Pennsylvania Post-Conviction Defender Organization

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TESTIMONY OF ROBERT DUNHAM

Good morning Senator Greenleaf and all the members of the Senate Judiciary Committee. My name is Robert Dunham. I am Executive Director of the Pennsylvania Post-Conviction Defender Organization. We are a new federal post-conviction defender organization providing post-conviction legal services to death-row inmates in Pennsylvania.

As you might imagine, that task is daunting. Of the twenty post-conviction defender organizations in the nation, we are the newest -- created only last July. With 189 death-row inmates to represent and only five lawyers, we have the highest inmate to lawyer ratio of any capital defender in the country. Last Fall, I estimated -- based on formulae employed by the Administrative Office of United States Courts -- that our office needed at least eighteen lawyers to begin to address the need in Pennsylvania. A preliminary report from the federal judiciary now estimates that full-time capital defenders can competently provide direct representation to 4 to 6 death-row clients per year. With seven death warrants since February 28 -- more warrants than we have lawyers -- we are already reaching the limits of our capacity to respond to the caseload.

It has long been acknowledged by the state and federal courts in Pennsylvania, and by legal experts across the country, that Pennsylvania does not provide adequate representation to

death-row inmates at trial, on direct appeal, or in post-conviction proceedings. This problem is deep and needs your attention. Whether you choose to fund us, some other institutional defender, or appointed counsel on a case-by-case basis, capital appeals cannot be propelled into the courts without significantly increased costs to the Commonwealth or to Pennsylvania's counties. And unless major reforms are instituted in the provision of counsel, there will be substantial costs to the legal process, including, I am afraid, a significant denial of the right to due process.

Considering for the moment only the filing deadlines imposed by Special Session Senate Bill 81, I believe this proposal will only make a bad situation worse. This can best be seen when placed in historical context.

As you know, in 1989, the Chief Justice of the Supreme Court of Pennsylvania and the Chief Judge of the United States Court of Appeals for the Third Circuit convened a Joint Task Force on Death Penalty Litigation in Pennsylvania to evaluate institutional issues relating to the Commonwealth's provision of capital representation. That Task Force issued a report in July of 1990, concluding that Pennsylvania faced "a problem of major proportions" as a result of systemic fundamental defects in the litigation of death penalty cases.

Among the "primary" problems identified by the Task Force were the lack of trained lawyers available to handle capital cases, the absence of any mechanism to recruit and train counsel to undertake capital representations, and the absence of representation between the direct appeal stage and the commencement of post-conviction appeals under the Post Conviction Relief Act. The Task Force reported that most part-time county public defender offices were not equipped to handle these cases, and that otherwise qualified private lawyers were discouraged from undertaking capital representations because of a lack of adequate compensation, resource assistance, and training.

Pennsylvania's capital representation problems are endemic. The Commonwealth does not have any state-wide system of indigent defense services in capital cases. The Commonwealth has not established any minimum competency standards for lawyers who are appointed to handle capital cases. Appointment rules and competency standards are left to the counties. The Commonwealth does not provide for compensation of counsel in capital cases. The level of compensation and the burden of paying for counsel is left to the counties. The Commonwealth has not established any mechanism to train capital counsel, or to ensure that capital counsel is up-to-date on the law; nor is there any system in place to ensure that counsel request and the Courts of Common Pleas provide funds for investigators and experts who are critical to the proper litigation of a capital case.

It is widely believed that these systemic failures have led to the capital conviction of numerous individuals who, with properly trained and adequately compensated counsel, would not have been sentenced to death. Indeed, in the cases my office has come across to date, counsel's failures to investigate and prepare for the sentencing stage of trial have been astonishing. These failures are frequently repeated by court-appointed counsel on appeal and at post-conviction.

Today, five years after the Task Force Report, this crisis in representation is worse than ever. Death row is now at 189 persons, up by nearly 75 since July 1990. Nearly all of the estimated 65-70 inmates who are eligible to seek post-conviction relief are unrepresented. Under the current rules of appointment, all of the approximately 60 defendants whose direct appeals are pending before the state Supreme Court will become unrepresented once their cases are affirmed. As Justice Castille noted several weeks ago, there is a great need for lawyers to handle these cases. There are not enough trained lawyers to do the job, and though we are trying desperately,

we cannot find enough, recruit enough, train enough lawyers soon enough to meet the burgeoning need.

Additionally, the Commonwealth has enacted one of the strictest death-warrant laws in the country, significantly accelerating the pace at which new capital cases will enter the post-conviction process. But in the five-year period since the Task Force Report, the Commonwealth has not addressed the larger systemic issues that the Task Force identified. I would urge this Committee, and the General Assembly, to first address these deep systemic issues that go to the core of our capital representation crisis before enacting legislation such as Special Session Senate Bill 81, which, under the retroactivity provisions of Section 3 would -- by my rough calculations -- force an additional 125 capital PCRA petitions into state court in the next year.

Apart from this logistical nightmare, there are serious substantive problems with Special Session SB 81, and I would like to touch on a few here.[1]

First, both Section 1 of the bill, restricting PCRA relief, and Section 2 of the bill, establishing unitary review in death penalty cases, are unconstitutional.

