

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Death Penalty and Proportionality Review

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House Judiciary Committee

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Room 60, East Wing
Main Capitol Building
Harrisburg, Pennsylvania

Wednesday, May 21, 1997 - 9:30 a.m.

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BEFORE:

Honorable Thomas Gannon, Majority Chairman
Honorable Stephen Maitland
Honorable Al Masland
Honorable Jere Schuler

Honorable Thomas Caltagirone, Minority Chairman
Honorable Andrew Carn
Honorable Harold James
Honorable Kathy Manderino

Honorable Nicholas Micozzie, House Majority
Insurance Committee Chairman

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ALSO PRESENT:

Judy Sedesse
Committee Administrative Assistant

Brian Preski, Esquire
Chief Counsel for Committee

David Krantz
Minority Executive Director

Paul A. Cacciamani
Intern with Minority Caucus

C O N T E N T S

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1 CHAIRMAN GANNON: The House Judiciary
2 Committee is called for a public hearing on the
3 death penalty. I would like to welcome
4 Representative Nicholas Micozzie, who is going
5 to join us today for these hearings.

6 Our first witness is Mr. Robert Graci,
7 Chief Deputy Attorney General, the Attorney
8 General's Office. Mr. Graci.

9 MR. GRACI: Thank you, Chairman Gannon
10 and Members of the Committee.

11 Good morning.

12 On behalf of Attorney General Mike
13 Fisher, I would like to thank the Chairman and
14 the Members of the Committee for allowing the
15 Office of Attorney General to participate in
16 this hearing focusing on issues of the death
17 penalty in Pennsylvania, in general, and of
18 proportionality review, in particular. The
19 Attorney General regrets that he is unable to
20 personally deliver these remarks. As you know,
21 he is not able to be with you himself because
22 today is the first day of the Drug Summit which
23 he called to address that very serious problem
24 facing Pennsylvania.

25 The subject of the death penalty is of

1 great importance to Attorney General Fisher. In
2 1978, as a member of the House, he helped draft
3 our current death penalty statute which is
4 codified at Section 9711 of Title 42 of the
5 Pennsylvania Consolidated Statutes. He was also
6 the prime Senate sponsor of the legislative
7 initiatives to require the Governor to
8 expeditiously sign execution warrants -- a
9 necessary part of the process to keep these
10 cases moving through the various levels of
11 review -- and to shorten the time consumed by
12 repetitive appeals.

13 As a candidate to be Pennsylvania's
14 chief law enforcement officer, Attorney General
15 Fisher campaigned for an effective death penalty
16 -- not just a statute that is on the books but a
17 statute and procedures that ensure that death
18 penalties fairly imposed are carried out in a
19 timely fashion. Shortly after assuming office
20 as Attorney General, he came to this body and
21 asked for needed funding to see that the
22 Commonwealth's prosecutors -- the Office of
23 Attorney General and the several district
24 attorneys -- are able to effectively and
25 efficiently respond to the complex litigation

1 that surrounds these most serious cases known to
2 our criminal justice system. You responded with
3 a \$500,000 appropriation for that purpose and I
4 am proud to be able to tell you that the
5 Attorney General has selected me to head this
6 capital litigation initiative in the Criminal
7 Law Division of the Office of Attorney General.

8 The Attorney General is hopeful that
9 your present effort will continue this trend of
10 having a real death penalty for Pennsylvania's
11 most brutal murderers in order that the will of
12 the vast majority of Pennsylvanians will be
13 given effect and that death sentences imposed
14 after fair trials will be carried out after fair
15 review.

16 In preparing my remarks, I thought that
17 it might be helpful to put our present death
18 penalty procedures statute into a historical
19 perspective. Capital punishment has existed in
20 Pennsylvania since colonial times. The Great
21 Law of William Penn adopted December 7, 1682,
22 provided for the death penalty -- by public
23 hanging -- for premeditated murder. Death was
24 the sole punishment for premeditated murder
25 until 1925. In 1860, the General Assembly

1 divided murder into two degrees. The punishment
2 for murder of the first degree -- which by
3 statutory definition encompassed both
4 premeditated murder and felony murder (which as
5 you now know is murder of the second degree) --
6 was death by hanging. The penalty was fixed by
7 the jury's verdict of guilty of murder in the
8 first degree.

9 In 1925, the legislature gave juries
10 the option of sentencing a person convicted of
11 murder in the first degree to death (by
12 electrocution, which had been adopted in 1913)
13 or imprisonment for life. The decision was
14 within the sole discretion of the jury. The
15 sentence was still fixed by the jury when it
16 rendered its verdict on the question of guilt or
17 innocence. There was no separate penalty
18 hearing. That was not to come for several
19 decades. Evidence relevant to the penalty was
20 then admitted during what we would call the
21 guilt phase of the trial.

22 In 1959, perhaps in response to a
23 Supreme Court decision which had reversed a
24 death sentence entered by a trial court sitting
25 without a jury in the case of a defendant who

1 was only 15 years old when he committed the
2 murder, the Penal Code was amended to allow the
3 jury to receive additional evidence, after a
4 verdict of guilty of first degree murder, upon
5 the question of the penalty to be imposed upon
6 the defendant. And I quote the language then in
7 the statute. It also allowed -- and again I
8 quote from the the statute -- argument by
9 counsel on the issue of penalty and jury
10 instructions -- again in the words of the
11 statute -- as may be just and proper in the
12 circumstances. The jury would then deliberate
13 on the penalty -- life imprisonment or death.
14 If the jury was unable to agree on a sentencing
15 verdict, a sentence of life imprisonment was
16 imposed. This statute was declared
17 unconstitutional by the Pennsylvania Supreme
18 Court after the 1972 decision of the United
19 States Supreme Court in Furman versus Georgia
20 which held that standardless discretion in
21 capital cases violated the Eighth Amendment.

22 In 1974, the General Assembly responded
23 to the Furman constitutional concerns and
24 adopted the forerunner of our present death
25 penalty procedures statute. The Pennsylvania

1 Supreme Court again declared that statute
2 unconstitutional because it limited mitigating
3 circumstances which could be considered by the
4 jury in determining the sentence. In addition
5 to providing for jury sentencing after
6 consideration of listed aggravating and
7 mitigating circumstances that statute was the
8 first to specifically provide for automatic
9 review of the death sentence by the Pennsylvania
10 Supreme Court.

11 Though the Court struck down this
12 statute in Commonwealth versus Moody, it noted
13 that the legislature had -- and again, I quote
14 from the opinion in Moody -- adopted procedures
15 for the protection of defendants in capital
16 cases which have been specifically approved and
17 endorsed by the [United States] Supreme Court.
18 Among the procedures identified by the Moody
19 Court was the statutory provision for automatic
20 appellate review of death sentences.

21 That language is important for your
22 present purposes because the statute simply
23 provided, in pertinent part: quote, A sentence
24 of death shall be subject to automatic review by
25 the Supreme Court of Pennsylvania In the

1 event that the sentence of death shall for any
2 reason be invalidated then the convicted
3 defendant shall undergo the sentence of life
4 imprisonment, end of quote. The Pennsylvania
5 Supreme Court considered this automatic review
6 provision to be important even though the scope
7 of review was not specifically delineated as it
8 would be when the statute was rewritten in 1978
9 to overcome the deficiencies identified in
10 Moody.

11 Before describing the 1978 changes, it
12 is important to note, as part of the historical
13 development of the death penalty in
14 Pennsylvania, that the 1974 statute was not the
15 first to provide for Supreme Court review of
16 murder convictions. Since at least 1860,
17 defendants convicted of murder had the right to
18 have their cases reviewed by the Supreme Court
19 by what was known as a writ of error. That was,
20 of course, during a time in which every
21 conviction for murder in the first degree --
22 premeditated murder or felony murder -- carried
23 a mandatory sentence of death. The Supreme
24 Court's review was limited to the errors
25 assigned by the defendant except for the

1 sufficiency of the evidence which the Supreme
2 Court was statutorily -- by mandate imposed by
3 this body -- required to review in all cases of
4 murder in the first degree.

5 That former statutory requirement of
6 reviewing every first degree murder conviction
7 for sufficiency continues as part of the common
8 law of the Commonwealth. It is interesting to
9 note that as late as 1962 -- in the case of
10 Commonwealth versus Elmo Smith which was the
11 last case before Zettlemyer in 1995 where a
12 death sentence was actually carried out -- the
13 Court, in Smith, said that the verdict of a jury
14 regarding a sentence imposed for first degree
15 murder could not be changed or reduced by the
16 Supreme Court on appeal.

17 Getting back to the 1978 statute. In
18 1978, responding to the invalidation of its 1974
19 attempt to enact a constitutional death penalty
20 statute, the General Assembly enacted a statute
21 which eventually passed constitutional muster in
22 the case of Commonwealth versus Zettlemyer (and
23 which has since, I note parenthetically,
24 withstood every constitutional challenge leveled
25 against it -- including a challenge in the

1 United States Supreme Court).

2 The 1978 statute allows unlimited
3 evidence of mitigating circumstances, overcoming
4 the constitutional flaw identified in Moody.
5 Like the 1974 version, the 1978 Act continued
6 the requirement of automatic review by the
7 Supreme Court. For the first time, however, the
8 statute prescribed the Court's scope of review.
9 The statute required affirmance of the sentence
10 of death unless the Supreme Court -- and I quote
11 from the statute -- determines that: (i) the
12 sentence of death was the product of passion,
13 prejudice or any other arbitrary factor; (ii)
14 the evidence fails to support the finding of an
15 aggravating circumstance ... or (iii) the
16 sentence of death is excessive or
17 disproportionate to the penalty imposed in
18 similar cases, considering both the
19 circumstances of the crime and the character and
20 record of the defendant.

21 This was the first time that
22 comparative proportionality review was made a
23 part of an appeal to the Supreme Court. The
24 Supreme Court was directed to, quote, either
25 affirm the sentence of death or vacate the

1 sentence of death and remand for the imposition
2 of a life imprisonment sentence. I note
3 parenthetically: (This language was interpreted
4 by the Pennsylvania Supreme Court as prohibiting
5 it from remanding cases for a new sentencing
6 proceeding. The legislature changed this
7 result, allowing for such remands, by amending
8 Section 9711(h) to its present form.) I will
9 get back to that in just a moment.

10 That, Mr. Chairman, and Members of the
11 Committee, is the history of the death penalty
12 in Pennsylvania in a nutshell. It brings me to
13 the specific concern of this committee, that is,
14 the statutory requirement for proportionality
15 review of all death sentences by the Supreme
16 Court as part of the automatic appeal. How that
17 review is conducted is now under attack in the
18 case of Commonwealth versus Gribble. I would
19 note for the committee, however, that this is
20 not the first time the proportionality review
21 has been questioned. Indeed, the case in which
22 the Supreme Court of Pennsylvania upheld the
23 constitutionality of Section 9711 --
24 Commonwealth versus Zettlemyer -- the Court
25 addressed its statutory proportionality review

1 obligation and how it would conduct it.

2 The Court observed -- and I am going to
3 quote from the exact language of the Zettlemyer
4 opinion -- It is certain that the United States
5 Supreme Court considers meaningful appellate
6 review by a court having statewide jurisdiction
7 to be at least a very important factor (perhaps
8 a sine qua non) in a constitutionally
9 permissible legislative scheme for imposition of
10 the death penalty because such review is, in
11 effect, a last line of defense to guard against
12 arbitrary sentencing by a jury. However, the
13 United States Supreme Court has also made it
14 clear that no particular mechanism of appellate
15 review is required, and has never struck down a
16 state's capital punishment scheme on the basis
17 that the review by the state appellate courts
18 was inadequate, choosing to assume, in the
19 absence of evidence to the contrary, that the
20 state courts would properly fulfill their
21 obligations to ensure against arbitrary and
22 capricious imposition of the death penalty. The
23 Court concluded that so long as an appellate
24 court of statewide jurisdiction will conduct a
25 meaningful review of a sentence of death to

1 guard against its arbitrary and capricious
2 imposition, the United States Supreme Court will
3 not interfere with the state's choice of
4 appellate and administrative mechanisms. The
5 Pennsylvania Supreme Court further observed that
6 the United States Supreme Court had recently
7 granted certiorari to review the case of Pulley
8 versus Harris to determine if the Eighth
9 Amendment required the type of comparative
10 proportionality review contained in
11 Pennsylvania's statutory scheme (a question, I
12 note, that the Pulley Court would ultimately
13 answer in the negative).

14 Of particular import for the concern of
15 this committee, the Court in Zettlemyer said --
16 and again, I quote -- This Court does not treat
17 lightly its statutory and constitutional duties
18 and will conduct -- and here, I emphasize --
19 conduct an independent evaluation of all cases
20 decided since the effective date of the
21 sentencing procedures under consideration (the
22 1978 statute became effective September 13,
23 1978). This independent review will utilize all
24 available judicial resources and will encompass
25 all similar cases taking into consideration both

1 the circumstances of the crime and the character
2 and record of the defendant in order to
3 determine whether the sentence of death is
4 excessive or disproportionate to the
5 circumstances.

6 In responding specifically to
7 Zettlemyer's complaint that the Court could not
8 perform the proportionality review because the
9 jury did not list the mitigating circumstances
10 it found, the Court gave its assurance that it
11 reviewed, in Zettlemyer's case, and would
12 continue to review -- and again, I quote -- in
13 the future, the entire record and will evaluate
14 similar cases on the basis of the evidence
15 presented as to mitigating circumstances. In
16 our review, that should have ended the question
17 -- but it has not.

18 The complaint now is that the data
19 compiled by the Administrative Office of the
20 Pennsylvania Courts by order of the Supreme
21 Court is incomplete and inaccurate. The data
22 was first described by the Court in the case of
23 Commonwealth versus Frey, which came not too
24 long after Zettlemyer.

25 In Frey, the Court reiterated that it

1 conducts an independent evaluation -- and again,
2 I am quoting -- of all cases of murder of the
3 first degree convictions which were prosecuted
4 or could have been prosecuted under . . .
5 [Section] 9711. The Court described how it had
6 ordered the AOPC to gather the data in order to
7 facilitate [its] review. The data was to be
8 compiled and monitored by the AOPC to insure
9 that the body of similar cases is complete and
10 to expedite [the Court's] proportionality
11 review. These passages -- all of which are
12 quotes from the Frey opinion -- make it clear
13 that the AOPC study was designed to facilitate
14 and expedite the Court's statutory duty of
15 independent evaluation -- which the Court
16 promised in Zettlemyer -- and was not intended
17 as a substitute for that independent evaluation.

18 Gribble's argument -- and I have read
19 the briefs -- seems to be predicated on language
20 from some Supreme Court opinions which indicates
21 that the Court is relying solely on the AOPC
22 data to conduct its proportionality review. To
23 be sure, some cases supported that conclusion.
24 For example, in Commonwealth versus Craver
25 decided earlier this year, the Court said, in

1 relation to its duty to review death sentences
2 from the standpoint of disproportionality as
3 required by the statute -- and again, I quote --
4 We reviewed the sentence imposed on Craver in
5 light of sentencing data compiled and monitored
6 by the Administrative Office of Pennsylvania
7 Courts. The Court determined that Craver's
8 sentence was not disproportionate. Similarly,
9 in Commonwealth versus Banks, a capital case
10 reviewed under the Post Conviction Relief Act,
11 the Court referred to the AOPC data as, quote,
12 the information upon which the Court bases its
13 decision as to proportionality. These passages,
14 however, do not necessarily require the
15 conclusion that the promised independent
16 evaluation of similar cases is not being
17 performed.

18 In four other cases decided since late
19 last year -- Commonwealth versus Marrero,
20 Commonwealth versus Gibson, Commonwealth versus
21 Marinelli, and Commonwealth versus Bronshtein --
22 the Court used language demonstrating that the
23 AOPC data was only part of the review -- data
24 used to facilitate and expedite the
25 proportionality review. In Marinelli, for

1 instance, the Court, speaking through Justice
2 Cappy, said -- and I quote -- we have reviewed
3 the sentencing data compiled by the
4 Administrative Office of Pennsylvania Courts in
5 accordance with the requirements set forth in
6 Frey ... and have performed an independent
7 review of the cases involving the sentence of
8 death to determine whether [Marinelli's]
9 sentence of death was proportional to the
10 sentences imposed in similar cases, taking into
11 consideration both the circumstances of the
12 offense and the character and record of
13 [Marinelli]. Very similar language to that
14 originally found in Zettlemyer. Similar
15 language indicating an independent examination
16 of similar cases is found in Marrero, Gibson and
17 Bronshtein. In addition, those cases identify
18 the cases which the Court found similar and
19 compared.

20 From this review, it is the opinion of
21 the Office of Attorney General that we should
22 accept the Supreme Court at its word and
23 conclude that it is independently reviewing
24 these cases for proportionality and is only
25 using the AOPC data to facilitate and expedite

1 its proportionality review. Since it first
2 upheld the 1978 statute in the face of a
3 challenge to its constitutionality and affirmed
4 a sentence of death in Zettlemyer, the Supreme
5 Court has affirmed more than 140 sentences of
6 death. In each case it has said, in one form or
7 another, that the sentence imposed in the case
8 under review was neither excessive nor
9 disproportionate to the sentences imposed in
10 similar cases. We assume that the Court, in
11 each of those cases, has undertaken its
12 proportionality review in good faith.

13 The question for this committee is,
14 should you, the General Assembly, continue to
15 statutorily require proportionality review? We
16 know from Pulley versus Harris (the United
17 States Supreme Court opinion) that the United
18 States Constitution does not require
19 proportionality review. There is no case that
20 holds that it is required by the Pennsylvania
21 Constitution. It is solely a creature of
22 statute. And the question for this committee is,
23 should it continue to be?

24 Since Section 9711(h) was enacted in
25 1978, the Supreme Court has never vacated a

1 sentence of death because it was
2 disproportionate to the penalty imposed in
3 similar cases. It has vacated death sentences,
4 however, because the evidence was insufficient
5 to support the finding of an aggravating
6 circumstance. Likewise, it has vacated the
7 death sentence because they were the product of
8 passion, prejudice or any other arbitrary factor
9 -- as where the prosecutor gave an improper
10 closing speech in the penalty phase, for
11 example, or where the jury instructions at the
12 penalty phase were flawed. Such review for
13 sufficiency of the evidence or prejudice is much
14 more manageable than proportionality review.
15 Tests for sufficiency of the evidence and
16 prejudice are regular fare for the courts. They
17 involve known and easily applied standards.
18 They relate only to the record of the case
19 before the appellate court. They do not involve
20 trying to decide whether or not a case is,
21 quote, similar as is required for comparative
22 proportionality review. And I query: Can cases
23 involving different defendants and different
24 circumstances ever really be similar for
25 comparison purposes?

1 It might be suggested that the
2 proportionality review be removed from the
3 statute. Eliminating proportionality review
4 from the statute will not eliminate what the
5 Pennsylvania Supreme Court found that the United
6 States Supreme Court thought was important, that
7 is, meaningful appellate review of these cases.
8 The Supreme Court would still be able to ensure
9 against the arbitrary and capricious imposition
10 of the death penalty. It will still determine
11 that the conviction for first degree murder is
12 supported by sufficient evidence and that all
13 aggravating circumstances are supported by
14 sufficient evidence. The existence of
15 aggravating circumstances, under our statutory
16 scheme, separate death eligible murders from
17 those that are not. The Court will be able to
18 review sentencing decisions for evidentiary and
19 instructional errors and for prejudicial or
20 inflammatory comments during closing arguments.
21 The importance of such review should not be
22 written off lightly. The death penalty
23 procedure statute would still pass
24 constitutional muster for such review would
25 still ensure against the arbitrary and

1 capricious imposition of the death penalty.

2 Can the General Assembly eliminate
3 proportionality review for pending cases? That
4 is not an easy question. The scope of appellate
5 review is clearly a question for the
6 legislature. The Supreme Court had ruled that,
7 though it had the authority, under a general
8 statute, to remand for resentencing if it found
9 a sentencing error in cases other than those
10 where a death penalty was imposed, it lacked
11 that authority in the context of a sentence of
12 death because the death sentence procedures
13 statute as originally enacted in 1978 limited
14 the Court's authority to either affirming the
15 sentence of death or vacating it and remanding
16 it for the imposition of a sentence of life
17 imprisonment. The legislature changed the
18 statute allowing for a remand for a new
19 sentencing proceeding under some circumstances
20 in 1988. That legislative amendment was made
21 applicable to cases pending on appeal as of its
22 effective date. When such an application was
23 challenged as a violation of the Ex Post Facto
24 Clauses of the Pennsylvania United States
25 Constitution in the case of Commonwealth versus

1 Young, the Supreme Court rejected the claim,
2 upheld the change and properly applied it -- and
3 has continued to apply it -- to pending cases.

4 By analogy, the result would be the
5 same if proportionality review is eliminated and
6 the legislation requires that the change apply
7 to pending cases. Of course, there is no sure
8 way to answer this question. It will be the
9 subject of litigation and, if you eliminate the
10 requirement for proportionality review, the
11 Supreme Court will ultimately decide the issue.

12 Mr. Chairman and Members of the
13 Committee, I would again like to thank you and
14 the members for inviting the Office of Attorney
15 General to participate in this hearing on this
16 important issue. I hope that our testimony
17 assists you as you address it. And I would be
18 happy at this point to try to respond to any
19 questions that you or the Members of the
20 Committee might have.

