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102 EM 2018

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 102 EM 2018 & 103 EM 2018

JERMONT COX and KEVIN MARINELLI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent.

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AND AMERICAN CIVIL LIBERTIES UNION CAPITAL PUNISHMENT PROJECT IN SUPPORT OF PETITIONERS

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Founded in 1920, the American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Pennsylvania is its state affiliate.

The ACLU opposes the death penalty and is greatly concerned by its arbitrary and discriminatory application in Pennsylvania.

INTRODUCTION

In Pennsylvania, the death penalty has not been imposed upon those who have committed "a narrow category of the most serious crimes" and are "the most deserving of execution," *Roper v. Simmons*, 543 U.S. 551, 568 (2005), but rather upon those who have received the worst representation. The ills that afflict the indigent capital defense system in Pennsylvania have been studied and documented exhaustively since Pennsylvania's reinstatement of the death penalty in 1978, including by a committee of this Court and most recently by a Joint State Government Commission of the General Assembly. Each review, considering the death penalty as a whole, has made reform of indigent representation in capital cases a central focus of its recommendations. Yet despite these decades of exhaustive analysis, Pennsylvania has taken only minimal steps towards defense reform – steps that have been wholly insufficient in tackling the crisis in the state's quality of representation. This, of course, is no secret to the members of this Court. Chief Justice Saylor observed several years ago that Pennsylvania's capital defense system "remains in sore need of improvement for the system to work properly." Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 Widener L. J. 1, 4 (2013). These concerns remain today.

All indigent people facing the death penalty are entitled to counsel – and the effective assistance of counsel – under the state and federal constitutions. *Powell v. Alabama*; 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Com. v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987). Pennsylvania has never successfully implemented these constitutional mandates. Among other reasons discussed below, Pennsylvania stands alone in the country in its failure to provide any statewide funding or accountability for representation to poor people facing the death penalty. This system relegates the funding of indigent defense entirely to the counties, resulting in extreme variances in the quality of representation in capital cases across and within counties. These county-level funding schemes have produced the greatest disparities in intra-county death sentencing seen in the entire United States. The results of this under-resourced system show that you get what you pay for: over one-third of the capital sentences imposed in Pennsylvania since reinstatement have been reversed on the basis of poor lawyering alone. Many more cases have been reversed on other grounds in which poor lawyering undoubtedly played a part.

The imposition of capital punishment in the United States rests on a constitutional foundation that demands that the death penalty is applied in a manner free from arbitrariness and discrimination. *Gregg v. Georgia*, 428 U.S.

153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). This right is guaranteed by the Pennsylvania Constitution, which more broadly than its federal counterpart prohibits the imposition of cruel punishments. Pa. Const. art. I, § 13.

Despite decades of scrutiny and recommendations for improvement, Pennsylvania has failed to bring systemic reform to indigent capital representation. Pennsylvania is left with an undeniably broken system, resulting in the arbitrary and discriminatory imposition of the death penalty that can no longer pass constitutional muster. This Court cannot fix through individual cases the underlying systemic flaws in indigent capital representation in Pennsylvania, but it can halt – finally – the devastation that this broken system has caused. This Court should exercise its King's Bench or extraordinary jurisdiction and hold that Pennsylvania's capital punishment system as applied stands in violation of the state constitution.

ARGUMENT

I. Pennsylvania fails to provide constitutionally adequate resources to indigent capital defendants.

All people facing the death penalty are entitled to the effective assistance of counsel under the state and federal constitutions. Pa. Const. art. I, § 9; U.S. Const. amend. VI; *Gideon*, 372 U.S. 335; *Strickland*, 466 U.S. at 687; *Pierce*, 527 A.2d at 975-76. Underpinning this constitutional obligation is the uncontroversial

recognition that competent counsel must serve "as an essential procedural safeguard to the fair and just administration of the death penalty." Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Syst., Final Report 210 (2003) ("Committee"). Almost all of the people who have faced the death penalty in Pennsylvania are poor and cannot afford representation. *See* Am. Bar Ass'n., Evaluating Fairness & Accuracy in State Death Penalty Syss.: The Pa. Death Penalty Assessment Rep. 112 (2007) ("ABA").