Article I, Section 14 of the Constitution of the Commonwealth of Pennsylvania establishes a constitutional privilege of the writ of habeas corpus. The Post Conviction Relief Act ("PCRA") is a statutory mechanism by which this right to habeas corpus is secured. The state constitutional right to habeas corpus is available to seek relief from any conviction or sentence obtained in violation of the law. Consequently, for example, the conditioning of post-conviction relief upon proof of "innocence" -- however that term would eventually be interpreted -- would

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[1] This testimony addresses only a few of the issues presented by Special Session SB 81. The PaPCDO is still reviewing the technical requirements in the bill, and will submit additional written comments to the Committee.

suspend the writ of habeas corpus for persons who were otherwise convicted or sentenced in violation of state or federal law or in violation of the Constitutions of the Commonwealth and/or United States. Similarly, repealing the availability of state post-conviction review of any violation "of the provisions of the Constitution, law or treaties of the United States [that] would provide a basis for federal habeas corpus relief" would unconstitutionally suspend the state writ of habeas corpus.

Section 2 on Unitary Review suffers from the same defect when it conditions a post-conviction petitioner's continued representation by trial counsel upon a waiver of the right to claim that trial counsel had been ineffective. Additionally, the fact that a defendant must either give up known counsel in favor of unknown counsel or give up the right to vindicate the state and federal constitutional rights to effective assistance of trial counsel transgresses both the state and federal constitutions.

Moreover, Section 2 is unconstitutional in its entirety because it violates both state and federal constitutional guarantees of equal protection of the law. Section 2, by its own terms, makes clear that noncapital cases and capital cases in which the defendant received a life sentence retain the right to direct and post-conviction review. However, the bill is intended to limit the availability of postconviction remedies in capital cases where the death penalty is imposed. In so doing, the Commonwealth has singled out "a discrete and insular minority" -- death-sentenced inmates -- for discriminatory treatment. This is precisely the type of discrimination that is constitutionally prohibitted. This curtailment of post-conviction process for capital defendants as compared to other defendants may also violate the Eighth Amendment's requirement of "heightened procedural safeguards" in capital cases. The death penalty is certainly different than other criminal sanctions, but as a matter of law, that difference is supposed to be reflected in

greater, not lesser, procedural safeguards.

Additionally, to the extent that the limitations on post-conviction discovery and the onerous affidavit requirements contained in SB 81 will make it impossible to develop and, hence, meaningfully litigate a variety of claims, those limitations may amount to a suspension of the state writ of habeas corpus. Constitutional considerations, aside, however, these limitations will effectively prevent capital defendants from obtaining information and witnesses necessary to properly present and preserve issues for review. Given the overwhelming public interest in insuring that the death penalty is not unlawfully or unconstitutionally imposed, these truth-limiting procedural restrictions are bad policy and undermine public confidence in capital adjudications.

Although I believe SB 81 has a number of other defects, both legally and as a matter of sound policy, I would -- given the limited time available -- like to address just one other serious problem: the stay of execution provisions of proposed section 9545(d).

As mentioned earlier, there is a state constitutional right to post-conviction review of a conviction and sentence (Article I, Section 14). Pennsylvania law, and the Commonwealth's long-standing practice (*see* PA. R. CRIM. P. 1504(a) and former Rules 1503 and 1504), entitles an indigent defendant to the appointment of counsel to assist with his or her initial collateral attack upon a conviction or sentence. *Commonwealth v. Albert*, 522 Pa. 331, 334, 561 A.2d 736, 738 (1989); *Commonwealth v. Finley*, 497 Pa. 332, 440 A.2d 1183 (1981), *rev'd on other grounds*, 481 U.S. 551 (1987); *Commonwealth v. Holland*, 496 Pa. 514, 437 A.2d 1159 (1981). This right necessarily "includes the concomitant right to effective assistance of counsel." *Albert*, 522 Pa. at 335, 561 A.2d at 738; *Commonwealth v. Wideman*, 453 Pa. 119, 123, 306 A.2d 894, 896 (1973). That right is rendered meaningless if a defendant is executed before he or she has been provided

post-conviction counsel and counsel is provided a meaningful opportunity to investigate and prepare a PCRA petition.

This plain fact notwithstanding, SB 81 would condition the issuance of a stay of execution upon the filing of a substantive PCRA petition that makes a "strong showing" on its face that it is likely to succeed on its merits. That is an impossible condition for unrepresented inmates to meet. Furthermore, the courts have the inherent power to issue stays of execution to preserve their prospective jurisdiction over a case, and this section of the bill interferes with the judiciary and violates the separation of powers doctrine. This stay requirement is draconian and unnecessary, and does injustice to due process.

Pennsylvania faces very serious systemic problems in providing representation to death-row inmates, and those problems have remained unattended for too long. I would urge this Committee to address those problems first -- to provide for statewide standards of appointment in capital cases; to ensure that counsel is adequately compensated; and to provide for adequate investigative and expert assistance and training.

Thank you.

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Problems with SB 81

Introduction to Discussion

This proposed bill lacks insight and foresight. It violates the Pennsylvania Constitution. It would make a shambles of post-conviction review of capital cases in Pennsylvania. It would allow the execution of people who should not be subject to execution under even the most stringent of perspectives. And, possibly most importantly, it will make Pennsylvania's application of the death penalty a national embarrassment: many prisoners will obtain relief in Federal Court because of the inherent flaws in this bill, while the bill will result in Pennsylvania's forfeiting the deference Federal Courts give to State Court decisions because of its inherent constitutional flaws. In the long run, the inherent unconstitionality and improprieties in the bill will result in great cost to Pennsylvania's taxpayers: the "system" of review established by this bill will not hold up; the purported "process" of review it puts into place will be struck down; and many cases will have to be reviewed anew, from scratch. The supposed "benefits" of this legislation -- an occasional additional execution -- will cost dearly as proceedings become more protracted and taxpayers foot the bill.

An outline of some of the obvious flaws in the proposed legislation follows.

