

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

JUDICIARY
COMMITTEE HEARING

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THURSDAY, JUNE 11, 2015
9:08 A.M.

PRESENTATION ON
PENNSYLVANIA'S DEATH PENALTY MORATORIUM

BEFORE:

HONORABLE RONALD MARSICO, MAJORITY CHAIRMAN
HONORABLE RICK SACCONI
HONORABLE JOE PETRARCA
HONORABLE SHERYL DELOZIER
HONORABLE TINA DAVIS
HONORABLE MIKE REGAN
HONORABLE TODD STEPHENS
HONORABLE MIKE VEREB
HONORABLE KATE KLUNK
HONORABLE JASON DAWKINS

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

COMMITTEE STAFF PRESENT:

THOMAS DYMEK, COUNSEL
EXECUTIVE DIRECTOR JUDICIARY REPUBLICAN CAUCUS

SARAH SPEED, COUNSEL
EXECUTIVE DIRECTOR JUDICIARY DEMOCRATIC CAUCUS

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SUBMITTED WRITTEN TESTIMONY

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P R O C E E D I N G S

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3 MAJORITY CHAIRMAN MARSICO: Good morning,
4 everyone. Just want to welcome everyone here today to this
5 Public Hearing of the House Judiciary Committee. We have a
6 very good turnout so far and expect other members as well
7 to be here to join us today.

8 Just a few ground rules, if you will. The
9 hearing is scheduled to go to 11:10 so we're going to try
10 to keep it to 11:10 a.m. and so I'm going to ask each --
11 I'm going to ask the Members to limit their questions to -
12 maybe to one question per Member and then, as you know, you
13 can see the -- this hearing is being recorded. I'd also
14 ask everyone to silence your cell phones.

15 I'm going to ask the Members to introduce
16 themselves. We'll start down here to my right. Rick?

17 REPRESENTATIVE SACCONI: Good morning. I'm
18 Representative Rick Sacconi. I represent the southern part
19 of Allegheny County and the northern part of Washington
20 County.

21 CHAIRMAN PETRARCA: Rep. Joe Petrarca, Democratic
22 Chair of the Committee. I would like to thank everyone for
23 being here today. I think this week with Special Meetings
24 and what we did on the floor yesterday, I think we're
25 putting the cart before the horse, so to speak, on some of

1 this but, again, glad everyone's here today and I look
2 forward to the testimony.

3 MAJORITY CHAIRMAN MARSICO: Thanks, Chairman.
4 Sarah, introduce yourself.

5 MS. SPEED: Sarah Speed, Democratic Executive
6 Director of the Judiciary Committee.

7 MAJORITY CHAIRMAN MARSICO: Go ahead, Tom.

8 MR. DYMEK: Tom Dymek, Executive Director for the
9 Committee.

10 REPRESENTATIVE DELOZIER: Sheryl Delozier,
11 Cumberland County, 88th District.

12 REPRESENTATIVE DAVIS: Tina Davis, Bucks County.

13 REPRESENTATIVE REGAN: Mike Regan, Cumberland and
14 York County.

15 REPRESENTATIVE STEPHENS: Todd Stephens,
16 Montgomery County.

17 REPRESENTATIVE VEREB: Mike Vereb, Montgomery
18 County.

19 REPRESENTATIVE KLUNK: Kate Klunk, York County.

20 REPRESENTATIVE DAWKINS: Jason Dawkins,
21 Philadelphia County.

22 MAJORITY CHAIRMAN MARSICO: That's it. I'm Ron
23 Marsico from Dauphin County, Chair of the Committee.

24 This is the second hearings that we're having on
25 the issue of capital punishment and so in March of this

1 year, the Committee was down in Philadelphia to hear from
2 the families of the victims. It was -- that was hearing
3 was devoted to specifically to hearing from those families
4 of murder victims.

5 Each of the family members who testified lost a
6 loved one and the perpetrator of each crime sits on
7 Pennsylvania's death row. In fact, one family that
8 testified was the Eng family who lost Trista Eng at the age
9 of 16 at the hands of Hubert Michael whose execution would
10 have taken place last Friday except for a last minute
11 reprieve by Governor Wolf. At that hearing, Committee
12 Members received a glimpse of the effect on those victims
13 left behind, not just the Eng family but the spouses, the
14 children, and other family members of several victims.

15 We did this because I believe that the true
16 concern for the victims and their family is often lost amid
17 a discussion of capital punishment because I believe that
18 to debate the pros and the cons of the death penalty, we
19 need always to keep in mind what sort of terrifying acts
20 led to the imposition of the death penalty in the first
21 place and the lasting impact that these violent acts have
22 on the families of the victims.

23 Today, we are joined by members of different
24 experts and advocates, all of whom are very well educated
25 about the capital punishment system. Some support the

1 death penalty. Others oppose it. We think we have a well
2 -- we have a balanced testifiers today. Some support the
3 death penalty and other oppose it, like I said.

4 Looking forward to hearing from all of them as
5 well as they explain their positions and then we'll take
6 any questions from Committee Members.

7 With that, we're going to begin with the
8 testifiers. The first to testify are the Pennsylvania
9 District Attorney's Association, The Honorable Ed Marsico,
10 Dauphin County District Attorney, Honorable Craig Stedman,
11 Lancaster County District Attorney, and Ronald Eisenberg,
12 Deputy District Attorney from the Philadelphia District
13 Attorney's Office. Welcome, and you may proceed when
14 you're ready. Good morning.

15 MR. MARSICO: Thank you. Good morning, Mr.
16 Chair. Good morning, members of the Judiciary Committee.
17 On behalf of the Pennsylvania District Attorney's
18 Association, I'd like to thank you for the opportunity to
19 testify here this morning. As you noted, Mr. Chair, I'm
20 joined by my colleague, Craig Stedman, District Attorney of
21 Lancaster County, as well as Ron Eisenberg from the
22 Philadelphia District Attorney's Office.

23 Our purpose here today is to talk to the
24 Committee about sort of the process that prosecutors go
25 through in determining whether or not a case should be a

1 capital case, as well as, you know, our collective
2 experience in dealing with the death penalty.

3 I've been a prosecutor for 27 years now in the
4 District Attorney's Office in Dauphin County and in that
5 time, we've seen hundreds, literally hundreds, of murder
6 cases but only a few cases where the decision was made to
7 seek capital punishment.

8 I think what you'll find is District Attorneys
9 across the Commonwealth take these cases, as they should,
10 as seriously as we can. We go through a deliberative
11 process to determine whether or not it's a case that we
12 believe warrants capital punishment under the
13 circumstances. As the Members I'm sure are aware, capital
14 punishment is reserved only for first degree murders and
15 first degree murders are murders that involve the specific
16 intent to kill or premeditation must be proven beyond a
17 reasonable doubt in those first degree murders and not
18 every first degree murder warrants capital punishment.
19 We've had many cases over the years. I tried a case one
20 time where a murderer killed his estranged wife in front of
21 their eight-year old daughter. She was my only witness in
22 the case and I remember getting criticism from individuals
23 saying why wasn't that a death penalty case. Well, there
24 was no aggravating circumstance. So only first degree
25 murders where there's an aggravating circumstance that we

1 believe can be proven beyond a reasonable doubt are cases
2 where we seek the death penalty.

3 At this time, I'm going to let Craig talk a
4 little bit about that process and what prosecutors do in
5 determining whether or not to seek the death penalty.

6 MR. STEDMAN: Good morning. I think it's
7 important before you do talk about the death penalty to
8 understand the real issue here is what's required to
9 prosecute a death penalty case and to get a death sentence
10 in Pennsylvania in 2015 because that's the issue. The
11 issue is not what took place in Georgia or Alabama in 1975
12 because they are vastly different and after our testimony,
13 I think you'll have a better perspective of how difficult
14 it is, and appropriately difficult it is, to get a death
15 sentence here, the solemn decision that we go through, and
16 DA Marsico talked a little bit about the aggravating
17 circumstances and just so you know, there's limited
18 circumstances that's listed in the Legislature for us to
19 obtain a homicide. A lot of the ones that people read in
20 the newspaper, as he said, they say I cannot believe; why
21 haven't you pursued the death penalty? We take criticism
22 for it. It has to be very specific and those circumstances
23 include things that are just common sense, the killing of a
24 child, the killing of a police officer, torture, multiple
25 homicides, and terrible prior records, convicted of murder

1 in the past, things like that, and they are very, very
2 limited in nature. So even if you have the circumstances,
3 you also have to look at the law.

4 Now, you also -- just because you have an
5 aggravating circumstance as a prosecutor does not mean
6 we're going to file a death penalty. There's a long
7 deliberative process that goes on and it is the most solemn
8 decision that we make and we take more seriously than
9 anything else. There is nothing worse for a prosecutor
10 than -- people forget we are the first public defender and
11 we protect the innocent just as much as we prosecute the
12 guilty and the last thing we ever want to do is convict an
13 innocent person and certainly don't want to send an
14 innocent person on to death row. So we have that
15 obligation under the law, under ethics, and morally to
16 screen that first and foremost and we do that and, as I
17 said, there's nothing that we take more seriously than
18 that.

19 Having said that, the reality of our
20 deliberations includes whether -- the strength of the case.
21 We are mindful that what we're asking jurors to do is an
22 incredibly difficult and significant decision and just the
23 reality of the Courtroom is they're not going to give you a
24 death sentence until they're -- beyond reasonable doubt,
25 they're going to want more. I don't know whether you would

1 say beyond all doubt but, in some cases, that may be the
2 case. You know, I've stood in front of juries on death
3 cases and I look in their eyes and I can see the enormous
4 weight on their shoulders. They are not taking this
5 lightly and one thing people forget is they don't know
6 that, in reality, in effect, we don't have a death penalty
7 in Pennsylvania; that no one's really getting executed. No
8 one's been executed I think since '99. The jurors don't
9 know that. They take that seriously. They don't know that
10 really all they're debating is how they're going to be
11 housed and whether they're going to be segregated from the
12 other life prisoners. They think the person will be
13 executed. I don't want to put a time on it but they think
14 probably within a few years, a reasonable time period for
15 the appellate process, and that's how serious they know it.
16 They don't know anything about this case. These are people
17 who are deciding this that have been screened and approved
18 by both sides with a number -- 20 challenges that people
19 can get rid of and, in my experience and I would imagine
20 it's the same across the State, Judges are very liberal in
21 allowing jurors to get struck by the Defense when they want
22 them off because they don't want anything coming back on
23 appeal, and I'm not complaining about that. I'm saying
24 that's the reality of it and it increases the hurdles that
25 we have to get through. So you got 12 people that

1 everybody agreed were fine that don't know anything about
2 this case. They can be fair. They're not zealous for the
3 death penalty or against the death penalty. They are the
4 common people, the fabric of America, the foundation of our
5 legal system which is really based on a jury's decision and
6 that's who we're trusting for these things and they do not
7 take it lightly, nor do we.

8 The only time -- and we tell them when we go in
9 there, you don't make a decision in the case on the death
10 penalty based on vengeance or based on sympathy, vengeance
11 against the defendant or sympathy for the victim's family
12 or anybody in the case, and that's natural. People have
13 those emotions. But we tell them, and the Judge tells them
14 you cannot do it based on that. And to give a perspective
15 of just how rare it is for us to seek and then actually
16 obtain the death penalty in Pennsylvania, I am told that it
17 is less than one percent of our homicides result in a death
18 sentence. That illustrates, brings home, the statistical,
19 I guess evidence, how difficult it is to get there. And I
20 mentioned before that what's important for everyone to
21 consider is that this is not 1975. It's not 1985. It's
22 not 1995. What the juries want are a modern prosecution
23 and in order to get the death penalty, I can tell you they
24 want more than what some of the I guess past convictions
25 may have -- and jurors may have demanded. I'm not saying

1 the old cases are bad cases. I'm saying evaluating what's
2 on the table now and should we continue the death penalty
3 in 2015 going forward and in 2015 going forward, jurors
4 watch CSI. They want more than an identification. They
5 want DNA. They want a fingerprint or a videotape or
6 something more. That's what they want. That's what they
7 demand in order -- to get the death penalty. It's not in
8 the law but that's a reality of it. It's a reality that we
9 face as DA's before we decide to go forward with the death
10 penalty because if we go forward on a death penalty case
11 and we have a weak guilt-phase case, we might actually hurt
12 that part of the case and we look at it.

13 In addition, before we even go on there, one of
14 the critical things for us is talking to the surviving
15 victim's families and where are they at on this decision
16 and we take that very, very seriously and it's -- you know,
17 they tell you how to present cases in law school. They
18 don't prepare you for sitting across the table from a
19 victim's family and telling them how their son, daughter,
20 spouse, or child was murdered and we don't need anybody to
21 tell us how solemn that is and how serious we take their
22 input and I can tell you that I've had a case where the --
23 really, the only family member was strongly religiously
24 opposed to the death penalty to the point where, you know,
25 we did not pursue the death sentence in that case and we

1 should have on all other reasons and it's not that the
2 victims dictate one way or the other; that can't be the
3 sole decision, but it's very, very important to us and it's
4 important for you to understand that we take into -- their
5 considerations and we tell those victims up front, listen,
6 the chances of this person actually being executed are
7 almost none. Do you understand if we're going to pursue
8 this sentence, the hard road that we're going to follow of
9 appeal after appeal and it's going to go to Federal Court,
10 back to State Court? It's a nightmare for victims'
11 families who've already suffered the worst thing possible
12 and it goes on and on and on and I'll give you like another
13 tangible example of that.

14 A lot of the -- and tie into another topic. A
15 lot of the things you see about that death penalties have
16 been overturned on appeal and it's used by people to say
17 how bad it is and there was appellate relief. One case I
18 had, a guy, his estranged wife got a PFA against him for
19 things that he had done. She called him up and said I got
20 a PFA against you. This infuriated him. This was the
21 motive for his homicide. He loaded up his firearm, took an
22 extra clip, went over to her house because he had heard
23 about the PFA, he kicked the door in, he shot her arms and
24 legs purposely so he didn't kill her so she suffered and
25 then loaded up the second clip in front of her while she

1 begged for her life and then shot her shoulders and then
2 finally, mercifully, killed her. He was barricaded in
3 there. There was no question of guilt. We had hours of
4 conversation on tape with him to surrender. It was
5 abundantly clear. One of the aggravating circumstances in
6 that case was that she was subject -- he was subject to a
7 PFA so that gives you extra protection, a protected class.

8 The Appellate Courts overthrew that because they
9 said well, yeah, he was -- he knew about it; that was the
10 motive for the crime, but he wasn't actually served with
11 the PFA. So that became a statistic where there was
12 appellate relief. It wasn't about guilt. He wasn't
13 exonerated; he wasn't innocent, and we didn't pursue that
14 and you know why we didn't pursue a re-trial on it, a re-
15 sentencing on it was simply because the family said to me
16 they couldn't take it; that it was years of this appellate
17 process, the roller-coaster that they were on and they just
18 said you know what, we want him. He deserves the death
19 penalty but I, the mother, particularly, of the victim,
20 said I cannot take this anymore and she was raising the
21 child. So it sticks with me. I won't forget it. It's
22 just an illustration of how some things can be used by one
23 side to get to a point and most of the relief that you see
24 are on procedural and kind of what I would say technical
25 grounds by that.

1 So getting back to the DNA and the modern
2 prosecution just briefly, I just want to say that those
3 things that are used -- that you see in the dialog and the
4 discussion for the exonerations that these cases, you know,
5 innocent person let go, keep in mind that case and also
6 keep in mind that those cases didn't have -- most of those
7 cases are old and they didn't have the benefits of the
8 technology and the DNA that we have now. And again, keep
9 in mind we're talking about now and the future, not those
10 old cases and the irony of that is what motivates the
11 people against the death penalty actually validates the
12 death penalty today. What motivates you against the death
13 penalty from the way it was done in the '70s and '80s
14 actually validates the process now and that's -- technology
15 has a lot to do with it.

16 So I think that the last thing I'll just sort of
17 tie up with is it used to be -- and again, to contrast the
18 old process, it used to be that basically, sentencing
19 hearings were just sentencing hearings. It was kind of
20 thrown up to the jury and said you guys kind of decide and
21 now there's a roadmap. Not only do you have to have the
22 first degree, but they're told look, you've got to find the
23 aggravating circumstance first. If you don't find an
24 aggravating circumstance at all, it's gone. It's life in
25 prison. It's automatic. We tell them that. If you do

1 find that, then you go on. Then you decide whether you
2 find a mitigating circumstance. To find an aggravating
3 circumstance, the jury has to be unanimous. All 12 of them
4 have to say we find it and we find it beyond a reasonable
5 doubt, the highest burden of proof. A mitigating
6 circumstance can be found by one juror, one alone, 1 out of
7 12, and that's established by the jury and it's only a
8 preponderance of the evidence. So again, the field is
9 tilted towards the Defense and we have no objection or
10 complaint with that, as it appropriately should be in that
11 hearing, but it gives you an illustration. Only if you
12 have one of each or more of each do they get to the debate
13 and, very clearly, if it's a tie, it's life. The
14 aggravating circumstances must outweigh the mitigating for
15 them to legally and lawfully give the death sentence and,
16 of course, it's just common sense as well.

17 Just a couple last comments and I'll turn it over
18 to my colleagues here. The one thing that I do have a
19 long-term concern about, in addition to the other concerns
20 that I've illustrated is the sense of -- that goal posts
21 will move that when -- if the death penalty is removed, the
22 next target will be life without parole and that will be
23 the target of that's cruel and unusual punishment and does
24 anybody in this room think that all the millions of dollars
25 that go to the Federal Defenders to fight capital

1 punishment, do you think if we eliminate capital punishment
2 in Pennsylvania, are they going to give that money back and
3 not turn it into fighting the next step? And the one thing
4 that victims' families want to know when we're pursuing the
5 death penalty is to assure that that person will never get
6 out and we can't even assure that. Look at what's going on
7 in New York. Two guys are the worst of the worst, the guys
8 that we would go after. That's -- right there is another
9 reason for keeping the death penalty on the table because
10 maybe -- you know, you can hear about deterrence all you
11 want. But like if they're executed, they're not escaping
12 and they're not hurting anybody else.

13 So I'll conclude by saying I'm a bit distracted
14 today. I've been up most of the night on a double murder
15 in which a perpetrator broke into a home, killed the
16 mother, killed a child, and tried to kill another child. I
17 don't know whether she's going to make it or not. So
18 that's what I'm coming into today and, again, I apologize
19 for maybe jumping around a little bit more than I normally
20 would.

21 The last thing I'll say is we don't do this by
22 our choice. These were -- we only get to the death penalty
23 if the defendant makes the choice to kill and have the
24 specific intent to kill. When we get to the death penalty,
25 he's not an innocent man. He's been convicted by 12 jurors

1 that didn't know anything about the case and the crime is a
2 reflection of that killer. Society has a right to protect
3 itself from certain crimes and there must be accountability
4 and there are just cases that just demand the most extreme
5 punishment.

6 And the last thing I'll say before I turn it over
7 to some of the appeal things is the one thing that I always
8 keep in mind when we're talking about these cases, and we
9 tend to forget, is that the victims of these crimes, they
10 have no right and no ability to appeal their sentence and
11 they -- nor do they have anything quite so formal as a
12 death penalty hearing. Thank you all very much.

13 MR. MARSICO: I'm going to let Ron talk a little
14 bit about the appeals process which, you know, gets a lot
15 of attention and you hear a lot of words thrown out like
16 exoneration of offenders and things of that nature when, in
17 our experience, most -- the overwhelming majority of cases
18 that are overturned, guilt isn't at issue and most of the
19 appellate litigation involving the death penalty, whether
20 in State Court or in Federal Court involves the sentence,
21 not guilt or innocence in that sense and this is an area
22 where we're outgunned. Millions of dollars are given to
23 the Federal Defenders for this appellate process. Our
24 State Supreme Court has repeatedly criticized the way that
25 is done, this Federal -- these Federal Defenders coming in,

1 going into counties across the Commonwealth, not counties
2 like Philadelphia where they have adequate resources but a
3 lot of counties, smaller counties, where you're up against
4 it. So, Ron, I'm going to let talk a little bit about the
5 appellate process.

6 MR. EISENBERG: Thanks. You've heard from the
7 other District Attorneys how rare the death penalty
8 actually is. No matter how much we talk about it; how much
9 attention is paid to it in public, the truth is it's a tiny
10 percentage of our murder cases. You've heard how difficult
11 it is to make the decision to proceed capitally and to get
12 a death sentence from a jury and I think that it's
13 important to keep in mind in light of that that when
14 advocates ask you, ask a legislative body to abolish the
15 death penalty, what they are saying is that we can never
16 have it. There is no case, not even those rare ones, where
17 we're going to trust a Pennsylvania jury to consider
18 whether the death penalty is appropriate; not the Boston
19 bomber, not the Oklahoma City bomber, not Adolph Eichmann,
20 not the defendant who committed the crime last night that
21 you just heard about from DA Stedman where a defendant who
22 had been -- who was about to stand trial for molesting two
23 little girls broke into their home in the middle of the
24 night, killed one, tried to kill the other, killed the
25 mother, none of those cases can even be considered by a

1 jury for the death penalty. That's what those opposed to
2 capital punishment are telling you.

3 Now, I'd like to talk about -- we've heard about
4 the newer cases. I'd like to talk about the older cases.
5 I started working in the Philadelphia District Attorney's
6 Office in 1981, 1981. I'm still working on capital cases
7 that we were working on then. They had already been tried
8 by that time. I'm still working on appeals that were in
9 process then more than 30 years ago. I think that tells
10 you a great deal about the nature of the appeals process in
11 the capital realm.

12 The defendant, after his trial, can appeal
13 directly to the Pennsylvania Supreme Court. If he loses
14 there, he can ask the United States Supreme Court to
15 consider his case. If he loses there, he can go back to
16 the trial Judge in Pennsylvania and file a Post-Conviction
17 Relief Act Petition. If he loses there, he can appeal
18 again to the Pennsylvania Supreme Court. If he loses
19 there, he can again go to the United States Supreme Court.
20 If he loses there, he often will file yet another Post-
21 Conviction Relief Act Petition. In the meantime, he can
22 also go to a Federal District Court Judge and file a
23 Federal Habeas Petition. If he loses there, he can appeal
24 to the Federal Court of Appeals. And if he loses there, he
25 can appeal again to the United States Supreme Court and

1 there are many cases where there have been multiple Post-
2 Conviction Relief Act Petitions and sometimes even multiple
3 Federal Habeas Court Petitions that each go through all of
4 those rounds of review. If a case survives that kind of
5 review, that many appeals, then I think the public can be
6 reasonably satisfied that it is appropriate for the
7 execution to take place, for the execution to go forward,
8 despite the fact that that is not being allowed to happen
9 right now.

10 I can also assure you that when you allow a case
11 to be appealed for 20 or 30 years, it's going to get
12 expensive. We hear a lot of complaints about the cost of
13 the death penalty. The reason isn't anything -- about
14 anything inherent in the trial. Yes, we do have extra
15 proceedings because of the sentencing hearing. We do have
16 extra Counsel. But the real additional cost of the death
17 penalty is the fact that the Courts have allowed the
18 appeals process to be abused by the fact to the point where
19 it never ends and if reforms are made and enforced by the
20 Courts that will give us a reasonable appeals process, the
21 cost will be much less. It doesn't happen this way in
22 every jurisdiction. The appeals process I have described
23 that may take decades isn't true everywhere. The Oklahoma
24 City bomber wasn't on appeal for decades. He was executed
25 within five or six years. The killers in the -- in

1 Virginia and Maryland who were on a killing spree several
2 years ago, execution took place within six years.

3 Executions are -- the appeals process is a much more
4 reasonable timeframe in many other jurisdictions in the
5 United States.

6 And that brings me to another point that's often
7 made about the appeals process by those opposed to capital
8 punishment. They say look how many cases get overturned.
9 Look how many errors there are. There must be something
10 wrong with the death penalty if Appeals Courts are
11 overturning cases all the time. The truth is that that's a
12 very regional phenomenon. The reason that no death
13 penalties happen in Pennsylvania in recent years is because
14 we have Courts here who have thrown out virtually every
15 case. That's not true everywhere and so in jurisdictions
16 where you hear about the capital -- where the executions
17 are actually going forward, and that's, to some degree, in
18 the south, Texas and Mississippi and Florida, but now
19 always. It's also true in Ohio that there have been many
20 executions. There have been more executions in Delaware,
21 in fact. It's because there are Courts that rule
22 differently on this very same constitutional questions.
23 It's the Federal Constitution. It's supposed to be the
24 same everywhere. But when it comes to capital punishment,
25 it's not the same everywhere. So when you hear from people

1 that convictions are getting overturned, capital cases are
2 getting overturned all the time and, therefore, there must
3 be something wrong with them, you have to ask yourself
4 well, gee, is there nothing wrong in Texas or Ohio or
5 Florida? Are they so much better there? Are the
6 proceedings so much fairer there? The truth is no one
7 believes that, not even those opposed to the death penalty
8 really believe that you get a fairer trial and a fairer
9 appeal in a place like Texas than you get in Pennsylvania.
10 But your chances of being executed are much higher because
11 there are Courts that are going to treat those cases
12 differently and that's -- and for no other reason than
13 that.

14 Another issue that we face during this long
15 appeals process often is this idea of innocence. We can't
16 execute people because they might be innocent, and I think
17 the simplest response to that is fine, we don't want to
18 execute innocent people. Let's just execute the guilty
19 ones. The reality is, as DA Marsico mentioned, that
20 there's not even a dispute about guilt in most of these
21 cases and to take the two most prominent examples, the
22 cases in which the Governor just issued reprieves, Hubert
23 Michael that you heard about and a case from Philadelphia
24 named Terrence Williams, no one is claiming that they are
25 innocent. No one is claiming that. And there are many

1 others in which there is no question of innocence. So if
2 you're worried about innocence, don't execute the innocent
3 people but execute the guilty people. If the basis for
4 being opposed to the death penalty is to protect the
5 innocent, then you have to go ahead with the cases where
6 the defendant is guilty.

7 Another claim that we often are seeing on appeals
8 is that the execution process is cruel and unusual because
9 it might -- the lethal injection process might cause pain
10 to the defendant. Well, you'll probably recall that the
11 reason we have lethal injection is because people who were
12 opposed to the death penalty claimed that prior processes
13 of execution were too painful. They advocated for lethal
14 injection. Now we have it and now the people opposed to
15 the death penalty say lethal injection is cruel and unusual
16 and the reason there's even a question about it is because
17 people opposed to the death penalty have fought to withhold
18 the drugs that are most effective, that are most sure to
19 complete the process without any chance of pain to the
20 defendant, the kinds of drugs that are used by surgeons
21 every day in the United States to complete surgery without
22 the patient being in agony during the process and,
23 obviously, that works. Those kinds of drugs are being
24 withheld from the States who are attempting to carry out
25 lethal injection and so the people who say the death

1 penalty is cruel and unusual are many of the same people
2 who are actually increasing the risk of pain to individual
3 defendants by advocating with drug companies and with
4 governments to withhold those drugs in order to have
5 another argument against the death penalty.

6 Another argument that we face when fighting these
7 death penalties over many years is the idea of deterrence.
8 The claim is made that the death penalty doesn't deter and
9 I can only assume that this means that it doesn't always
10 deter. There's still murder even though we have the death
11 penalty. Of course, no punishment always deters and yet we
12 use punishments, penalties, in every facet of our lives
13 throughout human experience. If a child is misbehaving, a
14 little child, we say go sit in the corner. If a kid in
15 school cheats on a test or doesn't do his work, we say
16 you're getting a bad grade. If a grown-up commits -- makes
17 some kind of damage to his neighbor's house, we say you
18 have to pay money for that. And yet we are supposed to
19 believe that the very worst punishment, the very worst
20 penalty, which is the death penalty, has no deterrent
21 value. Of course it has deterrent value. Of course no
22 punishment will be a hundred percent effective but it's --
23 regardless of any study that somebody tries to show you,
24 and they are conflicting, although most of the recent
25 studies have shown that there is deterrent value, there's

1 no getting around the basic idea that punishment deters and
2 in the case of the death penalty, we know that, aside from
3 general deterrence, there's certainly specific deterrence.
4 As Mr. Steadman said, if the death penalty had been applied
5 for those worst of the worst murders in New York, they
6 wouldn't have been able to escape. Escape isn't even
7 really the biggest danger for capital horrible murders.
8 The biggest danger is to all the people that they interact
9 with in the prisons. There have been many instances where
10 people in prison have killed again. They have killed other
11 inmates; they have killed prison guards and there are cases
12 where that risk just shouldn't be taken.