21 CHAIRMAN GANNON: Thank you very much,
22 Mr. Graci.

23 Representative Manderino.

24 REP. MANDERINO: Thank you, Mr.
25 Chairman.

1 Thank you, Mr. Graci. It was very
2 informative testimony.

3 I am not clear, though. Page 15, you
4 say it might be suggested that proportionality
5 review be removed from the statute. Is the
6 Attorney General's Office advocating that
7 proportionality review be removed from the
8 statute?

9 MR. GRACI: Without seeing a specific
10 piece of legislation to be able to analyse it,
11 we have not taken a position. We would have to
12 see what the legislature would want to do.

13 I understood from the letter from the
14 Chief Counsel that the committee wanted to
15 address that and I have prepared my remarks in
16 that regard. We certainly think it would be
17 constitutional. Whether or not that is the
18 direction this committee would wish to go in or
19 the legislature would wish to go in, I would not
20 want to comment without seeing what the proposal
21 would be.

22 REP. MANDERINO: Do you know or who
23 would know what the time period is between when
24 it goes on, when a death penalty imposition goes
25 on, its appeal to the Supreme Court and when it

1 is decided that under these factors it is or is
2 not appropriately imposed? And is the time
3 factor an issue that concerns folks who might be
4 suggesting that we get rid of proportionality
5 review?

6 MR. GRACI: The question of the time,
7 Representative Manderino, as to how long the
8 appellate process takes, the direct appellate
9 process, after the case leaves the trial court
10 and goes to the Supreme Court and until a
11 decision is rendered, has been a concern. I can
12 say to you from my own experience and in
13 reviewing these cases that the time period has
14 decreased more so in recent years. As to how
15 much of the time is being taken by the Court to
16 undertake the proportionality review, I do not
17 know.

18 We know when the case goes to the
19 Supreme Court, we know when a decision is
20 rendered and in every one of those decisions
21 where a, in effect, a sentence of death is
22 affirmed, the Court has said that it has
23 conducted the proportionality review. How long
24 that portion of the process is taking, whether
25 it is conducted before oral argument on the

1 case, after oral argument on the case, I just do
2 not know and I would not be privy to that
3 information.

4 REP. MANDERINO: Thank you.

5 Thank you, Mr. Chairman.

6 CHAIRMAN GANNON: Thank you,

7 Representative Manderino.

8 Representative Maitland.

9 REP. MAITLAND: Mr. Graci, thank you
10 for appearing today. What is the nature of the
11 data compiled by the AOPC for the Supreme Court?

12 MR. GRACI: I might have a sample. It
13 is reflected in the case of Commonwealth versus
14 Frey. And it includes things like the race of
15 the defendant, the race of the victim; the
16 aggravating circumstances that were presented,
17 the aggravating circumstances that were found;
18 the mitigating circumstances that were
19 presented. Let me see if I might have. There
20 is a form that is described and set forth,
21 actually, in the opinion in Commonwealth versus
22 Frey. It is an appendix to it. So you can see,
23 it is all listed there. I could provide that to
24 you. I thought I had that case with me, but I
25 do not seem to have it.

1 REP. MAITLAND: That's okay.

2 MR. GRACI: Now wait. I do. I do. I
3 am sorry.

4 * The defendant's date of birth, his
5 race, his or her sex;

6 * The victim's birth, date of birth,
7 race, sex;

8 * Whether guilt was determined by a
9 jury or by a judge, without a jury or by guilty
10 plea;

11 * Whether or not the sentence of death
12 was sought, whether or not it was imposed,
13 whether or not the sentence was determined by a
14 judge or jury;

15 * A listing of all the aggravating
16 circumstances presented;

17 * A listing of all the mitigating
18 circumstances presented;

19 * And an information concerning any
20 co-defendants involved in the same case;

21 * Opinions that were written in the
22 case;

23 * Transcript of the sentencing hearing.

24 So all the information from which the
25 Supreme Court would then be able to conduct its

1 -- regardless of the information that is set
2 forth, they would have the sentencing
3 transcript, or should, at least that is what is
4 called for.

5 Now, the challenge, among the
6 challenges in the Gribble case is that they are
7 not getting the right information, that the
8 information is flawed. The information is
9 supposed to be compiled, I might say, by Supreme
10 Court order, by the President Judge of each of
11 the 67 counties and forwarded to the AOPC in
12 order to continue this ongoing study.

13 REP. MAITLAND: Was that not being
14 done, is that the point?

15 MR. GRACI: According to Gribble, it is
16 not.

17 REP. MAITLAND: Thank you. No more
18 questions.

19 CHAIRMAN GANNON: Representative
20 Schuler.

21 MR. GRACI: Could I? I am sorry.

22 CHAIRMAN GANNON: Sure.

23 MR. GRACI: The Supreme Court, as I
24 said in my testimony, in over 140 cases now --
25 it is actually closer to 150 -- has affirmed

1 sentences of death. And in every one of those
2 opinions, in some fashion or another, says we
3 have conducted our proportionality review. If
4 you take what was said in the earliest cases --
5 Zettlemyer and Frey -- as to how they were
6 going to conduct. They are not just looking at
7 that information. Now, I do not sit with the
8 Supreme Court. I might like to, some day.

9 CHAIRMAN MICOZZIE: I will nominate
10 you.

11 MR. GRACI: Thank you, sir.

12 How they go about doing it, I do not
13 know. That, quite frankly, is one of the other
14 complaints made in the Gribble case.

15 REP. MAITLAND: Thank you.

16 CHAIRMAN GANNON: Representative
17 Schuler.

18 REP. SCHULER: No.

19 CHAIRMAN GANNON: Okay. Representative
20 Micozzie, I am sorry.

21 REP. MICOZZIE: The items you just
22 read, do they take a person they are reviewing
23 and then they compare it with other people who
24 have similarly, who have sentence to the death
25 penalty, is that the ...?

1 MR. GRACI: That is the language of the
2 statute, Representative Micozzie. If I can
3 quote it. And that, too, I might say, is one of
4 the challenges now being raised in this Gribble
5 case.

6 REP. MICOZZIE: So they compare it with
7 similar persons who are put to death?

8 MR. GRACI: Who are sentenced to death.

9 REP. MICOZZIE: Sentenced to death.

10 MR. GRACI: The language of the statute
11 is the Court is to determine, or it is to
12 vacate, I should say, a sentence of death if the
13 Court determines that the sentence of death is
14 excessive or disproportionate to the penalty
15 imposed in similar cases considering both the
16 circumstances of the crime and the character and
17 record of the defendant.

18 So they have to identify, first, cases
19 that are similar to the case that is in front of
20 them, similar as to penalty or that could have
21 been imposed.

22 The appellant in Gribble is saying that
23 you should examine all first degree murder cases
24 whether or not the death penalty was imposed;
25 they are saying that that should be the universe

1 of cases, and then determine whether or not they
2 are similar and then see whether or not what
3 aggravating circumstances might have existed and
4 what mitigating circumstances might have
5 existed.

6 Of course, the argument on the other
7 side of that is to compare a case where the
8 death penalty was not sought but was still a
9 case of first degree murder.

10 A case in your county is a very good
11 example, recently, in the case of Commonwealth
12 versus DuPont. While it was tried as a first
13 degree murder, the District Attorney, in his
14 discretion, after looking at the list of
15 aggravating circumstances which are the things
16 that make a particular murder death eligible,
17 determined that there were no aggravating
18 circumstances so there was never a possibility
19 in the DuPont case of a death sentence. Of
20 course, the jury there came back with third
21 degree.

22 But to try to compare because it was a
23 first degree murder as to whether or not that
24 sentence of life where the jury never had the
25 opportunity to impose a sentence of death kind

1 of makes you wonder if that is really
2 appropriate for comparison purposes.

3 The other problem that I see personally
4 is that when you say, look at the character and
5 record of the defendant, we have, and one of the
6 things that makes our statute constitutional, is
7 what the Pennsylvania Supreme Court as well as
8 the United States Supreme Court has called a
9 catch-all mitigating circumstance. That is any
10 information concerning the offense or the
11 character or record of the defendant that he
12 says is mitigating.

13 Well, often times, the jury comes back
14 and finds only that maybe that is the only thing
15 that was presented: character evidence, for
16 instance. Well, what might be mitigating in one
17 case that the defendant was --

18 I read a case. What was presented as
19 mitigation is that he played the guitar really
20 well. It was submitted and perhaps some juror
21 -- and it only takes one juror to find a
22 mitigating circumstances under the
23 constitutional scheme -- might have found that
24 that is mitigating. Perhaps a good military
25 record will be found to be mitigating. I would

1 think that some people would think --
2 particularly people who served in the military
3 -- well, if he served in the military and he was
4 honorably discharged, he should not have done
5 this. They might think of that not as a true
6 aggravating circumstance but certainly not as
7 mitigating. But if all the jury checked off was
8 E(8), general mitigation, how can you figure out
9 if that should be compared to somebody else's
10 crime or perhaps the mitigating circumstance was
11 that he did well in school or that he loved his
12 mother? It is difficult to identify what is
13 similar.

14 REP. MICOZZIE: How far back? There is
15 140 cases that are waiting, persons waiting to
16 be put to death. How far back do they compare?
17 I mean, do they compare, if I committed a
18 murder, right, and it goes --

19 MR. GRACI: Hypothetically speaking.

20 REP. MICOZZIE: Yes.

21 CHAIRMAN GANNON: Sometimes he would
22 like to kill me.

23 MR. GRACI: Only when you bring him up
24 here and you are not in session.

25 REP. MICOZZIE: At least on my

1 committee, on the Insurance Committee.

2 Well, anyway, the question: do they
3 compare, do they compare my case with all the
4 ones before me?

5 MR. GRACI: With those going back to
6 the effective date of the 1978 statute,
7 September 13th, 1978.

8 REP. MICOZZIE: Now I know why it takes
9 so long. I mean, that comparison could take a
10 long time.

11 MR. GRACI: And, quite frankly, if they
12 were to do what the defense argues in Gribble,
13 it would probably be impossible to try to
14 analyse the factors the way they would like them
15 to be analyzed.

16 REP. MICOZZIE: Thank you, Mr.
17 Chairman.

18 CHAIRMAN GANNON: Thank you,
19 Representative Micozzie.

20 Brian.

21 MR. PRESKI: No questions.

22 CHAIRMAN GANNON: Dave.

23 MR. KRANTZ: No.

24 CHAIRMAN GANNON: Thank you very much,
25 Mr. Graci. Wait. I have one question. Just a

1 clarification. Where there was a remand, where
2 there would be a remand for additional
3 sentencing, could that also include the
4 imposition of the death sentence?

5 MR. GRACI: Under the 1988. Since
6 1988. Until 1988, the Court read the language
7 in the statute as being restrictive. It said
8 the Court shall either affirm a sentence of
9 death or vacate and remand for an imposition of
10 a life sentence.

11 In a number of cases, the Commonwealth
12 had argued, under a general statute found in the
13 Judicial Code that says, on review (the general
14 statute says) on review, the appellate court can
15 affirm, reverse, modify, vacate, remand,
16 whatever. The Commonwealth, in those cases
17 where there was an error committed during the
18 sentencing phase, said, let us go back (and they
19 pointed to other cases in other states where the
20 Supreme Courts of those states had said that
21 that was permissible) let us go back and have a
22 new sentencing hearing.

23 The Pennsylvania Supreme Court said,
24 no, the legislature has constrained our
25 authority. We do have this general statute, but

1 we have a specific statute for death penalty
2 appeal (Section 9711(h), as it then existed) and
3 that statute said we could only remand for the
4 imposition of a life sentence.

5 And a number of the Justices of the
6 Supreme Court (three of them, if I am not
7 mistaken) said, we call on the legislature.
8 There was one case that was particularly
9 outrageous and the Members of the Supreme Court
10 thought was an appropriate candidate for the
11 death penalty, but they, because of a sentencing
12 error, their only option was to remand for the
13 imposition of a life sentence.

14 In response to those cases, the
15 legislature, in 1988, amended the statute to
16 allow for the remand for the imposition for a
17 new sentencing hearing if the reason for the
18 reversal of the sentence of death was that there
19 was a problem with one of the aggravating
20 circumstances found; there were two or three
21 found, but maybe one, there was insufficient
22 evidence; or there was a sentencing error, an
23 instructional error by the Court usually with
24 respect to the instruction on the aggravating
25 circumstances of what constituted torture or if

1 the prosecutor made an improper argument; in
2 those instances, the legislation was changed so
3 that the matter could go back to the trial court
4 for a new sentencing hearing.

5 In the first case to be addressed by
6 the Supreme Court after that change --
7 Commonwealth versus Young -- the Supreme Court
8 said that that was constitutionally permissible
9 and they upheld the reimposition of the death
10 penalty in Young, and they have done that
11 several times since.

12 At that time, quite frankly, the
13 Commonwealth was better off getting a reversal
14 of the underlying conviction where the Court
15 said there was an error at the guilt phase,
16 because then you could do the whole thing all
17 over again.

18 Now -- I do not want to say frequently
19 -- most of the time if there is a reversal, the
20 conviction for first degree murder is upheld,
21 the error is in the sentencing phase and they
22 send it back just for a new sentencing
23 proceeding.

24 CHAIRMAN GANNON: The way I read the
25 statute, okay -- and I appreciate you clarifying

1 that -- Subsection 4 seems to make an exception
2 for the proportionality.

3 MR. GRACI: Absolutely.

4 CHAIRMAN GANNON: So that that is the
5 old language applies to a proportionality
6 review?

7 MR. GRACI: If they were to find that
8 either there was insufficient evidence of any
9 aggravating circumstance or that the sentence
10 was disproportionate or excessive, then they
11 would have to remand it for an imposition of a
12 life sentence. That is why I said only in
13 certain circumstances.

14 CHAIRMAN GANNON: Thank you very much.

15 Oh, I am sorry.

16 REP. MASLAND: Thank you, Mr. Chairman.
17 Representative Masland. And I apologize to the
18 Chairman for getting here late and apologize to
19 Mr. Graci, who I had the pleasure of seeing last
20 night in Cumberland Court. And I would agree
21 that he should be on the Supreme Court, one of
22 these days, because he is an eminently qualified
23 legal scholar.

24 MR. GRACI: Thank you.

25 REP. MASLAND: I think one thing that I

1 would just comment on is the difficulty with
2 proportionality reviews in general. And I think
3 by analogy, you could look at many other areas
4 of the law. Having worked on the ARD Court in
5 the DA's Office, trying to decide one DUI
6 defendant comparing to another as to whether or
7 not they are qualified for ARD, you really have
8 to look at the specific cases. It gets very
9 difficult.

10 One thing that I am sure many of us on
11 the Judiciary Committee, many legislators, many
12 Attorneys General and the legislature will get
13 comments from constituents who say I think the
14 support guidelines are incorrect. Why shouldn't
15 I be getting as much support as this person? I
16 should be getting more. It is the same type
17 situation. You just cannot have a clear diagram
18 that says, okay, you fit into Block A, you fit
19 into Block B. And I think the Supreme Court has
20 to try to look at those facts of that specific
21 case because I think when you are determining
22 proportionality, it is not a simple matter, if
23 not impossible. But thank you for your comment.

24 MR. GRACI: Thank you, sir.

25 CHAIRMAN GANNON: Thank you,

1 Representative Masland.

2 Thank you very much, Mr. Graci.

3 MR. GRACI: Thank you, Mr. Chairman.

4 CHAIRMAN GANNON: Our next witness is
5 Mr. David Zuckerman with the Philadelphia Public
6 Defender's Office. Thank you, Mr. Zuckerman.

7 MR. ZUCKERMAN: Mr. Chairman, Members
8 of the Committee, I appreciate the opportunity
9 to be here today. If you will all forgive me, I
10 will depart from my prepared remarks. I would
11 also like to applaud Mr. Graci for his most
12 complete recitation of the history of the death
13 penalty. I, indeed, learned something this
14 morning.

15 The United States Supreme Court, when
16 they threw out, in 1972, threw out virtually
17 every death penalty scheme then in existense,
18 the concern was not in fairness in the
19 individual case. In each of those cases, they
20 were monitored for fairness as far as the
21 application of constitutional provisions as to
22 that case. That was not the concern of the
23 Supreme Court.

24 The Supreme Court imposed a further
25 obligation on the states, not just for basic

1 constitutional protections to individuals
2 charged with crimes, they imposed the burden of
3 instituting fair process that the death penalty
4 systems themselves must operate, as a whole,
5 fairly, without arbitrariness, without
6 capriciousness; that was the mandate in 1972.

7 Now, having said that, the Supreme
8 Court gave very little guidance. Said, we are
9 going to leave it up to the states, you devise
10 your schemes and then when you come back to us,
11 we will tell you if your schemes fit this
12 mandate.

13 In 1975, a host of cases went before
14 the Supreme Court. And some they said fine.
15 And some they said, no, go back and try again.
16 One of the statutes that passed muster was the
17 Georgia statute. The Georgia statute has the
18 proportionality review that most states follow.

19 When we passed our current statute, the
20 post Moody statute in 1978, at that time the
21 legislature already knew that proportionality
22 review was not an essential element. The
23 Supreme Court has never said any one element in
24 these schemes is essential.

25 What they did say was that your scheme,

1 as a whole, must function fairly.

2 Many of the state legislatures,
3 including this one, looked at proportionality
4 review as one element -- indeed, a small element
5 -- in the total scheme that helps ensure
6 fairness, not so much in the individual case as
7 it does ensure fairness in the entire scheme.
8 The pre 1972 cases, the pre Furman cases, when
9 you looked at those individuals, you could not
10 discern -- and this was the complaint of at
11 least three Justices, in Furman -- you could not
12 discern the difference between candidate A and
13 candidate B. The cases look similar, their
14 backgrounds look similar, yet candidate A was
15 getting sentenced to death, candidate B was
16 getting a life sentence. That was the problem
17 we identified.

18 Proportionality review permits the
19 Supreme Court to monitor the system. And
20 essentially that is what they are doing. We are
21 going to monitor the system. We are going to,
22 hopefully -- if there continue to be aberrations
23 in our system or arbitrariness in our system --
24 hopefully identify those few cases. And if we
25 can identify them and if we are satisfied that,

1 indeed, this case is not representative of
2 community sensibilities or Commonwealth
3 sensibilities on which types of cases is
4 deserving of death, then we will reverse.

5 A hundred and forty opportunities have
6 not yet reversed in -- as Mr. Graci pointed out
7 -- a proportionality review. I am a little
8 surprised, I must confess, that it is an issue
9 now.

10 There is a case, as Mr. Graci pointed
11 out (Commonwealth versus Gribble), before the
12 Court where counsel there -- I was not counsel
13 for that case, but we were amicus in that case
14 on one, a very narrow issue -- but counsel, as
15 diligent counsel does in these cases, raised
16 proportionality review. And in looking at the
17 information that was supplied to them by the
18 AOPC (the Administrative Office of Pennsylvania
19 Courts) identified some errors, some mistakes
20 and they brought that to the attention of the
21 Court. In oral argument, Justice Cappy
22 expressed surprise that, in fact, there were
23 errors identified in the data base because they
24 relied largely on that at that point. I do not
25 think they ever relied exclusively on that data,

1 but it was an important source for them to
2 identify these similar cases.

3 My office, which has only been doing
4 homicides for, I think three-and-a-half years
5 now, had also looked in to their data base and
6 we also had identified some errors.
7 Percentagewise, relatively few. And, indeed,
8 almost all of the errors that we identified were
9 ascribed to the trial court. The trial court,
10 when they submitted the information, submitted
11 it wrong. It was not data entry, it was not in
12 terms of monitoring compliance with the review
13 forms. The trial court themselves either
14 checked the wrong boxes, or whatever, as it was
15 coming in. If you were to fault the AOPC, they
16 probably should have double-checked they have
17 qualified errors. Rather than identify them and
18 send it back to the Judge, we think we made a
19 mistake here, double-check it, send it to the
20 clerk. If you admit a mistake, send it back to
21 us.

22 Since 1994, the AOPC, when it was
23 brought to their attention (this was late 1994)
24 that there were, we were finding occasional
25 mistakes, actually made an affirmative effort to

1 clean it up. The comparison in 1994 and 1996
2 has been dramatic. The AOPC has, in fact,
3 cleaned up a great number of the errors.

4 We were not able to identify any
5 mistakes that might have made a difference.
6 That was one of the issues in Gribble which we
7 did not address. There may have been mistakes
8 here, but we cannot identify any that would have
9 made a difference, not like in this case, that
10 would have made a difference in any of the other
11 cases. So to that extent, I think it was a
12 lack, a general lack of concern that prior
13 proportionality reviews may have been based on
14 incomplete data.

15 As Mr. Graci pointed out: in the recent
16 cases, the Supreme Court has reaffirmed its
17 commitment to proportionality review and it has
18 also reaffirmed that they are not going to rely
19 solely on data, which was a point that we made
20 as amicus in Gribble. Was that, as lawyers, we
21 do not want to look at numbers. We do not want
22 to say, well, there is twenty on this side and
23 six on this side.

24 We want to look at the facts of these
25 cases. Many of these cases, the facts could be

1 gleaned from what the AOPC had: they had the
2 trial court opinions, they had the sentencing
3 hearing notes. To the extent that Mr. Graci
4 pointed out, there were problems in defining the
5 catch-all categories, the sentencing hearing
6 notes gave you a good clue of what was
7 presented. So, as a whole, the difference
8 between 1994 and 1996, I think is dramatic.