Section 1:

§ 9542. Scope of subchapter

* The amendment on Page 2, Line 2 would appear to condition relief upon both being innocent and being illegally sentenced. It should be "or." The Pennsylvania Supreme Court has repeatedly stated that a person is always able to challenge the unlawfulness of a sentence under the Pennsylvania Constitution. People sentenced to death certainly have a right to such review of their sentences, in the Pennsylvania courts, under the United States Constitution. To the extent that this language tries to change this constitutional requirement, it amounts to an unconstitutional suspension of the state writ of habeas corpus. The language should remain in the disjunctive.

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* The amendment on Line 3 replaces "unlawful" with "illegal." "Unlawful" clearly applies both to sentences that are not authorized by law and sentences that are authorized by law but are improperly imposed in a given case. It is not clear what the term "illegal" would mean in this context, but to the extent that it could prevent a person who was improperly sentenced in a given case to a sentence that might be authorized in some other case or under other circumstances, this amendment amounts to an unconstitutional suspension of the state writ of habeas corpus. To avoid this potential problem, the correct term, "unlawful," should be used.

* The amendment on lines 3-5 purports to limit the scope of post-conviction relief by stating that the PCRA is no longer available "for an action by which persons can raise claims which are properly a basis for Federal habeas corpus relief." In the context of the death penalty, the Pennsylvania Supreme Court has held that there is an overwhelming public interest in ensuring that no person is executed in violation of the Constitution of the United States and the United States Supreme Court has long held this to be a requirement under the United States Constitution. Thus, the Commonwealth does not have any legitimate interest in precluding post-conviction relief for claims that would properly be a basis for federal habeas corpus relief. The result of this provision is that there will be relief, in many more cases, in Federal Court after years of litigation in state court. Pennsylvania's judges will recognize the constitutional errors, but will be deprived of authority to do anything about it. This proposed language should be stricken.

§ 9543. Eligibility for Relief

* The bill contains an inconsistency between use of "person" and "petitioner" -- to account for necessity of a next friend when a person is incompetent or incapacitated, (a) should say "petitioner" and (a)(1) and (a)(iii) should say "person."

* The amendment on page 3, lines 12-13 in (a)(2)(iii) would appear to precondition relief for an unlawfully induced guilty plea upon proof of innocence. This improperly rewards Commonwealth misconduct, particularly in the context of the death penalty where it has been suggested that prosecutors -- particularly in Philadelphia -- attempt to use the threat of capital proceedings to extort first-degree murder pleas from defendants who may be innocent of the underlying offense, guilty of a lesser offense, or guilty of the offense but innocent of death. The law should not reward extortionate prosecutorial misconduct and -- whether intended or not -- that is the effect of this language proposed by the District Attorney's Association.

Moreover, this section leaves unclear the standard accompanying the defendant's burden of proving his innocence. There are people who are innocent who will be unable to meet the burden of proving their innocence, underscoring the unfairness of imposing this additional burden upon a defendant who already has been victimized by government misconduct. The "innocence" language should be eliminated from the bill, or replaced with language that would require the Commonwealth to meet the burden that would have applied but for the prosecutorial

misconduct.

* The amendment eliminating (a)(2)(v) on page 3, lines 18-21, denies relief for a variety of constitutional violations that would require a grant of relief when those issues are reviewed by a federal court. As stated earlier, the Commonwealth has no legitimate interest in unlawfully or unconstitutionally executing an individual, and the only effect of this amendment would be to prevent a defendant from obtaining relief from an unlawful or unconstitutional conviction and sentence in state court, not Federal Court. This amendment is a suspension of the state writ of habeas corpus and an unbridled attempt to deny a defendant review of misconduct that improperly resulted in a conviction or sentence.

This and similar provisions in this bill would create an anomalous situation in which judges would be unable to grant relief in cases in which they know relief will be granted in a federal court. This would put the state court judge in the position of upholding an unlawful conviction or sentence, and would force the federal courts to reverse convictions and sentences that should have been corrected in the state courts. This would unnecessarily delay the grant of relief to persons who had been improperly convicted or sentenced and add another layer of unnecessary appeals, forcing everyone to litigate additional issues in federal court. As with many other short-sighted provisions in this bill, it is the taxpayers that will end up paying the resulting costs.

Additionally, there is absolutely no evidence that the Commonwealth has been adversely affected under the current law by permitting defendants a post-conviction opportunity to vindicate their federal rights.

* The amendment to (a)(2)(vi) severely curtails a defendant's ability to obtain a new trial for an unjust conviction or death sentence upon the discovery of new evidence that casts doubt on the verdict. A defendant already is denied relief, even though there may be new evidence of innocence or prosecutorial overreaching, unless the defendant can demonstrate that the evidence would have affected the verdict. The requirement that a defendant prove that the new evidence that was not available at the time of trial would not just have affected, but actually changed the outcome of the trial, places an impossible burden upon a defendant. The only beneficiary is the prosecutor, who may well have withheld the evidence in the first place. The Federal Courts do not tolerate such an unnecessary burden and, again, the result will be a system of "review" that is more costly.

* The amendment to (a)(3) is unnecessary and mean-spirited. First, there has not been any showing by the District Attorneys that the Commonwealth has been injured by permitting innocent persons to litigate issues that would otherwise have been waived; nor does the Commonwealth have a legitimate interest in preventing defendants from seeking state court review of federal issues that the defendant would otherwise not be able to raise until federal habeas corpus. Note: this amendment is irrelevant to capital cases because the Pennsylvania

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Supreme Court has adopted an independent waiver rule (as a matter of Pennsylvania constitutional law) that supersedes the language of the Post Conviction Relief Act.