13 I'd like to make one final note. You're going to
14 hear shortly from Mr. Dunham who is the -- in charge of the
15 Death Penalty Information Center. Despite the neutral
16 sounding name, I think we can all agree that that's an
17 anti-capital punishment organization. They have a very
18 famous list they call their innocence list to show that
19 people on death row are really innocent. There are only a
20 handful of Pennsylvania defendants on that list. But at
21 least for those of you who go back a few years like myself,
22 the one that you're most likely to recognize is the name
23 Jay Smith. Jay Smith is the school Principal who killed
24 the teacher and her two little children. His case was
25 thrown out by the Pennsylvania Supreme Court but on grounds

1 that had nothing to do, in fact, with guilt or innocence
2 and Jay Smith actually appealed -- not appealed, he sued in
3 Federal Court. He wanted to get money. Once he was out of
4 jail, that wasn't good enough. He wanted to get money so
5 he sued and the Third Circuit, the same Federal Court that
6 overturns almost every death penalty that comes its way,
7 that same Federal Court rejected Jay Smith's lawsuit and it
8 said there was nothing untrustworthy about Smith's
9 conviction for murder. Our confidence in Smith's
10 convictions for the murder of Susan Reinert and her two
11 children is not the least bit diminished. Yet Jay Smith is
12 one of the people on the Death Penalty Information Center
13 innocence list. So even when innocence is claimed, you
14 have to be skeptical about some of the cases. But the more
15 important point really is that there are cases in which no
16 one is claiming innocence. Hubert Michael is not on the
17 innocence list. Terrence Williams is not on the innocence
18 list. Thank you.

19 MR. MARSICO: Mr. Chair, we'll be happy to take
20 any questions.

21 MAJORITY CHAIRMAN MARSICO: Well, thank you very
22 much. That was an excellent explanation of the process and
23 the appeals process as well. So I just want to say thanks
24 for all of you giving a really excellent presentation with
25 that.

1 I wanted to recognize -- I think that
2 Representative Barbin is here. Chairman Petrarca, do you
3 have a question?

4 CHAIRMAN PETRARCA: Thank you, Chairman.
5 Appreciate you gentlemen being here; appreciate your
6 testimony. Obviously, as I said earlier, we were -- we
7 have been debating death penalty moratorium this week in
8 Committee on the House floor and, you know, if you agree or
9 disagree with I guess the Governor's position to wait for a
10 report that was asked for by the Legislature a number of
11 years ago regarding a number of issues around the death
12 penalty, I guess my question is I certainly heard what Mr.
13 Eisenberg said about the appeals and the appeals issues but
14 for those of us that would say we are proponents or think
15 that the death penalty is something that could or should be
16 used in certain circumstances, what can we do to fix this
17 process? I think everyone would agree that this is flawed.
18 I mean when you look at three people being executed in the
19 last 30 or 40 years, whatever it is, and, you know, the
20 problems and, you know, if those warrants had been signed
21 by the Governor, the two recently that have been discussed,
22 we're not in a position to execute anyone anyway in
23 Pennsylvania I think. So what can we do that will affect
24 the appeal process or anywhere else to improve on an
25 obviously broken system in Pennsylvania?

1 MR. MARSICO: I'll let Ron talk first and then
2 I'll go real briefly when he's done.

3 MR. EISENBERG: Well, first of all, I think that
4 there are reforms that we will be happy to put before the
5 Legislature that I think would rationalize the appeals
6 process, at least in State Court, and may even -- there may
7 even be things we can do with State law that will have an
8 effect on the process in Federal Courts and that may
9 prevent further delays.

10 Let me talk about the moratorium itself though.
11 You might think that the moratorium would be a way to
12 advance the ball on how to fix this broken process but the
13 truth is it's being used actually exactly the opposite way.
14 The Governor said I'm putting a moratorium on executions,
15 just the execution, just the cases that are ready to get to
16 execution. There's only two so far in Pennsylvania and
17 there aren't hundreds of others waiting for them. But
18 there are many cases that are stuck in the appeals process
19 and that we're trying to get through.

20 When the moratorium came out, the defense lawyers
21 went to the Federal Court and said oh, you should stop
22 hearing these cases; you should stop working on them; you
23 should stop litigating them. So instead of having cases
24 that would be ready to go when and if the moratorium is
25 lifted, we're going to be a year behind, two years behind,

1 five years behind, however long the Governor waits, and
2 only at that point will we pick up again with those cases
3 because the Third Circuit which overturns so many death
4 penalties has recently said oh yes, Mr. Defense Lawyer,
5 we'll put these cases into suspense and we'll do nothing
6 with them while you go ahead with your study.

7 CHAIRMAN PETRARCA: But if he would have signed
8 those warrants, where would we be right now?

9 MR. EISENBERG: Well, both of those cases have
10 been thoroughly reviewed by the Courts. No one -- or the
11 Governor doesn't claim that there's any error in those
12 particular cases. So I think there's a real question about
13 why a moratorium as to the very cases, the precise cases
14 that have already been upheld after years and decades of
15 appellate review. It would be one thing --

16 MR. MARSICO: I think --

17 CHAIRMAN PETRARCA: No, I agree and I think that
18 again, had those warrants been signed, I mean I think we
19 still have a problem in Pennsylvania on how these --

20 MR. MARSICO: Well, I think the problem --

21 CHAIRMAN PETRARCA: You know, on how to proceed
22 with this.

23 MR. MARSICO: The problem then would be, sir,
24 would be I think with the drugs, but as I understood it,
25 Department of Corrections had made efforts to obtain

1 certain drugs, you know, that could be used and I believe,
2 you know, those strides were being made late last year in
3 the prior Administration and I think Ron hits on that
4 point. You know, these are cases that made it through.
5 You know, these are cases that survived all that appellate
6 scrutiny and now the reprieve is being granted on those.
7 I'm on the Committee that you referenced, Mr. Chairman,
8 and, you know, that Committee, I think we met once a couple
9 years ago when the Committee was first constituted and I've
10 been on Committees in the Joint State Government Commission
11 before. One of the things of being local is I think you
12 get drafted for that, you know, the Conviction Integrity
13 Commission that we had previously, this Commission, others,
14 and, look, you know, unlike the Interbranch Commission on
15 Juvenile Justice which did some great work here, as well as
16 the recent post-Sandusky Commission that was convened, both
17 of those had a wide array of Representatives involved. I
18 think this Committee you see individuals with ideological
19 bents and I'm not saying we don't have an ideological bent,
20 you know, but I think we're up front about ours and that,
21 you know, the way the Committee is constituted, we could
22 have taken a vote day one and known that the vote was going
23 to be let's get rid of the death penalty in Pennsylvania.
24 So, you know, we're going through this process that -- I
25 don't know. I mean I think what you guys are doing is

1 great. It's much more important than issuing a reprieve
2 and waiting for a Commission or a Committee where we
3 already know what the pre-ordained result is going to be.
4 You know, you guys should do this. You should delve into
5 the process and see what it is. Governor Rendell, on his
6 way out the door I guess five years ago now, you know,
7 talked about the death penalty process being flawed and he
8 was exactly right. Now, some of it's out of our -- you
9 said what can we ask you guys to do to fix it. I think you
10 guys have done a lot over the years here to make it better.
11 Our State Courts, our State Supreme Court, has much more
12 often routinely upheld convictions, death sentences in
13 recent years. Unfortunately, you guys don't have any power
14 over the Federal Courts so, you know, reigning in that
15 process is a whole different story. But you're seeing
16 cases now that have survived that process where there's no
17 doubt about guilt, no doubt about what happened at trial.
18 Those are the ones that are coming ripe for execution and I
19 think, as Craig said, going forward, the cases we've
20 prosecuted in recent years with, you know, the advent of
21 technology in law enforcement with DNA cases, all of those
22 cases, you know, again, are much more solid and our Courts
23 have been much better in the -- I mean the jury
24 instructions are normally where most of the battle is in a
25 lot of these appellate cases. You know, I think our Courts

1 have gotten a lot better and I think you're going to see
2 more cases that survive the process and that's, frankly,
3 why I think the only way to stop it was the reprieve
4 process.

5 MAJORITY CHAIRMAN MARSICO: Representative Vereb
6 for question?

7 REPRESENTATIVE VEREB: Thank you, Mr. Chairman.
8 Thank you for your indulgence. Mr. Stedman, you brought up
9 about the essentially a slippery slope is what we --
10 they're terms we use up here in Harrisburg. We -- as of
11 yesterday, we now use the word hissy-fit too. It's kind of
12 unrelated to the actual death penalty in terms of what
13 we're talking about but let's talk about a murder case, you
14 know. I wrote that resolution and if you want to call it
15 -- some will call it a hissy-fit. It was a hissy-fit for
16 the victims and I want to continue to have a hissy-fit for
17 the victims just like I'm going to have a hissy-fit when I
18 leave here about Mr. Grise who is incarcerated about 600
19 yards from my house in a mental institution in Norristown
20 that now has received an additional 12 hours a month
21 unsupervised. It's going to be awesome when my people hear
22 about that back home and I think we need to be very
23 cautious of anything that we're doing for this slippery
24 slope, the blockage of the medication, which is exactly why
25 Governor Wolf -- or I'm sorry, Governor Corbett issued a

1 reprieve for Hubert Michael to begin with because,
2 mysteriously, medication was not available to execute him.

3 Other things we heard were, you know, Governor
4 Corbett didn't sign a single death warrant in his term of
5 office and, you know, I guess that's true if you look for
6 him to sign one but he signed 48 and I have a list that
7 I'll be releasing later of all of the former Governors and
8 the amount of death warrants they signed. But I think our
9 approach as a Committee is we want to make sure it's right.
10 But the one thing I think we need to be aware of is that we
11 can't have our cake and eat it too. Those who claim
12 innocent are being killed then complain that we're spending
13 too much money to defend them through this appellate
14 process. We heard a lot of that rhetoric yesterday.

15 But another thing people say is that some say
16 it's worse for these poor killers to sit in our prison
17 system on a life sentence than the death penalty and I was
18 wondering what your take was on how horrifying it must be
19 to sit in prison for life rather than the death penalty.
20 So that -- after that rambling on, that's my question.

21 MR. STEDMAN: How horrifying it is for the
22 inmates who are still alive?

23 REPRESENTATIVE VEREB: That's not my position but
24 that is -- it's nowhere near my position.

25 MR. STEDMAN: Yeah.

1 REPRESENTATIVE VEREB: But that's some of the
2 rhetoric that we hear and I just wonder what a DA's
3 position was on the darkness of prison compared to the
4 darkness of the death penalty.

5 MR. STEDMAN: Well, the person's or person's
6 lives that they took had hopes, dreams, their futures in
7 front of them and their life taken away by the choices and
8 actions of that defendant who is taken care of, fed,
9 clothed, and continues to simply live. I think we go
10 through death penalty and murder trials, weeks and weeks of
11 it, and it is shocking to victims' families that the victim
12 is almost never mentioned and it just becomes about the
13 defendant and the defendant's rights and it's not so much
14 about the fact that a living, breathing human, just like
15 each one of us, no longer exists because of the choices of
16 a defendant. So I think if you gave them the opportunity
17 to switch places with the victim who was, in my case, the
18 Stallworth case. She was shot 17 times from the feet up.
19 Would you rather have that or would you rather be in prison
20 for the rest of your life, and we all know what the choice
21 is going to be. So it's certainly not, as I said earlier,
22 about vengeance. It cannot be about vengeance. It must be
23 about the law and the right thing but it must also be about
24 accountability and there just are right cases for it, as
25 Mr. Eisenberg talked about.

1 MR. MARSICO: And you talked about the slippery
2 slope. You know, we already hear about geriatric prisoners
3 and why is that guy still in jail. He's not a threat to
4 kill anybody else. He's over 60. He's over 70. You know,
5 we're paying for his medical bills and it's inhumane to
6 keep that person in jail for life. You know, as Mr.
7 Stedman said earlier, you can do away with the death
8 penalty tomorrow and I guarantee you that the same people
9 that are saying we shouldn't have a death penalty; life
10 imprisonment does the job, will be back here in front of
11 you saying, you know, it's really inhumane to keep people
12 locked up their whole life when they're no longer a threat
13 and the costs of incarcerating these geriatric prisoners is
14 too much. You'll hear the same thing.

15 MR. STEDMAN: And the resources will go to that
16 very fight. That's where they'll go and I can tell you
17 from experience in dealing with the Federal Defenders in
18 one case. It was an older case and it was -- we had to
19 face a decision whether to re-sentence or not re-sentence
20 and they essentially literally, politely, honestly told me
21 you don't have the resources to combat us. We will do this
22 and pursue this until he's off the death sentence because I
23 mean we're -- you know, we're not the biggest county in the
24 world. We're not the smallest, but we're not the biggest.
25 But we're defending that. We don't get any extra funds to

1 fight that appeal process. There's no \$9 million sitting
2 out there of taxpayer money that we get. We get county
3 general funds and in that case, they got what they wanted.

4 REPRESENTATIVE VEREB: Well, thank you for your
5 testimony and, Mr. Chairman, just -- I just want to be very
6 clear. I mean this -- the things we were hearing on the
7 floor yesterday were certainly not from any member of this
8 Committee, Republican or Democrat, and I thank you for your
9 testimony.

10 MR. STEDMAN: Thank you, sir.

11 MAJORITY CHAIRMAN MARSICO: Rick Saccone?
12 Representative Saccone?

13 REPRESENTATIVE SACCONNE: Thank you, Mr. Chairman.
14 Thank you for your compelling testimony. There's a lot of
15 things in here I didn't know. I really appreciate that.

16 When we're talking about deterrence, I think
17 there are conflicting studies but I think we can all agree
18 that deterrence increases the sooner punishment is
19 delivered, the science and the studies bear us out on that.
20 So the public groans when they hear how long it takes to
21 execute the guilty. So my question, and Chairman Petrarca
22 took some of the steam out of that, but I really want to
23 get down to how can we streamline this process to reduce
24 what you said was appeal abuse and reduce the cost and
25 bring justice more swiftly to the guilty? What specific

1 legislative language -- do you have some prepared that we
2 can introduce? Can you talk a little bit about that?

3 MR. EISENBERG: In fact, we do and one of the key
4 features of it would be to basically model our appeal
5 process more after what the Federal Courts themselves do.
6 If you want to file a second Petition, you get your direct
7 appeal. That's the first one. That's what we call the
8 first one. Then you get your Post-Conviction Petition
9 automatic. If you want to file another one, which often
10 happens in these death penalty cases, we would propose that
11 you have to get approval from a higher Court, like the
12 Pennsylvania Supreme Court, as sort of a gatekeeper before
13 you can even do that.

14 Now, that's not some radical idea. It's exactly
15 what happens in Federal Court. With a Federal Habeas
16 Corpus Petition, you get one. If you want to file another
17 one, you can't do it. You have to go to the Court of
18 Appeals, the Third Circuit Court of Appeals, and you have
19 to meet a specific checklist of particular requirements for
20 a second Petition and they'll often say no and the
21 defendant doesn't get to file one. We think doing
22 something like that here in Pennsylvania might help reduce
23 the process too and there are other things that can be done
24 as well.

25 REPRESENTATIVE SACCONI: I'd love to work on that

1 with you and I'd be happy to introduce something like that.

2 I want to just say one thing to close. My
3 comment is that be careful; there is a danger in saying
4 that the process is flawed like Governor Rendell did
5 because when you just say it like that; the death penalty
6 is flawed, the process is flawed in Pennsylvania, it feeds
7 the argument that we're executing the innocent as opposed
8 to the process is flawed because we are delaying justice to
9 the guilty.

10 MR. MARSICO: Correct.

11 REPRESENTATIVE SACCONI: So we got to make sure
12 that we're specific when we say the process is flawed
13 because it just feeds the argument to the other side.

14 MR. MARSICO: You said it much better than I did.
15 The appeals process is flawed is what I should have said.

16 REPRESENTATIVE SACCONI: There we go. All right.
17 Thank you very much and thank you for your testimony.

18 MAJORITY CHAIRMAN MARSICO: Representative
19 Barbin?

20 REPRESENTATIVE BARBIN: Thank you, Mr. Chairman,
21 and thank you, Mr. Marsico and Mr. Stedman for the
22 testimony today. I've read through your testimony and I
23 take the position a little differently. You've provided in
24 your testimony today that there are States that don't spend
25 30 years deciding whether that a decision that was made by

1 a local county District Attorney was a good decision and is
2 -- should be law and the execution should be carried out.
3 You indicated that Maryland and Delaware I think, Ohio, and
4 some of the southern States have a process which allows for
5 carrying out the execution of sentence within six to a ten-
6 year process.

7 Our process, no matter how you look at it, had
8 three people executed out of 180 or so that are on death
9 row over the last -- since Governor Thornburgh. Now, your
10 testimony establishes that you have a Federal Court system,
11 system of appeals that has created some delay and our Third
12 Circuit has created some delay. We also have a State
13 system of appeals.

14 Now, I'm familiar in Ohio, they took all of this
15 into consideration and they appointed State certified
16 attorneys so that there would be no more ineffective
17 assistance of Counsel claims as additional delay tactics
18 and District Attorney Stedman has indicated that in a lot
19 of cases, the counties' budgets really aren't sufficient to
20 keep up with these appeals year after year. So I'm looking
21 at your recommendations. Why isn't this the time to say
22 that our State is going to have a system of appeals that is
23 similar to a State that gets the job done in six years?

24 MR. EISENBERG: Can I talk a bit about that?
25 There are many States, as I mentioned, where the appeals

1 process is much faster than here and they don't all have
2 the system that you've described in Ohio and I'd like to
3 talk a bit about that funding question/ineffective
4 assistance of Counsel question.

5 We hear a lot that Pennsylvania is one of the
6 only or the only States that doesn't have State funding for
7 capital representation and what that means is literally
8 State, appropriated by you. As we all know, the funding
9 comes through at the county level but there's nothing
10 strange about that. That's how my funding comes through at
11 the county level. Police and prosecutors are funded at the
12 county level too. What's different at the -- beyond the
13 county level is that there's a massive infusion of Federal
14 funding only for the defense side which doesn't occur at
15 all for the prosecution or the police side and that I think
16 is what allows -- one of the things that allows this
17 extreme delay.

18 It's true that there are many claims of
19 ineffective assistance of Counsel but those are, again,
20 very regional in their effect. In other words, those same
21 claims are made in all of the other States where the death
22 penalty process is much faster but Courts reject them there
23 and they are granted more often here. Again, I don't think
24 anybody really believes that that's proof that lawyers in
25 Pennsylvania are not as good as lawyers in Texas or

1 Mississippi. I think it's just a different orientation of
2 the Judges who are supposed to be applying the same law
3 about ineffective assistance of Counsel which is a
4 constitutional right.

5 And there's an additional technical legal reason
6 why you hear that phrase a lot and that is because under
7 Pennsylvania law, if your original lawyer doesn't raise a
8 particular claim, then it's waived. It's forfeited. It's
9 given up and you can't get relief on it. So every new
10 issue that a subsequent lawyer thinks of has to be phrased
11 in terms of ineffective assistance of Counsel and, of
12 course, every time you get a new lawyer, he's going to come
13 up with some new argument. That's the purpose of having
14 the new lawyer. Technically, however, the only way he can
15 get that issue before the Court is to say that the last
16 lawyer was ineffective for not thinking of it himself and
17 so those are the only ways in which a later Appeals Court
18 can reach an issue in order to grant relief.

19 REPRESENTATIVE BARBIN: All right. Here's what
20 I'm trying to get at and I read your paragraph on what is
21 needed in legislation. I'm interested in leaving this
22 hearing and writing legislation that's reviewed that says
23 we're going to speed up this process.

24 MR. MARSICO: Okay.

25 REPRESENTATIVE BARBIN: If I write that

1 legislation and I was going to follow some State that had a
2 better model than we have, and we obviously have one of the
3 worst, what State can I use as a model to start drafting
4 legislation?

5 MR. MARSICO: I would look -- I think Ohio. I
6 think Missouri from what I've seen has a process --

7 MR. STEDMAN: Virginia.

8 MR. MARSICO: -- that seems to make it through --

9 MR. STEDMAN: Virginia too.

10 MR. MARSICO: Virginia has over the years and,
11 you know, those are the ones that come to mind. You know,
12 Texas obviously has a lot of executions but -- and I agree
13 and back to your question. Were you talking about on the
14 prosecution side or the defense side that --

15 REPRESENTATIVE BARBIN: I want someone that if a
16 District Attorney makes a decision, 180 people out of -- we
17 have 50,000 prisoners and we're talking about 30 years,
18 there are 180 people that might meet the category of
19 Charles Manson. I want a process that says to the family
20 and to the law enforcement that if we make these decisions;
21 we have mitigating factors, we have aggravating factors,
22 you can only be a death penalty if you hit the top of the
23 line on all cylinders, but once that's done, we should have
24 a process that says the Federal appeals have to move on
25 this line. Does our State require a -- the Supreme Court

1 to have an approval for a third Federal appeal to be filed?

2 MR. MARSICO: No.

3 REPRESENTATIVE BARBIN: Okay. Do other States?

4 MR. MARSICO: If it's a Federal yes, but in State
5 Court no.

6 REPRESENTATIVE BARBIN: Okay. On our PC -- on
7 our Post-Conviction Relief Act appeals, do we have limits
8 on the number of those appeals and is -- after the second
9 appeal, is a higher Court required to sign a Petition for a
10 third Post-Conviction Relief Act appeal for a death penalty
11 case?

12 MR. MARSICO: Yes and no is the question.

13 REPRESENTATIVE BARBIN: All right. So we can
14 change some of that language to maybe streamline the
15 process?

16 MR. MARSICO: Yes.

17 REPRESENTATIVE BARBIN: Okay.

18 MR. MARSICO: There is statutory language but Ron
19 can probably attest, a lot of times it's --

20 MR. EISENBERG: Well, there's really only a time
21 limit and the defendant can say I come in with it untimely
22 because I got something new. So if the defendant says it's
23 been ten years but I just discovered something, he can file
24 a third or a fourth Petition.

25 REPRESENTATIVE BARBIN: But does a Court -- a

1 higher Court have to say that's --

2 MR. EISENBERG: No.

3 REPRESENTATIVE BARBIN: -- garbage?

4 MR. EISENBERG: Not in Pennsylvania Courts.

5 REPRESENTATIVE BARBIN: Okay. So we could put in
6 that requirement?

7 MR. EISENBERG: Absolutely.

8 REPRESENTATIVE BARBIN: Okay. And last, does any
9 other State -- like I noticed in your testimony you said
10 what happens with the Federal Court appeals is the warrants
11 that are signed are timed out. They expire. Is there any
12 State that has the rule that says when the warrant is
13 signed by whoever the Governor is, when the first -- it
14 goes through the first set of the appeals that that one
15 stays in effect until lifted by a Court?

16 MR. EISENBERG: We think there are and whether
17 there are or not, that's an obvious reform that we would be
18 in favor of and that we have drafted language about.

19 REPRESENTATIVE BARBIN: And, Mr. Chairman, I
20 conclude my questions. I would appreciate any information
21 being submitted to the Chairman on that particular issue
22 because --

23 MR. MARSICO: Sure. We can get information to
24 you.

25 REPRESENTATIVE BARBIN: -- I think that could

1 speed up the process. Thank you, Mr. Chairman.

2 MAJORITY CHAIRMAN MARSICO: Representative
3 Stephens?

4 REPRESENTATIVE STEPHENS: Thank you, Mr.
5 Chairman, and thank you DA Stedman, DA Marsico, and DDA
6 Eisenberg for being here to share your perspectives and
7 insights.

8 You know, I sincerely appreciate you bringing to
9 the table really the gravity of the decision that you all
10 have to go through in terms of whether or not to even seek
11 the death penalty at the outset. As one who's participated
12 in those discussions and decisions, I appreciate you
13 sharing that perspective with everybody.

14 I want to sort of expand on that just briefly if
15 I could and if you could maybe elaborate for the Committee
16 and for us about the victim involvement in the case both,
17 you know, pre-trial, during trial, and in terms of what
18 input they have, how much weight do you place on there and
19 put -- I know DA Stedman, you made reference to it and then
20 throughout the process, you know, their input and the
21 effects of the process on them.

22 MR. MARSICO: Sure. We've had capital litigation
23 courses where we've discussed this very issue, in fact,
24 somewhat recently and I think I can speak pretty broadly
25 across the Commonwealth whether it's Cambria County or

1 Dauphin County or Montgomery County, I think the process --
2 or Philadelphia County are rather similar. You know, too
3 often in my job one of the worst things, probably the worst
4 thing I do, is I sit across a table like this from a mom
5 whose 18 or 19-year old son, you know, has been killed and
6 that happens routinely in Harrisburg, Lancaster, York,
7 Reading, Norristown, you know, across the Commonwealth and,
8 you know, we're going to talk to those individuals. I
9 think we lay out in any case; and again, the majority of
10 our cases are cases where we know going into that meeting
11 with the victim -- you know, we know the night of a
12 homicide sometimes whether it's going to be -- whether it
13 could never be a death penalty case. You know, you -- the
14 case is solved two hours after the crime. You know there's
15 no aggravating factors that are going to surface. So you
16 know right then and there it's not a death penalty case.
17 So a lot of times, you're talking to victims' families that
18 want the death penalty, explaining why it's not a death
19 penalty case from the start, and you're not even going to
20 have the give-and-take about whether or not you're going to
21 seek it because you know you can't. But in those cases
22 where it's plausible and a case that you have some sincere
23 belief warrants the death penalty, you're going to have
24 that discussion and, you know, a lot of times you're going
25 to have more than one discussion with the victim's family.

1 You know, I like to say to the victim's family we're going
2 to talk today but we're not going to make any decisions and
3 then we're going to get back together in two weeks and
4 we're going to talk again, you know, about this case and I
5 had a case that I tried myself. A guy stabbed one woman,
6 picked up a 15-month old infant, slit the baby's throat
7 twice in front of a couple of cops as the cops were coming
8 into try and save the victims in the case. The baby died.
9 The cops shot the defendant. He lived. Still lives on
10 death row. Will outlive me I'm sure. And, you know, in a
11 case like that, I had parents of the child where one wanted
12 a death -- wanted us to go after a death penalty. One
13 didn't. You know, so sometimes we're faced with different
14 situations like that. But I would say, you know, the
15 victim's families' input is huge. It can evolve. It can
16 change. And then throughout the trial process, you know,
17 we're constantly talking to the victim's family prior to
18 trial. We have a murder case this week in my Courthouse.
19 It's not a death penalty case but, you know, the victim's
20 family I've met with I think two or three times. You know,
21 the prosecutor that's trying the case has met with them
22 countless more times, victim's advocates have met with
23 them. You know, so the victims are what comes first is a
24 long way of saying that, Representative Stephens.

25 REPRESENTATIVE STEPHENS: Sure.

1 MR. STEDMAN: If I could -- I would just briefly
2 say, I mean it's -- they're paramount to me. You know, we
3 are the victim's voice in that Courtroom. They can't speak
4 for themselves and we have to do that and I tell everybody
5 in the office that we treat them as is if they're some --
6 you know, a family member and that's how -- because they
7 are somebody's family member and they deserve to be just --
8 treated just as equally and just as important.

