

1
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4 HOUSE JUDICIARY COMMITTEE

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10 MONDAY, JULY 19, 2010
11 10:00 A.M.

12
13 PUBLIC HEARING ON
14 HOUSE BILL 1996

15
16 BEFORE:

17 HONORABLE THOMAS R. CALTAGIRONE, CHAIRMAN

18 HONORABLE DEBERAH KULA
19 HONORABLE KATHY MANDERINO
20 HONORABLE JOHN E. PALLONE
21 HONORABLE JOSEPH A. PETRARCA
22 HONORABLE DOM COSTA
23
24
25

1 ALSO PRESENT:

2 HONORABLE ROBERT F. MATZIE
3 HONORABLE VANESSA LOWERY BROWN
4 HONORABLE MARK B. COHEN
5 HONORABLE JOHN EVANS
6 HONORABLE CHRIS SAINATO
7 HONORABLE DANTE SANTONI, JR.

8
9 DAVID D. TYLER, EXECUTIVE DIRECTOR (D)
10 KAREN COATES, CHIEF COUNSEL (R)
11 KURT BELLMAN, RESEARCH ANALYST
12 DANIEL ALVAREZ, INTERN

13

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BRENDA S. HAMILTON, RPR
REPORTER - NOTARY PUBLIC

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P R O C E E D I N G S

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CHAIRMAN CALTAGIRONE: Good morning. We're going to open up the hearing on House Bill 1996, and it's going to be co-chaired by Representative Matzie whose bill we're going to be reviewing today with testimony.

And for the record, I'd like the members and staff that are present, if they would just introduce themselves, starting to my left.

REPRESENTATIVE KULA: Representative Deberah Kula, Fayette and Westmoreland Counties.

REPRESENTATIVE SANTONI: I'm Representative Dante Santoni from Bucks County.

CHIEF COUNSEL COATES: Karen Coates, chief counsel to the Judiciary Committee.

CHAIRMAN CALTAGIRONE: Tom Caltagirone, Berks County.

REPRESENTATIVE MATZIE: Rob Matzie, Beaver and Allegheny Counties.

EXEC. DIRECTOR TYLER: David Tyler, Executive Director, Judiciary Committee.

REPRESENTATIVE COSTA: Dom Costa, Allegheny County.

REPRESENTATIVE MANDERINO: And Kathy Manderino representing parts of Philadelphia and

1 Montgomery Counties.

2 MR. BELLMAN: Kurt Bellman, research
3 analyst for the Judiciary Committee.

4 CHAIRMAN CALTAGIRONE: And with that, we'll
5 start off with Representative Matzie making his
6 introductory remarks and then we'll have Reverend
7 Dr. Roger Thomas present his testimony.

8 REPRESENTATIVE MATZIE: Thank you,
9 Mr. Chairman. Just some brief opening comments.

10 Really, I think oftentimes when people come
11 to the Capitol for the first time or when they go to a
12 representative or senator's office, there's a pamphlet
13 about how to create a bill or how to make a law.

14 And shortly after my election in November
15 of 2008, I had a meeting with Reverend Dr. Thomas, a
16 constituent of mine and an acquaintance for some time,
17 and he had several issues that he wanted to bring to my
18 attention. And this was one of them.

19 And he had been working with several
20 stakeholders on this issue for some time and asked if I
21 would take into consideration the language that was put
22 together for the bill and consider introducing it as a
23 bill.

24 And we did it in the form of a package of
25 about four different bills, and this is the bill we will

1 be discussing today.

2 Now, I realize there are many stakeholders
3 involved; and oftentimes when people look at a fresh new
4 legislator introducing legislation, sometimes it gets
5 bogged down. So I think having an informational hearing
6 and hearing from so many stakeholders is an
7 accomplishment in and of itself.

8 So hopefully the dialogue that we hear
9 today will create even more dialogue and we can get this
10 to a point where if changes need to be made, fine, we are
11 open for compromise. That's what the process is all
12 about. And possibly get this on the docket and on the
13 schedule in the near future.

14 So I appreciate Chairman Caltagirone for --
15 taking this up as an informational hearing today and for
16 those who will be testifying and those who have submitted
17 written testimony.

18 Thank you.

19 CHAIRMAN CALTAGIRONE: Thank you.

20 Reverend.

21 REV. DR. THOMAS: Good morning,
22 Mr. Chairman. Good morning, members. My name is Roger
23 Thomas. I am co-chair of the -- can you hear me now?

24 CHAIRMAN CALTAGIRONE: Yes, sir.

25 REV. DR. THOMAS: Good morning,

1 Mr. Chairman. Good morning, members of the committee.
2 My name is Roger Thomas. I am co-chair of the -- can you
3 hear me now?

4 I am co-chair of the Governor's Committee
5 for the Analysis and Reform of the Criminal System.
6 Please, look at my prepared text which you should have in
7 front of you.

8 First, I want to thank you and the members
9 of the Judiciary Committee for allowing us to testify
10 this morning.

11 There's a consistent pattern throughout the
12 scriptures that all persons should be given equal
13 treatment before the courts. Americans have been
14 challenged to meet this burden since at least 1611 when
15 the first slave ships arrived from Africa.

16 Racism is a fact in our society. This
17 Racial Justice Act presents us with an opportunity to
18 eliminate one more vestige of it.

19 Studies of a thousand capital cases between
20 1976 and 1980 disclose various racial biases in
21 prosecution and sentencing.

22 Black defendants were sentenced nearly 40
23 percent more often than others.

24 Blacks were 15 percent more likely to be
25 prosecuted as capital cases than other defendants who

1 committed similar homicides.

2 Blacks who killed whites were 38 times more
3 likely to be prosecuted as capital cases.

4 A black male who kills a white female is 80
5 percent more likely to get the death penalty than a white
6 male who commits the identical crime.

7 This information was presented to the
8 United States Supreme Court in McCleskey versus Kemp, but
9 the Supreme Court ruled that this kind of analysis was
10 not admissible unless the defendant could first show
11 deliberate racial bias in their specific case. That's
12 the very kind of testimony that you cannot get.

13 The burden set out in McCleskey versus Kemp
14 is also a direct violation of both the Mosaic mandate
15 that a case should not be biased against a poor man and
16 the gospel's mandate that lawyers and experts on the law
17 should not bind men with impossible burdens. It is not
18 only bad law, it violates the scripture.

19 I have personally met with many of
20 Pennsylvania's district attorneys and judges. I have yet
21 to find even one who is deliberately racist. We are past
22 that. Racism is not deliberate in decision makers. It
23 is implicit in the society.

24 The Judiciary Committee of both houses of
25 Congress immediately drafted legislation to overturn

1 McCleskey. In the words of the House report, the
2 proposal is a civil rights measure and adopts evidentiary
3 procedures similar to those employed against racial
4 discrimination in other civil rights laws.

5 The states also developed a model Racial
6 Justice Act which was immediately endorsed by the
7 American Bar Association. Kentucky passed a bill in
8 1998, and North Carolina passed a bill in August of
9 2009. It is now before Pennsylvania as House Bill 1996.

10 The Pennsylvania Supreme Court's 2003 final
11 report specifically called for the adoption of the Racial
12 Justice Act. So did the American Bar Association's 2007
13 Pennsylvania death penalty assessment report.

14 Governor Rendell appointed this committee
15 for the analysis and reform of our criminal system in
16 August of 2003. And after four years of study, our
17 committee also joined the call for the adoption of the
18 Racial Justice Act.

19 On March 17th of 2010 the United States
20 Sentencing Commission quarterly report, again, discussed
21 the racial disparity in sentencing across America. The
22 report still found inherent biases and dramatically
23 disparate sentences.

24 Pennsylvania shows a similar pattern. Our
25 death row consists of 220 inmates as of July 1, 2010. It

1 contains 130 black, 70 white, 18 Hispanics and 2 Asians.

2 When these raw numbers are converted to
3 percentages, 53 percent of the homicides are by blacks,
4 45 percent are by whites, and two percent by others. Yet
5 59 percent of our death row are blacks, 32 percent are
6 whites, 8 percent are Hispanics, and .9 percent are
7 Asians.

8 Blacks are 6 percent overrepresented on
9 death row. Whites are 13 percent underrepresented on
10 death row. Hispanics and Asians are 6 percent
11 overrepresented.

12 There's something wrong with these
13 numbers. Although blacks make up only 13 percent of
14 Pennsylvania's population, they make up 44 percent of our
15 general prison population.

16 This 2010 data affirms what the
17 congressional report said in 1994. There is an apparent
18 racial bias in sentencing. The Racial Justice Act simply
19 provides an objective test to hold against racism that is
20 implicit in our system.

21 Representative Rob Matzie introduced House
22 Bill 1969 from our final report and from the national
23 Racial Justice Act model.

24 The operative language of the bill is: No
25 person shall be sentenced to death or shall be executed

1 under judgment that was sought or obtained on the basis
2 of race.

3 The act will apply if the court finds that
4 race was a significant factor in seeking or awarding the
5 death sentence at the time the sentence was imposed. In
6 carrying their burden, the defendants may rely on
7 evidence such as statistical analysis or the sworn
8 testimony of members of the criminal justice system.

9 Defendants may bring their claim at
10 pretrial or during post-conviction proceedings. Existing
11 inmates may have one year in which to enforce their
12 claim. The defendant carries the burden and the court
13 would modify his sentence from life imprisonment -- from
14 death to life imprisonment without possibility of
15 parole.

16 Please, listen. The Racial Justice Act
17 does not release inmates back onto the street. Nor does
18 it generate a new layer of protracted litigation. It
19 simply addresses one more increment of racism that is
20 implied in the American society.

21 The American Bar Association instantly
22 endorsed House Bill 1996. President Carolyn Lamm's
23 letter and Robert Tabak's letter are both attached to
24 this testimony. Their endorsement was followed by a
25 similar letter from The Sentencing Project, Mr. Marc

1 Mauer.

2 When we met with Representative Curtis
3 Thomas regarding this bill on March 11th, he instructed
4 us to ascertain the experience of the states that already
5 passed the Racial Justice Act.

6 We learned that Kentucky's 1998 act applied
7 only to people convicted after the date of enactment.
8 They had 13 death sentences in the five years before the
9 Racial Justice Act and 14 in the five years after the
10 Racial Justice Act.

11 It had no impact on the number of capital
12 cases prosecuted. 13 before and 14 after. Lexington had
13 five death sentences before the Racial Justice Act, all
14 of which involved white victims. They also had two death
15 penalty convictions since the Racial Justice Act, both of
16 which were white defendants on black victims. This had
17 never happened before in Kentucky.

18 As Gerry Vito's letter shows that a
19 significant impact of Kentucky's Racial Justice Act has
20 been a policy change among the courts and prosecutions so
21 that all eligible homicides are treated as capital
22 cases. The sentences have, therefore, begun to reflect
23 the demographics.

24 We learned that North Carolina's August
25 19 -- August 2009 Racial Justice Act provided a window

1 until August of 2010 for claims to be filed regarding
2 previous convictions. The courts will hear these claims
3 when that window closes.

4 As with Kentucky, please -- please, hear
5 me -- as with Kentucky, the Racial Justice Act had no
6 impact on the number of death penalty prosecutions.
7 North Carolina had one death sentence imposed in 2008,
8 two before the Racial Justice Act was passed in 2009, and
9 two in 2010. All were males, three were blacks, and two
10 were whites.

11 Our report back to Representative Thomas
12 was that the Racial Justice Act did not affect the number
13 of death sentences sought in those states, but it did
14 impact the racial distribution of these sentences. The
15 people sentenced tended to reflect the demographics of
16 the state.

17 We also had the opportunity to meet with
18 Representative Caltagirone on March 11th, and he asked us
19 to ascertain the District Attorneys' Association's
20 position on the bill.

21 Accordingly, we met with Ed Marsico,
22 president of the Pennsylvania District Attorneys'
23 Association. We met with him on March 11 and again on
24 June 9 and 10.

25 President Marsico said that he would prefer

1 that every case was judged only on its merits. And we
2 absolutely agreed.

3 He expressed two concerns regarding the
4 Racial Justice Act. First, he was concerned about a
5 possible rush of judicial activism. This concern tended
6 to be mollified when he saw the absence of such activism
7 in both Kentucky and North Carolina.

8 Second, he wished that the Racial Justice
9 Act applied equally to all classes of people, including
10 gender, sexual orientation, and disabilities. We also
11 agreed.

12 Yet the available data does not support the
13 need for litigation in these additional areas. The
14 gender distribution of death sentences reflects the
15 number of capital homicides committed by females.
16 Pennsylvania has five women on death row. That's two
17 percent. Women commit about five percent of the capital
18 homicides.

19 The data on sexual orientations and
20 disabilities is even less significant. This was reported
21 back to Representative Caltagirone.

22 The Western Pennsylvania Conference of the
23 United Methodist Church represents all the Methodists in
24 27 counties of western Pennsylvania. On June 9th, that
25 conference asked the members of the Pennsylvania General

1 Assembly to pass House Bill 1998 [sic] to reduce the
2 racism implied in our capital cases. A copy of that
3 resolution was provided to the members of the Black
4 Legislative Caucus on June 24th. 113 individual laity
5 and clergy signed individual letters asking that we
6 follow suit.

7 The purpose of the Racial Justice Act is to
8 address one more vestige of racism in our society. The
9 scripture consistently emphasizes that every person
10 should be treated equally before the law.

11 The information in front of us shows that
12 is not the case in either America or Pennsylvania.
13 Blacks and Hispanics show more than their fair share on
14 death row. This inequitable distribution can be seen
15 from the raw data from the Department of Corrections.

16 It has also been affirmed by the repeated,
17 multivariable analyses from across the country.

18 This situation has been aggravated by what
19 can properly be viewed as bad law which places an
20 impossible burden on one specific class of people. If
21 that burden has ever been met, it is not a matter of
22 general record. This impossible burden violates both the
23 spirit of the scripture and the specific instructions of
24 the gospels.

25 We are asking you to consider the

1 situation. Look at the alternative that is offered.
2 Review the experience of the states that have passed the
3 Racial Justice Act and take this affirmative step to
4 eliminate this particular vestige of racism from our
5 society.

6 Thank you.

7 CHAIRMAN CALTAGIRONE: Thank you,
8 Reverend.

9 Members, questions?

10 CHAIRMAN CALTAGIRONE: Thank you.

11 REPRESENTATIVE MATZIE: Thank you. Just
12 real quick. Roger, when -- when you said in 2003 when
13 the committee was established, give us a sense of who's
14 on that committee.

15 REV. DR. THOMAS: All right. Let's see if
16 I can name them off the top of my head. Governor Rendell
17 met with me and with Representative Joe Preston on August
18 the 28th, 2003. He appointed us as the chairmen of that
19 committee.

20 The members of the committee included a man
21 by the name of Marshall Dayan who is from the AC -- from
22 the ACLU; an attorney by the name of Martha Conoly, who
23 is in practice in Allegheny County; Attorney General was
24 Tony Birosh. He's a member of the panel. An expert in
25 the field was Alfred Blumenstein, who was a statistician

1 in the field. He was on -- a member of the committee.
2 And there were two other people.