9 If the committee's concern was, is the
10 Supreme Court conducting this review with
11 competent data? That has largely been
12 satisfied, at least to my satisfaction.

13 There are larger issues and, that is,
14 well, why do we have proportionality review
15 anyway? After Pulley, even though at the time
16 of Pulley, it was clear that proportionality
17 review was not required, some states repealed.
18 Relatively few. I think the last count, like
19 five states have repealed. But one state,
20 Tennessee, repealed and then re-enacted it.

21 Whether the other states review it as a
22 requirement of their own constitutions, there is
23 very, very little case law on that.

24 Mostly, it has validity and, in my
25 opinion as a practitioner, because it forces us,

1 as a Commonwealth, to monitor the system a
2 little bit.

3 Somebody really should be monitoring
4 the system. Why? Because we have a
5 constitutional obligation to do that. Or our
6 system is only constitutional if it functions as
7 a whole to minimize arbitrariness, minimize
8 capriciousness.

9 Who is going to have that
10 responsibility? It could be the Sentencing
11 Commission, it could be the PCCD. I think the
12 best place to monitor it is, is the Supreme
13 Court. And they assumed -- though without
14 legislative mandate -- they assumed that
15 responsibility by having the trial judges fill
16 out these forms (there are five or six pages,
17 maybe 15 questions or so) and fill out the
18 aggravating circumstances and then some
19 biographical data on the offending victim and
20 that is the extent of it.

21 It is data entered, they have a data
22 entry person, and then you can get their
23 information. It is a tremendous resource. They
24 have some 2400 cases entered by now after 20
25 years. Anybody can call them up. You can get a

1 copy of all their data. If you have a modern
2 computer, you can read their data with Works.
3 Most of the computers come bundled with
4 Microsoft Works, you can read their data. It is
5 very useful from a defense perspective because
6 if there is an issue of arbitrariness, if there
7 is an issue of disproportionality, a good part
8 of the work has been done by the Supreme Court.

9 And not only has it been done by the
10 Supreme Court, it has been done under under
11 conditions where they can monitor the accuracy
12 of it. You do not have to have a hearing at the
13 trial level to introduce what we think are the
14 similar cases. Well, if the Commonwealth says,
15 no, we do not think they are similar and battle
16 it out there. The evidentiary body from which
17 you will argue your proportionality review is
18 already collected and maintained by the entity
19 that is going to be making the decision.

20 If there are concerns about expense, I
21 think if you look at the budget, they do not
22 spend very much money on proportionality review.
23 They come in. I do not know how many come in a
24 week to get data entered. The actual reports,
25 perhaps you maybe just want to give Mr. Pines a

1 call (he is counsel in Philadelphia for the
2 AOPC) a very friendly gentleman. He will tell
3 you: okay, this is the way we do the reports and
4 give you a sense of how long they take. I
5 really do not know, I think they do not take
6 very long. I think that they turn over the
7 reports within a few days.

8 (The counsel for the AOPC is Zygmunt
9 Pines.)

10 And I would encourage this committee to
11 actually give him a call and get the disk. It
12 is really a fascinating kind of collection. For
13 example, if you want to find out which
14 aggravating circumstances do the citizens of
15 this Commonwealth respond to, which are the ones
16 that are more likely to result in a death
17 sentence -- it is very easy to divine -- which
18 are the aggravating circumstances that we
19 reject, which are the aggravating circumstances
20 that citizens of this Commonwealth almost always
21 reject as a basis for death. And it is useful
22 information not only for defense counsel if they
23 are arguing in the right case, proportionality
24 review, but it is also useful for policy makers
25 because it is, certainly my feeling, it is

1 everybody's responsibility, not just the Court's
2 responsibility, to ensure that these systems are
3 fair.

4 There are untapped areas. For example,
5 either questions of discrimination that are
6 going on in here. Those are untapped questions,
7 we do not know what the answers are to those.
8 That information that they maintain could be
9 useful, it may be information that we want to
10 know before we make any alterations to the
11 process.

12 Of interest in this particular area of
13 proportionality review: are there aggravating
14 circumstances that rarely result in death? It
15 may be that we may want to modify the statute
16 and say, look, here is one, we tried it, the
17 citizens of this Commonwealth, because the
18 evolving sensibilities, do not react strongly to
19 this, do not feel that this convict is death
20 worthy and we eliminate him. That is
21 fine-tuning. These death sentences schemes, we
22 look at them as like gardens, say, every so
23 often, they have to be tended. Left to their
24 own resources, if they get too big, if they
25 branch out and cover too much conduct, you are

1 going to run in to constitutionality problems.

2 In Furman, the only solution was to
3 knock out the entire system. They did not have
4 an alternative.

5 One alternative we have with
6 proportionality review is the occasional
7 trimming -- if you pardon the analogy -- for
8 perceiving arbitrariness and for perceiving
9 capriciousness. In select cases, we can do it.
10 Most states that have proportionality review use
11 it, but use it sparingly and use it in a
12 relatively uncontroversial way.

13 If there are cases that have high
14 levels of mitigation, low levels of aggravation,
15 where it seems like this case is not the kind of
16 case that citizens typically will return a death
17 sentence, they implore you in that situation.
18 Remember, juries are not privy. One jury is not
19 privy to what the next jury does. It is hard
20 for juries sitting in isolation to get a sense
21 of community values as to what conduct is death
22 worthy. For that reason, I think it is useful.

23 Is anything really consequential about
24 proportionality? I would be disingenuous to say
25 there was. Because there has not been a

1 reversal yet, the Supreme Court has not been
2 inclined to really take a fine tooth comb to
3 this comparative analysis. It may be a problem
4 with counsel. It may be that the counsel has
5 not presented it correctly or presented it in a
6 form that they could respond to. I really do
7 not know.

8 The briefs I see, very rarely, is it
9 even raised. And Mr. Graci can confirm that.
10 Whether that is because counsel does not believe
11 this is an appropriate case for proportionality
12 review, I do not know. But it has not
13 engendered much controversy at all, it has not
14 engendered much expense. It has tremendous
15 value with both the policy makers and
16 practitioners because it is a way to monitor how
17 well the system is working. And I would rather
18 the Supreme Court do it than PCCD or the
19 Sentencing Commission: you do not have to worry
20 about evidentiary issues, you just can argue the
21 facts.

22 Anyway, I will conclude my remarks and
23 I would be happy to answer any questions.

24 CHAIRMAN GANNON: Thank you very much.
25 We have been joined by Representative

1 Caltagirone and Representative Carn.

2 Representative Carn, any questions?

3 REP. CARN: Not at this point.

4 CHAIRMAN GANNON: Representative
5 Caltagirone.

6 REP. CALTAGIRONE: No.

7 CHAIRMAN GANNON: Representative
8 Manderino.

9 REP. MANDERINO: Just quickly.

10 David, in Gribble, are there still
11 issues before the Court right now?

12 MR. ZUCKERMAN: Gribble is a pending
13 case.

14 REP. MANDERINO: I mean, is that why we
15 are discussing this?

16 MR. ZUCKERMAN: I have no idea.

17 REP. MANDERINO: Are there some
18 decisions that people are anticipating might
19 come down out of Gribble?

20 MR. ZUCKERMAN: I have no idea. In
21 fact, I would suggest that, before doing
22 anything, to see what happened with Gribble.

23 The only issue that I personally was
24 involved in had to do with this questions of
25 errors in the data base. And mostly because

1 Justice Cappy seemed to be incredulous. He was
2 surprised, Justice Cappy. Remember, you are
3 talking 2400 cases times 30 or so variables.
4 Large data bases like that are prone to error.
5 They have to be checked every so often.

6 Well, we went and started checking
7 against the actual facts of the case and talk
8 over opinions and we did then identify certain
9 errors. And we keep track of them. We were not
10 looking for the errors. But at that point when
11 it became an issue in Gribble, we said, okay, we
12 can benefit the Court and at least identify for
13 them the errors that we have found and make
14 suggestions on, how do you improve it? I think
15 they have adopted it. And they have publicly
16 said so.

17 But we periodically get the data update
18 from Mr. Pines. And last check, certainly all
19 of our concerns have been dealt with. We are
20 not perfect either. We found, comparing our
21 data with their data, we found mistakes.

22 The reason you will not, probably would
23 not matter in the long run, is that these, the
24 comparative cases, by the time you weed out the
25 ones that are not similar -- remember, like 2400

1 cases and many of those are not even death
2 eligible -- you are only looking at cases that
3 are reportably death eligible. The Supreme
4 Court routinely looks for comparable aggravators
5 and mitigators. So once you find your cases of
6 comparable aggravators and mitigators, you are
7 talking about a very small group of cases.
8 Sometimes three, sometimes five, sometimes
9 twelve. But generally in that range, those are
10 the total number of cases that they will
11 actually be looking at.

12 There are methodologies, too, to
13 broaden it if you cannot find exact matches,
14 things like that. There are other ways to
15 compare cases besides exact matches. We have
16 enough cases (we have 2400 cases in the system)
17 we have enough cases, so generally when you are
18 looking for comparable aggravating
19 circumstances, you will find it.

20 If you want parts closer than that,
21 that is the responsibility of counsel. If
22 counsel has a robbery murder and he is thrusting
23 with the rape murders and says, well, I should
24 be compared to rape murder, he can bring that to
25 the Court's attention. In that case, that rape

1 murder is more aggravating than my case to the
2 list of histories. To me, that is the
3 responsibility of counsel. In my understanding
4 of the appropriate cases, they are really now,
5 in fact, recently.

6 REP. MANDERINO: Just let me draw your
7 attention specifically to your written testimony
8 that you presented to us.

9 MR. ZUCKERMAN: Yes. I apologize. It
10 is not paginated. I had to type it myself last
11 night.

12 REP. MANDERINO: That's okay. Page 6,
13 the last paragraph where you talk about Gribble,
14 should I just correct my copy to make that say
15 Justice Cappy?

16 MR. ZUCKERMAN: No. This is Justice
17 Castille.

18 REP. MANDERINO: Is that a different
19 issue?

20 MR. ZUCKERMAN: It is a different
21 issue.

22 REP. MANDERINO: Okay.

23 MR. ZUCKERMAN: One of the questions
24 that has been resolved, but is probably on the
25 table again as far as the Supreme Court is

1 concerned, is questioning appropriate universe:
2 which cases do you look at? It is a different
3 question than what are the similar cases.

4 There is two primary issues when you do
5 proportionality review. The first is, what is
6 your overall universe, what are the group of
7 cases from which I am going to select out my
8 comparable cases? That is the very first issue.
9 And that is the issue that Justice Cappy raised.

10 It had been decided in the Frey case.

11 The Supreme Court is looking at every
12 death case, obviously, and the death eligible
13 life cases. In practice, probably for practical
14 reasons, they seem only to look at cases that
15 actually went to a penalty hearing. They do not
16 look at those cases that could have been
17 prosecuted, could have gone to a penalty hearing
18 but plead. Some states will look at that.

19 It does not look like the Supreme Court
20 is looking at those cases. It looks like their
21 universe is all cases that actually went to a
22 penalty hearing, life and death.

23 Some states and almost exclusively
24 confined to states with very small death row
25 populations, or with the death cases, it is a

1 little different system. What they say is we
2 are going to look and if we find any case that
3 is as aggravated as this case, we will affirm
4 our proportionality. Even if those cases are
5 aberrational, we would not look at the life
6 cases. The Supreme Court traditionally here has
7 looked at both life and death cases.

8 My own personal feeling and the feeling
9 of most people in proportionality review is, in
10 large jurisdictions, to look at just the death
11 cases, you are not going to get an overall
12 picture. You can have one low aggravated case
13 buried at the bottom and a hundred comparable
14 cases that resulted in life and if you look just
15 at the death cases, you do not get a sense of
16 what the community sensibilities are.

17 It could be that, well, one example is
18 risk to others, is an aggravated, very rarely
19 supports a death sentence in the Commonwealth
20 and the ones that have obtain to the older
21 cases. It might be an indication that there are
22 some evolving sensibilities. Especially with
23 the prevalence of guns. Just firing a gun gets
24 you risk, these days. That's only on the
25 Supreme Court interpretations.

1 They say, well, this works pretty bad,
2 but we think life sentencing is appropriate
3 here. That just because other people were
4 endangered and not injured or whatever, we do
5 not consider that death worthy. I mean, that is
6 a fair assessment of community sensibilities.
7 You would not know that if you would only look
8 at death sentences. Because buried down at the
9 bottom, in terms of the scales of aggravation,
10 there are some cases that support just on this
11 alone. That is one example.

12 But that was Justice Castille's and
13 that was another issue that we briefed. It is a
14 legitimate question, it has already been decided
15 by the Supreme Court in the first major
16 proportionality review case which was Frey. I
17 expect that there were some members of the Court
18 that wanted to revisit that. And I do not know.

19 It will be resolved in Gribble. It was
20 an issue raised. I assume they reached
21 proportionality review, will resolve the
22 universe question. In Gribble, the best I can
23 divine, there is a split on the Court. That is
24 the best I can divine. And I do not know, I
25 mean, perhaps Mr. Eisenberg has a better clue as

1 to which way they are going, and we will have to
2 wait for the opinion on that one.

3 CHAIRMAN GANNON: Representative
4 Caltagirone.

5 REP. CALTAGIRONE: I was curious, in
6 this state, with computers and the transmission
7 of all of the information, what checks and
8 balances are being placed in the system so that
9 information is not twisted, to lost, to
10 converted, whatever, in these particular cases
11 so that we have better accuracy in storage in
12 these computers where people are accessing this
13 information, especially when you are pulling it
14 up from the Common Pleas Court level and the
15 reviews that are taking place? And I am just
16 curious, because there are no fail safe systems,
17 evidently.

18 MR. ZUCKERMAN: That's true.

19 REP. CALTAGIRONE: And what checks and
20 balances is the Court undertaking to make sure
21 that the administration of justice and
22 information is being properly maintained and
23 then stored so that there are no conversions?

24 MR. ZUCKERMAN: Okay. Let me answer
25 that with the technical answer. There are

1 methods in data entry programs to ensure data
2 entry. It is something called validation, where
3 you actually enter each document twice.

4 My understanding is that,
5 traditionally, the AOPC uses a validation
6 technique. Theirs is a little different, in
7 that they do not have the same operator enter it
8 twice. They have different operators can do the
9 identical form and then they compare them. It
10 is an excellent way to ensure that there are no
11 data entry errors. And I have not discovered a
12 single data entry error. I am sure there must
13 be some buried in there. That was traditionally
14 not the AOCPC problem.

15 The other way to test it is, verdict
16 sheets are a record. The verdict sheets list
17 the aggravating and mitigating circumstances.
18 And that is the only time where you might get in
19 trouble: if you enter the wrong aggravating
20 circumstance, you might be missing a death case,
21 you might be missing a life case. Where, you
22 can just print it out and compare it. Whether
23 the AOPC does that, actually manually checks
24 those against it, I think they do. I think over
25 the last two summers, they had collected their

1 missing verdict sheets. They were missing some.
2 They collected the missing ones with interns.
3 They had interns go out around the state and
4 collected the verdict sheets and then compared
5 them to the data base. That is my
6 understanding.

7 If there is a question about it again,
8 I will call Mr. Pines and he can answer that
9 question with much better accuracy. But when it
10 was, but when they activated it, it was probably
11 brought to their attention that they attempted
12 to remedy them. Certainly, in Philadelphia. I
13 know they do a lot of work in the Philadelphia
14 case, which, as you know, is the bulk of the
15 cases.

16 REP. CALTAGIRONE: Thank you, Mr.
17 Chairman.

18 CHAIRMAN GANNON: Representative
19 Micozzie.

20 REP. MICOZZIE: Let's assume that
21 Pennsylvania is going to use the review fully.
22 And this is for clarification. You have two
23 persons who commit murder, the same type of
24 murder, the same exact murder. One background
25 is different than the other's background. One

1 background is the list that you go through. One
2 is, they did not have education, is a minority,
3 or whatever. The other one was educated and
4 whatever, a good family background, all of that
5 business. Can the death sentence be overturned
6 on the person who does not have the background
7 as the other, the person who has the good
8 background? In other words, can we have one
9 going to the death penalty because of his
10 background and the other one not going to the
11 death penalty, getting overturned, to go to
12 life?

13 MR. ZUCKERMAN: Do they have the
14 authority to do it? They probably have the
15 authority to do it.

16 Now, their own methodology of when they
17 consider a case sufficiently aberrational to
18 reverse, we do not know because they have not
19 done it yet.

20 Once they reverse and they will explain
21 it, okay, we reversed for this, this, this and
22 this reason, we will have a better sense of
23 that.

24 I only know of one state that reversed
25 on proportionality ground. And it escapes me

1 which one it is. Because they had trouble
2 finding large enough comparison cases.

3 Generally, if there are a small number
4 of comparison cases -- and your hypothetical is
5 like two cases and there is a difference between
6 the two -- that that would not be enough to
7 trigger a reversal.

8 You only get a reverse when you have a
9 really clear sense that this is an aberrational
10 case, this is a case that the citizens of the
11 Commonwealth do not, as a whole, find to be
12 death worthy. And it harkens all back to the
13 original problem in Furman: you really want to
14 be able to look at these individuals and discern
15 a distinction. If you cannot discern a
16 distinction, then you have a problem with the
17 system overall.

18 So the answer is, legally, they
19 probably could. Would they, under their
20 methodology? I would say almost certainly no.
21 And I know only of one case where the lack of a
22 real good sense of what the community thought
23 was justification to them.

24 REP. MICOZZIE: That is a concern.
25 Legally, they can do it, if that is a concern.

1 MR. ZUCKERMAN: If it was abuse, I
2 would say it would be a bigger concern. If they
3 were routinely reversing cases on thin grounds,
4 it would be a much bigger concern. But there
5 is, I have no indication that that will happen
6 in the future.

7 REP. MICOZZIE: Thank you, Mr.
8 Chairman.

9 CHAIRMAN GANNON: Representative
10 Masland.

11 REP. MASLAND: No.

12 REP. MAITLAND: No.

13 CHAIRMAN GANNON: Representative
14 Schuler.

15 REP. SCHULER: Thank you, Mr. Chairman.
16 I have to leave shortly.

17 But something that is concerned with
18 me: you mentioned just a very quick phrase there
19 in your last discussion, you mentioned there are
20 comparatively few cases that are similar. You
21 said that, am I correct?

22 MR. ZUCKERMAN: (Nods head
23 affirmatively.)

24 REP. SCHULER: And yet, that is the
25 basis for this proportionality review.

1 Give me a number. I am hardpressed to
2 find that all cases or many cases could even be
3 similar.

4 MR. ZUCKERMAN: Yes, it's ...

5 REP. SCHULER: Maybe I am wrong. That
6 was all I wanted to find out.

7 MR. ZUCKERMAN: ... it can be bit of a
8 science. When you have a big group of cases --
9 And we are -- definitely it is popular
10 in Pennsylvania -- a lot of cases, not only that
11 resulted in death row but a great number that a
12 death was sought and juries returned life
13 verdicts, if you want to be technical about it,
14 you can actually bring in scientists that know
15 something about, for example, what are the
16 chances of --

17 There are 25 cases, for example -- let
18 me give you a number, twenty-five cases, only
19 one is a death sentence -- can give you a sense
20 of statistically, you know, what the likelihood
21 of someone who commits that kind of crime can
22 get death. That can be a tool that you can use
23 if you want to go down that road.

24 In the sense of, how do you compare are
25 these cases apples and oranges, really, in that

1 sense? Well, you have some convenient
2 yardsticks to group them. The aggravating
3 circumstances and the mitigating circumstances
4 are a very convenient grouping. If you go out
5 and take a weapon and go into a 7-Eleven and
6 kill somebody in the course of a robbery, those
7 cases from the aggravation side will tend to
8 look relatively similar. Some may be more
9 aggravated than others, but they will tend to
10 look similar.

11 REP. SCHULER: Similar but not the ...

12 MR. ZUCKERMAN: ... but not the same.

13 Oh, absolutely. And, remember, the statute does
14 not say, the same. The statute says, similar.
15 And it is a question of dispute.

16 In terms of mitigation, you have the
17 statutory mitigators and, again, they tend to
18 look similar. For this, yeah, it is bad, but
19 this guy, he was only 17; yes, he came from a
20 broken family; whatever it is, you know, those
21 kinds of things, maybe you can identify. Others
22 in that great big catch-all -- and that is one
23 of the big problems, as we know, in
24 administering death penalty systems -- you have
25 to allow any mitigation in. And it is hard to

1 compare.

2 For example, if you have a big data, I
3 can run a specific mitigator and say this
4 particular mitigator is a very powerful one --
5 age -- that we rarely will sentence juveniles
6 even though we are permitted in this state to
7 sentence juveniles to death, but we rarely use
8 it. I do not know if that is the case or not.
9 But I can look at the data base and get a sense
10 in isolation. I do not have to look at the
11 whole package, necessarily.

12 And it is difficult and that is the job
13 of the lawyers. It is the job of the lawyers to
14 say that -- to use Mr. Graci's hypothetical --
15 that my guy has got the Army record so that is
16 more mitigating than the guy who plays guitar
17 well. And lawyers are used to having to make
18 these comparisons. We do it all the time. We
19 can pick somebody, the crime, you have to get
20 inside their head. You have to understand, you
21 have to infer intent. You infer intent from
22 conduct. The same thing here.

23 REP. SCHULER: The next question then:
24 if we open this up to further exploration, this
25 just gives attorneys more opportunity to argue

1 their case?