§ 9543(b). Exception to eligibility for relief.

* The amendment to section (b) would allow the dismissal of an entire petition "at any time" if it appears that the Commonwealth has been prejudiced by a delay in filing the petition. This section is ambiguous and potentially draconian. First, the term "delay" is unclear in the context of the section. The statute neither requires that the delay be intentional or be the fault of the petitioner. Thus, under this amendment, a petition could be dismissed at any time because of a delay that had occurred at some prior unspecified time that could have resulted from any variety of things, including but not limited to: (1) the failure to transcribe a proceeding or the unavailability of notes of testimony; (2) the fact that a defendant was without legal representation for an extended period of time, or was incompetent, illiterate, mentally ill, or otherwise impaired; (3) the failure of prior appointed counsel to have filed any pleadings at all; or (4) the refusal of the prosecution to provide discovery, or other prosecutorial misconduct. Such mean-spirited provisions do not pass muster under either the United States or Pennsylvania Constitutions. The effect, again, is protracted litigation and greater costs for everyone. Such mean-spirited provisions will forfeit the deference federal Courts give to our review system in the Pennsylvania state courts.

The federal courts have dealt with the concept of delay in McFarland v. Scott by permitting the court to deny specific relief to a petitioner when the state can prove that a dilatory defendant inexcusably ignores the opportunity to file a petition and flouts the available legal processes. This standard requires that the delay (1) be attributable to the defendant; (2) be intentional; and (3) flout the process. This does not punish unrepresented inmates for delays resulting from systemic failures to provide representation or from other structural problems, nor does it punish the illiterate, poor and mentally ill. This proposed bill ignores all of this and thus, again, forfeits the deference federal Courts now give to the rulings of our Pennsylvania Courts.

§ 9545. Jurisdiction and Proceedings.

* The amendment to section (a) would prevent the Court of Common Pleas from granting a stay of execution to an unrepresented inmate, prior to the filing of a formal petition for post-conviction relief. It also would prevent an inmate who was able to retain counsel or who had obtained pro bono assistance from obtaining the court's assistance in conducting the extra-record investigation necessary to properly prepare a post-conviction petition; or even to obtain the court order that is necessary to obtain access to the inmate in order to conduct a psychiatric or psychological examination so that the petition can be filed. It also seeks to assure the execution of inmates who are mentally deficient, illiterate, or poor (i.e., do not have transcripts etc.), and thus cannot properly file. For example, in one recent case, the PaPCDO filed a pre-petition motion for access to the client, a pre-petition motion for a stay of execution, and

after the court had entered pre-petition orders for psychiatric examinations and conducted a pre-petition evidentiary hearing it determined that the inmate was insane and incapable of assisting in his own defense. To prohibit the Pennsylvania courts from exercising their constitutional duty, pre-petition, to assure that the post-conviction proceedings are fair is to assure that Pennsylvania's post-conviction review system will be rendered farcical. Thus, again, federal deference to Pennsylvania's courts will be forfeited and the entire process will end up costing a great deal more in the long run.

The rationale for the present system is best explained by the Northampton County Court of Common Pleas in Commonwealth v. Henry. A copy of the Henry decision is appended.

There is no evidence whatsoever that the courts' pre-petition jurisdiction has harmed the Commonwealth in any way, and this amendment is nothing more than an attempt to interfere with a defendant's ability to obtain a stay of execution and to force the defense to prepare a post-conviction petition in the shadow of the death warrant.

To the extent that this amendment can be read as depriving the Courts of their inherent power to grant relief in aid of their prospective jurisdiction, it amounts to a violation of the separation of powers doctrine, in addition to being bad policy.

* The amendment to section (b) purports to eliminate the Supreme Court's rulemaking power over post-conviction proceedings; most importantly, the long-standing rule mandating the right to counsel in post-conviction proceedings. This is plainly an intrusion into the judicial sphere. Of course, the lack of counsel will mean that the proceedings will have to be conducted again when there is counsel. The existing language of the statute should be restored.

* We do not take a position on the concept of a post-conviction statute of limitations per se. However, as is the case in other states that recognize a right to state post-conviction counsel, the statute of limitations should not begin to run until the state has provided competent counsel to the defendant. For example, Florida's Rule 3.850 (Fla R. Crim. P.) was created with the understanding that the statue of limitations was because qualified counsel -- an appropriately state funded statewide capital defender's office -- exists to provide representation in post-conviction proceedings.

The limitations period contained in SB 81 will create serious problems apart from its failure to start at the time of provision of qualified counsel. The one-year period provided for in new section (b) will itself create tremendous logistical problems and generate massive post-conviction litigation because it will force every defendant in Pennsylvania who is able to seek relief to file within one year. This will generate approximately 125 new capital PCRAs in the space of one year, including 70 capital cases that have been affirmed by the state Supreme Court and approximately 55 capital cases currently pending on appeal but which would be forced into post-conviction by the statute's unitary review provisions. That would create a need for lawyers

for 125 capital post-conviction petitions in a one-year period.

At the same time, the state has provided no money for the PaPCDO or any other capital defender, and we may be forced to close. As a result, there will be no institutional defender to handle these cases, or to provide assistance to other counsel who may be appointed. Additionally, all objective observers have long noted that Pennsylvania's already underfunded public defenders are not equipped to handle this onslaught of capital cases, nor are the courts or the D.A.'s offices. The Joint Task Force on Death Penalty Litigation in Pennsylvania recognized five years ago that there was a shortage of death penalty lawyers to handle post-conviction cases. This bill, if it becomes law, will create a catastrophe for the courts. Moreover, if the legislature does not come up with adequate funding for counsel, the financial burden of this proposal will be forced onto the counties. If the counties do not provide adequate funding -- as they have not to date -- some innocent people will die because of inadequate representation. Other defendants will be executed without ever receiving a fair sentencing hearing for a wide range of reasons, including that untrained, inadequately compensated, and unprepared counsel failed to present important evidence, or because of prosecutorial misconduct or significant, though unintentional errors by the courts.