3 REPRESENTATIVE MATZIE: Thank you.

4 CHAIRMAN CALTAGIRONE: Thank you for your
5 testimony. We appreciate it.

6 We'll next hear from Robert Dunham,
7 Assistant Federal Defender, Capital Habeas Unit,
8 representing the Pennsylvania Association of Criminal
9 Defense Lawyers.

10 MR. DUNHAM: Good morning, members of the
11 committee. I'm Rob Dunham. I'm an assistant federal
12 defender in the Capital Habeas Corpus Unit in -- here in
13 Harrisburg, a former director of Pennsylvania Capital
14 Case Resource Center, and for ten years I was director of
15 training of the Capital Habeas Unit in Philadelphia.

16 I'm also an adjunct professor of death
17 penalty law at the Villanova Law School.

18 I want to be clear the opinions that I'm
19 expressing today are my opinions, not those of the
20 federal government or Federal Defender, and I have
21 presented my testimony to the Pennsylvania Association of
22 Criminal Defense Lawyers and they have adopted it.

23 Before I get into my testimony, I spoke
24 with Dave Baldus, who is the national expert on race and
25 the death penalty and has done studies across the

1 country. He's unable to be here today because of his
2 cancer, but he authorized me to state that for all the
3 reasons expressed in his testimony before the
4 Pennsylvania Supreme Court Committee on Racial and Gender
5 Equity in the Courts that he supports the enactment of a
6 Racial Justice Act.

7 I similarly spoke with Andre Dennis who is
8 a member of the Pennsylvania Supreme Court Committee who
9 cannot be here today. He says for all the reasons
10 expressed within that report he supports the Racial
11 Justice Act.

12 We're now in the 20th Century. In this
13 century, in this great Commonwealth, in which the
14 constitution was written, it is unacceptable that
15 decisions on whether a person should live or die be or
16 appear to be based on the color of his or her skin.

17 Pennsylvania's death row is grossly
18 racially disproportionate, and there is no effective
19 legal mechanism to address this ill. That's why we need
20 a Racial Justice Act, and that's why we need it today.

21 My testimony today is going to be based not
22 on any written text but on a PowerPoint that I've
23 prepared. And if you take a look at the screen, I'll try
24 to go through this because sometimes seeing is a better
25 form of persuasion.

1 The numbers in Pennsylvania are
2 astounding. In -- as of January 1st of this year, this
3 is data from the NAACP Legal Defense Fund and the
4 Pennsylvania Capital Representation Project, Pennsylvania
5 at that point had 222 death row inmates. It's American's
6 fourth largest death row.

7 And the figures are close to what
8 Mr. Thomas said. We have -- currently 60 percent of
9 Pennsylvania's death row are African-American, 31 percent
10 are white, Latino is 19 percent -- I'm sorry -- is 9
11 percent, and Asian is about one percent.

12 The fact is that the majority of our death
13 row are minorities. And it's not just that there is an
14 apparent disproportionality. It's the way Pennsylvania
15 ranks in the rest of the country. There is only one
16 other state that has a more racially disproportional
17 death row than Pennsylvania and that is Texas.

18 The death sentences that have been imposed
19 in Pennsylvania over the last two years also illustrate
20 the problem, because since July of 2008 there have been
21 13 defendants in Pennsylvania who have been sentenced to
22 death. Twelve of those thirteen have been racial
23 minorities.

24 And the one white person who was sentenced
25 to death was not sentenced by a jury. He was sentenced

1 in a bench trial.

2 So all 12 jury verdicts in the last 12
3 years -- in the last two years that have placed people on
4 Pennsylvania's death row have been directed at racial
5 minorities.

6 A long time ago, in the 1990s, journalists
7 in Pennsylvania had been taking a look at what was going
8 on in this Commonwealth, and the message that was clear
9 then remains the same message that we get across the
10 country and it remains the message that we get looking at
11 the numbers today, and that is that race and place play a
12 pivotal role in who gets sentenced to death.

13 Discrimination occurs at a county level.
14 Different mechanisms are in place in different counties,
15 but there needs to be some mechanism available to address
16 that wrong.

17 So far there's been no statewide study in
18 Pennsylvania. There ought to be. But in the absence of
19 statewide data the Racial Justice Act is a good mechanism
20 to permit individuals to go into court to build their own
21 data to show what's going on, what's going on improperly
22 in the various counties in which the death penalty is
23 imposed.

24 We know that race plays a significant
25 role. We know the combination of the race of the

1 defendant and the race of the victim affect who gets
2 sentenced to death.

3 We know that the combination that is most
4 likely to produce a death sentence is a black offender
5 and a white victim. The studies, the data shows from
6 1977 through the year 2000 that extrapolating to a
7 rate of -- extrapolating to a thousand murders, 48.6
8 death sentences are imposed on black on white offenses.

9 Now, contrast that to white offender versus
10 black victim in which the rate is 11.9. So it's almost
11 four times the rate extrapolated over a thousand
12 murders.

13 Black offenders are more likely to get
14 sentenced to death when there's a white victim instead of
15 a black victim. White offenders are less likely to be
16 sentenced to death when there's a white victim as opposed
17 -- when there's a black victim as opposed to a white
18 victim. There is race of offender bias. There's race of
19 victim bias.

20 This is the classic chart from David
21 Baldus's report on Race and the Death Penalty in
22 Pennsylvania. In Philadelphia rather.

23 You see there are four separate curves.
24 Each one of those reflects the racial variables that I
25 spoke about a minute before, and this shows that across

1 all levels of severity the combination that is most
2 likely to produce a death penalty is a black defendant
3 and a white victim. Across all levels of severity the
4 combination that is least likely to produce a death
5 verdict is a black victim and a white defendant.

6 Now, there are a number of factors that
7 affect the racially disparate death row that we have.
8 The race and gender committee analyzed a number of them,
9 and one of the things that it says is that poor resources
10 disproportionately affects minorities. And we know
11 that's the case because minorities are disproportionately
12 poor.

13 But Pennsylvania's underfunding of indigent
14 defense produces poorer representation that goes directly
15 to the class of -- of defendants who are most likely to
16 be subject to racial discrimination.

17 The Pennsylvania Supreme Court Committee
18 recommended the Racial Justice Act in part to address
19 this concern. Obviously there are issues relating to
20 funding of indigent defense that need to be addressed.
21 But in the absence of correcting those problems, the
22 Racial Justice Act is a good step to try to address some
23 of the problems.

24 The ABA conducted an evaluation of
25 Pennsylvania in 2007 to address compliance with the ABA

1 standards and what it found was that Pennsylvania's
2 provision of counsel fails to meet the ABA standards.

3 And, again, as the committee has -- the
4 Pennsylvania Supreme Court Committee made clear, and as
5 we've experienced across the country, defects in funding
6 for indigent defense produce racially -- racially
7 disproportionate outcomes.

8 Counsel makes a difference. Philadelphia
9 is probably the best illustration, because most counties
10 do not have an adequately funded indigent defense
11 system. Most counties underfund Public Defenders. Most
12 counties underfund court-appointed counsel.

13 Philadelphia is one of the few places in
14 the country where we have a county-based homicide unit,
15 indigent defense homicide unit. What we have seen since
16 the creation of this unit, which covers only 20 percent
17 of the homicides in Philadelphia, there have been 87
18 death sentences imposed in Philadelphia.

19 If counsel made no difference, one would
20 anticipate that 20 percent of the death sentences coming
21 out of Philadelphia in that time would have been Public
22 Defender cases. But, in fact, all 87 death sentences
23 imposed in Philadelphia since 1992 have been
24 appointed-counsel cases. None have been with an indigent
25 capital defender. So we know that provision of counsel

1 makes a difference.

2 And we also know that in the close case
3 where there is inadequate representation, where bias can
4 creep in suddenly in the decisions, the difference in
5 counsel has racial effects. And so we know, if we're
6 serious about addressing the problem, we have to address
7 indigent defense; and if we don't do that, we have to
8 address the byproduct, which is racially disproportionate
9 death sentences.

10 Judges make a difference as well. And this
11 is something that is critical in a state in which we have
12 an elect -- an elected judiciary.

13 Now, that is something that is well beyond
14 the ken of the Racial Justice Act to address. But the
15 fact remains that in a system of elected judges there is
16 an inherent political pressure to respond to local
17 political concerns, and that subjects judges to pressures
18 from the community, and that subjects defendants to
19 pressures from the community; and so long as we have an
20 elected judiciary, we have one less mechanism by which we
21 can filter out political and social conditions and have
22 cases decided based solely on the facts and based solely
23 on the law.

24 We know that the individual judges can make
25 a difference and the -- I guess not the highlight,

1 perhaps the low light is the example from Philadelphia of
2 former Judge Sabo.

3 Judge Sabo had more people sentenced to
4 death in his courtroom than any other judge in the United
5 States and the data from his cases are astounding.
6 Twenty-eight black defendants going to death row, one
7 Latino, two Asian, and only two white. A grossly,
8 grossly disproportionate death row.

9 And 75 percent of the Sabo cases have been
10 reversed for various errors that have occurred. So you
11 have this discrimination that occurs and occurs in a
12 manner in which the cases -- that subject the cases to
13 higher scrutiny thereafter and higher rates of review.

14 It's not surprising that in -- in a
15 courtroom in which the judge was accused of bias that you
16 have some extraordinary facts. A waiver found of
17 mitigation for a non-English speaking Latino defendant
18 who we later proved to have mental retardation. A waiver
19 of mitigation for a non-English speaking Cambodian
20 defendant who we know now is paranoid schizophrenic.

21 He produced the only two Asians who are on
22 Pennsylvania's death row and he has produced the two
23 cases that led to the Supreme Court's decision to
24 forcibly medicate individuals to make them competent to
25 be executed.

1 In a fairer system, these cases probably
2 would not have gone through as capital cases. We
3 probably would not have had this kind of embarrassment.

4 So we have to pay close attention to what
5 judges do. We have to make sure that judges are
6 appropriately trained. It would be nice if they were
7 appropriately selected. But this is another major racial
8 problem that Pennsylvania courts face.

9 Philadelphia, when you talk about racial
10 discrimination and the death penalty in Pennsylvania,
11 that is a word that sums it up. Philadelphia. And it is
12 ironic that in the City of Brotherly Love you have the
13 most racially disproportionate death rows, not just in
14 Pennsylvania, but in the United States.

15 In 2001, at the height of Pennsylvania's death
16 penalty, there were a 135 death sentences in -- in
17 Philadelphia. Philadelphia produced more -- placed more
18 African-Americans on death row than any other county in
19 the United States at that time. Ninety-one percent were
20 racial minorities. The number has risen since then.

21 You take a look at this chart. Counties with
22 death rows of 30 or more, Philadelphia had more black
23 death row inmates than any other county in the United
24 States.

25 When you look at the per capital representation

1 of blacks and minorities on death row, Philadelphia had
2 the highest per capita representation of blacks and
3 minorities of any of the major counties in the United
4 States.

5 And under the Baldus study, we know that there
6 is statistically significant evidence that this made a
7 difference, race made a difference in who went to death
8 row, and we can document it in various different stages
9 of the decision-making process.

10 Among all death eligible cases, the odds that a
11 defendant would be sentenced to death increased by a
12 factor of 3.1 if the defendant was black. Among the
13 cases that advanced to penalty trials, where the
14 defendant was convicted, the odds that a defendant would
15 be sentenced to death increased by a factor of 9.3 if the
16 defendant was black.

17 Among all cases in which juries had the
18 discretion to decide whether to sentence the defendant to
19 death or to sentence the defendant to life, the odds that
20 the jury would exercise its discretion to take a life as
21 opposed to spare a life increased by a factor of 29.9 if
22 the defendant was black.

23 And we know that the race -- that issues
24 relating to race affected all aspects of the jury's
25 decision making, and we know it precisely because there's

1 one area of law in which the jury is required to make
2 decisions based solely upon the defendant himself. And
3 that's the decision about whether the defendant has
4 presented reasons for life, mitigating factors.

5 And the Baldus study found that in that set of
6 cases in which the jury rejected all mitigation and
7 therefore imposed a mandatory death sentence, finding
8 some aggravation and no mitigation, in those cases, the
9 odds increased by a factor of 4.1 that you would get a no
10 mitigation death verdict if the victim was white.

11 So we know the race of the victim is affecting
12 the jury's consideration of factors relating to the
13 defendant, and that is constitutionally impermissible and
14 it's intolerable.

15 Dave Baldus was able to calculate an excess
16 death rate using the same mechanism that we use for
17 determining health study as to whether exposure to a
18 toxin increases the risk of death, and he was able to
19 calculate an excess death rate of 30 percent. At that
20 time it was more than 30 black defendants. Over the
21 course of time we're probably talking about 40 black
22 defendants who went to death row probably only because of
23 the color of their skin.

24 And that's in one jurisdiction, the county and
25 city of Philadelphia.

1 What it means to be black? We know that there
2 are legitimate factors that might increase a defendant's
3 likelihood of getting the death penalty, such as torture,
4 such as creating a grave risk of death to others in
5 addition to the victim. And Dave Baldus was able to
6 chart out what the effects were.

7 But when you take a look at factors that are
8 involved in increasing a defendant's likelihood of
9 getting death, race ranks right up among torture and
10 grave risk.

11 It is a -- it is a greater predictor of whether
12 someone gets death than murder during the commission of
13 another felony, than murder with multiple stab wounds,
14 than a murder that caused great harm, fear, or pain to
15 the victim.

16 And we know that this is an invidious
17 characteristic. This is not something that ought to be
18 permissible, but it pervades Pennsylvania's death
19 sentence.

20 I'll skip some of the data on Philadelphia
21 because I've talked enough about that and you can see
22 that from the PowerPoint.

23 But here is some really interesting and
24 disturbing information. Since the year 2000, when death
25 rates in Philadelphia started dropping, when the

1 Philadelphia District Attorney's Office started seeking
2 death with less frequency and no longer indiscriminately
3 seeking death in every case, we have found the last 19
4 death sentences, even when the prosecution was acting in
5 a manner that had -- that showed reckless disregard to
6 discriminatory impact, we note that the last 19 death
7 sentences, even since then, have been imposed against
8 black defendants.

9 So when the District Attorney's Office has been
10 acting in a manner that would seem to be more racially
11 responsible the tail end has been an even more
12 disproportionate outcome.

13 The figures in the 21st Century are this: 22
14 death sentences, all by court-appointed counsel; 21 of
15 those against minority defendants, 20 against blacks, one
16 each against Latinos and whites.

17 And the Philadelphia trend is astonishing. Of
18 the last 43 death sentences imposed more than 95 percent,
19 41 of the 43 have been imposed upon persons of color.

20 Philadelphia is not alone. There's racially
21 disproportionate impact across the state. The variables
22 are different county by county, but we can document that
23 there are not just pockets of discrimination, there's
24 discrimination occurring all over the place.

25 Allegheny County has a very responsible

1 prosecutor, and yet in Allegheny County there's a highly
2 disproportionate outcome in capital cases. Berks County
3 since 1995, five blacks, three Latinos, two whites have
4 gone to death row. 80 percent minority representation.

