements of the law.

As a result, the Commonwealth of Pennsylvania is not in compliance with either Recommendation #6 or Recommendation #7.

#### *G. Recommendation #8*

**To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see below for recommendations as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.**

Section 9711 of the Pennsylvania Consolidated Statutes (PCS) contains two relevant mitigating circumstances that permit a capital jury to consider the defendant's mental condition: (1) "[t]he defendant was under the influence of extreme mental or emotional disturbance [during the commission of the crime];"<sup>125</sup> and (2) "[t]he capacity of the defendant to appreciate the criminality of his[/her] conduct or to conform his[/her] conduct to the requirements of law was substantially impaired [during the commission of the crime]."<sup>126</sup> The PCS also allows the jury to consider "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his[/her] offense."<sup>127</sup> However, neither the PCS nor the Pennsylvania Suggested Standard Criminal Jury Instructions require or recommend that judges specifically instruct capital juries that mental illness is a mitigating, not aggravating, factor.

Additionally, Pennsylvania courts are not required to instruct jurors that (1) they need not rely upon the mental disorder or disability to conclude that the defendant represents a future danger to society; or (2) that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor.

Because neither Pennsylvania law nor the Pennsylvania Suggested Standard Criminal Jury Instructions require or recommend that judges instruct the jurors on the three issues outlined in Recommendation #8, the Commonwealth of Pennsylvania is not in compliance with this Recommendation.

#### *H. Recommendation #9*

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<sup>125</sup> 42 PA. CONS. STAT. ANN. § 9711(e)(2) (2007).

<sup>126</sup> 42 PA. CONS. STAT. ANN. § 9711(e)(3) (2007).

<sup>127</sup> 42 PA. CONS. STAT. ANN. § 9711(e)(8) (2007).

**Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.**

The Commonwealth of Pennsylvania does not require and has not promulgated any standard jury instructions to communicate to jurors that (1) the defendant is under medication for a mental disorder or disability; (2) this affects the defendant's perceived demeanor; and (3) such demeanor should not be considered in aggravation.

Accordingly, the Commonwealth of Pennsylvania is not in compliance with Recommendation #9.

*I. Recommendation #10*

**The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.**

Recommendation #10 is divided into two parts; the first, which is identical to Recommendation #7 in the Mental Retardation Analysis, pertains to the existence of state processes that protect against waivers which are the result of an inmate's mental disability, and the second pertains to the specific mechanism of "next friend" petitions.

As discussed under Recommendation #7 in the Mental Retardation Analysis, the Commonwealth of Pennsylvania has in place certain processes to protect against waivers that are a product of a person's mental disability. For a detailed discussion on these processes, see Recommendation #7 in the Mental Retardation Analysis.

Apart from the processes discussed in Recommendation #7 in the Mental Retardation Analysis, if the court finds the death-sentenced inmate incompetent, it may allow a "next friend" to act on behalf of the inmate.<sup>128</sup> Specifically, Pennsylvania law allows a "next friend" to file a petition on behalf of a death-row inmate if the "next friend" demonstrates that:

- (1) The inmate is incompetent and is unable to make a rational decision as to whether to seek post-conviction relief; and

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<sup>128</sup> See *Commonwealth v. Williams*, 828 A.2d 981, 992 (Pa. 2003).

- (2) That s/he is “truly dedicated to the [death-sentenced inmate’s] best interests and shares a significant relationship” with the inmate.<sup>129</sup>

A death-sentenced inmate’s incompetence, therefore, is not a bar to effective collateral review if the inmate is being represented by a “next friend.”<sup>130</sup>

Based on this information, the Commonwealth of Pennsylvania is in compliance with Recommendation #10.