9 I can tell you that this process and the death
10 penalty process, it's extremely discouraging to family
11 members and one of the reasons is a lot of -- their main
12 concern is, and rightfully so and it should be everyone's
13 concern, is truth in sentencing. There should be truth in
14 sentencing proportional to the crime and what we have now,
15 it's essentially a farce when it comes to the death
16 penalty. There's no truth in sentencing. You've got him
17 sentenced to death and there is no death sentence and it
18 can be very discouraging and disappointing to the family
19 members who don't really know the real situation here and,
20 you know, it's discouraging to us to have those -- on top
21 of telling them how their loved one dies, now we have to
22 tell you that even though it's this death penalty case on
23 paper, strong case, no question of guilt, you know, the
24 jury's going to convict, you know, it's really -- it's not
25 going to happen and it feels like we're betraying them in

1 some way.

2 REPRESENTATIVE STEPHENS: I appreciate that
3 insight. In terms of the appellate process, and I know
4 some of my colleagues have weighed in on this process and I
5 share many of their concerns, you know, I know there's
6 many, many instances where, you know, the defendant is
7 granted a new sentencing hearing and the decision is
8 ultimately made; you know what, we'll live with life in
9 prison and take the death penalty off the table and there's
10 some -- obviously some high profile cases where that
11 decision is made and I'm sure it's a very difficult
12 decision, can you share with us whether or not the victims
13 have been, in your mind, sort of worn down by the process?
14 I mean what role do they play in those decisions and what
15 is their -- you know, the impact on them in that regard?

16 MR. EISENBERG: Absolutely worn down. You may
17 have heard of the Mumia Abu-Jamal case from Philadelphia.

18 REPRESENTATIVE STEPHENS: Once or twice.

19 MR. EISENBERG: I remember when I started
20 literally in 1981, I was one of the people that was helping
21 to do some research for that case for the trial lawyer and
22 when we finally finished the appeals process in I think it
23 was the year 2012 or 2013, three decades later, the wife of
24 the officer, Maureen Faulkner who had been fighting
25 constantly for the recognition that case properly deserved,

1 said yeah, I'm worn down and I'm okay with not re-doing
2 this death penalty hearing after all this time and there
3 was no one -- I don't think anyone in the victim community
4 who had been a more staunch advocate for the rights of
5 victims and for their proper consideration than Maureen
6 Faulkner. But in the end, even she agreed that it was, you
7 know, not worth it to her.

8 MR. STEDMAN: Not just worn down but they start
9 passing away over time. We lose them, the grandparents,
10 the parents. They're no longer even around to have a voice
11 about what took place with their loved one.

12 REPRESENTATIVE STEPHENS: All right. Thank you
13 very much for your insight and testimony. I appreciate it.

14 MR. EISENBERG: Thank you.

15 MAJORITY CHAIRMAN MARSICO: Gentlemen, thank you
16 very much. You certainly have given us a clear outline of
17 the death penalty process and we certainly appreciate your
18 suggestions in improving the system. So, once again,
19 thanks for being here and thanks for your input.

20 MR. MARSICO: Thank you.

21 MR. STEDMAN: Thank you, sir.

22 MAJORITY CHAIRMAN MARSICO: Next to testify is
23 Robert Dunham, Executive Director of the Pennsylvania Death
24 Penalty Information -- the Death Penalty Information
25 Center. Good morning, Mr. Dunham.

1 MR. DUNHAM: Good morning, sir.

2 MAJORITY CHAIRMAN MARSICO: Welcome, and you may
3 proceed when you're ready.

4 MR. DUNHAM: Good morning, Chairman, Members of
5 the Committee. My name is Robert Dunham. I'm the
6 Executive Director of the Death Penalty Information Center.
7 We are a non-profit organization in Washington that
8 provides services to the media and the public with analysis
9 and information on issues concerning capital punishment.

10 I think before I get started, I need to make
11 clear, as many of you know, I was a capital defense lawyer
12 here in Pennsylvania for 20 years and I ran the Death
13 Penalty Resource Center for five years and I was a Federal
14 Defender in Philadelphia and later in Harrisburg for 15
15 years after that. I want to make clear that I don't come
16 to you today as a legal representative of my former
17 clients. I come representing the Death Penalty Information
18 Center. That's not to say that my experiences and the
19 information I gathered in those 20 years are not relevant.
20 In fact, a lot of what I said in my written submission and
21 some of the testimony that I'll give today is based on the
22 information that I gathered during that 20-year period as
23 well as my personal experiences in litigating cases.

24 I don't want to -- we obviously don't have time
25 to go over everything that's in the testimony and I'd like

1 also to respond a bit to what the District Attorneys have
2 said but I think we can all start with the same conclusion
3 that everybody agrees with and that's one that should be
4 clear to anyone who's been paying attention to the issue in
5 Pennsylvania and that is that Pennsylvania's death penalty
6 is broken and it has been for many years. It's up to you
7 to decide whether that's irretrievably so and if not, what
8 reforms you think should be carried out.

9 There's an inevitable tension in States that have
10 the death penalty between fairness and finality, between
11 ensuring as best as humanly possible that no person is
12 unconstitutionally convicted or sentenced to death and that
13 the law of the Commonwealth, if fairly administered, is
14 carried out. The critical issue is the fairness and
15 reliability of the process because a finality that is
16 achieved by expediting executions that are the product of
17 an unfair or unreliable process is the ultimate miscarriage
18 of justice. Pennsylvania's death penalty is plagued with
19 systemic problems and I've set forth a lot of them in my
20 testimony. One thing we did not hear much about in what
21 the District Attorneys said is the state of defense
22 representation in the Commonwealth of Pennsylvania.

23 We did hear briefly that Pennsylvania is the only
24 State in the United States that has the death penalty that
25 provides no State funding for indigent defense at any level

1 of the capital case. The result of that is that the
2 counties are the ones who are doing the funding. The
3 multiple studies that have taken a look at the death
4 penalty, and I've set them out in more detail in my written
5 remarks, have consistently said that Pennsylvania's
6 counties, with near uniformity, fail to provide adequate
7 compensation and adequate resources for indigent defense.

8 In fact, the American Bar Association found that
9 only Philadelphia County, the Philadelphia Public Defender
10 portion of the capital representation, complied with the
11 American Bar Association standards; others do not, and we
12 have seen in county after county the insufficiency of the
13 resources that have been available for investigators, that
14 have been available for mental health services, and other
15 expert services and that is only made worse by the fact
16 that the Pennsylvania Supreme Court, when faced with
17 challenges to the denial of resources for mental health
18 experts, has never once held that the United States Supreme
19 Court Opinion of Ake v. Oklahoma, the case that said that
20 if you are indigent, you have a right to mental health
21 resources in a capital case applies in Pennsylvania. The
22 Pennsylvania Supreme Court has narrowly read this case to
23 apply only to the question of sanity in the guilt phase of
24 a capital trial and only to psychiatric testimony given in
25 response to future dangerousness arguments by the

1 Commonwealth. However, in the State of Pennsylvania,
2 future dangerousness is not an aggravating circumstance.
3 So one cannot imagine a circumstance in which the
4 information would be properly placed in front of the jury
5 that would, in the minds of the Pennsylvania Courts,
6 trigger the constitutional right to the provision of
7 experts.

8 Now, there is a State requirement of experts.
9 The State law says that a defense is entitled to those
10 experts that are reasonably necessary for the presentation
11 of their case. But that is a decision that is made at the
12 discretion of the local Courts and, as I said, there have
13 been no circumstances thus far in which the Appellate
14 Courts have found a violation.

15 Now, the prosecutors have suggested to you that
16 cases in Pennsylvania have been reversed largely on
17 technicalities. I would beg to differ. The experience
18 is that in the approximately 430 or so instances in which
19 death sentences have been imposed in Pennsylvania, 254 have
20 been reversed. Most of those have been reversed not in the
21 Federal Courts but in Pennsylvania's State Courts. 100
22 have been reversed -- approximately 100 have been reversed
23 on direct appeal by the Pennsylvania Supreme Court, the
24 remainder, in the post-conviction process. That's a State
25 PCRA or Federal habeas corpus. The reversals have been 100

1 and I believe 3 or 4 reversed in the Pennsylvania State
2 Courts by the Courts of Common Pleas and by the
3 Pennsylvania Supreme Court and slightly more than 50
4 reversed in the Federal Courts, most of those at the
5 District Court level, some of those affirmed, some reversed
6 by the Third Circuit and, in fact, the Third Circuit is not
7 as the prosecutors have portrayed, a runaway pro-defendant
8 circuit as you can tell from the Decisions it's made in
9 other States that are within the Circuit, as in Delaware.
10 The Third Circuit takes the cases as it sees them based on
11 the quality of representation that has been provided and
12 the issue that have been raised. The problem we have in
13 Pennsylvania is that there is a severe inadequacy in the
14 funding of indigent defense and that produces consequences.
15 The fact that we do these cases, in a vernacular term, on
16 the cheap up front, means that the cases will be reversed
17 down the road.

18 The single most frequent basis that capital cases
19 are reversed in the Commonwealth of Pennsylvania is for
20 ineffective assistance of Counsel and that means
21 objectively deficient performance by the lawyers and
22 performance that is sufficiently prejudicial that there's a
23 reasonable probability that the outcome would be different.
24 We're talking about 140 plus cases reversed for ineffective
25 assistance of Counsel and of those ineffective assistance

1 cases, the single most prominent basis for reversal is
2 ineffective assistance of Counsel for failing to
3 investigate and present reasons for life in the penalty
4 phase. That is 87 cases so far that fall in that category
5 and that is directly attributable to the absence of
6 resources for investigating and presenting the case for
7 life.

8 Now, we know, we know that Counsel makes a
9 difference and, in fact, Pennsylvania has provided its own
10 unfortunate experiment on that very subject. We don't have
11 to look any further than the City of Philadelphia.

12 In 1992, prior to 1992, all of the cases that
13 were handled in Philadelphia were done by appointed
14 Counsel. The Philadelphia Public Defender's Office was not
15 involved in those cases. In 1992, the Philadelphia Public
16 Defender's Office received resources to create its Homicide
17 Unit and from that time forward, the Philadelphia Public
18 Defender's Office, through that institutional Defender, has
19 represented 20 percent of the homicide cases in that City.
20 Since that time, 93 people have been sentenced to death.
21 If Counsel made no difference, then one would expect that
22 20 percent of the people who were sentenced to death in
23 Philadelphia since 1992 would have been Philadelphia Public
24 Defender cases and that would mean about 18 or 19 of those
25 Public Defender clients would have been sentenced to death

1 if Counsel made no difference. Well, zero of the
2 Philadelphia Public Defender clients have been sentenced to
3 death. All of the other death sentences have been from
4 under-resourced appointed Counsel who also didn't have the
5 institutional expertise and experience to handle capital
6 cases and that is an experience that's been reflected in
7 the results in other States.

8 So, for example, in New York when that State re-
9 introduced its death penalty, it did so with statutes that
10 provided for the utmost in procedural safeguards and one of
11 the important procedural safeguards that New York adopted
12 was the creation of a State indigent defense system for
13 capital cases. There was not one death sentence that was
14 imposed in the State of New York that was a Capital
15 Defender case. The only people who were sentenced to death
16 were either defendants who had waived their right to
17 Counsel or defendants who had conflicts and the Capital
18 Defender represented one defendant and so the other
19 defendant was left with who was left.

20 In New Jersey where there was an indigent defense
21 system that was provided adequate resources, there were
22 very few death sentences that were imposed. And in States
23 that we regard as high death sentencing States; States like
24 Virginia, States like Texas where many people have been
25 sentenced to death and many people have been executed,

1 after those States created either regional or statewide
2 capital defense systems where they used lawyers who had
3 experience in capital defense, the rate of death sentences
4 in those states plummeted. So we know, historically, that
5 Counsel makes a difference and it makes a difference on the
6 other end as well because when those cases are reversed,
7 all of the resources that went into it first time through
8 are for not. You're in a situation where you either have a
9 do-over or you have to decide many years later whether
10 you're going to go for the death penalty at all.

11 Now, I have tracked capital cases in Pennsylvania
12 from the post-conviction process from 1994 to the present.
13 There have been 154 cases reversed in the post-conviction
14 process in the history of Pennsylvania's death penalty
15 statute. Of those 154, 115 have gone on to a new final
16 disposition. That is to say either the case was disposed
17 of through a plea or it went on to a re-sentencing. 115
18 cases have gone on to a new final disposition.

19 In an arbitrary system, if you flip the coin, the
20 result would be 50/50. In Pennsylvania, the result has
21 been that there are 111 cases in which defendants in this
22 new process afterwards have received sentences of life or
23 less or been freed. There are four of those individuals
24 who are still on death row. That is a 95 plus percent life
25 or less result and, in fact, more have been freed than have

1 been re-sentenced to death and that speaks serious problems
2 in the administration of Pennsylvania's death penalty.

3 You know, on the appellate process, we heard from
4 the prosecutors that most of the relief they say has been
5 on technicalities. I think that's incorrect. I think
6 that's incorrect because I don't think it is a technicality
7 that someone has received objectively deficient
8 representation that was prejudicial to their case. The
9 right to Counsel is not a technicality nor was it a
10 technicality in the 40 plus cases that were reversed
11 because of prosecutorial misconduct of one sort or another.
12 Those are not technicalities. The majority of cases are
13 not reduced -- are not reversed because of technicalities.
14 They are reversed because of harmful constitutional errors
15 that are present in a case and that's why it's critical
16 that when one considers reforms, if you decide that you
17 wish to keep the death penalty, that if one considers
18 reforms, you must not, if you want to be fair, place a
19 premium on expediting executions and saying that's what's
20 necessary to get the job done. Getting the job done is
21 getting the case right. Getting the job done is ensuring
22 that people are not sentenced to death in violation of the
23 Constitution; that they have gotten fair process; that we
24 can have more confidence in the outcome of the proceedings.
25 Getting the job done is not just executing people because

1 if we have executed people unfairly and it's a rush to
2 execution, as I said earlier, that is in itself a
3 significant, significant injustice. And the States that
4 have been pointed to as examples of getting the job done;
5 States like Texas and States like Virginia, are not States
6 that are known for having the most meaningful appellate
7 process. In fact, many people in Virginia were executed
8 not because Courts had confidence in the outcome of the
9 proceedings, but because of technicalities like lawyers
10 missing filing deadlines.

11 In the Commonwealth of Virginia, if you miss a
12 filing deadline, you may never present that claim again and
13 so there are individuals whose lawyers, by an hour, by a
14 day, by a week, misread the statute of limitations,
15 miscalculated the time, and filed valid constitutional
16 claims that would have undermined confidence in the outcome
17 of the proceedings and their clients were executed without
18 any Court ever passing judgment on the legitimacy of those
19 claims. An execution that occurs in those circumstances is
20 not an execution that is worthy of respect and not an
21 execution that is worthy of confidence and that is not a
22 path that Pennsylvania should strive to follow.

23 We heard the prosecution -- the prosecutors who
24 spoke, and eloquently so, about the need to care for
25 victims and I think that there is no fair and no just

1 system that fails to take into consideration the legitimate
2 needs of victims. These family members have experienced
3 horrible, horrible things and they need to have services to
4 ensure that their psychological needs are met and to ensure
5 that they are not re-traumatized or that the level of re-
6 traumatization in the Pennsylvania procedures are
7 minimized. It is critical that we take care of all of our
8 citizens and especially that we take care of people who are
9 so vulnerable because of the horrific experiences that they
10 have had.

11 Having said that, the view of the victim
12 community is not monolithic. One of the first cases in
13 which I provided representation was the case of Keith
14 Zettlemyer who was the first individual in Pennsylvania to
15 have been executed in the modern era. In that case, I
16 represented Aldona DeVetsco. Aldona DeVetsco was Charles
17 DeVetsco's mother. He was the murder victim in the case.
18 Mrs. DeVetsco wanted to intervene in the case as the next
19 friend to keep Keith Zettlemyer alive. Now, not all
20 victims have family members who want to do that. We have
21 seen that there is great conflict among victims' family
22 members. We heard eloquently from the Richards family in
23 the Boston Marathon case about they did not want their kids
24 who still survived to be brought up in circumstances in
25 which the death of their brother, the Richards' son, was

1 re-lived over and over in the media and in the Courts and
2 on the terms relating to the homicide, not the wonderful
3 memories they had from this charming child. Those kinds of
4 things are always a problem in capital cases. Victims'
5 family members are always re-traumatized in capital cases
6 and studies that have been done are instructive because
7 while there is division about what victims' family members
8 say about capital cases and most of them still do say that
9 they would prefer death over other punishments. But
10 studies that have been done show that whether they say they
11 prefer death or they prefer another punishment, the death
12 penalty process is not good for them. The most recent and
13 most publicized study appeared in the Marquette Law Journal
14 and the researchers followed family members of murder
15 victims in Texas, where there is a death penalty, and in
16 Minnesota where there is not, and they followed them from
17 the beginning of the process through the end of the process
18 and what they found was that the murder -- the family
19 members of murder victims in Minnesota, at the end of the
20 day, were physically more healthy, were emotionally more
21 healthy, and were psychologically better off than the
22 family members of murder victims in Texas. The death
23 penalty is not good, is not good, for family members of
24 murder victims. It's the process that just makes it worse
25 than the already horrific experiences that they have

1 undergone.

2 We heard earlier a bit about deterrence. Is the
3 death penalty deterrent or is it not? The National Academy
4 of Sciences sponsored a study that looked at the deterrent
5 studies and said there was no reliable evidence whatsoever
6 that the death penalty was, in fact, a deterrent and it
7 said that State Legislatures and the Federal Government
8 should not rely on the poorly structured studies that
9 indicated some evidence of deterrence. The most recent
10 study, a respected study done by the Brennan Center on
11 Justice coming out of New York University, looked at
12 numerous factors that could contribute to crime, to the
13 rates of crime, especially the rates of violent crime and
14 murders. One of the factors they looked at was the death
15 penalty and what they found was whether you have a death
16 penalty or don't have a death penalty has no relationship
17 whatsoever to murder rates. That's borne out by the crime
18 rates that we've seen across the country. When homicide
19 rates rose in the United States in the '80s and '90s, the
20 patterns of rising homicide were the same in States that
21 had the death penalty and States that did not. When murder
22 rates dropped thereafter, the rate of dropping was the same
23 in States that had the death penalty and States that did
24 not. The presence of the death penalty played no role
25 whatsoever as a deterrent and, in fact, it's a red herring

1 because the question isn't even from a public policy
2 perspective. Does the death penalty deter? It is does the
3 death penalty deter appreciably better than other
4 alternatives and there is no evidence whatsoever, none of
5 any kind, that suggests that a death penalty is any more of
6 a deterrent, if it deters at all, than the alterative
7 punishment of life without possibility of parole.

8 So there is not a legitimate justification that
9 one has been able to ascertain from the studies or any
10 realistic experience based on deterrent nor is the death
11 penalty, according to information from the Bureau of
12 Justice Statistics, a deterrent with respect to the conduct
13 of the inmates in prison. We heard the District Attorneys
14 make reference to possible prison murders. In fact, the
15 evidence from the Bureau of Justice Statistics seems to
16 indicate that there is no difference in prison murder rates
17 in States that have the death penalty and States that do
18 not. So it is not, although superficially it seems like a
19 decent argument, it is not an argument that is borne out by
20 the facts.

21 There's much more that we could talk about and I
22 don't think that we have really the time to do so but I
23 would briefly like to touch on two issues. One is the
24 question of the death warrants in the Commonwealth of
25 Pennsylvania.

1 In 1995, this Legislature adopted an automatic
2 death warrant statute and that was based on the perception
3 that Governor Casey had not been signing death warrants and
4 as a result of his failure to do so, people were
5 languishing on death row without their cases moving forward
6 and, in fact, I think it is true to say that in the early
7 cases from the 1980s, very few of them moved into the post-
8 conviction process without some kind of external
9 stimulation to do so. Traditionally, Governor Thornburgh
10 did so by signing warrants and Governor Casey had done so
11 to a much lesser degree.

12 Well, it turns out that there is another way of
13 address that problem of moving cases into the system and
14 that is by adopting a statute of limitations and this
15 Legislature did so. A one-year statute of limitations was
16 adopted and 110 plus cases moved into the system within the
17 course of a year. That addressed the question of the
18 delayed initiation of proceedings. And when the District
19 Attorneys talked about cases that have languished from the
20 1980s, one of the things that is frequently overlooked is
21 that most of that languishing, the early part of that
22 languishing, may well have been addressed by the statute of
23 limitations. What you see in reality is that the early
24 cases from the 1980s are proceeding on the same pace as the
25 cases that entered the system from 1994 and beyond. So the

1 long length of the early cases is an aberration of the part
2 of the system that this Legislature, in fact, corrected in
3 1995. But at the same time that the one-year statute of
4 limitations was adopted, there was an automatic death
5 warrant statute that was adopted. That statute required
6 Governors, or if a Governor declined to sign, required the
7 Secretary of Corrections to sign death warrants at specific
8 periods in a case.

9 The problem was that it did so at periods in the
10 case that were legally premature. Defendants have a right
11 to seek review of their case. They have a right to post-
12 conviction review. They have a right to habeas corpus.
13 But under the automatic death warrant statute, a warrant
14 would be signed within 90 days at the completion of direct
15 review. That would raise false hopes among victims of --
16 family members of victims that an execution was imminent
17 and would be about to occur. It also caused the
18 Commonwealth to initiate a dress rehearsal for executions
19 that were not going to occur. They would measure the veins
20 of the defendant to see if they would hold up to a large
21 gauge needle. They would fit the defendant for an
22 execution jumpsuit. They would contact the defendant's
23 family and send them a letter telling them to make
24 arrangements to pick up the body, even though an execution
25 was not going to occur and so we had a process caused by

1 this automatic death warrant that was going to re-
2 traumatize both the family members of homicide victims and
3 the family members of the defendant who had been sentenced
4 to death. These were dress rehearsals for executions that
5 would not occur unless the defendant waived his rights and
6 that is largely why, with the 434 death warrants that have
7 been signed, only three have been carried out, a failure
8 rate in excess of 99 percent.

9 Well, that's something that this Legislature can
10 do away with. There is a place for death warrants,
11 obviously, in a system that has the death penalty and
12 wishes to carry it out. But there is not a place for death
13 warrants during periods that are legally premature that
14 raise false hopes and that bring about the expectations of
15 an execution where it is not going to occur and that force
16 litigators, both for the Defense and for the State, to go
17 into Court to obtain stays of execution that should be
18 granted as a matter of course. That is a waste of
19 resources. It's also a waste of Department of Corrections
20 resources as they walk along the protocol. That is
21 something this Body can do something about and ought to do
22 something about and that will have no adverse impact on the
23 process at all.

24 The final matter that I wanted to very briefly
25 talk about is the question of race. In Pennsylvania,

1 better than two-thirds of the individuals who are on death
2 row are racial minorities. That in itself is not evidence
3 of discrimination because it may be the case that murderers
4 are disproportionately committed by people of color. But,
5 in fact, when you take a look at what the murder rates are,
6 the representation of minorities on death row exceeds in
7 statistically significant ways the homicide rate.

8 What we also see is when we take a look at who
9 gets sentenced to death for what types of offenses, that
10 there is a discrepancy in the rates in which death
11 sentences get imposed based upon the race of the accused
12 and the race of the victim, taking a look at data on
13 Pennsylvania death sentences race, by race of victim and
14 offender from 1977 through 2000. The data shows if you
15 adjust this to 1,000 murders, that when a crime involves a
16 black offender and a white victim, the death penalty was
17 returned in 48.6 death sentences per 1,000 murders. When
18 it was a black offender with a black victim, the death
19 penalty was returned 1 -- 17.7 death sentences per 1,000
20 murders. When it was a white offender and a white victim,
21 the death sentences were returned 22.2 death sentences per
22 1,000 murders. So white-on-white, was less than half the
23 rate for black-on-white. And when it was a white offender
24 and a black victim, the death sentence was returned 11.9
25 death sentences per 1,000 murders. What we see there is

1 the same pattern that we saw in the Baldus study in
2 Philadelphia and in many studies across the State -- across
3 the Country and that is that at all levels of severity, at
4 all levels of severity, for every combination of defendant
5 and victim, the combination that is most likely to produce
6 a death sentence is a black defendant and a white victim
7 and that which is least likely is the inverse.

8 The legal system for whatever the reason is seems
9 to more highly value the lives of white victims and less
10 highly value the lives of defendants of color. That is a
11 problem that has been intractable. That is a problem that
12 needs to be addressed. That is an issue that we have to
13 think seriously about because whether somebody is innocent
14 or somebody is guilty, in the 21st Century in this great
15 Nation, we should not be sentencing people to death based
16 upon the color of their skin and so long as we have the
17 death penalty, if we do not address that intractable
18 problem, that will be an issue that will continue to haunt
19 us. Thank you very much.

20 MAJORITY CHAIRMAN MARSICO: Thank you.

21 Representative Saccone for questions?

22 REPRESENTATIVE SACCONI: Thank you. Thank you,
23 Mr. Chairman. Starting with the deterrence thing, the
24 studies that say, you know, deterrence, there's no
25 conclusive evidence that there's any deterrence. Well,

1 there won't be any evidence if the punishment isn't
2 delivered swiftly. We do know that when punishment is
3 delivered swiftly, there is deterrence. But if you have a
4 punishment that's not delivered swiftly, as were not in
5 Pennsylvania, then, you know, you're not likely to find as
6 much significance in the amount of deterrence and --

7 MR. DUNHAM: Yes, and Representative Saccone,
8 that's certainly the case; that you would expect that there
9 would be a greater deterrent value if executions occurred
10 more frequently and if executions occurred more quickly.
11 But when you take a look at the homicide statistics in all
12 the States in the United States that have the death
13 penalty, those rates remain basically -- the patterns
14 remain basically the same whether you have the death
15 penalty or not, whether it's carried out frequently or not.

16 REPRESENTATIVE SACCONI: And I think part of
17 those variables might be the number of cases. You got to
18 look at the end number if you're going to look at this
19 statistically. But we can go into that a little later. I
20 mean I think one definition of these deterrence researchers
21 is what President Regan used to say about economists.
22 There's somebody who uses -- sees something happen in
23 practice and wonders if it can occur in theory. I mean we
24 know that deterrence works. It's just a question of why
25 isn't it working in certain cases, as I said, if it's

1 delayed or not. I know you're not satisfied with the
2 exhaustive appeal process that we have already. It takes
3 decades to get through. But the public isn't satisfied
4 that the process is swift -- is bringing swift justice and
5 it's overly slandered in the favor of criminals. So we
6 have to look at ways to make sure, obviously, that we're
7 giving justice; that we're not executing innocent people
8 but that we make it more swiftly.

9 And I just want to add that in the statistics you
10 cited about the racial disparities, they don't include, and
11 they need to include, the variable of aggravating
12 circumstances. So when you have black-on-black crime, for
13 example, if you look at, you know, the chances of there
14 being any aggravating circumstances in those might be a lot
15 lower than it is when there's a -- in the case of a black-
16 on-white crime. But if they don't include the variable,
17 you don't know. The data is flawed. You have to look at
18 the study in a more comprehensive sense.

19 MR. DUNHAM: And, Representative Saccone, one of
20 the -- I think a number of the studies actually do include
21 that. When you take a look at the Philadelphia study that
22 Professor Baldus did, there were over 300 different
23 variables that were considered. Aggravating circumstances
24 were among them and when he calculated what the increased
25 statistical likelihood was of getting death penalty, he was

1 able to, and did, calculate the presence of particular
2 aggravating circumstances. What he found was that being
3 black, by itself, ranked among the most serious of
4 aggravating circumstances as a variable that would pre-
5 dispose a sentence of death.