Any statute of limitations, unaccompanied by guarantees of competent counsel, adequately compensated and provided with the tools necessary to litigate these cases, will exacerbate Pennsylvania's long-recognized and long-ignored systemic inability to provide fair capital trials.

The so-called "exceptions" to the proposed statute of limitations are draconian and simply will not work. The proposal does not pass muster under the proposed "habeas reform" bills in the United States Congress, and does not pass muster under current Federal law. Again, as with many provisions of this bill, the result will be that Pennsylvania will forfeit the deference it now receives in federal court and the cost of protracted litigation will be borne by the taxpayers. The exceptions should not reward the inadequate provision of counsel or prosecutorial misconduct, and certainly should not reward prosecutorial misconduct by imposing a statute of limitations on the one hand, and taking away discovery on the other. Neither should they impose special burdens on the illiterate, poor or mentally ill, which they certainly will if adopted in their current form.

* The new subsection (c) on stays of execution is unconscionably draconian.

* First, (c)(1) violates constitutional separation of powers standards by attempting to limit the Courts' authority to grant stays of execution. The constitutional underpinnings of the Courts' authority was explained in the Henry case (appended).

* Second, (c)(2) would deprive a court of the power to grant a defendant -- even one who has never been provided a post-conviction lawyer, or who is illiterate; mentally ill;

poor; deprived of transcripts; or otherwise deprived of access to the courts -- a stay of execution unless he or she is able to file a post-conviction petition that "makes a strong showing of likelihood of success on the merits." Under this bill, the defendant would not be entitled to a stay unless he first filed a PCRA petition. Under the existing death warrant law, death warrants have been, and will continue to be, directed at unrepresented inmates shortly after their sentences have been affirmed. This "no-stay" provision, read in connection with the death warrant law, effectively obliterates the one-year statute of limitations for capital defendants and, indeed, obliterates any opportunity for a defendant to seek appropriate review before he or she is executed. Unrepresented defendants for whom new warrants are signed would be forced to prepare a full PCRA petition making a strong showing of likelihood of success in the compressed warrant period. At the same time, Pennsylvania has no mechanism to find qualified counsel for a capital defendant, while Pennsylvania's law as currently interpreted by the Department of Corrections requires resort to the courts to gain access to a defendant who is under warrant. The "reforms" in this bill would deprive the court of jurisdiction to hear even a pre-petition access motion, thus preventing the petitioner from preparing a petition, and depriving him or her of any real ability to discover the merits of a claim or plead claims that show any likelihood of success on the merits.

At the same time, the bill would count the time used in obtaining a stay of execution toward the statute of limitations period and the times allotted in the one-sided, prosecution biased procedural rules written by the District Attorneys and included in this bill. As with virtually all of the other provisions this bill creates which limit fair access to the courts, the result is that Pennsylvania will be deprived of federal deference and proceedings will have to begin again once the provision is struck down.

* In short, the no-stay provisions are completely unprincipled. They are designed to expedite executions without representation, not to advance due process. A principled system of post-conviction review would grant a stay of execution to permit the litigation of a meaningfully counselled post-conviction petition, and would provide counsel the tools to adequately litigate that petition.

§ 9545(d). Evidentiary hearing.

The affidavit and no-discovery provisions of the prosecution-proposed procedural rules are irrational, one-sided, unworkable, unconstitutional, and would spawn a variety of satellite lawsuits. The costs, again, will be borne by taxpayers.

* The addition of (d)(1) requires the petitioner, but only the petitioner, to provide a notarized affidavit from each intended witness and documents material to that witness's testimony. It imposes no similar requirement upon the prosecution. Similarly, (d)(3) permits the prosecution, but not the defense, to declare a witness's testimony inadmissible unless the affidavit requirement is substantially complied with. This is a plain violation of both the due process and

equal protection clauses of the United States Constitution and the Pennsylvania Constitution.

Apart from its blatant unfairness and unconstitutionality, this prosecution-biased provision is also entirely unworkable. A defendant frequently requires the testimony of hostile witnesses from whom it is impossible to obtain affidavits, and of witnesses who are discovered only after a petition is filed -- especially in capital cases, where witnesses often do not come forward until they have learned of a pending execution. All of the inequities of this anti-defendant requirement are magnified when a defendant is under death warrant. During these times, the outrageousness of permitting the prosecution to determine whether or not a witness's testimony is heard is especially clear. There is no such requirement in the federal courts and there is no such requirement in any of the proposed federal habeas corpus reforms now before the United States Congress. The federal courts will find these provisions intolerable and the proceedings will then have to begin again once the results are struck down. As with the other provisions of this bill, the result will be that Pennsylvania's courts will lose the deference they now receive in the federal courts. Trading away our state system's fundamental fairness in order to give an undue advantage to prosecutors is not only inconsistent with due process, it is short- sighted. Witnesses who come forward will be heard in federal court, whether or not they have affidavits. This provision assures that witnesses who have no affidavits will not be heard in Pennsylvania's state courts. As a result, Pennsylvania's judges will be deprived of the power to do justice and justice will be obtained in federal court, all at the cost of federal deference to our state court system and to the findings of our state court judges.