2 MR. ZUCKERMAN: If it is an appropriate
3 case, yes, absolutely.

4 REP. SCHULER: Right.

5 MR. ZUCKERMAN: And I think they
6 should. Most of the candidates for the death
7 penalty that have been sentenced to death do not
8 have resources of their own, they rely on
9 appointed counsel. And appointed counsel has
10 trouble getting money for basic experts.
11 Certainly, that is the experience in
12 Philadelphia. There is certainly money
13 available. But to go and say, well, I need
14 somebody to help me with something this large,
15 they need to be able to turn to this data base
16 and rely on it.

17 And if it is there, it is there. Let
18 the Courts decide if this really is an
19 aberrational case. That is really what we want.
20 We want to ensure that we have a fair system,
21 that we have a system that is relatively free of
22 arbitrariness. And if you can convince the
23 Court, the majority of the Court, that, in fact,
24 this is one, then those tools should be
25 available.

1 REP. SCHULER: That is all I have, Mr.
2 Chairman.

3 CHAIRMAN GANNON: Thank you.
4 Representative Carn.

5 REP. CARN: Thank you, Mr. Chairman.
6 You just said we all would like to have
7 a system that is not arbitrary and then I also
8 hear you talking about our role to project the
9 feelings of the public and knowledge and
10 information. And I heard you say that the death
11 penalty issue needs to be trimmed and
12 continuously cut or adjusted. Well, what is the
13 basis that that is supposed to be based on? Is
14 that supposed to be based on the feeling of the
15 public as its attitude changes from month to
16 month or year to year or what are we actually
17 ...?

18 MR. ZUCKERMAN: Representative, that is
19 my understanding of Furman and some of the other
20 cases that talk about the death penalty. That
21 they first looked, in Furman, they first looked
22 at what sins that we are actually doing. And
23 one thing they found, the most objectionable
24 thing they found was that -- maybe two points --
25 one, that death was rarely applied even when it

1 is legally available, there were relatively very
2 few death sentences being imposed. And when you
3 looked at those who are receiving death and you
4 looked at those who are receiving life, you
5 could not discern a distinction.

6 I may have overstated it a little bit.
7 The highly aggravated cases tend to be death.
8 The low aggravated cases tend to be life. But
9 there is a vast middle ground: you could not
10 discern a distinction and that is what they
11 meant by there is a problem. So, in the sense
12 that the community sensibilities are important
13 in determining whether a death sentencing scheme
14 is constitutional? The answer is, yes, you need
15 sensibilities as to what conduct is death
16 worthy, is an important inquiry in determining
17 whether your overall scheme is constitutional.
18 And there is some conflict there. But the
19 answer is, yes, it is.

20 REP. CARN: Okay. How do you engage
21 that empirically? How do you engage that?

22 MR. ZUCKERMAN: You get the AOPC disk
23 and you say, okay, in these cases and how many,
24 let's look at, pick an aggravator, a felony
25 aggravator, for example.

1 REP. CARN: No, I am trying to, I am
2 talking about the public, not what is happening
3 in the system itself. I understand the numbers
4 that you are talking about. But you are also
5 saying that we, as lawmakers, in this process of
6 determining what should be the basis for a death
7 sentencing, you are saying that we must gauge
8 the public's view or feelings on that in order
9 to determine what we should do. I am just
10 asking you: how do we clearly do that?

11 MR. ZUCKERMAN: Okay. Well, it is not
12 a question I thought about, but I have two
13 suggestions. One would be kind of informally,
14 as legislators dealing with the public, you can
15 get a sense of what types of things bothered
16 them the most, what types of things make them
17 angry.

18 The other way to do it -- and it would
19 be a little difficult to do with the AOPC data
20 -- but the other way to do it is try to identify
21 some nonstatutory aggravating circumstances that
22 seem to be cropping up. Perhaps Mr. Graci is
23 better, more of an authority than myself, but
24 you can go state to state and you will see that
25 certain states emphasize certain aggravated

1 circumstances that other states do not have.
2 And my best sense is because somebody in that
3 community had made that point, that this is the
4 kind of conduct that we, as a state, really do
5 not like and we want to put extra penalties on
6 that and you add it.

7 REP. CARN: So then the US Supreme
8 Court now has to look at all of these different
9 perspectives, in terms of what is priority to
10 these different communities in different states
11 and their job then is just to use numbers and
12 statistics?

13 MR. ZUCKERMAN: Well, your job, as the
14 legislature, is to channel the discretion. You
15 cannot make it so that any conduct along the
16 way, it makes you eligible for death. You have
17 to focus them on particular types of cases.

18 Traditionally, the cases we discern
19 were aggravated: killing a police officer; rape
20 murders; robbery murders; those kinds of cases
21 are worse than just the brawl-type murder, by
22 common consensus. There are some, perhaps, on
23 the credence that maybe we might disagree with.

24 My understanding is, as long as the
25 discretion of the juries is adequately channeled

1 that you will survive constitutional attacks.

2 If the larger question is, do these
3 aggravators that we have accurately reflect the
4 way our citizen's feel? It is a hard question.
5 The data, the empirical data, can be helpful if
6 they are routinely rejecting an aggravating
7 circumstance.

8 The inverse is harder: are we missing
9 it? That is a little harder question. Put the
10 feelers out and I am sure the Commonwealth has
11 some suggestions on that, the conduct that is
12 not currently an aggravating circumstance but
13 should be. You know, that is not my perspective
14 and it is not a question I thought a lot about.
15 I can give you a compare and contrast, if you
16 know the states against, since what other states
17 you are talking might be different.

18 REP. CARN: Thank you.

19 Thank you, Mr. Chairman.

20 CHAIRMAN GANNON: Representative
21 Manderino.

22 REP. MANDERINO: Thank you. I want to
23 go back to Gribble. And you said that you
24 participated in the amicus on one small issue
25 and, am I correct, that issue was, what should

1 be the appropriate universe in cases that we are
2 looking at for determining a proportionality
3 review?

4 MR. ZUCKERMAN: Actually, two issues.
5 The first issue we got in on was the accuracy of
6 the data base. But then when this other issue
7 was raised, sua sponte, we added that. So there
8 were actually two issues addressed. The first
9 was accuracy of the data base. The second was
10 the question of the appropriate universe.

11 REP. MANDERINO: And what did you
12 advocate vis-a-vis the appropriate universe?
13 They should be just what they retained with the
14 universe they had identified in the Frey case,
15 which is class of death eligible cases, and not
16 limited to the death only cases. The death only
17 cases have very little utility in large
18 jurisdictions like this. You will always find a
19 precedent somewhere down from 10 or 15 years ago
20 that seems to be at least as aggravated as this
21 case.

22 REP. MANDERINO: Death eligible cases,
23 does that mean cases that I brought (that I, the
24 prosecutor brought) the charge of the death
25 penalty and which you are either at the

1 sentencing phase said, yes, death penalty, or,
2 no, life imprisonment? Or does that also mean
3 crimes for which, in one instance, I, as a
4 prosecutor, may have asked for the death penalty
5 but for whatever reason, I use my discretion not
6 to even ask for the death penalty so the death
7 penalty was not an issue for the sentencing jury
8 to consider?

9 MR. ZUCKERMAN: The Frey universe, as
10 articulated by the Supreme Court, includes those
11 cases. They say, a case that could have been
12 prosecuted capitally, that if you want to look
13 at the exercise of the prosecutory discretion --
14 which is of interest, certainly to my
15 organization in Philadelphia County -- and you
16 want to make it an issue before the Supreme
17 Court (for example, selective prosecution, if,
18 in fact, that were to exist) if they were
19 selectively focusing on this class of candidate
20 and not another class, under proportionality
21 review with that universe, you can identify it
22 or bring it to the attention of the Supreme
23 Court.

24 In practice, my understanding is, they
25 limit it, they do not look at those cases which

1 could have been prosecuted capitally but were
2 not.

3 The argument in favor of looking at
4 those is, one, it monitors prosecutorial
5 practices, which again at least it should be
6 monitoring in most jurisdictions. The other
7 argument is that what prosecutors do is also a
8 measure of community sensibilities. They would
9 not offer pleas on the highly aggravated cases.

10 It is a little weaker. You really have
11 to treat those nonpenalty hearing cases a little
12 differently than you would the penalty hearing
13 case because they measure different things. The
14 nonpenalty hearing measures the prosecutor's
15 conduct. The penalty hearing cases measure the
16 jury sensibilities. And, traditionally, you
17 would look at them separately, but I like to
18 include them, or would include them, if it was
19 relevant.

20 If I felt that there was arbitrariness
21 in the selection process of who the district
22 attorney was seeking death on, if I felt there
23 was a problem there, I would like to have that
24 opportunity to go to that larger universe and
25 say, look, here are 15 cases that are very

1 similar, yet they did not seek death in these
2 cases. At least prompt an explanation, you
3 know, give us a reason why you said this case
4 was treated differently. Again, a concern not
5 focused on very much in Furman, but I think it
6 continues -- certainly to practitioners -- to be
7 a concern.

8 REP. MANDERINO: In that issue that you
9 just articulated is something that could be
10 decided by the Court in Gribble vis-a-vis the
11 issues that are before it pending?

12 MR. ZUCKERMAN: The answer is, I do not
13 know. I do not know to the extent --

14 We do not get involved in whether
15 Gribble, Gribble's case is disproportionate. We
16 have no interest in that whatsoever. I do not
17 know much about his legal issues, I know very
18 little about the facts of the case, so to the
19 extent that that is the issue in Gribble, I do
20 not know.

21 I think based on -- perhaps Mr.
22 Eisenberg has a better recollection -- I think
23 they did argue proportionality. We did not get
24 involved in that. And I do not think, though,
25 that they argued any kind of selective

1 prosecution in Gribble's case. I think they
2 argued that one aggravator, one felony
3 aggravator, by itself, in the majority of these
4 cases, resulted in life. I think that was their
5 argument.

6 REP. MANDERINO: Frey is a 1984 PA
7 Supreme Court case. Zettlemyer is what year?

8 MR. ZUCKERMAN: They just receded it
9 [Zettlemyer]. Frey was the third case and
10 Zettlemyer was the first case affirmed, I
11 believe. Perhaps Mr. Eisenberg can correct me.
12 Zettlemyer was the first case and there was one
13 intervening case. The first two cases were a
14 little unclear on the universe. Then in Frey,
15 they were very clear. They said the universes
16 could be all cases that were or could have been
17 prosecuted capitally.

18 REP. MANDERINO: I mean, this is where
19 I am getting confused. I got the impression
20 from both what you said and maybe as I tried to
21 read your testimony as well that kind of there
22 is this Zettlemyer standard that was saying we
23 are only going to look at death and where death
24 could have been imposed versus Frey that was
25 saying we were going to look at where death

1 could have been asked for -- maybe I am
2 simplifying too much -- and the Court went back
3 and forth between the two and prosecutors were
4 happy when they were using Zettlemyer and the
5 defense was happy when they were using Frey and
6 that is really what we are arguing about?

7 MR. ZUCKERMAN: You have to forgive me,
8 because I took kind of a fine grain to it and I
9 read between the lines in these cases. They
10 have not explicitly said anything. But when
11 each case comes out, let's see what they did in
12 proportionality review. And I noticed where
13 there was a period of time where all of a
14 sudden, you know, there is like 120 cases where
15 they cite Frey and all of a sudden they stop
16 citing Frey. Okay. I am reading between the
17 lines: something is happening here. And then a
18 few cases go by and they go back to citing Frey
19 again. I am reading between the lines.

20 We will know in Gribble. I think that
21 when Gribble comes out, we will have a sense on
22 the way the Court is going to go on this issue.
23 It may call for some kind of legislative
24 response. I do not know.

25 That is kind of a fine grain and

1 perhaps was unnecessary to include in this
2 presentation. But the real point is that: see,
3 there seems to be some disagreement on the Court
4 about what to do with this. And I think, quite
5 honestly, it is a direct response to some
6 improved counsel, some better counsel coming
7 out. Since you have, I mean since 1990, are
8 better at having standards for counsel in
9 Pennsylvania -- excuse me, in Philadelphia -- in
10 that these issues for the first time are really
11 being raised in a little greater depth than they
12 are used to seeing. So for the first time --
13 you really kind of wallowed for 10 or 12 years
14 -- but now they are coming back up to the
15 forefront and specifically forced to confront
16 some of the issues that they were able to ignore
17 but this counsel was not adequately raising. I
18 think maybe it will work here.

19 REP. MANDERINO: Thank you.

20 Thank you, Mr. Chairman.

21 CHAIRMAN GANNON: Thank you,
22 Representative Manderino.

23 Two issues, as I understand it from the
24 colloquy between yourself and Representative
25 Manderino, one was this issue of data and

1 methodology; the other was the universe. And
2 Representative Manderino said, well, there was a
3 situation where the jury could come back with
4 either the imposition of a death sentence or the
5 imposition of a life sentence. I think there
6 would be a third: nondecision. And that is when
7 the jury, there was one hold out. And the jury,
8 just by verdict, not coming with it, not having
9 a decision would lead to the automatic
10 imposition of a life sentence. How do you
11 rationalize or justify including that type of a
12 case over the years, where there is a
13 nondecision on the part of the jury, by
14 operation of the statute, a life sentence is
15 imposed? Let me ask, does that become part or
16 would you argue that that would be part of the
17 that universe?

18 MR. ZUCKERMAN: Under the Supreme Court
19 methodology, it is not. They exclude the hung
20 juries. I would advocate that they belong in
21 there, but, you know, with the asterisk that
22 this was a hung jury.

23 Most cases result in life, so if they
24 are going to hang ... Most cases are unanimous
25 for life, a lesser percentage is unanimous for

1 death and you have this middle group.

2 If I were to make the argument that we
3 had to characterize it one or the other, there
4 are two grounds. One, juries are charged in
5 Pennsylvania: if you cannot decide, if you
6 cannot agree on the appropriate sentence, the
7 sentence will be life. And there are
8 indications. You see, you actually see actual
9 indications where they kind of agree to
10 disagree.

11 That situation is a conscious decision.
12 So if you really talked it out, it does not seem
13 like that anybody is going to change their mind
14 and you tell the Judge we are hung and that is
15 it and no further deliberations would be
16 fruitful, that in that sense that those can be
17 considered as life cases.

18 I would, if I were on the Supreme
19 Court, I would want to know about them, but I
20 would give those cases less weight. But I
21 certainly would want to know about them.

22 CHAIRMAN GANNON: Let's assume that a
23 case went up to proportionality (one of the
24 issues under review was proportionality) and the
25 Court made the determination that using the data

1 and all other information available to it that
2 this case, in fact, met the proportionality test
3 and the death sentence stood and then the Court
4 in a later decision says, well, this methodology
5 and data was flawed on which we were using our
6 proportionality review, what would be the status
7 of that case that had already had a
8 proportionality review under data that now the
9 Court has said was flawed?

10 MR. ZUCKERMAN: Well, you have big
11 problems, procedurally, because the PCRA
12 statute, as currently drafted, we might knock
13 you out of the box. We have pretty much
14 eliminated, in effect, the post conviction
15 review in Pennsylvania. The unitary review
16 statute with your hypothetical would not apply,
17 pretty much wipes it out. We substitute two
18 lawyers for one lawyer and then we take away
19 subsequent collateral review and you would have
20 big problems.

21 I believe there is a case pending now
22 where that was at issue, where I think the claim
23 is, the counsel, first time around (two
24 plaintiffs) counsel first time around did not do
25 a very good job in arguing this and also that it

1 was a case that was decided very early within
2 that big sample group but now that we have a
3 much larger sample group, we have a much better
4 sense of what the community feels about this and
5 maybe that proportionality should be revisited.
6 Tremendous procedural hurdles to get around to
7 getting a second look at proportionality review.

8 I do not know - I certainly know it did
9 not happen in this state -- I do not know of any
10 states that have looked at proportionality
11 review a second time.

12 It seems to me that you can demonstrate
13 that if but for these errors the result likely
14 would have been different, that you should have,
15 you should be able to go back, but.

16 CHAIRMAN GANNON: Could the Court on
17 its own do that?

18 MR. ZUCKERMAN: It would be a point of
19 contention. The defense would argue yes and the
20 Commonwealth would argue no. With the strict
21 interpretation of PCRA, I do not see how you can
22 get that. Under kind of relaxed regs. and rules
23 or something that you are using, using that,
24 they may let you go back. I am not sure. It is
25 not an issue I have thought about or would think

1 about. I wish I could fashion a legal avenue to
2 get back. But the overly restrictive post
3 conviction statutes that are in effect now
4 pretty much limit going back to the actual claim
5 of innocence and then under very restrictive
6 conditions.

7 CHAIRMAN GANNON: Well, this would not
8 be an issue of claim of innocence. This would
9 be an issue of sentencing.

10 MR. ZUCKERMAN: It would not. Yes,
11 that is right. That is another flaw in there.

12 Another thing, certain jurisdictions --
13 I do not know what the story is in Philadelphia
14 -- but certain jurisdictions are claiming that
15 no death sentencing issues at all are
16 prognosible (phonetic) under PCRA because it
17 does not speak to that. It says it is a problem
18 that the Supreme Court is going to have to deal
19 with or perhaps this legislature has to deal
20 with.

21 CHAIRMAN GANNON: Thank you very much
22 for your testimony today, Mr. Zuckerman.

23 MR. ZUCKERMAN: Thank you.

24 CHAIRMAN GANNON: Our next witness is
25 Mr. Ron Eisenberg, Deputy District Attorney, the

1 Law Division of the Philadelphia District
2 Attorney's Office. Welcome, Mr. Eisenberg.

3 MR. EISENBERG: Thank you, Mr. Chairman
4 and Members of the Committee. Good morning.
5 Thank you for this opportunity to appear before
6 the committee on behalf of my office. I would
7 also like to depart from my prepared remarks and
8 hopefully be much briefer than those and try to
9 focus in on some of the issues that have been
10 raised during the course of the testimony today.

11 It is important to remember, I think
12 firstoff, that it is not prosecutors who have
13 raised this issue of proportionality review to
14 the fore. It is the defense bar in the state
15 which has done so and the Pennsylvania Supreme
16 Court which is now focusing on this issue. So
17 that the question before the Court is not so
18 much whether it would be a good thing to
19 continue proportionality review it has and has
20 developed over the years in Pennsylvania, but
21 whether it should be changed. Changed in what
22 would really be a very radical fashion.

23 Now, you heard Mr. Zuckerman explain
24 today -- and even more clearly before the Court
25 in the pending Gribble case, which has been

1 mentioned -- what the universe of cases should
2 be that is reviewed by the Court in the view of
3 the defense bar. And you have heard terms like
4 death eligible. And you have heard argument
5 that in order to properly decide whether cases
6 are, compare against each other in a way that
7 supports the death penalty, we have to look at
8 all cases which are, quote, unquote, death
9 eligible because of factors such as, for
10 example, prosecutorial discretion.

11 What is important to understand that
12 that means is what the defense is asking the
13 Court to do is to look at essentially every
14 homicide case. Because that is really the only
15 point at which there is an objective distinction
16 between a case which is death eligible and
17 nondeath eligible.

18 If there is a case where the prosecutor
19 goes for the first degree murder and the other
20 case where the prosecutor does not, well, once
21 the prosecutor decides not to go for first
22 degree murder, there is not going to be a death
23 penalty in that case; but that decision in and
24 of itself is something that, as Mr. Zuckerman
25 has explained here and in his brief, he thinks

1 the Court ought to be looking at, which means
2 that all of those cases have to be in the data
3 base under the proposal for how the law should
4 be developed based upon the legislative statute
5 going back to 1978.

6 And what that means in terms of numbers
7 of cases, since that time, is something over
8 10,000. That is, every fact and detail of
9 something over 10,000 cases (so far, not to
10 mention future cases) would have to be reviewed
11 and compared against each other.

12 And, of course, that leads directly to
13 the next question, which is, how can courts
14 possibly do that? In the mere sense of how can
15 they deal with this volume of data, with this
16 volume of facts, how can they get their minds on
17 the facts of case 1,999 versus case 7,320?

18 Well, the way that it is proposed that
19 it be done is through a social science
20 statistical sort of approach. And again, you
21 heard Mr. Zuckerman refer to bringing science
22 into this question. And there has been a lot of
23 reference in the litigation to what is being
24 done in New Jersey.

25 Now, as a result of that, we went and

1 looked at the sorts of things being done in New
2 Jersey. We got the proportionality review
3 prepared by the New Jersey Supreme Court staff
4 in just one case (from New Jersey, just one) and
5 the document was three-inches thick just for
6 that one case.

7 And the reason that it was that thick
8 is because what the Court was requiring to have
9 done for that case is to have every possible
10 element of the case, every possible fact about
11 the case, somehow quantified into a number.
12 Because if we can reduce case number 3,120 to a
13 number, well, then we can compare that number
14 with the numbers we assigned to other cases and
15 therefore we can have something we can call a
16 proportionality review.

17 Here is the kind of quantification, the
18 kind of number making that they do in that
19 situation. They define categories for the
20 strength of the evidence of the prosecution
21 (overwhelming evidence, strong evidence, clearly
22 defensible evidence, clearly insufficient
23 evidence) and they give points based on how
24 strong they think the evidence was. They give
25 examples of what would be, say, strong evidence

1 as opposed to overwhelming evidence.