Across the country and in Pennsylvania, the quality of an attorney's representation in a capital case can literally mean the difference between life and death. Pennsylvania's indigent capital defense system has not served as the safeguard the constitution demands it must be. Pennsylvania's condemned prisoners have not received the death penalty for committing the most heinous crimes or for being the most culpable offenders, but because they had deplorable representation. *See generally* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994). A nationwide study "show[ed] definitively that poor representation has been a major cause of serious errors in capital cases." ABA, at 112 (citing James Liebman et al., *A Broken System: Error Rates in Capital Cases*, 1973-1995 (2000)). Indeed, the Liebman study found that across the country, "egregiously incompetent defense lawyers who didn't even look for – and demonstrably missed

– important evidence that the defendant was innocent or did not deserve to die" was the most frequent error resulting in reversal. *Id.* at ii, 5. Pennsylvania assessments at the state and local level echo these conclusions. A study of Philadelphia homicides over an 11-year period (1994-2005), for instance, found that the quality of defense counsel made an "enormous difference" in case outcomes. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L. J. 154, 159-60 (2012).

After years of reviewing death penalty appeals on the United States Supreme Court, Justice Ruth Bader Ginsburg observed, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial . . . . People who are well represented at trial do not get the death penalty." *Justice Backs Death Penalty Freeze*, CBSnews.com, April. 10, 2001.[1] Justice Sandra Day O'Connor, after decades on the Court, similarly observed that the quality of lawyering varied greatly if a client had court-appointed counsel versus retained counsel, and noted that in Texas a capital defendant was 44% more likely to be sentenced to death if he was indigent. *See* Associated Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001. She added, "Perhaps it's time to look at minimum standards

[1] https://www.cbsnews.com/news/justice-backs-death-penalty-freeze/.

for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." *Id.* Systemic concerns with the quality of representation were also among the reasons motivating the American Law Institute's decision in 2009 to remove capital punishment from the Model Penal Code, on which Pennsylvania's statute is based. *See* American Law Institute, *Report of the Council to the Membership on the Matter of the Death Penalty* 5 (Apr. 15, 2009) ("ALI Report")[2] ("[T]he enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate.").

Pennsylvania has done much looking, as Justice O'Connor suggested, but has failed to take the necessary steps to remedy the grave problems with its quality of capital representation. Over decades, numerous bodies have undertaken comprehensive reviews of Pennsylvania's death penalty system. Among them, a joint Task Force of this Court and the Third Judicial Circuit of the United States convened in 1990 to study the state's death penalty system; the Committee on Racial and Gender Bias in the Justice System, appointed by this Court in 1999, published findings, including on indigent capital defense, in 2003; the American Bar Association published an assessment of Pennsylvania's death penalty in 2007;

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[2] https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

and most recently, a Joint State Government Commission of the General Assembly released its findings last year.[3] *See also Com. v. McGarrell*, 87 A.3d 809, 810 (Pa. 2014) (Saylor, J., dissenting) ("Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the *ad hoc* fashion by which indigent defense services are funded from the local government level.").

Each of these institutions has reached similar conclusions and offered similar recommendations, to little effect, as will be discussed further below.

A. Indigent capital defense in Pennsylvania is systematically under-resourced.

Unfortunately, the "history of capital representation in Pennsylvania is a history of the death penalty administered on the cheap." Testimony of Robert Dunham, Executive Director, Death Penalty Information Center, Concerning the Death Penalty: Hearing Before the H.R. Judiciary Comm. (June 11, 2015).[4]

Pennsylvania has no statewide mechanism for the appointment of counsel in capital cases. Appointments occur exclusively at the county level. Predictably, in

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[3] Joint Task Force on Death Penalty Litigation in Pennsylvania, Report (1990) ("Task Force"); Committee, *supra*; ABA, *supra*; Joint State Gov't Comm'n, *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Comm.* (June 2018) ("JSGC").