Significantly, the law in effect now requires the pleading of facts with specificity. The additional affidavit requirement is unnecessary, shortsighted, unfair and will only result in additional litigation.

* Section (d)(2) provides no other discovery, apart from the one-sided discovery by the prosecution of affidavits and documents relating to defense witnesses, "except upon leave of court with a showing of exceptional circumstances." This lack of parity, of course, shares all the due process and equal protection problems of the affidavit requirement. But additionally, the "exceptional circumstances" standard is unduly harsh. Currently, discovery is granted in PCRA cases through interim orders that must advance "the interests of justice." Plainly, the stricter standard seeks to prevent the defense from obtaining discovery that otherwise would have been in the interests of justice.

The prosecution's insistence on avoiding discovery makes no sense if prosecutors are interested in their ethical duty of doing justice, rather than in hiding their files or preventing defendants from obtaining favorable information to which they had otherwise not had access. If a prosecutor has acted fairly, he or she has nothing to hide and nothing to oppose in discovery. That is why several other states have an open-file policy, especially in capital cases. Moreover, the United States Supreme Court has recently affirmed in Kyles v. Whitley the requirement that a prosecutor has a continuing, affirmative obligation to turn over to the defense all exculpatory evidence in the possession of the state. The effect of the proposed requirement -- and the reason

the prosecutors want the law changed in this manner -- is to prevent defendants from having the most effective tool for discovering prosecutorial misconduct. It will not hold up in federal court, where discovery is allowed.

Additionally, the virtual elimination of formal discovery will create unnecessary collateral litigation in other courts as petitioners must file lawsuits to obtain a variety of documents and records, such as Department of Correction records, mental health records, police records, etc. In the case of prison records, defendants will be forced to file a federal action to vindicate their right of access to the courts, and seek attorney's fees against the state. In the case of untranscribed or unavailable notes of testimony, the defense could be forced to file suit against a court reporter to generate or recreate the transcripts. None of these collateral actions would be necessary with full, proper discovery.

As noted, the "no discovery" and "affidavit" provisions are not required in federal habeas corpus cases, and so what prosecutorial gains there may be in state court from excluding favorable defense evidence or witnesses will not be binding in the federal habeas proceedings that would follow. Discovery is available under federal habeas and defendants will invoke their right to discovery at that point. The absence of discovery in state court will thus deprive the state-court petitioner of a full and fair hearing in that forum, as that term is understood in federal habeas law, which would then entitle the defendant to an evidentiary hearing in federal court. Having been denied the opportunity for full and fair development of a factual record in state court, the factfinding of the state court would not be entitled to deference from the federal court.

Thus, depriving a defendant of the tools to develop a post-conviction case in state court may give the prosecution the unfair advantage it seeks at the PCRA stage, but ultimately it will force the District Attorneys to defend more extensive -- and more expensive -- litigation in federal court.

§ 9546. Relief and Order.

* Currently, both the Commonwealth and the defendant have the right to appeal an adverse PCRA judgment in a capital case directly to the Pennsylvania Supreme Court. This section of SB 81 would discriminate against capital defendants by taking that right away from the defense, but not from the prosecution. Under the proposed amendment, the District Attorney would be given the right to seek direct review from the Pennsylvania Supreme Court of a Common Pleas Court order overturning a capital conviction or death sentence. However, the bill would permit a capital petitioner Supreme Court review only after allowance of appeal by the Supreme Court.

This alteration of the appeals process is blatantly one-sided and violates a capital defendant's right to due process and equal protection of the laws. This unconstitutional provision, as much as any other, illustrates the lack of equity that permeates the entire bill.

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Conclusion

The proposed bill is blatantly one sided, shortsighted and unconstitutional. It will result in but a few additional executions, some of which will involve wrongly sentenced defendants. It trades away the benefits of the deference Pennsylvania's courts now receive in federal litigation for a short-term advantage to prosecutors. In the end, it will cost the taxpayers dearly: these provisions will not hold up in a federal court and proceedings conducted under this bill will simply be a waste of resources when many of the cases heard under this bill are overturned, and the proceedings will be ordered to begin again, from scratch.

Facts and Procedural History

Petitioner Joseph Henry was found guilty of first degree murder and related felony charges on April 25, 1987, in the Northampton County Court of Common Pleas. On April 27, 1987, the sentencing phase of the trial began, and on the following day, the jury returned a verdict of death. This court denied Joseph Henry's post-verdict motions on June 30, 1988; and on July 22, 1988, the Honorable Michael V. Franciosa, Judge of this Court, sentenced Henry to death. Joseph Henry's automatic direct appeal to the Pennsylvania Supreme Court was denied on February 8, 1990. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990).

On February 28, 1995, Pennsylvania Governor Thomas Ridge signed a death warrant scheduling Joseph Henry's execution by the Department of Corrections for the week of April 16, 1995.

Joseph Henry is not currently represented by counsel for purposes of post-conviction collateral attack proceedings, and no attorney has represented him for this purpose since the Pennsylvania Supreme Court affirmed his conviction and sentence on direct appeal in 1990. Henry has never filed a petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, et seq.[2] Henry intends to file a PCRA petition challenging his conviction and sentence, but claims he is not able to do so without the effective assistance of counsel. Henry is indigent and cannot afford to retain counsel. An order of this court permitting

[2] Post Conviction Relief Act. As amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective.

Henry to proceed in forma pauperis was signed March 27, 1995.

