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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Senate Bill 81 Special Session

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House Judiciary Subcommittee on
Crimes and Corrections

Room 22, Capitol Annex
Harrisburg, Pennsylvania

Monday, August 21, 1995 - 1:00 p.m.

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BEFORE:

Honorable Jerry Birmelin, Majority Chairman
Honorable Brett Feese
Honorable Timothy Hennessey
Honorable Stephen Maitland
Honorable Al Masland
Honorable Jeffrey Piccola
Honorable Jere Schuler
Honorable Thomas Caltagirone
Honorable Andrew Carn
Honorable Kathy Manderino

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ALSO PRESENT:

Brian Preski, Esquire
Chief Counsel for Judiciary Committee

James Mann
Majority Legislative Analyst

Suzette Beemer
Judiciary Staff

David L. Krantz
Minority Executive Director

Galina Milohov
Minority Research Analyst

C O N T E N T S

CHAIRMAN BIRMELIN: Good afternoon. We welcome you to the Judiciary Subcommittee on Crimes and Corrections' public hearing. Today, we are having a public hearing on Senate Bill 81 on special session of crime called by Governor Ridge. Before we get into those who will be giving testimony here this afternoon, I'd like the members of the Judiciary Committee to introduce themselves to the general public who is gathered here to know who they are. If I could, I would also ask the staff to introduce themselves. Jim Mann, if you would go first, please.

MR. MANN: My name is James Mann, House staff for Republican analyst.

REPRESENTATIVE MASLAND: My name is Al Masland, Representative from Cumberland County.

MR. PRESKI: Brian Preski, Chief Counsel to the Judiciary Committee.

CHAIRMAN BIRMELIN: Representative Birmelin. I'm the Chairman of the Subcommittee.

REPRESENTATIVE FEESE: Brett Feese, Lycoming County.

REPRESENTATIVE HENNESSEY: Tim

Hennessey, Chester County.

REPRESENTATIVE PICCOLA: Jeff Piccola, Dauphin County.

REPRESENTATIVE SCHULER: Jere Schuler, Lancaster County.

CHAIRMAN BIRMELIN: Did I miss any other members or staff people?

MR. KRANTZ: David Krantz, Executive Director of the Democratic side.

CHAIRMAN BIRMELIN: Just as a note of explanation, the Republican members of the subcommittee were assigned several months ago. Despite the promptings and urging of Representative Piccola and myself, the Democratic leadership have not appointed members from the Democratic Party to this subcommittee.

However, as all of the Democrats are members of the committee as a whole, they were certainly invited to be here. I hope we can dispel any misconceptions that this is strictly a Republican function. It's not. Unfortunately, some of the Democrats probably would have liked to have been assigned to the subcommittee and weren't. We are not sure when they will get around to it, but I'm sure Mr.

DeWeese is thinking it over long and hard on deciding who he will appoint.

In any event, we want to welcome you here this afternoon. There are also, for your information, be a public meeting of this subcommittee tomorrow morning at 10 a.m. dealing with the issue of giving concurrent prosecutorial, or arrest powers, rather, to federal prisons in Pennsylvania to enforce state law. You may be interested in that. That's tomorrow morning at 10 a.m. in Room 39 in the East Wing.

Our first presenter is with us this afternoon. He's acting Attorney General Walter Cohen. Mr. Cohen, we welcome you to our subcommittee. Good to have you here in this capacity. It's the first time, I believe, you've testified in public before this committee, anyway. We wish you well. We trust that you have enjoy a good day of give and take with this committee, and I urge you to give your testimony at this time.

ACTING ATTORNEY GENERAL COHEN: Thank you, Chairman Birmelin, Chairman Piccola, members of the committee: I appreciate the

opportunity to appear before you and testify on and in support of Senate Bill 81. This bill that emerged from the special crime session would substantially amend the Post-Conviction Relief Act applicable to all criminal cases, and would provide for a new post-verdict process known as unitary review for capital cases.

The legislation was drafted primarily by the Philadelphia District Attorney's Office, which is a large office with a number of prosecutors who are very experienced in this area. They are to be commended for taking the lead and efforts to draft, what we consider to be in the Attorney General's Office, much-needed reforms of the criminal process.

As I indicated, the Office of Attorney General supports this proposal, but we do want to address some concerns and some thoughts that we have on it.

Pennsylvania is one of 38 states which permits the death penalty for defendants that have been convicted of murder. Death penalty cases by Pennsylvania law involve just one category of crime, and that is the most heinous, brutal and cruel premeditated murders.

In Pennsylvania, basically this has been the law since the time of William Penn. In 1978 the legislature rewrote the death penalty statute to meet certain constitutional concerns that had been raised by the United States Supreme Court. I would add as a footnote that when I was an Assistant District Attorney in Philadelphia in the early '70's when the Supreme Court decision in Furman versus Georgia and a couple of other cases came down from the United States Supreme Court, I wrote the proposed first draft of legislation that would address the whole issue of aggravating and mitigating circumstances that seemed to be required by the Supreme Court decisions, and, in fact, somewhat parallel what is now the law in Pennsylvania--a law that the United States Supreme Court held to be constitutional in the Blystone case.

When a defendant in a death penalty case is found guilty of first degree murder, a separate proceeding is held to determine what the penalty will be, either life imprisonment or death by lethal injection. The jury considers specific aggravating circumstances and unlimited mitigating circumstances.

If it imposes a sentence of death, the case is automatically reviewed for pretrial, trial and sentencing error by the Pennsylvania Supreme Court. That review is conducted only after the trial court has ruled on post-verdict or post-trial motions regarding purported errors at trial or in the sentencing process. Throughout all of those proceedings the defendant is represented by counsel.

After direct review by the State Supreme Court, a defendant sentenced to death may seek further review of specified errors, including any allegations of ineffective assistance of counsel, by either trial or appellate counsel under the Post-Conviction Relief Act or PCRA.

Under the current Supreme Court rules upon filing of the first PCRA petition, every defendant is entitled to the appointment of new counsel, someone other than the attorney or attorneys who represented the defendant in the previous appeals. The courts grant leave to amend PCRA petitions freely after the appointment of this new counsel.

In capital cases, defendants usually

choose not to file their first PCRA petition until after the Governor has signed the warrant setting an execution date. As the current case being heard in Philadelphia involving Mumia Abu-Jamal illustrates the filing of the PCRA petition generally causes the trial court to stay the scheduled execution. If that petition is denied, the defendant may appeal to the Supreme Court of Pennsylvania. That in and of itself is not the end of the review process even under current law.

After the Pennsylvania Supreme Court reviews these cases both on direct appeal and on appeal from the denial of a PCRA petition, defendants may seek review in the United States Supreme Court.

By the time this entire process has run its course, enough time will have passed and the death warrant will have expired and the execution cannot be carried out as scheduled. The case then returns to the Governor's desk to await the issuance of a new warrant sometime in the future.

In addition to this process of review and collateral review in the state courts,

review is available in the federal district courts on petitions for Writs of Habeas Corpus. Those proceedings, virtually all the claims which were already presented to the state trial court and to the Pennsylvania Supreme Court are re-litigated in the federal trial courts and in the Court of Appeals for the Third Circuit for Pennsylvania, and with the possibility of review again in the United States Supreme Court.

In short, death penalty defendants have multiple opportunities to pursue appeals in these most serious cases.

Mr. Chairman, everybody who cares about our constitution agrees that careful judicial review is required to protect the rights of defendants. But that fact itself does not mean that our present system cannot be improved. It can be improved. Present system takes too long. Society, in general, and the families of murdered victims, in particular, suffer repeatedly every time an execution is scheduled and delayed for the litigation of last-minute appeals, which need not be last minute.

The bill before you today, Senate Bill

81, provides for a more expedited review, provides for finality and upholds principles of fundamental fairness in the state appellate process.

Many of the concepts proposed in Senate Bill 81 parallel the reforms that are being considered at the federal level. While Congress continues to debate these issues, this legislature has already taken a major step toward eliminating one of the major causes of delay at the state level, and I'm referring to Act 4 of 1995, the Special Session, which requires the Governor to issue death warrants in a timely fashion.

Because of Act 4, capital cases will no longer grind to a halt due to a Governor's delay of months or years in issuing warrants. That will do much to eliminate the inordinate and unnecessary delays that have become so common in our capital case process. Those delays are graphically illustrated if you review the time line in the case of Commonwealth versus Keith Zettlemoyer. Up until May 2nd of this year, the last execution in Pennsylvania was of Elmo Smith from Montgomery County in 1962.

On May 2 Keith Zettlemoyer was put to death by the Commonwealth for the brutal murder of Charles DeVetsco, a citizen who had agreed to testify against Zettlemoyer in an upcoming trial. Zettlemoyer was arrested for the crime on October 13 of 1980; thus, was executed for the crime almost 15 years later. The only reason that the execution in that instance took place that quickly was that he did not attempt to further challenge his execution.

Leon Moser, who was executed last week, also chose not to pursue appeals that may have been available to him. Still, a full decade passed between the time he murdered his ex-wife and 2 daughters and the time he finally received the punishment that had been imposed by the Court after the verdict that had been rendered by the jury.

Under our present court system, 10 or 15 years is not an unusually long time between conviction and execution; and, in fact, the average delay is more than a decade.

Act 4 should reduce that delay in the future and Senate Bill 81 would do even more to improve the process by making significant

changes to the Post-Conviction Relief Act.

In Subchapter D, beginning in Section 9570 of the bill, there's a provision for Unitary Review in capital cases. In short, collateral review and death penalty cases would begin pre-appeal rather than post-appeal. Thus, the Supreme Court would have both the trial and the collateral review proceeding before it at the same time. This means that defendants who are facing the death penalty would no longer be able to use their PCRA petition as a trump card to be played only after the Governor signs a death warrant and then to delay the carrying out of that death warrant pending the appellate process.

Rather, they would be required to file their PCRA petition at the outset of the appeal process, so that by the time a death warrant is issued, all PCRA issues including ineffective assistance of trial counsel will already have been resolved.

Mr. Chairman, it is a source of great public dismay and cynicism when death warrants are issued only to be thwarted by the filing of some last-minute appeal. This General Assembly

cannot entirely prevent that from happening because so many of the appeal opportunities lie in the federal courts over which you have no control, but you can through Senate Bill 81 eliminate one of the most common delays, the belated filing of PCRA petitions.

There is one additional time limit that we recommend be included in the act in addition to those already set forth; and that is, this committee should consider setting time limits for the Pennsylvania Supreme Court to rule on the new unified appeals provided in Section 9577.

Our staff has researched the 118 capital cases that have been affirmed by the Pennsylvania Supreme Court. In the cases for which complete information was available, we found it took an average of approximately 37 months, slightly over 3 years, from imposition of sentence to affirmance of the case by the Supreme Court. That does not address the time taken by the trial courts to resolve post-verdict motions or post-conviction petitions.

The goal of this legislation is to expedite the process while preserving the rights

of those who may have been wrongly or unfairly convicted or sentenced to death. Defendants often claim, and sometimes with justification, that their rights were violated either because their lawyer provided inadequate representation or because the prosecutor did something improper during the course of the trial. The fact our research has revealed that the Pennsylvania Supreme Court has overturned more death penalties because of errors by the prosecutor, 11 cases, than because of ineffective assistance of defense counsel, 7 cases.

Senate Bill 81 directly addresses the issue of ineffective assistance of counsel in 2 ways. It requires the Supreme Court to adopt standards for appointment of counsel for all stages of capital cases, considering the criteria set forth in the bill. We believe the local practices should be among the criteria the Court should be required to consider, and I would recommend that you so amend the bill.

Secondly, Senate Bill 81 mandates that new counsel must be appointed immediately after sentencing and that the unitary review occur as soon as possible. The newly-appointed lawyer

would raise and litigate issues different from and in addition to those raised and preserved for appeal by the trial counsel before, during and after trial and sentencing.

This second lawyer would prepare and file an appellate brief in addition to and different from the brief filed on direct appeal. While this proposal has merit, you must understand that the impact it will have on death penalty litigators is significant. It's an impact that will be in addition to the accelerated pace of appeals already being seen because of the passage of Act 4 and because of Governor Ridge's action to begin eliminating the backlog of the over 100 capital cases that are pending.

The new unitary review counsel, if he or she is to be faithful to the task that is mandated by this proposal, will be compelled to do a thorough review and analysis of an already enormous trial record in order to adequately ascertain if the actions, motions, objections, arguments and strategies or the failure to raise certain arguments of the defense trial counsel and appellate counsel presented an ineffective

assistance of counsel claim.

In this regard, he or she may be required to have new investigators, require new scientific tests and review all case law to see what relevant leads, witnesses, scientific and psychological evidence and legal theories were not advanced by trial counsel but should have been.

Because of the time constraints the new unitary review counsel would face, and the breadth of the review that they would have to undertake, this new counsel would have to be an experienced capital litigator.

Counties already bear the cost of defense counsel for direct appeals and for collateral reviews, but I would caution you that the process called for in Senate Bill 81 could cause counties to incur higher costs, or at least to incur those costs more quickly in the process.

If this process is to do justice in a timely fashion, then issues of resources must be addressed. There is a cost to providing counsel for death-row inmates and someone must pay it and it has to be done. Pennsylvania this year

eliminated funding for death penalty resource centers in the budget that was passed in June, and the U.S. House of Representatives last month voted to eliminate federal funding as well. We have to realize that if federal and state funds are not available for this purpose, the cost of defense counsel in capital cases will by default fall on the counties. It's not a process that will just end. It's a process that will have to go forward if the Commonwealth intends to enforce the death penalty and someone will have to pay for adequate counsel to represent the defendants in these cases.