[4] https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2015_0113_0013_TSTMNY.pdf.

this patchwork system, the methods of appointment vary across counties. In many counties, for instance, the county's public defender (including, sometimes, a part-time public defender) represents the capital defendant. In others, the judge hearing the case, or in some instances a Criminal Administrative Judge, appoints an attorney from the private bar, with the attorney paid a flat rate or an hourly rate, and often with a fee cap. *See* ABA, at 116. Philadelphia County has its own hybrid system. There, a non-profit organization, the Defender Association of Philadelphia, handles 20% of the indigent homicide cases, while judges assign the remaining 80% to private attorneys, based on a rotating assignment wheel. Pennsylvania is also the only remaining state in the country that fails to provide any state money towards indigent capital representation. *See Kuren v. Luzerne Cnty.*, 146 A.3d 715, 749 (Pa. 2016). Each county must fully fund its own indigent defense. ABA, at 114. "In every other state, the state itself either funds a statewide public defender program or contributes to the costs of county public defender programs." Anderson & Heaton at 160. Likewise, Pennsylvania "does not provide any statewide oversight of indigent defense systems." Committee, at 164.

As a consequence, there are vast discrepancies in funding structures, appointment practices, and monitoring of counsel's performance across counties – and often within counties. *See, e.g.,* ABA, at 114 (noting the stark differences in indigent defense budgets of Allegheny, Dauphin, and Butler counties). It is no

surprise, then, that the quality of representation afforded capital defendants produces extreme variances across the state. *See Kuren*, 146 A.3d at 749 ("This funding structure necessarily leads to variations in the availability and quality of indigent representation from one county to the next.").

Due to the complex law and proceedings, and the comprehensive investigation required to prepare for a possible penalty phase, competent death penalty representation requires specialized skill and knowledge, hundreds (if not thousands) of hours of preparation, and extensive resources. *See McFarland v. Scott*, 512 U.S. 1256, 1257-58 (1994) (Blackmun, J., dissenting from denial of certiorari); Committee, at 210; ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 986-987 (2003) ("ABA Guidelines"). "Indeed, it is no secret that capital cases are more time-consuming and expensive than non-capital cases." *Com v. Sanchez*, 36 A.3d 24, 80 (Pa. 2011) (Melvin, J., concurring and dissenting, joined by Todd, J.). *See also* Saylor, 23 Widener L.J. at 20 (citing *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) and *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

The federal funding system provides a stark contrast to Pennsylvania's. In federal death penalty proceedings, on average, attorneys spent 353 in-court hours and 2,373 out-of-court hours on death penalty cases that proceeded to trial, in the period between 1998 and 2004. Jon B. Gould & Lisa Greenman, Report to the

Committee on Defender Services (Sept. 2010).[5] Attorneys at the time were paid the federal rate of $125/hour for all of their work, whether in court or out. *Id.* The current federal rate for attorneys representing defendants in death penalty cases is $188/hour. *See, e.g.*, Criminal Justice Act, *Pay Chart: Hourly Rates, Mileage Rates, & Compensation Maximums*.[6] Federal judges are generally satisfied with the quality of representation before them. Gould & Greenman, at 56. *Cf. Com. v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring specially) ("we have seen more than enough instances of deficient stewardship to raise very serious questions concerning the … accuracy" of any presumption of counsel effectiveness in capital cases); *Com. v. McGarrell*, 87 A.3d 809, 810 (Pa. 2014) (Saylor, J., dissenting) ("During my tenure on the Court I have been dismayed by the deficient performance of defense counsel in numerous Pennsylvania death-penalty cases."); Nancy Phillips, *In Life and Death Cases, Costly Mistakes*, Philadelphia Inquirer, Oct. 23, 2011 (citing then-Chief Justice Ronald Castille's concerns with the quality of counsel, including "'intolerable' errors by defense lawyers and some 'idiotic' appellate briefs").