2 The example they give for overwhelming
3 evidence is a case supported by a full
4 confession with rich details.

5 The example that they give for a strong
6 evidence in contrast is a case with multiple eye
7 witnesses to the killing, with no credibility
8 problems.

9 Now, I think even a nonlawyer can
10 figure out that in a case where the
11 prosecution's evidence was based on a confession
12 with no eyewitness, the defense is going to say
13 where the eyewitness is, this is a weak case.
14 And a case with an eyewitness and no confession,
15 the defense is going to say, well, you did not
16 hear anything from the defendant, the defendant
17 did not commit on this crime, these. The
18 eyewitness could be wrong. And you know what?
19 Sometimes they win the case, the first case, and
20 sometimes they win the second way.

21 You cannot say that the case with the
22 confession is stronger than the eyewitness, or
23 the case with the eyewitness, it is stronger
24 than the case with the confession as a
25 categorical matter. But that is what

1 proportionality review would require to be done
2 if the defense position on proportionality
3 review were accepted.

4 And as I mentioned, that is why we are
5 here at all, because the Court is being asked to
6 change proportionality review in that radical
7 fashion based on that one little sentence in the
8 statute that this body passed back in 1978. And
9 somebody in that review process has to decide,
10 well, gee, this case is overwhelming as opposed
11 to just strong, strong enough for the jury to
12 convict beyond a reasonable doubt. But now
13 somebody else comes along and says, not just
14 strong enough for a conviction, but overwhelming
15 as opposed to just strong.

16 And there are many other questions of a
17 similar fashion that have to be decided in order
18 to conduct the kind of proportionality review
19 that the Courts are now being asked to do.

20 For example, here are some more of the
21 kinds of questions that you have to do in
22 proportionality review. And I am referring here
23 to the last several pages of my prepared
24 testimony. The level of intent to kill of the
25 defendant, the level of premeditation is one of

1 the categories that this study tries to get in.

2 And it says, for example, well, gee,
3 was this killing planned for more than five
4 minutes? Five minutes to one hour? One hour to
5 24 hours? One day to ten days? Ten days to a
6 month? Because, of course, if it was planned
7 for more than an hour, that is worse than
8 planning it for less than an hour. If it was
9 planned for more than a day, that is worse than
10 planning it for 12 hours and 37 minutes. It
11 makes sense, but how do we decide whether it was
12 planned, for example, 12 hours and 37 minutes as
13 opposed to 59 minutes?

14 There is not going to be evidence about
15 that specifically in the case, necessarily,
16 because that is not an element of the crime.
17 The prosecution so far has not had to prove, to
18 the minute or the second, how long the defendant
19 was planning the murder. And how would the
20 prosecution possibly prove that in the average
21 case? So somebody is going to have to decide on
22 their own, based on the evidence. And that is
23 really what this all comes down to, this
24 question of proportionality review, I think.

25 And that is what, I think the

1 legislature has to consider is, who is going to
2 decide, who is going to decide what?

3 When we talk about proportionality
4 review, what we are really talking about is
5 somebody other than the jury, other than the
6 citizens, coming into the process of the
7 appellate stage and saying, I assigned this
8 evidence a four on the scale of five of
9 strength, or I assigned this confession a 27
10 instead of a 23 because that is how strong it
11 is.

12 And I believe that the character of the
13 defendant, information which may never even at
14 all have come before the jury, should be rated
15 in a similar fashion. There is a category, for
16 example, for problems in schools. So I will
17 say, well, gee, on the problems for school
18 category, this defendant rates nine out of ten
19 or six out of ten.

20 Well, how can that sort of thing be
21 decided through the process of appellate review?
22 We are talking about something which is
23 completely and totally different than the kind
24 of decision that we have traditionally entrusted
25 to the Court. We are talking about value

1 judgments about the death penalty on the basis
2 of facts in an individual case.

3 And heretofore we have had a system for
4 making those value judgments. We have called it
5 the jury system. We get the members of the
6 community together in their representative
7 capacity as the 12 members of the community and
8 we put on these facts before them and we ask
9 them in accordance with the statutory structure
10 to decide whether they believe that this
11 defendant merits a life sentence or a death
12 sentence. And they hear the evidence, they see
13 the witnesses, they make the credibility
14 determinations and then beyond that they make,
15 at some level, of course, some sort of value
16 judgment, some sort of moral judgment. Because
17 that is what sentencing is. The Supreme Court
18 has said that over and over, in death penalty
19 cases, that ultimately the jury is making some
20 kind of moral decision.

21 What we are really talking about when
22 we describe proportionality review and we argue
23 about having proportionality review of this sort
24 that is now being argued before the Supreme
25 Court is really taking that basic moral

1 sentencing function away from the jury and
2 giving it to the Court.

3 And even worse than giving it to the
4 Court -- because we can at least say the Court
5 is justices and they are elected -- the justices
6 are not going to read through the records of all
7 of those 10,000 cases, they are not going to
8 digest all of that information and give the
9 quantification of all those categories like the
10 confession and the problems in school and all of
11 that stuff. That is going to have to be done by
12 some kind of scientist, some kind of expert,
13 some kind of staff member; and those will be the
14 people who really make the decision about how a
15 case factors in this proportionality review.

16 We will add up all the numbers and case
17 number so and so comes out to a score of 97 on
18 our death penalty proportionality scale and then
19 the Supreme Court will look at that and decide
20 from there. Because, of course, they are not
21 going to be able to review all of the thousands
22 and millions of facts that distinguish one case
23 from another.

24 Now, Mr. Zuckerman has said to us
25 today, well, it is easy. Even if we do not do

1 all of that, we can just take the aggravating
2 circumstances and mitigating circumstances and
3 those are in categories and we can just compare
4 those.

5 Well, let's take one that he mentioned:
6 the aggravating circumstance for risk of death
7 to another. You murder someone and in the
8 course of doing that, you create a grave risk of
9 death to another person. Contrary to Mr.
10 Zuckerman's statement, that aggravating
11 circumstance has actually been the basis for a
12 great number of the death penalties that have
13 been returned by juries in Pennsylvania.

14 Even so, it is impossible, I would say
15 ridiculous, to say that one grave risk of death
16 case is like another grave risk of death case.
17 You might have one case where the grave risk was
18 caused by somebody setting fire to a building
19 that had other people in it and the defendant
20 was trying to kill just one of the people in the
21 building. You may have another case where the
22 defendant shoots someone in a bar and standing
23 behind that person is somebody else, the bullet
24 might pass through the body and hit that other
25 person.

1 And there are numerous other examples
2 of cases which all fall in that category of
3 grave risk of death. In fact, in my own review
4 of the kinds of cases that the Court has upheld
5 as establishing a grave risk of death, I believe
6 that there is a huge variety in the facts that
7 support that aggravating circumstance.

8 So the fact is that you cannot even
9 truly, meaningfully take just the aggravating
10 circumstances and the mitigating circumstances
11 and check off a few numbers and say, hey, this
12 case is truly like this one or is not truly like
13 this one.

14 And the problem is complicated all the
15 more by the role of mitigating factors. Mr.
16 Zuckerman referred to those.

17 In our statute, we allow as a
18 mitigating factor, what we call sort of
19 colloquially sort of a catch-all category. We
20 do not want to restrict the defendant to the
21 kinds of evidence that he can present in order
22 to convince the jury that he is worthy of
23 getting a chance for life. It would be, it has
24 been held unconstitutional to restrict him from
25 doing that.

1 So we have set out several specific
2 sort of categories as examples to the jury and
3 then we say but anything else that he wants to
4 put on, he can put that on, too. And then we
5 say to the jury even beyond that, we say, look,
6 when it comes to aggravating factors, you all 12
7 have to agree in order to find any aggravating
8 factor, but when it comes to mitigating factors,
9 no.

10 You can consider a mitigating factor
11 even if only you, as an individual, believe that
12 the evidence that you heard is in some respect
13 mitigating. And it can be anything you have
14 heard, it does not have to fit into any specific
15 sort of category. You get to decide whether it
16 is mitigating or not.

17 Well, that is a system which has been
18 designed for the benefit of defendants to ensure
19 that they will have a fair chance to make their
20 argument to the jury. But how are we going to
21 categorize that? How are we going to compare
22 that sort of evidence for proportionality review
23 purposes?

24 Because the jury is not required to
25 come back and say the 12 of us decided that

1 there was catch-all mitigation or even that one
2 of us or five of us or seven of us decided that
3 there was and, if so, what kind of evidence we
4 decided constituted the catch-all mitigation.
5 We would not let the jury tell us that because
6 we are afraid that it might keep the jury, make
7 the jury feel less free in finding that
8 mitigation.

9 We want the individual jurists to feel
10 that they can recognize whatever they personally
11 feel is mitigation as such and put it into the
12 weighing process. So by design we are never
13 going to know, and we cannot know without
14 infringing on the defendant's rights, to put on
15 that evidence, we cannot know what sort of
16 evidence is found or considered to be mitigating
17 and how and what sort of evidence is not.

18 And yet, we are being told that there
19 is something meaningful we can do by comparing
20 aggravating circumstances and mitigating
21 circumstances from case to case to case over
22 hundreds of cases and thousands of cases and I
23 suggest that that is a very, very dubious
24 proposition.

25 Now, I would like to address the

1 question of where are we now and what are the
2 prospects. I think it is important to remember
3 that if and when this happens, if and when there
4 is a decision from the Supreme Court to engage
5 in the kind of proportionality review that they
6 are being asked to engage in, then at that point
7 it is most likely too late for a legislative
8 approach to the problem even though the argument
9 is based solely on legislation to begin with.

10 The entire argument arises from this
11 body's statute. And yet, once the Supreme Court
12 decides, we cannot just change the statute in
13 order to in some way remedy the problem.

14 And if the Supreme Court decides that,
15 in fact, all the long proportionality review has
16 been no good, the data base is too small, not
17 accurate enough and therefore that none of these
18 cases had a proper proportionality review, I
19 think that there are only two likely legal
20 consequences of that.

21 The most likely consequence, I believe
22 that the Court will return, is to knock out,
23 then and there, every existing death penalty in
24 Pennsylvania (that is over 200) on the ground
25 that the sentence was not and could not properly

1 be reviewed by the Court at the time, and that,
2 therefore, the sentence is in some sense illegal
3 because the statute requires proportionality
4 review in order for the sentence to be affirmed.

5 And the Court has said in other
6 context, many times, that if a sentence is
7 illegal, then it cannot stand. It does not
8 matter whether the argument was preserved,
9 whether it was years ago, whether it is being
10 raised now for the third time or the fourth time
11 or whatever, none of those concepts apply if the
12 sentence is illegal under the governing statute.

13 And what that means is that the defense
14 position would certainly be -- and I believe
15 quite possible the Supreme Court's position
16 would be -- that if proportionality review is
17 and has been flawed, then every existing death
18 penalty goes out the window.

19 Now, even if we do not get to that
20 level of effect from this sort of ruling, then
21 at the very least what I believe will happen is
22 that in every case, not just future cases but
23 the cases we have already had, the Court will
24 require that a new proportionality review be
25 conducted.

1 Okay. Maybe that does not sound so
2 bad, but let's think about that for a second.
3 If the Court is going to rule that
4 proportionality review has to be the sort of
5 review, the broader in scope kind of thing where
6 we look at all of these categories of
7 information, we talk about thousands of cases
8 and millions of details, how exactly are we
9 going to do that for those 200 cases (not to
10 mention future cases) how are we going to do
11 that for all of those cases?

12 If you are a defense attorney and Mr.
13 Zuckerman says it is good that defense attorneys
14 are starting to address this issue, they should
15 be briefing this proportionality review, what
16 are you going to do?

17 You are going to write a brief and you
18 are going to talk about a bunch of other cases
19 where there was a death penalty. And you are
20 going to argue, as a good advocate, hey, here
21 was a case with these sorts of factors where a
22 death penalty was not returned and here is mine
23 where I say the factors were similar and there
24 was a death penalty. And you are going to do
25 that for as many cases as you can, five other

1 cases, 10 other cases, a hundred other cases,
2 maybe.

3 In New Jersey, which is the model that
4 we are being asked to follow, briefs on this
5 issue are typically hundreds of pages long. The
6 briefs that are filed with the Court on just
7 this issue of proportionality review are
8 hundreds of pages long and so, of course, the
9 prosecution's brief is going to have to be
10 hundreds of pages long to discuss those same
11 details and we are going to multiply that by the
12 hundreds of cases that we already have that have
13 been affirmed.

14 Now, Mr. Zuckerman suggested that, oh,
15 gee, we are not going to have to do any of that
16 because this legislature has already unfairly
17 taken away the right to collateral appeals by
18 death penalty defendants by virtue of the
19 legislation passed last year under the PCRA and
20 Unitary Review.

21 Well, as I mentioned, the defense
22 argument in this respect is going to be that if
23 the proportionality review was not conducted
24 properly, the sentence is illegal. And illegal
25 sentences have been challenged under the PCRA

1 and the language which governs that has not been
2 significantly altered, so undoubtedly, the
3 argument will be -- despite what has been said
4 today -- when we get into Court, the defense
5 will argue, and quite possibly successfully,
6 that they can raise this issue, in any case,
7 years later, second appeal, third appeal, fourth
8 appeal, because it goes to the legality of the
9 sentence and that the PCRA does not preclude
10 that.

11 Certainly, Unitary Review does not
12 preclude that. All we mean by that phrase of
13 Unitary Review, which was part of the
14 legislation from last year, is not that we are
15 going to eliminate the possibility for defense
16 hearings, we are just going to change the time
17 at which they occur for future cases. This is
18 the part of the legislation that will affect the
19 pending ones.

20 All it said was, from that point
21 forward, when there is a death penalty, we will
22 give the defendant an additional lawyer. We
23 would not take away his first lawyer who did the
24 trial, we will give him another one on top of
25 the first one. And we will say to that other

1 one, go look at this record, go look at outside
2 in the world, find whatever claims you have, do
3 whatever you would normally do five years from
4 now after the case has been sitting around and
5 maybe evidence has been lost and issues have
6 been forgotten and memories have faded.

7 Instead of doing that five years from
8 now, do it now, within say a year after the
9 trial has occurred. We will let you bring all
10 of that in now, have a hearing on it and take it
11 up on appeal in the normal course, just as you
12 would have under the old system, except, instead
13 of waiting five or ten years, we will do it
14 earlier on. And I think this is a legitimate
15 attempt, by the legislature, to bring the death
16 penalty review process into some semblance of a
17 timely system.

18 Remember, that even with all the new
19 statutes that have been passed, even with all of
20 the, you know, supposedly Draconian, new laws
21 that we have had in Pennsylvania in the last 30
22 years, of all the people on death row in
23 Pennsylvania, two have been executed (and that
24 is only because they wanted to be, they waived
25 their appeal). And even when someone wants to

1 waive their appeal and not challenge them any
2 further (as happened just last month with Gary
3 Heidnik) even then the Courts are not
4 necessarily allowing the execution to take place
5 even when the defendant says, over and over
6 again, year after year, I do not want to have
7 any more appeals.

8 So the idea that the legislation that
9 is now in place is somehow going to prevent the
10 fair exposition of these issues and the fair
11 litigation of these issues and somehow going to
12 rush death penalty appeals through the system is
13 dramatically opposed to what we know to be
14 reality.

15 Now, the argument has also been made
16 (will be made) that we need proportionality
17 review because we have to guard against
18 disparities in the system. People will say that
19 there are various sorts of geographical, other
20 sorts of disparities in how the death penalty is
21 imposed and therefore we need proportionality
22 review.

23 And I do not really believe that the
24 scope or nature of those disparities are our
25 focus today. I do think what is important to

1 recognize is to get back to what was said before
2 and that is, who is going to decide those
3 questions, who is going to make those value
4 judgments?

5 It is certainly appropriate for members
6 of the public to come to the legislature and
7 say, hey, we understand that the voice of the
8 public has been to support the death penalty, to
9 expand the death penalty in certain respects, to
10 attempt to accelerate the death penalty, but we
11 think as a matter of public policy there are
12 some other factors that ought to be considered
13 and that maybe the death penalty should be
14 scaled back, maybe we should not have it at all,
15 because we cannot be sure enough about how it is
16 being imposed.

17 Those are legitimate issues to raise
18 before a legislative body.

19 What is now being proposed under the
20 guise of proportionality review is to have
21 courts and staff members and social scientists,
22 in effect, make those decisions. Because they
23 will decide whether a case is, quote, unquote,
24 disproportionate, whether there should have been
25 a death penalty in this place or in this kind of

1 case as compared to this other kind of case on
2 the basis of system-wide sort of statistics.
3 They will be making that sort of value judgment,
4 which I believe has always been and should
5 always be the judgment for the legislature to
6 make on a systemic level and for the citizens
7 through juries to make on the level of
8 individual cases.

9 Thank you very much for the opportunity
10 to be here. And if there are any questions, I
11 would like to attempt to answer them.

12 CHAIRMAN GANNON: Thank you, Mr.
13 Eisenberg.

14 Representative Carn.

15 REP. CARN: Thank you, Mr. Chairman.

16 CHAIRMAN GANNON: Wait a minute. We
17 have been joined by Representative Harold James.

18 REP. CARN: Mr. Eisenberg, would it be
19 fair to say that you are opposed to any type of
20 proportionality review?

21 MR. EISENBERG: Let me try to answer
22 that, Representative Carn, by reiterating what I
23 said earlier in the testimony today. Until this
24 issue was raised and focused on by the defense,
25 it was not prosecutors around the state who were

1 complaining about the nature of proportionality
2 review in Pennsylvania, and now I think the
3 question is whether, in some sense, Pandora's
4 Box is being opened up and we are going to get
5 into something which will, in effect, make it
6 impossible to support the death penalty. So as
7 to proportionality review, as it was
8 traditionally carried out under the statute that
9 the legislature passed in 1978, I would say that
10 historically there has not been a problem.

11 The problem is, as to proportionality
12 review, as it is now being threatened to be
13 carried out in the future.

14 REP. CARN: So you are opposed to it
15 being expanded, is that what you are opposed to?

16 MR. EISENBERG: Yes, Representative
17 Carn, that is what we are opposed to and that is
18 the position we have taken in Court.

19 The question, I think for the
20 legislature, is what they might do on that issue
21 of whether it should be expanded. That is why
22 we have pointed out -- and Mr. Graci went
23 through the history in his testimony, at length
24 -- about how we even came to have this sort of
25 proportionality review in the statute.

1 Originally, it was there because it was
2 believed, after Furman versus Georgia, the
3 landmark US Supreme Court decision, that in
4 order to have a valid death penalty, a state had
5 to have some kind of proportionality review.

6 I suggest no one really knew what that
7 was. They put in the words and statutes around
8 the country. We have them in ours. But that is
9 where it came from.

10 Later on, as the cases came from the US
11 Supreme Court, it really fleshed out what a
12 capital sentencing scheme had to have to be
13 constitutional muster. We learned that
14 proportionality review, that is, some sort of
15 comparison by appellate judges or social
16 scientists between one case and hundreds of
17 thousands of other cases, the proportionality
18 review is not constitutionally required.

19 And I would suggest that, in light of
20 the legal development since the statute was
21 passed that the present provision on
22 proportionality review could be
23 constitutionally, lawfully removed from the
24 statute. But the motivation to do that from our
25 point of view would not be so much what has

1 happened in prior cases as what may be happening
2 in future cases and if it does happen would
3 certainly bring appellate review of capital
4 cases to a halt.

5 REP. CARN: Okay. Can I get a yes or
6 no answer? Does the Office of the Philadelphia
7 District Attorney oppose any proportionality
8 review?

9 MR. EISENBERG: No, Representative
10 Carn, not as it was carried out in the past.

11 REP. CARN: But I am hearing you say
12 that this Office would not object to it not
13 being there?

14 MR. EISENBERG: And as I hope to
15 convey, the reason for that is because of the
16 basis that legislation now appears to be giving
17 for an expansion, a radical departure from what
18 proportionality has been in the past.

19 REP. CARN: So the District Attorney's
20 Office of Philadelphia supports the existing
21 proportionality review?

22 MR. EISENBERG: I am afraid that that
23 is a difficult one for me to give you a yes or
24 no answer to, Representative Carn. And the
25 reason for that is because the words of the

1 statute are never an ending of themselves, they
2 mean only what the Courts say they mean from
3 case to case and that is something which has the
4 capacity to change from case to case.

5 REP. CARN: Thank you, Mr. Eisenberg.

6 Thank you, Mr. Chairman.

7 CHAIRMAN GANNON: Representative James.

8 REP. JAMES: Not at this time, Mr.

9 Chairman.

10 CHAIRMAN GANNON: Representative

11 Caltagirone.

12 REP. CALTAGIRONE: No.

13 CHAIRMAN GANNON: Representative

14 Manderino.

15 REP. MANDERINO: Thank you, Mr.

16 Chairman.

17 I need to go back to the beginning
18 because I heard Mr. Graci's testimony a little
19 bit different, as well as my own understanding
20 of the United States Supreme Court guidelines
21 vis-a-vis states implementing a death penalty.
22 So if you could correct me where I am wrong.

23 I thought our obligation as a state, if
24 we wanted to have a death penalty, was to make
25 sure -- and I do not know the exact words,

1 whether it says fairly administered or not
2 arbitrary and capricious -- but that is the
3 requirement on the states from the United States
4 Supreme Court, am I correct?