It will also be necessary to provide adequate funding to staff and to train prosecutors to enable them to deal with the increased caseload.

Several years ago our office participated in a task force that was convened to consider the creation of a death penalty resource center. I participated in those discussions with the Supreme Court and also with the federal court judges and Bob Graci, who is with me today, who is Chief of our Appeals and Legal Services Section, also participated in

those discussions.

When the task force filed its report, the Office of Attorney General agreed that capital defendants should receive competent representation regardless of their financial condition, and that counsel in these difficult cases have to be reasonably compensated.

The dissent that we filed from the task force report was because it failed to address the problem of prosecutors who lacked the resources to handle these cases.

As executions begin to be carried out in the Commonwealth, we are seeing the demands that these cases impose on prosecutors who must be prepared to respond to rapid-fire challenges, sometimes in the middle of night, sometimes in the Court rooms hundreds of miles from the Capitol.

On many occasions, including the Zettlemoyer case, those district attorneys successfully prosecuted those cases have turned to the Attorney General's Office for assistance and we have been able to render that assistance. Mr. Graci worked endless hours over several days and weekends on the process of the final review

in the courts on the matter involving Keith Zettlemoyer.

Most of the requests have come from district attorneys in the third through eighth class counties. You may recall that Montgomery County handled the process recently involving Leon Moser. We hope to be able to continue providing assistance when asked, but again, the legislature must be willing to continue to make adequate resources available for the prosecution and must address the issue of making the resources available for the defense.

Capital cases are on the cutting edge of the development of constitutional law. These kinds of cases ought to be tried by our best lawyers, appealed by the best lawyers on both sides, and done so in a timely manner so that justice may be served in a timely fashion.

Thank you, and Mr. Graci and I are available to answer any questions that you may have.

CHAIRMAN BIRMELIN: Thank you, Mr. Cohen. I'll entertain questions from members of the Judiciary Committee at this time. Representative Piccola.

REPRESENTATIVE PICCOLA: Thank you, Mr. Chairman. On the last point that you made, General Cohen, what is the status of the law with respect to the Office of Attorney General and what your responsibilities are in an appeal of a death case? Is it simply you only get involved when a district attorney requests, or is there some more formal involvement?

ACTING ATTORNEY GENERAL COHEN: No. We get involved when a district attorney requests under the Commonwealth Attorney's Act that basically states that if a district attorney represents that he needs the assistance of the Office of Attorney General either because he has a conflict of interest, which would not be really applicable here, or lacks the resources to handle the matter. It's a question of their having established lack of resources combined with our having the expertise that you develop by having handled these cases.

But, aside from an instance where we may have handled the prosecution, which has happened in a couple of cases, but even there when we handle a prosecution of a capital case at the request of a D.A. for trial, we are doing

that in the context of really being a Special Assistant District Attorney. So, we would continue the representation, but it's not something that is specifically provided for in any legislation.

REPRESENTATIVE PICCOLA: Either you or Mr. Graci, do you think it should be formally provided for, particularly given the fact that, as you alluded to, there will be, as we now have a statute requiring the Governor to sign death warrants, there will be more frequent use of the appellate courts?

ACTING ATTORNEY GENERAL COHEN: I believe that is done in some states where some states do have specific provision that that is the job of the Attorney General.

REPRESENTATIVE PICCOLA: Do you have any thoughts on that, whether we should get into that?

ACTING ATTORNEY GENERAL COHEN: I'll defer to Bob since he is the one that is working the nights and the weekends.

REPRESENTATIVE PICCOLA: Even if it's just a personal opinion, I would be happy --

MR. GRACI: I have been a member over

the past several years, Mr. Chairman, of a group called the Association of Government Attorneys in Capital Litigation. It's made up of prosecutors from around the country. As the General said, in many states the breakdown, the division of labor, does shift the case to the Attorney General for everything after verdict.

That certainly has not been the history in Pennsylvania. I know that while we make ourselves available to the prosecutors around the state and work very closely with them, I don't know that I would want to take that away. These are the cases that they've suffered through; that they have sat with the victims, held the victims' hands. It's their case. When they need our resource, we are there and so far we have been able to provide it.

When Mr. Cherry from Dauphin County called me and my staff, working along with Mr. Cherry and his staff that were there during the last minute and are literally up through the night preparing our brief for the Third Circuit, finished at 3 o'clock on a Monday morning and I had to argue at 11 o'clock that morning in Philadelphia. That's a fantastic burden. I

wasn't there alone. I had 2 people from my staff and 2 lawyers and my secretary working through the night to meet a crunched deadline that wasn't caused by us, but it was caused by what I believe to be, quite frankly, re-dilatory tactics waiting for the last minute. And the smaller county D.A.'s are going to have that difficulty. They have turned to us in time of need and we have been able to provide it.

As the General suggests, as more and more of these cases come, as more and more of these deadlines occur, because of Act 4 and because of Governor Ridge's commitment to eliminate the backlog of over a hundred cases that he inherited, there is going to be more and more work, and right now in the Criminal Appeals and Legal Services Section there's me and 4 lawyers.

In some of these cases, many of them, as we said at the beginning, come out of Philadelphia. They certainly have more lawyers on staff doing just this stuff than I have doing all of our appellate work. But for the smaller counties where a number of these cases come from, that could cause a crunch if they start to

fall together.

REPRESENTATIVE PICCOLA: Reading between the lines, I'm going to conclude that you feel it works fairly well?

MR. GRACI: It has been working fine up to now. What the crunch will cause, I think, remains to be seen.

REPRESENTATIVE PICCOLA: One other line of questioning. On page 6 and on page 7 of your testimony, you make suggestions, the first instance that we place a time limitation on the Supreme Court to decide -- I think that's the first appeal available --

ACTING ATTORNEY GENERAL COHEN: That's right.

REPRESENTATIVE PICCOLA: -- after sentencing because of the 37-month average time that elapses in those cases. Then on page 7, you suggest that we require -- I guess that's in the bill; that we have the Supreme Court adopt standards for appointment of counsel at all stages of these capital cases.

Given our Supreme Court's propensity to suspend statutes because they, in their view, impinge on their rule-making authority, which I

might add parenthetically, I have a bill which will stop that if we can get that passed later on in the fall. But, given the court's current propensity to do that, the power to do that, do you believe that they will allow us to impose such time limit or allow us to require them to adopt these standards?

ACTING ATTORNEY GENERAL COHEN: It is our belief, and we have discussed this very point with Ron Eisenberg, who is the Chief of Appeals in the Philadelphia District Attorney's Office. He believed and we believe that it is both a constitutional limitation and something that the Court would accept. We think it's very important.

If I can expand for just a moment on the second part of it, which would look like it is imposing some standards on the Court to impose on the issue of the appointment of counsel. What we are referring to there, basically, is the vast difference and the experience of defense counsel in different counties.

So that, you could have a requirement that in order to be appointed counsel in a case,

you have to have already had 5 or 10 first-degree murder cases that you tried or that you handled. That kind of a requirement would be met by a large number of criminal defense counsel in Philadelphia, but perhaps, by nobody in one of the smaller counties that ended up having such a case. There would have to be some consideration given to the local situation and the local practice. Otherwise, you would have a process where Philadelphia defense counsel would end up being circuit riders in the defense of these cases, which we don't think would be appropriate.

REPRESENTATIVE PICCOLA: Thank you, Mr. Chairman.

CHAIRMAN BIRMELIN: Before we take any further questions, I'd like to introduce Representative Steve Maitland from Adams County. He's a member of the subcommittee, and Representative Kathryn Manderino from my right who is the long-time Democratic Representative here. You'll have to hold up their end of the discussion.

REPRESENTATIVE MANDERINO: I don't think that would be a problem.

CHAIRMAN BIRMELIN: I didn't either.

(laughter)

CHAIRMAN BIRMELIN: I would also like to mention that, although they were not able to give testimony today and had given it at the Senate hearing on this bill, the Pennsylvania Post-Conviction Defender Organization has submitted written testimony for the members of the committee and subcommittee. I would also point out that all of those members of the House Judiciary who are not present today will receive copies of the testimony of all those who have submitted it for the public meeting.

Further questions from members of the committee? Mr. Hennessey.

REPRESENTATIVE HENNESSEY: Thank you, Mr. Chairman. Attorney General Cohen, you had mentioned that, somebody, maybe it was Mr. Graci mentioned that Philadelphia has a rather sizable and experienced staff in dealing with capital cases litigation, the appellate litigation, re-dilatory of court activity result at the end of the judiciary review process.

I point to page 9 of your comments when you talk about -- you make the reference to

prosecutors who lack the resources to handle these problems, these kind of cases. Are you suggesting that, perhaps, we should have an office in the Attorney General's Office that specializes in this type of litigation? Or, is there a way that we can find ways to share the expertise that Philadelphia and Pittsburgh might already have and make that available to the county district attorneys offices that we don't, in a sense, duplicate those services?

ATTORNEY GENERAL COHEN: Well, the problem comes down to one of funding. I think right now there is a somewhat informal process of sharing among that group of prosecutors that have handled these cases. I am anticipating that we will have to, in our proposed budget for next year, show a request for an increase for the staff and our Appeals and Legal Services Section in order to be able to handle the number and volume of cases, since over the past 30 years there has been very limited volume and now there are 192 cases in the backlog. That's going to continue to grow.

We anticipate that we are going to need an additional -- some number. We haven't

calculated what it would be yet, but it would be an additional staff and funding that will be in probably the mid to high 6 figures to do that. I think it's appropriate to place it in the Office of Attorney General.

REPRESENTATIVE HENNESSEY: I think you alluded to the fact that maybe some of this is going on, this sharing of expertise on an informal basis already?

ATTORNEY GENERAL COHEN: That's correct.

REPRESENTATIVE HENNESSEY: When that happens, do the cities that provide that expertise, do they bill the counties for it or simply done on a gratis basis?

MR. GRACI: No. No, not that I'm aware of and that's where some of the problem is. If you have a prosecutor, highly qualified prosecutor, very much experienced in Pittsburgh, it's not appropriate for the Pittsburgh taxpayers, the Allegheny County taxpayers to be paying for him or her to be trying a case in Fayette County, which is what you are really talking about. If it is a problem, it's a state problem.

Whenever I have a problem there are a number of people in my circuit, if you will, that I call, and likewise who call me, be it a trial problem or appellate problem and try to resolve it. That cooperation exists and is institutionalized to a point and a very successful point to the Pennsylvania District Attorneys Association. It's a great informal networking.

I have had several people who will call me; oftentimes, I'm a clearinghouse. They might be getting ready to try with a passage of a bill, I think about 6 years ago that allows for a remand for resentencing. Now I have to retry the sentencing phase. I have not done that. How do I get this in?

I might say, well, I know the D.A. in X county just did that. He just went through that, so he is going to be able to help you out. I might see that because I keep track of all these things; whereas, the D.A. in the outlying county wouldn't have known necessarily that that happened. It's just a providing of information. We are all very willing to share whatever knowledge we might have, but the actual trial of

the case --

I'm not aware of any case, Representative, where a D.A. from one county or an A.D.A. from one county has gone to actually try the case in another county. That does happen with some other crimes, and oftentimes through our office we'll appoint as a special deputy a D.A. from an adjoining county to take care of a conflict situation, for instance, to handle.

I have not been aware of it happening. Again, it goes back to what I said to Chairman Piccola, when you have the most serious crime known to our criminal justice system occur in your county as a D.A., and I know you have a former D.A. sitting on the panel, you don't want to give that away to somebody else. You owe that to the constituents who elected you to handle that case and to see it all the way through.

By having a unit housed in the Office of Attorney General, we can be that, and it would be something that appropriately falls on the purse of the Commonwealth, because it is a Commonwealth problem.

ACTING ATTORNEY GENERAL COHEN: Or the process of the appeal.

REPRESENTATIVE HENNESSEY: Another issue that sometimes arise, and I think you allude to it in your comments, Mr. Attorney General; the fact that capital cases are *expensive not only from the prosecution side but* also from the defense side. The biggest complaint that people make -- Well, one of the biggest complaints people make with regard to review of capital cases is that the funds that were made available to investigators or to the counsel at the trial where the die is cast, so to speak, on many of these issues, is woefully inadequate.

You read once in awhile of somebody giving the defendant $500 to hire an investigator to do the entire case. There are certain areas of the state, perhaps, that $500 won't get phone calls answered or a trip to the crime scene.

How would you suggest we cover that issue? Because it seems to me that's one of a basic fairness. If there's enough money, you can get a good investigation done. If there's

not enough money you can strangle that investigation, but it sure sounds good to say that an investigator was provided.

ACTING ATTORNEY GENERAL COHEN: A good question raised by former defense counsel and an important question. I think that's what we are addressing when we talk about -- on this bill about providing adequate resources in the appeal process. But, that issue really comes down to the county and it is a very legitimate concern that has to be addressed at the county level, I think, unless the state legislature is willing to get into the trial process in terms of raising that kind of problem.

That's not the type of issue that generally gets considered by the General Assembly. But, it is a local problem and a real concern and it impacts on, in the end, the issue of the fairness of the trial.

REPRESENTATIVE HENNESSEY: Thank you. Thank you, Mr. Chairman.

CHAIRMAN BIRMELIN: Any other members have questions for Attorney General Cohen? Mr. Feese.

REPRESENTATIVE FEESE: Thank you, Mr.