[5] https://www.uscourts.gov/sites/default/files/fdpc2010.pdf.
[6] https://www.insd.uscourts.gov/sites/insd/files/CJA%20Pay%20Chart.pdf.

Pennsylvania's compensation system pales in comparison. Pennsylvania counties have only ever provided minimal compensation for the representation of people whose very lives are on the line.

It is appropriate to start with Philadelphia County, where inadequacy of counsel has been a significant driver of an outsized contribution to this State's death row population. In 2011, this Court, concerned with the high reversal rates in capital cases, appointed Judge Benjamin Lerner as a special master to address the inadequacies in Philadelphia's capital defense compensation system. In his review, Judge Lerner described the compensation system for court-appointed counsel in Philadelphia as "a disaster waiting to happen." Report and Recommendations, *Com. v. McGarrell*, 77 EM 2011 (Pa. Feb. 21, 2012), at 16. In Philadelphia at the time, lead counsel appointed to a homicide case was paid a flat fee of $2,000, including the first half-day of trial – in other words, a mere $1,800 for an attorney's pre-trial preparation of the case. For the remainder of courtroom time, attorneys would receive $400 per day, or $200 per half-day. Another "penalty phase" counsel would receive $1,700 for pre-trial preparation. Saylor, *supra*, at 39. If the case did not proceed to trial, counsel only received $1,333. Anderson & Heaton, *supra*, at 162.

Other counties have had similarly low rates. For decades, and through at least 2007, Lebanon County limited attorney's fees in death penalty cases to

$5,000 maximum. In one capital case, the fee cap resulted in an effective rate of $35 per hour for preparation and $45 per hour for an attorney's in-court time. *King*, 57 A.3d at 615. The attorney, primarily a civil practitioner, had minimal experience in criminal cases and no capital experience and did not realize, until well into the trial itself, that a penalty phase would begin upon conviction. She spent a total of 1.5 hours preparing to save her client's life. Saylor, *supra*, at 22-23.

In Lehigh County, an attorney's fee was capped at $3,500, with only $500 allotted for investigative support. *Com. v. Williams*, 950 A.2d 294, 298 (Pa. 2008). As of 2007, Dauphin County provided a flat fee of $6,000 to capital trial counsel. ABA, at 118. Montgomery County provided $5,000 at minimum but capped fees at $15,000. *Id.* In York County, counsel did not face a fee cap, but was paid an hourly rate of $55. *Id.* Allegheny County offered up to $3,000 for preparation, and a daily rate of $500 for in-court time. *Id.*

No attorney could afford to work the "hundreds of hours of preparation" that capital cases require, Committee, at 210, with such limited funds and expect to provide constitutionally adequate representation.

Beyond counsel's own compensation, insufficient resources are provided to assist lawyers in the preparation and litigation of a capital case. Given the legal complexities and extensive preparation required to defend death penalty cases, the ABA Guidelines mandate that the defense team include, at a minimum, two

attorneys, a mitigation specialist, and a fact investigator. ABA Guidelines, at 952. *See also* JSGC, at 185 ("generally enrdors[ing]" the Guidelines). Pennsylvania has no statewide mechanism to ensure that two attorneys are appointed to a capital case. ABA, at 117. For many years in Philadelphia County, capital defendants, including many who still remain on Pennsylvania's death row, were represented by just one attorney. *See* Michael DeCourcy Hinds, *Circumstances in Philadelphia Fill Death Row,* N.Y. Times, June 8, 1992;[7] Frederic N. Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials,* Philadelphia Inquirer, Sept. 13, 1992 (finding that only one capital defendant in a review of 20 Philadelphia capital cases in the preceding two years, was represented by two lawyers). While current practice in Philadelphia County is to assign two lawyers to a capital case, some counties continue to appoint a single lawyer. *See, e.g.*, In re: Opinion Pursuant to Pa. R.A.P. 1925, *Com. v. Abdul-Salaam*, No. CP-21-CR-1499-1994, Cumberland Cty. Ct. of Common Pleas (Jan. 22, 2019), *appeal filed*, 772 CAP (Pa. 2019).