Discussion

Under Pennsylvania law, Joseph Henry is entitled to representation of able counsel in the preparation, filing and advancement of a collateral attack on his conviction, appeal, and death sentence. This right is absolute, and is not impaired because it was not filed until after a death warrant issued. See Pa. Const. art. I, § 14; 42 Pa.C.S. § 9541, et seq.; Commonwealth v. Albert, 522 Pa. 331, 334; 561 A.2d 736, 738 (1989). Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981).

Relief under Pennsylvania's Post Conviction Relief Act is in the nature of a common law writ of habeas corpus constitutionally guaranteed, and not available to defendant unless he is provided the time and representation to file a counselled petition under the act. Joseph Henry cannot meaningfully assist his counsel in the preparation of a petition for collateral post-conviction relief without sufficient time necessary to meet with counsel and examine the issues. See Commonwealth v. Rolan, Nos. 8402-2893, 2896 (Phila. C.P.), Commonwealth v. Rolan, 83 Cap. App. Dkt., 1994 (Pa. Jan. 26, 1995) (per curiam); Commonwealth v. Lark, January Term 1980, Nos. 2012, 2013, 2015, 2022 (Phila. C.P.), Commonwealth v. Lark, 77 Cap. App. Dkt. 1994 (Nov. 10, 1994), Lark v. Lehman, Civ. A. No. 94-6762, slip op. (E.D. Pa., Nov. 10, 1994); Commonwealth v. Terry, No. 1563-79 (Mtgy. C.P.) Aug. 1994.

There have been no executions in Pennsylvania in over thirty (30) years, and Pennsylvania courts have regularly granted stays of

execution to permit convicted murderers sentanced to death to pursue an initial counselled post-conviction petition for collateral relief.[3]

In the single case brought to the attention of this court where the Pennsylvania Supreme Court sustained common pleas denial

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[3] Commonwealth v. Lesko, No. 681 C, 1980 Term (Westm. C.P.) (stay issued Nov. 12, 1985 for execution scheduled Nov. 19, 1985); Commonwealth v. Travaglia, Nos. 684 C, 1980 Term (Westm. C.P.) (stay issued Nov. 13, 1985 for execution scheduled Nov. 19, 1985); Commonwealth v. Zettlemoyer, No. 639 819, 1979 Term (Dauph. C.P.) (stay issued Nov. 12, 1985 for execution scheduled Dec. 3, 1985); Commonwealth v. Beasley, Nos. 2175-2178, July Term 1980 (Phila. C.P.) (stay issued Nov. 26, 1986 for execution scheduled Dec. 2, 1986); Commonwealth v. Frey, No. 159, 1980 Term (Lanc. C.P.) (stay issued June 9, 1988 for execution scheduled June 14, 1988); Commonwealth v. Maxwell, Nos. 1080-86, March Term 1981 (Phila. C.P.) (stay issued Sept. 7, 1989 for execution scheduled Sept. 19, 1989); Commonwealth v. Cross, No. 565 A, B, C of 1981 (Beaver C.P.) (stay issued Sept. 20, 1990 for execution scheduled Oct. 2, 1990); Commonwealth v. Whitney, Nos. 1416-1429, Nov. Term 1981 (Phila. C.P.) (stay issued Nov. 29, 1990 for execution scheduled Dec. 13, 1990); Commonwealth v. Griffin, Nos. 1555-84 (Del. C.P.) (stay issued June 11, 1991 for execution scheduled June 25, 1991); Commonwealth v. Albrecht, Nos. 408-11, 1980 Term (Bucks C.P.) (stay issued May 13, 1991 for execution scheduled July 15, 1991); Commonwealth v. Fahy, Nos. 2284, 2286, 2288, 2289, Feb. Term 1981 (Phila. C.P.) (stay issued Jan. 13, 1992 for execution scheduled Jan. 14, 1992); Commonwealth v. Christy, No. 0270, a, b, c 1983 (Cambria C.P.) (stay issued Nov. 9, 1992 for execution scheduled Nov. 17, 1992); Commonwealth v. Terry, No. 1563-79 (Mtgy. C.P.) (stay issued Aug. 9, 1994 for execution scheduled Aug. 16, 1994; Commonwealth v. Holland, Nos. 1430, 1437, 1439, 1441, Oct. Term, 1984 (Phila. C.P.) (stay issued Oct. 7, 1994 for execution scheduled for Oct. 16, 1994); Commonwealth v. Lark, 77 Cap. App. Dkt. 1994 (Pa. Nov. 10, 1994) (per curiam) (summarily reversing orders of Court of Common Pleas and issuing a stay of execution Nov. 10, 1994 for execution scheduled Nov. 13, 1994) (Lark v. Lehman, Civ. A. No. 94-6762 (E.D. Pa. Nov. 10, 1994) (stay issued Nov. 10, 1994 for execution scheduled Nov. 13, 1994); Commonwealth v. Rolan, 83 Cap. App. Dkt. 1994 (Pa. Jan. 6, 1995) (Montemuro, J., in chambers) (temporary state issued Jan. 6, 1995 for execution scheduled Jan. 10, 1995); id. (Pa. Jan. 26, 1995) (summarily reversing order of Court of Common Pleas and issuing stay of execution). But see Commonwealth v. Duffey, 78 Cap. App. Dkt. 1994 (Pa. Dec. 5, 1994).

of a stay of execution, the stay was nevertheless granted and counsel appointed to pursue post-conviction relief in a collateral proceeding, by the United States District Court for the Middle District of Pennsylvania.[4]

The Supreme Court of Pennsylvania requires the appointment of PCRA counsel for a pro se petitioner. See Pa.R.C.P. No. 1504(a). The Pennsylvania Capital Case Resource Center, initiated in July, 1994, is now a Community Defender Organization under 18 U.S.C. § 3006A of the Criminal Justice Act, without sufficient resources to represent this petitioner in contemplated PCRA proceedings.