5 MR. EISENBERG: Yes, it is,
6 Representative Manderino.

7 REP. MANDERINO: Okay. Now, Mr. Graci
8 made it clear, as did you and as is my
9 understanding, that proportionality review, in
10 and of itself, is not the prescribed method by
11 the United States Supreme Court that making sure
12 that something is not arbitrary and capricious,
13 although that is the way that some states,
14 including Pennsylvania, have chosen to measure
15 or implement this mechanism to make sure our
16 death penalty is not arbitrary and capricious,
17 correct?

18 MR. EISENBERG: Well, I am not sure
19 that that is the reason that Pennsylvania chose
20 that method, but that certainly would be the
21 defense argument, that that is a proper way to
22 achieve that result.

23 REP. MANDERINO: Okay. Let me ask you
24 this: how does Pennsylvania assure that their
25 death penalty is not arbitrary and capricious?

1 Let's put aside a proportionality
2 review, whether it is a proposed proportionality
3 review as people are guessing might come down
4 out of Gribble or whether it is a
5 proportionality review as we have known it
6 heretofore under, well, depending on who you
7 ask, under Zettlemyer or Frey. Let's put aside
8 proportionality review. Is there some other
9 mechanism that we have in Pennsylvania, in our
10 statute, that assures this global view, not an
11 individual case view but this global view of: is
12 our death penalty being fairly administered?

13 MR. EISENBERG: Well, I think that
14 there is, in the sense that the body that
15 reviews every single one of these cases is the
16 same body and every case that it reviews on
17 every legal issue is reviewed in reference to
18 the body of law that it has developed in capital
19 cases.

20 Mr. Graci's testimony contained several
21 pages, I believe, describing the kind of review
22 that the Court engages in over and above, aside
23 from proportionality review, a review that is
24 required to engage in by other provisions in the
25 statute. And that, indeed, is what courts have

1 always done and I believe consistently with what
2 the United States Supreme Court says has to be
3 done in order to have a valid sentencing scheme.

4 The United States Supreme Court does
5 not say that, after the fact, somebody other
6 than the jury or the legislature has to go back
7 and look at one case compared to another or
8 compared to a thousand others and decide whether
9 that person thinks it was fair to have the death
10 penalty in this case rather than another.

11 What the Supreme Court says is:

12 * You have to have a proper system
13 coming in, going in to the process in order to
14 have a proper death penalty.

15 * You have to have a system that
16 properly limits the class of cases that are
17 eligible for the death penalty, and that allows
18 the defendant free reign to place evidence
19 concerning his character and record and the
20 nature of the offense before the juries so that
21 they can weigh those facts in deciding on the
22 death penalty.

23 And if you have those things, if you
24 have the right structure going in, then we, the
25 United States Supreme Court, are not going to

1 require that a court look back after the fact
2 and second guess the decisions of the jury or
3 the legislature.

4 REP. MANDERINO: If you have to have a
5 proper mechanism going in on the front end and
6 not a back end review, do we now measure, in any
7 way, and is it appropriate to measure, the issue
8 of prosecutorial discretion in whether to ask
9 for a death penalty in a particular case?

10 MR. EISENBERG: It is appropriate to
11 measure that in the way that we always measure
12 prosecutorial discretion or legislative
13 discretion or in some sense even judicial
14 discretion and that is the check of the public
15 making decisions through elections about whether
16 it believed discretion is properly being carried
17 out.

18 That is what it means to have
19 discretion for any public official, whether
20 is a district attorney or a state legislator or
21 a judge. What it means is to have discretion to
22 be able to take actions which are not all being
23 able to be second guessed and reviewed by some
24 other branch of the government.

25 I think it is important to recognize,

1 in relation to that question of prosecutorial
2 discretion and the incidents of death penalties
3 in Pennsylvania that of the thousands of cases
4 which are homicide cases in Pennsylvania, I
5 believe (as I said, there have been about 10,000
6 over the last 20 years or so) only about 10
7 percent of those have resulted in first degree
8 murder convictions. And of those first degree
9 murder convictions, only about 10 percent
10 (actually, I believe the statewide figure was
11 about 8.9 percent) have resulted in death
12 penalties. Which means that, according to
13 statewide statistics, you are seeing juries
14 returning a death penalty sentence in about 1
15 percent of homicide cases.

16 And by the way, that figure happens to
17 be virtually exactly the same for the County of
18 Philadelphia as it is for the State of
19 Pennsylvania, statewide.

20 I think it is difficult to argue, given
21 those facts, that there is some kind of problem
22 regarding prosecutorial overuse of the death
23 penalty which is resulting in some
24 disproportionate, unfair number of people being
25 subjected to the death penalty and thereby

1 requiring some sort of judicial review of a
2 process which has always been entrusted to a
3 different branch of government.

4 REP. MANDERINO: I was not suggesting
5 that there was any misconduct. I was only
6 asking whether or not that issue is something
7 that should be measured. Because I am now
8 taking you to Gribble -- if I understand now
9 what everyone on both sides are afraid or
10 hopeful or whatever of what will happen in
11 Gribble -- what I am hearing is that the defense
12 saying the universe should be bigger and that
13 bigger universe should look at things which are
14 not heretofore looked at and the things that
15 they should be looking at, the cases they should
16 be looking at, are cases where the prosecutor
17 decided not to ask for the death penalty so the
18 death penalty was not in front of the jury to
19 consider; and further, they argue that the
20 legislature should not do anything until we see
21 what Gribble says.

22 The prosecutors are saying the universe
23 should not be any bigger than it has been
24 heretofore, you should not expand it as is being
25 expounded by the defense bar; and furthermore,

1 the legislature should act to -- before a
2 Gribble decision comes down -- to preempt any
3 potential result from Gribble that goes beyond
4 that.

5 Now, am I hearing it wrong from your
6 perspective? And if not, what are you
7 suggesting that we do proactively as a
8 legislature to get rid of -- or are you
9 suggesting that we act as a legislature
10 proactively to get rid of proportionality review
11 or something else?

12 MR. EISENBERG: Well, that would
13 certainly be a reasonable response to the
14 problem and not an unusual one for the
15 legislature to undertake.

16 In other situations where the
17 legislature is aware of pending litigation which
18 it believes could result in a misinterpretation
19 of the statutory intent, the legislature has
20 attempted to correct that problem.

21 It is not the only way to avoid this
22 problem. It would certainly be a way of doing
23 it.

24 And I think it is important to remember
25 that when we talk about, for example, this issue

1 of prosecutorial discretion in relation to
2 proportionality review that the defense is not
3 asking that to have proportionality review
4 expanded in order to have the Court directly
5 look at prosecutorial discretion. That is just
6 one of the factors which in the defense view
7 would sort of scientifically be factored in to
8 the equation. Not by some sort of specific
9 category about prosecutorial discretion, but
10 really just sort of automatically along with
11 lots of other factors.

12 We would look at everything, says the
13 defense, every case that could possibly result
14 in a death penalty if the prosecutor had decided
15 differently, if the judge had decided
16 differently, if the jury had decided
17 differently, if the individual juror had decided
18 differently.

19 The Chairman mentioned the example
20 earlier, for example, of a hung jury where one
21 juror cannot reach the same result as the rest
22 and Mr. Zuckerman responded consistently with
23 his argument in Gribble that that sort of case
24 should be included in the data base, too.

25 So what is really being argued is not

1 that there should be some sort of special focus
2 on prosecutorial discretion, but that if we have
3 a large enough data base and we quantify these
4 issues by having experts come in and run studies
5 for us that we will really be able to escape the
6 bounds of concerns about prosecutorial
7 discretion or jury bias or judges (as defense
8 attorneys often argue) being lenient, in favor
9 of the prosecution on death penalty issues
10 because they are afraid of not being re-elected.
11 We will be able to get beyond all of that
12 through this sort of scientific analysis.

13 And we will know, we will be able to
14 discern whether one case really compares with
15 another in some objective sense that allows us
16 to move beyond the alleged biases of
17 prosecutors, judges, juries or whomever.

18 REP. MANDERINO: My final question is
19 -- as a legislature, I feel very strongly and
20 take very seriously the United States Supreme
21 Court guideline that our state death penalty, we
22 must assure that it is not arbitrary and
23 capricious -- if I were to agree with you that
24 eliminating the proportionality review will not,
25 that that was not what measured that

1 arbitrariness and capriciousness and you
2 suggested that the check and balance that is in
3 place other than the proportionality review is
4 the election ballot, the ballot of the
5 electorate for district attorneys across the
6 Commonwealth, do you have just any other
7 suggestions, other checks and balances that
8 might also be appropriate? Or am I making my
9 decision on whether to eliminate proportionality
10 review on whether or not I think the election
11 box for DA's is a sufficient checks and
12 balances?

13 MR. EISENBERG: Well, let me get back
14 to that point, Representative Manderino. I was
15 referring to the process of elections on the
16 issues specifically of the discretion of any
17 public official, not on the larger question or
18 the separate question of checks and balances
19 within the legal system concerning the death
20 penalty or any other criminal conviction.

21 REP. MANDERINO: But the arbitrary and
22 capricious notion of our statute of the death
23 penalty, that is where I was focusing.

24 MR. EISENBERG: And I am focusing on
25 the same.

1 REP. MANDERINO: Okay.

2 MR. EISENBERG: What the primary check
3 and balance on arbitrariness and capriciousness
4 in the imposition of capital punishment is, on
5 the front end, the legislation itself and, on
6 the back end, the kind of appellate review which
7 has always existed in our capital cases under
8 this statute and earlier where the Court looks
9 at an individual case and considers claims of
10 legal error by the judge or ineffectiveness in
11 the assistance of counsel or prosecutorial
12 misconduct by the DA; those are claims that come
13 up in any sort of criminal case, including in
14 capital cases.

15 And they are decided against a
16 consistent body of law. That is the way it is
17 supposed to work, appellate review. That is the
18 nature of appellate review. There are supposed
19 to be consistent rules developed over time so
20 that one case can be compared to another in that
21 legal sense, in terms of claims of legal error.
22 Not in the sense of the Court deciding, well,
23 gee, I think this guy is more worthy of dying
24 than that guy because this guy had a good
25 background and the other guy did not. Well,

1 once we get into that sort of analysis, we are
2 really at sea, in terms of appellate review.

3 How do we even decide, that two people
4 commit similar crimes (the example was mentioned
5 before) one has a good background, he was
6 brought up with all the advantages and resources
7 of life; the other one was disadvantaged as a
8 youth? Well, does the good background of the
9 one constitute aggravating evidence or
10 mitigating evidence?

11 I can well imagine a defense attorney
12 arguing that the jury should look at all the
13 good things that this person did (he went
14 through school, he got lots of A's, he was nice
15 to his parents, etc.) as evidence in mitigation.
16 And I can easily imagine the prosecution in the
17 very same case arguing, hey, that is not
18 mitigation, that is aggravation, he had all the
19 advantages and he murdered somebody anyway.
20 First degree, premeditated murder.

21 And the jury has to decide that sort of
22 question. And so the idea that we can have some
23 sort of a statutory system whereby courts
24 eliminate arbitrariness and capriciousness by
25 making that sort of value judgment on their own,

1 I think is elusory. The Courts cannot make
2 those sorts of value judgments. And having that
3 sort of review does not promote or protect
4 against arbitrariness and capriciousness, in a
5 sense.

6 REP. MANDERINO: So it is elusory to
7 think that we can design a system that, not on a
8 case by case basis administers justice
9 appropriately, but on a macro level looks at --

10 We cannot really design, what you are
11 suggesting is we cannot really, we are kidding
12 ourselves by thinking that we can design a
13 system that, macro, will look at the whole
14 universe out there and say is it being
15 arbitrarily and capriciously administered, we
16 can only successfully look on a case by case
17 basis?

18 MR. EISENBERG: As to the legal system,
19 the Court system, yes. The way in which we can
20 address those sorts of questions, appropriately,
21 I think is through the legislative process.

22 The legislature is certainly free to
23 decide, hey, the penalty should be available in
24 these sorts of circumstances ... they are not
25 ... maybe not have it at all, ... maybe have more

1 aggravating circumstances, fewer aggravating
2 circumstances, different kinds of mitigating
3 circumstances. The statute can certainly be
4 changed if the legislature judges: is that
5 necessary?

6 The US Supreme Court has really made
7 that clear, that that really is the primary
8 focus in terms of arbitrariness and
9 capriciousness, how we design the statutory
10 scheme.

11 REP. MANDERINO: Thank you very much,
12 Mr. Chairman.

13 CHAIRMAN GANNON: Thank you very much,
14 Representative Manderino.

15 Representative Masland.

16 REP. MASLAND: Thank you, Mr. Chairman.

17 I have a couple of comments and I am
18 probably going to throw in at least one question
19 here. But I do think that you have framed the
20 issue accurately, in that it is really a
21 question of who is going to decide these cases.
22 Is it going to be the 12 people, the 12 men and
23 women who are selected to sit on that jury? Or
24 is it going to be a Supreme Court down the road
25 with a set of facts that they give to the staff

1 or scientists who are going to cull through this
2 huge universe and come up with a decision?

3 As someone who has practiced law,
4 though I never did actually handle a death case,
5 I did have some homicide cases, but none in
6 which death warranted an inverse (phonetic)
7 problem to the discretion that we exercised in
8 those cases. But it is very difficult. In any
9 case, it is very difficult to get 12 people to
10 agree. And it is even more so after you have
11 gotten past this situation where you have gotten
12 them to agree that the person is guilty and then
13 you have to get them to the next phase to agree
14 death or life. That is extremely difficult.

15 And I do not think we want to minimize,
16 if you will, the discretion that the jurors use
17 at that stage by saying, you are totally off
18 base, we are going to get this mountain of
19 material and we are going to cull through it and
20 we are going to decide whether A through Z
21 really does apply in this case.

22 I think, as you noted, the
23 ludicrousness of resorting to pure science is
24 just, well, it is ludicrous.

25 And I do not think, no matter how

1 technologically advanced we get, we are ever
2 going to have a computer system that is going to
3 come up with some great data base that we can
4 fill all of these things in and say we have all
5 10,000 homicides since 1978 and we can just
6 punch in a couple of numbers and we will be able
7 to tell you whether this is appropriate or not
8 appropriate.

9 And I sense your concern -- I think
10 this is getting back to Representative Carn's
11 question to you -- is not so much the existing
12 interpretation by the Supreme Court, but the
13 potential for a different interpretation.
14 Whether it is Gribble or son of Gribble,
15 eventually the Court could say, yeah, I think we
16 are going to consider everything, but we really
17 are going to act as a super jury and redecide
18 all of these things instead of just allowing
19 trial courts and jurors to do that and I think
20 that is an appropriate concern.

21 Now, one question I have -- since I am
22 not an expert in this area and certainly not on
23 the disproportionate issue -- has the Court ever
24 distinguished in that clause the sentence of
25 death is excessive or disproportionate, have you

1 ever distinguished between the two terms,
2 excessive and disproportionate? And how so?

3 MR. EISENBERG: That is a very good
4 question, Representative Masland. And to my
5 knowledge, the Court has not. And I think it
6 would be difficult to do so. Although there are
7 two different words there, it is not clear to me
8 how the Court could at least set up a process
9 for review that would be different from one
10 standard to the other. Conceivably, there might
11 be a case that one could imagine where one would
12 say, well, this is excessive even if not
13 disproportionate, or this is just
14 disproportionate even if not excessive.

15 But it is difficult to imagine how you
16 get to that point except by undergoing the kind
17 of proportionality review process where you look
18 at other cases in extreme detail that we have
19 discussed.

20 If you did not do that, I do not know
21 how you would know either that the case is
22 disproportionate or that it is excessive.

23 REP. MASLAND: Well, again, I have no
24 expertise there. But I just was thinking, it
25 seems like we are focusing entirely on the term

1 disproportionate and I was wondering if there
2 were any cases out there that did focus on the
3 term excessive.

4 I think you if put all three of those
5 clauses together even without the
6 disproportionate, if you look at the arbitrary
7 factor, if you look at the passion, the
8 prejudice, the evidence failing to support the
9 aggravating circumstance, I think what you
10 ultimately come up with is just a sense of
11 whether or not it is appropriate.

12 And you can have a meaningful review
13 with that general sense without resorting to
14 some scientifically precise terminology. I
15 think that that is what, whether we keep this
16 phrase in there or not, ultimately I would see
17 the Supreme Court still trying to get some feel
18 for how this case fits in with everything else
19 they know.

20 And that is something we expect our
21 justices to do. We do not expect to elect them
22 and have them throw out all of their common
23 sense or all of their background, their
24 understanding. So they are going to have a feel
25 for that without dwelling disproportionately on

1 the term disproportion.

2 MR. EISENBERG: I think that is a very
3 good point, Representative.

4 And I think that it is important to
5 remember that what is at stake here is not even
6 just whether the Supreme Court winds up issuing
7 a decision in Gribble or some later case which
8 says, all right, now we have got to do these 20
9 million things. If a climate develops where the
10 way that these claims get litigated, get argued
11 in court, is that each side has to write briefs,
12 spanning hundreds of pages, discussing the facts
13 of dozens or hundreds of other cases, that, in
14 and of itself, is going to bring the review
15 process to a screeching halt.

16 Because it is going to take so long to
17 write those briefs and so long for the Court to
18 read those briefs and so long for the Court to
19 then write an opinion digesting and resolving
20 the conflicts between those briefs that we are
21 going to see the process suddenly balloon again
22 to one that takes years.

23 REP. MASLAND: And I am sure those
24 Justices will each individually read all 100
25 pages, plus all the supporting data, just as we

1 legislators do the same with our budget and
2 everything else we receive so I am comforted by
3 that. Thank you.

4 CHAIRMAN GANNON: Thank you,
5 Representative Masland.

6 Representative Schuler, a question?

7 REP. SCHULER: No.

8 CHAIRMAN GANNON: Just a follow up.
9 Because I asked the same question to the last
10 witness. And the answer, I believe, is going to
11 be a little bit different. And that is, if the
12 Court were to agree that the methodology and
13 data, on which these proportionality reviews
14 were done, for prior cases, what effect would
15 that have on these prior cases that have already
16 had a proportionality review?

17 And the other thought that occurred to
18 me: as you go further back to these older cases,
19 that data base gets smaller and smaller. I
20 mean, that data base is constantly growing, so
21 at what point does it become so big it becomes
22 unmanageable?

23 Getting back to my question, though.
24 What impact would that have on those cases where
25 a decision has been made that this particular

1 case passed muster as far as proportionality is
2 concerned?

3 MR. EISENBERG: That is a very
4 interesting question. I would imagine that the
5 defense argument would be -- and I think Mr.
6 Zuckerman alluded to this -- that as the data
7 base becomes larger and we have more, quote,
8 unquote, information about proportionality that
9 it will be necessary to re-review those cases to
10 decide whether they are still proportional.

11 After all, what we are about here is
12 whether the penalty being imposed is
13 proportionate. And if ten years pass from the
14 time of the jury's verdict to the time where the
15 penalty is going to be imposed, one can see a
16 strong argument being made to the Court that you
17 ought to look at proportionality again on the
18 basis of this new information.

19 And the argument would be made to the
20 Court, hey, it is not like we overlooked this
21 claim earlier, it is not like we gave it up or
22 passed it by and tried to hide something from
23 the Court. The reason we did not raise this
24 claim earlier is because we did not have the
25 knowledge, we did not have the facts to tell you

1 about cases 2,000 through 3,000. Because at the
2 time you first looked at this case, we only had
3 cases 1 through 100.

4 And I think that that's a serious
5 problem. And the genesis of that problem
6 resides with the basic notion that we can have a
7 court look at cases and meaningfully compare,
8 after the fact, the details of dozens, hundreds,
9 thousands of cases, one with another, and make a
10 value judgment about which ones are good and
11 which ones are not good in some way that has a
12 meaningful relationship to the other cases.

13 I think that is a very problematic
14 question, whether a court can legitimately do
15 that.

16 But if we say that a court can and if
17 we say that the Court should be doing that from
18 here on out for future cases in some expanded
19 fashion, then I think that the most likely
20 result is the Court will say it should do it for
21 past cases, too, and redo it as necessary.

22 CHAIRMAN GANNON: Okay. Getting back
23 to some comments that were made by
24 Representative Carn, which I really think that
25 he had some good points, but I am having, I am

1 trying to reconcile:

2 In the statute itself, it says that the
3 Court shall affirm the sentence unless it
4 determines that it was the product of passion,
5 prejudice or any other arbitrary factor and then
6 later we have this proportionality review and I
7 am trying to figure out how you reconcile this
8 proportionality review, which more -- and in the
9 discussion I heard -- I heard the element, the
10 administration of our system of justice, and the
11 other section deals with this specific case to
12 make sure that this particular defendant gets
13 appropriate justice and I am just trying to get
14 your comments on how you view that.

15 MR. EISENBERG: Well, I think that that
16 portion that you have mentioned Representative
17 Carn referring to, for example, the product of
18 passion, prejudice and any other arbitrary
19 factor is a very important aspect of appellate
20 review in these cases that the legislature has
21 entrusted to the Court.

22 And although the Court is not going to
23 take a sort of scientific statistical systemic
24 sort of look at all cases in answering that
25 question under that provision of the statute, it

1 is going to look at its body of case law in
2 answering that question. In other words, in
3 deciding whether something is a product of
4 passion or prejudice or arbitrary factors, the
5 Court is going to look at case law, it is going
6 to look at the opinions that it has issued over
7 the years in death penalty cases and in nondeath
8 penalty cases.

