TESTIMONY OF THE OFFICE OF ATTORNEY GENERAL

D. MICHAEL FISHER, ATTORNEY GENERAL

BEFORE THE JUDICIARY COMMITTEE OF
THE HOUSE OF REPRESENTATIVES

WEDNESDAY, MAY 21, 1997

PRESENTED BY

Robert A. Graci
Chief Deputy Attorney General

Chairman Gannon and members of the committee.

Good morning!

On behalf of Attorney General Mike Fisher, I would like to thank the Chairman and the members of the committee for allowing the Office of Attorney General to participate in this hearing focusing on issues of the death penalty in Pennsylvania, in general, and of proportionality review, in particular. The Attorney General regrets that he is unable to personally deliver these remarks. As you know, he is not able to be with you himself because today is the first day of the "Drug Summit" which he called to address that very serious problem facing Pennsylvania.

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

As a candidate to be Pennsylvania's "chief law enforcement officer," Attorney General Fisher campaigned for an effective death penalty--not just a statute that's on the books but a statute and procedures that ensure that death penalties fairly imposed are carried out in a timely fashion. Shortly after assuming office as Attorney General he came to this body and asked for needed funding to see that the Commonwealth's prosecutors--the Office of Attorney General and the several district attorneys--are able to effectively and efficiently respond to the complex litigation that surrounds these most serious cases known to our criminal justice system. You responded with a $500,000 appropriation for that purpose. I am proud to be able to tell you that Attorney General Fisher has selected me to head this capital litigation initiative in the Criminal Law Division of the Office of Attorney General.

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

In preparing my remarks I thought that it might be helpful to put our present death penalty procedures statute into historical perspective. Capital punishment has existed in Pennsylvania since colonial times. The Great Law of William Penn, adopted December 7, 1682, provided for the death penalty--by public hanging--for premeditated murder. Death was the sole punishment for premeditated murder until 1925. In 1860, the General Assembly divided murder into two degrees. The punishment for murder of the first degree--which by statutory definition encompassed both premeditated murder and felony murder (which is now murder of the second degree)--was death by hanging. The penalty was fixed by the jury's verdict of guilty of first degree murder.

In 1925, the legislature gave juries the option of sentencing a person convicted of murder in the first degree to death (by electrocution, which had been adopted in 1913) or imprisonment for life. The decision was within the discretion of the jury. The sentence was still fixed by the jury when it rendered its verdict on the question of guilt or innocence. There was no separate "penalty" hearing. That was not to come for several decades.

Evidence relevant to the penalty was then admitted during what we would call the "guilt phase" of the trial.

In 1959, perhaps in response to a Supreme Court decision which had reversed a death sentence entered by a trial court sitting without a jury in the case of a defendant who was only 15 years old when he committed the murder, the Penal Code was amended to allow the jury to receive additional evidence, after a verdict of guilty of first degree murder, "upon the question of the penalty to be imposed upon the defendant." It also allowed "argument by counsel" on the issue of penalty and jury instructions "as may be just and proper in the circumstances." The jury would then deliberate on the penalty--life imprisonment or death. If the jury was unable to agree on a sentencing verdict, a sentence of life imprisonment was imposed. This statute was declared unconstitutional by the Pennsylvania Supreme Court after the 1972 decision of the United States Supreme Court in *Furman v. Georgia* which held that standardless discretion in capital cases violated the Eighth Amendment.

In 1974, the General Assembly responded to the *Furman* constitutional concerns and adopted the forerunner of our present death penalty procedures

statute. The Pennsylvania Supreme Court declared that statute unconstitutional because it limited mitigating circumstances which could be considered by the jury in determining the sentence. In addition to providing for jury sentencing after consideration of listed aggravating and mitigating circumstances that statute was the first to specifically provide for automatic review of a death sentence by the Pennsylvania Supreme Court. Though the Court struck down this statute in *Commonwealth v. Moody*, it noted that the legislature had "adopted procedures for the protection of defendants in capital cases which have been specifically approved and endorsed by the [United States] Supreme Court." Among the procedures identified by the *Moody* Court was the statutory provision "for automatic appellate review of all death sentences." That language is important for your present purposes because the statute simply provided, in pertinent part: "A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania . . . . In the event that the sentence of death shall for any reason be invalidated then the convicted defendant shall undergo the sentence of life imprisonment." The Pennsylvania Supreme Court considered this automatic review provision to be important

even though the scope of review was not specifically delineated as it would be when the statute was rewritten in 1978 to overcome the deficiencies identified in *Moody*.