6 REPRESENTATIVE SACCONI: I didn't quite get that.
7 Being black is not an aggravating circumstance?

8 MR. DUNHAM: That's correct. That is correct.
9 So that when you --

10 REPRESENTATIVE SACCONI: So it doesn't apply to
11 the death sentence?

12 MR. DUNHAM: It should not and so when you do a
13 regression analysis, then the fact that somebody is black,
14 when you do the regression analysis should reduce that as a
15 variable to something that was statistically insignificant
16 and, in fact, the fact that somebody was black ranked up
17 among the most serious of aggravating circumstances as a
18 factor that was most likely -- that was more likely to
19 influence the verdict.

20 So if you had torture as an aggravating
21 circumstance, torture is something you would expect a jury
22 would treat seriously and would increase the likelihood of
23 a death sentence, being black ranked up among -- at the
24 same level of some of the most serious aggravating
25 circumstances as a reason why a person may have been

1 sentenced to death, as a risk factor, if you will, for a
2 defendant to be sentenced to death.

3 REPRESENTATIVE SACCONI: It sounds like you're
4 conflating here what statistics is, it was -- with what
5 actually happens. A jury can't consider as an aggravating
6 circumstance whether -- someone's race.

7 MR. DUNHAM: That's exactly the point.

8 REPRESENTATIVE SACCONI: You're finding that,
9 statistically, that there's some correlation but that's not
10 an aggravating circumstance.

11 MR. DUNHAM: That's exactly the point. That's
12 exactly the point. It should not statistically make a
13 difference if it was not something that the juries were, in
14 fact, considering. If it's not something that,
15 subconsciously or otherwise, influenced the juries, then it
16 would not have appeared at that level in the study as a
17 risk factor for a death sentence being imposed.

18 REPRESENTATIVE SACCONI: So you're concluding
19 that because there is a statistical correlation that juries
20 must be considering race as an aggravating circumstance and
21 I think you're making a very big leap of faith there.

22 MR. DUNHAM: Whether they're "considering it" or
23 not, it is a factor that has a huge correlation that when
24 you do the regression analysis, it shouldn't have. It
25 shouldn't have if it were not a factor.

1 REPRESENTATIVE SACCONI: And that may be but
2 you're trying to attach an explanation to that that you
3 can't do. You don't know why. You don't know why that
4 regression might lead to that. I haven't seen that
5 statistic but you don't know why. You're attaching a cause
6 to that that you don't know whether it's the cause or not.
7 You'd have -- you can surmise that but you don't know that.
8 So we'd have to look at that more closely and break that
9 out and see what is the cause of that; why is there a
10 correlation like that?

11 MR. DUNHAM: Yes. And I think, in fact, you may
12 be able to make that leap but the question really is what
13 is the mechanism by which that occurs and why does that
14 occur?

15 One of the things that was surmised and one of
16 the reasons that Professor Baldus then did the second study
17 on jury selection practices in Philadelphia was because
18 they had seen during the -- when this study came out, the
19 videotape had been released that indicated that prosecutors
20 in Philadelphia were striking African-Americans from jury
21 service in disproportionate rates and so Professor Baldus
22 did an analysis of that and after getting the race of
23 14,000 jurors whom the prosecution had the opportunity to
24 accept or strike, and I think being able to identify the
25 race of 12,000 of those, they saw that over the course of

1 three prosecutorial administrations, black jurors were
2 struck with twice the frequency of other jurors and jurors
3 from integrated neighborhoods, non-black jurors from
4 integrated neighborhoods, were struck with twice the
5 frequency of white jurors from highly segregated
6 neighborhoods and they postulated that the fact that so
7 many African-Americans were excluded from juries may have
8 been one of the factors that led to the apparently
9 disproportionate representation of African-Americans on
10 death row in Philadelphia and the analysis that there was a
11 "excess death rate" that 30 percent of the African-
12 Americans who were sentenced to death, statistically, most
13 likely would not have been sentenced to death but/for their
14 race.

15 We don't know with specificity what the
16 particular cause was in a particular case. There are a
17 number of things that give us concern. One is simply what
18 does the defendant look like? There was a study that was
19 done called Looking Death Worthy that took photographs of
20 all of the defendants who had been tried for homicide
21 cases; some sentenced to life and some sentenced to death,
22 and it was examined to see if what the defendants looked
23 like made a difference. What they found is, and they
24 looked for, stereotypically African features. If you had
25 darker skin; if you had a broader nose; if you had thicker

1 lips, that was a sign, a stereotypically African -- as a
2 stereotypically African feature. If you had lighter skin,
3 thinner nose, thinner lips, that was considered non-
4 stereotypical, more European features. And what they
5 discovered was in instances in which defendant were black
6 and the victims were black, there was no statistical
7 difference in the way in which juries treated those
8 defendants. But in cases of interracial homicide where the
9 defendant was black and the victim was white, a defendant
10 who had stereotypical African features was twice as likely
11 to be sentenced to death as a black defendant who had more
12 European-looking features.

13 Now, that's not something that shows up in a
14 transcript. That's not something that comes in in any kind
15 of evidence. But that is data that suggests that there is
16 subconscious forms of discrimination that are at work and
17 we have seen evidence across the country of various
18 instances in which being black is perceived to be evidence
19 of future dangerousness, of imminent dangerousness even.

20 In Texas, there is a case that the Supreme Court
21 has so far let stand, Buck v. Texas, in which there was
22 actually a mental health professional who testified that
23 Mr. Buck was more likely to be a danger in the future
24 because of his race and we see in other areas, such as the
25 use of guns, shooting of civilians by police officers, that

1 the rate at which police officers shoot armed white
2 civilians is equal to the rate at which they shoot unarmed
3 black civilians. That is additional evidence that really
4 gives you pause and makes you think is it the physical
5 perception of the individual that's creating the perception
6 of future danger.

7 Juries want to protect society. It is always in
8 their head what verdict I give here, is that going to make
9 a difference? Is that going to protect society? And to
10 the degree that that determination is the product of
11 conscious or unconscious biases, that's a real problem for
12 us, for the United States because, as I said earlier, this
13 is not a time and this is not a country in which a person's
14 race should be the determinate. Whether it is an objective
15 or subjective or conscious or subconscious determinate, it
16 should not be a factor in whether people live or die.

17 MAJORITY CHAIRMAN MARSICO: Okay. Thank you.
18 Representative Stephens I believe had a question.

19 REPRESENTATIVE STEPHENS: Thank you. Thank you
20 for your testimony. I want to -- and it was a little -- it
21 early in your testimony so I just want to refer back to it.
22 You were discussing the notion that, in your opinion, many
23 of the sentences that are overturned are done so for -- not
24 for a technical reason, not for a technicality, I guess,
25 and I guess your claim is that many of these folks are, in

1 fact, factually innocent. Is that accurate? I mean is
2 that an accurate portrayal?

3 MR. DUNHAM: My statement that the cases have
4 been overturned for reasons other than technicalities, I
5 think stands for the proposition that there were trials and
6 sentencing proceedings that were unfair. That's distinct
7 from the separate question of factual innocence.

8 REPRESENTATIVE STEPHENS: So what's your position
9 on factual innocence? I mean do you have an opinion as to
10 whether the people in Pennsylvania that are on death row
11 are largely factually innocent?

12 MR. DUNHAM: Are a majority of the people who are
13 convicted of murder and sentenced to death in Pennsylvania
14 actually innocent of the crimes?

15 REPRESENTATIVE STEPHENS: The people remaining on
16 death row today.

17 MR. DUNHAM: I don't think that anyone would say
18 that a majority of the people who are on death row are. I
19 think the criticism is that there is an unacceptable risk
20 that some are and that we don't know how many there are.

21 REPRESENTATIVE STEPHENS: Okay.

22 MR. DUNHAM: Now, Mr. Eisenberg made reference to
23 the innocence list that's on the Death Penalty Information
24 website. The innocence list lists six individuals who have
25 been legally exonerated from death row in Pennsylvania. He

1 is correct when he says that Jay Smith is on that list
2 because a Court barred his capital re-prosecution, barred
3 re-prosecution of any kind. Let me explain briefly how you
4 get on that list.

5 REPRESENTATIVE STEPHENS: Can I -- I don't want
6 to interrupt you but I know the Chairman is trying to move
7 things along, and I'm not necessarily focused on the list.
8 That's now where I'm going with my question. So I'm happy
9 to talk to you afterwards. I am interested to kind of hear
10 it and --

11 MR. DUNHAM: Sure.

12 REPRESENTATIVE STEPHENS: But I know the Chairman
13 does want to move it along because we're running behind.

14 MR. DUNHAM: Well, let me say very quickly that
15 the list has been criticized both as being over-inclusive
16 and under-inclusive. There are the six people who are on
17 it but people like Fred Thomas who died while the
18 Philadelphia District Attorney's Office was appealing his
19 grant of a new trial, a Judge found that there's almost
20 certainly no way that a jury would have convicted him. He
21 was -- his conviction was the product of a -- of testimony
22 by two informants who had recanted and a police officer who
23 was later convicted of violating someone else's civil
24 rights. But there are also cases like Dennis Counterman
25 where there is almost certainly no crime that occurred. He

1 went to death row because of junk science testimony about
2 arson and he pled no contest to a crime that he didn't
3 commit in order to be released.

4 REPRESENTATIVE STEPHENS: So let's assume, okay,
5 let's just assume --

6 MR. DUNHAM: Yes.

7 REPRESENTATIVE STEPHENS: -- that there may be
8 someone who deserves a new sentencing hearing or even a new
9 trial. Okay?

10 MR. DUNHAM: Yes.

11 REPRESENTATIVE STEPHENS: It's important that
12 they get before a Court for justice. I mean that was the
13 discussion as it related to the speed of our appellate
14 process. I mean you would agree with me that we need to
15 get these folks before a Judge because in these instances
16 that you're pointing to, Judge has made a decision that
17 these people should be granted a new trial or a new
18 sentencing phase.

19 MR. DUNHAM: Yes.

20 REPRESENTATIVE STEPHENS: Okay. So would you
21 then -- of course then you would disagree with the Third
22 Circuit's decision not to hear any more cases pending this
23 moratorium because that denies these folks the ability to
24 get before a Judge to be heard on their issues, right?

25 MR. DUNAHM: I would think that there are

1 numerous -- in fact, because I still have an
2 attorney/client relationship, although I am no longer
3 representing people, but the attorney/client relationship
4 continues past the time which you're in the office, but
5 there were instances in which clients that I was
6 representing received an inquiry from the Court as to
7 whether the -- their appeal should be delayed pending
8 resolution of the moratorium or not and my argument was
9 that the case should proceed because in each -- in those
10 instances, you know, when you are on death row in
11 Pennsylvania, you're in solitary confinement. You're
12 talking about a 23-hour per day solitary confinement. I
13 had a former client whose death sentence was overturned in
14 I believe it was 2003. He has not yet been re-sentenced
15 and he's been in solitary confinement that entire time
16 without a valid death sentence. So you want your clients
17 to not be subject to those kinds of conditions.

18 REPRESENTATIVE STEPHENS: And so the Governor's
19 moratorium that led now to this Third Circuit Decision,
20 equally and to your point, would deny justice for those
21 that need to get before a Court so that they can have their
22 claims addressed for ineffective assistance of Counsel or
23 whatever the -- well, it wouldn't be ineffective.

24 MR. DUNHAM: No, I'm not aware --

25 REPRESENTATIVE STEPHENS: But whatever Federal

1 claim they have.

2 MR. DUNHAM: I'm not aware that there's a Third
3 Circuit Decision that is preventing all cases from moving
4 forward. There are cases that are pending before the
5 Circuit that are capital cases that are continuing in the
6 briefing and that are continuing to oral argument.

7 REPRESENTATIVE STEPHENS: Okay. So your point is
8 it's not a blanket suspension?

9 MR. DUNHAM: Right.

10 REPRESENTATIVE STEPHENS: It's just -- and I see
11 DDA Eisenberg in the back shaking his head no. It is a
12 blanket. Am I -- is it a blanket suspension or just
13 individually?

14 MR. EISENBERG: It's general. The Court issued
15 an Order saying in light of the Governor's moratorium,
16 these cases will be placed in civil suspense. They haven't
17 issued that in every case yet but every case that has
18 apparently been --

19 REPRESENTATIVE STEPHENS: Right.

20 MR. EISENBERG: -- ripe for action that has
21 happened.

22 REPRESENTATIVE STEPHENS: But I guess my point
23 that I want to make here is, to your credit, you know,
24 defendants deserve a right to be heard before a Court.
25 They deserve a right to get before a Judge and have their

1 claims addressed and, frankly, so do victims, victims'
2 families. You know, they enjoy that same right and so it
3 serves I think everybody purposes, for you to get together
4 with the DA's Office and do what you can to try to move the
5 Court off of that position that we're just going to stop
6 hearing these cases. Obviously, it's nothing we can do
7 legislatively, but it seems to me right now everyone is
8 being denied justice, the folks that you represent who you
9 say are wrongfully on death row, and the victims' families
10 who want closure to the case. So --

11 MR. DUNHAM: I -- just to clarify. I do not
12 represent anybody at this point.

13 REPRESENTATIVE STEPHENS: Okay.

14 MR. DUNHAM: The Death Penalty Information Center
15 does not do litigation. We're not involved in this.

16 REPRESENTATIVE STEPHENS: How about we do this?
17 The folks you advocate for? How's that?

18 MR. DUNHAM: Well --

19 REPRESENTATIVE STEPHENS: You're here advocating
20 on behalf of folks on death row, right?

21 MR. DUNHAM: Here, I'm advocating for positions
22 on fairness in the death penalty.

23 REPRESENTATIVE STEPHENS: Fair enough.

24 MR. DUNHAM: And one of the important things with
25 the process is that you need to make sure that the process

1 that is available is one in which defendants have access to
2 the important evidence. One of the things that we see and
3 one of the lessons that we learn from the innocence cases
4 across the nation is that very frequently evidence of
5 innocence is not available until close to the end of the
6 process and that's because in instances in which prison
7 informants lie, in instances in which other witnesses have
8 given false testimony, in instances of wide ranges of
9 misconduct, that misconduct has been successfully hidden.
10 A number of the defendants who were exonerated from death
11 row over the last year had been on death row for 30 years.

12 REPRESENTATIVE STEPHENS: In Pennsylvania?

13 MR. DUNHAM: No, across the country.

14 REPRESENTATIVE STEPHENS: Okay.

15 MR. DUNHAM: And -- but I don't think that you
16 can say that the experience in other States is irrelevant
17 to what happens here.

18 You know, in the Terry Williams case, while there
19 is clearly not an issue there as to whether he committed
20 the homicide, there are serious issues about whether the
21 death penalty was an appropriate punishment in that case
22 and one of the issues in that case was what did the
23 Philadelphia District Attorney's Office know about the
24 activities of the victim?

25 REPRESENTATIVE STEPHENS: Were these issues

1 raised before either the Pennsylvania Supreme Court, any of
2 the Federal Courts, including the U.S. Supreme Court, that
3 reviewed the case? Were these claims presented?

4 MR. DUNHAM: Some portion of the claims were
5 presented.

6 REPRESENTATIVE STEPHENS: All right. And they
7 obviously rendered a Decision.

8 MR. DUNHAM: They rendered a Decision without
9 having key evidence and the key evidence was not that there
10 was an allegation that the perpetrator -- that the victim
11 of the crime had been a sexual predator against young boys,
12 including Mr. Williams, the key evidence was that the
13 Commonwealth itself was aware of that and suppressed that
14 fact and after suppressing that fact, made an argument to
15 the jury based upon the evidence not being before them,
16 portraying the victim as a good Samaritan, as opposed to
17 someone who had a prior abusive relationship with the
18 defendant.

19 REPRESENTATIVE STEPHENS: Sure. So look, we're
20 not going to be able to re-litigate the Terrence Williams
21 case here --

22 MR. DUNHAM: Sure.

23 REPRESENTATIVE STEPHENS: -- but we can agree
24 that a number of different Courts, both State and Federal,
25 have reviewed the case and in all instances have found that

1 everything was done properly procedurally and substantively
2 and that --

3 MR. DUNHAM: No, that --

4 REPRESENTATIVE STEPHENS: -- the death penalty is
5 ready to go.

6 MR. DUNHAM: That is not correct.

7 REPRESENTATIVE STEPHENS: Okay.

8 MR. DUNHAM: A number of Courts had reviewed the
9 case --

10 REPRESENTATIVE STEPHENS: Um-hum.

11 MR. DUNHAM: -- without the critical facts. They
12 did, in fact, affirm the conviction of the death sentence.
13 The Philadelphia Court of Common Pleas granted discovery of
14 the prosecutor's file and the homicide file and found
15 evidence there that the Court said was material; said it
16 wouldn't have made a difference with respect to guilt of
17 first degree, although in a prior case, the same prosecutor
18 was aware that Mr. Williams had been sexually victimized by
19 that person that he had killed and the jury had refused to
20 return a first degree murder verdict. But the Court,
21 nonetheless, said that in this instance, she did not
22 believe that that would affect the guilt verdict. She did
23 say that she thought that it would affect the penalty
24 verdict and it could make a very, very important
25 distinction in the minds of the jury about whether Terrence

1 Williams should be sentenced to death or not.

2 REPRESENTATIVE STEPHENS: Was that reviewed by an
3 Appellate Court?

4 MR. DUNHAM: The Pennsylvania Supreme Court
5 reversed that.

6 REPRESENTATIVE STEPHENS: Okay.

7 MR. DUNHAM: Okay? So it's inaccurate to say
8 that no Court had seen it and --

9 REPRESENTATIVE STEPHENS: Okay.

10 MR. DUNHAM: -- deemed it to be unimportant.

11 REPRESENTATIVE STEPHENS: All right. As we sit
12 here today, at the highest levels of review by the
13 Appellate Courts, nobody has found any reason to delay
14 Terrence Williams' execution any further, is that right?

15 MR. DUNHAM: The death sentence has been affirmed
16 by the State Courts at all stages. I believe that there is
17 still proceedings to reopen the Federal issue based on the
18 fact that the information about the -- what the District
19 Attorney's Office knew was not before the Federal Court.

20 REPRESENTATIVE STEPHENS: All right. I'm going
21 to try to really make this quick, Mr. Chairman, this last
22 question, sort of series of questions I have. It relates
23 to race --

24 MR. DUNHAM: Yes.

25 REPRESENTATIVE STEPHENS: -- and the issue,

1 because that's very troubling to me. The data that you
2 cited, you said 1977 to 2000. Is there more recent data,
3 Pennsylvania-specific, available on this subject, do you
4 know?

5 MR. DUNHAM: I don't know. There should be, and
6 I will get it and forward it to you.

7 REPRESENTATIVE STEPHENS: Well, I'm a member of
8 the Sentencing Commission, and I've asked our folks to just
9 send an email over saying do we have data, because I'd like
10 to see that. But you ran through some statistics, and in
11 particular I want to ask a question about those statistics.
12 Am I correct that in terms of murders, most African
13 American murderers murder African-Americans, and white
14 murderers murder whites? Is that accurate?

15 MR. DUNHAM: I believe that's correct.

16 REPRESENTATIVE STEPHENS: Do you have any idea of
17 the percentage of folks that don't fit in that category?

18 MR. DUNHAM: I don't.

19 REPRESENTATIVE STEPHENS: Okay. So -- but we
20 can agree that the vast majority of murder cases happen in
21 that fashion?

22 MR. DUNHAM: Most races -- most murders are not
23 interracial murders ---

24 REPRESENTATIVE STEPHENS: Okay. So ---

25 MR. DUNHAM: -- whether they're committed by

1 whites or whether they're committed by African Americans.

2 REPRESENTATIVE STEPHENS: So do you have a
3 comparison of -- I know you were rattling off statistics
4 but I didn't hear the numbers of black-on-black defendants,
5 African-American-on-African-American defendants who are
6 sentenced to death versus white defendants and white
7 victims sentenced to death. Are you following me there?

8 MR. DUNHAM: Yes.

9 REPRESENTATIVE STEPHENS: I heard all the cross,
10 and maybe I missed it. I'm sorry if I did. But -- so do
11 you know those numbers?

12 MR. DUNHAM: I do not.

13 REPRESENTATIVE STEPHENS: Okay.

14 MR. DUNHAM: I do not have that data.

15 REPRESENTATIVE STEPHENS: It seems to me that
16 that is a pretty critical component for -- because that
17 would be -- those would be the numbers that apply to the
18 majority of the cases since that's what we've agreed on.

19 MR. DUNHAM: I think the relevant number for
20 comparison -- it's not the raw number that there are ten of
21 this ---

22 REPRESENTATIVE STEPHENS: No, percentages I'm
23 talking about.

24 MR. DUNHAM: Yes, that -- well, it's not
25 necessarily the percent who are on death row, although that

1 is instructive. It is the percent of individuals who
2 commit interracial murders who are on death row versus the
3 percent who commit interracial murders. You know, that's
4 the more --

5 REPRESENTATIVE STEPHENS: Intra or interracial?

6 MR. DUNHAM: Inter. What you want to see is do
7 people who are on death row reflect the category of murder
8 proportionately or disproportionately. If people who
9 commit interracial murders are disproportionately
10 represented among death row, that would be more significant
11 than if you just say that a certain percentage of people
12 who are on death row fall within that category.

13 REPRESENTATIVE STEPHENS: Okay. So I think you
14 and I are probably going to have to discuss this because
15 I've gone round and round with our statisticians over at
16 the Sentencing Commission trying to get my head around some
17 of the data that's presented, but it just seems to me, and
18 we can discuss this offline, but it seems to me that if you
19 want to make an assertion that race is a factor in a jury's
20 decision to impose the death sentence, that you need to
21 keep the other factors the same so, you know, you need to
22 control for all the other factors --

23 MR. DUNHAM: That's right.

24 REPRESENTATIVE STEPHENS: -- and keep them
25 constant.

1 MR. DUNHAM: That's right.

2 REPRESENTATIVE STEPHENS: So that's why I feel
3 like you need to compare the African-American-on-African-
4 American murders and the white-on-white murders so you're
5 comparing apples to apples and not involving other factors.

6 And I guess the other point that I -- the other
7 concern I have just relative to this is, I mean, you
8 mentioned the jury selection process - -

9 MR. DUNHAM: Yes.

10 REPRESENTATIVE STEPHENS: -- as being somehow
11 possibly tainted as it relates to a racial bias and I guess
12 the issue I have with making that contention is that that
13 whole process occurs under the purview of a Judge, and it's
14 very clear. I mean, Batson and its progeny are very clear
15 that race cannot be a -- you know, the factor for striking
16 a juror, and so a Judge, in many cases an African-American
17 Judge, is presiding over these proceedings and I guess I
18 just wonder, you know, if the data that you're talking
19 about is specific to Pennsylvania if there are specific
20 Judges, specific instances, specific locations, something
21 like that, I think that would be interesting to look at.
22 But I think to castigate the entire jury selection process
23 when we have some pretty serious protections in place, you
24 know, is really painting with too broad a brush. So maybe
25 we can follow up with that offline too.

1 MR. DUNHAM: Well, but also, and I think it's
2 important to respond ---

3 REPRESENTATIVE STEPHENS: Sure.

4 MR. DUNHAM: --- to this degree and so the public
5 can hear. The issue with jury selection is not just the
6 exercise of peremptory strikes to disproportionately
7 exclude people of color, and the statistics -- but the
8 statistics in Philadelphia are almost identical to the
9 statistics across North Carolina, the rate at which
10 African-Americans were struck as compared to the rate at
11 which white jurors were struck. It's almost identical to
12 what we saw in North Carolina that the Courts there found
13 to be a violation of their Racial Justice Act and the data
14 is very similar to what the Dallas Morning News found when
15 they did a study of jury selection practices in Texas. But
16 the difficulty with capital cases, and the question of
17 fairness of the juries goes beyond simply the question of
18 peremptory challenges. In capital cases, there's a process
19 called life qualification and death qualification.

20 REPRESENTATIVE STEPHENS: Sure.

21 MR. DUNHAM: And as a result of that, individuals
22 who say that they would not impose the death penalty or
23 have substantial impairments in their ability to impose the
24 death penalty --

25 REPRESENTATIVE STEPHENS: Regardless if the law

1 dictated that?

2 MR. DUNHAM: --- are excluded. And jurors who
3 say that they would always impose the death penalty are
4 also excluded. What we see from that is that many more
5 jurors are excluded for saying they have views against the
6 death penalty, and in addition, because jurors of color are
7 more likely to say that they have opposition to the death
8 penalty in general, the first process, excluding jurors for
9 cause, substantially reduces the percentage of African-
10 Americans in the general venire. You then --

11 REPRESENTATIVE STEPHENS: But not because they're
12 African-American. I mean, I think that's at the heart of
13 what Representative Saccone was pointing to earlier. There
14 can be -- you can point to data which may, and I always get
15 these terms incorrect, but you can point to data and not
16 necessarily come to the conclusion that one causes the
17 other. The cause and effect isn't always clear because
18 there is a correlation in data.

19 MR. DUNHAM: There may be racially neutral
20 reasons for what happens, but what happens has effects that
21 are not racially neutral. So you end up skewing the racial
22 composition and the representation and whether the jury
23 reflects the community. The death qualification process
24 skews that. It eliminates a disproportionate number of
25 jurors of color and then you go on top of that to a system

1 of peremptory challenges that is also disproportionately
2 used to strike jurors of color. The net product is that in
3 capital cases, the jury that ends up there is not one, as
4 Justice Stevens just recently said in the context of what
5 happened in Boston, the jury that survives that process is
6 not one that reflects the views of the community and we
7 also know that the mere process of life qualification and
8 death qualification has effects on the jury.

9 The -- I believe it was Capital Jury Project.
10 I'm not -- I don't remember off the top of my head which
11 study it was that took a look at what the implications were
12 of the death qualification process. What they found was
13 that merely being exposed to those questions, which no one
14 says you shouldn't ask because you do want to make sure the
15 jurors are able to impose the law, to apply the law, but
16 the exposure just to the question about if you find this
17 person guilty, we're going to be considering life or death,
18 that affected jurors and the jurors who were eventually
19 impaneled, the study indicated that ten percent of them had
20 already made up their mind based solely upon exposure to
21 that process that they should convict and that death was
22 the appropriate punishment.

23 REPRESENTATIVE STEPHENS: And that's fair, and
24 I'll close on this, Mr. Chairman. I guess the one point
25 that I don't want to be left behind is that any one juror,

1 just one, in the guilt phase or the sentencing phase could
2 stop the guilty verdict or the imposition of the death
3 penalty, any one. So ten percent doesn't -- I mean, ten
4 percent, that's great. You got 90 percent of the jury.
5 You only need one, you need one person to hold things up,
6 and, you know, that's where I think some of these
7 statistics -- we can get bogged down in statistics but I
8 think it's important we remember that any one individual
9 can put a halt to it. Thank you.

10 MR. DUNHAM: You need to be tried by a fair jury,
11 and if ten percent of the jury is pre-disposed, that
12 undermines confidence in the outcome.

13 MAJORITY CHAIRMAN MARSICO: Representative Regan?

14 REPRESENTATIVE REGAN: Thank you, Mr. Chairman.
15 I cut this way down in Your Honor, Your Honor, but, sir,
16 thank you for being here, and just a quick question. Mr.
17 Eisenberg made a I thought a very interesting point that I
18 know to be true from my past experience in Federal law
19 enforcement is that someone doing life with parole -- or
20 life without parole or someone who may be on death row
21 currently commit murders in prison. So if you're doing
22 life without parole, what's your motivation not to commit a
23 murder if there's no penalty for committing murder other
24 than you just continue your sentence? What do you propose
25 you do with people who commit murders in prison who can't

1 be sentenced any further down the road?