As a whole, these fee structures incentivize counsel to take these cases to trial, as soon as possible, rather than focusing on pre-trial investigation and litigation and opportunities for negotiation and settlement, at great harm to their

[7] https://www.nytimes.com/1992/06/08/us/circumstances-in-philadelphia-fill-death-row.html.

clients. *See* ABA Guidelines (describing counsel's duty at every stage to work towards an agreed-upon resolution of the case, to avoid a death sentence). As Chief Justice Saylor has recognized, "Capital defendants and their court appointed counsel are ill-served by a compensation system which favors the longest possible trial over the most comprehensive preparation and intensive negotiations." Saylor, *supra*, at 39 (quoting *McGarrell* Report, at 11).

These grossly underfunded systems leave capital counsel with alternatives this Court could never have assumed when it approved the state's death penalty scheme in 1982. *Com. v. Zettlemoyer*, 454 A.2d 937, 969 (Pa. 1982): 1) conscientious counsel could *attempt* to provide constitutionally acceptable representation and work at a great financial loss, effectively "work[ing] at minimum wage or below while funding from their own pockets their client's defense," *McFarland*, 512 U.S. at 1258 (Blackmun, J., dissenting); 2) apply effort reflective of the state's insufficient investment and thereby provide constitutionally inadequate representation; or 3) refuse the appointment in the first place, leaving capital representation to the inexperienced and the overloaded at best and to the lazy, the drunk, and the incompetent at worst. It comes as no surprise that almost all capital trials under these compensation systems have fallen into the latter two categories.

B. The systemic failures have led to a crisis in indigent capital representation.

These woefully inadequate resources afforded capital counsel across the state have unsurprisingly led to horrendous representation for people facing the death penalty. In turn, findings of ineffective assistance of counsel have led to numerous reversals of convictions and death sentences. *See, e.g., King*, 57 A.3d at 635-38 app. (collecting cases in a 10-year period in which Pennsylvania state courts reversed the defendant's death sentence based on counsel's deficient performance). This has been especially true in the presentation of evidence in the penalty phase of capital trials – the most critical stage of death penalty proceedings. JSGC at 184.

A statewide study of death sentencing in Pennsylvania found a disturbing trend. In nearly a quarter of all death penalty cases, the defense did not present a single mitigating circumstance to the jury. John Kramer et al., *Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, Capital Punishment Decisions in Pennsylvania: 2000-2015* 57 (2017) ("Penn State Study"). The reality thus runs counter to the *theory* this Court accepted when it approved the state's capital punishment system – that capital defendants would enjoy "the opportunity to [present] . . . mitigating circumstances that might convince a jury that the sentence . . . should be set at life imprisonment." *Zettlemoyer*, 454 A.2d at 963. For far too many, this theoretical underpinning of a

constitutional capital sentencing system has not realized in Pennsylvania, for far too few receive the effective lawyering needed.

A review of Pennsylvania capital cases from 1978-2011, revealed an astonishing 125 reversals in state and federal death penalty appeals, of 391 total death penalty convictions, based on counsel's ineffectiveness – nearly one-third of all death sentences in the state since reinstatement. Phillips, *supra*. In the years since the *Inquirer*'s review, the number has only risen. A more recent analysis of cases, through May 2018, showed 150 reversals – now more than one-third of all convictions – due to counsel's poor representation. JSGC at 183. Indeed, in many cases, defense counsel's representation was so reprehensible that the Commonwealth has conceded error. *See, e.g., Com. v. Smith*, 17 A.3d 873, 882 (Pa. 2011); *Com. v. Williams*, 980 A.2d 510, 517 (Pa. 2009). *See also King*, 57 A.3d at 635-86 app. (collecting additional cases where the Commonwealth opted not to appeal a post-conviction court's grant of penalty phase relief).