Before describing the 1978 changes, it is important to note, as part of the historical development of the death penalty in Pennsylvania, that the 1974 statute was not the first to provide for Supreme Court review of murder convictions. Since at least 1860, defendants convicted of murder had the right to have their cases reviewed in the Supreme Court by "a writ of error." That was, of course, during a time in which every conviction for murder in the first degree--premeditated murder or felony murder--carried a mandatory sentence of death. The Supreme Court's review was limited to the errors assigned by the defendant except for the sufficiency of the evidence which the Supreme Court was statutorily required to review "in all cases of murder in the first degree." That former statutory requirement of reviewing every first degree murder conviction for sufficiency continues as part of the common law of the Commonwealth. It is interesting to note that as late as 1962 the Supreme Court said that the verdict of a jury regarding the sentence imposed for first

degree murder could not be changed or reduced by the Supreme Court on appeal.

In 1978, responding to the invalidation of its 1974 attempt to enact a constitutional death penalty statute, the General Assembly enacted a statute which eventually passed constitutional muster in the case of *Commonwealth v. Zettlemoyer* (and which has since withstood every constitutional challenge leveled against it--including a challenge in the United States Supreme Court). That statute allows unlimited evidence of mitigating circumstances, overcoming the constitutional flaw identified in *Moody*. Like the 1974 version, the 1978 Act continued the requirement of automatic review by the Supreme Court. For the first time, however, it prescribed the Court's scope of review. The statute required affirmance of the sentence of death unless the Supreme Court "determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; (ii) the evidence fails to support the finding of an aggravating circumstance . . . or (iii) 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." This was the first time that comparative proportionality review was made a part of an appeal to the Supreme Court. The Supreme Court was directed to "either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence." (This language was interpreted by the Pennsylvania Supreme Court as prohibiting it from remanding cases for a new sentencing proceeding. The legislature changed this result, allowing for such remands, by amending section 9711(h) to its present form.)

That is the history of the death penalty in Pennsylvania in a nutshell. It brings me to the specific concern this committee--the statutory requirement of proportionality review of all death sentences by the Supreme Court as part of the automatic appeal. How that review is conducted by the Supreme Court is now under attack in the case of *Commonwealth v. Gribble*. This is not the first time that proportionality review has been questioned. Indeed, the case in which the Supreme Court upheld the constitutionality of section 9711--*Commonwealth v. Zettlemoyer*--the Court addressed its statutory proportionality review obligation and how it would conduct it.

The *Zettlemoyer* Court observed: "It is certain that the United States Supreme Court considers meaningful appellate review by a court having statewide jurisdiction to be at least a very important factor (perhaps a *sine qua non*) in a constitutionally permissible legislative scheme for imposition of the death penalty because such review is, in effect, a 'last line of defense' to guard against arbitrary sentencing by a jury. However, the United States Supreme Court has also made it clear that no particular mechanism of appellate review is required, and has never struck down a state's capital punishment scheme on the basis that the review by the state appellate courts was inadequate, choosing to assume, in the absence of evidence to the contrary, that the state courts would properly fulfill their obligations to ensure against arbitrary and capricious imposition of the death penalty." The Court concluded that "so long as an appellate court of statewide jurisdiction will conduct a meaningful review of a sentence of death to guard against its arbitrary and capricious imposition, the United States Supreme Court will not interfere with the state's choice of appellate and administrative mechanisms." The Pennsylvania Supreme Court observed that the United States Supreme Court had recently granted certiorari

in the case of *Pulley v. Harris* to determine if the Eighth Amendment required the type of comparative proportionality review contained in Pennsylvania's statutory scheme (a question the *Pulley* Court would ultimately answer in the negative).

Of particular import for the concern of this committee, the Court in *Zettlemoyer* said: "This Court does not treat lightly its statutory and constitutional duties and will *conduct an independent evaluation of all cases decided since the effective date of the sentencing procedures under consideration* (September 13, 1978). *This independent review will utilize all available judicial resources and will encompass all similar cases taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death is excessive or disproportionate to the circumstances.*"

In responding to Zettlemoyer's complaint that the Court could not perform the proportionality review because the jury did not list the mitigating circumstances it found, the Court gave its assurance that it reviewed, in Zettlemoyer's case, and would continue to review "in the future, the entire

record and will evaluate 'similar cases' on the basis of the evidence presented as to mitigating circumstances." That should have ended the question--but it has not.

The complaint now is that the data compiled by the Administrative Office of Pennsylvania Courts (AOPC) by order of the Supreme Court is incomplete and inaccurate. The data was first described by the Court in *Commonwealth v. Frey*.

In *Frey*, the Court reiterated that it "conducts an independent evaluation of all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted under . . . [section] 9711." The Court described how it had ordered the AOPC to gather the data "in order to facilitate [its] review." The data was to "be compiled and monitored by the AOPC to insure that the body of 'similar cases' is complete and to expedite [the Court's] proportionality review." These passages make it clear that the AOPC study was designed to "facilitate" and "expedite" the Court's statutory duty of independent evaluation--which the Court promised--not as a substitute for it.