Chairman. Thank you for your testimony, Attorney General Cohen, and your assistance to Lycoming County District Attorney's Office in the past and also Mr. Graci who helped, I know at least in my office, invaluable in cases of this nature. I appreciate it.

ACTING ATTORNEY GENERAL COHEN: Thank you.

REPRESENTATIVE FEESE: I have 2 questions. First of all, you suggested a time within which the Supreme Court should be required to act. Do you see that need on the trial level also for post-trial motions? The reason I mention that is because, I tried a capital case in Lycoming County in October of '91 and they have not decided post-trial motions yet. That's approaching 4 years. Do you see a need for that?

MR. GRACI: My recollection, Representative Feese, is that this bill would require disposition within a specified time.

REPRESENTATIVE FEESE: I read the bill. I didn't pick that up.

MR. GRACI: That's one of the substantial delays in what General Cohen pointed

out in his testimony is the time line. I can show you the statistics as I have calculated them. That just goes from sentence to -- and the filing of notice of appeal to when the Supreme Court issues its opinion. It doesn't take into consideration, and a lot of these cases like Abu-Jamal that the General made reference to presently being litigated in Philadelphia, there was a long delay at the trial level before the formal sentence was imposed and the appeal went forward. When we identify a little over 37 months, it's just from the time of formal notice of appeal is filed until the Supreme Court issues its decision.

My recollection in the bill was, with the filing of the unitary review petition, which would come along with the -- it's Section 9575 on page 14, disposition without evidentiary hearing, the Court shall no later than 90 days from the date of the determination dispose of the petition. Likewise, I think the next section if there's to be an evidentiary hearing, 9576, requires disposition within so many days, again 90, after the close of the hearing.

One of the problems that was

identified by the Philadelphia District Attorney's Office in drafting in large measure the bill that you have before you, was that, too often these cases languish at the trial court level. Until there's a decision on the post-verdict motions or on the new unitary review petition, it can't go forward. The Supreme Court doesn't get the opportunity.

This is also a problem we have seen -- There's a case called Commonwealth versus Fry and Alfred Fry versus Faulkmer, it's impending in the United States Eastern Court in the Eastern District of Pennsylvania since, I believe, on remand from the Third Circuit, the district court originally granted the writ. That was reversed; went back for resolution of the rest of the issues in 1991, and nothing has happened in that case since.

It's not just delays in the state trial courts. It's delays in the federal courts. As the General pointed out, you can't address those. Hopefully the Congress will. We have been working in the Office of Attorney General for the past 2 or 3 terms with the Congress to try to come up with a telescoping

down of the federal process; not to eliminate anybody's rights. To make sure that everybody who is charged with theses offenses is represented by counsel throughout as competent representation, brings up these issues. If there has been a trial, to get it resolved in a new trial quickly; or, if everything is affirmed after all this review, that the lawfully imposed sentence, which you have decided as a matter of policy, is the appropriate punishment for first-degree murder be carried out in a timely fashion.

REPRESENTATIVE FEESE: One other question. I'm assuming you have not had the benefit of looking at Mr. Frankel's written testimony from the ACLU. He raises a concern in regard to Section 9572, Subsection B, which is representation of counsel; that the petitioner could not be represented by the trial counsel in a collateral review unless he or she be waived the right to raise the issue of ineffective assistance of counsel.

Mr. Frankel sees a constitutional issue there about placing a petitioner in that particular situation; waiving the right to raise

ineffective, or giving up your attorney, so to speak, the attorney that that petitioner may wish to proceed with.

ACTING ATTORNEY GENERAL COHEN: I think the whole issue is, if you think your counsel is ineffective, why do you want to use that counsel for the appeal of your death penalty? If you don't think that that counsel is ineffective and want to keep them, then that's where you would waive the right to raise that.

REPRESENTATIVE FEESE: Would the petitioner waive the right -- If a petitioner waived the right to different collateral review counsel at that stage, counsel that the petitioner has could still be ineffective on the appeal itself. Then that petitioner would not have the protection of collateral review counsel to review the mistakes possibly that the trial counsel made while continuing on direct appeal.

MR. GRACI: If I might, Representative Feese, when this bill, as I remember testifying in front of the Senate when it was pending before the Senate Judiciary Committee, that was I thought a much more serious problem and one

that I had discussed both in the office and with the other prosecutors who were appearing. Now the trial counsel may continue throughout the appeal. You are actually having 2 -- you would have 2 lawyers operating at the same time.

When you get to filing of briefs Section 9557, page 15 of the bill, the briefs are filed serially. First the brief will be filed on the appeal, and then within the appropriate time frame, the collateral, the unitary review brief would be filed with the Supreme Court so the unitary review counsel can raise not only things that were missed by trial counsel at trial, but can also review the brief that's now been filed and can claim ineffective assistance of appellate counsel in saying that you raised this issue pretrial but you didn't preserve it in your appeal and you are ineffective for doing that as well.

So, we've tried to cover -- and I think the people who rewrote it did an excellent job in covering the aspect of allegations of ineffectiveness of appellate counsel as well as trial counsel. Since you don't have to throw away the old lawyer with the appointment of the

unitary review counsel, he's still there or she's still there. If there's that special relationship that is developed between a client and the attorney, that continues.

All this does is guarantee that if there were errors made by that lawyer during the trial, they are brought to light immediately. We don't want to wait 6, 7, 8 years to have the Supreme Court at that point say, yeah, your defense lawyer was ineffective. What's the remedy for that? It doesn't mean you walk away. We give you a new trial.

Well, now they are going to complain that the memories are faded. We can't find our defense witnesses. We are much better off if we appoint new counsel at the outset, and identify those errors immediately, possibly at the post-verdict stage or while during the direct appeal with time limits to make everybody act speedily. You certainly know as your experience as a D.A. you had to bring cases to trial within 180 days. Why can't the judges have to decide them? These are the most serious cases that our society knows. Make them decide them in a timely fashion. If there's an error, correct it

quickly and have a new trial. If there's no error, have the sentence that was lawfully imposed carried out.

REPRESENTATIVE FEESE: Thank you, gentlemen.

CHAIRMAN BIRMELIN: We have been joined also by Representative Andrew Carn from Philadelphia County. Representative Manderino is recognized. She has some questions.

REPRESENTATIVE MANDERINO: Thank you. Mr. Cohen, I apologize I didn't hear your spoken testimony, but I did quickly read your written testimony. The one area that I want to ask questions about deals with a point that you made about Section 5972 (c) which is the suggested criteria for appointment of counsel in capital cases and the kind of factors that the Supreme Court should consider. At least in your written testimony you were suggesting that local practices be among the criteria required by the Court to consider.

I guess my question is twofold. Is that suggestion in addition to the language which is currently in the amended bill that talks about local practices be part of what the

Court may use if there are absent standards established under the subsection, or are you saying that that should be another, kind of 1 through 5 listed in --

ACTING ATTORNEY GENERAL COHEN: Yes.

REPRESENTATIVE MANDERINO: Okay. Explain to me what you consider to be -- because I don't understand what local standards and practices you are referring to and what you see to be -- what will be missing if that's not in there as a requirement from the Court?

ACTING ATTORNEY GENERAL COHEN: This would be an issue that, for example, would not be a concern in Philadelphia County. It's the issue of those counties where there are very limited numbers of capital cases that have been litigated, so that if the Court were to set a standard, as I've mentioned earlier, of a requirement that for appointment of counsel, the individual would have had to have litigated 10 capital cases, or even 5 capital cases, you would by that kind of a criterion eliminate in those counties any member of the Bar from being able to handle the case.

What we're suggesting is, where that's

the situation, that local practice could dictate that a member of the Bar there who may not have had that same volume of capital cases might still be found to be qualified to handle the defense of the case at this stage.

REPRESENTATIVE MANDERINO: Correct me if I'm making an incorrect lead. I did hear you testify from the prosecutor's point of view how many times your office, because of the level of expertise of your office, will get involved in either assisting or helping local prosecutors in smaller counties be able to effectively prosecute their case because they may be in a county with very limited expertise.

If that is the case, isn't the argument the same from the defense side? And, is it fair or is it reasonable to expect that if a small county who has one capital case in 20 years, is it agreeable to expect that maybe there isn't the expertise in that county? And, that local criterion may not be appropriate, and that something like what you've also talked about at the end of your testimony with proper resources being given to a central body like the capital resource --

ACTING ATTORNEY GENERAL COHEN: That's why --

REPRESENTATIVE MANDERINO: -- entity is also necessary for the defense.

ACTING ATTORNEY GENERAL COHEN: Absolutely, and that's why I mentioned the importance of the General Assembly considering the action that was taken, or I should say not taken by the failure to fund the resource center for the provision of resources to assist defense counsel. We support that. That's important. That's an important part of this whole process.

At the same time, the skills that one develops as an appellate litigator are also different from the skills one develops as a trial litigator. So that, an experienced appellate lawyer who may not have handled a large number of trials in capital cases could also be a very effective counsel. But, where the specifics of issues involving, for example, scientific evidence or something that could be specific to a homicide trial, where that is lacking in such an individual, that's where the resource center would come in.

That's why the combination of the

Pennsylvania General Assembly not funding the resource center and now the House of Representatives in Washington cutting out the funding, which has not been a final act of Congress, but it may be that that's where it's headed, that creates a very serious problem. The end result, although those people may say that what they are trying to do is to expedite the death penalty and there's probably some thinking on the part of some of those people, well, we don't need to go to this length to provide government assistance to people who have already been sentenced to death. The end result of that thinking will be the denial of the carrying out of the death penalty because of the lack of adequate appellate and trial defense for the individual involved, so it's counterproductive.

REPRESENTATIVE MANDERINO: If I can summarize, not to do any -- If I can summarize the gist of what I understand your testimony to be and also why you support Senate Bill 81 is, you're saying, shorten the dead time and that's what 81 does, but don't shorten or don't take -- The way to expedite is to shorten the dead time

and not to remove the resources to be effective?

ACTING ATTORNEY GENERAL COHEN: That's correct.

REPRESENTATIVE MANDERINO: Thank you. Thank you, Mr. Chairman.

CHAIRMAN BIRMELIN: Any other members have questions for the Attorney General?

(No response)

CHAIRMAN BIRMELIN: Seeing none, I want to thank you, Mr. Cohen and Mr. Graci, for your help and testimony. We have taken note of your suggestion. They may or may not be incorporated in the legislation that we vote on. But, we welcome your office's contribution to this and any other legislation. Thank you very much for coming.

Our next guest is Pamela S. Grosh, Program Director of the Victim/Witness Services Program in Lancaster County at the District Attorney's Office. We welcome you, Ms. Grosh. You may proceed.

MS. GROSH: Good afternoon. My name is Pamela Grosh. For the last 6 and one-half years, I have worked with victims of crime in Lancaster County District Attorney's Office.

During this time I have walked the criminal justice path with many victims and their families.

Their stories are all unique. Each one has its own pain. Each person struggles with the everyday reality of living in the aftermath of a crime. Those realities are physical in the loss of abilities once taken for granted. They are psychological with an overwhelming range of emotions that deluge at unexpected moments, and financial, with a fistful of unanticipated expenses.

They are not all big moments. From victims who have given me the gift of looking into their souls, I understand that it is the constantness of these realities that is the most painful. As one mother said of her murdered child, she's the first thing I think of when I open my eyes in the morning, and she's the last thing I think of before I close them at night.

While each of the stories are unique, many elements of crime victims quests are similar. Each of them seek to make sense of an event that is inherently senseless. They seek some level of understanding that will enable

them to live without the constant cry of, why? Many of them hope for these answers within the criminal justice system. They attend hearings and trials with incredibly painful testimony in order to facilitate their own search for the truth about what has happened. Sometimes those of us in the system would like to shelter victims from these revelations.

I have learned from them that nothing is worse than their imaginings. No truth is more difficult than not knowing.

Having sought and found whatever facts a trial can offer, victims and their families are deeply affected by a favorable verdict. While nothing can erase the crime, a verdict does close a chapter for them. They are satisfied with the feeling that justice has been exacted, a sentence has been pronounced, and the world has recognized the wrong that has been done.

However, the process is far from over. Many victims and their families enter this phase of the system with a complete unawareness of its existence. Prosecutors, police and advocates are loath to make even the most general

prediction of a case outcome. Everyone focuses on the trial and the verdict. There is no room for information about post-sentencing appeal rights of the defendant. Many victims and their families expend a great deal of energy in the trial process and hope intensely that life once again be normal when it is done. That hope is seldom realized.

Recognizing that the impact of a crime does not end with the sentencing of a defendant, despite a victim's fervent hopes, is the first step toward understanding the importance of the appeal process to victims. A victim's physical, psychological and financial healing is not on a timetable. While the facts of the case may never again be disputed in a courtroom, there are seemingly endless appeals based on legal procedure, representation and issues that are little understood by the general public. It is hard for victims and their families to understand this part of the process.

One father told me after spending a day listening to testimony related to inadequate representation, no one said one word about the murder of my daughter. No one ever even

mentioned the reason why the defendant needed an attorney.

Victims and their families seek closure. They want to be able to move into the new normal of living as a crime victim survivor without the baggage of an open court case. Another father told me that while he knows that it is unlikely that his child's murderer will be granted a new trial, it is difficult to stop into his favorite spot for a beer after work to be greeted by questions about a new appeal of which he was unaware. The most private pain he will ever know is public news and can be exposed completely without warning.

I urge you to consider this legislation which, while preserving the fundamental rights of defendants to the fair exercise of justice, would also help victims and their families to gain a sense of closure. Help them to find the meaning of finality that the justice systems promises but sometimes fails to deliver. Help them to find sense in the knowledge that their wrongs have been heard and the guilty punished. Thank you.