5 Lehigh County, death row is currently five
6 Latinos, two blacks, and one white.

7 In Delaware County, again, with a prosecutor's
8 office that is not known for pressing capital charges
9 willy-nilly, a prosecutor's office that behaves in a
10 manner that most outside observers would say is very
11 responsible, in Delaware County, the only people who have
12 gone to death row have been racial minorities and one
13 innocent white person, Nick Yarris.

14 When we talk death penalty and discrimination,
15 we frequently talk about black and white. But the true
16 fact is -- and that is a problem in Pennsylvania. The
17 true fact is that we have an emerging problem with Latino
18 defendants. There is emerging racial discrimination
19 across the state, and particularly in the area that I
20 refer to as the I-80/I-83 corridor, that swath that comes
21 across starting in the northeast corner of the state and
22 sweeping down through -- through central Pennsylvania.

23 In these areas we've seen more capital
24 prosecutions against Latino defendants in circumstances
25 in which we would suspect that charges might not be

1 brought if the defendant were white.

2 We've seen cases where when there are Latino
3 victims and white defendants, the charges that have been
4 brought have been less than first degree. In the
5 converse, we're seeing disproportionate death.

6 The mechanism we think for the discrimination
7 is the jury. There's studies across the board that show
8 this concept of modern racism, that jurors who are more
9 likely to believe that blacks have received too many
10 social benefits, are more likely to be jurors on capital
11 cases, and that's a problem. So the death qualification
12 process produces more racially biased jurors.

13 The slides show -- and I won't go into this
14 because we're running short on time -- that -- that --
15 that this affects their view of the evidence.

16 In Philadelphia there's an astonishing study.
17 Take a look at these pictures. A black man on the left.
18 A black man on the right. Who is more likely to get
19 death? The one with darker-complected skin.

20 Among white victims you are twice as likely to
21 get death if you have stereotypically African features
22 than if you have lighter features, more European
23 features.

24 And racial profiling in jury selection, we have
25 demonstrated over the course of 20 years that the

1 Philadelphia District Attorney's Office is twice as
2 likely to strike black jurors as any other jurors; and
3 among the white jurors who were selected, you were twice
4 as likely to be struck if you lived in an integrated
5 neighborhood as opposed to a highly segregated white
6 neighborhood. And that makes a difference.

7 The slides have quotes from Philadelphia
8 district attorney trainings. I won't go into them now.
9 You can read them.

10 But it wasn't just the famous training tape
11 that taught discrimination. Other trainings indicate
12 that the DA's office was trained to find ways of avoiding
13 the law. The ideal jury, 12 Archie Bunkers will convict
14 on little evidence. Wait outside and count and see who
15 is on the jury. If you wanted to strike all blacks, you
16 could. It would give you a tactical advantage.

17 So we know that there was a consciousness of
18 race and we know it makes a difference. The data shows
19 that the discrimination occurred across all answers that
20 jurors gave about their background, their education, all
21 occupations, and so forth.

22 And the probability that this occurred by
23 chance in the case of the person who did the training
24 tape, Jack McMahon, was calculated at one in a
25 quadrillion. Astronomical. And you can't just say the

1 numbers will just make it up, because when they did that
2 same calculation with respect to women, the figure was
3 much, much lower. The odds were one in about 600.

4 Finally, why do we need the Racial Justice
5 Act? Because McCleskey versus Kemp, the United States
6 Supreme Court decision makes it so there's no effective
7 remedy under the federal constitution. Defendants cannot
8 bring these claims with statistical evidence.

9 We need the Racial Justice Act because recent
10 decisions by the Third Circuit and the United States
11 Supreme Court make it clear that even during the period
12 before defendants knew there was a pattern and practice
13 of discrimination and racial selection, you can't raise
14 jury discrimination claims unless those issues were
15 preserved at trial.

16 So there are many, many cases where we know
17 discrimination has occurred and there's no remedy. The
18 Race and Gender Committee looked at this and they said we
19 need a Racial Justice Act.

20 Other neighboring states have taken other
21 remedies. But I'll tell you what. We know. We know as
22 an absolute certainty that in every jurisdiction that
23 borders Pennsylvania there are geographic effects that
24 show discrimination. There are race of victim
25 discrimination. There is race of defendant

1 discrimination.

2 It's pervasive in all of the states and
3 endemic in the death penalty. It is a reason why we need
4 the Racial Justice Act. It's a reason why we need it
5 now.

6 Thank you very much.

7 CHAIRMAN CALTAGIRONE: Thank you. We've
8 been joined by other members.

9 If you want to stay for questioning.

10 MR. DUNHAM: Oh, certainly. I'm sorry.

11 CHAIRMAN CALTAGIRONE: Obviously there will
12 be some questions.

13 MR. TYLER: Nice try.

14 CHAIRMAN CALTAGIRONE: But we've had
15 additional members join us. If they would just introduce
16 themselves for the record starting over on my right.

17 REPRESENTATIVE COHEN: Representative Mark
18 Cohen, Philadelphia.

19 REPRESENTATIVE WATERS: Representative Ron
20 Waters, Philadelphia and Delaware County. 87.

21 REPRESENTATIVE SAINATO: I'm Representative
22 Chris Sainato. I represent parts of Lawrence and a small
23 section of Beaver County.

24 REPRESENTATIVE EVANS: Representative John
25 Evans. I represent Erie and Crawford Counties.

1 let's say we implement this Racial Justice Act -- tell me
2 how it would work at trial, at sentencing, what it would
3 or wouldn't add to the process in terms of cost, time,
4 appeals, fact finding, sentencing, witnessing, give me
5 the practical if we had this in place, what it would mean
6 as a -- as a death-qualified case is going through the
7 system.

8 MR. DUNHAM: I think practically there are
9 three types of effects. First, the mere presence of a
10 Racial Justice Act, the mere fact that -- the mere fact
11 that folks know that the law is watching will affect
12 decisions.

13 You are much less likely -- as Mr. Thomas
14 mentioned previously, you're less likely to see racial
15 discrimination in charging practices and a lot of that is
16 subconscious. But when prosecutors are aware that this
17 something they should be thinking about, they're more
18 likely to be fairer in their charging practices.

19 But assuming that that isn't the case, the
20 Racial Justice Act would provide a pretrial mechanism to
21 challenge the selection of the defendant as a death
22 eligible case. And if you were able to show a prima
23 facie case, through statistical evidence that there is
24 probable racial discrimination, then you can move
25 beforehand to have the capital charges quashed. That

1 would save the case of the capital trial altogether.

2 There would be additional costs obviously
3 related to litigating that claim and those are the same
4 costs you would have any time there is a claim in any
5 court on racial discrimination. It would be no different
6 than if there were a housing discrimination case, if
7 there's a discrimination case about the provision of
8 medical benefits.

9 The other place you would see some court
10 action obviously would be with respect to cases that have
11 already gone through the system, and the act has a
12 mechanism to bring the cases forward. It has a statute
13 of limitations.

14 So one would suspect that there will be,
15 if -- if the act is passed, there will be litigation
16 filed. One of the ways you can address that in the
17 post-conviction context would be by essentially having a
18 class action. Because the operative set of facts in
19 individual counties will remain the same. You would only
20 need to do the hearing once with respect to the general
21 facts and then each defendant would have the obligation
22 to try to show that there was something linking him or
23 her to that discrimination.

24 But you would not have to do, as in the
25 case of Philadelphia, 135 separate hearings. You can

1 streamline that by having a single -- a single judicial
2 response.

3 REPRESENTATIVE MANDERINO: So if I can
4 follow up, on the pretrial basis, we saw a lot of
5 statistics about the number we have on death row, but I
6 don't remember seeing a number that says we have on
7 average X number of death-qualified cases that move
8 forward in Pennsylvania each year.

9 MR. DUNHAM: That's right.

10 REPRESENTATIVE MANDERINO: What's that
11 number?

12 MR. DUNHAM: We don't know.

13 REPRESENTATIVE MANDERINO: We don't know?

14 MR. DUNHAM: Because Pennsylvania does not
15 have a system for gathering it up. In fact, I just
16 informally started trying to figure out what's going on.

17 I can tell you that I'm aware of 82 cases
18 that are currently pending that are capital charges, but
19 I know that it is probably twice that amount.

20 And there is no formal basis, there's no
21 formal mechanism for us to figure that out. That's one
22 of the things that we've been urging for years, but it's
23 a problem that the Racial and Gender Equity Committee
24 had. It's a problem the ABA had. We don't have that
25 data.

1 REPRESENTATIVE MANDERINO: Other states do
2 collect it? That's what you were trying to show us up
3 there?

4 MR. DUNHAM: That's correct.

5 REPRESENTATIVE MANDERINO: With regard to
6 what other states do versus us, one of the other points
7 that you made was kind of if we funded -- or you talked
8 about how we fund or don't fund adequately indigent
9 defense.

10 If we funded indigent defense better -- and
11 -- and, again, you hinted at the fact that even if we did
12 it, we would probably still have this disparate impact
13 based on some of the data you showed with regard to
14 Philadelphia.

15 But is there any correlations that have
16 been drawn? For example, other than -- we're up there
17 number one and two with Texas. Do they have the same
18 problem with funding indigent defense as we do?

19 MR. DUNHAM: Yes, they have a major
20 problem.

21 REPRESENTATIVE MANDERINO: In states that
22 fund indigent defense better, are you -- should I take
23 from your testimony they still have racially disparate
24 impacts, just not as grave as ours?

25 Do you understand where I'm going with

1 this?

2 MR. DUNHAM: Yeah. There are differences.
3 There appear to be differences based on whether there are
4 statewide systems of indigent defense versus
5 county-by-county systems of indigent -- of indigent
6 defense.

7 In the states, such as New Jersey and New
8 York that adequately funded indigent defense and did so
9 on a statewide level, the evidence from trials was that
10 there was less racial disproportionality in general, but
11 we also found there was a significant reduction
12 altogether in the use of the death penalty and in death
13 verdicts when cases went to trial.

14 When there is good representation, when
15 there's constitutionally sufficient representation, there
16 is a disincentive for prosecutors to seek death in
17 marginal cases, because there's less prospect of winning
18 in those marginal cases.

19 And the theory is, though we don't yet have
20 the data that would bear this out, that it's probably the
21 marginal cases that produce much of the discrimination.

22 The cases that probably wouldn't be death
23 cases if they were well defended probably wouldn't be
24 death cases if they were looked at more seriously. So a
25 good defense system will eliminate those marginal cases.

1 REPRESENTATIVE MANDERINO: So can I take it
2 from what you said, is it hard to draw a conclusion? In
3 Pennsylvania -- not in Pennsylvania. We have no data.
4 But places where there is data, is it -- is it hard to
5 draw a conclusion as to which matters more, the inherent
6 bias of the -- of the racial prejudice or adequate or
7 inadequate funding of the indigent defense?

8 MR. DUNHAM: Yeah. It's hard to say which one
9 is more important, but it is safe to say that both are
10 important.

11 REPRESENTATIVE MANDERINO: And then my last
12 question, because I know other members would have it --
13 have questions, I realize that perhaps some of the
14 evidence that you presented us which was very
15 Philadelphia-oriented was because of where there have
16 been some studies and some specific information gathered,
17 but I -- I -- I could almost conclude that, well, based
18 on what you told me, if we, once again, just got rid of
19 the problem that seems to be Philadelphia, we wouldn't
20 have a problem.

21 So let me throw that out that way and let
22 you address that.

23 MR. DUNHAM: Yeah. There are -- there is
24 clearly a problem in Philadelphia. But the fact that
25 Philadelphia has an overwhelming problem doesn't mean

1 that there aren't problems in other places.

2 We do have a problem across the state. And
3 if you took Philadelphia out of the equation, we would
4 still have a problem. The nature of the problem would be
5 different.

6 What you see in a lot of the counties in
7 northeast Pennsylvania, then slanting through the center
8 of the state, is what appears to be an emerging pattern
9 of discrimination against Latino defendants.

10 But you still do have racially
11 disproportionate representation of African-Americans on
12 death row in the other counties.

13 In terms of proof, almost all the studies
14 across the country have shown geographic disparities in
15 the imposition of the death penalty. It is almost always
16 discrete factors, local political factors, local social
17 factors, that are involved in that.

18 There's no question there would be
19 discrimination found in some of -- some of Pennsylvania's
20 counties. There's certainly prima fascia evidence of
21 it.

22 And the Racial Justice Act would at least
23 create a judicial forum in which we can find out if the
24 disproportionate impact is a product of discriminatory
25 decision making.

1 REPRESENTATIVE MANDERINO: Thank you,
2 Mr. Dunham.

3 CHAIRMAN CALTAGIRONE: Representative
4 Evans.

5 REPRESENTATIVE EVANS: Thank you very much,
6 Mr. Chairman.

7 Thank you, Mr. Dunham, for your testimony
8 today as well.

9 On Page 1 of your PowerPoint presentation
10 you went down the statistics, the percentages of inmates
11 on Pennsylvania's death row. 59.9 percent black, 31.5
12 percent white, 8.6 Latino, and .09 Asian.

13 In a utopian world where racism would not
14 be a factor, where would you like to see the percentages
15 for each of those categories?

16 MR. DUNHAM: Let me preface that by saying
17 I would prefer that we don't have the death penalty. But
18 if we do have the death penalty, if you're looking for it
19 being imposed in a nondiscriminatory way, what you would
20 want the data to reflect is the percentage in which
21 particular classes of defendants are committing
22 death-eligible offenses.

23 Now, we don't have really good data in
24 Pennsylvania that will tell us exactly where that is, but
25 the suggestion is that there's probably a ten percent

1 overrepresentation of minorities.

2 REPRESENTATIVE EVANS: And that data would
3 factor in the preponderance of crimes or the number of
4 crimes committed?

5 MR. DUNHAM: That's correct. It
6 wouldn't -- this wouldn't be a case of -- you say that,
7 for example, the population in Philadelphia is 44 percent
8 African-American. Therefore, death row should be 44
9 percent African-American.

10 You have to take into consideration the
11 crime statistics, not just the population statistics.

12 REPRESENTATIVE EVANS: Thank you. And your
13 first response, I think, is -- is truly where this is all
14 going. I'll make an analogy. It may not be a proper
15 analogy, but I think it carries some weight.

16 Is that you see legislation now for the
17 approval of medical marijuana in Pennsylvania, and it's
18 happened in other states, and -- and I believe that even
19 the supporters of that legislation, the true goal is to
20 make marijuana legal in -- in Pennsylvania, not just for
21 medicinal purposes.

22 And I think in looking at this legislation,
23 your true goal is to eliminate the death penalty, is it
24 not?

25 MR. DUNHAM: I don't have a goal. I mean

1 my -- my personal preference is I don't -- I don't like
2 the death penalty. That's -- that's a product of my
3 close to 20 years as a defense lawyer.

4 I've actually been called as a juror in
5 capital cases -- a capital case early in my career and
6 truthfully answered the question could I impose the death
7 penalty in an appropriate case, and my answer was yes.

8 So this is not something that arises out of
9 a political predisposition. My opinion is something that
10 arises out of 20 years of practicing death penalty cases
11 and seeing that Pennsylvania has not been able to
12 administer it in a manner that's fair and equal.