9 And, of course, that is what the Court
10 has been doing all the long when this sort of
11 claim is brought before it in the capital case.
12 It looks at its body of case law so that the
13 decision that it is making about this individual
14 case is in some sense intended to bring into
15 consistency this case with the other cases that
16 have come before the Court. Not, I think, in
17 the social scientist, sociological sort of sense
18 that is now being argued to the Court, but in
19 the traditional nature of legal review.

20 And I think that that is not an
21 insignificant factor in guarding against
22 arbitrary or capricious sentences in this
23 context or in any other.

24 When it comes to the kind of
25 sociological policy sort of review that we are

1 talking about with proportionality review,
2 though, that really is an import of a very
3 different nature. And I suggest, as I have
4 said, that that, the kind of import which
5 traditionally has been reserved to the
6 legislature to engage in and which the
7 legislature can properly consider doing over
8 time as conditions change.

9 CHAIRMAN GANNON: Let me ask you a
10 hypothetical question. If the legislature said,
11 look, proportionality, when it was enacted, was
12 more of a common sense approach (you know, you
13 are not going to sentence somebody to death row
14 for robbing a parking meter but a jury could do
15 that so we ought to take a look at that type of
16 a case and say this is totally out of wack) but
17 instead of proportionality -- and Representative
18 Masland made me think of this -- if it was
19 changed to excessive, so that, I guess the
20 axiom, did the punishment fit the crime, would
21 be applicable as opposed to some socioeconomic
22 scheme. I do not know if you have any reaction
23 to that.

24 MR. EISENBERG: Well, that is something
25 to think about. It actually gets for me to,

1 again, some comments of Representative Carn and
2 Mr. Graci, which it is hard to take a yes or no
3 position on this kind of thing, given that there
4 really are a variety of possible approaches.
5 But on this particular question --

6 CHAIRMAN GANNON: If I may interrupt
7 you just a second.

8 MR. EISENBERG: I am sorry.

9 CHAIRMAN GANNON: Maybe my question was
10 misphrased. I am just wondering if we get into
11 the same problems with that, with the word
12 excessive, that we get into with the word
13 proportion?

14 MR. EISENBERG: I think there is
15 something of that danger. I think it lessened.
16 I think it may still exist to some degree. In
17 theory, at least, it could call on the Court to
18 make its own decisions, its own value judgments
19 about what sort of facts merit the death penalty
20 which really is the essential question before
21 the jury. So it is very much a question of how
22 the Court would exercise that sort of a power.

23 We do have an analogous sort of review,
24 even under Federal Constitutional principles.
25 There have been arguments made that the Federal

1 Constitution prohibits the death penalty for
2 certain kinds of offenses. For example, that it
3 would be cruel and unusual punishment to impose
4 the death penalty for the crime of rape without
5 any sort of accompanying murder;

6 That it would be cruel and unusual
7 punishment to impose the death penalty for
8 murder which is not intentional murder where the
9 defendant is convicted of some sort of an
10 accomplice in a homicide, but he did not
11 personally have any sort of intentional murder.
12 And in that case, for example, the US Supreme
13 Court has said that that would be
14 unconstitutional. In effect, that would be an
15 excessive punishment for the crime.

16 So I think that this concept of
17 excessiveness really is embodied to, in
18 appropriate extent, in the constitutional
19 requirement of cruel and unusual punishments.

20 CHAIRMAN GANNON: So, basically, it is
21 just another way of saying excessive so it would
22 be redundant.

23 MR. EISENBERG: I think that may be
24 true.

25 CHAIRMAN GANNON: Brian.

1 MR. PRESKI: Mr. Eisenberg, if you
2 could, the questions that I have are procedural.
3 As a prosecutor, you know when you impact on
4 that jury that you are going to seek the death
5 penalty, is that not correct?

6 MR. EISENBERG: Well, yes, we are
7 required by the Rules of Criminal Procedure to
8 actually give specific notice to the defense in
9 advance of trial about any aggravating
10 circumstances that we might be seeking.
11 Certainly, things can change during the course
12 of the trial.

13 MR. PRESKI: So the defense knows which
14 of the 17 aggravating circumstances you will
15 move under prior to the beginning of trial?

16 MR. EISENBERG: That is exactly true.

17 MR. PRESKI: And in the situation we
18 talked about before where the defendant was of a
19 good background as opposed to the defendant of a
20 bad background, you would not be able to list
21 that as an aggravating circumstance?

22 MR. EISENBERG: That is correct. The
23 jury would have the freedom, when it heard the
24 evidence, to decide whether they think it helps
25 or hurts, but not in the sense of finding it as

1 an aggravating circumstance.

2 MR. PRESKI: Okay. And then you are
3 required to prove your case on the first degree
4 premeditated homicide beyond a reasonable doubt?

5 MR. EISENBERG: Yes.

6 MR. PRESKI: You are also required to
7 prove the aggravating circumstance beyond a
8 reasonable doubt?

9 MR. EISENBERG: Yes.

10 MR. PRESKI: And from what Mr. Graci
11 said -- and I believe then Mr. Zuckerman
12 followed with this -- the defense for the
13 mitigating circumstances need only prove them by
14 a preponderance of the evidence?

15 MR. EISENBERG: Yes. And not
16 unanimously, either.

17 MR. PRESKI: Okay. So in order for you
18 to get to the penalty phase where a jury is
19 deciding death or not, you have to have a
20 unanimous agreement of the jury on aggravating
21 circumstances and consideration by at least one
22 member of that jury of mitigating circumstances?

23 MR. EISENBERG: (Nods head
24 affirmatively.)

25 MR. PRESKI: The death penalty itself,

1 procedurally, has to be agreed to unanimously?

2 MR. EISENBERG: Yes.

3 MR. PRESKI: Okay. So my questions
4 then becomes this: you talked about there were
5 two consequences if the legislature were to
6 reactively to what the Supreme Court may or
7 might not do in Gribble and it is my
8 understanding that the defender's request was
9 not a finding that proportionality review be
10 stricken for any reason, only that a moratorium
11 be placed upon it until the reliability of the
12 data could be assured?

13 MR. EISENBERG: Yes.

14 MR. PRESKI: Wouldn't that, in effect,
15 though, basically undo the statute because you
16 would then have to have further proceedings of
17 the Court to determine that, okay, we are
18 happier, we are satisfied now with the data?

19 MR. EISENBERG: Yes, you certainly
20 would. And presumably, given that a lot of time
21 has passed since Gribble, the Court is already
22 in the process of deciding whether it is
23 satisfied with the data. And if it decides that
24 it is not satisfied with the data, then I think
25 a great many cases will be affected.

1 MR. PRESKI: Okay. Then what you said
2 in your testimony was that if the Court acts
3 would be too late for the legislature because
4 there would be two consequences: one, it would
5 knock out all existing death penalties, and,
6 there would be a new proportionality review
7 requirement to be conducted for all existing
8 cases?

9 MR. EISENBERG: Well, as the past
10 cases, one or the other of those could occur.
11 Either the Court could just knock them out from
12 the get go or it could say we have to have some
13 sort of redetermination as to all of them. As
14 to future cases, they would be.

15 MR. PRESKI: Okay. Given what the
16 Supreme Court said -- and when I say the Supreme
17 Court said, in Pulley versus Harris -- there is
18 no proportionality requirement. To follow up on
19 the Chairman, if this committee and this General
20 Assembly were to strike the proportionality
21 review portions of the existing statute, what
22 would the effect be upon those defendants now
23 subject to the death penalty?

24 MR. EISENBERG: Those defendants would
25 not have to go through a proportionality review

1 by the Court. I believe -- and Mr. Graci
2 touched on this question -- that even those
3 defendants who already have been sentenced to
4 death and may have appeals in progress but not
5 completed would not have to be subjected to a
6 proportionality review because the right, so to
7 speak, to that proportionality review vests at
8 the time that it is conducted by the Court, not
9 at some earlier time. And when this legislature
10 has changed the nature of appellate review in
11 the past concerning the opportunity for a remand
12 for a hearing, the Supreme Court has held that
13 that change applied to pending cases to pending
14 appeals.

15 MR. PRESKI: I guess that is the basis
16 of my question then. For those defendants who
17 have been convicted and subject or sentenced to
18 the death penalty, but they have not yet had
19 their review conducted, if this legislature was
20 to change that statute, the Supreme Court could
21 not, under any concept such as laws of the case
22 or anything else, say that we are going to
23 review these existing cases under the old
24 statute, we will conduct further reviews under
25 the new statute?

1 MR. EISENBERG: I do not think it would
2 be a fair result, an appropriate result for the
3 Court to do that, that's correct. And in
4 analogous context, the Court has not do that.
5 The Court has applied the new, then-existing
6 law.

7 MR. PRESKI: Okay. Thank you.

8 CHAIRMAN GANNON: A follow-up question
9 following up on what Mr. Preski said. What
10 about a case where there was a proportionality
11 review and it was found that it passed the test
12 and then the legislature struck that section of
13 the law, would that person or that case have an
14 appeal under the old statute or would that come
15 under the new statute?

16 MR. EISENBERG: In my opinion, they
17 would have to come under the new statute because
18 they would have to initiate some new sort of
19 action, a PCRA provision, some sort of
20 collateral petition in order to bring that issue
21 before the Court and that new appeal would be
22 governed by the rules for appeal that would
23 apply at that point in time.

24 CHAIRMAN GANNON: Thank you very much
25 for your testimony today.

1 Are there any other questions?

2 (No response.)

3 CHAIRMAN GANNON: Thank you, Mr.

4 Eisenberg.

5 Our next witness is Mr. Larry Frankel,
6 who is the Executive Director of the American
7 Civil Liberties Union. Welcome, Mr. Frankel.
8 Thank you for being here today.

9 MR. FRANKEL: Thank you, Chairman
10 Gannon, and the other Members of the Committee,
11 for asking us to provide some views on the issue
12 of proportionality review.

13 Before I go into my testimony, I would
14 like to make it clear: we are not involved in
15 the Gribble case at all, we did not file an
16 amicus, and they are not, other than having
17 reviewed some of the briefs, not familiar with
18 the specifics of that case and therefore have no
19 specific stakes in the outcome of that decision.

20 As you already have heard today,
21 Pennsylvania's death penalty statute does direct
22 our Supreme Court to undertake review in each
23 and every death penalty appeal to determine
24 whether, quote, the sentence of death is
25 excessive or disproportionate to the penalty

1 imposed in similar cases, considering both the
2 circumstances of the crime and the character and
3 record of the defendant.

4 And I believe that those words have
5 some significance and I will come back with
6 that.

7 But I would note at this point that
8 when the General Assembly enacted this current
9 death penalty statute, it made -- and I will use
10 Mr. Eisenberg's words -- a value judgment at
11 that time that it was appropriate, if not even
12 necessary, for the State Supreme Court to
13 undertake its own review of each death penalty
14 case to determine whether the penalty was
15 excessive or in some ways disproportionate to
16 that imposed in similar cases.

17 That rule has been given to the State
18 Supreme Court and, in fact, it is consistent
19 with the constitutional duty of the Court to
20 make sure the jury decisions not only do not
21 violate the law, but particularly with regard
22 for the death penalty, so they are not
23 arbitrary, not capricious and not the subject of
24 factors that are unintended or irrelevant.

25 We believe the proportionality review

1 should assist the Commonwealth's highest court
2 in discovering those death sentences which are
3 the product of prejudice and/or capriciousness.
4 We think the proportionality review can act as a
5 check against sentencing aberrations.

6 We acknowledge that the United States
7 Supreme Court in the Pulley versus Harris
8 decision did state that each state does not need
9 to provide for proportionality review if its
10 capital sentencing procedures otherwise include
11 adequate checks on arbitrary sentencing.
12 Therefore, if one were to remove proportionality
13 review, one would still have to ensure that
14 there was an adequate check within the system.

15 However, there is considerable
16 evidence, which I will be discussing, that the
17 Pennsylvania death penalty system does not
18 function in a manner that prevents certain
19 arbitrary and frequently unfair imposition of
20 the death sentence. Therefore, we at the ACLU
21 believe that the Pennsylvania Supreme Court must
22 engage in a thorough review of all first degree
23 murder cases to ensure that no defendant is
24 improperly executed. Comprehensive appellate
25 review properly carried out is necessary to

1 guarantee that the death penalty is applied in a
2 consistent manner, regardless of geography, race
3 or wealth.

4 In fact, we believe that the Supreme
5 Court of Pennsylvania in Commonwealth versus
6 Frey articulated its understanding of its own
7 obligation to engage in an intensive review of
8 death sentences to prevent the discriminatory
9 use of the death sentence. You have heard about
10 Frey already today. The Court set forth what
11 kind of information it felt it needed in order
12 to make that kind of review.

13 Unfortunately, since Frey, our Supreme
14 Court mainly (inaudible) did not have received
15 the required information. You have heard some
16 discussion about flaws in the information
17 collection process which may include the
18 inadequate reporting of mitigating circumstances
19 and the virtual absence of information on any of
20 the cases that have been tried as capital cases
21 but which have resulted in life sentences. I do
22 not know how you engage in a review to determine
23 whether a sentence is excessive or
24 disproportionate because it is a death sentence,
25 if all you compare it to is other death sentence

1 cases.

2 I think you have to include in the
3 universe of cases, some of the cases that were
4 at least initially treated as capital cases,
5 because no bail was allowed or the notice was
6 sent out that the prosecutor was treating it as
7 a death case, and look at what the result was,
8 whether it was because a plea agreement was
9 reached or because the jury did not come back
10 with first degree murder or the jury came back
11 with life sentence.

12 But how can you determine whether a
13 sentence is excessive or disproportionate if all
14 you are comparing it to is cases where the
15 sentence was the same? I do not understand how
16 you do it. And I would be interested if someone
17 could enlighten me as to how you can make those
18 comparisons.

19 And as you already heard, there have
20 been about 140 cases, maybe as many as 150,
21 where the State Supreme Court has indicated that
22 they engaged in proportionality review and find
23 the sentence is proportionate, but it is hard
24 for us to conclude that the meaningful
25 proportionality review has, indeed, occurred.

1 We know of no cases -- and it is been
2 affirmed today -- where the Court has reversed a
3 death sentence on that basis. The portion of
4 the Court's opinions are maybe a paragraph,
5 sometimes a footnote, to indicate that they have
6 engaged in it, but then we learn that there has
7 possibly been some flaws in the evidence. It is
8 hard for us to believe that a meaningful level
9 of review has occurred and we think that may be
10 one of the reasons the Court is taking on these
11 issues in the Gribble case.

12 However, as I indicated earlier, we
13 support a thorough review. And it is not just
14 proportionality. We mean a complete review of
15 death sentences to guard against improper
16 imposition of the death penalty in Pennsylvania.
17 We think that there is considerable evidence
18 that the capital sentencing system in
19 Pennsylvania is so dysfunctional that our courts
20 need to have the necessary authority and tools
21 to correct sentences which are arbitrary or
22 unjust or the result of disparities in race,
23 wealth, quality of representation or the county
24 of trial.

25 And I would like to briefly discuss

1 several factors that we think are important.

2 In Pennsylvania, a disproportionate
3 number of those on death row were tried in one
4 county: Philadelphia. As of the end of March of
5 this year, of the 207 prisoners sentenced to
6 death in Pennsylvania since capital punishment
7 was reinstated, 115 (or 55 percent) of the
8 Pennsylvania cases were tried in Philadelphia.
9 We do not think it is the result of an excessive
10 murder rate in Philadelphia, rather we know that
11 Philadelphia prosecutors have a history of
12 taking a very aggressive posture in these cases.

13 In fact, the New York Times Sunday
14 Magazine carried an article on this, which may
15 be good politics for prosecutors, but did
16 reflect that, at least in Philadelphia, whenever
17 they think there is an aggravating circumstance,
18 they will always at least initially treat it as
19 a capital case.

20 It does not seem that necessarily
21 occurs once you get across City Line Avenue.
22 Although, the prosecutor has not articulated yet
23 why he does not believe the death penalty case
24 is what he has: the famous case involving Mr.
25 Rabinowitz is already not a death penalty case.

1 And the arbitrariness of geography, if not
2 wealth, is rather troubling to some of us, at
3 least in the part of the state that I am from,
4 that, you know, maybe you have an incentive to
5 go across City Line to commit your murder
6 because they are not going to as aggressively
7 pursue the death penalty.

8 At the same time, we know that the vast
9 majority of capital defendants in Philadelphia
10 have been represented by appointing counsel that
11 Mr. Zuckerman from the Defender's Office noted
12 that they have been involved only in the last
13 two years and in those cases, up until 1990,
14 there were no standards for Philadelphia, only
15 one attorney was normally appointed (not two as
16 is common in other counties) limitations were
17 placed on the funds that they could use to hire
18 experts.

19 I only point this out because I think
20 it underscores a problem of geographic
21 disparity.

22 Now, proportionality review may not be
23 able to address geographic disparity, but
24 certainly, somebody is going to have to, at some
25 time, because I do not think you have a fair

1 system if one county's death penalty system is
2 working so differently than that which occurs in
3 other counties.

4 Beyond the problem of geography, it
5 appears that race plays too important a role in
6 determining the fate of capital defendants. And
7 it is not only the race of the defendant that is
8 important, it is also the race of the victim.

9 According to the NAACP Legal Defense
10 and Education Fund, as of the Summer of 1996,
11 there have been 335 executions since 1976. Over
12 80 percent of the victims in the cases that led
13 to those executions were white and only 1
14 percent of the cases was a white defendant
15 executed for killing a black person. (While in
16 comparison, in 22 percent of the cases the
17 defendant was black and the victim was white.)
18 I do not have any statistics specifically for
19 Pennsylvania as to the race of the victims. I
20 was not aware and I am still not aware that that
21 is actually compiled in any place, but there is
22 no reason to think that it is different in this
23 state.

24 There are other studies that have been
25 conducted which demonstrate that a person who

1 murders a white person, regardless of the
2 defendant's race, is much more likely to receive
3 the death penalty than a person who murders an
4 African American. But the race of the defendant
5 can be also very important. The statistics from
6 our own Department of Corrections indicate that
7 in Pennsylvania about two-thirds of the inmates
8 on death row are nonwhite. This situation is
9 even more skewed with respect to death row
10 inmates from Philadelphia. Among those inmates,
11 almost 90 percent are nonwhite.

12 And I would like to go back to the
13 issue of value judgments and whether we look at
14 what juries do. But if we have juries in one
15 county or even throughout the state consistently
16 applying a different standard based on the race
17 of a victim, we do need an appellate court that
18 addresses those issues. We cannot just ignore
19 it in the name of saying, well, the juries made
20 those value judgments. I mean, we have got to
21 have a system that at least puts out the
22 appearance of fairness or it will not have the
23 competence of many members of the public.

24 Another factor I would like to draw
25 your attention to is that in the last

1 two-and-a-half years, the General Assembly
2 itself has passed several pieces of legislation
3 that favored the imposition of the death
4 sentence and the execution of defendants. The
5 list of aggravating factors has been expanded,
6 victim impact statements can now be used in
7 death penalty cases.

8 With the Governor's blessing, a law was
9 passed that limited his own discretion with
10 regard to the signing of death warrants. The
11 post conviction procedure has changed with
12 regard to death penalty cases.

13 And in this last budget, as Mr. Graci
14 noted, the Attorney General's Office received an
15 increase in funding of half a million dollars to
16 prosecute death penalty cases, but no money was
17 appropriated for defense counsel to allow them
18 to increase their skills or their capacity to
19 handle these cases.

20 I think when you put these factors
21 together of what the legislature and the
22 Governor have done over the last two-and-a-half
23 years, you really see a pattern of helping one
24 side and not helping the other. I think
25 eliminating proportionality review, you know,

1 may, indeed, help an argument that maybe people
2 like me want to make that the system is so
3 inherently unfair, Pennsylvania cannot have it
4 because the legislature continually acts to
5 restrict the ability of defendants to raise
6 certain issues and continually permits the use
7 of the death penalty be expanded.

8 The Supreme Court says you can use the
9 death penalty when it narrows the discretion and
10 really focuses on the cases where death is
11 appropriate. This legislature should bear that
12 in mind when considering the issue before it.

13 The last factor I would like to note is
14 that several years ago, the Supreme Court of
15 Pennsylvania and the Third Judicial Circuit of
16 the United States created a joint task force to
17 consider some of the complex problems with
18 respect to death penalty litigation in
19 Pennsylvania. That Task Force included members
20 of the State and Federal Judiciary, this General
21 Assembly, representatives from the Executive
22 Branch, attorneys, academics, representatives of
23 the American Bar Association and court
24 administrators.

25 The Task Force issued a lengthy report

1 in 1990 that identified a number of primary
2 problems, including the need to provide
3 competent representation by qualified and
4 trained attorneys at all stages of capital
5 punishment litigation. The Task Force also
6 noted that there should be qualification
7 standards for court appointed attorneys as well
8 as adequate compensation for those attorneys.

9 Sad to say, little has been done since
10 1990 to implement the recommendations of that
11 Task Force. The lack of a sufficient number of
12 qualified and adequately compensated attorneys
13 in death penalty cases continues to undermine
14 the integrity of death penalty litigation. The
15 sad reality is that the quality of
16 representation may, indeed, be the most
17 important factor in determining who is sentenced
18 to death and executed and who is not. (Not the
19 nature of the crime, not the background of the
20 defendant, but the quality of the lawyer.)