CHAIRMAN BIRMELIN: Thank you. I will

entertain any questions from the committee members.

(No response)

CHAIRMAN BIRMELIN: Representative Masland.

REPRESENTATIVE MASLAND: Let me just say, I had the pleasure of hearing your testimony before committee on various matters before. Although you may not be here open for the technical questions that some of our other witnesses are, your testimony is important for us to hear and for us to remember the human side, the emotional side. And as you say, the fact that we are talking about timetables in the Supreme Court, but a victim's family knows no timetable. Thank you.

CHAIRMAN BIRMELIN: Any other members have a question or comment?

(No response)

CHAIRMAN BIRMELIN: Thank you, Ms. Grosh. We appreciate your testimony.

Our next person to testify is Larry Frankel, the Legislative Director of ACLU in Pennsylvania, and, of course, no stranger to this subcommittee, or the committee as a whole.

The fourth witness is Donna Zucker. I have a copy of her testimony. Mr. Frankel, you can present your testimony, we would appreciate it.

MR. FRANKEL: Thank you, Chairman Birmelin. Good afternoon. I want to thank the House Judiciary Committee for giving me this opportunity to testify regarding Special Session Senate Bill 81. We hope that your consideration of this legislation will not become solely a debate over the merits of the death penalty.

This legislation raises important procedural issues that relate to all defendants; not just those sentenced to death. Section 1 of the legislation which runs from pages 1 to 8 makes significant changes regarding post-conviction review for all defendants.

Section 2, which creates the new procedure of the capital unitary review, will affect only those defendants sentenced to death in the future. It has no retroactive application.

I point that out to emphasize that this legislation involves technical questions about what procedures will be used in this

Commonwealth to provide justice for improperly convicted defendants and defendants whose innocence is ascertained years after trial, through DNA testing, discovery of police, or prosecutorial misconduct, or some other means. The legislation raises question of fairness and the capacity of this Commonwealth to provide a remedy for instances of injustice. While those instances might be rare, it is important that there be a mechanism to rectify them.

While the ACLU does not oppose the establishment of time limits for the filing of post-conviction petitions, we believe that such limits should not be so strict that they prevent the consideration of claims involving constitutional rights and evidence that is exculpatory.

However, we do question the need for enacting the Capital Unitary Review proposal. As you have already heard as described by the Acting Attorney General, Pennsylvania now has a timetable for the signing of death warrants. A defendant who is sentenced to death must file a petition under the Post-Conviction Review Act within months after the Supreme Court affirms a

death sentence.

Delaying the filing of that post-conviction attack will be virtually impossible for a defendant on death row. There just will not be time. While a federal court may grant some stay for the filing of that petition, it is not going to grant an indefinite stay and probably will not be allowed to grant an indefinite stay. You have taken the step to get the mechanism moving, but see if it works.

I would point out that additional costs will be incurred under capital unitary review. There will be post-conviction proceedings in every death case. Usually, new counsel will be appointed and an evidentiary hearing conducted. After the trial court rules, the matter will proceed to the Pennsylvania Supreme Court. That court will review issues relating to the original trial and those raised during unitary review.

This new procedure will require substantial post-trial expenses that are not incurred at present, particularly in those cases where the Supreme Court reverses the death sentence or reverses the verdict of guilt. At

present, once the Supreme Court does that there is no post-collateral review. There is no hearing needed. There is no new counsel appointed for purposes of doing that hearing. This procedure will require that in every case, a hearing that does not occur now.

I was present when the former Attorney General Ernie Preate testified on this bill on May 18. At that time he indicated there were 17 death penalty cases where the Supreme Court had reversed the trial court's judgment. Today, from the Acting Attorney General's testimony, it seems that there is one more. Had there been a unitary review procedure in place, we would have seen 18 hearings held that would have been pointless hearings; who knows how much expense to the Commonwealth.

There are additional problems with a delay associated with the additional stage of review. That delay could result in a reversal and remand of a case for a new trial affects the defendant who has been sitting in prison all this time, but may also affect the Commonwealth's ability on retrial. The Commonwealth may lose witnesses that it wouldn't have lost

otherwise, had we not taken this intermediary review procedure and the case gone back.

Based on some discussions I have had and research I had done about unitary review processes in other states, I know of 2 other states which adopted unitary review process for all criminal cases, Arkansas and Missouri. They have since abandoned that process because it did not work. California has a version of unitary review. It is different than what is proposed here. It's my understanding that they are experiencing additional costs, delay and additional litigation.

I would hope that this committee would take some independent review or call in some law professors rather than advocates, very committed to one side or the other to examine what the experience has been in other states; whether unitary review process will speed things up or will it slow things down because of further litigation over habeas corpus issues, over issues of what is effective assistance counsel in unitary review, over issues that I probably can't contemplate because I haven't been actively practicing criminal law for the last 3

years, but I believe there will be new litigation.

I think we can look at law that's already been passed this session which requires the Governor to sign warrants within so many days and the Governor is disposing of the backlog of cases. The post-conviction collateral attacks have not yet been made; they will be made. We will see them. We do not believe that given all these certainties that it would be wise to pass the unitary review portion of this legislation.

I would now like to address several specific technical issues in both sections of the legislation and then discuss what we think should and could be done in this area, some of which is in agreement with Acting Attorney General Cohen and other prosecutors who have spoken in this area.

Section 1 of this legislation makes several changes to the existing Post-Conviction Relief Act that could have a major impact on the rights of many defendants. One set of changes could make it much harder for defendants to obtain the right to file an appeal where prior

counsel has failed to file the notice of appeal or failed to file a brief, and as a result the appeal is dismissed.

Under present law, if defense counsel is so negligent that the defendant's appeal is not heard on its merits, the defendant can file a PCRA petition, and at least in Philadelphia the courts routinely grant those petitions because the defendant has not been able to have his constitutional right to at least one appeal.

That relief is generally called an order granting the defendant leave to file a notice of appeal nunc pro tunc. In this legislation the word Commonwealth, which modifies the word officials, is deleted. I've got a reference to the page number where that's done, but also the term government officials is defined to exclude defense counsel.

We fear that when the Court goes back to review what you have done here, they will say, well, the legislature intended that the defense counsel were the ones who made the mistake and obstructed the defendant from having the appeal heard or the defendant doesn't

necessarily have any rights to that appeal. We would submit that these changes -- I don't know why they are proposed. I don't think they are necessary, and absent some compelling reason for them, they should be deleted so that there is no question but that a defendant can continue to exercise his appellate rights when he has not been able to do due to counsel's failure; not even defendant's own failure.

On page 3 at line 24, the word affected is deleted and replaced with the word changed. A defendant would be required to demonstrate that newly-discovered exculpatory evidence would have changed the outcome of the trial had it been introduced. We cannot understand why this modification is being proposed. We hope that it is not the intention of the proponents to create a virtually impossible hurdle for defendants to overcome.

How do you effectively prove that something would have changed the outcome of a trial, and what kind of standard does that set? We think the existing statutory wording is fine and recommend that the present language be maintained.

The bill also attempts to strip Pennsylvania's courts of the authority to grant any relief before the filing of a petition. This could have a profound consequence where the relief being sought is the appointment of counsel for the help of that counsel in the filing of a petition for a stay of execution so that a full amended PCRA petition can be filed, or a request for funds to hire investigator so that the attorney can determine whether there's a basis for filing a petition.

There are also specific restrictions on the authority of a court to issue a stay of execution. Turn to page 6, line 30 through page 7, line 13. The language in these 2 provisions will be applied to defendants whose death sentences were affirmed already prior to the date of the enactment of this legislation. In those cases, the records can be hundreds of pages. Counsel may not be appointed or obtained until after the Governor has signed a death warrant.

I hope that nobody really intends to prevent a court from staying an execution if there's insufficient time for new counsel to

review what can be a very extensive record.

If these 2 provisions remain in the bill, the Court could be barred from entering a stay without regard to the length of the record, the complexity of the legal issues and/or the need for an independent investigation of factual issues relating both to guilt and the inappropriateness of the death penalty.

Section 1 also creates a one-year statute of limitation for the filling of a petition under the Post-Conviction Relief Act. A number of exceptions to that one-year limitation are noted. What I would ask you to consider what this time limit will mean for an indigent defendant whose court-appointed counsel fails to file either the timely notice of appeal or some other necessary step to protect that appeal.

The appeal is dismissed by the Superior Court and neither counsel, although unexcusable, but the counsel nor the court notifies the defendant that this action has been taken. The defendant finds out about this dismissal 15 months later because he has written to the Court and says, what's happening with my

case? And I write back, oh, by the way, it was dismissed 15 months ago. It would appear that under the Statute of Limitations being proposed, such as a defendant would be precluded from seeking relief under the Post-Conviction Relief Act.

Or ponder the fate of the indigent defendant who belatedly discovers exculpatory evidence. Unless he or she can put together a well-drafted petition or find counsel to do so, he or she could be barred from presenting such evidence to a court. Will the new time limits preclude an unrepresented defendant from being able to present newly-discovered DNA evidence or evidence based on a technology of which we are net even aware? The time limits set forth in the bill will severely hamper the ability of an indigent defendant who may not have the know-how for the filing of a complete pro se petition in a timely manner.

In cases where an attorney is appointed to represent the defendant, will there be sufficient time for that attorney to review the record? And having been appointed in some of these cases, I can tell you that some cases

the record is an entire file box, hundreds and hundreds of pages of transcripts to read through, and evaluate and investigate the significance of that new evidence.

Again, we do not completely oppose a reasonable standard of Statute of Limitations, but we believe that consideration must be given to providing greater flexibility for the raising of claims where the defendant is not at fault for the delay in filing the petition seeking relief.

The legislation states that no discovery will be allowed except by leave of the court, quote, with a showing of exceptional circumstances, close quote. This bar on discovery is also included in the section of the legislation creating the capital unitary review.

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Will a reasonable belief that the prosecution has potentially exculpatory evidence be deemed an exceptional circumstance? Will materials that should have been requested before trial, but were not asked for due to trial counsel's negligence, be discoverable under this section? Would documents that have come into the hands of the prosecution since the time of

trial that relate to the factual issues at trial be discoverable? The answers to these specific questions are unclear.

Finally, with regard to Section 1, there's a provision for the automatic review by the Pennsylvania Supreme Court of an order granting a defendant post-conviction relief in a death penalty case. However, if the court denies the relief for that defendant, and he or she wants the Supreme Court to review that determination, the defendant must file a petition for an allowance of appeal. The Commonwealth gets automatic review. The defendant has to file a petition for allocatur. What is the justification for the disparate treatment in death penalty cases?

That kind of differential treatment, which is always favorable to the Commonwealth, can be found in several provisions of Section 2, the section that creates the capital unitary review. For example, the legislation set the time requirements for the filing of a unitary review petition and answer. The Commonwealth is not required to file an answer, and the failure to file an answer by the Commonwealth will not

been considered an admission of any fact alleged in the petition.

Another provision governs the disposition of the petition without an evidentiary hearing. The section there states that the Court shall determine within 20 days if an evidentiary hearing on the allegations in the petition is necessary. If the Court fails to issue a written order -- the Court fails to issue a written order within 20 days, that failure should constitute a determination that no evidentiary hearing is warranted.

In other words, a capital defendant would lose the right to an evidentiary hearing on issues involving trial counsel's effectiveness if a judge purposely or inadvertently does not stick to the deadline set by this legislation.

Another example of a lack of evenhandedness can be found on page 15, lines 12 through 27. The petitioner who has new counsel on collateral review must file 2 briefs with the Supreme Court, a collateral appeal brief and a direct appeal brief. The Commonwealth need file only one brief.

Now, when I read the present bill when I was preparing my testimony and when I read it here again as I was listening to the Acting Attorney General, I guess the mistake in understanding that this new counsel that would be appointed for unitary review is handling both the collateral review and the appeal. It wasn't my understanding that the original trial counsel would continue to handle the appeal. Then an assumption I made, it doesn't say that in the legislation, but the legislation also doesn't make it clear that trial counsel is continuing and handling the appeal.

Now, let's say that you clean up the language so that it's clear. I would submit maybe the difference in the number of briefs isn't so significant, but I think you will have potential problems where the trial counsel who is preparing the appellate brief wants to argue certain things and the unitary review counsel not only wants to argue on ineffectiveness, but other issues that may be directly in conflict with the brief being filed by trial counsel.

I mean, are they supposed to work together? Are they supposed to work against

each other? What if one of them has the record and the other one needs access to the record? I mean, there's all sorts of issues of conflict that I can foresee, none, of which, I really anticipated. Because when I read the bill and heard the testimony from the prior hearing, I think all of us were going on the assumption that there is going to be one new counsel who was going to take over due collateral review in the trial court and then file the briefs for collateral review and direct appeal.

I think it's a very problematic area. I'm going to address another reason why it is. But, two counsel who could potentially have conflicting theories about what to do with this case filing briefs before the Supreme Court is not, to my mind, an effective way of providing competent counsel to indigent defendants in capital cases.

But, there is a significant constitutional flaw in this procedure that I'm going to briefly discuss. I have attached to my testimony a 4-page letter that I wrote to Senator Greenleaf awhile ago. Rather than read that entire letter, I will summarize what that

letter says, which is that, there are 2 cases from the Third Circuit--I believe they are both from the Third Circuit--but they are Pennsylvania cases that went to federal court. Neither of them were death penalty cases, but where the trial court was really trying to force the defendant to make choices between either retaining their present counsel or pursuing some other constitutional claim. The federal court said you cannot force that on the defendant. The defendant does not have to give up a constitutional right in order to proceed with counsel of his or her own choosing.

