TESTIMONY OF

ACTING ATTORNEY GENERAL WALTER W. COHEN

BEFORE THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIMES AND CORRECTIONS

ON SENATE BILL 81

AUGUST 21, 1995

Good morning Chairman Birmelin, members of the Committee. Thank you for the opportunity to appear before you and testify on Senate Bill 81. This Special Session bill would substantially amend the Post Conviction Relief Act applicable to all criminal cases, and would provide a new post-verdict process, known as "unitary review," for capital cases.

Our office has testified on this issue before the Senate Judiciary Committee, but much of that testimony bears repeating.

This legislation was drafted in large part by the Philadelphia District Attorney's Office, a large office with prosecutors thoroughly experienced in these areas. They are to be commended for taking the lead in efforts to draft much-needed reforms of our criminal appeals process.

The Office of Attorney General supports this proposal as rewritten, but we do have several concerns which I will address.

Pennsylvania is one of 38 states which permit the death penalty for defendants convicted of murder. Death penalty cases, by Pennsylvania law, involve just one class of crime: the most heinous, brutal and cruel premeditated murders.

In Pennsylvania, this has been the law since the time of William Penn. In 1978, the Legislature rewrote our death penalty statute to meet certain constitutional concerns. Subsequently, the United States Supreme Court, ruling in the Blystone case, found our law to be constitutional.

When a defendant in a death penalty case is found guilty of first degree murder, a separate proceeding is held to determine the penalty - life imprisonment or death by

lethal injection. The jury considers specified 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 sentencing.

Throughout all these 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 allegations of ineffective assistance of trial and appellate counsel, under the Post Conviction Relief Act or "PCRA." Under current 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 his trial, post-trial and direct appeals. The courts grant leave to amend PCRA petitions freely after the appointment of the new counsel.

In capital cases, defendants usually choose not to file their first PCRA petition until after the Governor has signed a warrant setting an execution date. The filing of the PCRA petition generally causes the trial court to stay the scheduled execution. If the petition is denied, the defendant may appeal the decision directly to the Supreme Court of Pennsylvania.

That is not the end of review. Generally, after the Pennsylvania Supreme Court reviews these cases on direct appeal and on appeal from the denial of a PCRA petition, defendants seek review in the United States Supreme Court.

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

In addition, review is available - and always sought - in the federal district courts on petitions for writs of habeas corpus. In those proceedings, virtually all the claims which were already presented to the state trial court and the Pennsylvania Supreme Court are re-litigated in the federal trial courts and the Court of Appeals for the Third Circuit, 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, everyone who cares about our Constitution can agree that careful judicial review is required to protect the rights of defendants. But that does not mean our present system cannot be improved. It can be. It must be. The present system takes too long. Society, in general, and the families of 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.

S.B. 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 S.B. 81 parallel the reforms being considered at the federal level.

While Congress continues to debate, however, this Legislature already has taken a major step toward eliminating one of the major causes of delay at the state level. I

refer to the passage of Act 4 of 1995, Special Session, which requires the Governor to issue death warrants in a timely fashion.

(The Act mandates that within 90 days of the date a sentence of death is upheld by the Pennsylvania Supreme Court, the prothonotary of the Supreme Court must transmit the full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court to the Governor.

(After receipt of the record, the Governor has 90 days in which to issue a warrant specifying a week for execution which shall be no later than 30 days after the date the warrant is signed. Provision is made for the Secretary of Corrections to schedule and carry out the execution if the Governor fails to perform this statutory duty.

(If a scheduled execution is stayed for any reason, Act 4 requires the Governor (or the Commissioner of Corrections) to reschedule the execution within 30 days of the lifting of the stay. The new execution date must be within 30 days of the reissued execution warrant.)

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 inordinant and unnecessary delays that have been so common in our capital case process.

Those delays are graphically illustrated if you review the "time-line" in the case of Commonwealth v. Keith Zettlemoyer. Until May 2, the last execution was of Elmo Smith in 1962. On May 2, Keith Zettlemoyer was put to death by the Commonwealth

of Pennsylvania 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, 1980, and was executed almost **fifteen years later**. And the only reason the execution took place that "quickly" was that he did not attempt to further challenge his execution.

Leon Moser, 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 two daughters and the time he finally received the punishment that the court had imposed.

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

Act 4 should help reduce that delay in the future, and S.B. 81 would do more to improve the process by making significant changes to the Post Conviction Relief Act.

It would, in Subchapter D, beginning at Section 9570, provide for "Unitary Review" in capital cases. In short, collateral review in death penalty cases would begin pre-appeal, rather than post-appeal. Thus, the Supreme Court would have both the trial and collateral review proceeding before it at the same time.

This means death-penalty defendants 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. 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, already will 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 Legislature cannot entirely prevent that from happening -- because so many of the appeal opportunities lie in the federal courts -- but you can, through S.B. 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: This Committee should consider setting time limits for the Supreme Court to rule on the new, unified appeals provided in Section 9577(a).

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

Mr. Chairman, 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.

In fact, our research has revealed that the Pennsylvania Supreme Court has overturned more death penalties because of prosecutors' errors - 11 - than because of ineffective assistance of defense counsel - 7.

S.B. 81 directly addresses the issue of ineffective assistance of counsel in two ways.

First, Section 9572(c), requires the Supreme Court to adopt standards for the appointment of counsel at all stages of capital cases, considering the criteria set forth in the bill. We believe that local practices should be among the criteria the court should be required to consider, and I would recommend that you so amend the bill.

Second, S.B. 81 mandates that new counsel must be appointed immediately after sentencing and that the unitary review occur as soon as possible. The new 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 which will be filed by trial counsel.

While this proposal has merit, you must understand the impact it will have on death penalty litigators -- 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 over 100 capital cases he inherited.

The new unitary review counsel, if he or she is to be faithful to the task 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 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 arguably 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 will have to be an experienced capital litigator.

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

If the 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. Pennsylvania this year eliminated funding for death penalty resource centers and the US House of Representatives last month voted to eliminate federal funding as well. We must realize that if federal and state funds are not available, the cost of defense counsel in capital cases will fall, by default, on the counties.

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

Several years ago our office participated in a Task Force convened to consider the creation of a death penalty resource center. When the Task Force filed its report,

the Office of Attorney General agreed that capital defendants should receive competent representation, regardless of their financial situation, and that counsel in these difficult cases should be reasonably compensated.

However, we filed a dissent from the report because it failed to address the problem of prosecutors who lack the resources to handle these cases.

As executions begin to be carried out, we are seeing the demands these cases impose on prosecutors, who must be prepared to respond to rapid-fire challenges -- sometimes in the middle of the night, sometimes in courtrooms over a hundred miles away.

On many occasions, including the Zettlemoyer case, those district attorneys have turned to the Office of Attorney General for assistance, and we have been able to render that assistance. Most such requests have come from district attorneys in third through eighth class counties. We hope to be able to continue providing assistance when asked, but again, the Legislature must be willing to continue making adequate resources available.

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

Thank you and I will be happy to answer any questions.

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