In yet more cases, the quality of representation was poor, but did not amount to reversible error. "[T]he list of capital cases manifesting lawyer ineffectiveness 'would be far longer were it to catalogue the many instances in which severe derelictions have been alleged but the defendant ... [was] denied the opportunity to adduce supporting evidence based on other considerations, such as waiver, or a finding of insufficient prejudice." Saylor, *supra*, at 32 (quoting *King*, 57 A.3d at

635-36).[8] The *Philadelphia Inquirer*, for instance, found dozens of cases in which courts found counsel's performance was deficient, but the defendant could not meet the prejudice standard under *Strickland v. Washington*, 466 U.S. 668 (1984). Phillips, *supra*.

Capital appellate counsel have also been responsible for "many cases of apparent ineffectiveness." Saylor, *supra*, at 32. In one case, the prisoner's claims "were rejected because the arguments presented were deemed 'unintelligible,' underdeveloped, 'vague and confusing,' waived, 'incomprehensible,' and 'incapable of review.'" *Id. See also Johnson*, 985 A.2d at 928 (Saylor, J., concurring) ("express[ing] continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide the professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claims"). Capital appellate counsel's failures undermine this Court's assumption that the state's appellate review would be "meaningful[,]" a "'last line of defense' to guard against arbitrary sentencing by a jury." *Zettlemoyer*, 454 A.2d at 960 & n.25 (citing *Gregg*, 428 U.S. at 198, 204-06 (Stewart, J., plurality opinion for Court), 211 (White, J., concurring) (other citations omitted).

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[8] Like the reversals on counsel inadequacy, the reversal rates on overall errors have been increasing, too. *See* Task Force, at i (noting in 1990 that retrials were ordered in 35% of cases for all fundamental errors). *Cf.* JSGC at 173 (noting an overall reversal rate of 45%).

In yet more cases, courts found other constitutional errors leading to reversal[9] – errors that in many cases could have been avoided with higher quality lawyering. *See* ABA, at 112 ("more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief").

A series of studies, commissions, and task forces have documented the problem over decades. Despite these many opportunities for reform, this crisis in capital representation has persisted for decades.

In 1989, this Court joined forces with the U.S. Court of Appeals for the Third Circuit to confront a "problem of major proportions" in the quality of representation for capital defendants. Task Force, at i. After its review, the Task Force named five pressing needs in Pennsylvania's indigent capital defense system: 1) competent representation at every stage of capital proceedings; 2) case monitoring; 3) minimum qualification standards for counsel; 4) improved compensation for counsel; and 5) improved continuing legal education. *Id.* at 1. It recommended, among other things, the creation of a resource center funded, in part, with state funds; minimum criteria for the appointment of counsel to capital cases, and adequate compensation, at the rate of $75/hour for time in-court and

[9] *See* n.6, *supra*.

$50/hour for time out of court. *Id.* at 22-25, 31. None of these reforms was made at the state level.[10]

Ten years later, this Court appointed a Committee on Racial and Gender Bias in the Justice System "to undertake a study of the state court system to determine whether racial or gender bias plays a role in the justice system," including the death penalty. Committee, at 12. The Committee published its findings in 2003, echoing the earlier concerns of the Joint Task Force. The Committee criticized the compensation of capital counsel: "Fee structures are inadequate and in some instances, actually discourage effective representation by building in financial disincentives to devote the necessary hours of preparation. The systems employed in most counties favor inexperienced and less-qualified lawyers, and discourage specialization in criminal defense. They uniformly fail to provide adequate funding for support services such as investigators and social workers." *Id.* at 212.

The Committee found that, across the state, only one public defender – the Defender Association of Philadelphia – was complying with national standards for capital representation. *Id.* at 212. And when considering Philadelphia County as a whole, given that 80% of Philadelphia homicide cases were not handled by the

[10] A state resource center opened in 1994 for a very brief time, but Pennsylvania never provided state matching funds to the federal money available. *See* Dunham Testimony, *supra*, at 11, n.18.

Defender Association, it found that "[n]o county is providing representation that meets minimal ABA standards." *Id.* at 213.

