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**TESTIMONY ON PROPORTIONALITY REVIEW IN DEATH PENALTY APPEALS
PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION
OF PENNSYLVANIA BEFORE THE PENNSYLVANIA
HOUSE JUDICIARY COMMITTEE ON MAY 21, 1997**

Good morning. My name is Larry Frankel and I am the Executive Director of the American Civil Liberties Union of Pennsylvania. I would like to thank Representative Gannon and the other members of the House Judiciary Committee for providing us with this opportunity to discuss the subject of proportionality review in death penalty appeals.

Pennsylvania's death penalty statute directs the Pennsylvania Supreme Court to undertake a review in each death penalty appeal to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." 42 Pa.C.S. Section 911(h)(iii). When the General Assembly enacted Pennsylvania's current death penalty statute, it saw proportionality review as a method for safeguarding against the arbitrary or unfair application of the death penalty. Proportionality review should assist this Commonwealth's highest court in discovering those death sentences which are the product of prejudice and/or capriciousness. Proportionality review should act as a check against sentencing aberrations.

The ACLU acknowledges that the United States Supreme Court has held that a state does not need to provide for proportionality review if its capital sentencing procedures otherwise

include adequate checks on arbitrary sentencing. Pulley v. Harris, 465 U.S. 37 (1984).

However, there is considerable evidence, which I will discuss, that the Pennsylvania death penalty system does not function in a manner that prevents the arbitrary and frequently unfair imposition of the death sentence. Therefore, we believe that the Pennsylvania Supreme Court must engage in an extremely thorough review of all first degree murder cases to insure that no defendant is improperly executed. Comprehensive appellate review, properly carried out, is necessary to guarantee that the death penalty is applied in a consistent manner regardless of geography, race, or wealth.

In fact, we believe that the Pennsylvania Supreme Court, in Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984), articulated an understanding of the obligation to engage in the intensive review of death sentences to prevent the discriminatory use of the death sentence. In that decision, the Court not only recognized that it had a duty to evaluate all first degree murder cases which were prosecuted as capital cases or which could have been prosecuted as first degree murder cases (thus factoring in a review of the discretion exercised by prosecutors), but also described the kinds of information it would need from the Administrative Office of Pennsylvania Courts in order for it to engage in complete and meaningful proportionality review.

Unfortunately, since Frey, our Supreme Court has not required the compilation of all the necessary data. The flaws in the information collection process include, inter alia, inadequate reporting of mitigation evidence by trial courts and the virtual absence of information on any of cases that have been tried as capital cases but which have resulted in life sentences. It is almost impossible for the court to undertake a meaningful review of the excessiveness of a death sentence if the court lacks this kind of information.

A review of the numerous death penalty decisions of the Pennsylvania Supreme Court leads us to conclude that meaningful proportionality review has **not** occurred in Pennsylvania. The ACLU knows of no case where a death sentence was reversed on account of the excessiveness of the sentence when the case was compared to similar cases where a life sentence was imposed. The portions of the Court's opinions that describe the Court's proportionality review are almost always extremely brief and thoroughly unrevealing. We believe that the Court itself may be troubled by the manner in which it has engaged in proportionality review because it asked for supplemental briefs on this issue in the Gribble case.

As I indicated earlier in my testimony, the ACLU supports a thorough review of death sentences to guard against the improper imposition of the death penalty in Pennsylvania. We think that there is much evidence that the capital sentencing system in Pennsylvania is so dysfunctional that the Pennsylvania Supreme Court must be given the necessary authority and tools to correct sentences which are arbitrary or unjust or the result of disparities in race, wealth, quality of representation, or county of trial.

I would like to now draw your attention to several factors:

A. In Pennsylvania, a disproportionate number of those on death row were tried in one county - Philadelphia. As of the end of March of this year, of the 207 prisoners sentenced to death in Pennsylvania since capital punishment was reinstated, 115 (55% of the Pennsylvania total) were tried in Philadelphia. We do not think that this is a result of an excessive murder rate in Philadelphia. Rather, Philadelphia prosecutors have a history of taking one of the most aggressive postures in the country towards death penalty cases. At the same time the vast majority of capital defendants in Philadelphia have been represented by court appointed counsel,

many of whom lack the requisite experience and resources to provide quality representation. [Only recently have the attorneys from the Philadelphia Public Defenders office been allowed to handle homicide cases. Since the Defenders office has become involved in representing indigent capital defendants, none of their clients have been sentenced to death.] It is hard to have confidence in a system that permits such geographic disparity.

B. In Pennsylvania race plays too important a role in determining the fate of a capital defendant. And it is not only the race of the defendant that is important. The race of the victim can also be determinative in the decision of who is sentenced to death. According to the NAACP Legal Defense and Education Fund, as of summer of 1996, there have been 335 executions since the 1976 reinstatement of the death penalty. Over 80% of the victims in the cases that led to those executions were white. In only 1% of the cases was a white defendant executed for killing a black person. [In comparison, in 22% of the cases the defendant was black and the victim white.] There are other studies that show that a person who murders a white person is much more likely to receive the death penalty than someone who kills a non-white person. Also, statistics from the Department of Corrections indicate that in Pennsylvania about 2/3 of the inmates on death row are non-white. The situation is even more skewed with respect to death row inmates from Philadelphia. Among those inmates, almost 90% are non-white.

C. In the last two and one-half years, the General Assembly has passed several pieces of legislation that favor the imposition of the death sentence and the execution of defendants. The General Assembly has expanded the list of aggravating factors. It has permitted the use of victim impact statements. With Governor Ridge's blessing, a law was passed that limited the Governor's discretion with regard to the signing of death warrants. A new and confusing post-

1835 (1994)] It is unconscionable that Pennsylvania has not addressed the problems identified seven years ago.

The ACLU believes that the factors that I have just described demonstrate the compelling need for a safety valve in our capital sentencing scheme. We are realistic and do not expect that the General Assembly or the Governor will resist the considerable political pressure that seems to favor swift executions with greater limits being placed on procedural safeguards. Experience has taught us that the courts can be the only true safeguard in this area. That is why meaningful proportionality review is so important. Yet the limitations of that review, that have been discussed today, demonstrate that the scope of review and the ability to undertake a thorough review should be expanded so that factors like geography, quality of counsel, adequacy of resources for counsel, racial discrimination, and prosecutorial discretion can be exhaustively examined. Without such strenuous reviews, it is inevitable that somebody will be inappropriately executed by the government. The hasty execution of an innocent individual at the hands of the state would be one of the ugliest possible indictments of our justice system and our attempt to have a civil society.