In death penalty cases, which are very difficult, I don't know how many defendants can really know whether their trial counsel was ineffective. The issues are fairly complicated and there may be significant errors that were made that many lawyers miss, frankly. Lawyers reviewing cases sometimes miss errors of ineffectiveness.

For a defendant to say, I'm competent to make this decision about whether I forever want to waive a claim of ineffectiveness, I think is not really in keeping with the level of

understanding of the defendant. We have a constitutional claim and we have got, I think, an unrealistic understanding of what a defendant knows.

In addition, we have the whole problem of the ethical attorney, and there are some who represent defendants in capital cases, feels he or she has done a very good job; no problem with their representation, but they are then going to have to sit down with the defendant and say, I think I have done a very good job for you, but if you want to challenge my ineffectiveness at this stage, you are going to have to make a choice and let the court appoint another attorney for you. I have seen the standards and I know who practices in this jurisdiction and I don't think any of them are as good as I am, but you are going to have to make that choice.

That's what this provision forces on defendants. But even if I think I have done everything possible for this defendant, but I'm willing to let somebody else look at my work, but I have to tell this defendant you have to take the risk. You may have a counsel who is less effective than I am in bringing these

claims.

Some of that may be eliminated if we, indeed, have the trial counsel continue with the appeal and have the unitary review counsel just question trial counsel's effectiveness. But, these are choices you are asking some of the poorest, least educated, and probably the most emotionally under duress defendants in the system to make. I would submit that it's going to create difficulty.

I also predict that we'll see lots of litigation over whether unitary review counsel was effective. It's not clear under the bill where that gets challenged. Does it get challenged in a further state collateral review? Does it get challenged in a federal collateral review?

I know a few attorneys who probably to this day, today would come and say, yes, I'm competent to do unitary review. I don't know how many know what it is. It involves difficult questions of habeas corpus law, both the state habeas corpus position, the federal habeas corpus provision, the requirement to investigate the case and understand the entire record,

issues that were raised and not raised.

I think the Attorney General, you know, very correctly set out the kind of pressures and requirements that capital counsel must meet in order to discharge their obligation. I think we will see litigation over whether unitary review counsel were competent.

Before I forget, there's one other issue I think with this waiver of counsel. Suppose you have a defendant who does waive his right to seek new counsel? Is that also going to be deemed a waiver of the ineffectiveness of counsel during unitary review? Because I'm a trial counsel, trial counsel is going to handle the whole bottle of oil, ball of wax, when does he get to raise the issue that, well, he was fine at trial, but then in unitary review he really messed up? When is that going to be raised?

I think these are questions that are difficult. I think the courts are going to spend a lot of time sorting them out and we're going to have the kind of delay I referred to.

I do have a recommendation which is relatively consistent with what the Acting

Attorney General Walter Cohen suggested with what former Attorney General Ernie Preate suggested when he testified on this bill, and which one of the Supreme Court Justices, Ron Casteel, recommended in a speech that he gave. He didn't actually recommend, but he noted the problem in a speech he gave to the Criminal Justice Section of the Philadelphia Bar Association, and that's the problem of competent counsel for defendants on death row.

Once the Supreme Court affirms that death sentence, possibly the case might go to the U.S. Supreme Court. But, once the death sentence is affirmed, if the defendant has had a court-appointed attorney, that appointment ends and the defendant is unrepresented at that time and will remain unrepresented unless somebody comes in to represent him, the family hires somebody, or a PCRA is filed and an attorney is appointed.

We have people on death row right now who have no lawyers; who don't know what steps could or could not be taken. We believe that if lawyers would be appointed for those defendants, lawyers who are competent, who meet the

standards when the standards are determined, that this will iron out a lot of the procedures. It's not easy for a defense lawyer to come and try to recreate a case 20 years later.

To think that attorneys are jumping up and down to do these cases at present with the purposeful delay until the last minute, well, you don't know which cases are really moving through the system. When there are so few attorneys who handle the cases, they are going to end up being, you know, coming in at the very end to try and provide the zealous representation to which these defendants are entitled.

I have attached to my testimony a proposal for the appointment of counsel in death penalty cases, both for those who come down in the future, but also a possible way to deal with those whose sentences have already been affirmed and are among those sitting on death row at the moment.

Before I conclude, I would like to address a couple of issues that came up in the testimony of the Acting Attorney General. I think Representative Piccola raised one of the

questions I had with the limitations on the court's time to decide any matter. I think you all know how the court will probably react to your attempt to tell them when to make a decision.

But, beyond that, what's the remedy? What if the court doesn't decide? What's going to happen? Is the defendant going to lose his rights because the court doesn't decide? I don't know what specific remedy one has in mind or what specific remedies you could even impose on trial courts, although I guess the Supreme Court could, but I don't think there is anything realistic short of removal of the justices for not deciding cases. I don't know if that's constitutional.

I already did address the question of whether we are going to have 2 counsels simultaneously representing the defendant after the sentence is imposed and that should be either clarified, although it would be my recommendation that the provisions about new counsel be eliminated. That includes the provision regarding unitary review be eliminated. But if you are going to have new

counsel appointed, actually, it will be additional counsel, and I think that the wording there must be looked at.

That is all that I have with regard to my testimony. I'll be happy to attempt to answer any questions that members of the committee may have.

CHAIRMAN BIRMELIN: We recognize the esteemed Democratic Chairman of this committee, Representative Caltagirone. You and Representative Carn are welcome to join us up here if you would like.

I'll entertain any questions that members of the committee have at this time for Mr. Frankel. Ms. Manderino.

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman. Just one. When we did the bill earlier this session that set the time limit on the Governor's signing of death warrants, one of the issues that I was interested in at the time, and was unsuccessful in promoting, was the notion of a requirement of counsel to be appointed, and I'm trying to remember how it was drafted; I think within either a short time after the death warrant was signed or before the

death warrant was signed. I can't remember exactly how it was drafted.

But, it was my notion there that that would not delay the process; would be consistent with the expedited process that was trying to be enacted, but at the same time make sure that you didn't leave a defendant unrepresented and not knowing what to do next.

I guess my question is, and I assume that's consistent with the recommendation that you were appointing here. What I'm not understanding is what that time frame is now in light of the legislation we now have with the 90-day requirement on the Governor to sign and the proposal put forth in Senate Bill 81. If you can help me with that.

MR. FRANKEL: It is my belief that there is no requirement for appointment of counsel by anybody at the time the warrant is signed. The defendant has to get into court with some kind of a petition that -- then the court will appoint somebody or there has to be a volunteer, attorney who is willing to go to court for them.

There's nothing at present, once the

Supreme Court affirms the sentence and until collateral attack petition is filed, for any counsel to be appointed. There is no mechanism. It would be my recommendation that the important time is when the Supreme Court actually affirms the sentence because the Governor presumably will be signing a warrant within 90 days.

Whether it works or not, that at least gives the court some leverage over the attorney, and said you have 5 months to do this, why haven't you done this? As opposed to the attorney being appointed less than a week or two before the actual execution date and how is the attorney suppose to accomplish all of this in that period of time?

So, by having it at the time the sentence is affirmed, an attorney has a better chance at having the time to look at the record and investigate the case. But at present, most--I'm sure there are some people whose sentences have been affirmed--but most defendants on death row do not have counsel and do not necessarily know what the next step to take would be.

REPRESENTATIVE MANDERINO: Follow-up,

then, you were critical of a portion of this bill that had a one-year Statute of Limitations to raise the issue, if I'm remembering correctly, of ineffectiveness of trial counsel, correct? Am I right so far?

MR. FRANKEL: I was critical of the -- a strict one-year time limitation. No. It could be ineffectiveness of counsel with regard to filing of an appeal with the example I used.

REPRESENTATIVE MANDERINO: When does Senate Bill 81 propose that that one-year Statute of Limitation start running; when the Supreme Court affirms or when the trial gives a verdict?

MR. FRANKEL: It's when either the Supreme Court concludes the direct review or denies discretionary review; in other words, denies the petition for allowance of appeal, or if the defendant has not requested any form of direct review or discretionary review, the time at which that expires. It's not at the time the judge imposes sentence.

For the defendant who doesn't take any further action, it would be 30 days later that one-year period would start. For the defendant

who appeals his case further up, when that review process ends, it presumably either would be the affirmance of the decision below or the denial of the petition for allowance of appeal.

REPRESENTATIVE MANDERINO: If we built in at that stage an appointment of counsel, how would that, or would that not affect the proposal of courts?

MR. FRANKEL: Just so you're clear, the one-year time limitation applies for all cases; not just death penalty cases. If we are talking about appointment of counsel, it's going to happen in death penalty cases upon the affirmance of the death sentence by the Supreme Court or the failure for the petition for certiorari in the U.S. Supreme Court.

Say the defendant's sentence is affirmed by the Pennsylvania Supreme Court and the defendant files petition for further review by the U.S. Supreme Court and that is denied. Presumably then, the record would be -- I shouldn't presume here. I don't know what happens to all these records. But, at that point would be when the Supreme Court of the state should appoint counsel because that's

going to start the clock running on the Governor's acting on a warrant.

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman.

CHAIRMAN BIRMELIN: Any other members have questions for the gentleman? Mr. Masland.

REPRESENTATIVE MASLAND: Just a couple. I firmly believe we need to speed the process up, and I commend the sponsors to Senate Bill 81, but there are some logistical problems and logistical questions which you have raised and some, of which, as I think about this and thought about it today, I have not completely dwelt on Senate Bill 81 all summer, but it raises some concerns.

The fact that you could have trial counsel continue on in the case, technically having the defendant waive his ineffectiveness, but then how do you raise his ineffectiveness during this collateral process later on is still not clear in my mind. I'm not sure whether this bill does answer that question at this point in time. Somebody, as you say, could be a great trial counsel, but may not be all that great on appeal.

Logistically, if you do have 2 counsel going at the same time, you were talking about the problems getting the record back and forth and making sure everybody has copies of the record and making sure the briefs are filed. We have one brief by the trial counsel and then a brief filed by the collateral counsel later on, you have 2 arguments. When you have argument 1 for the trial counsel, but the collateral counsel has to attend so that he or she could see what person did wrong at the argument. Or, do you have them both at the same time so that the Supreme Court could be thoroughly confused? I don't know.

Those are some, I think, logistic questions that we really need to look at. I don't think there's any easy answer from looking as I have just in my cursory review of Senate Bill 81.

MR. FRANKEL: I don't disagree. These are only thoughts that -- I am one attorney. I have talked to other attorneys who have looked at this, but we know from these other states that there have been problems. There may be alternatives that can be looked to that don't

raise this logistical problems.

In addition, we don't know what impact the new legislation, Act Number 4, and the Governor's own protocol will have. Let me point out that if this legislation were to pass, you could have possibly the requirement that a hundred PCRA petitions in death penalty cases all be filed within a year.

Now, are there a hundred attorneys in the right places in the state to appoint to all of those cases? Again, what kind of logistical nightmares would that mean since the bulk of them might be in one county, Philadelphia? As I sit here there are more problems that occur to me. Then the costs associated with that being borne by one county.

Granted, in those cases there probably will be some collateral review of those cases anyway, so maybe we are just shoving the costs and the crunch of time into a shorter frame. But, it means a lot of other court business doesn't get done if these cases have to be dealt with. That's a priority decision that the system has to make.

REPRESENTATIVE MASLAND: Another thing

I was thinking of, as far as the waiver of bringing ineffectiveness assistance to the counsel claim, against trial counsel; if you intend to continue to have them represent you in the collateral appeal, how else can you make that decision? Who else can make that decision?

There is a lot of times when the Court has a colloquy with a defendant at the time the defendant is waving his right to a jury trial, and the Court has to determine whether that person is making a competent decision. Here you are going to have that same trial counsel, I guess, who is going to be having colloquy with the defendant who has seen the attorney represent that person at trial, maybe has some idea, you know, the judge's idea as to whether or not there was competent representation at that time. How can you do it otherwise? Can you just have the judge make the decision?

MR. FRANKEL: You can certainly have the judge --

REPRESENTATIVE MASLAND: Or do you automatically say you are going to have second counsel?

MR. FRANKEL: You can have the judge

control the colloquy and the judge should have some pretty probing questions to ask. I'm recalling, as you are asking me, although I fortunately never handled a death penalty case, I did have to handle both guilty pleas and jury waivers. I know defendants that I represented *didn't understand the question of colloquy.* I mean, they're like looking at me, I'd say, yes; they'd say, yes.

The reality is that, many defendants are not educated and do not understand the process. Even if you have the trial judge leading them through, how is the trial judge going to make sure that they haven't been unduly influenced by the trial attorney who doesn't want to hear the defendant say, yeah, I think my lawyer messed up at trial? Therefore, explains the process to them in such a way without giving him the full implications of what he may, indeed, be giving up unless he goes in and asks for a new attorney.

Although I used the example of the ethical attorney who has to wonder about what the new counsel will be, I'm much more afraid what the unethical attorney who wants to stick

with the case no matter what and doesn't really care what happens to the defendant because of the glory of appealing a capital case. We are not necessarily protecting them and protecting the defendant's right to later on when another attorney finally does get involved in a case, said, wait, do you know what your lawyer did at trial? Do you know your lawyer did X, Y, or Z?