The Committee also lamented the fact that there is no state- or county-wide training or monitoring of the performance of attorneys representing defendants in capital proceedings, despite the complexities of capital representation. *Id.* at 202.

Like the Joint Task Force before it, the Committee recommended that the state "institute statewide funding and oversight of the indigent defense system by establishing an independent Indigent Defense Commission and appropriating state funds for the support of indigent defense." *Id.* at 168. Sixteen years later, Pennsylvania still stands alone in its failure to fund indigent capital defense at the state level.

Only one of the Committee's many recommendations was implemented. The Committee recommended that this Court "adopt minimum qualifications for all court-appointed counsel in capital cases in accordance with those recommended by the ABA." *Id.* at 213. In response, this Court adopted Rule 801 of the Pennsylvania Rules of Criminal Procedure, effective November 1, 2004, which set minimum qualifications and training requirements for counsel appointed to capital cases. *See* 234 Pa. Code § 801. The current standards require that counsel in a death penalty case must be a member of the Pennsylvania bar in good standing, have five years of experience in criminal cases, and have served as counsel in at least eight

"significant" cases that have gone to the jury. *Id.* In terms of training, the rule requires lead counsel to have had 18 hours of capital-specific training in the three-year period preceding appointment. *Id.*

Chief Justice Saylor has acknowledged the Rule's shortcomings: "Our standards are limited to some experience and qualification criteria and are quite modest by comparison [to other states.]" Saylor, *supra*, at 42. What's more, these new standards had no impact on the great majority of people still on Pennsylvania's death row today – nearly 100 of whom were sentenced prior to the effective date of the new rules.[11] While an improvement, these standards also still fall short of the rigorous standards needed for the qualification of capital counsel.[12] And no other reforms were implemented at the state level.

An ABA review of Pennsylvania's death penalty took place several years later, with a report published in October 2007, and found that despite these new standards, the state was not in full compliance with any of the five recommendations for the provision of defense services outlined in the ABA

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[11] *See* Pa. Dep't of Corr., *Persons Sentenced to Execution in Pa. as of Feb. 1, 2019*, https://www.cor.pa.gov/About%20Us/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf ("Execution List").

[12] Derrick White was sentenced to death in Philadelphia in 2012, represented by lawyers who had to meet the Rule 801 qualifications. His sentence was reversed only a few years later, in post-conviction review, and unopposed by the Commonwealth, due to penalty phase ineffectiveness of counsel. *See generally* Docket, *Com. v. White*, Court of Common Pleas of Philadelphia Cty., No. CP-51-CR-0012991-2010.

Guidelines, and only partially compliant with two of the five. Namely, the ABA observed that Pennsylvania was not complying with its guidelines concerning the defense team and supporting services; the designation of a responsible agency; and funding and compensation. ABA, at xiv. It was only partially in compliance with the ABA guidelines concerning the qualifications of defense counsel and the training of defense counsel. *Id.* The ABA, like other institutions before it, was particularly concerned with Pennsylvania's failure to provide statewide funding for indigent defense given that many counties did not provide adequate defense resources; its failure to provide ABA-compliant staffing of the defense team; and its lack of a statewide agency to train, select, and monitor capital counsel. *Id.* at xv.

Several years following the ABA report, the problems, particularly in Philadelphia County, persisted. After a capital defendant challenged in 2011 the fee structure there, "the Supreme Court of Pennsylvania commissioned a Philadelphia homicide judge as a special master, who reported his findings that the dynamics of the appointment system are "woefully inadequate," "completely inconsistent with how competent trial lawyers work," "punish[] counsel for handling these cases correctly," and unacceptably "increase[] the risk of ineffective assistance of counsel" in individual cases." Saylor, *supra*, at 40. After the review, the First Judicial District announced moderate improvements to its compensation structure, raising the flat fee guaranteed to lead counsel to $10,000 and $7,500 for

"penalty phase" counsel, "covering both preparation and trial, and payable regardless of whether the case is tried to verdict." *Id.* at 40, n.204 (citing *McGarrell* Report). These changes began in fiscal year 2013. JSGC at 57.