13 But the question here is whether race is an
14 issue that should be addressed. One need not abolish the
15 death penalty in order to attempt to address racial
16 inequities. And the consideration should be what's fair,
17 what's just, and what should we do in a society that --
18 where -- where we're striving for equality?

19 REPRESENTATIVE EVANS: What would the level
20 of racism need to reach? I mean racism is a pretty broad
21 term. And if you're going to attack a juror for being a
22 racist, is that because maybe his brother or sister
23 belongs to all inclusive or exclusive club? Is it
24 because someone made a comment using the N word? Is it
25 -- how -- how -- what would be the level to say someone

1 is racist?

2 MR. DUNHAM: The Racial Justice Act does not
3 engage in that kind of analysis. In fact, there are
4 separate kinds of constitutional violations that can
5 already be alleged if a decision maker in the case has
6 said something specifically that would demonstrate that
7 they are racially biased against the defendant.

8 What the Racial Justice Act addresses is
9 overall systemic evidence of unfairness, disparate impact
10 that suggests that race is an impermissible factor in
11 decisions as to whether an individual should live or
12 die.

13 So my answer to that is that it's -- it's
14 outside what the Racial Justice Act does. We certainly
15 should not be having people who have racial bias
16 participating in -- in capital decisions.

17 But that's something that's entirely separate
18 from systemic efforts to redress racial discrimination
19 that this act attempts to address.

20 REPRESENTATIVE EVANS: So if I understand this
21 correctly, you're talking about pretrial actions and not
22 actually during the trial? The jury selection is where
23 you're more focused on than it is after the sentence is
24 made?

25 MR. DUNHAM: Well, the focus on jury selection

1 was to illustrate one of the mechanisms by which
2 discrimination frequently occurs.

3 REPRESENTATIVE EVANS: Okay.

4 MR. DUNHAM: And what's interesting is the
5 Racial Justice Act gets at a very discrete area of
6 discrimination that is frequently impossible to get at
7 otherwise.

8 There are times in which prosecutors will be
9 making decisions in individual cases and thinking that
10 they are not doing anything on the basis of race. But
11 over the course of multiple decisions, you see that their
12 discretion is exercised in a way that has racial
13 effects.

14 It may be at the subconscious level. It may be
15 something that you can't measure in an individual case.

16 The same thing with juries. There are a lot of
17 subtle influences. And so what the Racial Justice Act
18 does is allow you -- allow you to aggregate what's
19 happened across cases, across time, within a particular
20 jurisdiction, and to find out whether these subtle things
21 have produced impermissible discriminatory impact.

22 REPRESENTATIVE EVANS: So if this legislation
23 is enacted -- and I'm just trying to understand this --
24 if a defendant would have -- if he's convicted and sent
25 to death row, they would have legal redress to come back

1 and say this is an improper sentence because there was
2 racial discrimination involved with this trial?

3 MR. DUNHAM: Yes.

4 REPRESENTATIVE EVANS: Okay.

5 MR. DUNHAM: Yes. I believe that's the case.
6 I don't believe that is anything that is -- I mean
7 prospectively I don't think that's anything much beyond
8 what -- involves processes much beyond what's already
9 there.

10 It's just a different kind of claim. And, of
11 course, if the claim has already been presented within
12 the jurisdiction, a lot of evidentiary materials have
13 already been developed.

14 REPRESENTATIVE EVANS: Thank you.

15 CHAIRMAN CALTAGIRONE: Other members?

16 REPRESENTATIVE WATERS: Yes.

17 CHAIRMAN CALTAGIRONE: Representative
18 Waters?

19 REPRESENTATIVE WATERS: Yeah. Good
20 morning. Thank you --

21 MR. DUNHAM: Good morning.

22 REPRESENTATIVE WATERS: -- Mr. Chairman.
23 Thank you, Mr. Chairman. Sorry I wasn't here for the
24 earlier comments that were made.

25 I wanted to ask you, I don't know if it was

1 already discussed about the -- the case that -- where --
2 in Philadelphia where people were being taught how to
3 eliminate African-Americans from the jury, the jury
4 pool. Was that discussed already today?

5 MR. DUNHAM: I alluded to that. And on the
6 PowerPoint there are some -- there's some slides that
7 have excerpts from that -- from that videotape training,
8 yes.

9 REPRESENTATIVE WATERS: Who was that that
10 was accused of doing that? I forget what his name was
11 now.

12 MR. DUNHAM: The Assistant District
13 Attorney was a gentleman by the name of Jack McMahon.

14 REPRESENTATIVE WATERS: Yes. That's
15 right. Do we -- do we have any data that shows during
16 the time of jury selections where the -- the breakdown of
17 the -- how many times people who are called are
18 eliminated from the jury pool and how many times were --
19 other people were -- I say other, as not -- not in a
20 negative way, but it's African-Americans or people of
21 color have been excluded and then in the other case where
22 people were not excluded? Do we have any data on that?

23 MR. DUNHAM: Yes, we do. We've been able
24 to take a look at 14,000 choices that the Philadelphia
25 District Attorney's Office made in selecting jurors.

1 And of those 14,000 jurors we were able to
2 identify the race of approximately 12,000 of them. Among
3 those jurors, over a --close to 20-year period, the
4 Philadelphia District Attorney's Office was twice as
5 likely to exercise a peremptory challenge, that is, a
6 discretionary strike, to eliminate a black juror from
7 service as it was --

8 REPRESENTATIVE WATERS: You say twice as
9 much?

10 MR. DUNHAM: Twice as likely to strike a
11 black juror as any other juror. And the effects are not
12 limited to the -- the immediate race of the juror.

13 Let me rephrase that. It's not limited
14 just to black jurors, because we've found that among the
15 white jurors, when you take a look at the neighborhoods
16 in which the white jurors lived -- and we were able to do
17 this because we were able to cross-reference the juror's
18 address and census track information to obtain the -- the
19 neighborhood race.

20 Among white jurors, you were twice as
21 likely to be struck from jury service if you lived in an
22 integrated neighborhood than if you lived in a highly
23 segregated neighborhood.

24 So there is -- there are effects based on
25 the race of the defendant. There are effects based upon

1 the type of neighborhood that the white juror lived in.

2 And the ultimate effect of that is that,
3 whether by design or just by practice that evolved over
4 time, the Philadelphia District Attorney's Office ended
5 up selecting for the most racially insulated and most
6 racially isolated white jurors who also happened to be
7 the ones who were most likely to be racially fearful, and
8 I believe that's what accounts for the fact that in
9 interracial killings the defendants who are most likely
10 to be sentenced to death are the defendants who have the
11 darker skin features and most stereotypically African
12 features as contrasted with light-skinned blacks or
13 blacks who have more European features.

14 REPRESENTATIVE WATERS: So then that
15 totally kills the whole notion of being judged by a jury
16 of your peers when that is, in fact, the outcomes that
17 are going on.

18 And -- and then we hear -- I know a lot of
19 folks in neighborhoods where I -- where I live, the
20 neighborhood where I live and people I know, they don't
21 even want to participate in a jury. If they're called
22 for jury duty, they don't even want to come out because
23 they feel as though it's a waste of time.

24 And if you come out a lot and find yourself
25 being excluded and excluded and excluded, sooner or later

1 you feel as though you're not wanted either. So you'll
2 probably just not even want to show up anymore, and that
3 in the long run psychologically discourages a person from
4 even participating at all in this whole process.

5 I think that the -- the whole notion that
6 we had to even have the civil rights movement at all,
7 even after, still need to have this kind of legislation,
8 I think says a lot about where we are as a -- as a just
9 society.

10 But obviously -- obviously we do need it.
11 We will have to have another law to prevent people from
12 not being fair or -- or to increase the possibility of
13 justice in the jury -- in our jury -- in our jury
14 justice, justice, quote/unquote. I'm going to quote, put
15 that in quotes, in our justice system.

16 So now, if this law is -- if we do come to
17 pass with this law, how would -- would it have any
18 retroactive effects?

19 MR. DUNHAM: It permits people who have
20 already been sentenced to death to challenge their death
21 sentences based upon racial -- yes. Based upon racial
22 factors, yes.

23 REPRESENTATIVE WATERS: Within?

24 MS. COATES: One-year --

25 MR. DUNHAM: You'll have one year to bring

1 the claim.

2 MS. COATES: -- window.

3 MR. DUNHAM: But people who have already
4 been victimized by racial discrimination, who have
5 already been sent to death row, will have the opportunity
6 to seek redress.

7 REPRESENTATIVE WATERS: Say that again.

8 MR. DUNHAM: When you say does it
9 retroactively apply, does that apply to people who have
10 already been sentenced to death?

11 REPRESENTATIVE WATERS: Yes.

12 MR. DUNHAM: The answer is yes.

13 REPRESENTATIVE WATERS: Okay.

14 MR. DUNHAM: There's a limited time frame
15 in which to bring those claims to court. But if you are
16 on death row now for a death sentence that was imposed in
17 Philadelphia during the early 1990s, for example, then
18 you are able within that one-year period to seek a court
19 hearing to determine whether the death sentence was a
20 product of racial discrimination.

21 REPRESENTATIVE WATERS: All right. So
22 those people that did not do that within that one year,
23 by 1991, they can't use this. This will not be --

24 MR. DUNHAM: No. One year. One year from
25 the date the law goes into effect.

1 REPRESENTATIVE WATERS: The law -- if this
2 becomes law, they'll have a year after, no matter how old
3 their case is, to -- to -- to use this law for -- for a
4 retrial? Would it -- would it be a retrial or would it
5 --

6 MR. DUNHAM: No. It would just be to
7 overturn the death sentence. The law would not affect
8 the conviction. It would only affect the sentence.

9 REPRESENTATIVE WATERS: Well, then it still
10 doesn't go far enough. If the person was convicted based
11 on race, then a lot of other mitigating circumstances
12 might not have been a part of the evidence, or at least
13 considered.

14 We know there have been cases where things
15 have been withheld from the jury to know. But I guess
16 it's going in the right direction. It may not -- it may
17 not take us where we want to go.

18 And I agree with the -- my feeling on the
19 death penalty is -- I'm not saying I'm totally opposed to
20 it, because I'm not totally opposed to it in certain
21 cases.

22 And I don't even want to talk about it
23 right now, but in certain cases, I think with clear
24 evidence that you got the right person, you know, I'm not
25 saying that whatever the justice is should not be carried

1 out, but -- but I -- I do have a bill right now that is
2 in the committee for -- well, it's a resolution right now
3 in the committee to do a study on the -- on the -- on --
4 on the death penalty.

5 We know a lot of people who have been found
6 innocent after serving long periods of time in jail for a
7 crime they didn't commit. So I'm -- I'm -- I guess I'm
8 kind of like you. I heard that New Jersey says that they
9 -- they eliminated it. I see you have that up there,
10 too.

11 And they save the taxpayers a lot of money
12 as a result of it. I don't know if that came out in this
13 hearing yet or not.

14 Of course, we're not trying to save money.
15 We just want to make sure we're doing the right thing by
16 -- by whatever, you know, the determination is terms of
17 applying justice.

18 So, you know, I -- I really appreciate it.
19 And I'm glad you told me what you said. I need -- I'm --
20 I'm hoping we can go over those facts of the -- of the
21 amount of people that have been excluded because based
22 on -- I mean not based on but because I mean it just
23 happens to come out that more African-Americans are twice
24 as likely to be excluded and poor. I guess you would say
25 in most cases, the people that are not African-Americans

1 or people who come from more -- neighborhoods where maybe
2 they have more diversity in their community are probably
3 also people who have less income in -- in many cases?
4 Would you -- is that based on that analysis, like
5 Kensington and other places like that?

6 MR. DUNHAM: Well, and you also have areas
7 such as Society Hill and Mount Airy in Philadelphia that
8 are racially integrated where white jurors were struck
9 with higher frequency than white jurors in -- in
10 segregated neighborhoods.

11 REPRESENTATIVE WATERS: I thank you. I
12 appreciate your comments.

13 CHAIRMAN CALTAGIRONE: Thank you. Are
14 there any other questions? Mark?

15 REPRESENTATIVE COHEN: May I?

16 CHAIRMAN CALTAGIRONE: Sure.
17 Representative Cohen.

18 REPRESENTATIVE COHEN: Yeah, I do. Your
19 study of peremptory challenges, is -- is this all cases
20 or just limited to death penalty cases?

21 MR. DUNHAM: These were capital cases.

22 REPRESENTATIVE COHEN: These were all --
23 these were capital cases.

24 MR. DUNHAM: And -- and Representative
25 Cohen, one thing I should -- I should make clear, the

1 data on the peremptory challenges was gathered from the
2 1980s through around 2001, 2002.

3 We don't have data on what the District
4 Attorney's Office has done since then and certainly there
5 is -- it appears that the new District Attorney may not
6 be engaging in those practices.

7 I mean time will tell. But I don't want to
8 leave the impression that the Philadelphia District
9 Attorney's Office is currently still engaging in those
10 practices.

11 The fact is we don't know statistically how
12 its peremptory challenges have been exercised in the last
13 five or six years.

14 REPRESENTATIVE COHEN: Thank you. That
15 answers my question.

16 I would just like to say for -- briefly,
17 for the record, in response to Representative Evans, the
18 purpose of introducing the medical marijuana, while it
19 was to legalize medical marijuana in Pennsylvania, it was
20 not to legalize all marijuana.

21 I think the public as a whole has a great
22 understanding of the differences between as to -- as to
23 the sponsors of this legislation.

24 CHAIRMAN CALTAGIRONE: Any other
25 questions?

1 Thank you, Bob.

2 MR. DUNHAM: Thank you for the opportunity.

3 CHAIRMAN CALTAGIRONE: Good to see you
4 again, by the way. Thank you.

5 We'll next hear from William M. DiMascio,
6 the Executive Director of the Pennsylvania Prison
7 Society.

8 EXEC. DIRECTOR DiMASCIO: Good morning.

9 REPRESENTATIVE MATZIE: Good morning.

10 EXEC. DIRECTOR DiMASCIO: Thank you,
11 Chairman Caltagirone and members of the committee, for
12 this opportunity to speak here on behalf of House Bill
13 1996.

14 This legislation is as compelling as
15 anything that comes before this General Assembly because
16 it really addresses issues of life and death and racial
17 equity. In representing the Pennsylvania Prison Society,
18 I come to you not as a bleeding heart, but as a voice of
19 an enlightened and concerned citizenry.

20 Our support for this bill is predicated
21 upon the following:

22 The disproportionate application of capital
23 punishment on the poor and minorities throughout the 20th
24 Century.

25 The waste of millions of dollars over and

1 above what a sentence of life in prison might cost.

2 The death penalty's utter lack of deterrent
3 value.

4 And, lastly, any number of respective state
5 and national studies that conclude unmistakably that
6 racial bias is prominent in the use of capital
7 punishment.

8 And we heard about quite a few of them here
9 this morning.

10 House Bill 1996, I believe, is really
11 critically important because it addresses the issues
12 raised in the Supreme Court decision in 1987 in the case
13 of Warren McCleskey. That case, which according to
14 Anthony Lewis, a noted New York Times' columnist at the
15 time, said effectively condoned the expression of racism
16 in a profound aspect of our law.