2 MR. DUNHAM: Well, I think that one can learn
3 from what jurisdictions do. In most States; Pennsylvania
4 doesn't do this and Virginia, for example, doesn't do this,
5 when you're sentenced to death, you get an automatic
6 solitary confinement in what's called administrative
7 custody. But for someone who is not sentenced to death,
8 the prison does an individualized assessment of what their
9 future dangerousness is likely to be, what their adjustment
10 within the facility is likely to be, and there are levels
11 of segregation that the individual can be placed in and
12 after they make a judgment as to where that individual
13 should be placed, they go there. Individuals who get
14 sentenced to life are not automatically placed in solitary
15 confinement, and so the administrative custody, the
16 administrative segregation is something that is an option
17 that prisons can go to. Now, I'm not an expert in prison
18 conditions but that is one -- you know, and I don't purport
19 to have the answers to, you know, to prison condition
20 questions, but that is certainly something that is
21 available and options available to States.

22 REPRESENTATIVE REGAN: So in your statistics, do
23 you have any data on how often that happens, that someone
24 doing life without parole assaults or commits a homicide
25 within the State institutions?

1 MR. DUNHAM: I don't know that the Bureau of
2 Justice statistics keeps that. I have asked them for
3 additional information but I have not received that, and my
4 understanding is that they do not have it at that level of
5 specificity.

6 REPRESENTATIVE REGAN: Okay. So would you agree,
7 though, that that situation when there's not a -- there's
8 no further penalty anyone can receive, would you agree that
9 that puts prison guards and other inmates in peril?

10 MR. DUNHAM: I don't think that there is
11 empirical evidence that supports that. I know that members
12 of the law enforcement community and some prison personnel
13 believe that to be the case, but that does not seem to be a
14 belief that is borne out by available statistics.

15 REPRESENTATIVE REGAN: Okay. Well, you know, I'm
16 at a loss because I don't know what the State statistics
17 are but I do know in the Federal system that homicides are
18 committed continually in Federal prisons, and they do have
19 the death penalty for that and those trials, I presided
20 over one, so it happens fairly regularly. So I would
21 assume, I know there's a different level of sophistication
22 within the State penitentiaries than there is the Federal
23 penitentiaries with inmates --

24 MR. DUNHAM: Yeah.

25 REPRESENTATIVE REGAN: -- but I would be willing

1 to bet that it happens more often than not.

2 MR. DUNHAM: And I know that in the instance of
3 David Hammer, for example, who was a -- who is a Federal
4 inmate and who was capitally tried and initially sentenced
5 to death for a murder, not of a prison guard but of another
6 inmate while in Federal custody.

7 REPRESENTATIVE REGAN: There's Michael O'Driscoll
8 too. You know that case?

9 MR. DUNHAM: Well, Mr. Hammer was just re-
10 sentenced to life and the explanation that was given during
11 his penalty phase, the Court was provided information about
12 the varying different levels of confinement that were
13 available to keep guards safe and to keep other inmates
14 safe and so I know the Federal system has a series of
15 stricter levels of confinement.

16 REPRESENTATIVE REGAN: And they also have several
17 institutions which allow for solitary confinement 23 hours
18 a day, so I think it's a little bit different, but thank
19 you very much for your testimony.

20 MAJORITY CHAIRMAN MARSICO: Thank you.
21 Representative Barbin for questions.

22 REPRESENTATIVE BARBIN: Thank you, and thank you
23 for your testimony today. I'm not convinced that your
24 statistics show what you say they show, and I particularly
25 view Clemens' approach to statistics as applicable to some

1 of your conclusions today but the thing that I did like in
2 your testimony was you have raised a valid question that if
3 we do go forward and assume that the public, 80 percent of
4 the public is in favor of the death penalty in certain
5 limited circumstances, what model should we use to ensure
6 that the defense is as capable as the prosecution so that
7 we can slow down or speed up this slow-down process? What
8 States should we be looking at as a model for ensuring that
9 if we're going to have death penalty cases at least someone
10 is certified, handled these type of cases before, so we can
11 eliminate all of the years of appeals that we currently
12 have in our system?

13 MR. DUNHAM: I think the New York model is
14 probably recognized as the one that was the most thorough
15 and provided the greatest procedural safeguards and that
16 other approaches are what the -- what has been done in the
17 State of Texas in which rather than have a single State
18 institutional Defender, there is a system that individual
19 counties can opt into of Regional Capital Defenders and
20 each county pays a particular amount a year; sometimes it's
21 been described as a kind of insurance policy against the
22 cost of capital representations, and they pay in and that
23 funds individual regional offices.

24 I think Mr. Bookman is here and he may speak to
25 that more because he, in fact, was a trial lawyer who

1 handled some of these cases and has more information about
2 that than I do but, at a minimum, I think you're looking at
3 an independent statewide system where you have an
4 institutional Defender that has institutional resources and
5 institutional skills and one that has the opportunity to
6 get into the case from the very beginning and to fully
7 investigate the cases. What we've seen in a number of the
8 cases with institutional Defenders who have that kind of
9 expertise is a lot of negotiation with prosecutors before
10 the cases go to trial and those negotiations often
11 alleviate the need to go to trial and we have seen much
12 higher levels -- higher quality of representation as the
13 Philadelphia statistics show.

14 REPRESENTATIVE BARBIN: Thank you, Mr. Chairman,
15 and thank you for your testimony.

16 MR. DUNHAM: Thank you.

17 MAJORITY CHAIRMAN MARSICO: Representative Klunk.

18 REPRESENTATIVE KLUNK: Thank you, Mr. Chairman.
19 Thank you, Mr. Dunham, for joining us today. My question
20 goes to a statement that you make on page 3 of your
21 testimony. You state, "Initially, Pennsylvania's death
22 penalty statute and ten -- had ten aggravating
23 circumstances that has expanded over time to 18, an
24 expansion that calls into question whether the statute
25 meaningfully identifies the worst of the worst murderers

1 and the worst of the worst killers." My question back to
2 you, is this a rhetorical question? You -- in your
3 testimony, you really don't provide any suggestions to us,
4 the Legislature, on how to potentially change that. I'm
5 going down through those 18, and I see, you know, children,
6 pregnant women, law enforcement officers as a list of those
7 victims. One that might have been included in the
8 expansion is the death of the victim, if the death of the
9 victim occurred while the defendant was engaged in a
10 hijacking of an aircraft, which I'm assuming is in response
11 to the hijackings on September 11th or maybe even
12 previously. What are your recommendations? I'm going
13 through and reading these, and these were passed by the
14 House and the Senate here in the General Assembly, signed
15 by our Governor, and those do seem to be the worst of the
16 worst murderers and killers here in Pennsylvania that would
17 fall under those categories. What recommendations would
18 you have, or is that just a rhetorical question?

19 MR. DUNHAM: No, I think -- you know, and it was
20 interesting, when David - when Professor David Baldus was
21 alive, he once said to me that the larger the number of
22 aggravating circumstances, the more arbitrary the outcomes
23 tend to be because you don't differentiate -- it becomes
24 more difficult to differentiate between who gets the death
25 penalty and who shouldn't get the death penalty. His

1 recommendation would be to select among types of murders
2 and narrow that down. There are some of the -- some of the
3 aggravating circumstances would, on their face, appear to
4 provide a meaningful basis to distinguish between whether
5 someone should get death and whether they shouldn't but, as
6 applied, are problematic. So, for example, one of the
7 aggravating circumstances that we have is that the
8 defendant has a significant history of felony convictions
9 involving the use or threat of violence and clearly the
10 purpose behind that is to say that someone who commits a
11 murder is closer to the worst of the worst if they have,
12 prior to committing that murder, a history of violence.
13 But the way that aggravating circumstance has been
14 interpreted in Pennsylvania, it is possible and it has
15 happened that individuals have been found to have a
16 significant history of violent felony convictions based
17 solely on burglaries and trespasses that were completely
18 non-violent, and, in fact, involved no person being present
19 in the house at all. So that -- things like that make it
20 so that the jury is led to believe that the individual's
21 history of violence is much different from what it actually
22 is, and that is not a principal basis to say this person
23 deserves to be subject to the death penalty versus somebody
24 who, for example, had committed a prior murder or had been
25 involved in some other acts that actually were violent.

1 So I think one of the things that the Legislature
2 certainly could do is to ensure that on an aggravating
3 circumstance like a prior history of violent felonies that
4 the crimes, in fact, are crimes that involve violence so
5 that the jurors are not misled. There are other instances
6 such as the grave risk aggravating circumstance which on
7 its face is something that -- you know, look at Boston.
8 Right? That's a case of grave risk and there are numerous
9 instances in which you can see clear grave risk, but the
10 manner in which it has been sought and the manner in which
11 it has been applied and the manner in which it's been
12 interpreted by the Pennsylvania Supreme Court has been so
13 expansive that it can justify seeking death in virtually
14 any offense, for example, that occurs in public. That's
15 not a meaningful distinction in the -- for whether somebody
16 should live or whether somebody should die.

17 Now, I can't substitute my judgment for yours as
18 to what the most serious types of murders are. That is a
19 legislative judgment and that's one that's different in
20 every State. But the fact is that in the 1980s, Bradley
21 Bridge from the Philadelphia Public Defenders Office went
22 over to the Court files and looked at all the homicides
23 that had taken place in Philadelphia and which ones had
24 facts that would have supported potentially being included
25 as a death penalty case and he concluded that upwards of 80

1 percent of the first-degree murders would have qualified,
2 and that's before the aggravating circumstances were
3 expanded. The problem with that is, a statute that is that
4 broad swallows up the narrowness requirement because each
5 individual aggravating circumstance may in itself narrowly
6 circumscribe seeking death, but when you have it 18
7 different times for 18 different things, the grand total
8 makes it so that it really doesn't principally distinguish.

9 REPRESENTATIVE KLUNK: Thank you. I guess we're
10 just going to disagree on this one, but I have looked
11 through the 18, and the will of the House and the will of
12 the Senate and the will of the Governor here in
13 Pennsylvania clearly show that this is the will of the
14 people in Pennsylvania and in addition to the aggravating
15 circumstances, you also have to look at the mitigating
16 circumstances, and it all comes back to the jury. One
17 person can have a question with this and it all goes away
18 and we don't have a death penalty case. So I guess we're
19 just going to disagree on this, but I do think the will of
20 the House and the Senate has spoken on this issue and I do
21 believe the 18 aggravating circumstances are complete. So
22 we're just going to disagree on this, and I thank the
23 Chairman for the time.

24 MR. DUNHAM: And I would certainly -- you know,
25 that's, of course, the Legislature's prerogative. I would

1 simply say that it increases the risk that the results will
2 be arbitrary.

3 CHAIRMAN PETRARCA: Thank you, Representative
4 Klunk. A few quick questions. One, the Information Center
5 that you represent here today, how are you funded? Where
6 does that funding come from?

7 MR. DUNHAM: We are a nonprofit foundation. We
8 receive private funding.

9 CHAIRMAN PETRARCA: Okay.

10 MR. DUNHAM: We receive private funding.

11 CHAIRMAN PETRARCA: Thank you. You said that
12 Pennsylvania was I believe the only State that does not
13 provide any State money for indigent defense.

14 MR. DUNHAM: In capital cases. That's correct.

15 CHAIRMAN PETRARCA: Capital cases.

16 MR. DUNHAM: At any stage of the proceedings.
17 There are other States that provide it at some stages and
18 not others.

19 CHAIRMAN PETRARCA: Okay. I just -- I have, I
20 guess, a general question about that. I think it would be
21 difficult to have this Legislature provide funding when the
22 system is as it is today and we're looking at decades
23 before these things can be resolved. But how does this
24 work in other States, if you know that?

25 MR. DUNHAM: There are some States that have

1 State indigent defense systems and so there is essentially
2 the State equivalent of a public defender, and it's State-
3 funded and they have different offices in different parts
4 of the State and it's a centrally funded and centrally
5 organized system of criminal defense.

6 CHAIRMAN PETRARCA: Great. Thank you and thank
7 you for your testimony. I appreciate your time and
8 testimony today.

9 MR. DUNHAM: You're welcome.

10 CHAIRMAN PETRARCA: Our next panel is Pamela
11 Grosh, Director of Victim and Witness Services in Lancaster
12 County, and Jennifer Storm, the Victim Advocate from the
13 Office of the Victim Advocate.

14 Ladies, you can decide who wants to go first and
15 maybe we're just a little behind, so I appreciate your
16 patience.

17 MS. GROSH: Good morning. I'm Pamela Grosh. I'm
18 the Program Director of the Lancaster County Victim/Witness
19 Services in the District Attorney's Office and
20 Representative Stedman who spoke earlier is my boss.

21 I'm also speaking today as a representative of
22 the Crime Victims Alliance, which is a group of victims,
23 survivors, and other Human Service resources around the
24 State and I've included in my testimony some of their
25 recommendations to the Legislature about some of the issues

1 surrounding the death penalty and so I'll just leave those
2 for your reference as well.

3 I've been a victim advocate for 26 years and
4 during that time, all of the cases for which individuals
5 are currently awaiting sentencing on execution cases from
6 Lancaster County were tried during that time. None of the
7 cases are actually approaching resolution. Three of them
8 are still in the post-conviction process and three are in
9 the beginning states of their Federal appeals, and I just
10 included a little chart there so you can see how long some
11 of these cases have persisted in the appeal process. Three
12 individuals were also removed from death row during that
13 period and each was removed for procedural defects in the
14 case and in two of the cases, the families did face that
15 agonizing decision that was referenced earlier by the
16 Representative of what to do in the face of that, and I'm
17 going to just amplify a little bit the case that DA Stedman
18 mentioned earlier. In that case, and this was the case
19 involving the Protection From Abuse Order. In that case,
20 the victim's mother steadfastly wished that the defendant
21 would accept a plea to life rather than to go to trial
22 because she did not want to hear the details of her
23 daughter's murder and she knew that she would be confronted
24 with it at trial and we literally begged him to take that
25 offer and he refused. We went to trial and the jury gave

1 him a death sentence. As DA Stedman said, it was
2 overturned because of the manner of service. So then we
3 were faced now with this decision of to go forward on a
4 sentencing hearing alone because the guilt was not
5 challenged by the Court. So to go through a sentencing
6 hearing alone, we would, though have to focus on the most
7 heinous parts of that case and she made that decision
8 partly because she felt that it was highly probable that
9 without the trial, that the jury would find that he should
10 have a life sentence and she felt that it was the last
11 possible remnant of power that she could take in this case
12 was to agree to give him a life sentence and to take that
13 power from him of sort of acquiring a life sentence from a
14 jury. What a convoluted, difficult decision for someone to
15 face, but that's a decision that she made.

16 But homicide victims are all different. I talked
17 about sort of the individual characteristics of some of the
18 folks here. You know, Janice was a strikingly beautiful
19 young mother. Angelina was also a mother who had just
20 moved with her baby to Lancaster County. Daryl was a shy
21 and simple man who loved to help others. Terry was an
22 inventor, an entrepreneur, and his wife, Lucy, was an
23 elementary school principal. Ray was a very successful
24 businessman, also an inventor, who used his knowledge of
25 water treatment systems to benefit many people around the

1 world. And Cornell was just a young fellow who was just
2 starting -- on the night of his death, he had -- was
3 performing as a rap performer in a contest and had won the
4 right to do so. So all their lives and all of their deaths
5 are very, very different and all their families are
6 different. Janice's large, extended family, four
7 generations now including her children, who were three and
8 four at the time of her death, and who discovered their
9 mother's body, they are grown up now with children of their
10 own and they attend every single hearing that we hold.
11 Daryl's family is small, just his mother, his brother, his
12 sister-in-law. So, you know, they -- it's not as though
13 there's a certain commonality. Angelina's family is
14 raising the son that she left behind and they struggle with
15 the words to try to explain what has happened in this case.
16 He doesn't remember his mother or his mother's death. So
17 what can we say about her life to this child? They have
18 varying education and income levels. They are mostly
19 multi-racial families. Our county is quite diverse. And
20 they come to us, the criminal justice system. They're
21 trying to understand the complex questions of law and
22 justice while grappling with the deeper issues of grief and
23 loss that is sudden, violent and intentional. Some have
24 never given any thought to the death penalty. Some have a
25 general belief that it's the right outcome. Some have no

1 position whatsoever. They prefer to focus on their loss
2 and allow the law to punish the perpetrator. Some believe
3 that it's the only appropriate outcome given the
4 heinousness of the circumstances of the crime, and some are
5 opposed for legal, moral or philosophical reasons, and some
6 believe that it would be inconsistent with the life or the
7 belief of the victims. So there's nothing I could ever say
8 to generalize the opinions, feelings and experiences of
9 families faced with this outcome. So why am I here? What
10 is it I can say?

11 Well, we can say loudly and clearly and as often
12 as possible in whatever forum that victims in this aspect,
13 as in all aspects of the criminal justice system, that they
14 need to be informed, they need to be heard, and they need
15 to be present. They should not learn via the media that
16 despite a trial, a separate sentencing hearing, multiple
17 appeals and examination of the case by legions of lawyers,
18 law clerks, and Judges, that it is all moot because nothing
19 whatsoever is going to happen. Even if every detail
20 regarding the facts, the law, the process, every bit of it
21 is upheld, the sentence is stayed. They have waited for
22 years, for decades, for the sentence of the Court but it
23 will not come. Now there's nothing further to do but wait.

24 We can say that victims should also have finality
25 of sentence. Their belief in the integrity of the system

1 should not be compromised by years and years of waiting in
2 a suspended state to hear the outcome to interminable
3 appeals.

4 It may seem that the moratorium makes no
5 difference. After all, one of the first and most certain
6 things I say to families is that no one has been executed
7 in Pennsylvania for 40 years unless they voluntarily
8 abandoned their appeals. Even if the defendant chooses to
9 follow that course, it does not mean that he will not
10 change his mind and simply add another hill or two to the
11 roller-coaster ride through the appeals process, which is
12 exactly what happened in the first case referenced in our
13 chart. We took a three to four-year detour through the
14 appeals process while the defendant engaged in an exercise
15 of deciding whether or not he wished to be executed.

16 I tell families that it's a quality-of-life
17 issue; that the punishment of life on death row is
18 significantly different than the punishment of natural life
19 served in general population. But this is not the sentence
20 that was given by the Court for the death of their loved
21 one. The defendant was not sentenced to spend 23 hours a
22 day in lockdown. The defendant was sentenced to death.

23 Closure is a myth. Families do not experience
24 closure because a sentence is determined or because it's
25 fulfilled. Their loved ones are not resurrected because

1 another person has been held responsible and accountable
2 for their death. However, that does not diminish the
3 meaningfulness of having some predictability about the
4 process. Victims need to be informed, they need to be
5 present, and they need to be heard. They need to believe
6 that the offender has been held accountable for his or her
7 actions. They need to have an assurance that this will not
8 happen to another person at the hands of this offender and
9 those needs translate into different desired outcomes.

10 The fact that victims do not speak with one voice
11 regarding the appropriate punishment does not give us the
12 right to ignore or disregard them. We still have the
13 responsibility to honor them and the lives that have been
14 taken by support for their healing, by inclusion at every
15 turn, and by consideration of their needs for justice.

16 Thank you.

17 CHAIRMAN PETRARCA: Thank you. Ms. Storm.

18 MS. STORM: Yes. My name is Jennifer Storm. I'm
19 the Victim Advocate of the Commonwealth. I want to thank
20 both the Chairmans for allowing me to be here today to
21 present testimony.

22 The Office of the Victim Advocate represents the
23 interests of all crime victims in the Commonwealth. We
24 support them, we inform them, we let them know of major
25 events coming up in their case. We empower them with

1 information. Most importantly, though, we make every
2 feasible attempt we can to ensure that no additional harm
3 comes to them from justice system.

4 At the Office of Victim Advocate, we understand
5 and respect that all crime victims have different opinions,
6 even in the same cases, as you heard today. It is our duty
7 and job to represent, respect and reflect them all. The
8 OVA does not have a formal stance on the death penalty as
9 we could not accurately respect, reflect, and represent the
10 interests all of our clients if we did.

11 On February 13, 2015, our office had to make over
12 400 phone calls to families, friends and loved ones whose
13 loved ones had been brutally murdered, tortured, raped,
14 discarded on roads, dismembered, and ultimately savagely
15 murdered. We called them to let them know that Governor
16 Tom Wolf had issued a moratorium on the death penalty, thus
17 halting an already slow, painful, and arduous path that
18 each of them respectively had been traveling on for years
19 and in many cases, for decades.

20 In the overwhelmingly majority of those calls, my
21 staff and I did the most important thing we seek not to do
22 and that is that we caused harm. We broke hearts, and we
23 sat while listening to the tears and screams of many of our
24 clients who could not understand why once again our office
25 was calling them with news that was not news they wanted to

1 hear.

2 As you can imagine, crime victims whose offenders
3 are serving death sentences only get calls from our office
4 when an appeal is filed, and that is on the very rare
5 instance that we actually are informed of the appeal before
6 the media is informed, when a warrant is signed and then
7 again ultimately when the warrant is stayed. We make every
8 attempt we can to answer their questions and ease their
9 pain but our efforts are futile as we can't answer their
10 questions. We can't ease their pain. They understand that
11 every time the phone rings, it is just yet another steep or
12 valley on the roller-coaster of emotions that is the death
13 penalty in Pennsylvania.

14 It's not my role to debate the death penalty with
15 you today, whether or not our system is broken or not.
16 What I am here to convey are the thoughts, opinions, and
17 desires of the hundreds of hearts that are broken because
18 justice in their respective case has not coming to
19 fruition. Our office endured the hours of calls and heard
20 various input from our clients. We felt strongly that we
21 wanted to quantify their information, their feelings, their
22 thoughts in a way that we could present to the Governor
23 office as well as to the Legislature. Victims' voices
24 matter.

25 In Pennsylvania, we have a rich history of

1 valuing the opinions and voices of our crime victims. When
2 we're seeking policy changes that impact crime victims, we
3 must understand the emotional and psychological impact that
4 these policy decisions can have upon them. It is our duty
5 to ensure our system is not inadvertently doing harm where
6 we are seeking to do better.

7 To that end, our office did conduct a survey to
8 the 418 registered crime victims that are registered within
9 our system whose offenders are serving death sentences. We
10 engaged the research staff of the Department of Corrections
11 to ensure our questions were scientifically sound and that
12 our results were analyzed properly. I'm here today to
13 provide those results to you.

14 In March of 2015, we did mail out 418 surveys.
15 Of this total, 29 of them were returned as having inactive
16 addresses. So for the remaining 389 surveys which were
17 delivered, 156 of those were completed and returned. This
18 is a response rate of 40 percent.

19 In an effort to keep our survey brief, we asked
20 five questions with responses ranging from strongly agree
21 to strongly disagree. We also provided space for comments
22 at the end of the survey. You will find those comments in
23 the actual report that we gave today. I'm just going to go
24 through each question and then the results that we found.

25 Question 1: I support the death penalty.

1 Overwhelmingly, the respondents agreed with the statement,
2 "I support the death penalty." 80.1 percent of respondents
3 strongly agreed with that statement, and 91 percent either
4 strongly agreed or agreed with that statement. Only 5.1
5 percent disagreed or strongly disagreed.

6 Question 2: I feel the sentence imposed by the
7 Courts in my case should be carried out. Overwhelmingly,
8 the respondents felt that the sentence imposed by the
9 Court, which obviously is the death penalty in these cases,
10 should be carried out. 87.2 percent strongly agreed with
11 that statement; 93.6 percent either strongly agreed or
12 agreed with that statement. Only 3.8 percent either
13 disagreed or strongly disagreed. What's important to note
14 here is that while some of the clients in question 1 stated
15 that they don't support the death penalty, they still
16 supported the sentence being carried out by the Courts.

17 Question 3: I had the opportunity to voice my
18 wishes during the sentencing phase of my trial regarding
19 the execution of the offender. These answers were more
20 mixed. Approximately 60.7 percent agreed or strongly
21 agreed that they had opportunity to voice their wishes
22 while 23.6 percent disagreed or strongly disagreed. While
23 more mixed, the majority of responses, near two-thirds of
24 respondents, were that they had the opportunity to voice
25 their wishes.

1 Question 4: I would support abolishing the death
2 penalty if it means the offender would remain separate from
3 general population, i.e., a version of death row would
4 remain in effect and that the offender would receive a life
5 sentence without the possibility of parole. This question
6 was added predominantly because in the majority of the 400-
7 some calls that we made, the question of confinement
8 continuously came up and came up and came up. What the
9 families really wanted to know is that these individuals
10 were not going to be taken off of death row and they would
11 not be put in general population, and as Pam expressed, I
12 spent ten years at the local level as a victim advocate
13 doing the same work that she did and I can tell you in
14 every one of these cases, it was confinement was the single
15 most important factor for these families because we
16 understood and knew that the death penalty doesn't
17 necessarily always result in death in Pennsylvania but
18 confinement was significantly important. Answers to this
19 question were mixed as well. 63.2 percent disagreed or
20 strongly disagreed with abolishing the death penalty under
21 these circumstances whereas 28.4 agreed or strongly agreed
22 with replacing the death penalty under these circumstances.
23 While more mixed, the majority of responses, nearly two-
24 thirds, were that they would not support abolishing the
25 death penalty if life without parole or a version - - and a

1 version of death row replaced it.

2 The final question, question 5, there should be
3 specific timeframes on the appeals process of death penalty
4 cases. Overwhelmingly, the respondents indicated that
5 there should be a specific timeframe on the appeals
6 process. 91.6 percent agreed and strongly agreed that
7 there should be a specific timeframe whereas only 3.9
8 percent disagreed or strongly disagreed.

9 Clearly, by these statistics that I'm giving you
10 today, and these are obviously the voices of the victims in
11 these specific cases that we're discussing today,
12 overwhelmingly, there is support for the death penalty.
13 Overwhelming, there is support and a need for their voices
14 to be heard.

15 One of the recommendations that our office would
16 make, and I believe you'll find it in the Crime Victims
17 Alliance of Pennsylvania's recommendations is that it is a
18 requirement for victims' voices to be heard at the penalty
19 phase of sentencing when it is a death penalty case.

20 While currently in the Crime Victims Act; crime
21 victims do have the right to give a victim impact statement
22 at the time of sentencing, it's not an explicit right at
23 the time of the sentencing phase in a death penalty case.
24 That really ends up being the choice of who is put on to
25 provide testimony or not. Many cases across the country do

1 allow for this, and in fact, Oklahoma allows that victims
2 specifically can tell the jury whether they want the death
3 penalty or not in that case, and that was a result of the
4 Oklahoma bombing case. 80 percent, as I indicated, of
5 those surveyed provided written comments. I've provided
6 those for you today. They are completely unedited by our
7 staff. So they are -- if there's grammatical inaccuracies
8 or things that are incorrect, that is -- we did not want to
9 modify in any way the voice of the victims. So we have
10 those for you.

11 We do hope that the bipartisan Pennsylvania Task
12 Force and Advisory Commission on Capital Punishment takes
13 swift action concluding their report in a comprehensive
14 manner so that a resolution to this moratorium can occur
15 and that our crime victims are no longer held in legal
16 limbo as to the status of their offender's case. We do,
17 however, strongly feel that any policy decision made that
18 potentially have the ability to impact crime victims should
19 be fully inclusive of their thoughts, opinions, and voices
20 and at this time the composition of that Task Force is not
21 such that it fully compromises -- or fully encompasses the
22 voice of victims.

23 I do thank you for inviting me here today, and
24 certainly Pam and I are both open to any questions that you
25 may have.

1 CHAIRMAN PETRARCA: Thank you. Questions,
2 Representative Barbin?

3 REPRESENTATIVE BARBIN: Thank you, and I
4 appreciate your testimony because it makes real clear that
5 aside from the political correctness of whether we should
6 have a death penalty at least for the people that are
7 personally impacted, they've overwhelmingly said you passed
8 the law, execute the law.

9 MS. STORM: Yeah.

10 REPRESENTATIVE BARBIN: And thank you for this
11 information and thank you for the -- if we're going to do
12 legislation, whether the Senate Task Force does anything,
13 we should be including a statement that allows the jury
14 impact to come from the victims because, in general, a jury
15 is allowed to always over -- just on their own decide to
16 throw out the charges.