One case in Philadelphia, the trial lawyer used the word murder herself during the guilt phase rather than talk about the death of -- the defendant talked about the murder of the defendant (sic).

In another capital case the person got funds to hire the investigator, but the 9 months before trial didn't hire the investigator took 5 days before trial. Is that defense counsel really -- You know, we're going to have to count on that defense counsel telling the defendant, you know, that was a big mistake on my part. Some lawyers will, but some lawyers won't. Who is going to fair out the truth in those situations?

REPRESENTATIVE MASLAND: That's the problem. From another perspective, I have a

concern that there are ineffective assistance of counsel claims that are trumped up. I know some people who are handling and have handled death cases in the appeals process and they have been advised, or I guess I should say, it has been suggested to them by different organizations, *and as far as I know, Larry, not yours,* but maybe you don't want to do this on appeal because then we can have a subsequent appeal about how you were ineffective for not having done that; those kinds of continuous loops.

I would like to see us find some way to fair it out those problems, on the one hand, but I'm concerned in the process of doing this unitary review, we may be creating other problems.

MR. FRANKEL: That's why I would go back to appointment of competent counsel with standards at all stages of death penalty cases, with maybe some kind of monitoring unit to make sure --

My proposal addresses mostly the appellate, but I think everybody who is addressing really knows it has to be at all stages of the proceedings. Some counties do a

lot better jobs than others about making sure defendants have competent counsel.

Assured that at every stage that at no point a defendant remains unrepresented that is in this process, have standards that are meaningful; standards that are enforced; provide resources so lawyers can be trained to represent defendants.

I, frankly, think the reason you see prosecutors and former prosecutors support the notion of better assurances of quality representation is the knowledge that the ability of the vast majority of the public to accept the constitutionality and the mortality of the death penalty is premised on the fact that the defendant had a fair shake. That's what calling for competent counsel at all stages is about. The defendants have had a fair shake.

I remember when the bill came up in the Senate, I started reviewing some of the cases that had been reversed by trial court because of incompetent counsel. It was pretty scary. Fortunately, the court stepped in. But, it was the Supreme Court. It wasn't the trial court stepping in and saying, this is bad and we

shouldn't have let this happen. That is a real problem and a potential danger zone in this Commonwealth unless the public is assured that the defendants have gotten quality representation and not just who happens to be a friend of the appointing judge, we are going to continue to have zealous lawyers come in and be able to make a colorable claim way down the line that counsel didn't do what they should have because we don't have standards. We don't have training and we don't have funds to investigate.

REPRESENTATIVE MASLAND: That's all.

CHAIRMAN BIRMELIN: Representative Hennessey.

REPRESENTATIVE HENNESSEY: Thank you, Mr. Frankel. I appreciate your analysis of the bill and the comments that you have made. But, I'm going to return to one area that you talked about. Obviously, the bill is seeking to eliminate delays in the judicial system wherever they occur. We have had some talk about whether or not the Supreme Court was zealous to defend its own rights in terms of giving an unhurried review of the cases.

It's also the suggestion, I think you alluded to in your testimony, how do you resolve? What's the proper remedy if the judge at the trial level doesn't decide cases in a prompt fashion?

What are the downsides of leaving the case at trial court level but reassigning different trial judge to go through the review and make that decision, if a particular trial judge refuses or fails, for whatever reason, to make a decision after a fairly lengthy period of time? Are there constitutional problems of switching judges and having somebody else pass on those claims?

MR. FRANKEL: I don't know that there's a constitutional problem. It must be a practical problem in some cases because judges die before they resolve post-verdict motions. Or, in current practice, if a county has the procedure where the PCRA is sent back to the trial judge, what if that trial judge is no longer sitting in the court because they have retired, gone on to another court, or whatever? There must be a practical way that we deal with it now. If the judge is no longer available to

handle things post-trial, whatever they may be, so I'm not so sure that it is a constitutional problem.

In some cases, in particular I guess a rather prominent case right now in Philadelphia, there is a real question about whether a trial judge whose own handling of the case came under question in the post-conviction, or PCRA petition should be reviewing those issues. There may be a claim that it would be fairer to a defendant for another judge to be assigned a review of the matter, particularly since a lot of the issues not related to trial counsel but related to matters ruled upon by the judge, can they really be fairly decided by the same judge who made the ruling in the first place, which is why you have automatic review of the cases by an appellate court.

REPRESENTATIVE HENNESSEY: You touched on that a little while ago, when you said maybe it's unfair to ask or to expect trial counsel to advise the defendant that he messed up. Therefore, they should file an ineffectiveness of assistance counsel claim. And yet, it seems to be ingrained in our system is the

presentation of post-trial motions to the trial judge in raising potential mistakes that the trial judge would have to -- if he is going to grant a new trial, would have to admit that he made the mistake and made the wrong ruling at the time the trial was going on.

To some extent we do expect the trial judge to do that, even though a couple of witnesses who talked earlier said we can't really expect the defense counsel to throw themselves on the sword in that situation.

MR. FRANKEL: I would point out and it's some of the cases that I rely and are cited in the letter I drafted to Senator Greenleaf, that the general constitutional principle is that in death penalty cases we provide greater procedural protection, so maybe an exception can be carved out in death penalty cases because we do provide greater procedural protection that the post-trial matters do get assigned to a judge who did not preside over the case.

You originally asked me if there was a downside, is that a trial judge doesn't have to rely solely on a cold record. They saw the witnesses testify. They have the chance to

judge demeanor. They have the awareness of what never made it on the record because things were off the record; offers of proof that were denied, whatever. They have a much livelier and active memory of what the case is which can be helpful. So, that is a downside.

I think you've correctly noted that there are some positive aspects and it may, indeed, move the case more quickly through the system even though a new judge is going to have to review the entire record, because the judge who heard the case may be real tired of the case and doesn't want to think about it for awhile and move on to a new case.

REPRESENTATIVE HENNESSEY: Thank you.

CHAIRMAN BIRMELIN: Thank you, Mr. Frankel for your testimony.

Our last witness this afternoon is Donna Zucker, who is Chief of Federal Litigation for District Attorney's Office in Philadelphia. Ms. Zucker.

MS. ZUCKER: Thank you very much. I have noticed that we have lost several people as we've gone on. I hope given the concern that's been expressed about this system, particularly

about the system of unitary review, that I can allay some of your fears and, perhaps, answer some of the questions that seem to be troubling various of you who are still here and some of those who have left. I do have some prepared remarks, and I will read those, and then I will attempt to address some questions that have been raised by ACLU and by various members of the committee.

I wish to thank you for the opportunity to speak in support of Senate Bill 81 which amends the Post-Conviction Relief Act and provides for a system of unitary direct and collateral review in cases in which the death penalty has been imposed.

Today, I would like to briefly address the system of collateral review for death penalty cases established by the Capital Unitary Review Act, since this act is entirely new and represents a significant change in the way death penalty cases will be reviewed in Pennsylvania. At the conclusion of my remarks I will be happy to answer any specific questions you might have about unitary review or about the changes to the Post-Conviction Relief Act reflected in Senate

Bill No. 81.

The Capital Unitary Review Act replaces post-appeal collateral review with pre-appeal collateral review. Thus, issues such as claims of ineffective counsel, which in our present system are classically reviewed in post-conviction actions, often litigated years after the crime, will be explored immediately after trial and will be ultimately resolved at the same time as claims of trial error raised on direct appeal.

There have been suggestions that the unitary review procedure will amount to a rush to judgment. Nothing could be further from the truth. What the procedure ensures is that, those with legitimate claims may obtain speedy review and quick relief.

The vast majority of capital cases are reviewed in collateral proceedings. Thus, while some critics of the unitary review procedure complain that supplying a second lawyer immediately upon conviction will increase the cost of capital litigation, the fact is that the costs of collateral review in capital cases are inevitable. We either have them today or

tomorrow.

The present system merely delays incurring these costs and, indeed, increases them, since the longer collateral litigation is delayed the more difficult it becomes. Files are lost; notes of testimony are unretrievable; witnesses are missing and cannot be located; memories have faded. Thus, the resources required to investigate a claim only increase as time passes.

The costs of delay are not merely monetary. Our criminal justice system is built upon the premise that justice delayed is justice denied. Our constitution and statutes require speedy trial to ensure the swift and just resolution of criminal charges, for, obviously, the search for truth is most effectively pursued when the evidence is fresh.

The present system of collateral review totally subverts the philosophy underlying the speedy trial rules. It encourages delay for as long as possible; thus, ensuring that the litigation of claims will be far removed in time from the crime and from the trial and that evidence and witnesses will be

more difficult, if not impossible, to obtain. Delay furthers no interest but that of a justly convicted defendant who has no legitimate claim, but merely wishes to avoid the imposition of his sentence.

The new statute requiring the Governor to sign death warrants within a time certain after affirmance does not obviate this problem. The signing of a warrant does not force or provide a time for the filing of a post-conviction petition, but only fosters emergency stay litigation. It does not encourage the swift investigation of claims, but to the contrary, allows a defendant to wait until after his warrant is signed to make any effort to explore possible collateral issues in his case.

The Unitary Review Act systemizes the collateral review process. It ensures an orderly process. It ensures the investigation of issues before a warrant is signed. It ensures every defendant the means to investigate, for it provides every defendant with a second lawyer to explore and raise collateral claims.

All claims, whether collateral claims

of ineffective counsel or claims of trial error, will ultimately be resolved in a single proceeding in the state Supreme Court. The defendant who has been truly wronged by the conduct of his lawyer can only welcome such immediate review.

The Unitary Review Act will also foster public confidence in the criminal justice system. We have all heard complaints about what is perceived to be an endlessly drawn-out appellate process, particularly in capital cases. The Capital Unitary Review Act precludes unnecessary delay by ensuring the rapid consideration and resolution of collateral issues. That this is a goal in everyone's interest cannot seriously be disputed.

Now, from the questions that I heard asked while I was sitting in the audience, it seems that the major problem many of you are having with this proposed legislation is the right to the appointment of new counsel aspects and what that means; whether there's some conflict; whether we are forcing the defendant to chose between constitutional rights, and so on. That simply isn't the case.

What the statute does is immediately provide a second lawyer to every defendant who has been sentenced to death. The defendant can waive that if he chooses to, but it would be in no defendant's interest to do that, and it certainly isn't our perception that the usual case will proceed with trial counsel functioning as collateral counsel as well.

Trial counsel will continue to represent the defendant on direct appeal. As is the case now in direct appeal, if you are represented by the lawyer who represented you at trial, you are limited in the issues that you can raise to those that were preserved at the trial. You can't come in with new issues. You can't have your lawyer saying I was ineffective, I'm so sorry.

So that, nothing will be different in the direct appeal context, if you will. The direct appeal lawyer, whether it's trial counsel or, indeed, a new direct appeal lawyer will be limited to raising the claims that were properly preserved at the trial; claims that evidence was improperly admitted; claims of suppression errors, that sort of thing.

Collateral counsel will function as collateral counsel does now under the Post-Conviction Relief Act. Only, he will be appointed years earlier. He will be appointed when all of the evidence is fresh; when, if the defendant is angry with his lawyer for not calling an alibi witness that he suggested, collateral counsel can go out and find this person much more easily than he would be able to do 5 years from now or 10 years from now under the present system.

The idea behind this legislation is to have literally 2 lawyers working side by side, one dealing with the claims of trial error that have been preserved; one dealing with claims of collateral error.

The idea of having them simultaneously reviewing the case is this: In the original bill there was an objection raised that how could a defendant ever complain of ineffective assistance of appellate counsel if he was automatically provided with new counsel after his conviction, and that constituted the collateral appeal process. So, this legislation deems 2 separate processes to occur, both of

which are decided simultaneously ultimately by the state Supreme Court if the trial court does not afford any sort of relief.

As I say, collateral counsel will raise new issues, say a claim of after-discovered evidence or something that's been uncovered since the trial. He will also review the record to see if, in his view, trial counsel handled the trial correctly.

If the defendant loved his trial counsel, he doesn't have to give him up. He can have him litigate those things that he preserved at trial, which are the only things that he could have litigated anyway. So, to suggest that this is depriving the defendant of something is really misleading. In fact, it is giving him an additional lawyer, an additional level of review much earlier than he would have it now.

I don't think that the committee need be frightened of this waiver. The waiver of collateral counsel will occur in very few cases. When it does, it does; but it will be after a full colloquy just as we have colloquies for every other right of the defendant that he gives

up; the right to a trial by jury, the right to a trial at all when he pleads guilty, and the trial court will be able to assess whether he, in fact, is knowingly and intelligently giving up that right.

We cannot not enact this legislation *because it's difficult, or because it's new, or* because it hasn't been tried here yet. It's an attempt to make these appeals move quickly, efficiently and to provide as much counsel for the defendant as possible.

There was a question about, well, when is the ineffectiveness of collateral counsel going to be raised? The ineffectiveness of collateral counsel is not going to be raised. There is no right to effective collateral counsel, just as -- Obviously, we hope that collateral counsel will do a good job.

But, just as under our statute that we have now, you can't come back in under the Post-Conviction Relief Act and say my collateral counsel was ineffective.

In federal court, you can't go in a habeas corpus and say, my Post-Conviction Relief Act counsel is ineffective because there

is no constitutional right to post-conviction review and there is no constitutional right to counsel on post-conviction review. We are providing defendants with something that we don't need to give them. We can give them a trial. We could give them an appeal and say, okay, that's it. Now, if you have any other problems, go down to federal court.