Gribble's argument seems to be predicated on language from some Supreme Court opinions that indicates that the Court is relying solely on the AOPC data to conduct its proportionality review. To be sure some cases support that conclusion. For example, in *Commonwealth v. Craver* decided earlier this year, the Court said, in relation to its duty to review death sentences "from the standpoint of disproportionality" as required by the statute: "We reviewed the sentence imposed on [Craver] in light of sentencing data compiled and monitored by the Administrative Office of Pennsylvania Courts." The Court determined that Craver's sentence was not disproportionate. Similarly, in *Commonwealth v. Banks*, a capital case reviewed under the PCRA, the Court referred to the AOPC data as "the information upon which this Court bases its decision as to proportionality." These passages, however, do not necessarily require the conclusion that the promised independent evaluation of similar cases is not being performed.

In four other cases decided since late last year--*Commonwealth v. Marrero*, *Commonwealth v. Gibson*, *Commonwealth v. Marinelli*, and *Commonwealth v. Bronshtein*--the Court used language demonstrating that the

AOPC data was only part of the review--data used to "facilitate" and "expedite" the proportionality review. In *Marinelli*, for instance, the Court, speaking through Justice Cappy, said: "we have reviewed the sentencing data compiled by the Administrative Office of Pennsylvania Courts in accordance with the requirements set forth in . . . . *Frey* . . . and have performed an independent review of the cases involving the sentence of death to determine whether [Marinelli's] sentence of death was proportional to the sentences imposed in similar cases, taking into consideration both the circumstances of the offense and the character and record of [Marinelli]." Similar language indicating an independent examination of similar cases is found in *Marrero*, *Gibson* and *Bronshtein*. In addition, those cases identify the cases which the Court found similar and compared.

From this review, it is the opinion of the Office of Attorney General that we should accept the Supreme Court at its word and conclude that it is independently reviewing these cases for proportionality and is only using the AOPC data to facilitate and expedite its proportionality review. Since it first upheld the 1978 statute in the face of a challenge to its constitutionality and

affirmed a sentence of death in *Zettlemoyer*, the Supreme Court has affirmed more than 140 sentences of death. In each case it has said, in one form or another, that the sentence imposed in the case under review was neither excessive nor disproportionate to the sentences imposed in similar cases. We assume that the Court, in each of these cases, has undertaken its proportionality review in good faith.

The question for this committee is should you--the General Assembly--continue to statutorily require proportionality review. We know from *Pulley v. Harris* that the United States Constitution does not require it. There is no case that holds that it is required by the Pennsylvania Constitution. It is solely a creature of statute. Should it continue to be?

Since section 9711(h) was enacted in 1978 the Supreme Court has never vacated a death sentence because it was disproportionate to the penalty imposed in similar cases. It has done so, however, because the evidence was insufficient to support the finding of an aggravating circumstance. Likewise, it has vacated death sentences because they were the product of passion, prejudice or any other arbitrary factor--as where the prosecutor gave an

improper closing penalty phase speech, for example, or where the jury instructions at the penalty phase were flawed. Such review for sufficiency of the evidence or prejudice is much more manageable than "proportionality review." Tests for sufficiency of the evidence and prejudice are regular fare for the courts. They involve known and easily applied standards. They relate only to the record of the case before the appellate court. They do not involve trying to decide whether or not a case is "similar" as is required for comparative proportionality review. Query: Can cases involving different defendants and different circumstances ever really be "similar" for comparison purposes?

It might be suggested that proportionality review be removed from the statute. Eliminating proportionality review from the statute will not eliminate "meaningful appellate review" of these cases. The Supreme Court would still be able to ensure against the arbitrary and capricious imposition of the death penalty. It will still determine that the conviction for murder of the first degree is supported by sufficient evidence and that all aggravating circumstances are so supported. The existence of aggravating circumstances

separate death eligible murders from those that are not. The Court will be able to review sentencing decisions for evidentiary and instructional errors and for prejudicial or inflammatory comments during closing arguments. The importance of such review should not be written off lightly. The death penalty procedures statute would still pass constitutional muster for such review would still ensure against arbitrary and capricious imposition of the death penalty.

Can the General Assembly eliminate proportionality review for pending cases? That is not an easy question. The scope of appellate review is a question for the legislature. The Supreme Court had ruled that, though it had the authority, under a general statute, to remand for resentencing if it found a sentencing error, it lacked that authority in the context of a sentence of death because the death sentence procedures statute as originally enacted in 1978 limited the Court's authority to either affirming the sentence of death or vacating it and remanding for the imposition of a sentence of life imprisonment. The legislature changed the statute allowing for a remand for a new sentencing proceeding under some circumstances in 1988. That legislative amendment was made applicable to cases pending on appeal as of

its effective date. When such application was challenged as a violation of the *Ex Post Facto* Clause in *Commonwealth v. Young*, the Supreme Court rejected the claim, upheld the change and properly applied it to pending cases.

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

Mr. Chairman, I would again like to thank you and the members of the committee for inviting the Office of Attorney General to participate in this hearing on this important issue. I hope our testimony assists you as you address it. I would be happy to try to respond to any questions you might have.