17 That decision, incidentally, was one in
18 which Justice Powell, who wrote the majority opinion,
19 later told his biographer that if there was one decision
20 that he could change from his career it would have been
21 the McCleskey decision.

22 Specifically, this bill states that the
23 defendant must show one or more of the following:

24 First, that the death sentence was sought
25 or imposed significantly more frequently on defendants of

1 one race over another.

2 Second, that the death sentence was sought
3 to be imposed significantly more frequently for capital
4 offenses against people of one race than people of
5 another race.

6 And, third, that race was a significant
7 factor when deciding to exercise peremptory challenges.
8 And I think we just heard a fairly thorough discussion
9 about a number of those instances.

10 In the aggregate, these stipulations are
11 supported by a substantial body of data presented in
12 numerous publications that show the racist implementation
13 of the death penalty. In 2007, Professor David Baldus
14 from the University of Iowa, and statistics professor,
15 David Woodworth, published a study of death penalty
16 sentencing in Philadelphia County from 1978 to 2000.

17 The study found that race significantly
18 affected death penalty sentencing in Philadelphia. And,
19 before that study's publication, Baldus testified before
20 the Pennsylvania Committee on Racial and Gender Bias in
21 the Criminal Justice System that one-third of
22 African-Americans on death row from Philadelphia at the
23 time would have been sentenced to death without
24 possibility of parole but for the color of their skin.

25 In addition, the professor compared being

1 African-American to being, quote, in his words, saddled
2 with an extra aggravating factor.

3 Quantitative data also show the death
4 sentence was sought or imposed significantly more
5 frequently for capital cases against victims of one race
6 than victims of another race.

7 One example of this is presented in
8 sociologists Michael Radlet and Glenn Pierce's
9 statistical analyses of prosecutorial discretion. In
10 cases with white victims and black defendants, the
11 researchers found that not only are prosecutors sometimes
12 motivated to seek a death sentence for reasons that
13 reflect the racial configuration of the crime, but they
14 do -- they do so in a way that greatly reduces the
15 possibilities for discovering evidence of discrimination
16 and arbitrariness when only later stages of the judicial
17 process are examined.

18 The University of Maryland study released
19 in 2003 shows that blacks who kill whites are 2.5 times
20 more likely to be sentenced to death than whites who kill
21 whites and 3.5 times more likely than are blacks who kill
22 blacks.

23 Baldus and Woodworth's study of the death
24 penalty in Philadelphia also supports an assertion that
25 race was a factor in determining when prosecutors

1 exercised peremptory challenges in capital cases. They
2 found that, on average, prosecutors struck 51 percent of
3 African -- African-American venire members but only 26
4 percent of the non-African-American venire members. And
5 race reflects -- race effects persisted after controlling
6 for legitimate juror characteristics, such as occupation,
7 education, neighborhood, and the responses.

8 In testimony, again, before the
9 Pennsylvania Committee on Racial and Gender Bias, Baldus
10 asserted that in select -- in the selection of capital
11 juries, Philadelphia prosecutors and defense counsel
12 systemically exclude venire members through the use of
13 peremptory challenges on the basis of their race and
14 gender and that this exclusion based on race and gender
15 is principally the product of high prosecutorial strike
16 rates against African-American venire members that are
17 not offset or counteracted by high defense counsel strike
18 rates against non-African-American members.

19 Race of jurors and peremptory strikes
20 become very important when discussing capital cases in
21 which the defendant is black and the victim is white. In
22 the U.S. Supreme Court 1986 decision in Turner v. Murray
23 the majority acknowledged that jurors can be influenced
24 by both conscious and unconscious racism in cases with an
25 African-American defendant and white victim.

1 A follow-up study by the Capital Justice
2 Project examined 74 cases with an African-American
3 defendant and a white victim. The study reported that
4 the juries -- that juries with fewer than five white male
5 jurors handed down a death sentence 30 percent of the
6 time, but that percentage rose to 70.7 percent when five
7 or more white male jurors sat on the jury.

8 And while we're most concerned about racial
9 equity and fairness, the point has been raised here
10 already about the cost incurred to the Commonwealth.
11 It's another compelling fact to consider, but there's a
12 tremendous expense that capital punishment imposes on the
13 already strapped treasury of the Commonwealth.

14 On top of all of the many problems
15 associated with death penalty litigation, racial
16 disparity adds additional appellate expenses.

17 Just last month, Richard Dieter, Executive
18 Director of the Death Penalty Information Center
19 testified, before a Senate commission here in Harrisburg,
20 and by extrapolate -- we don't have a -- a good cost
21 study in Pennsylvania, but by extrapolating from other
22 studies, he was able to estimate that the death penalty
23 costs the Commonwealth some \$46 million a year with
24 virtually no return. Inasmuch as the deterrence theory
25 has been thoroughly debunked, these are dollars that are

1 totally wasted.

2 Dieter noted that a recent nationwide poll
3 of police chiefs found capital punishment ranked last
4 among crime fighting strategies and the least efficient
5 use of limited taxpayer dollars. Police chiefs would
6 much rather see that money spent on other strategies they
7 believe to be more effective.

8 If the ineffective and expensive death
9 penalty were eliminated, the question of race and its
10 imposition would be moot. But the Prison Society
11 continues to support the abolition of the death penalty;
12 but as long as the sanction remains on the books,
13 citizens need assurance that it is used fairly and
14 even-handedly in all cases.

15 Given the facts and the history of capital
16 punishment, that accomplishment is no small feat,
17 although House Bill 1996, we believe, is a step in the
18 right direction.

19 The late Justice Thurgood Marshall told the
20 American Bar Association almost 18 years ago that the
21 Supreme Court restored the use of capital punishment in
22 the Gregg v. Georgia decision, quote, premised on the
23 promise that it would be administered with fairness and
24 justice.

25 Instead, the promise has been a cruel and

1 empty mockery, he added. If not remedied, the scandalous
2 state of our present system of capital punishment will
3 cast a pall of shame over our society for years to come.
4 We cannot let it continue.

5 Unfortunately, we have permitted this
6 travesty to go on for far too long. So we salute
7 Representative Matzie and this -- this committee for
8 considering this long overdue remedial legislation. We
9 strongly urge members of the committee to support it --
10 the measure.

11 Thank you.

12 CHAIRMAN CALTAGIRONE: Thank you.

13 Questions?

14 Okay. Thank you.

15 EXEC. DIRECTOR DiMASCIO: Thank you.

16 CHAIRMAN CALTAGIRONE: We'll next hear from
17 Jeremy Collins, Director of the North Carolina Coalition
18 for a Moratorium.

19 DIRECTOR COLLINS: Good morning.

20 CHAIRMAN CALTAGIRONE: Good morning.

21 REPRESENTATIVE MATZIE: Good morning.

22 DIRECTOR COLLINS: I believe everyone has a
23 written copy of my testimony.

24 To the Governor of this great state,
25 Governor Ed Rendell, and his honorable cabinet; to the

1 Lieutenant Governor and President Pro Tempore of your
2 Senate, Joseph Scarnati, and to the leader of this great
3 House, Speaker Keith McCall, and to the chair of this
4 Judiciary Committee, Representative Caltagirone, and to
5 you, the elected representatives of the people of this
6 state, I extend my sincere gratitude and appreciation for
7 the opportunity to speak before you this morning.

8 As stated, my name is Jeremy Collins. I'm
9 the director of the North Carolina Coalition for a
10 Moratorium, a partnership of organizations and
11 individuals across the state that supports reforms to the
12 North Carolina capital punishment -- I'm sorry --
13 supports reforms to the North Carolina capital punishment
14 process -- capital punishment system.

15 The campaign's membership includes
16 Democrats and Republicans, attorneys, politicians, faith
17 leaders and communities from a variety of denominations
18 and nonprofit organizations whose missions are dedicated
19 to criminal justice reform, victims' rights, and
20 restorative justice.

21 I am honored to appear before you today on
22 behalf of our 25 state coalition partners and the great
23 state of North Carolina.

24 This morning I'm here to speak briefly
25 about a bill currently before this body that would

1 address the issue of racial bias and Pennsylvania's
2 capital procedure. Racial bias has and continues to play
3 an inappropriate role in capital sentencing in
4 Pennsylvania, in North Carolina, and across the United
5 States.

6 I'm proud to share that last year North
7 Carolina took the brave step of enacting the North
8 Carolina Racial Justice Act. This bill, just as your
9 House Bill 1996, provides no person shall be sentenced to
10 death or executed pursuant to any judgment based on
11 race.

12 It would be an understatement to say that
13 passage of this legislation was not an easy task in North
14 Carolina. Our bill sponsors, other supportive
15 legislators, civil and religious leaders, both black and
16 white, worked tirelessly to promote the principle that
17 fairness to all persons, regardless of race, is essential
18 to our capital punishment process and our criminal
19 justice system at large.

20 I would love to tell you -- I would love to
21 tell you how we passed the Racial Justice Act in North
22 Carolina and the rough road we traversed. It's a
23 wonderful story and I never tire -- tire of sharing it.
24 But today I would rather spend my time talking to you
25 about the amazing things we've seen in North Carolina

1 since passing this act.

2 For the first time, the state has enab --
3 established an enforceable compact with its citizens that
4 no person will be executed if it can be shown that there
5 is a significant risk that race was a factor on the part
6 of the justice system when deciding whether persons live
7 or die.

8 This act gives North Carolina citizens
9 generally, and its minority citizens in particular,
10 greater confidence that the death penalty will not be
11 meted out in North Carolina in an arbitrary or
12 discriminatory fashion.

13 By its willingness to engage in
14 self-examination about past racial discrimination and
15 future procedural protections, North Carolina has
16 established itself as a leader in fairness and justice.

17 Additionally, by examining the practices of
18 excluding certain minorities from juries, the Racial
19 Justice Act will help to weed out state-sponsored
20 discrimination in jury selection and, as a result, lead
21 to more diverse juries across the criminal justice
22 system. The Racial Justice Act sends an official message
23 that racial discrimination, wherever it is found, will
24 not be tolerated by the state.

25 In short, we passed this bill in North

1 Carolina because we were willing to recognize and address
2 a glaring problem in North Carolina. I would submit to
3 you that our shared official state drink of milk is not
4 the only two things our states have in common.

5 In North Carolina, the Darryl Hunt case
6 became a symbol of a breakdown in the court system for
7 people of color. That symbol became much worse in 2008
8 with the exoneration of three African-American men from
9 North Carolina's death row: Levon Jones, Jonathan
10 Hoffman, and Glen Edward Chapman.

11 Both Pennsylvania and North Carolina share
12 history of prosecutors using peremptory challenges to
13 exclude African-Americans from capital jury service. In
14 North Carolina, African-Americans are routinely excluded
15 from capital juries, resulting in many of the men and
16 women living on North Carolina's death row being
17 sentenced to death by all white juries.

18 In North Carolina, a 1996 study of race and
19 the death penalty found that African-Americans are 3.5
20 times more likely to receive a death sentence for the
21 murder of a white person. Similarly, Philadelphia was
22 the only one of two jurisdictions in the country, the
23 other being Houston, Texas, where statisticians found an
24 actual correlation between the race of the defendant and
25 the imposition of the death penalty in recent times.

1 North Carolina and Pennsylvania have a
2 history of leading the nation in criminal justice reform
3 to make the system better, fairer, and more just. The
4 Pennsylvania Rule is -- is known to all students of
5 criminal law as the first attempt to narrow the class of
6 cases for which death was an eligible punishment.

7 The Pennsylvania Prison Society was the
8 first public education and advocacy group in America to
9 focus on more humane conditions of punishment.

10 Our comparisons put aside, perhaps the most
11 compelling reason for you to pass this bill has to do
12 with the decision the Supreme Court of the United States
13 made about 23 years ago. While the McCleskey decision of
14 1987 acknowledged the problem of racial bias in capital
15 sentencing, the Court said addressing the problem would
16 force them to deal with the unmanageable problem of
17 racial bias in the entire criminal justice system.

18 Instead they found that while Mr. McCleskey's showing of
19 racial bias in Georgia was compelling, state legislators
20 were the appropriate bodies to remedy such injustices.

21 House Bill 1996 is Pennsylvania's response
22 to the Court's charge at addressing racial bias in
23 capital sentencing. This reform will empower the state
24 courts to determine based on facts whether or not race
25 was a significant factor in the decisions to seek or

1 impose a death sentence.

2 I will not stand before you and suggest --
3 actually as I sit before you -- and suggest that the
4 process of enacting this important piece of legislation
5 was simple. There were those in North Carolina who,
6 despite the acknowledgment of racial bias in the capital
7 punishment process, chose political popularity over the
8 politics of justice and fairness.

9 I will concede that many of your colleagues
10 will do the same. Some prosecutors in North Carolina
11 warned legislators that the Racial Justice Act would end
12 the death penalty in North Carolina, but it has had no
13 such effect.

14 In fact, there have been an equal number of
15 capital prosecutions in North Carolina over the past two
16 years. And, additionally, there were two death sentences
17 in 2009 compared to the two death sentences already in
18 2010.

19 In light of the abundant evidence
20 documenting this issue, I hope and pray that this body
21 will refuse to succumb to the rhetoric of division and
22 fear and choose to acknowledge and address this problem.

23 For the judicial -- for the judicial system
24 to work most effectively, all people in the state have to
25 feel and believe that it is available to them and working

1 for them. In North Carolina, there was a growing
2 feeling, particularly among people of color, that the
3 judicial system did not work for them.

4 A justice system that serves only some well
5 is not justice. It is, in fact, injustice. I charge you
6 to do justice.

7 I offer to you every resource at my
8 disposal to help you pass this bill. The Racial Justice
9 Act rejects the notion that we can rely on human beings
10 to be impartial and that we are incapable of policing
11 ourselves.

12 I submit to you that passing the Racial
13 Justice Act is a simple step that strengthens what we all
14 hope for the world we live in and the respective states
15 we love. It ensures that justice works for everyone.

16 Thank you. I'm happy to answer any
17 questions about North Carolina. I noticed there was a
18 number of procedural questions asked earlier about what
19 it would mean to have a Racial Justice Act.

20 I can also speak to -- to indigent defense
21 service. We have an indigent defense service in North
22 Carolina that has been fully funded since 2001. But I'm
23 happy to answer any questions.

24 CHAIRMAN CALTAGIRONE: Thank you.

25 Questions?

1 Yes. Kathy.

2 REPRESENTATIVE MANDERINO: Thank you.

3 Thank you, Director Collins.

4 I would like to hear -- let's see. I'm
5 trying to quickly remember. What year -- was it just
6 last year that you passed your --

7 DIRECTOR COLLINS: Yes, ma'am. August 5th,
8 2009.

9 REPRESENTATIVE MANDERINO: Okay. So what
10 impact -- practical impacts have you seen so far in terms
11 of either what it's -- how you're implementing it, what
12 it's costing to implement, what the results have been, et
13 cetera?

14 DIRECTOR COLLINS: Well, interestingly
15 enough, your bill, just as our bill, has a one-year
16 sunset for defendants who are on death row to file a
17 racial justice motion.

18 The -- so -- so what we've done since
19 August 5th is we have, by use of private and foundation
20 dollars, had a study of race and the death penalty done
21 that's being implemented -- that's being carried out now
22 in North Carolina. And the findings will not be released
23 until the end of this month.