*J. Recommendation #11*

**The jurisdiction should stay post-conviction proceedings where 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 such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.**

The Pennsylvania Supreme Court has rejected the practice of staying post-conviction proceedings for incompetent inmates.<sup>131</sup> If a court finds that the death-row inmate is not competent to proceed with post-conviction relief, it will not stay the proceedings, but will appoint a “next friend” to pursue post-conviction relief on behalf of the inmate.<sup>132</sup> While the Pennsylvania Supreme Court recognizes that an inmate may be “unwilling or unable to assist in identifying issues to raise on collateral review,” the Court has found it more important that the inmate “promptly reap[ ] the benefits from meritorious claims, rather than suffering delay in relief.”<sup>133</sup>

In addition, the Commonwealth of Pennsylvania does not allow a death-row inmate to have his/her sentence reduced if there is no significant likelihood of restoring the inmate’s capacity to participate in post-conviction proceedings in the foreseeable future.

Because the Commonwealth of Pennsylvania will not stay post-conviction proceedings even if the defendant is incompetent, and will not reduce a death-row inmate’s sentence even if there is no significant likelihood of restoring the inmate’s capacity to participate

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<sup>129</sup> Commonwealth v. Haag, 809 A.2d 271, 280 (Pa. 2002), cert. denied 539 U.S. 981 (2003); see also Commonwealth v. Bronshtein, 729 A.2d 1102, 1106 (Pa. 1999).

<sup>130</sup> See Haag, 809 A.2d at 278.

<sup>131</sup> Commonwealth v. Cruz, 852 A.2d 287, 294-95 (Pa. 2004).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* It is important to note that the Pennsylvania Supreme Court has recognized that the exception found in Section 9545(b)(1)(ii) of the PCRA for claims based upon facts not discovered by PCRA counsel through the exercise of due diligence may serve as an avenue by which a death-row inmate may file a second post-conviction petition in order to receive consideration of those claims which may have come to light after the inmate regained competency. *Id.*

in post-conviction proceedings, the Commonwealth is not in compliance with Recommendation #11.

*K. Recommendation #12*

**The jurisdiction should provide that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction and death sentence’s validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.**

Recommendation #12 is divided into two parts; the first pertains to the Commonwealth’s standard for determining whether a death-row inmate is competent to be executed, and the second pertains to the Commonwealth’s sentencing procedures after a death-row inmate has been found incompetent to be executed.

Standard for Competency to Be Executed

In order for a death-row inmate to be “competent” for execution under Recommendation #12, the death-row inmate must not only “understand” the nature and purpose of the punishment, but s/he also must “appreciate” its personal application in the death-row inmate’s own case—that is, why it is being imposed on the death-row inmate.

The Commonwealth prohibits the execution of any death-row inmate who is found incompetent to be executed.<sup>134</sup> The Pennsylvania Supreme Court has held that a death-row inmate is incompetent to be executed if s/he is unable “to comprehend the reasons for the death penalty and its implications.”<sup>135</sup> The existence of a mental disorder does not automatically translate into a finding of incompetence.<sup>136</sup>

Sentencing Procedures after Finding of Incompetence

In cases in which an inmate is found incompetent to be executed, the Commonwealth of Pennsylvania does not require that the inmate’s sentence be reduced to life imprisonment without the possibility of parole or life imprisonment. In fact, the Commonwealth has not adopted any procedures detailing the post-determination process for a death-row inmate who has been found incompetent to be executed.

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<sup>134</sup> See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Caritativo v. California*, 357 U.S. 549, 550 (1958) (Fourteenth Amendment prevents the execution of people who are insane); *Commonwealth v. Jermyn*, 652 A.2d 821, 822 (Pa. 1995) (holding that “no insane person can be tried, sentenced, or executed”); *In re Heidnik*, 720 A.2d 1016, 1018 (Pa. 1998).

<sup>135</sup> See *Jermyn*, 652 A.2d at 823-24.

<sup>136</sup> *Id.*

## Conclusion

Based on this information, the Commonwealth of Pennsylvania is in partial compliance with Recommendation #12.

### *L. Recommendation #13*

**Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.**

To the best of our knowledge, the Commonwealth of Pennsylvania is not currently working with organizations devoted to protecting the rights of mentally ill citizens, or any other organization, to develop or disseminate—to police, attorneys, judges, and other court and prison officials—models of best practice on ways to protect mentally ill individuals within the criminal justice system. The Commonwealth of Pennsylvania, therefore, is not in compliance with Recommendation #13.