17 MS. STORM: Um-hum.

18 REPRESENTATIVE BARBIN: They have that right.
19 But juries don't understand what the power really is. It's
20 their power to impose sentence and I think if we had that
21 included in our death penalty and we changed the process so
22 that justice wasn't delayed and therefore denied, that we
23 would have a much better piece of legislation. So thank
24 you for your testimony.

25 CHAIRMAN PETRARCA: Thank you, Representative

1 Barbin. Representative Stephens?

2 REPRESENTATIVE STEPHENS: Thank you, Mr.
3 Chairman, and thank you both for being here and your
4 testimony.

5 This is terrific. I mean, my only negative
6 reaction is, I wish more than 40 percent would have
7 replied, you know, and that's certainly no reflection on
8 you but -- and I don't blame them, frankly, for just
9 wanting to set aside a system that has unfortunately
10 treated them poorly over -- through their experience.

11 I want to just touch base on a little bit of the
12 victim's role throughout the process and I know that we
13 have statutory provisions that require Courts in all
14 criminal cases to hear or receive victim impact testimony,
15 and I know you touched on a little bit about the lack of
16 any requirement for a victim to testify before -- it was
17 just in the sentencing phase. Is that --

18 MS. STORM: Yes.

19 REPRESENTATIVE STEPHENS: And there are States
20 that do allow that?

21 MS. STORM: Yes.

22 REPRESENTATIVE STEPHENS: Okay. As it relates to
23 -- and I know you mentioned the appeals process. We had a
24 chance to talk about that and I told you I'll be drafting
25 something along those lines in the near future, but as it

1 relates to this moratorium, could you expand on when did
2 our victims find out that the Governor was unilaterally
3 going to impose this moratorium? So when did our victims'
4 families become aware of it? Do you know?

5 MS. STORM: We became aware of it on -- around
6 7:30 the morning of the moratorium being issued. The
7 moratorium was made public, I believe, at 10 a.m. So we
8 were given roughly two and a half hours heads up, and we
9 literally phone banked, to the best of our ability, trying
10 to call as many of our victims as we possibly could. We
11 put a statement on our Facebook page. We put a statement
12 on our website. We put a statement out to the media. But
13 it was incredibly troublesome. Many of them ended up
14 inadvertently hearing it from the media or from others. As
15 you can imagine, we left a lot of messages. What was also
16 troubling was it was a holiday weekend. So we knew that we
17 weren't going to be in the office on Monday to receive a
18 lot of the returned calls from the messages that we were
19 leaving, so that put us in a little bit more of a
20 challenging position but -- so they -- we tried to the best
21 of our ability to give them a heads-up but we had a very
22 small window.

23 REPRESENTATIVE STEPHENS: Do you have any idea
24 whether -- so was it entirely put on you to reach out to
25 the victims' families in this instance or did the

1 Administration connect with any of the -- are you aware,
2 did the Administration reach out to any of the victims'
3 families themselves or was it entirely put on you to do
4 that?

5 MS. STORM: Victim information in Pennsylvania is
6 confidential, so any crime victim's phone numbers,
7 addresses, input, anything they provide to the Office of
8 the Victim Advocate is confidential. So our office will
9 not and does not share that with anyone. So even if the
10 Governor himself called me today and said I want Terrence
11 Williams' victim's phone number, I would say sir, I'm not
12 allowed to give that to you, per the law. My understanding
13 is I believe that there were attempts to contact specific
14 victims. Those attempts were not successful because the
15 information was not readily obtained and we did not give
16 information out that was requested of us.

17 REPRESENTATIVE STEPHENS: Okay. But so it fell
18 upon you and you learned of it two and a half hours, and
19 you had how many people to notify?

20 MS. STORM: 418 registered victims.

21 REPRESENTATIVE STEPHENS: All right. Well, I can
22 imagine how those calls went. Thank you.

23 CHAIRMAN PETRARCA: Thank you, Representative.

24 Question from Sarah Speed.

25 MS. SPEED: Hi. Just a data question. So it

1 doesn't say on here who the survey was submitted to. Is
2 this exclusively to clients? How was that defined? Family
3 members? How far back in your files?

4 MS. STORM: It should have stated that it was
5 sent to 418 registered crime victims. So in the
6 Commonwealth of Pennsylvania, in order to receive services
7 from the Office of the Victim Advocate, you actually have
8 to register with us so that we can put you in our database
9 and that allows us to make notifications. So it was the
10 418 victims who are registered with our office on death
11 penalty cases. Sorry. So only those --

12 MS. SPEED: Exclusively death penalties?

13 MS. STORM: -- victims whose offenders were
14 serving death penalty sentences, yes.

15 MS. SPEED: So would a registered victim, would
16 that be -- I mean only the person like immediate family or
17 how far back and broad is that scope?

18 MS. STORM: So in terms of how far back it goes,
19 and we have cases from the 1970s, so, you know, we're
20 working with victims whose, you know, offenders have been
21 on death row for decades. We -- in terms of how that's
22 defined, homicide survivor is a little bit broader. It's
23 probably one of the broadest definition of victim in law,
24 and it's the immediate family, loved ones. Whoever is kind
25 of immediately impacted by that crime, those rights in the

1 Crimes Victims Act extend to those persons. So typically
2 it's mom, dad, sister, brother, uncle, grandmother. It
3 really depends upon the dynamics. Sometimes it's a
4 guardian ad litem. It depends upon the situation of the
5 person who was impacted and who is existing in their
6 family.

7 MS. SPEED: Sure.

8 CHAIRMAN PETRARCA: Thank you, and thank you for
9 your testimony.

10 MS. STORM: Yes.

11 CHAIRMAN PETRARCA: I appreciate your time. Our
12 next testifier is Mark Bookman, Director of the Atlantic
13 Center for Capital Representation.

14 MR. BOOKMAN: Good afternoon. We've crossed
15 over. My name is Mark Bookman. I'm the Director of the
16 Atlantic Center for Capital Representation. We provide
17 training and consultation with capital defense teams in
18 Pennsylvania and previous to that, I was in the Homicide
19 Unit of the Philadelphia Defender Association from 1993
20 until 2010. So I appreciate the opportunity to testify
21 here today.

22 I don't want to be overly repetitive because
23 we've heard a lot. We've heard that there's been over 250
24 reversals and no involuntary executions since 1962. So
25 there's a sense that you get that it's -- you know, these

1 overly zealous death penalty opponents that are saying oh,
2 my, God, the system isn't working; it's a disaster. But
3 it's not overly zealous capital defense attorneys who are
4 pushing this agenda. The Chief Justice of the Pennsylvania
5 Supreme Court has said that the Pennsylvania death penalty
6 is in disrepair. That's the word he used. He's written
7 Law Review articles pointing out the failures of our system
8 to work so that when the Governor says well, we have a
9 problem here, we ought to take a good look at it, it's a
10 little bit like the scene in Casablanca when everyone
11 throws up their hands and says they're shocked to see
12 gambling going on here. The system's obviously not
13 working. I think a number of Representatives here have
14 said that. When you have more than 250 reversals, when you
15 have no involuntary executions in 53 years, when you have a
16 Chief Justice saying that the system's in disrepair, it's
17 reasonable to conclude that there's something wrong with
18 our system and it needs to be looked at.

19 Why is it not working? I'm going to suggest at
20 least two major reasons leaving aside some of the other
21 things that were mentioned. Bad lawyering is one of the
22 most essential reasons it's not working. I don't want to
23 just give you statistics. I want to give you some
24 examples, recent examples, because there was a suggestion
25 that things are better now than they were before. I'll

1 give you some suggestions -- some examples from this
2 century and then a couple from just in the last couple
3 years. A defense lawyer, and try to imagine when you're
4 hearing these stories that your son, God forbid, is facing
5 a capital -- a death penalty trial and this is your son's
6 lawyer. Just try to imagine that. A lawyer argues to the
7 jury that the phrase "an eye for an eye" only applies when
8 you kill a pregnant woman. He fancies himself a biblical
9 scholar and apparently in the Bible, there's a connection
10 between an eye for an eye and the killing of a pregnant
11 woman. So he argues to the jury that an eye for an eye
12 only applies when you're killing a pregnant woman. What he
13 forgets is that that's what his client was convicted of,
14 killing a pregnant woman. So, of course, the Courts
15 reverse that, yes, Representative Saccone. If it wasn't so
16 incredibly serious and devastating to everyone involved, it
17 would be humorous. Of course, the Courts have to reverse
18 that. That's the sort of lawyering we're talking about.

19 Very recently, a lawyer prepared a case for two
20 years, not realizing that his client was under the age of
21 18 when he was -- when the crime was committed, thereby
22 making him ineligible to be represented. So the lawyer had
23 the case for two years preparing a death penalty case when
24 the client wasn't even eligible to be executed.

25 I'm working on a case myself right now where the

1 defense attorney agreed to an aggravating circumstance that
2 the murder was committed -- the homicide was committed
3 during the course of a felony. What the defense attorney
4 did not realize is that it was not in fact a felony; it was
5 a misdemeanor, so that that did not apply. This is the
6 sort of lawyering we're talking about that has hindered the
7 death penalty in Pennsylvania for 40 years.

8 I want to talk for a minute about a case that
9 just came out of Philadelphia very, very recently, the
10 Derek White case. Derek White received a death sentence.
11 It was reversed by the Pennsylvania Supreme Court. He came
12 back again for another death trial. Literally hours before
13 that second trial was to begin, the Clerk, a one-year Clerk
14 for the Judge, discovered that the aggravating circumstance
15 on which this case had been based did not apply to the
16 Derek White case, and so Mr. White is now serving life
17 without the possibility of parole. Four defense lawyers
18 had that case, did not realize that the aggravating
19 circumstance did not apply in the case. We're talking
20 about a waste of time for victims, for defendants'
21 families, and for the Courts themselves.

22 Let me talk for a minute about the Terry Williams
23 case. The question is asked, you know, is he the worst of
24 the worst, and I know that there are some Representatives
25 who want to ask questions about this. There's some

1 questions as to what the Court did and didn't do because
2 the Court didn't rest on the fact that Mr. Williams was the
3 worst of the worse or that the evidence of sexual abuse was
4 not relevant. What it said was, that they applied timing
5 rules to it so that the argument was that in 1998, he made
6 an argument about the fact that he was sexually abused.
7 I'm getting a little ahead of myself; I'll explain that in
8 a second, and then the Court said, well, it was raised in
9 1998 so we're not going to entertain it again in 2014.
10 That's what the Courts actually held, the Pennsylvania
11 Supreme Court.

12 But here's what I'm going to say to you. You ask
13 yourself if Terry Williams is the worst of the worst. He
14 was barely 18 years old at the time he killed a man who was
15 sexually abusing him. Now, I'm speaking before Professor
16 Blecker. I don't want to speak on his behalf, but I've
17 read Professor Blecker's material. I don't want to mislead
18 this Committee into thinking that I agree with him. In
19 many, many ways I don't agree with him. But you should ask
20 him if those circumstances would make Mr. Williams the
21 worst of the worst. I think most of us would say that he's
22 not the worst of the worst, a man who's barely 18; you're
23 barely eligible for the death penalty, who kills someone
24 who's been sexually abusing him, an adult who was paying
25 him for sex when he was a juvenile. Anyone would consider

1 that sexual abuse. So is Mr. Williams, is Terry Williams
2 the worst of the worst? Is our system really working to
3 funnel the worst of the worst? I would suggest not.

4 Consider this. Mr. Williams met his lawyer the
5 day before his capital trial. Again, remember, this is
6 your son, God forbid, is facing a capital trial. His
7 lawyer meets him the day before trial; is subsequently
8 disbarred. Is that the sort of representation that we want
9 when we're trying to decide who is, in fact ,the worst of
10 the worst? Who, in fact, should be executed? I suggest
11 not.

12 We've talked some about the victims in this case,
13 and I think Mr. Dunham makes the most important point,
14 which is there is no monolithic perception about what
15 victims feel and don't feel, and that's important for us to
16 remember. In the Terry Williams case, the spouse of the
17 victim has long advocated that she does not want Mr.
18 Williams executed. In fact, she accused some people of
19 political opportunism in suggesting that she did want him
20 executed when she had been very clear on the record saying
21 that she didn't.

22 I want to address some of the things that were
23 said by the District Attorneys in the beginning because the
24 suggestion was that this is all old news and that we have
25 improved the representation in these cases. I profoundly

1 disagree. I've already given some almost humorous
2 suggestions of bad lawyering, but I also want to point out
3 something else that's important and that we don't consider
4 very much. Consider the prosecutor's role in these cases.
5 In the case where the felony was actually a misdemeanor,
6 the prosecutor didn't know it either. He assumed that the
7 felony was in fact a felony when it was a misdemeanor. The
8 prosecutor is the one that sought the death penalty and
9 filed Death Penalty Notice for the young man who was not 18
10 at the time the crime was committed, the fact that the
11 aggravator did not apply and that the four defense lawyers
12 missed it and it took the Judge's Clerk to realize that
13 that aggravator did not apply in that case where there was
14 a prosecutor who was there for two entire trials and the
15 prosecutor's office in Philadelphia sought death against
16 that young man.

17 So, you know, we can certainly say that the
18 defense attorneys handling these cases are not doing a
19 competent job but we should also look at the prosecution
20 and the sloppiness in which they are seeking the death
21 penalty. I think these are both profound reasons why we're
22 having so many problems, so many reversals, so few
23 involuntary executions.

24 We talked a little bit during the course of this
25 morning about whether we should keep the death penalty. If

1 we don't have the death penalty, then the next group of
2 "zealous" defense attorneys are going to go after life
3 without parole. I don't think that that's a good reason to
4 keep the death penalty. The death penalty is not used as
5 leverage to make defendants plead guilty or waive trial or
6 whatever. That would be an unconstitutional use of the
7 death penalty. We don't decide we're going to keep the
8 death penalty because if we get rid of the death penalty,
9 then we might have to then look closely at life without
10 parole. We don't keep the death penalty as a public policy
11 because of the incredibly rare number of escapes of lifers.
12 The two men that escaped from New York, they were not under
13 a death sentence. They did not receive a death sentence.
14 The fact that they escaped has nothing whatsoever to do
15 with the death penalty. I don't think anyone here is going
16 to advocate that we take everyone that's in prison serving
17 a long term of years and execute them to make sure that no
18 one escapes. I don't think anyone is advocating that.
19 That's not a reason for us to keep a public policy that so
20 far for 40 years has failed.

21 I want to suggest that this is not just a Court
22 problem. Our Courts are not runaway Courts that are willy-
23 nilly reversing death sentences. Mr. Dunham pointed out
24 that the State Courts have reversed more cases than the
25 Federal Courts by a significant number. But there's

1 something more important than that. When we were
2 litigating the fees paid to Court-appointed counsel in
3 Philadelphia, we took a careful look at the last 25 cases
4 that had been reversed in the Philadelphia Court System.
5 Of the last 25 death penalty reversals; this dates back to
6 2012, 60 percent of them had been agreed to by the District
7 Attorney's Office. 15 out of 25, the District Attorney had
8 conceded needed, at the very least, a new penalty phase
9 based on the ineffectiveness of Counsel.

10 So this is not zealous advocates pushing an
11 agenda. This is the Chief Justice of Pennsylvania. This
12 is the District Attorney's Office in Philadelphia and in a
13 lot of other places as well. I think that this has been a
14 failed public policy. I do have some suggestions for ways
15 that we could at least rectify the problems that I've
16 identified. If this panel has questions about that, I'm
17 glad to go into that and that's what I have to say today,
18 and I appreciate your time in hearing from me.

19 CHAIRMAN PETRARCA: Thank you, Mr. Bookman. I
20 certainly appreciate your testimony. In your written
21 testimony, do you have your recommendations included in
22 that testimony?

23 MR. BOOKMAN: You know, Representative, I'm not
24 100 percent sure I do. I know it's been discussed. I'll
25 say very briefly, it's been discussed that State regional

1 offices will raise the level of -- I mean, assuming that
2 everyone wants lawyers that know what their clients have
3 been convicted of, assuming everyone wants a lawyer that
4 knows how old his client is or whether a felony is a felony
5 or a misdemeanor, we can improve the quality of that
6 representation by bringing in State-funded and State-
7 organized and State-centered Counsel that are experts in
8 this field. I don't think you have to be an expert to know
9 how old your client is or whether a felony is a felony or a
10 misdemeanor. But it's been proven in Virginia, a State
11 that executed 86 percent of the people that receive death
12 sentences, that when they brought in these regional trial
13 offices with lawyers that were competent; they don't have
14 to be dream team lawyers, they don't have to be highly
15 paid, they just have to be competent lawyers, when Virginia
16 brought in regional offices of competent death penalty
17 lawyers, death sentences plummeted and executions
18 plummeted. There's only one way to look at that, and that
19 is that, as Mr. Dunham said, lawyers matter.

20 And I'll tell you one other thing. If you look
21 at the Rand study, the Rand study was cannibalized into the
22 Yale Law Journal. It was a study of homicide cases, 20
23 percent handled by the Defender Association in
24 Philadelphia, 80 percent handled by the private bar, the
25 private bar under-resourced, undertrained. The Defender

1 Association, competent Counsel, competent Counsel on a
2 salary, right? What the Rand study found is that; I may
3 get these statistics slightly wrong, 61 percent less likely
4 to be convicted of first degree murder if you're
5 represented by the Defender, 19 percent more likely to be
6 acquitted, 24 percent lower sentences by the Defender-
7 represented lawyers, no death sentences. But here's what
8 should be important to you. The Rand study found that
9 competent representation saved over \$200 million in excess
10 incarceration costs. That's a staggering amount of money
11 over an 11-year period. The point being that if we provide
12 competent representation, we can save the taxpayers a huge
13 amount of money. I really encourage everyone to read the
14 Rand study, which is in the Yale Law Journal. If someone
15 asks me for it, I'll be glad to email it to you. That's
16 the bottom line. The bottom line is, it's not zealous
17 representation. It's good, smart lawyering and public
18 policy that can save a lot of money for the taxpayers.

19 CHAIRMAN PETRARCA: I appreciate that. I think
20 often times we see that anyone, maybe someone who is
21 convicted or if their trial does not go their way, then of
22 course the claim of incompetent Counsel is raised.

23 MR. BOOKMAN: Of course.

24 CHAIRMAN PETRARCA: And obviously that's the
25 other side of what you're saying, but I certainly do

1 understand.

2 MR. BOOKMAN: Yes. I'm not telling you that
3 we're going to eliminate the claim of ineffective
4 assistance of Counsel. I am telling you that competent
5 lawyering will dramatically lower the success of those
6 claims. We do not have runaway Courts in Pennsylvania. As
7 I pointed out, the State Courts have reversed more than the
8 Federal Courts that District Attorneys have conceded relief
9 in over 60 percent of the cases, just in a small section
10 that we looked at. We're not talking about runaway Courts
11 here. We're talking about lawyers that don't know how old
12 their clients are, don't know felonies from misdemeanors,
13 don't know what their clients were convicted of. We're not
14 talking about, you know, some dream team defense. We're
15 talking about competent lawyering here.

16 CHAIRMAN PETRARCA: And in Virginia, you
17 mentioned Virginia, that is State-funded regional offices?

18 MR. BOOKMAN: Yes.

19 MINORITY CHAIRMAN PETRARCA: Thank you.
20 Representative Barbin for questions.

21 REPRESENTATIVE BARBIN: Thank you, and I
22 appreciate your testimony. I question your conclusions or
23 how you get to your positions.

24 Regional Counsel does make sense, or at least
25 version of -- someone from maybe the State Attorney

1 General's Office who can ensure that the aggravating
2 factors are there and the mitigating factors are there, and
3 the same thing with the Defenders Office maybe and maybe we
4 would save money, that \$220 million you're talking about.
5 I also doubt that it's \$220 million because you're assuming
6 sometimes people who get off on procedural issues and are
7 let out of prison are somehow a savings to the taxpayer.
8 They're not.

9 MR. BOOKMAN: I'm --

10 REPRESENTATIVE BARBIN: Wait. Just let me
11 finish.

12 MR. BOOKMAN: Okay.

13 REPRESENTATIVE BARBIN: Let me finish. The idea
14 that we should have competent Counsel, good idea. The idea
15 that we should have less death penalty cases to ensure that
16 before we start the whole process with them that the death
17 penalty factors are there, that makes a whole lot of sense.
18 But it makes no sense to say because we have some death
19 penalty cases that are overturned on appeal or more death
20 penalty cases are overturned on appeal at the State level
21 of the Federal level, none of that matters because to the
22 person who has been strangled or the person who has had
23 their throat slit or has any of those other aggravating
24 factors, they have a right under the law to have the law
25 executed quickly and fairly, but the bigger problem isn't

1 how long this takes. For the defendant, it's how long this
2 process takes for the victim, and you assume because we
3 have mistakes in the system, because the Chief Justice said
4 that it's in disrepair, that means we should throw it out.
5 We should not throw it out. We should fix it and allow the
6 law to go forward in the way that the public policy of the
7 Commonwealth, as expressed by the Legislature and the
8 Governors at the time, said to carry it out.

9 You think we have too many death penalty cases,
10 too many people that aren't qualified to defend defendants,
11 maybe that's what we should change. But it shouldn't have
12 any impact on having a death penalty in Pennsylvania or
13 carrying it out when it's appropriate.

14 MR. BOOKMAN: Well, okay. I don't want to argue
15 back and forth about what, you know, reasonable people can
16 disagree about. I do want to correct one thing. The money
17 that the Rand Corporation is talking about, that study, was
18 not about reversals or anything else. They're talking
19 about the extra years of incarceration by ineffective
20 lawyering that results. Ineffective lawyering does not
21 result in people going free all over the place. It results
22 in people getting death sentences that shouldn't be getting
23 death sentences like someone who's not of age or someone
24 who's -- where the felony is actually a misdemeanor or the
25 lawyer who makes the argument that makes some of us smile

1 in front of a jury. Ineffective lawyers don't set people
2 free; they put them in custody longer than they're supposed
3 to be. So the Rand study finds that that kind of
4 ineffective lawyering costs more than \$200 million in the
5 extra incarceration time, the length of incarceration. The
6 Allentown Morning Call found that every death-sentenced
7 inmate is \$10,000 more expensive per year than a man
8 serving life without parole. So we're talking about those
9 sorts of costs, not ---

10 REPRESENTATIVE BARBIN: Except here's what you're
11 doing. Here's what you're doing to us. We have a system
12 that doesn't work in the appellate process. You're saying
13 because a national study may save \$220 million, not its
14 effect in Pennsylvania ---

15 MR. BOOKMAN: No, it ---

16 REPRESENTATIVE BARBIN: --- that we should change
17 our system or get rid of the death penalty when what we
18 really need to do is to say whatever it costs for somebody
19 to be properly tried, for a Judge to properly sentence, for
20 appeals to be properly -- I don't care what that costs, and
21 that's not your decision or the Rand study or anybody
22 else's decision. It's the public elected officials that
23 say we're going to have a death penalty and we're going to
24 execute it.

25 So your statistics, I really don't care about

1 them because you can't put a price tag on somebody being on
2 death row because they're taken off the street and now
3 they're protecting everybody else who's left. So the
4 numbers are -- this is a red herring. If you have people
5 that aren't in jail and shouldn't be in jail because of the
6 process, let's change the process. But stop talking about
7 the money and stop talking about how many statistically
8 significant appeals were thrown out for this reason or that
9 reason. Correct the reasons. We pay for the costs because
10 we don't want people like that on the street. I just think
11 your testimony on statistics is really a red herring.

12 MR. BOOKMAN: Sir, the Rand study took place in
13 Philadelphia.

14 REPRESENTATIVE BARBIN: I don't care about the
15 Rand study. It's not Pennsylvania.

16 MR. BOOKMAN: It was a Pennsylvania study. I'm
17 not making it up from Idaho. It happened in Philadelphia.

18 REPRESENTATIVE BARBIN: Okay. We're not getting
19 anywhere here. I appreciate the fact ---

20 MR. BOOKMAN: That's fine.

21 REPRESENTATIVE BARBIN: --- that you think we
22 need additional services at the defense level. That's
23 makes some -- that's helpful. The rest of your conclusions
24 I don't believe are accurate or are based on any other
25 statistics and the kind Mark Twain said are at a lower

1 level than two other categories.

2 CHAIRMAN PETRARCA: Thank you, Representative.
3 Representative Saccone.

4 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman,
5 and thank you for your testimony, but I have to just point
6 out that your only - - and various times that I was able to
7 decipher what you were saying, you were only presenting
8 part of the story which is it's not good. It's not good
9 lawyering. It's not good academics. It's -- even -- and I
10 don't want to try the case in here or anything, but even
11 when you were talking about Terrence Williams and you talked
12 about the first case but you didn't talk about the second
13 murder where he lured the guy into the cemetery, made him
14 strip naked and stuffed his own socks in his mouth so that
15 he didn't have to hear him screaming for mercy as he beat
16 him to death with a tire iron, and then to say that somehow
17 well, this guy, you know, he didn't get the right, you
18 know, lawyering and he didn't get this or that, it doesn't
19 carry much weight. You've got to tell the whole story.

20 But my thing I want to impress upon you is that
21 when you said that it's not overzealous advocates that are
22 out there talking about the death penalty, you know, it's
23 the people within the system, well, it does appear that
24 it's overzealous advocates that are calling for this
25 because of what Representative Barbin said. We all want

1 good Counsel and so forth. Those things we can correct,
2 but you're never satisfied with that. You always -- no
3 matter what we -- we could have the most heinous crime that
4 if a guy walks into McDonald's and starts shooting it up
5 and we wrestle him to the ground and we have him right
6 there and you'd say no, we don't want the death penalty for
7 that one either because for whatever, whatever reason you'd
8 find, so you just want to throw the baby out with the
9 bathwater, so to speak, because you don't want the death
10 penalty. You're not willing to say that there are cases
11 where we absolutely know this is the right man and we want
12 to execute the death penalty, the law of the land, but you
13 won't be satisfied with that, and that takes credibility
14 away from the argument. Do you want to comment on that?

15 MR. BOOKMAN: Well, you know, I don't know if
16 you're asking me, you know, should Adolph Hitler have
17 gotten the death penalty. I mean, what I'm saying is that
18 when we've had over 250 reversals and no involuntary
19 executions, it doesn't take a brain surgeon to understand
20 that our system isn't working properly. You know, I agree.
21 You know, you listed some Terry Williams facts. None of
22 those facts change the fact that he was barely 18 at the
23 time and killed his sexual abuser. Now, I didn't say other
24 than that, and I'm not trying to. I don't want to -- you
25 know, I think everything I said was accurate. I don't

1 think that someone who is barely 18 who kills his sexual
2 abuser under any set of circumstances qualifies as the
3 worst of the worst people that we're trying to target.
4 That's all I'm saying. And I think -- you know, I don't
5 want to throw a bunch of numbers here. That's why I told
6 those specific stories, all of which happened, you know, in
7 the last ten years. I'm not talking about something from
8 the 1950s. I'm simply saying that our lawyering is bad,
9 the fact that our District Attorneys are not scrutinizing
10 these cases carefully is problematic, and that the facts
11 speak for themselves. The reason we're here is because of
12 all of the reversals and no executions. If those facts
13 weren't those facts, none of us would be here today. So I
14 don't think I'm saying anything all that controversial,
15 frankly.

16 REPRESENTATIVE SACCONI: Thank you, sir.

17 REPRESENTATIVE BARBIN: I'd like to say
18 something. You're going to say the facts. The facts are,
19 this wasn't his first murder, okay? He had murdered
20 someone before.