21 And I can say from my experience when I
22 was in private practice and having not handled
23 any death penalty cases directly but involved
24 either in some appellate cases or post
25 conviction, that some of the more horrible

1 crimes, even in my opinion, the defendants were
2 able to get away with life sentences because of
3 the quality of their attorney, who really knew
4 how to represent these defendants in these cases
5 to obtain a life sentence. They were qualified,
6 they were experienced and they had some
7 resources or knew how to use the resources that
8 were available to them.

9 The ACLU believes that these factors
10 that I have described demonstrate the compelling
11 need for a safety valve in our capital
12 sentencing scheme. We are realistic, however,
13 and we do not expect that the General Assembly
14 or the Governor can resist the considerable
15 political pressure that seems to favor swift
16 executions with greater lengths limits being
17 placed on procedural safeguards.

18 Experience has taught us that it is the
19 Courts that can be the only true safeguard in
20 this area.

21 That is why meaningful proportionality
22 review is important and why meaningful appellate
23 review is important.

24 Yet limitations on those kinds of
25 reviews demonstrate some of the problems that

1 exist today and also demonstrate that we need to
2 figure out a way.

3 I do not have a scheme devised and I
4 know there is things like the Racial Justice Act
5 which I am not sure it can work either and has
6 been suggested, but we have to find a way so
7 that factors like geography, race and wealth do
8 not play as significant a role in determining
9 who is sentenced to death and who is not.

10 In addition to my written testimony, I
11 have a few thoughts to offer, particularly with
12 regard to the speculation on Gribble, which has
13 not been decided. I am sure that the Supreme
14 Court has been duly warned that a decision on
15 their part which would, if not carefully
16 crafted, open the doors for tremendous levels of
17 review. That the Court is aware of that.

18 I do not think that they take lightly
19 the consequences of their decision and I do not
20 think it is appropriate to engage in some mere
21 speculation that we are going to have to go and
22 retry hundreds of cases for proportionality
23 review or that they will set up a universe where
24 there is going to be ten thousand cases for them
25 to review.

1 I have greater confidence that they
2 will look at this and say maybe we can improve
3 the process, maybe we need to do this better,
4 maybe there are some changes to be made.

5 I cannot predict what they will do, but
6 I am sure that they are aware that there will be
7 consequences to their decision and will not
8 invite consequences that they cannot deal with
9 and cannot handle.

10 That concludes my testimony, and I
11 would be happy to attempt to answer any
12 questions that any members may have. I do not
13 assure you that I can provide answers, but I can
14 sure give it a try.

15 CHAIRMAN GANNON: Thank you very much,
16 Mr. Frankel.

17 Representative James.

18 REP. JAMES: Thank you, Mr. Chairman.

19 And thank you for your testimony,
20 Larry, from the ACLU, it is always appreciated.
21 And I appreciate you providing your perspective.

22 In just reviewing some of the
23 information, from your perspective do you view
24 that the Philadelphia District Attorney's Office
25 may not want to expand their review because they

1 may be fearful of results, just from your
2 experience?

3 MR. FRANKEL: Based on what I have
4 heard today and based on my experience, I would
5 expect they would not want to expand the review
6 since the review to date has resulted in a
7 hundred percent batting average with regard to
8 proportionality review. Why would they want to
9 change it?

10 REP. JAMES: Okay. Also, do you know
11 if or how many people have been executed in
12 Pennsylvania and later turn out to be that that
13 was wrong, innocent of the crime?

14 MR. FRANKEL: I do not know that. I do
15 know ...

16 REP. JAMES: I have heard of one that I
17 remember, but I ...

18 MR. FRANKEL: No, we have only had two
19 executions in the last 30 years, so that maybe
20 minimizes that of the chances of that happening
21 have increased considerably. You know, with all
22 of the legislation that has passed, it is
23 conceivable that someone may be executed prior
24 to the exculpatory evidence coming to light.
25 Sometimes in other states, it has taken 10 or 15

1 years after the trial before the evidence came
2 out that, indeed, the person was not guilty.

3 Again, I do not know of any cases, but
4 I think we have increased the chances
5 considerably because of the time lines that have
6 been set up.

7 REP. JAMES: Thank you.

8 Thank you, Mr. Chairman.

9 CHAIRMAN GANNON: Representative Carn.

10 REP. CARN: Thank you, Mr. Chairman.

11 Thank you, Mr. Frankel. I want to
12 explore the issue of: in your testimony that
13 says, unfortunately, since Frey, our Supreme
14 Court has not required the compilation of all
15 the necessary data. The flaws in the
16 information collection process include, inter
17 alia, inadequate reporting of mitigation
18 evidence by trial courts and the virtual absence
19 of information on any of the cases that have
20 been tried as capital cases ... (on page two of
21 your testimony) ... and my QUESTION is, how
22 could there be an effective review if this
23 information has not been compiled?

24 MR. FRANKEL: I think it is difficult
25 to have an effective review. Maybe not as much

1 with the problem of mitigating evidence, but if
2 they have not also had evidence of cases that
3 did not result in the death penalty. I would
4 understand that that's one of the problems. At
5 least that it has existed. But they were really
6 -- and when you read their opinions. I mean,
7 most of the cases they talk about their
8 comparison with has been a case where a death
9 sentence was imposed.

10 As I stated earlier, I am waiting for
11 somebody to explain to me how you determine
12 whether a sentence is excessive or
13 disproportionate. A death sentence, if all you
14 are comparing it to is other cases that resulted
15 in the death sentence, you do not have a set of
16 cases to look to for comparison. So I think the
17 ANSWER to your question is, I am skeptical that
18 it has been as effective as it could be or
19 should be.

20 REP. CARN: Well, is there a legal
21 question there?

22 MR. FRANKEL: I am sure there is a
23 legal question and I think that is one reason
24 that the Court is --

25 The Court asked for supplemental briefs

1 in the Gribble case. And then Justice Castille
2 -- based on the briefs I have read -- himself is
3 the one who raised the issue of the universe of
4 cases. And these are issues that apparently are
5 troubling the Court at this time.

6 So I do believe there is a significant
7 legal and I think it is of a constitutional
8 dimension even though the US Supreme Court has
9 said you do not have to have proportionality
10 review if there is an otherwise adequate system.
11 That does not address the QUESTION: is there an
12 otherwise adequate system under the US
13 Constitution? Nor does it address the QUESTION:
14 does the Pennsylvania Constitution require
15 proportionality review even if the United States
16 Constitution does not require it?

17 REP. CARN: Thank you, Mr. Chairman.

18 Thank you, Mr. Frankel.

19 CHAIRMAN GANNON: Representative
20 Masland.

21 REP. MASLAND: Yes. Mr. Frankel, I had
22 just basically assumed that the ACLU was opposed
23 to the death penalty under any circumstances.
24 But I did note, through your oral and written
25 testimony, your use of the word improperly or

1 inappropriately on a couple of different
2 occassions. That some people may be improperly
3 executed and inappropriately executed the
4 improper imposition of the death penalty, which
5 to me means that, implicitly, the ACLU is
6 saying, admitting that there are cases when the
7 death penalty is appropriate and proper, is that
8 the case?

9 MR. FRANKEL: The ACLU does, indeed,
10 oppose the death penalty. However, given the
11 state of affairs in the Commonwealth of
12 Pennsylvania and having observed both the issue
13 of the death penalty much more on the sidelines,
14 I guess as a litigator than as an advocate here,
15 I find it almost -- I do not even have to ask
16 the question of whether I support or oppose it
17 in general because I think the system here has
18 failed to provide the fundamental level of
19 fairness with regard to representation, race and
20 geographical problems. That it is an issue
21 that, in some sense, I myself and I think the
22 ACLU of Pennsylvania itself does not have to
23 face.

24 If we had a much fairer system, I think
25 the question would be more difficult.

1 But to be candid, yes, the ACLU does
2 have a policy of opposing the death penalty. We
3 do think it is cruel and unusual punishment.
4 Some of the reasons that we think it is cruel
5 and unusual punishment, however, are because of
6 the race based factors, the lack of adequate
7 counsel -- the guarantees of adequate counsel
8 that purvey all over the country, not just
9 Pennsylvania.

10 REP. MASLAND: Okay. The reason I
11 asked is because that is what I thought your
12 position was. And I was thinking, well, if we
13 did X, Y and Z to improve the system, would that
14 satisfy the ACLU? My answer to that was, no,
15 they would still be opposed to the imposition of
16 the death penalty. But I could not help but
17 notice inappropriate and improper and take them
18 to implicitly mean that you are accepting the
19 reality and not just being realistic.

20 MR. FRANKEL: I am probably being
21 realistic in presenting testimony today, but I
22 do not think that that changes the fact that we
23 are --

24 We are troubled by the death penalty in
25 general, but we are specifically troubled by the

1 inadequate safeguards. Not necessarily not
2 solely an innocent person, but a person whose
3 murder and circumstances may not be worse than a
4 lot of guys who get life sentences but whose
5 lawyer was not as good or because there was some
6 racial bias on the part of the jury. That is
7 where the inappropriate may come in.

8 But we do oppose the death penalty.
9 But I think there are some specific problems
10 which I think we are capable of addressing here,
11 despite that opposition. That we accept the
12 fact that the death penalty has, is part of the
13 law of Pennsylvania, and we strive to see that
14 it is carried out in as fair and unarbitrary
15 manner as possible.

16 REP. MASLAND: Well, thank you. And
17 just so there is no confusion, I explicitly
18 believe that there are cases that are
19 appropriate and proper for the death penalty.
20 And I would like to see you guys come around to
21 that, too. Thanks.

22 CHAIRMAN GANNON: Representative
23 Manderino.

24 REP. MANDERINO: Thank you, Mr.
25 Chairman.

1 Just a clarifying point. Because I
2 thought I understood the universe until
3 something you said and now I am confused again.

4 Under the current law with regard to
5 looking at proportionality, the Supreme Court
6 proportionality review, are they looking at
7 cases where the issue of whether to give
8 somebody the death penalty was put before the
9 jury and both results happened, meaning they
10 said, yes, death penalty, or, no, not death
11 penalty, just life sentence; or, are they only
12 looking at those cases where the issue of the
13 death penalty was put before the jury and the
14 result was actually imposition of the death
15 penalty?

16 MR. FRANKEL: My understanding -- and I
17 am happy to be corrected if there is further
18 information -- my understanding, based on what I
19 have read and the cases that I have reviewed is
20 that only an occasional nondeath sentence case
21 even enters the realm of what they compare it to
22 and that may be as a result of their own
23 analysis and not the information supplied by the
24 Court system.

25 REP. MANDERINO: But what is a nondeath

1 penalty case? One where that was not given as a
2 sentence or one where that was not asked for?
3 That is where I am stumped.

4 MR. FRANKEL: And I am not sure. But
5 we do believe that it has to go beyond merely
6 the ones where it was asked for, if at some
7 stage the prosecutor did consider it a capital
8 case.

9 I mean, in trying to put some limit on
10 the universe -- I do not want to suggest that we
11 look at all homicide cases because I am sure
12 that there are many cases that the prosecutor
13 never intends to seek the death penalty because
14 they know there are no aggravating factors or
15 because they already know they are going to
16 enter into a plea agreement -- but where they
17 have at least at some point identified a case as
18 a death sentence case, that seems to be one that
19 is appropriate for the comparison purposes if
20 you are going to actually give meaning to the
21 words. How do you determine whether something
22 is excessive or disproportionate to similar
23 cases unless you do?

24 REP. MANDERINO: Thank you, Mr.
25 Chairman.

1 CHAIRMAN GANNON: Thank you. Just an
2 observation to follow up on what Representative
3 Manderino said. And I do not know the answer to
4 this, but I think what she is asking: we have
5 cases where the death penalty is asked for and
6 then the jury comes back with a nondecision,
7 (they just cannot agree), one, there is a holdup
8 and that results in a life sentence, is that
9 currently in the universe or is that something
10 that is being looked at to be put in the
11 universe?

12 So, in other words, we are expanding
13 this now, this data base is going beyond those
14 cases where there has been a crime and the
15 person has been sentenced to death.

16 MR. FRANKEL: I mean, I have two
17 thoughts. One is, if you want specific answers,
18 probably Mr. Pines, who was referred to today,
19 is the person to answer those questions.

20 But, secondly, if you factor out of the
21 universe all of those cases where the prosecutor
22 has exercised some discretion that it could have
23 qualified as a capital case, at least to go to
24 the jury, but the prosecutor has exercised some
25 discretion, then you are letting them control

1 the universal cases and I do not think we can
2 allow that to happen.

3 CHAIRMAN GANNON: It seems to me that
4 we have some core factors that the jury is going
5 to look at in weighing whether or not the
6 individual should be sentenced to death or not
7 and then they seem to get on the fringes of
8 these and we start to expand this, we start to
9 get more on the fringes. You know, what size is
10 their shoe? Are they left-handed or
11 right-handed? You know, I am being absurd. But
12 as we get further and further away from the core
13 elements of that and we have this and I think
14 somebody said the Supreme Court now becomes a
15 super jury, it starts to verge on, instead of
16 looking at empirical data and hard facts and
17 hard evidence, it starts to deal with
18 speculation as to why the jury did or did not do
19 something. It seems to me that is the area,
20 that is the direction that we start going as we
21 keep on expanding, not only the universe of the
22 case but also the elements of the
23 proportionality. So you start throwing things
24 in. It just seems to me that that is what is
25 happening here, at least the argument that I am

1 hearing.

2 MR. FRANKEL: I think that the State
3 Supreme Court can fashion the universe it wants
4 and limits elements which are really difficult
5 for it to evaluate at the same time trying to
6 guard against. One might be excessive or
7 arbitrary.

8 I think I disagree with the sense that
9 you either have to have the system that is in
10 place or the system where you have 100-page
11 briefs or 200-page briefs. I mean, I do not
12 think it is an either/or.

13 I think that is already an inaccurate
14 analysis. That there certainly is capacity
15 within the Court to fashion something. They
16 fashioned the information sheet in Frey. Maybe
17 they realized that after 13 years, that that
18 needs to be refined, they need to relook at the
19 number of cases. But they are not necessarily
20 going to say what we want you to do is, you
21 know, analyze 18 different sociological factors
22 and give us them all in briefs.

23 I do not think it is appropriate for
24 the legislature to jump to a conclusion when the
25 Court has not issued a decision yet.

1 And see what factors they determine are
2 important. Maybe they will determine there is
3 no need for refinement. Maybe as a result of
4 what was pointed out a couple of years ago, the
5 data base has improved sufficiently that it is
6 providing them with what they feel they need to
7 make an adequate determination.

8 What is, I guess troubling here is
9 there is speculation about what the Court may
10 do, being used as a justification to further
11 diminish the review power of the Court, when the
12 Court has not even made its decision yet.

13 I hear some witnesses really asking the
14 legislature to pre-emptively act on a decision
15 that has not been issued whose contents we do
16 not even know. And it is the same Court that
17 has, in the last, you know, 15, 16 years,
18 affirmed many, many death sentences and affirmed
19 that they were not excessive or
20 disproportionate.

21 It could be that they are looking to
22 improve and refine the system, particularly if
23 they have any sense of being troubled by some of
24 the factors that I have mentioned today. But
25 they need to have a better system of determining

1 whether certain cases, the penalty is excessive
2 or disproportionate.

3 It strikes me that could be reasonably
4 what is on the Court's mind. I was not there at
5 oral argument. I am certainly not privy to
6 their discussions, what their law clerks are
7 thinking, what the influence of the briefs, that
8 they are looking at what other states are doing.
9 But I do caution against acting in a vacuum at
10 this point until the Court makes any decision,
11 whatsoever.

12 CHAIRMAN GANNON: Well, I think the
13 legislature could act without pre-empting the
14 Court. I mean, I disagree that we just have to
15 stand by and wait for the Court to do something.
16 Because we have heard some conflicting testimony
17 today about the consequences of what the Court
18 may or may not do as a result of something the
19 legislature did years ago.

20 And I certainly think it is within our
21 purview to correct something if we feel it has
22 to be corrected or leave it alone if we feel it
23 has to be left alone, without, in any way,
24 impairing the Court's right to do their judicial
25 review.

1 MR. FRANKEL: And I would agree. I
2 mean, I do agree.

3 But I do not know where the problem is.

4 The problem appears to be more that the
5 Court is not, what it is not addressing either
6 through proportionality review or otherwise,
7 unless one feels comfortable about the racial
8 disparities and the geographic disparities and
9 the findings of inadequate representation that
10 were made as far back as 1989. I mean, the need
11 for -- as seems to be more glaring than the
12 issue of proportionality review and what the
13 Court may do.

14 CHAIRMAN GANNON: Representative
15 Manderino.

16 REP. MANDERINO: You mentioned, I just
17 want to address a little bit further this
18 universe issue and then the practical realities.
19 I mean, I had asked one of the former testifiers
20 if it was elusory to think that we could design
21 any system that could make sure it factored out
22 the arbitrariness and capriciousness. And I
23 guess I am following up on what you said and
24 suggesting that it might be elusory to think
25 that we can even broaden that universe and get

1 what you think you need to measure more
2 effectively whether a sentence was
3 disproportionate.

4 For example, you mentioned the
5 Rabinowitz case, another highly -- and these are
6 just the ones we know about. But another very
7 public case in Montgomery County about a year
8 and a half ago was the Farley case where the
9 young man at his mother's store murdered a
10 mother and her young child. So we know in that
11 case, because of how the publicity followed it,
12 that originally there was pronouncement that
13 this was a death penalty case and that there was
14 a decision and an agreement in exchange for
15 locating the body (which if we did not have the
16 body, we would never even perhaps be able to
17 successfully prosecute the case), we decided to
18 give up the death penalty, seeking the death
19 penalty, okay?

20 Now, right now, if I understand
21 everybody's testimony, that kind of case, the
22 Farley case, would not be in the universe of
23 cases that we would consider?

24 MR. FRANKEL: From what I have heard
25 today and read, I would agree with you.

1 REP. MANDERINO: Okay. But I guess my
2 QUESTION is, let's assume we think it should be
3 because how else would we know if another case
4 that had this heinous murder of a mother and
5 infant child that resulted in the death penalty
6 where the person actually gave evidence that led
7 them to the body, the person did not drop the
8 death penalty and they not only pursued it but
9 they got it, okay?

10 My QUESTION is, say we add that to the
11 universe and then all of a sudden, I just quit
12 pronouncing what I would have or would not have
13 done up front in seeking or not seeking the
14 death penalty and does that not lead you to the
15 same problem again? I just quit showing you my
16 hand, general public or defense attorneys or
17 whoever, I just do not show you what I would
18 have done and now you are in the same position.

19 MR. FRANKEL: Representative Manderino,
20 I think you are raising, as you did with the
21 previous witness, the real problem of what
22 system would be anything but elusory or would be
23 effective. But I do believe that, thanks to the
24 United States Supreme Court that there is a
25 constitutional mandate that either the General

1 Assembly or the Court come up with a system to
2 try and channel some of the decision making so
3 it is not arbitrary, so it is not capricious, so
4 it is not unfair, so it comports with our sense
5 of what is civilized and what is justice.

6 And as difficult as that process may be
7 to refine a perfect system, I think there is an
8 obligation to try and make, create a way for
9 appellate review to be effective and meaningful
10 in ensuring that from county to county or even
11 within counties, we do not have a death penalty
12 system that is so skewed, depending on where you
13 are or your race or your wealth or the
14 willingness that week of the prosecutor to make
15 a deal and unwillingness in another week.

16 I mean, we are talking about taking
17 somebody's life. No, we do not execute
18 everybody who commits murder and therefore as
19 difficult as it may be to create a review
20 process, I think the US Constitution and
21 hopefully our collective sense of justice
22 requires us to do so. The appellate court and
23 the Supreme Court is the check on prejudice,
24 passion and unfairness. And we do not have a
25 good alternative at this point.

1 REP. MANDERINO: Thank you, Mr.

2 Chairman.

3 CHAIRMAN GANNON: Thank you.

4 Representative James.

5 REP. JAMES: Thank you, Mr. Chairman.

6 Mr. Chairman, I want to thank the Judicial
7 Committee for holding this hearing. I think
8 that it is an important issue and the fact that
9 it is so complicated and confusion as to what is
10 going on. I was wondering, would this be the
11 only hearing or are we are going to have a
12 follow-up hearing?

13 CHAIRMAN GANNON: I do not know at this
14 time.

15 REP. JAMES: Okay. I would hope that
16 we would consider that.

17 Also, has the committee be given the
18 facts and information as to the racial or
19 geographical statistics of people on death row,
20 etc.?

21 CHAIRMAN GANNON: I have not seen any
22 statistics on that.

23 REP. JAMES: Is it possible that since
24 we are having hearings on the death penalty,
25 that we be given that type of information or get

1 that information?

2 CHAIRMAN GANNON: I believe we could
3 request that from the Administrator's Office,
4 the Office of the Courts.

5 REP. JAMES: Will you do that for me?

6 CHAIRMAN GANNON: Sure.

7 REP. JAMES: Thank you.

8 CHAIRMAN GANNON: You are welcome.

9 Thank you very much.

10 Thank you, Mr. Frankel, for being here
11 today and offering your testimony and answering
12 our questions.

13 MR. FRANKEL: Thank you all for your
14 patience.

15 CHAIRMAN GANNON: This meeting is
16 adjourned.

17 (Whereupon, the hearing was adjourned
18 at 1:00 p.m.)

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C E R T I F I C A T E

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2
3 I, Roxy C. Cressler, Reporter, Notary
4 Public, duly commissioned and qualified in and
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23 expires 12/11/00