We are attempting to have the states have the opportunity to review their cases, but there's no constitutional requirement that we provide any procedure like this. There will be no claims of ineffective unitary review counsel. There will be a claim of ineffective appellate counsel and that's what unitary review or collateral counsel can raise in his portion of the unitary appeal.

He'll review the brief of direct appeal counsel and say, well, you preserved 10 claims at trial. You've only raised 5 on appeal. I think these other 4 claims are good so I'm going to raise them in my brief and say appellate counsel was ineffective in abandoning these issues. That's precisely what would happen now. It's just all happening at the same

time.

Now, if there are any other specific questions I'll try to answer them. You look confused, and I feel that I've made them worse.

CHAIRMAN BIRMELIN: Thank you for your explanations. The last comment you made was helpful to me to the point they are not entitled to any constitutional relief in some of these areas. I'll open it up to members of the committee if they have any questions. Representative Hennessey.

REPRESENTATIVE HENNESSEY: Ms. Zucker, it may be that there is no constitutional right to counsel or to effective collateral counsel, or effective counsel over collateral issues. But, isn't there a statutory right under the Post-Conviction Relief Act?

I mean, if the legislature would pass the statute that says there's going to be these kinds of reviews, to say that it's not constitutionally mandated doesn't mean it's not statutorily mandated that those reviews be effective? Otherwise, we are just spitting in the wind as far as having that statute in the first place.

MS. ZUCKER: There is a statutory right to counsel. You are creating a statutory right to counsel, but that doesn't mean that we are creating, or we would want to create an endless circle of appeals whereby a person can come back and say my collateral counsel is ineffective because he didn't raise this issue. And then, the next lawyer can come in and say that collateral counsel was ineffective because he didn't claim the first collateral counsel was ineffective, and that's what we have now.

REPRESENTATIVE HENNESSEY: I think we can all agree that we don't want sixth counsel to say that the fifth counsel was wrong. I'm a little troubled by your suggestion that the first person that looks at this, in a sense, in an independent way, that the actions of trial counsel doesn't have to be effective in doing that; that he can be totally incompetent and that's somehow meets the requirements of the state statute.

In fact, there's no constitutional right. It would seem to me that there may well be some due process rights in the constitution. But, aside from that, just assuming that you are

right in saying that there is no constitutional issue, isn't -- I mean, it's almost appalling for me to hear you say that there's no right to effective counsel. It would seem to be an important stage of the proceedings.

MS. ZUCKER: It's a stage of review. But, if you don't change the act at all, if you don't have unitary review and we simply stay with what we have now, the defendant has a direct appeal. He has the right to effective counsel on direct appeal. The United States Supreme Court has said so. The standards is Strickler versus Washington apply in that situation.

If he comes back in and files a PCRA now and litigates it and then goes into federal court in a habeas corpus petition and says, my PCRA counsel was ineffective because he didn't do this, the federal court will say, that is not a federal claim. You have no constitutional right to the effective assistance of counsel, and to constitutionally effective counsel in --

REPRESENTATIVE HENNESSEY: Under the federal constitution?

MS. ZUCKER: Right.

REPRESENTATIVE HENNESSEY: They are dealing with federal constitution and not with the state?

MS. ZUCKER: Yes.

REPRESENTATIVE HENNESSEY: And not state statute either?

MS. ZUCKER: I beg your pardon.

REPRESENTATIVE HENNESSEY: They are not dealing with the state statute either, right?

MS. ZUCKER: No, they are not dealing with the state statute. This is purely for purposes of federal constitutional law and federal review. In other words, someone on death row could not ever get federal habeas corpus relief or a stay upon a claim of post-conviction counsel ineffectiveness, and that's the only point that I was trying to make.

The statute itself, I think you'll see in the provisions makes an attempt to be sure that the people who are assigned to these cases are people with a certain modicum of experience and understanding of death penalty law and serious criminal cases. I'm not suggesting that counsel's conduct is irrelevant or that nobody

cares. My only point is that, that counsel's conduct does not create yet another issue, yet another reason for undoing a death penalty.

REPRESENTATIVE HENNESSEY: Let me just move to another subject. There's been some suggestion that, perhaps, a standard would be that nobody is to be appointed to defend a capital case until they had 5 capital cases work experience. How does a person get the first capital case with experience unless they sit as an assistant? Perhaps as an Assistant D.A. you might have that 2 or 3 people assigned to a case?

But, you don't normally have primary counsel on a secondary, or tertiary counsel for an indigent defendant. How does a person get the first, second and third case under their belts so they can go in and say, I have 3 cases worth of experience? I'm qualified now to be appointed to any indigent defendant that might come down the pike.

MS. ZUCKER: This is exactly what's happening now. The Philadelphia rules that govern appointments in capital cases require a pretty serious level of experience and do

require, I believe, 5 prior homicides or something like that. What people do is, they go second seat with other defense lawyers. It's just like continuing legal education or any other thing.

REPRESENTATIVE HENNESSEY: On a voluntary basis?

MS. ZUCKER: Yes.

REPRESENTATIVE HENNESSEY: Does that ever happen?

MS. ZUCKER: Some of them I know do it on a voluntary basis. Some of them I imagine can actually get paid by counsel; you know, share the fee, or whatever, as an assistant, hired on as assistant. The Defender Association in Philadelphia for many years, as you all I'm sure are aware, could not handle homicide cases. In order for them to begin to do that, that's precisely what they did; was go in and attend trials with private counsel and other experienced lawyers.

REPRESENTATIVE HENNESSEY: Yeah, but they were being paid by the state as well. They were being paid --

MS. ZUCKER: That's true.

REPRESENTATIVE HENNESSEY: -- by being a member of the staff. Then either the appointed counsel -- Well, if it was an appointed counsel could handle the murder case, then you have 2 lawyers that are being paid by the state to do it, right, or some level of the government?

MS. ZUCKER: Right. There was another question that was raised that I thought I might address that you asked, I believe, which was about the slowness of trial courts and what can we do about a trial court not acting quickly.

As you know, the statute attempts to set certain timetables for certain things to occur. The question is, what happens if they don't stick to the timetable? What's the remedy. The ultimate remedy, one that, unfortunately, has been, or fortunately, depending on how you look at it, that's been actually imposed on courts in Pennsylvania is through the federal courts.

The federal court has held that the right to a speedy trial includes the right to a speedy appeal. So that, if there is undo delay in a post-conviction pre-direct appeal context,

a defendant can go into federal court and make that claim as a denial of due process.

In one case, Burkett versus Cunningham which was a Third Circuit case--it was not a death case--but the Third Circuit as a remedy for what they deemed to be undue delay in disposing of post-verdict motions actually shaved time off of the man's sentence. That wouldn't work in a death penalty context.

But, what delay -- the function delay normally has in the interplay between state and federal courts is for the federal court to say, all right, you don't have to bother with your state remedy anymore. We'll hear your claims, so that the defendant can march right into federal court and have his post-sentencing motions, his direct appeal, whatever else, if you will, heard in the federal court. He has his evidentiary hearing there. He has counsel appointed there. So that, that is the ultimate remedy for undue delay. I would suspect if that happens to a trial judge once, that would be the end of his delaying.

REPRESENTATIVE HENNESSEY: It also seems to me another possibility would be for the

appellate court to take it even without the final decision having been rendered by the trial court on post-conviction motions, they can just assume jurisdiction if we gave them the statutory authority to do that. What I suggested to Mr. Frankel is that, perhaps, we could move it sideways rather than up the appellate ladder; sideways to another trial judge.

MS. ZUCKER: With another judge. Of course, as Mr. Frankel pointed out, you get some delay there by the new trial judge familiarizing himself with what is usually a very lengthy record. I feel it certainly has to be done on a case-by-case basis, and I don't think that we should assume in passing legislation always the worse case scenario; that there's going to be a judge out there, which there probably will, who will take too much time, who won't follow the time limits and, therefore, let's try to design a statute that will cover all of these disasters that could occur. We can't envision them all.

I think most trial judges are responsible in an attempt to discharge their duties in an expeditious fashion. I think that

in the Robe (phonetic) case where there is undue delay, that can be handled through the powers of the Supreme Court of Pennsylvania or, finally, ultimately, if necessary through the federal courts.

REPRESENTATIVE HENNESSEY: Generally when you have a situation where an attorney is being challenged for ineffective assistance or incompetence handling the case, it's because of the failure to do something or to raise an issue, it seems to be, more so than having raised the issue wrongly or handled it wrongly when it was presented.

If it's difficult to expect an attorney to say that I was ineffective; that he was ineffective in his handling the case, perhaps by not raising some issue that, perhaps, should have presented himself to him, he forgot or overlooked it somehow, is it realistic to expect the trial judge when he is presented with an issue, an objection, argument on both sides, and the entire matter is crystallized in front of him and he has to say yes or no, when the evidence comes in or it's excluded; is it fair to expect that he can say I made the wrong call

even though I've heard all this argument and the issue was properly framed, when we can't even expect the trial attorney to say -- or to rule on his ineffectiveness when the issues weren't raised, or just potential issues lurking somewhere in the background?

MS. ZUCKER: I think that we have seen in the cases in the Commonwealth trial judges grant new trials on the basis of trial error. In other words, where the defendant wants to put on a witness and the trial judge says no, I'm not letting you put it on, it's irrelevant. Then in -- We've got post-verdict motions, rethinks his position or reads additional law, or whatever, and says, I errored.

I think that that's a pretty classic thing when you get a new trial awarded at the trial level. It often would be the case that it would be the trial court saying, I errored. I made a mistake. I think that we ask our judges to do this, and I think for the most part they can.

REPRESENTATIVE HENNESSEY: My question really raised as to whether or not we ought to be thinking about having a new trial level judge

pass on the post-trial motions. But, I guess that's beyond the scope of this --

MS. ZUCKER: It's certainly beyond the scope of the act as it's written. We don't have -- Putting aside the new act, under the old system we don't have new judges ruling on what the original trial judge did. If you'll think back to the system we had 3 years ago, 4 years ago, you had the trial. Counsel filed post-verdict motions which included -- usually can only include preserved claims unless new counsel came in at the post-verdict stage and says to the judge, you made the following errors. The judge reviews those and he either grants relief or he doesn't and then it goes on direct appeal. That's classically the way things have always been handled.

I think for purposes of not overburdening the trial level courts unless there was some evidence that trial courts were ignoring their oath to do justice and were ignoring clear errors that they may have made that to -- just as a matter of course assign a case to the new judge would be a mistake. That judge's rulings will be ultimately reviewed by

the state Supreme Court.

REPRESENTATIVE HENNESSEY: I raise the issue only in a sense it's much more manageable when you are dealing with capital cases than it would be if you were dealing with every case that come down through the system, because you are dealing with a much more finite and limited number of cases and, perhaps, it's --

MS. ZUCKER: You are dealing with a more finite number of cases, but you're also dealing with usually extremely lengthy records and extremely lengthy proceedings.

I know in Philadelphia County just recently, it was the case that all Post-Conviction Relief Act cases went to a single judge. This was not the trial judge. This was a judge who did nothing but PCRA cases. It became so unduly and horribly burdensome for him to try to review every homicide case. It wasn't just death cases.

In fact, at that time I think there were few because not too many warrants had been signed. But, they changed the system so that homicide judges hear their own PCRA's now specifically because they will be familiar with

the issues and can deal with that much more quickly.

REPRESENTATIVE HENNESSEY: I wasn't aware that this type of effective system had been even tried in Philadelphia. I appreciate you bringing that to our attention.

One final question, Attorney General Cohen, I think Mr. Frankel touched on it too, the question in terms of basic fairness was going to depend on whether there was adequate levels of funding both through the prosecution of defense. Prosecution generally has its own investigators on call through the D.A.'s Office, so adequate funding for defense investigators as well.

You come from Philadelphia. Are you satisfied with the level of Philadelphia funding is adequate for current needs? We read about stuff in the newspapers where $500 for an investigator just doesn't buy you anything as I had mentioned earlier.

MS. ZUCKER: Well, I'm not a defense lawyer. I think if you ask a defense lawyer from Philadelphia County, is he receiving sufficient funds for investigations? He would

probably say no. Everybody would always like to have more money and there is never enough money.

We do, of course, have the Post-Conviction Defender Association and there has been, I guess, problems with their funding recently and some question about whether Congress would continue to fund them. But, certainly the existence of that organization makes a big difference in the litigation of capital cases.

There was a question earlier about this sort of limbo period where the defendant's case has been affirmed but before the warrant is signed and he's unrepresented. The Unitary Review Act would get rid of the limbo period because, once his case is affirmed, he will already have had his collateral review, so that when the Governor signs the warrant within 90 days, the next step for that defendant to take is to seek his federal relief, his federal habeas review. And the federal system provides for the appointment of counsel in a capital case upon the mere request for one. You do not have to have filed your habeas petition. You file a petition for the appointment of counsel, counsel

is appointed, and at that point the habeas process begins.

Under the Unitary Review Act, you won't have that limbo period of an unrepresented defendant. For those defendants Pre-Unitary Review Act defendants, I would note that the Capital Resource Center or Post-Conviction Defender Association is monitoring all of those cases.

As you probably noticed recently in the Moser case, even though that man wanted no appeals and didn't want to pursue any remedy, the Defender Association was nonetheless actively litigating on his behalf. I think we can feel confident that no defendant is going to be lost in the shuffle, if you will.

CHAIRMAN BIRMELIN: Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman. My questions are probably arising out of my lack of understanding or direct experience with the criminal courts; obviously, none really with the criminal courts and particularly on death sentence.