Attorneys Dunham and Bradley who assisted in the preparation of the pro se petition for stay of execution are not familiar with the Joseph Henry trial, or the substance of the direct appeal; they are thus unable to file a PCRA petition for Joseph Henry at this time. Further, Henry's private trial counsel for pretrial, trial, and direct appeal may not represent Henry on a collateral attack on conviction and sentence, and direct appeal because trial counsel cannot litigate the question of his own ineffectiveness. Commonwealth v. Albert, supra.

For Joseph Henry the judicial trial process concluded with imposition of the death sentence in 1988. The direct appellate review process concluded with the timely opinion and order of the Pennsylvania Supreme Court affirming the death penalty in 1990. The execution process requires thereafter the governor's signature

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[4] See Commonwealth v. Duffey, No. 78 Cap. App. Dkt. Supreme Court of Pennsylvania; see also Duffey v. Lehman, 1995 WL 103359 (M.D. Pa.).

on a death warrant. It appears clear that the full spectrum of Henry's constitutionally guaranteed rights to post-conviction collateral review of the trial, direct appeal, and warrant process, including effectiveness of counsel does not ripen until the death warrant issues. The warrant issued here on February 28, 1995, less than thirty (30) days before petitioner comes before the court seeking an opportunity to have the court conduct a meaningful review.

Henry cannot receive effective and meaningful assistance of counsel, as required in McFarland v. Scott, 114 S. Ct. 2568 (1994), under the pressure of an execution date approximately three weeks from the time counsel appears in the case.

The court notes the five-year delay in issuing the death warrant here is not of petitioner's making, or due to any interruption or abuse of the constitutionally guaranteed judicial process. The court continues to address this most serious of issues with all due dispatch contemplated by death penalty legislation, giving due regard to the necessary review that must accompany imposition of the irreversible penalty of death. Henry's absolute right to collateral review may not be infringed to accommodate a desire to bring a quicker end to legal proceedings surrounding this tragic episode that deeply and irrevocably affects us all, but none more than the families of the victim, and principals involved.

We cannct ignore that there is an "overwhelming public interest [in] insuring that capital punishment in this Commonwealth

comports with the Constitution." Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Entry of a stay of execution does not rest on an evaluation of any alleged prior procedural or substantive error. The stay empowers the petitioner to employ the means necessary to procure a counselled opportunity for judicial review to determine if any prejudicial error occurred.

Under these facts and circumstances, the court will grant a reasonable limited stay of execution and appoint counsel immediately for purposes of pursuing defendant's PCRA relief forthwith.

The Philadelphia Inquirer

EDITORIALS

Dead to rights

The death penalty's faint pretension to fairness dies when inmate's access to counsel is limited.

Death-row lawyers were no refuge for Leon Moser, the triple murderer who, around midnight Wednesday, became the second Pennsylvanian executed since the state breathed new life into its death penalty.

Last-minute appeals on Moser's behalf were brushed aside by the U.S. Supreme Court. And the condemned man had long said *he* wanted to die for his awful crime — the Palm Sunday 1985 slayings of his ex-wife and two children in Montgomery County.

Which, for Americans who believe in the death penalty, may be a satisfying result: an evil deed avenged; the often drawn-out appeals process swatted aside by a 5-4 U.S. Supreme Court majority.

But the majority of citizens who say they support the death penalty, *provided* it is imposed fairly, ought to be troubled by Moser's last days.

Troubled, particularly, by the seemingly perfunctory manner in which the Supreme Court, twice in 24 hours, overruled lower-court judges who wanted to stay the execution.

The issue was whether it was reasonable to delay the execution to determine whether Moser was mentally competent to waive his federal rights to appeal. Of course it was reasonable. Moser had been treated at Farview State Hospital for the criminally insane.

U.S. District Judge Thomas J. O'Neill approved two temporary stays, and was upheld by the Third Circuit Court of Appeals. But after each stay, the Supreme Court — without a word of explanation — gave the state's executioners the green light.

Was the high court majority sending a message? If so, it is ominously in step with a mood in the land to speed executions.

And the clear danger is that, more and more, fairness will be a casualty.

Language in the federal antiterrorism bill would limit most federal and state death-row inmates to a single habeas corpus appeal. Those appeals challenge an execution on grounds of constitutional due process.

Not only would the condemned be limited to one appeal, they would also have to file within one year of their death sentence. That strict timetable alone seems to violate the Constitution's spirit of fair play.

Also under legislative assault is $20 million in government funding for lawyers who specialize in death-penalty appeals. The U.S. House of Representatives voted July 26 to eliminate funds for 20 regional death-penalty law centers, including the fledgling Philadelphia office.

Most would close. (The Ridge administration already yanked state funding for the Philadelphia center.) The odd thing is, their demise could be bad for the execution business. Federal funding for such appeals grew out of a late '80s crisis in which the unavailability of skilled counsel to handle these delicate cases led to what the American Bar Association describes as "a systematic breakdown which stopped both appeals and executions."

Nor were the death-penalty law offices the brainchild of lefty lawyers, but, rather, blue-ribbon panels of judges, lawyers and legislators who saw the legal and moral need for such expertise. (It also happens to be the cheapest way to provide the required counsel to indigent inmates.)

Both the cuts and the habeas "reforms" are dangerous. As Andre L. Dennis, the former Philadelphia Bar chancellor who created the local death-penalty law center, says, "If we're going to have the death penalty, there has to be a commitment ... that we're sure people will have their constitutional rights."