24 So we have no -- no post-conviction motions
25 filed for the Racial Justice Act. And this is a perfect

1 segue that answers a question, I think, from earlier.

2 If a defendant files a pretrial motion
3 alleging racial bias, they cannot file -- they cannot
4 additionally file a post-conviction motion. So you can't
5 take two bites at the apple. Only one bite at the
6 apple.

7 So as far as real evidence of what we've
8 seen since passing this act, there is no data yet. We --
9 we are charting new waters here. As was -- as was stated
10 earlier, Kentucky is the only other state that has a
11 Racial Justice Act and their bill is not much different
12 from ours.

13 What we have seen anecdotally across the
14 state is lawyers, both on the defense side and the
15 prosecutor's side, thinking more clearly and diligently
16 about the decision to proceed capitally in many of these
17 cases.

18 In North Carolina we have a Rule 24 hearing
19 before every capital trial. At this Rule 24 hearing
20 that's when the prosecutor announces to the court that
21 they intend to proceed capitally.

22 It's at this same hearing that the defense
23 can raise this racial justice motion. We have had a few
24 of those motions filed pretrial but no hearings on those
25 motions.

1 And I would also submit to you that there
2 are dozens of motions that both prosecutors and defense
3 bar can -- can -- can raise pretrial, and this motion
4 does not seem to weigh more heavily financially on the
5 court than any of those other motions that might be
6 filed.

7 I think the most important thing that we've
8 seen across the state is this renewed sense of
9 confidence, particularly in the African or minority
10 community, but across the state that the General Assembly
11 was willing to deal with a problem that, you know, while
12 we might differ on the way we address it, we can all
13 agree it exists, and that is this problem of race bias.

14 What we -- this bill addresses capital
15 sentencing, but as with the courts, as McCleskey noted,
16 that there's a problem with race bias across the criminal
17 justice system. So I think there's a -- you know,
18 clearly we've seen kind of a -- a renewed sense of
19 enthusiasm about people's willingness to participate.

20 I mentioned our jury study, as a part of
21 this -- as a part of this racial bias study in North
22 Carolina, they're also doing a study of peremptory
23 challenges in North Carolina. And -- and what we've
24 seen -- what we found anecdotally is that there are
25 African-Americans struck from juries in many of these

1 counties, many of these jurisdiction, and there's a
2 renewed sense of enthusiasm about the willingness of the
3 state to -- to not only address the issue but to remedy
4 it with an act like this.

5 REPRESENTATIVE MANDERINO: I may -- I'm
6 sure this came up when you were trying to move this
7 legislation through your General Assembly.

8 If this becomes -- became law -- if this
9 becomes law, then every minority defendant being charged
10 with a crime, this is going to be one of the pretrial
11 motions that gets filed in every case and if it happens
12 to be the jurisdiction that is like my city where I come
13 from, in Philadelphia where you already have this
14 statistical evidence that shows these kind of disparate
15 impacts, no minority person is going to be able to be
16 brought on -- up for a capital case.

17 Please address that.

18 DIRECTOR COLLINS: Well, okay. First of
19 all, you know, to be fair, the bill is not limited to
20 minority defendants. A white defendant could raise the
21 claim that white jurors were struck from their jury.
22 Because what we know from the evidence, from the facts,
23 from the statistics, is that African-American jurors are
24 less likely to find -- to -- to -- to find death as a
25 punishment in a capital trial.

1 So a -- a -- a non-minority defendant
2 can -- does have the benefit of the Racial Justice Act.

3 To answer your second question, it is not
4 a -- it should not be a foregone conclusion that every
5 minority will raise a pretrial motion allowing them to
6 evade --to evade a death sentence. As I stated earlier,
7 if you raise a pretrial motion, you do not have -- if you
8 raise a pretrial motion asserting that a prosecutor is
9 seeking death against you as a part of some racial bias
10 trend and you lose, you cannot raise a post-conviction
11 motion.

12 So I would -- I would offer to you that --
13 that most minority defendants, most defendants will be
14 less likely to raise a pretrial motion and more likely to
15 raise a post-conviction motion which -- which, again, is
16 not another level of appeal. All right? It's -- it's
17 just -- it's -- it's a motion before the court as a -- as
18 a -- as a mechanism of review, but it does not add a new
19 layer of appeals to your process.

20 But -- so I would not consider it a
21 foregone conclusion that every minority defendant will
22 raise a pretrial motion.

23 REPRESENTATIVE MANDERINO: Okay. In North
24 Carolina your -- you -- your act has been in place for a
25 year. You talked about the process you're going through

1 with regard to post-conviction.

2 Tell me what's happening in at the trial
3 court level right now in North Carolina, if you have any
4 information on that, or has that not yet gone into effect
5 yet either?

6 Tell me what is happening in terms of folks
7 being brought for capital charges and -- and what's
8 happening.

9 DIRECTOR COLLINS: Okay. We -- we did --
10 so as -- this act passed August 5th, 2009. We have one,
11 maybe two prosecutors in North Carolina that have
12 a represent -- a reputation much like your prosecutor
13 here in -- in Pennsylvania, the assistant prosecutor that
14 was mentioned earlier in the study.

15 You know, one of those prosecutors decided
16 to not proceed capitally in a case that -- that he had
17 already decided to proceed capitally in, because there
18 were -- it was a circumstantial case. I think that the
19 writing was on the wall as far as the evidence against
20 the defendant, and this was the same prosecutor who had
21 tried Darryl Hunt in Winston-Salem, North Carolina.

22 So that the thought process was that this
23 case would be overly scrutinized because of the passage
24 of the Racial Justice Act. So we have seen one case that
25 was going to procedure capital -- capitally proceed

1 noncapitally.

2 Capital trials are still -- are moving
3 along at the same rate they were last year. As I
4 mentioned earlier, we had two death cases all year in
5 2009. We've already had two in -- in 2010.

6 There have -- there has been one high
7 profile case a -- in a, quote/unquote, cop killing in
8 Mecklenburg County. Mecklenburg is the largest metro --
9 metropolitan county in North Carolina. There was a case
10 out of that county where a defendant raised a racial
11 justice motion and the judge filed a -- the judge allowed
12 for a three-month continuance and that case will proceed
13 for the next hearing in October.

14 That has -- that has been the longest delay
15 of a capital trial that we've seen in North Carolina as
16 -- to date.

17 What we also know is that even if that case
18 were to proceed, at trial in October, it would still be
19 the shortest capital prosecution from start to finish in
20 the past ten years in North Carolina.

21 So we've seen no real halt in our capital
22 punishment process in North Carolina since the act
23 passed.

24 REPRESENTATIVE MANDERINO: So you've told
25 us about cases, at least that you're familiar on -- of

1 that we can count on less than the fingers on one hand.
2 What is Pennsyl -- or what is North Carolina's numbers,
3 however you know them, in a given year of cases that are
4 capital cases?

5 DIRECTOR COLLINS: Okay. In North Carolina
6 we have about 550 homicides every year. Of those 550
7 homicides, about half of them are capital-eligible
8 homicides. Of those -- of -- you know, so we're talking
9 about 275 homicides annually.

10 Of those 275 homicides annually, about 60
11 of them proceed where at a Rule 24 hearing a prosecutor
12 says I'm going to proceed capitally in this case. A
13 large majority of those cases end in second degree plea
14 offers or life without the possibility of parole.

15 When I say a large majority, somewhere
16 greater than 40 of those cases end in that manner. And
17 then you've got this smaller number of cases that
18 actually go to trial. And what we see in North Carolina
19 is, as you see here in Pennsylvania, what usually happens
20 is the indigent and those who are minority end up with
21 the death sentence and -- and I think I mentioned the
22 numbers earlier. Since 2005 we've not sentenced more
23 than three people to death in a given year.

24 And then there are the remaining defendants
25 who end up with life without the possibility of parole as

1 a sentence. So I hope that answers your question.

2 REPRESENTATIVE MANDERINO: So is it fair to
3 conclude based on your experience so far, which I realize
4 is just under a year, that the passage of a racially
5 discriminatory -- what are we calling this?

6 DIRECTOR COLLINS: Racial justice. You
7 call yours something --

8 REPRESENTATIVE MANDERINO: Racial Justice
9 Act has not been the end of the death penalty as you know
10 it in North Carolina?

11 DIRECTOR COLLINS: It has not.

12 REPRESENTATIVE MANDERINO: Thank you,
13 Mr. Chairman.

14 Thank you, Mr. Collins.

15 CHAIRMAN CALTAGIRONE: Representative
16 Matzie and then Pallone.

17 REPRESENTATIVE MATZIE: Thank you,
18 Mr. Chairman.

19 And thank you, Mr. Collins, for coming for
20 the testimony.

21 You mentioned in your testimony about North
22 Carolina that the Darryl Hunt case became a symbol and
23 then you went on to mention that the symbol became much
24 worse in 2008 with the exoneration of three
25 African-Americans from death row.

1 Can you expound on that a little bit and
2 explain it?

3 DIRECTOR COLLINS: So just to give you a
4 snapshot of North Carolina's death row, we have 160
5 people on North Carolina's death row. We have exonerated
6 eight men from North Carolina's death row, and we've
7 executed 43 men -- 43 men and women, I should say, since
8 1978, which is what we consider the modern era of the
9 death penalty.

10 North Carolina was actually the first state
11 to execute a woman in the -- in the modern era of the
12 death penalty in 1984.

13 Darryl Hunt was this high profile case in
14 Winston-Salem, North Carolina which is -- what most would
15 say is a -- a rural county but it's set -- it's kind of
16 -- there's an urban pocket in that county.

17 And Darryl Hunt was an African-American
18 male who was sentenced to death in 1985 for the 1984
19 murder of a white news -- a print media reporter. Darryl
20 Hunt was exonerated by DNA evidence in 1994, but he was
21 held in prison for another nine years because prosecutors
22 in Winston-Salem, Forsyth County, argued that although
23 DNA evidence exonerated him from this crime that he
24 likely had some part in it. There -- there was no other
25 evidence linking him to this crime. This woman was very

1 brutally raped and murdered.

2 And although his DNA evidence did not link
3 him, they said that he was probably involved in some
4 way. They held him in prison for another nine years and
5 he was not fully released -- he was not released from
6 prison until the Department of Corrections did a -- a --
7 what they call a run of the DNA across the Department of
8 Corrections and found a partial match and then they
9 tested the brother of the partial match and found out who
10 the real killer was.

11 So we were dealing -- we were still coming
12 off the heels of this Darryl Hunt decision in 2008 when
13 we found that there were three African-American males in
14 North Carolina who had been sentenced for death for
15 prosecutorial misconduct, the withholding of evidence
16 from the defense bar, no DNA evidence linking them to the
17 crime or DNA evidence linking other persons to the crime,
18 and this all happened within a calendar year.

19 So this -- you know, that set the stage for
20 North Carolina to -- to -- to really begin advocating for
21 a measure that would address this -- you know, we talk
22 about the use of statistics and a -- a measure that would
23 allow the courts to find not necessarily blatant racism.

24 But we also need a mechanism -- the Racial
25 Justice Act also provides a theatre, right, a space to

1 address real racism. One of the cases that we talked
2 about in North Carolina of a person who was not
3 exonerated was a man named Kenneth Rouse who in North
4 Carolina was sentenced to death by an all white jury and
5 one of the jurors believed, by his own testimony, by
6 sworn affidavit testimony, that black men rape white
7 women so that they can go home and brag to their friends
8 about it. That he believed that African-American men did
9 not want to live as much as their white counterpart, and
10 he referred regularly to the defendant as a nigger in the
11 jury room.

12 This was something that the courts did not
13 feel were -- was important and that man still lives on
14 North Carolina's death row today.

15 What this bill does is allow -- is allows
16 us a space to address, not his guilt or innocence, but
17 the fact there was a certain amount of charge in the
18 jury room that likely played out in the decision to -- to
19 sentence Mr. Rouse to death.

20 REPRESENTATIVE MATZIE: Just to wrap up as
21 more or less a statement, I think both your testimony and
22 Reverend Thomas's testimony stated the same relatively
23 equal numbers of capital prosecutions after such
24 legislation was passed in varying jurisdictions,
25 including North Carolina, and -- and also in your

1 testimony, and in answer to a question, both your
2 testimony and Mr. Dunham's comments relative to how
3 indigent folks are not getting the proper benefit of a
4 good defense has led to -- led to some -- some issues
5 that could potentially be corrected as a result of the
6 Racial Justice Act.

7 And hopefully that's something folks
8 will -- that are listening to the testimony will
9 understand. I appreciate your testimony. Thank you.

10 DIRECTOR COLLINS: Thank you, sir.

11 REPRESENTATIVE PALLONE: Thank you,
12 Mr. Chairman.

13 And you're the last presenter, so I think
14 it's a -- my perspective is kind of a combination of all
15 of those who testified prior to you and you may be the
16 victim of my questioning. And I apologize for that.

17 DIRECTOR COLLINS: I've been here before.

18 REPRESENTATIVE PALLONE: From a more --
19 from a more practical point of view, in terms of, you
20 know, jury selection, structure, and things to that
21 effect, and probably the major cities, at least in
22 Pennsylvania, we'll say Allegheny and Philadelphia
23 Counties, may or may not be an issue, but I'm looking,
24 for example, at my home county, Westmoreland County. The
25 African-American population in my county is less than ten

1 percent, probably somewhere between eight and nine
2 percent, which would mean we would have to have, what, at
3 least one African-American on every jury, because if you
4 do the numbers, or would that be racial profiling because
5 we don't have adequate representation on the juries?

6 How do we avoid the racial profiling in the
7 judiciary system because we -- we -- practically we can't
8 do it. In Westmoreland, and probably in Armstrong County
9 and Butler County and Indiana County where there are very
10 low African-American populations, how would we address
11 that practically on the -- at the expense of the
12 taxpayers and the citizens of each of those counties?
13 How do we address that practically?

14 DIRECTOR COLLINS: Right. Well, the -- the
15 issue is -- you know, I'd like to kind of -- I want to
16 answer your question directly but kind of shift to
17 what -- what I believe the real issue is.

18 The real issue is not how many black people
19 or minorities live in a given jurisdiction. The issue is
20 whether or not prosecutors strike eligible
21 African-American jurors from the jury pool.

22 So you may live in a county that has one
23 black person. All right? If that black person or
24 minority comes before the courts as an eligible juror and
25 that person is struck by a peremptory challenge simply

1 because they're African-American or some of the reasons
2 that were listed in the PowerPoint earlier, that is a
3 valid racial justice claim.

4 Not because there's only one
5 African-American but the manner in which that person was
6 struck from the jury pool. Does that make sense?

7 REPRESENTATIVE PALLONE: Well, as a
8 practicing -- as a practicing lawyer and having -- while
9 I don't do criminal defense work and never did, in the
10 civil system, you know, we have peremptory challenges as
11 well.

12 DIRECTOR COLLINS: Right.

13 REPRESENTATIVE PALLONE: And -- and you can
14 drop a juror for any reason. And just coincidentally,
15 because you may be Italian-American, African-American, or
16 whatever nationality or race, I may drop you from the
17 jury because of your education or lack thereof, because
18 of your field of profession that you belong to or don't
19 belong to. There are a number of issues for peremptory
20 challenges.