21 MR. BOOKMAN: Yes, he had, when he was 17, he
22 murdered --

23 REPRESENTATIVE BARBIN: Well, then when you go
24 with this idea that somehow an 18-year-old, because he's a
25 couple days over being 18 is somehow less culpable, he's 18

1 and he murdered someone before. So don't say he's not the
2 worst of the worst. He is. And also, don't say that he
3 had proved that there was some sort of sexual molestation
4 because none of that has ever been other than a statement
5 that you make, and defense lawyers come up with those
6 statements to somehow put their clients in a better light.
7 I don't take that as gospel.

8 CHAIRMAN PETRARCA: Thank you, Representative
9 Barbin. Mr. Bookman, thank you for being here. We
10 appreciate your time and testimony.

11 MR. BOOKMAN: Thank you.

12 CHAIRMAN PETRARCA: Next, we have Professor
13 Robert Blecker from the New York Law School.

14 MR. BLECKER: Thank you. I appreciate this
15 opportunity. Since my name was already invoked about
16 Terrence Williams, let me make things clear. I was just
17 met by Mr. Bookman and I had not met him before and he said
18 if someone kills their abuser, sexual abuser, would you
19 count that as the worst of the worst and I said no, if
20 that's it and nothing else. So I made it clear at the time
21 and would like to reiterate, I did not study the case. I
22 do not know anything about the case. I'm now told that the
23 first time his sexual abuser came up as his victim was ten
24 years later, that in his first testimony he never even
25 mentioned that his victim was a sexual abuser. So please

1 do not invoke my name concerning this case about which I'm
2 ignorant.

3 What I do have a certain knowledge of in which I
4 hope -- and what I hope will be helpful are in two
5 respects: One, who are the worst of the worst? How can
6 Pennsylvania change its system and refine it, not about
7 process so much but about substance? The question of
8 aggravating circumstances came up.

9 Let me give you a sense of my background. I've
10 spent thousands of hours inside prisons, maximum security
11 prisons, and on death rows in seven States. Well,
12 actually, now it's eight States because the last two days
13 anticipating that I'd be testifying before you and fearing
14 that someone would say well, is it relevant; has your
15 experience been duplicated in Pennsylvania, with the
16 approval of Secretary Wetzel, I've spent the last two days
17 inside Graterford Prison to see whether the experiences
18 that I've witnessed are relevantly similar in Pennsylvania;
19 that is to say, the life on death row as compared to the
20 life in general population, as compared to the life of
21 those who are serving their time in disciplinary
22 segregation.

23 I was given carte blanche to interview officers
24 with a directive saying that they should speak to me
25 candidly. I was allowed to interview killers who are

1 serving life and killers who are on death row with the
2 dictate that the officer stay outside of any reach, ear
3 reach, so that they couldn't hear what was going on, they
4 could just visually protect me in case I needed protection.
5 I was allowed to go anywhere inside Graterford at any time
6 I wanted, see any part of the prison operation, talk to
7 anybody, and stay there for as long as I wanted.

8 So I'd like to respond to some of the issues that
9 have come up. The first part is reflected in my written
10 statement. The second part is not because this is the
11 result of the last two days inside Graterford and I didn't
12 want to put in my written statement that which I've learned
13 and which is reflected in a book that I wrote that was
14 published recently called The Death of Punishment:
15 Searching for Justice among the Worst of the Worst.

16 I begin and end with the proposition that the
17 punishment should fit the crime and I take it that that's
18 common ground. I also begin and end with the proposition
19 that we can tell the difference between the worst of the
20 worst and less serious criminals and that we can adequately
21 reflect on that and so the statement was made earlier by
22 one of your colleagues that the 18 aggravating
23 circumstances represent the considered wisdom of the people
24 of Pennsylvania and after deep reflection. I would suggest
25 they do not. That, in fact, one of the things that this

1 committee should be proposing is a refined death penalty
2 statute. Now, I know that there's supposedly a Study
3 Committee Meeting from the Senate. I do not know of any
4 witnesses they've called who favor the death penalty, as I
5 do. Maybe they have called some, but none of my colleagues
6 have been called that I know of. I certainly have not been
7 called. And my guess is if that experience replicates what
8 went on in New Jersey and Connecticut and New York where
9 I've testified before Death Penalty Study Commissions, it's
10 basically predisposed to call for an end to the death
11 penalty and will not even consider changing it, amending
12 it, refining it morally. Well, I would urge you to take
13 that responsibility and do that, and I won't go through in
14 any detail. I just want to spend a minute or two and then
15 get to the part that's not in the written statement about
16 what life is like for convicted killers who are serving
17 life both on death row and inside general population and to
18 answer two of the questions that came up earlier in the
19 questioning period.

20 For example, what do we do with a lifer who kills
21 again? Don't we need the death penalty? And also, isn't
22 life without parole worse than death? The answers to those
23 two are actually deeply connected. The answer is no, life
24 without parole is not worse than death. It's not even
25 close. But the answer that they are otherwise

1 undeterrable, are they deterrable, the answer is yes,
2 lifers are deterrable and the two reasons are connected.

3 First, in terms of proposed -- it's reflected
4 very briefly in the written statement and the book itself,
5 The Death of Punishment, gives you a model death penalty
6 statute based upon thousands of hours inside prisons across
7 the country over 30 years now. It's one of the largest,
8 maybe the largest study ever conducted. But some of the
9 things I would ask you to rethink in your aggravating
10 circumstances, and some of them will make it broader and
11 some of them will make it narrower, the death penalty,
12 really to get to the worst of the worst. Among the
13 categories of people, for example, that aggravate of the
14 victims are law enforcement, and I understand that police,
15 Judges, prosecutors. You've left out one that's critical,
16 and it's startling and may be unusual but it's critical,
17 jurors. Anybody who kills a juror in retaliation for the
18 verdict, a juror is the purest person doing the citizens
19 good. Jurors are left off there. They should be added.
20 Killing a witness is an aggravating circumstance,
21 appropriately, but it depends upon -- and one relies upon
22 prosecutorial discretion to weed this out. My view is, not
23 on the basis of protection or deterrence, which I reject.
24 I'm a retributivist. For me, the reason we have, and the
25 only legitimate reason we have the death penalty in the end

1 is because some people deserve to die, and we have an
2 obligation to kill them. But so if we're really focused on
3 the worst of the worst of the worst, I would distinguish,
4 and I would like the statute to distinguish, between
5 killing an innocent witness and killing a snitch. That is
6 to say, if you go on a robbery and one of your co-felons
7 gives it up to the police, well, we want them to do that
8 and they deserve witness protection, but if you kill that
9 person, you're not in the same moral category as if you're
10 the robber, at least the ones I've come across, and you're
11 in the midst of the robbery and you look up and you notice
12 that someone's looking at you outside the window, from a
13 window, and you go let's see, that's second story, third
14 apartment over, and you break down the door and then go
15 kill them in order to eliminate him as a witness or you
16 eliminate your very victim, robbery victim, as a witness,
17 that's in a different moral category and all other things
18 equal, that deserves death, whereas killing one of your co-
19 felons who understood what the rules of the game were is
20 not, and so I would distinguish that in the statute.

21 I would definitely eliminate the drug-dealing
22 aggravator. This may not be popular, but the fact is, once
23 again, if you're in the game and you know what the rules of
24 the game are and you kill a drug dealer, it does not in and
25 of itself, in my view, appropriately aggravate. That

1 connects, by the way, with the question of race because one
2 of the reasons why there's a disproportionate number of
3 African-Americans on death row who are committing death-
4 eligible crimes does not go to prejudice. It goes to the
5 definition of the crimes themselves. Race correlates very
6 closely with class. Class correlates very closely with
7 drug crimes and robbery and so if you eliminate -- and
8 that's another thing and a key thin, my view is you should
9 eliminate felony murder entirely, but you should definitely
10 eliminate the felony aggravator. Because you've killed in
11 the course of and in furtherance of a felony does not in
12 and of itself and should not make you death-eligible. By
13 the way, I would definitely keep rape as an aggravating
14 circumstance but not because it's a felony but because it's
15 torture and torture unquestionably belongs as a moral
16 aggravator.

17 I would also add, because this is crucial in
18 determining who the worst of the worst of the worst are,
19 the motive of the killer. I would add the bias aggravator,
20 which is absent from Pennsylvania statute, and in my view
21 really belongs there. That is a person who commits a hate
22 crime, who kills because of the victim's race, religion,
23 national origin, sexual orientation, or gender identity,
24 all other things is worse than someone who does not do
25 that. That should be an aggravating circumstance.

1 And then in terms of the child under 12, yes, I
2 agree, but that's too narrow. It should be broader. It
3 should be killing especially vulnerable victims, that which
4 should include the elderly, which Pennsylvania does not
5 presently include. It should include people who are
6 mentally or physically disabled. People who prey on
7 vulnerable victims tend to be cowards. By the way, they
8 also tend to, once captured, be the most compliant and best
9 behaved when confronted with overwhelming State power,
10 which will get me to the second part of my comments, which
11 have to do with what's life like inside for those are
12 spared the death penalty or those who are given it.

13 Two quick other points and then I'll move to
14 that, which is -- this is the closest thing I'll get to
15 talking about process unless you ask me about it in the
16 questioning period. I think your burdens of persuasion are
17 not adequately thought out, though they're very standard
18 across the country and we heard earlier the statement about
19 proof beyond a reasonable doubt from the prosecutors, and
20 they're right, is the maximum burden of persuasion
21 presently. The United States Supreme Court has held in
22 Kansas v. Marsh that the Constitution does not command a
23 burden of persuasion any higher in the penalty phase or any
24 different in the penalty phase that it commends in the
25 guilt phase. That may be true as a matter of

1 constitutional law. That is not true as a matter, in my
2 view, of moral fact. I believe that the burden of
3 persuasion should be different as death is a different
4 punishment in kind than any other. The burden of
5 persuasion should be different in the penalty phase than it
6 is in the guilt phase. The question is different. The
7 question in the guilt phase is did he do it. The question
8 in the penalty phase is does he deserve it. And in order
9 to answer that question properly, in my view, the jury
10 should be instructed that they may not have even a
11 lingering doubt, which is a doubt that is not strictly
12 rational but it's real. Something in their gut just isn't
13 sure. They're certain enough to convict and they properly
14 did convict of murder because they're convinced beyond a
15 reasonable doubt. Nevertheless, they still have a real
16 doubt. It's not rational. They can't give a reason for
17 it, but it's real. It's sometimes called the residual
18 doubt; it's sometimes called the lingering doubt and in my
19 view, if a juror has that residual doubt or lingering
20 doubt, though he or she properly convicts of first-degree
21 murder, he or she improperly sentences to death.

22 And then finally, I would alter the burden of
23 persuasion in the penalty phase to say that not only must
24 you have no lingering doubt but you also have to be
25 convinced to a moral certainty that he deserves it and

1 that's on a different nature than strictly rational. That
2 is if a jury that's already been appropriately selected as
3 a death-qualified jury cannot say to a moral certainty that
4 they believe that death is the appropriate punishment, then
5 they ought not to have it.

6 I would also add the word "clearly" to the
7 aggravators outweighing the mitigators. Some States do it;
8 some States don't. Again, that's giving the benefit of the
9 doubt to the defendant. On the other hand, I would
10 eliminate the requirement of unanimity on the part of the
11 jury. There are what we call stealth jurors, as many of
12 you know. That is there are jurors who go through the
13 process who say that under the right set of circumstances,
14 I will in fact give the death penalty and they're lying;
15 they simply won't. And because it's an enormous advantage
16 as it's come up in the hearing so far that it only takes
17 one, you know, that's been said two or three times, and of
18 course, that's right. It only takes one holdout juror who
19 may be a stealth juror who will not listen to the evidence.
20 That happened in one of the post-9/11 cases in New York
21 where the jury in a Federal case came back 11-1 with
22 Moussaoui -- I think it was Moussaoui, I may be wrong of
23 the person, came back 11-1 for death. It was clearly
24 qualified as death under any reasonable interpretation, and
25 that was a single stealth juror holdout. I personally

1 would have 10-2 or 11-1 verdicts for death-be-death
2 verdicts on the grounds that it represents the clear
3 consensus of the jury and that every other advantage still
4 remains to a great degree with the defendant.

5 Okay. So much then for -- I mean, that just
6 scratches the surface. Again, if you're interested on the
7 basis of 30 years of probing this on what a model death
8 penalty statute would look like, I included it in my
9 written statement. It comes from the book, The Death of
10 Punishment. It's Appendix, I think, B, from that book.

11 Now I want to talk about stuff that's not in the
12 written statement and respond to some of what's gone on,
13 because here I do bring a certain expertise that I hope
14 will be helpful to you in terms of what is life like inside
15 prison, and specifically what is life like inside
16 Pennsylvania's maximum security prison at Graterford.

17 Now, I haven't toured all the prisons; I've only
18 toured one, but there's something important about
19 Graterford. Number one, Graterford is a large prison. It
20 is a maximum security prison. It draws principally from
21 Philadelphia. It is also only one of two prisons in
22 Pennsylvania that has death row, which I toured, so there
23 are only going to be two, and it also gives you the chance
24 to contrast what life is like, and more importantly, what I
25 discovered is after those 15 hours with extraordinary

1 access to both prisoners and officers is I could sample it
2 and it would become a reliable sample because I heard the
3 same thing that I've been hearing and seeing for 30 years
4 inside prisons in other States.

5 The first thing is, if you look at the Mission
6 Statement of the Department of Corrections in Pennsylvania
7 and every other State in the United States, you will not
8 see the word "punishment" in any Mission Statement in any
9 Department of Corrections in the United States or the
10 Federal Government. And then when you talk to the members
11 of the Department of Corrections, and I had occasion in
12 these last two days to talk to the Deputy Administrator, to
13 talk to the Major and to talk to several of the line
14 officers down there inside the prison themselves, and I
15 asked what's your goal, what are you trying to accomplish,
16 and from the top, it's basically this: Safety. I went
17 right from the top and said I want my officers to be able
18 to come into the prison safely and get out of the prison
19 safely at the end of the day; I want to keep the people
20 safe, people out here in Pennsylvania safe from these guys,
21 I want to keep the prisoners safe from each other, and I
22 want to keep staff safe from the prisoners. Safety,
23 safety, safety. And then I asked them, do you know what
24 these guys did? Do you know the killings they committed?
25 Do you know the crimes? And then you get two answers, yes

1 or no, but you get one answer about the relevance of that,
2 either I don't know; I make a conscious effort not to know,
3 or I do know but I don't let that affect any part of the
4 way that we treat them once inside.

5 So their mission is safety. It's not at all
6 punishment, and they say that with one voice.

7 Consequentially, let me tell you a little bit of what life
8 is like. You know, the question came up earlier, some
9 people are saying -- I know it came from a supporter of the
10 death penalty who's not here right now but some people are
11 saying that life without parole is worse than death. Let
12 me tell you what life without parole is like for the people
13 in Graterford. I saw it over the last two days. On death
14 row, they're in their cell for 23 hours a day and they do
15 not have contact visits, but even that, by the way,
16 solitary confinement; you heard the phrase "solitary
17 confinement," it's solitary confinement in the sense that
18 it's single-celled. It's not solitary confinement in the
19 sense that you don't talk to other people during the day.
20 The cells are open bars. You can communicate with the
21 mirror. You can talk to the people on either side of you,
22 and during rec you can talk to people, and in fact, death
23 row has a basketball court that I was on yesterday, and it
24 allowed -- two at a time are allowed on that. Most of the
25 people on rec on death row are in single cages, but there

1 is this basketball court.

2 But let me contrast that to the lifer, life for
3 the lifer. Let's talk about a well-behaved lifer, the
4 typical coward who preys on vulnerable victims, who rapes
5 and murders a child and does not get the death penalty and
6 gets instead life in Graterford Prison. What's his life
7 like? Well, if he's well behaved, he's going to be on A
8 and B block. If he's less well behaved, he'll be on C and
9 D block. There are slight differences that I'll go through
10 in just a second, but let me tell you their essential life.
11 You know how much they're out of their cells either working
12 or engaged in playing, in recreation? They are out of
13 their cells essentially from 6:30 in the morning until 9
14 p.m., 6:30 a.m. to 9 p.m. They are either at their jobs,
15 and I went to Industry and I went to the Barber Shop, and
16 in the Barber Shop, I couldn't tell the difference between
17 a Barber Shop and prison, and by the way, they're skilled
18 barbers. They're inmate barbers but they go through a
19 sustained procedure in order to get licensed for it. Or
20 they're in the day room playing cards, playing chess,
21 showering, telephoning 6:30 a.m. to 9 p.m. Now, you ask,
22 you know, are the doors locked? Well, the cell doors on C
23 and D pod, not the honor pod, not A and B pod; by the way
24 which contain hundreds of lifers, let me assure you.
25 They're nothing but an isolated situation. Hundreds of

1 lifers are living there indiscriminately with non-lifers.
2 Guys who commit burglary or guys who commit murder and are
3 sentenced to life are living together under the same
4 conditions. In A and B block, the honor block, they open
5 their own cell doors when they want, and furthermore, they
6 can lock their cell doors for their own safety or to secure
7 their valuables because they don't want anybody coming into
8 their cells so they open and close their doors at will.
9 They are out essentially, except for a few minutes for a
10 couple of counts, they're out essentially from 6:30 a.m. to
11 9 p.m. Then after 9 p.m., you might imagine it's lights
12 out, but no, it's not lights out. It's just they're
13 confined to their cells at that point. They have cable
14 television, which can stay on all night. There's no
15 lights-out policy. You can watch TV all night. I also
16 went to the Commissary where you go once a week with a
17 maximum -- I have it written down, I think it's \$78 a week
18 worth of commissary. The bags, the guys are walking out
19 with these huge bags of goodies from the Commissary. And
20 by the way, for all these guys who are never going to see
21 the light of day including death row, if you never see the
22 light of day on death row, how come the commissary list,
23 which I have here, the death row commissary list because I
24 asked for it because I know what to look for, how come the
25 commissary list includes suntan lotion with an SPF factor

1 of 30 on it for people who never see the light of day? I
2 wonder why you need suntan lotion with an SPF factor of 30.

3 But that's even more so, the volleyball court,
4 which is sand, is also labeled "the beach" where guys hang
5 out and get suntans. I could not believe when I went out
6 on the great yard, the great yard in Graterford is the size
7 of about three football fields. I watched a softball game.
8 There's an A league and a B league. The A league is the
9 equivalent of really good, good softball, and they're into
10 it. During those hours that they're playing softball -- by
11 the way, there's an all-star game. There are guys keeping
12 statistics. There are umpires in uniform. The statistics
13 are posted every month. There are playoffs at the end. So
14 the softball game's going on at a remote corner hundreds of
15 yards away. There's a basketball game, the quality of
16 which was really pretty good going on. There are
17 volleyball games going on. There's bocce going on.
18 There's weight-lifting. There's handball, 6:30 a.m. to 9
19 p.m.

20 Now, some of the time they're at their jobs.
21 Now, in terms of lifers, you know, you might think that
22 those would get the best jobs who committed the least
23 serious crime. It's just the opposite and this is true not
24 just of Pennsylvania. This is true across the board. The
25 people who run Industry would choose to give the lifers the

1 best jobs because they are the most reliable, they are the
2 most dependable, and so they work their way up pretty soon
3 to the best jobs. So ironically, the people who commit the
4 least serious crimes on the outside have the best
5 lifestyles on the inside in Graterford.

6 Now, the Department of Corrections is somewhat
7 remedying that somewhat because of the new Secretary,
8 Secretary Wetzel, is apparently committed very much to
9 rehabilitation and has come to realize that if you allow
10 the best jobs in industry to go to the lifers and they're
11 never getting out, you're not really serving
12 rehabilitation. So the new rule from the Department of
13 Corrections is no more than ten percent of industry may be
14 lifers, thus they're not -- I went to the Weaving Industry
15 yesterday, and the guy in charge of it was saying you know,
16 I wish I could take more lifers but I have way above my
17 quota of ten percent so I can't take some lifers for a
18 while but I look forward to the time when I can and once
19 again have the lifers because they are reliable. By the
20 way, if you're in A block and B block, you can smoke
21 outside. It is a smoke-free facility but you can smoke
22 outside. Oh, not only that, I couldn't believe it. Out in
23 the great yard yesterday there's an ice cream stand and you
24 can buy ice cream. Remember who we're talking about,
25 hundreds of guys who were convicted of murder and spared

1 the death penalty. And the flavors rotate. The flavors
2 yesterday were strawberry shortcake, chocolate chip cookie
3 dough, birthday cake, and banana daiquiri water ice, two
4 scoops for a dollar.

5 So I mean, I could go on and on and on. I guess
6 another thing you might be curious about is, I went to the
7 library to see the kinds of books that the library stocks,
8 and again, I mean, I would be astounded except that I've
9 seen it also in Tennessee and I've seen it in I forgot what
10 other State. Believe it or not, they have a true-crime
11 section, a true-crime section; think about that, in the
12 prison library for convicted murderers. Some of the books
13 available -- these weren't the most popular ones right now
14 because they were on the shelves, they weren't taken out,
15 but I wrote down some of them: A Rip in Heaven, a Memoir
16 of Murder, I Did It: Confessions of a Killer, Death
17 Scholarship, Run at Destruction: A True Fatal Love
18 Triangle, Death Benefit, and the librarian told me that the
19 mafia books are especially popular.

20 So the point about this is, for one, the answer
21 is, is there any way to deter lifers from killing again.
22 The answer is yes there is. There's an easy way, and that
23 is threaten them with the loss of this lifestyle, which is
24 what's going on. There's very little murder going on among
25 lifers. You should not retain the death penalty under the

1 illusion that there is no other way to keep lifers in
2 check. First of all, that's not a retributive -- it's not,
3 in my view, about justice. But second, because the United
4 States Supreme Court has made it clear, and rightfully so,
5 that incapacitation alone cannot constitute a legitimate
6 reason for the death penalty. It must only be deterrence
7 or retribution. We have the ability to construct prisons
8 that will keep us safe and we have the obligation to do
9 that. Lifers can be deterred. I would eliminate the lifer
10 aggravator. There are sets of circumstances in which
11 lifers will kill again inside the prison and I understand
12 and it doesn't make them the worst of the worst. The
13 threats are constant. Take away their privileges and
14 transfer. Do you want to know what the lifers fear,
15 especially most of these guys who are in Graterford who are
16 coming out of Philadelphia? They fear of being transferred
17 to a prison that's nine hours away when their visitors want
18 to visit them. That's the end of visits. They fear being
19 transferred to disciplinary segregation. I forgot. They
20 don't call it disciplinary segregation but it's close to
21 that. There, the lifestyle is pretty grim. It's 23 hours
22 a day. You still can have televisions; you still have
23 radios if you can afford it from the commissary. But
24 again, ironically, the lifestyle in disciplinary
25 segregation, which you can get from illegally possessing

1 cigarettes or smoking in your cell or having other kinds of
2 contraband; I'm not talking about weapons, I'm just talking
3 about drugs, et cetera, the lifestyle to which you will be
4 subjected will be much worse, much harsher than the
5 lifestyle that you will get on death row.

6 So we say let the punishment fit the crime and
7 then we do everything in the administration of the prison
8 system to sever the very connection of the punishment from
9 the crime. We do it through the Mission Statement in the
10 Department of Corrections. We do it in the day-to-day
11 operation of the Department of Corrections.

12 What can you do about it? There's a lot you can
13 do about it. You can take the step that Connecticut took.
14 It abolished the death penalty, and in my view, that was a
15 terrible step, but even as it did it, and it may be partly
16 as the basis of the same kind of testimony that I've given
17 to you here, I gave it to them there after visiting the
18 Connecticut prisons and seeing what life was like, what
19 they did when they abolished the death penalty was enact a
20 provision that says that anybody serving life without
21 parole shall serve their entire sentence in a separate wing
22 or a separate prison under conditions no better than
23 disciplinary segregation, and I would urge you to think
24 about that; that is reserve the worst punishment for the
25 worst crime. Make life without parole something special,

1 something different, something extraordinarily unpleasant
2 but only reserve it for those who don't get the death
3 penalty. That's another thing I urge you and beg you to
4 change and it's ironic that Pennsylvania does not have a
5 separate life sentence and life without parole sentence.
6 It's one sentence. I don't know if you knew that. I
7 didn't know that. All lifers serve life without parole.
8 That's morally indiscriminate. There's a big difference
9 between, and there should be, between life with parole and
10 life without parole. The same kind of sentence, the same
11 day-to-day experience which is the essence of punishment
12 should not be reserved for those who get a few drug deals
13 stacked on top of each other when no one got hurt as it is
14 for those who murder and rape, et cetera. They exist in
15 different moral universes and the experience should be
16 different.

17 So to conclude this, why should you keep the
18 death penalty? You should keep the death penalty for a
19 couple of reasons. Number one, you hear the argument made,
20 well, there would be no difference -- it would be no
21 different if Pennsylvania abolished the death penalty
22 because no one's being executed. It would be a huge
23 difference if Pennsylvania abolished the death penalty. If
24 Pennsylvania abolished the death penalty, those guys on
25 death row go into general population. They're going to be

1 out of their cells from 6:30 a.m. to 9 p.m. playing
2 basketball, playing -- I'm told they play football in the
3 winter. I didn't see that. Playing basketball, playing
4 softball, et cetera, et cetera, et cetera, buying ice
5 cream.

6 Number two, you should retain the death penalty
7 because it serves one other function that nobody talks
8 about. It serves a function of censuring. It is a very
9 important statement on the part of the Commonwealth of
10 Pennsylvania and the juries who give the death penalty that
11 you have committed such a heinous crime that you simply
12 deserve to die. Whether or not we kill you, you deserve to
13 die. That has a certain sting, by the way, for guys who
14 have been condemned to death. I've interviewed now dozens
15 of condemned killers and I probe them about do you remember
16 the moment when the jury sentenced you to die and how did
17 you feel and how do you feel about that now and it bothers
18 them, as it should, but more importantly, it is a statement
19 that we make, we the citizens make about what they deserve.

20 And then finally, there's another reason that
21 nobody talks about, and that's because the United States
22 Supreme Court, three Justices and perhaps four, are just
23 itching to abolish the death penalty on the grounds of it
24 being cruel and unusual. They don't yet have the majority.
25 But their jurisprudence has been evolving standards of

1 decency of a maturing society and the way they measure the
2 evolving standards of decency. So the content of the
3 Eighth Amendment of what constitutes cruel and unusual
4 punishment is a function, to some degree, of public opinion
5 and the way they measure that are by jury verdicts of death
6 and by State legislation. There are 31 States with the
7 death penalty right now. Pennsylvania is one of them. The
8 latest jurisprudence out of the United States Supreme Court
9 is saying it's not just the number of States, it's the
10 direction of change so that now seven States with Nebraska
11 have abolished the death penalty, seven State Legislatures.
12 If Pennsylvania were to join them, it gives added fuel to
13 the United States Supreme Court's jurisprudence that the
14 uniform direction of change is a rejection of the death
15 penalty. Even though your Governor and your Courts may
16 presently be blocking the executions, if you as a
17 Legislature were to abolish the death penalty, you would in
18 fact be undermining the ability of those States whose
19 Governors and Courts are not blocking the death penalty and
20 allowing justice to proceed. You would be significantly
21 aiding the abolitionists on the United States Supreme Court
22 to have the fuel that they need to say look, now
23 Pennsylvania, a leading State, has just joined them and the
24 uniform direction of change is to reject death.

25 So because of justice, because some people

1 deserve it, and because the actual alternative to death as
2 it is presently experienced by those who are murdering is
3 so far outside, so far different from what's deserved, and
4 so clearly supported by the mission statement of the
5 Department of Corrections, which is another thing I urge
6 for you to change and I gave you in the written statement
7 what I think a model correction statement should be, it's
8 your power to do that as the Legislature. But because in
9 terms of the reality, because the worst of the worst of the
10 worst who don't get death are presently experiencing the
11 lifestyle they lead, if nothing else, that's a reason to
12 retain the death penalty. But ultimately, the reason is
13 justice. Some people deserve to die and we, you, the
14 people's Representatives, have the obligation to recognize
15 it and do your best to implement the punishment that's
16 deserved. Thank you.