However, I thought I knew what we were

talking about, and in listening to your testimony, now I realize I either don't understand or confused. The whole notion of a unitary review, if I understood it, was to take a process that was happening later on down the line and try to move it forward.

MS. ZUCKER: That's correct.

REPRESENTATIVE MANDERINO: But, the name unitary review, as well as some of the things that you said, also suggest to me that we collapsed a process of rights to review that were more than one into one thing. That's were I'm getting stuck. Because then I read in the language -- and Representative Hennessey asked a question about rights that a defendant did or didn't have before that they are going to have now and you seem to think that there are none.

Then I read the language that talks about this unitary review and then it talks about limitations on subsequent petitions, particularly limiting no further review shall be available except as provided on the subchapter leads me to believe that currently now there is some level of review out there that we are getting rid of. I want to know what it is, and

what rights are or aren't involved in the level that we are trying to get rid of?

MS. ZUCKER: There's no level of review that we are getting rid of. I think your first description was apt. What we are doing is taking a procedure that used to happen after the appeal -- after the case was affirmed and we're putting it before the Supreme Court reviews the conviction. We are providing for, if necessary, evidentiary hearings to occur before the appeal goes to the Supreme Court.

What happens under the present law is that, sometimes a defendant will get new counsel after he's convicted and new counsel will challenge trial counsel's effectiveness and will raise various claims; he didn't call this witness; he didn't put this on, whatever. There will be an evidentiary hearing at that point at the trial level. When that's over, if the defendant is unsuccessful, then it goes up to the Supreme Court and the Supreme Court reviews it.

If the Supreme Court affirms, then the remaining remedy for the defendant is a Post-Conviction Relief Act action. He files a

petition under the Post-Conviction Relief Act. One of the complaints that we have had about the Post-Conviction Relief Act in the context of death penalty litigation is, well, gee, these guys don't know what to do. They are not represented by counsel at this point. They don't get counsel until they actually file the petition.

I would point out that these petitions, these pieces of paper that these people file are freely available at all of the prisons. They file them all of the time, and it's inconceivable that there is a defendant who doesn't know about this right. But, as soon as that is filed, counsel is appointed again, and reviews the record; will file an amended petition; will seek an evidentiary hearing if there are issues that require factual resolution. When that proceeding is over then that goes to the Supreme Court.

What we're doing with the unitary review is taking that procedure, that new counsel coming in, reviewing what trial counsel did, and putting it before the Supreme Court ever looks at the case, which should save

significant amounts of time; while it will take longer, perhaps, for the case to be ultimately be affirmed, if that's what the ultimate disposition is going to be. It won't be nearly as long as it will take to do a whole complete appeal proceeding, and then do a whole complete collateral proceeding some years down the pike.

REPRESENTATIVE MANDERINO: Am I correct that the notion and this whole notion of unitary review really applies to the Supreme Court?

MS. ZUCKER: Yes.

REPRESENTATIVE MANDERINO: Meaning that, instead of the direct appeal issues coming all the way up through the Supreme Court and the Supreme Court making a decision and then the collateral and other post-convictions coming all the way up and coming to the Supreme Court, and the Supreme Court making a second decision in the name of defendant A, so the unit combined is at the Supreme Court level, so there has been some combination.

MS. ZUCKER: That's right.

REPRESENTATIVE MANDERINO: It's your contention that the combination of that level

leaves no defendant unable to raise any issue or defend himself in any way that he currently cannot do. Is that your contention?

MS. ZUCKER: Yes.

REPRESENTATIVE MANDERINO: That is also your intention? You are not looking to deny him of that?

MS. ZUCKER: No. The entire point of the statute is to move things along, to avoid the kinds of delay -- well, the major for us, I would say, of the statute is to avoid the kinds of delay that we have experienced; to avoid emergency litigation; to avoid midnight stays in the Supreme Court of Pennsylvania and the Supreme Court of the United States; to set up a process that everybody will understand.

Mr. Frankel says, well, nobody is going to know what they are doing. Well, they are not going to know what they are doing at first, just like you never know what you are doing when you are starting something new. But, you learn it. You read the statute. All we are asking collateral counsel, unitary review collateral counsel to do is what he would have done post-affirmance before affirmance. There's

no difference. He just does it earlier.

So, we're not asking that person or those people who will be doing these appeals to be doing something totally foreign to them, or that bears no resemblance to what they have been doing for many, many years. It's the same thing. It's just earlier.

REPRESENTATIVE MANDERINO: Okay. I don't mean to be simple. It's simple for my case; not your case. Right now the direct appeal issues, whether taken by counsel who represented the defendant at trial or new counsel are limited to those that were raised by trial counsel?

MS. ZUCKER: Well, no. Right now, the current system that we have now, if the defendant is represented by new counsel on appeal, then the law provides that he must raise claims of ineffective counsel because --

REPRESENTATIVE MANDERINO: If he's counseling right now, he's handling collateral as well as direct appeal issues?

MS. ZUCKER: Right. If trial counsel represents the person on direct appeal, he cannot raise his own ineffectiveness. So that,

the issues would be limited to those that he preserved.

REPRESENTATIVE MANDERINO: Right. And that review, currently, happens after trial counsel is done with all direct appeals. So, somebody is not coming in on the backside and saying you were ineffective until after you have done your whole job and you're out of the picture?

MS. ZUCKER: Right.

REPRESENTATIVE MANDERINO: One thing we are changing that may have a substantive impact on a defendant's right is, what happens when someone comes in and says you are not doing your job right while you are still doing your job?

MS. ZUCKER: Well, that's a bigger -- That appears to be a bigger issue than it should be, because -- Let's assume that trial counsel is representing the man or woman on direct appeal. He, today, or under unitary review is limited to raising those issues that he preserved at trial, so he can't come in with new issues. He can't be expected to be investigating new things. He can only do what

is already passed. He can only present to the appeals court what he has already done his very best to preserve. His function is in that sense somewhat limited.

He doesn't have to proclaim his own ineffectiveness. He doesn't have to second-guess what he did at trial. He can only raise what he properly preserved.

Collateral counsel, on the other hand, can assess what happened at trial. He can say, well, I don't think that this was handled so well, so I'm going to claim that this guy was ineffective at trial. He can also say, because he gets the brief, he files the second brief. So the first guy files his brief, collateral counsel gets to review that and says, well, you haven't raised all the claims that you preserved at trial, and there were some claims at trial that I thought were good issues that are possible winners on appeal. So, he can put those in his appellate filing and say appellate counsel was ineffective in failing to forward this issue. That way the defendant gets to claim appellate counsel's ineffectiveness.

He's not deprived of that ability as

he would be if trial counsel were removed at the very beginning, or if there was, indeed, only one proceeding that was going on rather than 2 separate ones that are going up at the same time. That's how that would work.

Does that answer your question?

REPRESENTATIVE MANDERINO: Well --

REPRESENTATIVE HENNESSEY: Kathy, if I can interject, in order to find the first trial counsel ineffective then in this unitary review by the Supreme Court, would the Supreme Court be required then to pass on the substantive issues that -- problems the collateral counsel raised that the trial counsel decided to forego?

I mean, otherwise the Supreme Court is going to say, that's fine as collateral counsel you've raised these other 5 arguments that trial counsel left out and we find that one of them is meritorious and, therefore, he is ineffective. If they are going to find him to be effective, they've got to find all the ones that you've raised and said these really should have been raised by trial counsel aren't effective anyway or aren't meritorious. You have to pass on the substance of them in order to find --

MS. ZUCKER: Just as they do now in any case where a court is reviewing the conduct of counsel, as you know there are 2 prongs to an ineffectiveness claim. One is, did counsel behave reasonably; and 2, was the defendant prejudiced by counsel's conduct or omissions?

If the underlying issue is meritless, then appellate counsel's failure to pursue it on appeal is reasonable. If the underlying issue is meritless, the defendant is not harmed by appellate counsel's failure to raise it because he wouldn't have gotten relief on it. So, the claim of appellate counsel ineffectiveness fails.

If, on the other hand, the claim is a good one that has merit and there can conceivably be no basis not to have forwarded it, other than he forgot about it, or whatever, and it's a claim that the defendant would have won on had it been preserved, then there's a basis for a finding of appellate counsel ineffectiveness and for the appropriate relief, whatever it is. That's the way these cases work now. It's no different.

REPRESENTATIVE MANDERINO: I'm still

troubled by this limitation of the absent subsequent petitions. I'm reminded of a recent case in Philadelphia. I don't think it was a death penalty, but it was one where the defendant kept maintaining his innocence and was finally granted, or somehow got the money, but was granted a right to analyze part of the ID'd him as the witness, all circled around a cigarette butt at the scene that the person who created -- who did the crime had been smoking prior.

When they finally did DNA analysis on the cigarette, which wasn't available at the time that he was tried, they found out that, indeed, it wasn't his. It wasn't the right defendant and he was innocent. That's an issue of not something that happened in the past, but whole new evidence comes to light, a new way to interpret evidence.

In a death penalty case, who raises the issue, which I do believe is available to be raised, of new evidence not available at the trial level or a new fact based on that evidence not available at trial level? Who raises that now, and will this unitary review either because

of how it's proceeding or what each counsel is limited to do preclude that or because of this language in this bill that says no further review shall be available except as provided in the subchapter and preclude that kind of issues?

MS. ZUCKER: The language that says no further review except as provided, what is provided is that, after-discovered evidence that could not have been discovered at the time of trial is one of the exceptions.

REPRESENTATIVE MANDERINO: But then the exception also says, if I remember it correctly, it said -- I'm sorry to interrupt you. Please, go ahead.

MS. ZUCKER: I believe that claim that you have described is the kind of claim that would come in under one of the exceptions.

REPRESENTATIVE MANDERINO: Who raises it now?

MS. ZUCKER: Who raises it? It depends on when it becomes available. If trial counsel is still representing this person at whatever stage we are, whether it's post-sentencing motions or direct appeal and he becomes aware of this, he raises it as a claim

of after-discovered evidence. If the guy is on a collateral appeal under the PCRA, then whoever is representing him at that point, PCRA counsel, would raise it.

REPRESENTATIVE MANDERINO: So, it's always available to be raised by either direct appeal or collateral counsel?

MS. ZUCKER: At this point, yes.

REPRESENTATIVE MANDERINO: Will that change under this?

MS. ZUCKER: I think under unitary review it would be raised by collateral counsel.

REPRESENTATIVE MANDERINO: I don't know that you know this answer. Is there a study that shows or some sort of -- through your office or whatever, this is how long it usually takes for things to go through the process of direct appeal and get to the Supreme Court? And, here's the time line that it takes after that or what we now call the collateral review, and here's how many years we are going to shave off of it by --

MS. ZUCKER: I don't think there is such statistics available as such. We do know

that because of prior practices, collateral review in a death case could occur 20 years after the crime. There was no previous incentive for a defendant to file a collateral petition because that would only speed up the inevitable. It's only been in the last few months that we have experienced any flutter of activity in death cases with the new Governor signing warrants.

I have worked on 2, in recent months, that are very old. As you are aware of the Jamal case, that's a very old case.

REPRESENTATIVE MANDERINO: I really don't have problems with the notion -- I have problems personally and morally with the whole notion of the death penalty, but that's the law in our state right now. I don't have problems with speeding up the process from the victim's point of view. I think it's horrible that 12 years later you are still in the case of Abu-Jamal. His widow is going through this all over again.

But, what I don't understand is, and what I have real problems with is, I think it's incumbent on us to make sure that in shortening

that process we are not trampling on rights of a potentially innocent person that we won't learn about until it's too late. I guess that's why I'm asking all these questions about what are we leaving out when we do this?

MS. ZUCKER: I sincerely advise you that we are leaving out nothing. I think that many people are uncomfortable with the death penalty; therefore, think on some level that the longer that you wait, maybe some claim will percolate and come to the surface, and that just isn't accurate.

The chances of discovering a true claim, of giving relief to someone who deserves it are much better soon after the trial than they are 15 years later when witnesses are dead. We've all heard of the case where the defendant comes forward and says, well, my brother did it, but he died 5 years ago and on his dying bed he told my mother.

REPRESENTATIVE MANDERINO: We've all heard the case in Texas where they came forward and said, my sister did it. The Commonwealth knew it and they still executed him. We need some balance here.

MS. ZUCKER: Right, but I think that true claims are there and people know what they are. A defendant who is innocent knows what his claims are. It's not that it's hidden somewhere and he doesn't know where it is.

REPRESENTATIVE MANDERINO: Last question. I'll quit beating a dead horse. And there's no claim that's going to be lost to somebody tomorrow that they don't have today, in your educated opinion?

MS. ZUCKER: In my educated opinion --

REPRESENTATIVE MANDERINO: -- by putting these together and moving them simultaneously?

MS. ZUCKER: Yes.

CHAIRMAN BIRMELIN: I want to thank you, Ms. Zucker, for the grueling interrogation that you have withstood and did fine.

This concludes the meeting today of the Subcommittee on Crimes and Corrections on Senate Bill 81 Special Session. We are adjourned.

(At or about 3:55 p.m. the deposition concluded)

C E R T I F I C A T E

I, Karen J. Meister, Reporter, Notary Public, duly commissioned and qualified in and for the County of York, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

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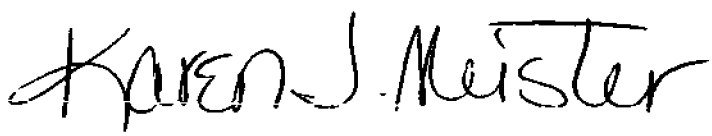

Karen J. Meister - Reporter
Notary Public

My commission
expires 10/19/96