21 So the reality of it is -- and I'll use
22 Westmoreland County as an example as well. You know, we
23 have -- Lesko and Travaglia have been on death row for 20
24 years.

25 DIRECTOR COLLINS: Right.

1 REPRESENTATIVE PALLONE: And it's a high
2 profile cop killing case, you know, blah, blah, blah, and
3 everything that goes with it.

4 You know, I was in high school when that
5 case started and they've been on death row for 20 years.
6 The general population believes that the judicial system
7 is failing because it has enabled Lesko and Travaglia to
8 have numerous appeals, appeal after appeal after appeal,
9 to delay their final ultimate sentence of death.

10 This, in the public's eye -- now this is a
11 perception issue. Forget about your statistics and
12 facts. This is a perception issue now.

13 The general public views this as nothing
14 more than another appeal for capital cases, particularly
15 based on the issue of this race or racial profiling.

16 How is North Carolina -- how should we in
17 Pennsylvania address that so when I go back home to my
18 citizenry and I say, yeah, we have implemented this
19 program that, quite frankly, is another appeal to allow
20 for, you know, the raising of an issue that -- that could
21 prevent a capital case from going to death row?

22 And the second component of that is -- is
23 where do we stop? Do we stop at racial profiling or then
24 do we start getting into physical attributes?

25 Because let's -- let's talk about the man

1 or the woman who has -- has a very hardened physical
2 profile, a pocked face, you know, the more --
3 disfigurement to their -- to their presentation or
4 whatever. They oftentimes look like the person who may
5 commit a crime, but yet they may be a teddy bear.

6 DIRECTOR COLLINS: Right.

7 REPRESENTATIVE PALLONE: So do we stop at
8 race or do we start then moving on to these other
9 physical attributes that -- that may or may not have an
10 impact on the outcome of a jury?

11 I mean, as I said, as a 20-year practicing
12 lawyer, the jury system, while it is not imperfect, is
13 probably the best system in the world that the -- that
14 the failure rate is based on performance of the lawyers
15 involved.

16 DIRECTOR COLLINS: So I'll answer your
17 second question first. The second question was what
18 about, you know, people with disfigurements on their
19 face.

20 REPRESENTATIVE PALLONE: Right.

21 DIRECTOR COLLINS: That's above my pay
22 grade. All right. This -- this bill, the purview, the
23 scope of this is race. There is a -- there is a -- there
24 is another reform we passed in North Carolina, was a
25 reform to address the issue of mistaken eyewitness

1 identification.

2 I would suggest that you all take a -- take
3 that under advisement and possibly look at that, the idea
4 that a person may seem more aggressive just by their
5 appearance and it conjures up all these other types of
6 emotions when you try to identify a person who you say
7 committed a crime.

8 So my short answer to that is I believe
9 that's a problem, but I also think that's outside the
10 view -- purview of this bill.

11 The answer to your first question, I think,
12 is -- is quite simple. If the legislature were to send
13 home -- if -- if, let's say, your county,
14 Allegheny County?

15 REPRESENTATIVE PALLONE: Westmoreland.

16 DIRECTOR COLLINS: Westmoreland? I'm
17 sorry. Were to send home a notice to every person in
18 that county and say we're going to take \$15 -- we're
19 going to charge \$15 next year in additional taxes. I
20 would guarantee you that everybody would come out in the
21 streets screaming. Right? Who wants their taxes to be
22 raised?

23 REPRESENTATIVE MATZIE: He knows our
24 county.

25 DIRECTOR COLLINS: I know your county.

1 REPRESENTATIVE PALLONE: You must have been
2 there.

3 DIRECTOR COLLINS: But if -- if you say to
4 your constituents, we have a problem in Pennsylvania, in
5 Westmoreland County. We have a problem that has resulted
6 in African-Americans or racial minorities being X times
7 more likely sentenced to death and there's a provision
8 before the legislature -- you know, you can go into as
9 much detail as you would like.

10 But my point is, this is, just as any other
11 political decision, about framing it to the people who
12 you represent. This is a representative republic so you
13 have to be responsible and accountable to the people who
14 you represent, and I think a part of that responsibility
15 and accountability is to -- to -- to educate them on why
16 the legislature makes the decisions that it makes.

17 Now, the greater argument that I think
18 really comes forward here is the same problem that
19 hamstrung McCleskey. The argument was, yeah, I agree the
20 problem exists, but if I deal with this, then I'm going
21 to have to deal with a whole bunch of other stuff and how
22 do I explain this problem? I know it's a real issue, but
23 dealing with it would force me to have to explain why we
24 dealt with it.

25 And I would submit to you that the

1 problems, the merits of the problem warrant the
2 explanation, warrant the action taken. And I think that
3 when constituencies are educated on that, I think it's
4 less likely a problem.

5 Let's -- I mean let's -- let's be
6 realistic. The mere fact that -- that people would have
7 a problem addressing the problem of race bias speaks to
8 an even greater problem. Right? And I can't -- you
9 know, this bill -- we can't legis -- I actually heard
10 senator Mitch McConnell speaking on CNN yesterday, and
11 saying we can't legislate competence.

12 That's true. You can't legislate
13 competence, and you can't legislate inclusion and you
14 can't legislate diversity. You can't -- well, you can't
15 legislate unity.

16 So -- so -- so I can't speak to that. But
17 what I can say is that there is plenty of evidence to
18 support the need for the passage of this bill. I think
19 that it's incumbent upon the representatives and the
20 advocates in these various communities to educate their
21 communities on why it was necessary.

22 REPRESENTATIVE PALLONE: And I don't
23 disagree with your observation that the mere fact that we
24 have to deal with an issue, whether it be racial bias or
25 religious bias or ethnic bias on any level or whatever

1 the -- you know, race, creed, national origin, whatever,
2 that's a problem in and of itself, but -- but I'm going
3 to again come back to reality and the -- and the issue
4 then becomes, you know, with the statistics, for example,
5 and I'm -- and I'm going to use your issue there of the
6 statistics. The statistics may drive this.

7 But when you look at the statistics, and
8 not trying to skew the data by any sense, when we look at
9 the data, we say the data that we have indicates that,
10 you know, the larger percentage of capital cases involve
11 African-American males, I think is what most of the
12 testimony has been today. And I might be being very
13 general in how you presented it.

14 But the second piece of that is -- is
15 statistically, when we look at the imprisoned population,
16 I believe that there's a significant percentage of the
17 imprisoned population of African-American males. So when
18 you're looking at your -- the beginning part is the
19 class. When we look at the class of -- of capital cases,
20 for example, we already know that that number is a
21 defined number.

22 We know that a significant percentage of
23 that class of criminals, if you want to call it that, or
24 alleged criminals, are African-American males, then
25 naturally the statistics would show that a larger

1 percentage of those who are convicted in capital cases
2 would be African-American males.

3 DIRECTOR COLLINS: Right.

4 REPRESENTATIVE PALLONE: Because they're
5 the largest group of that class. You know, the -- and
6 that's kind of where I'm -- I'm confused by the -- the
7 statistics. And then how do I come back home and -- and
8 I have the political fortitude to do what's right for the
9 citizens in Pennsylvania.

10 DIRECTOR COLLINS: Right.

11 REPRESENTATIVE PALLONE: How do I have --
12 to come back home and say that -- to my citizenry that --
13 that we're going to treat one class of alleged criminals
14 differently than all of the rest of the criminals in the
15 system?

16 DIRECTOR COLLINS: Right.

17 REPRESENTATIVE PALLONE: And I think
18 practical application creates a little bit of a problem
19 in terms of implementation.

20 And then I come back to my original
21 question which is -- is the cost. What do we do in the
22 suburban and particularly the more rural counties where
23 we can't perhaps avoid the appearance, if nonetheless,
24 the appearance of a -- of a bias, if you want to call it
25 that, because we don't have population numbers to be able

1 to put any kind of balance in place.

2 And you used the example of a county that
3 has one African-American and that person peremptorily
4 always gets discharged from the jury. Well, that's
5 unfortunate that there's only one African-American in
6 that -- in that county.

7 So what are we going to do? Are we going
8 to bus in additional jurors as an expense to the judicial
9 system so that we could have 50 to review and only
10 discharge one or two of them?

11 Or I don't understand. How is it
12 practical --

13 DIRECTOR COLLINS: Well --

14 REPRESENTATIVE PALLONE: And cost
15 effective?

16 DIRECTOR COLLINS: Okay. Again, the issue
17 is not how many people you have on a capital jury, how
18 many blacks there are on a capital jury. The issue is
19 how they were withheld from a capital jury.

20 You don't have to bus anybody in. The
21 thing that you're defending is not how many blacks were
22 on the jury. It's whether or not blacks were -- were
23 barred from being on the jury.

24 You mentioned another issue --

25 REPRESENTATIVE PALLONE: So then in a small

1 county like Westmoreland or Armstrong, the -- the
2 prosecutor would be nearly precluded from ever
3 discharging an African-American from the jury.

4 DIRECTOR COLLINS: Well, no. No. Not at
5 all. They would just need to be able to defend why they
6 did it. Clearly not with some of the evidence that was
7 shown here, waiting outside, striking a person, simply
8 because they're African-American or because -- you know,
9 for whatever reason. For whatever discriminatory fashion
10 was used to strike the person from the jury.

11 Again, African-Americans can be struck just
12 like any other person from a jury but if it's done in a
13 discriminatory fashion, that changes --

14 REPRESENTATIVE PALLONE: The whole -- the
15 whole process of jury voir dire is discriminatory in
16 nature. Do you understand that?

17 DIRECTOR COLLINS: I understand that.

18 REPRESENTATIVE PALLONE: So I --- I'm --
19 when I'm voir diring the jury, potential jurors, I'm
20 looking for a reason to either put them on the jury or
21 take them off the jury.

22 DIRECTOR COLLINS: Right.

23 REPRESENTATIVE PALLONE: It's
24 discriminatory by definition.

25 DIRECTOR COLLINS: Right.

1 REPRESENTATIVE PALLONE: So I'm not
2 following your -- your -- your presentation that -- that
3 we can't discriminate when we're selecting jurors.
4 Because if I'm -- if I'm defense counsel, I want a
5 certain profile on the jury. If I'm the prosecutor, I
6 want a different profile --

7 DIRECTOR COLLINS: Right.

8 REPRESENTATIVE PALLONE: -- on the jury.
9 And that's -- by definition profiling is discriminatory.

10 DIRECTOR COLLINS: Right.

11 REPRESENTATIVE PALLONE: So you're --
12 you're going to take away that -- that discretion of both
13 defense counsel and prosecutorial counsel.

14 DIRECTOR COLLINS: Right. The question
15 though is do you have eligible, qualified minority
16 juries -- jurors available for a jury pool that is
17 supposed to, as the representative stated earlier, be a
18 part of a jury of peers and if you can -- and if a
19 prosecutor can show -- cannot show cause as to why they
20 struck a person only but -- but for the fact that their
21 skin color was African-American, that is a problem even
22 in the voir dire jury selection process.

23 REPRESENTATIVE PALLONE: Thank you.

24 DIRECTOR COLLINS: But you raised another
25 point that I think was possibly even more important, but

1 it -- it escapes me and I think it had to do with -- you
2 spoke about going back to your district and you -- do you
3 remember what your -- what your -- your point was prior
4 to that?

5 Because I had an answer for it, but I got
6 caught up in the -- in the jury. There was -- you raised
7 a -- I can't -- I can't --

8 REPRESENTATIVE WATERS: You were talking
9 about why it would not be --

10 DIRECTOR COLLINS: Oh.

11 REPRESENTATIVE WATERS: -- working for
12 everybody.

13 DIRECTOR COLLINS: I know. Here's --
14 here's -- so your point was, how do I go back to my
15 district and -- and explain to them that we're about to
16 treat a class of defendants differently from everyone
17 else?

18 The evidence shows that you've already
19 been -- you've already been treating classes of
20 defendants different from everyone else. This is a
21 remedy to the fact that you've -- that certain classes
22 have been treated a certain way.

23 So, you know, it is -- you know, this is an
24 act that levels the playing field. So that argument
25 would suggest that everything has been fair up until this

1 point but now we're going to create this mechanism that
2 will, you know, give African-American or minority
3 defendants, you know, a hand up or a leg up in the -- in
4 the criminal justice system when, in fact, the evidence
5 shows that that class of defendants has been getting a
6 raw deal in the criminal justice system and this is -- as
7 my testimony was this was an opportunity -- this -- this
8 is the legislature's opportunity and mechanism to -- to
9 not only address the issue but -- but police ourselves
10 in -- in righting something that has been a clear wrong
11 for some time now.

12 Not just in Pennsylvania. In North
13 Carolina, in Texas, all across the country. And I agree
14 with you. It's broader than -- than just the death
15 penalty system, which I believe was your first point.

16 REPRESENTATIVE PALLONE: Right.

17 DIRECTOR COLLINS: You talked about a
18 certain class of criminals.

19 REPRESENTATIVE PALLONE: Right.

20 DIRECTOR COLLINS: I -- I believe that
21 speaks to -- it is not -- it is not accurate that many of
22 our Department of Corrections population is 60 to 70
23 percent African-American. Right.

24 REPRESENTATIVE PALLONE: I didn't use any
25 numbers. So don't put words in my mouth, please.

1 DIRECTOR COLLINS: Well, I mean just
2 from -- just from the crime statistics. We know from the
3 statistics that those are disproportionate numbers as far
4 as who commits crimes to who -- who finds themselves in
5 prison. All right.

6 But acts like this one attempt to address
7 that, at least at the sentencing phase. All right? We
8 can't get to the first line of -- of -- of discrimination
9 where -- you know, who -- who gets arrested, who gets let
10 go, or who -- who in a criminal proceeding might get
11 probation as opposed to active time.

12 This bill doesn't address stuff like that.
13 But what it does say is in a criminal justice proceeding
14 where the decision of who lives and who dies is at stake,
15 race will not be a factor in that decision.

16 REPRESENTATIVE PALLONE: And that's based
17 on the presumption that -- that race is a factor and I --
18 I --

19 DIRECTOR COLLINS: On the fact that race --

20 REPRESENTATIVE PALLONE: I discount -- I
21 discount that race is a factor in capital cases. I
22 appreciate your -- and acknowledge your position. Mine
23 differs slightly, and I appreciate your position. Thank
24 you very much.

25 DIRECTOR COLLINS: Thank you.

1 CHAIRMAN CALTAGIRONE: Thank you, John.
2 Representative Waters.

3 REPRESENTATIVE WATERS: Thank you,
4 Mr. Chairman.

5 And thank you, Mr. Collins, for being
6 here.

7 And I wanted to thank the prime sponsor of
8 the bill, Representative Matzie, for introducing this,
9 and I want to now be added as a cosponsor to it.

10 I believe that this is addressing something
11 that is worthy of our -- of our balancing out the way
12 that people are treated in the criminal justice system.
13 So I'm -- I want to be added.

14 I want to ask you about the -- since the
15 inmates who are on death row have a one-year statute
16 to -- to -- to -- to -- to be able to -- what would they
17 do? What would they have to do? Submit some kind of
18 complaint or something are you saying?