17 CHAIRMAN PETRARCA: Thank you, Mr. Blecker. I
18 certainly appreciate your testimony. It sounds like maybe
19 you had a better time at SCI Graterford than you're having
20 here with us today.

21 But in Pennsylvania, I don't know, I don't
22 believe we're discussing or that the discussion should be
23 abolishing the death penalty. I think that what's going on
24 is this Governor's asked for a moratorium to wait for a
25 report from the Joint State Government Commission that is

1 due this fall on a number of recommendations relative to a
2 resolution passed by the Senate a few years ago as to where
3 we should go with our death penalty in Pennsylvania. As
4 has been said, many problems, many flaws with that report.

5 Questions from members? Representative Saccone.

6 REPRESENTATIVE SACCONI: Thank you, Chairman.

7 I'm shocked, and I know that people back home will be
8 shocked if I relayed this information to them, and I will
9 relay this information to them. But I want to make sure I
10 got this right. So were you saying that all these
11 privileges, the no-lights-out policy, the opening of the
12 doors at will, the cable television, all those things, that
13 was for people with life sentences, not for people on death
14 row?

15 MR. BLECKER: Correct.

16 REPRESENTATIVE SACCONI: On death row, they are
17 confined 23 hours and ---

18 MR. BLECKER: They are confined 23 hours a day.
19 They are not in solitary. They're singled-celled, by the
20 way, which is another privilege that prisoners want.
21 There's a certain irony. If the solitary is so horrifying,
22 how come they want single cells rather than having a celly?
23 I perhaps spoke too quickly. A and B pods, who are the
24 best behaved, have control over the locks on their doors.
25 C and D pods, who are also out from 6:30 a.m. to 9 p.m. --

1 by the way, death row has no lights-out policy and is
2 allowed to have televisions all night also. But C and D
3 pods do not control the locks on their cells. All cells
4 are opened at the same time when the officers open them and
5 they're all closed at the same time. A and B, which
6 include hundreds of lifers, have control over their cells
7 from 6:30 a.m. They can lock their cells at any time.
8 They can unlock their cells at any time, other than count.
9 When they have to be in their cells at count, they have to
10 be in their cells at count, but that's very brief during
11 the day.

12 REPRESENTATIVE SACCONI: Could you document this
13 for our Committee saying, you know, people on death row get
14 these privileges; people that are lifers get these
15 privileges so that I can compare them? Because I was
16 taking notes but I want to make sure I get it accurate.

17 MR. BLECKER: Sure. There are probably documents
18 that reflect that from the Department of Corrections.

19 REPRESENTATIVE SACCONI: Okay.

20 MR. BLECKER: I'm not ---

21 REPRESENTATIVE SACCONI: But I was fascinated by
22 your testimony. If you could give that to us, I would
23 really appreciate it.

24 MR. BLECKER: By the way, one last point.

25 CHAIRMAN PETRARCA: One point.

1 MR. DYMEK: If I can just note, this is recorded.
2 You know, the feed's going to be made available and we're
3 going to be transcribing all this testimony, so it will be
4 available.

5 MR. BLECKER: Oh, good. I appreciate that. One
6 last note. In terms of solitary confinement, you hear
7 about Death Row Syndrome. Solitary confinement -- well, I
8 might have mentioned briefly again unlike disciplinary
9 segregation, these guys can talk to the people on either
10 side of them and even a couple of cells down. Beyond that,
11 roughly 90 days a year, you can be a janitor on death row,
12 which means that you're cleaning up the corridor. You
13 don't go outside the row but you're cleaning up the
14 corridor on the row, and I watched it happen and it's not
15 stopped, and while you're doing that for those 90 days, you
16 have interaction with everybody on your corridor so you can
17 have conversations as you go down and mop and clean. So
18 again, this notion that it's 23 hours a day; they never
19 speak to anybody else; it's solitary confinement and so
20 they go mad is simply not the truth. It is not the actual
21 experience on the row.

22 REPRESENTATIVE SACCONI: Okay. I know we've
23 taken some tours before but I would love to go see ---

24 MR. BLECKER: Secretary, I mean you should do it.
25 You're the Legislature. I was just allowed as an expert

1 visitor. You're the Legislature. It's more vital that you
2 see what I've seen and not just get the hour-and-a-half
3 tour ---

4 REPRESENTATIVE SACCONI: Yes.

5 MR. BLECKER: --- and remove. Go down there. Go
6 into the bows of the prison. Go out on the great field and
7 sit there, as I did, for an hour or stand there for an hour
8 and really soak it up and get the ambience of it.

9 REPRESENTATIVE SACCONI: Thank you, sir.

10 CHAIRMAN PETRARCA: Thank you, Representative
11 Sacconi. I too would maybe -- again, appreciate your
12 comments. I'd maybe like to hear what the Department of
13 Corrections has to say about your testimony.
14 Representative Stephens for questions.

15 REPRESENTATIVE STEPHENS: Thank you, Mr.
16 Chairman. Thank you so much for your testimony. I got to
17 tell you, I couldn't write fast enough, so fortunately we
18 have a transcript to go off of.

19 Your testimony is particularly relevant. I know
20 you're here talking about the death penalty. Next week
21 we're going to be considering legislation about the fact
22 that many of those folks who are enjoying all those items
23 from the commissary owe restitution to victims that haven't
24 been made whole yet, yet they're shelling out money at the
25 commissary to get themselves TVs. You mentioned \$78 a

1 week, and I missed what that was.

2 MR. BLECKER: I have my notes from yesterday. I
3 can tell you exactly. I know when that came up. That came
4 up when I visited the Commissary, which was the last place,
5 one of the last places I went to and I asked the person in
6 charge of the Commissary how much they were allowed to
7 have. Here it is. I'm sorry. Let me correct that
8 statement: \$74.90 per week. Sorry.

9 REPRESENTATIVE STEPHENS: So that's the maximum
10 they're allowed to spend?

11 MR. BLECKER: Correct. \$74.90 per week. Same
12 limits of death row, I have in my notes, on the commissary.

13 REPRESENTATIVE STEPHENS: So ---

14 MR. BLECKER: --- I have the commissary list, by
15 the way, for death row if you want to see it.

16 REPRESENTATIVE STEPHENS: I have the general
17 commissary list. I don't know if it's different.

18 MR. BLECKER: It's slightly different.

19 REPRESENTATIVE STEPHENS: It's much smaller
20 because the one I have is pretty voluminous.

21 MR. BLECKER: Yes, this is it. This is the
22 commissary list for the male capital offenders right here.
23 It's voluminous, pages and pages, 14 pages of items.

24 REPRESENTATIVE STEPHENS: And they have the
25 leisure items, poker chips, chess, cards. That's all

1 right. You don't have to look.

2 MR. BLECKER: I haven't yet focused on it.
3 That's just material I got yesterday. I was focused on the
4 actual life inside, making the most of those two days
5 inside Graterford.

6 REPRESENTATIVE STEPHENS: Sure. Look, I
7 appreciate your testimony. In particular, I had a question
8 about your discussion regarding the aggravating factors,
9 and as it related to ---

10 MR. BLECKER: By the way, that is in the written
11 statement.

12 REPRESENTATIVE STEPHENS: Yes, and I -- now, Of
13 course, now I lost my train of thought. But talk to me --
14 okay. So I know that, at least I think, under our
15 statutes, punishment is one of the goals of sentencing.

16 MR. BLECKER: No, it is not.

17 REPRESENTATIVE STEPHENS: I'm not talking about
18 DOC regs. I'm talking about our statutes.

19 MR. BLECKER: Oh, I'm sorry.

20 REPRESENTATIVE STEPHENS: I feel like it's either
21 our statutes or our Court Rules, because I was a prosecutor
22 and I feel like I remember many a time arguing it and a
23 Judge referencing it and I just wonder, I didn't know if
24 you had a chance to look through our statutes too or
25 whether you were just referencing a DOC reg.

1 MR. BLECKER: It's not so much a reg. It's the
2 Mission Statement ---

3 REPRESENTATIVE STEPHENS: Okay.

4 MR. BLECKER: --- which is relevantly similar to
5 every Mission Statement of every Department of Corrections
6 in the United States.

7 REPRESENTATIVE STEPHENS: Okay.

8 MR. BLECKER: The actual Mission Statement is as
9 follows. This is Pennsylvania's Department of Corrections'
10 Mission Statement on their website. "Our mission is to
11 reduce criminal behavior by providing individualized
12 treatment and education to offenders resulting in
13 successful community reintegration through accountability
14 and positive change.

15 Now, I'm all for rehabilitation for those who are
16 going out, which is another reason why I urge you to re-
17 think that all lifers should be life without parole. They
18 should not be. Some lifers should go out. But many
19 shouldn't. For those who shouldn't, this mission is
20 perverse. It's irrelevant. But I mean, it's even more
21 deeply and generally perverse because again, we say let the
22 punishment fit the crime but in the actual experience of
23 it, Corrections does everything they can to sever it, not
24 because they want to but because it makes sense.

25 Look, the Warden's Assistant said it best in one

1 sentence when I asked her, you know, on death row in
2 Oklahoma, and I asked her, you know what these guys did?
3 Yes. And you see the lifestyles they're leading? Yes.
4 How do you feel about that? And she said we make it easy
5 for them because it's easy for us when it's easy for them.
6 That's it in a nutshell.

7 REPRESENTATIVE STEPHENS: Sure.

8 MR. BLECKER: They want to go home at night, and
9 I understand that.

10 REPRESENTATIVE STEPHENS: Right.

11 MR. BLECKER: There were five officers for six
12 unarmed officers. We sat there and we walked around; five
13 unarmed officers inside with 600 prisoners who have access
14 to them at any time they want.

15 REPRESENTATIVE STEPHENS: Right.

16 MR. BLECKER: They sit in what's called the
17 bubble, this little room, and then they walk around in the
18 day room, 600 guys, 600 prisoners of whom hundreds are
19 lifers, five unarmed officers walking among them. Well,
20 what do you think keeps them alive?

21 REPRESENTATIVE STEPHENS: Sure. And look, I've
22 been to Graterford many times voluntarily. I was always
23 able to leave when I wanted in my life as a prosecutor, but
24 let me ask you this. In your research, have you found any
25 type of correlation between safety for the officers and

1 this leisurely lifestyle that these folks lead? Because
2 that is obviously I think a concern for most of us. We
3 certainly don't want our officers in harm's way.

4 MR. BLECKER: Yes, and that should be -- yes, I
5 do think there is a correlation and that should be
6 acknowledged, which is if you in fact do revise your
7 punishment system, you will make it less safe for
8 corrections officers. It's a price you're going to have to
9 be willing to pay for justice on the margin and/or you're
10 going to have to spend more money on corrections and/or
11 you're going to have to redesign your prisons.

12 REPRESENTATIVE STEPHENS: So and I guess that's
13 the point. More manpower might be able to offset that
14 safety issue.

15 MR. BLECKER: If you have 12 officers instead of
16 five in the bubble among 600 guys, how are you going to
17 stop them?

18 REPRESENTATIVE STEPHENS: Sure.

19 MR. BLECKER: Unarmed officers, let me add.
20 Unarmed.

21 REPRESENTATIVE STEPHENS: And we heard a little
22 bit of testimony earlier about this Rand study. Are you
23 familiar with that at all?

24 MR. BLECKER: No, I'm not. I don't know which
25 one they're talking about.

1 REPRESENTATIVE STEPHENS: I mean and this is a
2 little off from your testimony, but have you done any
3 research into cost savings that might be available through
4 better representation of defendants charged with murder?

5 MR. BLECKER: Not an expert.

6 REPRESENTATIVE STEPHENS: Okay.

7 MR. BLECKER: Can't intelligently comment.

8 REPRESENTATIVE STEPENS: All right.

9 MR. BLECKER: I can talk about race if you want
10 to go into it but I'm not an expert.

11 REPRESENTATIVE STEPHENS: Well, maybe I'll follow
12 up with you on that because I'm very interested in it but I
13 know the Chairman wants to move us along, but I could
14 follow up. Is that okay if I follow up on that?

15 MR. BLECKER: Sure.

16 REPRESENTATIVE STEPHENS: Thank you very much. I
17 appreciate it.

18 CHAIRMAN PETRARCA: Thank you, Representative
19 Stephens. We're talking about the moratorium in
20 Pennsylvania on the death penalty, as I said earlier ---

21 MR. BLECKER: Yes.

22 CHAIRMAN PETRARCA: --- until this study is
23 released or received, and we have a new Governor in
24 Pennsylvania who has been on the job let's say for six
25 months. These situations that you're talking about or the

1 lifestyle that you're referring to at Graterford, that is
2 in no way related to this new Administration or the
3 moratorium that you know of is it?

4 MR. BLECKER: No, it is not. This is a
5 longstanding thing. A word about the moratorium, because I
6 understand it, and I saw on the news about criticism of the
7 Legislature on the grounds that the Legislature was taking
8 a position that what the Governor did was unconstitutional
9 and some commentators say well, it's not for the
10 Legislature to talk about unconstitutionality. I teach
11 constitutional history as well as constitutional law so I
12 feel qualified to say that that's absolutely wrong. The
13 Legislature is very much a legitimate branch to be
14 discussing the constitutionality of its coordinate branches
15 as well as its own behavior and the other thing I would say
16 is I think it's very important and very fine that what
17 Pennsylvania has done in censuring the Governor is a
18 nonpartisan move, that it's a majority that includes
19 Democrats and Republicans and that it should not be
20 partisan. The death penalty should never be a partisan
21 issue and so it doesn't upset me that Nebraska, a
22 conservative Republican State, would be the one to abolish
23 it because that then moves the focus away from partisan
24 politics, although that's an unusual alliance there to what
25 it should be, which is justice and criminal justice system.

1 CHAIRMAN PETRARCA: Yes, and certainly members of
2 the Legislature have opinions on both sides of that
3 question.

4 MR. BLECKER: From both parties.

5 CHAIRMAN PETRARCA: Correct. Follow-up question,
6 Representative Saccone?

7 REPRESENTATIVE SACCONI: Yes. Thank you for
8 indulging me, Chairman. I just want to know, in the
9 Commissary when they can spend this money, that's 300 bucks
10 a month basically, are the prices ---

11 MR. BLECKER: \$74 ---

12 REPRESENTATIVE SACCONI: --- discounted prices
13 and is it tax-free? I imagine they don't charge any tax in
14 the prison on these things, right?

15 MR. BLECKER: No, that's -- but to be fair, if
16 their income is a function only of their work, let's know
17 what they're getting paid. The highest payment, the
18 greatest payment in the barber shop for the licensed
19 barbers is 51 cents an hour. In Industry, and this is one
20 of the premier jobs, it was 41 cents an hour. So they're
21 getting paid. If the income comes only from their jobs in
22 the prison, it's relatively meager. On the other hand, I'm
23 just reading arbitrarily the first page; soups, ramen
24 noodles, beef-flavored, three ounces, 28 cents price, non-
25 dairy creamer, 8 ounces, \$1, granulated sugar, 12 ounces,

1 \$1. So I don't know. A granola bar is eight packs ---

2 REPRESENTATIVE SACCONI: Okay. I get you. But
3 they're not given \$75 a week to spend. They have to earn
4 it?

5 MR. BLECKER: No, no, no. I'm sorry. That
6 should be ---

7 REPRESENTATIVE SACCONI: That's the maximum that
8 they have to earn?

9 MR. BLECKER: Absolutely.

10 REPRESENTATIVE SACCONI: Okay. I just want to
11 make sure I get it right.

12 MR. BLECKER: Or bring in from the outside.

13 REPRESENTATIVE SACCONI: Or bring in from the
14 outside? Okay. Thank you very much.

15 CHAIRMAN PETRARCA: Representative Stephens,
16 follow-up question, then Representative Barbin.

17 REPRESENTATIVE STEPHENS: Just to follow up on
18 that point. So my understanding is, though, general
19 population inmates, if they make themselves available for
20 the work pool are paid just for being available for the
21 work pool even if they might not work. Are you familiar
22 with that program at all ---

23 MR. BLECKER: No, I'm not.

24 REPRESENTATIVES STEPHENS: --- when it applies to
25 lifers?

1 MR. BLECKER: I'm not.

2 REPRESENTATIVE STEPHENS: Okay. All right.

3 MR. BLECKER: That would surprise me.

4 REPRESENTATIVE STEPHENS: Well, the only reason I
5 know about it is, some guys from the State were addressing
6 some concerns in our county jail and their complaint was
7 they're not getting their stipend while they're in the
8 county jail because -- and so when I looked into it, the
9 stipend was if you make yourself available for work, even
10 if you aren't necessarily going to work but you're
11 available for work, you receive a stipend in our State
12 prison and I wasn't sure if that applied to lifers or not,
13 but I can check with DOC on that.

14 MR. BLECKER: That surprises me. I mean, it's
15 contrary to an inference I made, though. No one
16 specifically said that you were right or wrong on that but
17 I inferred that that would not be ---

18 REPRESENTATIVE STEPHENS: Okay.

19 MR. BLECKER: --- the case because they were
20 talking about guys wanting jobs who weren't getting them,
21 and the reason they were wanting the jobs was to get the
22 money to get the commissary, and the irony was that the
23 guys who had the jobs are often the worst criminals ---

24 REPRESENTATIVE STEPHENS: Right.

25 MR. BLECKER: --- who had the best jobs. So it

1 was ---

2 REPRESENTATIVE STEPHENS: Well, they get paid
3 more money by actually working than being available for
4 work but they are nonetheless paid for being available for
5 working ---

6 MR. BLECKER: I never thought to ask that.

7 REPRESENTATIVE STEPHENS: --- in the work pool.

8 MR. BLECKER: It never came up and I never
9 thought to ask that.

10 REPRESENTATIVE STEPHENS: Thank you.

11 CHAIRMAN PETRARCA: Representative Barbin.

12 REPRESENTATIVE BARBIN: Thank you. My question
13 goes to what other States that aren't operating like us
14 would be ones to take a look at? Because I agree with you
15 that if the death penalty's going to be justified on safety
16 and censure, but if you move to a system that says all
17 right, we're going to look at the life without parole
18 separately from a life term, and where should I be looking?
19 Who has a system of corrections that also has this separate
20 category for the people that somehow escape the death
21 penalty sentence but really shouldn't be with other people?

22 MR. BLECKER: Only Connecticut, to the best of my
23 knowledge, when they abolished the death penalty.

24 By the way, just to correct something you said.
25 I hope I didn't leave the impression, I am not in favor of

1 the death penalty on the grounds of safety. I am in favor
2 of the death penalty only on the grounds of justice.

3 REPRESENTATIVE BARBIN: All right. So your ---

4 MR. BLECKER: And censure. You're right about
5 censure.

6 REPRESENTATIVE BARBIN: So justice is, there's a
7 very narrow group of people ---

8 MR. BLECKER: Who deserve it.

9 REPRESENTATIVE BARBIN: --- who should go to --
10 all right. That would be Manson and ---

11 MR. BLECKER: Oh, well ---

12 REPRESENTATIVE BARBIN: --- whoever else met that
13 particular -- and I guess the other question I would have
14 is that when you're trying to make these decisions and
15 you're trying to get who is the really absolute worst and
16 who's the next absolute worst so you get this second
17 category for life without parole as a separate group,
18 should the aggravating or mitigating circumstances that we
19 have be the model that's attached in your Appendix or
20 should there be something different for the life without
21 parole than there is for, you know, the people that are
22 entitled to the death penalty but they're going to go
23 through a process?

24 MR. BLECKER: That's a very good question. My
25 view is that life without parole, and it should be if it's

1 done right, should be such a severe sentence that it should
2 require all the due process, super due process, that the
3 death penalty presently requires; that there should be a
4 separate penalty phase and a guilt phase. You can't do it
5 now where all life is life without parole but that it
6 should be a very special sentence. I mean, it's funny
7 because those who are against us retributivists for whom
8 the past counts and accounts independently of future
9 benefits and say abolish the death penalty and instead
10 embrace life without parole don't realize that life without
11 parole is a fundamentally retributive sentence because what
12 it says is no matter how much you mature, no matter how
13 much you acquire skills and values that enable you to
14 become a productive member of society, no matter how much
15 you may feel legitimate and genuine remorse about what
16 you've done, we so commit ourselves at this moment forever
17 keeping you imprisoned. We will never revisit, we will
18 never reconsider because the past will count perpetually.
19 That is essentially a retributive sentence.

20 So if you're going to reject retribution, then
21 you should be rejecting life without parole as an
22 alternative sentence. That's why this slippery-slope
23 argument I heard before I think is genuine. The ACLU, for
24 example, when I've confronted them in public discussion, if
25 they abolish the death penalty, will you then also now next

1 oppose life without parole have implicitly conceded that
2 yes, they will, and you hear that we should follow Europe's
3 lead, let's not forget that Europe has abolished not only
4 the death penalty, and that's the Governments of Europe;
5 the people still support it in most European countries,
6 they have not only abolished the death penalty, they've
7 abolished life without parole. They've abolished life in
8 prison as well as death.

9 REPRESENTATIVE BARBIN: All right. And does any
10 other State, including Connecticut, have a C and D category
11 where they're separate from -- right now, our life without
12 parole allows people to be basically general population
13 prisoners. Does any State have a category that keeps the
14 life without parole prisoners in a more restrictive
15 setting?

16 MR. BLECKER: Not to the best of my knowledge.

17 REPRESENTATIVE BARBIN: All right. Thank you,
18 and I appreciate your non-political correct answers.

19 CHAIRMAN PETRARCA: Thank you, Professor. I
20 appreciate your time and testimony. Our final testifier is
21 Kathleen Lucas speaking on behalf of Pennsylvanians for
22 Alternatives to the Death Penalty.

23 MS. LUCAS: Good afternoon. It's been a long
24 day, and I hear they're having a party outside and they
25 didn't invite us.

1 Thank you very much for allowing us to talk about
2 this issue. Before I go any further, I just want to
3 acknowledge that there are two people from law enforcement
4 that I just want to point out to you in case anybody would
5 like to speak with them afterwards. Over here to the far
6 right is David Scott. He's a retired Deputy Police Chief.
7 And over here in the second row is David Rose, who had a
8 34-year career in Corrections.

9 As you've heard, not all victims' families feel
10 the same way. They don't feel the same way about how the
11 death penalty does or does not impact their healing
12 process. They don't agree whether it means justice for
13 their families. Not all members of law enforcement feel
14 the same way. Not all prosecutors and juries feel the same
15 way.

16 Under Pennsylvania law, a reasonable doubt is
17 doubt that would cause a person of ordinary sensibility to
18 hesitate or pause before acting in a matter of great
19 concern. There is no matter of greater concern than the
20 State taking the life of one of its citizens. And when you
21 look closely at the problems of Pennsylvania's death
22 penalty, that should certainly give you pause.

23 In the 35-year history of Pennsylvania's death
24 penalty, when over 400 people have been sentenced to death
25 and more than 250 of those sentences have been reversed,

1 when the single most likely outcome of a public policy is
2 that the decision will be reversed, that should give you
3 pause.

4 In the 35-year history of Pennsylvania's death
5 penalty, Governors have signed 434 death warrants. Only
6 three have actually been carried out.

7 When a policy fails to do its job over 99 percent
8 of the time, that should give you pause. When the Capital
9 Jury Project supported by the National Science Foundation
10 interviewed jurors who had served in Pennsylvania death
11 penalty cases, the project found that 98.6 percent of them
12 misunderstood the jury instructions they were given and did
13 so in a manner that was harmful to a capital defendant.
14 When jurors who hold the power of life and death are so
15 greatly misinformed, that should give you pause.

16 Pennsylvania has exonerated six men from death
17 row. Other death row inmates are currently pursuing
18 serious claims of innocence. When by conservative
19 estimates 4 percent of people who are sentenced to death
20 nationwide are in fact innocent and then therefore there
21 are serious doubts of the system's ability to protect the
22 lives of the innocent, that should give you pause.

23 One fact has become clear, and that is that the
24 single greatest safeguard against unconstitutional or
25 mistaken death sentences is quality defense representation.

1 When Pennsylvania remains the only State in the country
2 that has the death penalty while providing no State funding
3 for indigent defense in any stage of the proceedings, that
4 should give you pause.

5 DNA cases nationwide have demonstrated that
6 eyewitness identification is unreliable, that confessions
7 may be false or fabricated, that so-called scientific
8 evidence may be junk or unreliable, that prison informants
9 may lie, that police and prosecutors may misbehave, when a
10 person's life is at stake, that should give you pause.

11 It's important to understand that DNA is not the
12 panacea we would hope. DNA evidence is unavailable in the
13 overwhelming majority of homicide cases, leaving the
14 possibility of executing an innocent person uncomfortably
15 high.

16 Finally, let me draw your attention to an event
17 that occurred in Texas just a few days ago. Alfred Dwayne
18 Brown was exonerated after spending ten years on death row.
19 That brings the national number of death row exonerees to a
20 stunning 154 and six of them happened right here in
21 Pennsylvania. Regardless of our individual opinions on the
22 death penalty itself, we all agree that we want our
23 criminal justice system to treat everyone equally
24 regardless of race, geography, socioeconomic status, and
25 other factors. In short, we want it to be fair. Numerous

1 studies have demonstrated that our current system is
2 anything but. Pennsylvanians care about fairness.

3 This is not about Hubert Michael and Terry
4 Williams, their heinous crimes, or about the loved ones of
5 their victims. This is about a deeply flawed system that
6 has the very real potential to take innocent lives.

7 I urge you, the people we have elected and
8 entrusted with protecting the public good, to exercise that
9 responsibility by making decisions based on facts, not
10 opinions. The results of the ongoing study on capital
11 punishment will provide important additional data. We must
12 not continue to follow the path that we know has resulted
13 in so many mistakes. Rather, we must err on the side of
14 caution. Thank you.

15 CHAIRMAN PETRARCA: Thank you, Ms. Lucas.

16 Questions from members? Representative Saccone.

17 REPRESENTATIVE SACCONI: Yes, and thank you, and
18 thank you for coming before us today. Of course, I don't
19 know anyone that wants to execute an innocent person, so
20 but I just want to ask you in the cases that we're
21 absolutely sure, the guy comes into the McDonald's, he's
22 shooting the place up, we wrestle him to the ground, we
23 take him off, we try him, he gets the death penalty. Are
24 you okay with the death penalty in those cases?

25 MS. LUCAS: No, I'm opposed to the death penalty.

1 REPRESENTATIVE SACCONI: You're totally opposed
2 to the death penalty?

3 MS. LUCAS: PADP is a single-issue organization
4 and we are opposed to the death penalty.

5 REPRESENTATIVE SACCONI: Okay. Yes, I just
6 wanted to make sure of that. It wasn't because of the
7 possibility of executing an innocent person because when
8 we're sure that aren't innocent ---

9 MS. LUCAS: It's for multiple reasons. That's
10 one of them but ---

11 REPRESENTATIVE SACCONI: Okay.

12 MS. LUCAS: Yes.

13 REPRESENTATIVE SACCONI: All right. Well, thank
14 you very much for that.

15 CHAIRMAN PETRARCA: Thank you, Representative.
16 We heard the Professor talk about situations of life with
17 parole, life without parole. Do you have an opinion on
18 sentences of that nature?

19 MS. LUCAS: My understanding is that currently in
20 Pennsylvania, life without the possibility of parole really
21 is life without the possibility of parole and that when
22 that's your sentence, there is no opportunity to be
23 released from prison. I don't have an opinion on that. My
24 issue is really around the death penalty.

25 CHAIRMAN PETRARCA: Okay. Thank you very much.

1 And seeing no further questions, I would note for
2 the record that the Committee has received testimony from a
3 number of individuals and organizations, and as is the
4 policy, I believe, of this Committee, we will leave the
5 record open for any additional written testimony.

6 With that, this hearing is adjourned. Thank you.

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8 (The hearing concluded at 1:15 p.m.)
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