19 DIRECTOR COLLINS: Well, what they would do
20 is they would through their -- in North Carolina, we have
21 an indigent defense service and what that means is that
22 every person who is capitally charged has the benefit of
23 two competent, qualified attorneys from the time they're
24 charged to the time they're executed.

25 And so for those persons who are at any

1 phase of their capital appellate procedure, they, by way
2 of their attorney, would file notice to the court that
3 they intend to file a racial justice motion where -- and
4 it's not at that time that they have to allege what that
5 motion -- what their action will entail, but they can --
6 they can appeal only the decision -- only the -- the --
7 the sentence. All right?

8 So the remedy for a racial justice motion
9 is life without a possibility of parole. So they could
10 be challenging the make-up of their jury, by prosecutors
11 use of peremptory challenges. They could -- they could
12 challenge the decision by the prosecutor to seek death
13 only in cases where there's a white victim. They could
14 be challenging the prosecutor's decision in that given
15 jurisdiction or in the -- in the county, in the
16 prosecutor -- in the judiciary division or under the
17 state, a prosecutor's decision to seek death only against
18 black defendants.

19 So they could raise any one of those claims
20 as a post -- as a -- as a post-conviction motion.

21 REPRESENTATIVE WATERS: Okay. Thank you.

22 And when they -- so now, once they -- once
23 they enter into this type of -- I -- I'm just going to
24 use the word complaint or notice, does that preempt them
25 from pursuing any other legal remedies if they still say

1 that they are innocent?

2 DIRECTOR COLLINS: No, it does not. You --
3 you actually raise a great question. The short answer
4 is, no, you -- you may file a racial justice claim.
5 It -- it all depends on where you are in the -- in the --
6 in the appellate process.

7 If you have completed all your other
8 appeals and you file a racial justice motion and it's
9 denied, then, you know, you just follow suit with the
10 next available step, which is a clemency proceeding from
11 the governor and then, depending on that decision,
12 execution or a -- or a granting of clemency.

13 If you're not as far along in the appellate
14 process and you file a racial justice claim, it's either
15 granted or denied and then you would proceed with --
16 with -- with whatever the next level of appeal is.

17 If it is granted, then you go to -- you're
18 a -- you're a lifer. You're in prison for the rest of
19 your life without the possibility of parole, which brings
20 on another set of conditions where there are no -- no
21 structured appeals available in North Carolina.

22 I'm not sure what your -- what your
23 appellate process is here for people in prison for life
24 without the possibility of parole.

25 REPRESENTATIVE WATERS: Okay. And then

1 with the -- and I guess you're coming up on your
2 anniversary. August 5th would be the anniversary of the
3 one-year window for these -- these -- these claims to
4 come forward.

5 How did you -- by what way did you advise
6 the people who perhaps could use this if they felt as
7 though this factored into the verdict -- or not the
8 verdict but the sentence, how did you -- how did you
9 get -- let the inmates know? By what way?

10 Was it dependent on the Department of
11 Corrections to inform them or did you have some other
12 outreach method of dealing with it?

13 DIRECTOR COLLINS: Well, you know, again,
14 each of our death row inmates has two lawyers. So
15 their -- their lawyers --

16 REPRESENTATIVE WATERS: The lawyers would
17 do it?

18 DIRECTOR COLLINS: -- would -- would
19 automatically let them know. But -- but you should
20 not -- you should understand that -- that prisoners have
21 nothing else to do but read, and, you know, many of them
22 knew about this --

23 REPRESENTATIVE WATERS: They do here, too.

24 DIRECTOR COLLINS: Right.

25 REPRESENTATIVE WATERS: But the problem --

1 they do the same thing here.

2 DIRECTOR COLLINS: Right.

3 REPRESENTATIVE WATERS: But a lot of
4 inmates come out of jail not knowing they can vote --

5 DIRECTOR COLLINS: Right.

6 REPRESENTATIVE WATERS: -- when they come
7 out. Okay. So -- so --

8 DIRECTOR COLLINS: That's true.

9 REPRESENTATIVE WATERS: So even though they
10 have a lot of time to read, they come out still thinking
11 that they can't vote so I know how I know --

12 DIRECTOR COLLINS: I hear you. I hear
13 exactly what you're saying.

14 Basically our -- you know, the
15 department -- we did not depend on the Department of
16 Corrections to tell them. We -- we -- we -- we went
17 through our indigent defense service, through those
18 attorneys, and they let all the clients on death row know
19 that this was an available motion for them to make.

20 REPRESENTATIVE WATERS: Okay. Now -- and I
21 agree with something that was said earlier. You alluded
22 to the fact that the facts should rule the case. It
23 should -- it should at least -- people should be judged
24 on the facts, not people being eliminated from the --
25 being included in the jury to be a part of the case based

1 on their race.

2 And I would think that people that are --
3 for instance, any gender issue should not factor in
4 either. You know, we have a female up on some -- on a
5 charge, and I know that sometimes people, you know, might
6 select an attorney based on gender sometimes or race
7 sometimes, because a lot of appearances or perceptions
8 that way have to benefit the case.

9 But, you know, just like race should not
10 factor in, gender shouldn't factor in either. And I
11 don't think a person should be excluded from the jury
12 pool just because of what gender they are either.

13 And I'm sure that some prosecutors or -- or
14 -- or -- or defense attorneys might be -- might look at
15 those things, too, when they -- you know, when they go
16 through the questioning of the -- of the jury or reading
17 up their history. That should not factor in either.

18 And I hope I don't raise another issue here
19 about racial bias, but I don't think -- I think fairness
20 should rule in the -- in the criminal justice system.

21 So I just want to say, Mr. Chairman, I
22 thank you for having this hearing today.

23 And I thank you for being here, and I wish
24 you all -- all the best and I hope that we are another
25 state that can be added to the ones who stepped forward

1 and say that we're going to do the right thing to make
2 sure that there's balance and justice in our criminal
3 justice, no matter where it is needed or required. Thank
4 you.

5 CHAIRMAN CALTAGIRONE: Representative Kula.

6 REPRESENTATIVE KULA: Yes. This whole
7 legislation has to do with the sentencing phase.
8 Correct?

9 DIRECTOR COLLINS: Yes, ma'am.

10 REPRESENTATIVE KULA: Okay. I'm -- I'm
11 having a hard time trying to understand how even if you
12 file this appeal to the death sentence, what -- I'm not
13 understanding how this can ever be alleged.

14 When you go into the sentencing phase of it
15 all, there's aggravating circumstances, there's
16 mitigating circumstances presented, and those 12 people
17 decide from that testimony whether it is life
18 imprisonment or a death sentence. Correct?

19 DIRECTOR COLLINS: That is the way it would
20 work, as someone stated, in a utopian world.

21 REPRESENTATIVE KULA: Okay. So you have --
22 so how do you prove -- okay. So if all of those -- if
23 all of those circumstances are met -- but how do you
24 prove that it was a race bias issue?

25 DIRECTOR COLLINS: Okay. I actually did

1 not answer your question correctly. Your first question
2 was this only deals with the sentencing phase.

3 REPRESENTATIVE KULA: Okay.

4 DIRECTOR COLLINS: That is -- my answer was
5 yes. That is actually not true. I should have been more
6 clear.

7 REPRESENTATIVE KULA: Well, it -- I
8 understand that if you appeal it because of the charge
9 itself --

10 DIRECTOR COLLINS: Right.

11 REPRESENTATIVE KULA: -- you can't do
12 anything about it at the sentencing phase.

13 DIRECTOR COLLINS: Right.

14 REPRESENTATIVE KULA: Correct? Okay.
15 Let's just deal with the sentencing phase.

16 DIRECTOR COLLINS: Well, okay. Well, first
17 of all, it deals with the sentence, not just a sentencing
18 phase.

19 REPRESENTATIVE KULA: Okay. The sentence
20 itself.

21 DIRECTOR COLLINS: So if a -- if a
22 defendant can show with statistical evidence, all right,
23 that a prosecutor in a given county chooses to seek death
24 against black defendants more often than they seek death
25 against white defendants with the same -- accounting for

1 the same set of aggravating and mitigating factors,
2 that's how -- that's how you show it.

3 You don't just -- you don't just look at
4 the data and say, well, three people -- three black
5 people were tried in this county versus, you know, two
6 white people that were tried in this county. You look at
7 cases and you -- and the code -- the people who were
8 doing the statistical analysis, who are coders, they
9 actually account for aggravating factor, socioeconomic
10 status. So they are plotting a chart that basically
11 gives you a picture of who these defendant are, black,
12 white, Indian, Asian, whatever. Right?

13 And then once you do that, you put that on
14 a board and then you can decide -- you can look at --
15 person X and person Y had a extremely similar case. One
16 victim, torturing, armed robbery, whatever. Right? And
17 then you find the similar cases, all right, and you group
18 those together.

19 So you got ten similar cases. Well, let's
20 say out of those ten similar cases you've got five whites
21 and you've got five blacks. Well, what do you do in a
22 case in one county where you've got ten similar cases,
23 where it's split down the middle, five -- five whites,
24 five black, and the prosecution decided in four out of
25 five of the African-American cases to go forward with

1 death but in none of the cases where the -- where the
2 defendant was white to proceed with death.

3 What remedy should a defendant have to
4 raise that claim to the courts? At this point there
5 isn't one. That is -- that is the purpose of the Racial
6 Justice Act.

7 REPRESENTATIVE KULA: Okay. I'm not
8 sure -- I'm not sure I totally -- you're saying -- okay.
9 That -- that seems that they would raise that issue at
10 the time -- at the very beginning.

11 DIRECTOR COLLINS: That is -- that is as an
12 RJA pretrial motion.

13 REPRESENTATIVE KULA: Okay.

14 DIRECTOR COLLINS: That is exactly it.

15 REPRESENTATIVE KULA: Okay. So then
16 they -- they're sentenced to the death penalty?

17 DIRECTOR COLLINS: Well, so -- so let's say
18 they made the claim pretrial and they were --

19 REPRESENTATIVE KULA: Okay. Let's say they
20 didn't make the claim then.

21 DIRECTOR COLLINS: Okay. Let's say they --

22 REPRESENTATIVE KULA: And now we're all the
23 way to the death penalty.

24 DIRECTOR COLLINS: Okay.

25 REPRESENTATIVE KULA: Now what?

1 DIRECTOR COLLINS: They raise that claim.
2 Well, first of all, they would have already been
3 sentenced to death at this point.

4 REPRESENTATIVE KULA: Correct.

5 DIRECTOR COLLINS: All right. And they
6 raised the claim that death was only sought against me
7 because I'm African-American and look at these -- look at
8 these other -- look at the majority of these cases where
9 there was a white defendant, similar case, just like
10 mine, but they were -- they were not even tried for
11 death. They were -- they were tried for life.

12 Then the remedy in that case would be life
13 without the possibility of parole. So that -- that's
14 what would happen.

15 REPRESENTATIVE KULA: But -- but it seems
16 to me that if -- that it's not so much the prosecutor
17 then at the sentencing phase.

18 DIRECTOR COLLINS: Right.

19 REPRESENTATIVE KULA: I mean in the
20 beginning you're talking about a -- a prosecutor
21 profiling.

22 DIRECTOR COLLINS: Right.

23 REPRESENTATIVE KULA: We get to the -- to
24 the penalty phase.

25 DIRECTOR COLLINS: Right.

1 REPRESENTATIVE KULA: How do you then raise
2 that I should not have been sentenced to death because --

3 DIRECTOR COLLINS: But I see what you're
4 saying.

5 REPRESENTATIVE KULA: -- I should have
6 never been charged with it.

7 DIRECTOR COLLINS: That's the -- that's the
8 argument. I should have never even been tried for death
9 because look at these other cases where these other
10 defendants were not tried for death.

11 That's the argument. The argument doesn't
12 attack the jury necessarily. The argument says I should
13 not have even been charged with -- with death. But
14 now -- I mean charged capitally.

15 But there is a possibility, as with the --
16 with the case -- one of the cases that we -- that we talk
17 about in North Carolina. Jurors can actually sign sworn
18 statements that say they are discriminatory in their
19 behavior. That they -- I mean you would be amazed at
20 what juries will -- jurors will say and what they will
21 sign and they will -- they will offer to you as
22 evidence.

23 And they'll say, you know -- you know, I
24 don't like -- I don't like black people and that
25 influenced my decision on the jury in a sworn affidavit

1 statement. And if a juror says that, the jury room
2 should by statute be absent -- that should be absent from
3 the jury room. And any judge is likely going to agree
4 with that.

5 So -- so it's not -- you may not be making
6 the argument that I shouldn't have been charged
7 capitally, but what you can make the argument of is
8 that -- is that not only -- you know, in North Carolina
9 you have to be death qualified to even serve on a jury.
10 Right? So you have to be able to answer this question in
11 the affirmative about your -- about your belief in the
12 death penalty.

13 But what you -- you know, what you -- what
14 you should not have on the jury is people who -- you're
15 already prejudiced by the fact you're a capital
16 defendant, all right, and you've now been found guilty of
17 a capital crime. Right. That's two strikes against
18 you.

19 The third strike against you should not be
20 the color of your skin. All right. We weigh aggravators
21 versus mitigators which is what makes the assertion by
22 David Baldus that you are saddled with an extra
23 aggravating factor that's much more of an injustice.

24 Does that -- does that kind of make sense?

25 REPRESENTATIVE KULA: Yes.

1 DIRECTOR COLLINS: Okay.

2 REPRESENTATIVE KULA: Thank you.

3 DIRECTOR COLLINS: Yes, ma'am. Thank you.

4 CHAIRMAN CALTAGIRONE: Representative
5 Matzie wanted to make some closing arguments. But before
6 we do that, I just wanted for the record to make sure
7 that -- the submission is Pennsylvania Alternatives to
8 the Death Penalty, we have some submissions from them,
9 the ACLU, and the NCAA Legal Defense and Education Fund.
10 So I'd like to make sure that's included in the record.

11 Representative Matzie.

12 REPRESENTATIVE MATZIE: Thank you,
13 Mr. Chairman.

14 And, again, I thank you. As I mentioned in
15 the opening statements, the hope and goal and desire of
16 the hearing today was to get the dialogue and to give the
17 members the information.

18 I'll look forward to seeing some statistics
19 from North Carolina after that one year and to see how
20 many inmates have petitioned for challenging as a result
21 of the legislation.

22 And I think it's -- it's paramount that we
23 heard many times from testifiers today about the
24 McCleskey case, and I think, when you look at that, and
25 you read some of the quotes from some of the testimony

1 today, that that's really why we're here today to discuss
2 this.

3 And, again, I hope that the members will --
4 will look at this and the testimony presented here today,
5 take it very seriously, because if we can -- if we can
6 step up and this bill can become statute and we can save
7 one person, I think that's -- that's worth it.

8 I thank you again, Mr. Chairman.

9 CHAIRMAN CALTAGIRONE: Thank you.

10 Thank you for coming up from North Carolina
11 to testify and we appreciate everybody's participation.

12 The meeting is adjourned.

13 (The proceedings were concluded at
14 12:28 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings and that this is a correct transcript of the same.

Brenda S. Hamilton, RPR
Reporter - Notary Public