Philadelphia's new fee structure, though still insufficient for cases proceeding to trial,[13] have drastically altered the death penalty landscape in Philadelphia County, with only two people sentenced to death from that county in the six years since it was instituted.[14] These reforms have not followed uniformly across the rest of the state.

Last year, the Joint Government State Commission, noted that the provision of state funding was key to "avoid[ing] justice by geography." JSGC at 184. It recommended the "creation of a state-funded capital defender office." *Id.* at 186.

C. These systemic failures call for a system-wide remedy.

The modest reforms over time, including the promulgation of Rule 801 and the higher fees for appointed counsel in Philadelphia – have failed to eliminate the pattern of egregious representation in capital cases. *See Com. v. McGarrell*, 87

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[13] For example, a $10,000 fee cap would only pay for 100 hours of the lead attorney's time at $100/hour - time that should be spent in preparation for trial alone, let alone in-court time. (Counsel is entitled, under the new fee structure, to $400 per day, above the $10,000 cap, after the first week in court. JSGC at 57.) *See McGarrell*, 87 A.3d at 810 (McCaffery, J., dissenting) ("express[ing] disagreement with the 'flat fee' manner paid to guilty phase and penalty phase counsel").

[14] *See* DPIC, Death Sentencing Information (data for years 2013-2018), https://deathpenaltyinfo.org/death-penalty-sentencing-information.

A.3d 809, 810 (Pa. 2014) (McCaffery, J., dissenting) (“”[A]lthough the reforms instituted thus far have had the salutary intended effect of improving somewhat the system for providing legal services to indigent capital defendants, the work is certainly not done[.]”).

This Court cannot address these chronic and systemic concerns on an individual case basis. *Cf. Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer and Ginsburg, JJ, dissenting) (advising against trying “to patch up the death penalty’s legal wounds one at a time”). A capital defendant’s constitutional right to the effective counsel is insufficient, on its own, to produce systemic reform that would ensure quality representation in death penalty cases. “Despite the fact that ‘effective assistance of counsel’ is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases.” *See* ALI Report, Annex B at 17. “[C]onstitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.” *Id.*; *see also* James Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2121 (2000) (describing a court’s case reversal as a “slap on the wrist” that does not incentivize officials “to

change the local policies and practices that led to the mistake"). Pennsylvania's own experience unmistakably demonstrates that this holds true: even with 150 reversals in death penalty cases over a 40-year period, the system largely remains the same. The poor quality of representation for capital defendants system-wide has called into question "the integrity of the judicial process," *Com. v. Williams*, 129 A.3d 1199, 1207 (Pa. 2015), and is therefore ripe for this Court's review.

II. The inadequate resources in indigent capital representation have produced arbitrary and discriminatory results.

The death penalty must be "imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Pennsylvania's death penalty is inconsistent at its core, in that it has been reserved for defendants not who have committed the worst crimes, but who have had the worst representation. Much of the blame belongs with the foundation of Pennsylvania's system of indigent capital defense: the complete delegation to each county of both the responsibility and the bill for providing indigent defense. 16 P.S. § 9960.1-.13. Forty years of Pennsylvania's experimentation with the death penalty has shown that, with a system subject to the vagaries of local finance and politics, representation has been uneven and underfunded. *Cf. Kuren*, 146 A.3d at 749 ("It is no surprise that statewide funding lies at the core of nearly every reform recommendation pertaining to improving the quality of indigent defense.") (citations and quotations omitted).

As a result of these system-wide inadequacies in representation, Pennsylvania's death penalty has produced arbitrary and discriminatory results, in violation of Pennsylvania's prohibition on cruel punishment. The Committee found "strong indications that Pennsylvania's capital justice system does not operate in an evenhanded manner." Committee, at 201. As Chief Justice Saylor astutely observed more recently of the county-based system of capital defense, "[t]his kind of a decentralized arrangement risks inequalities, in tension with the kind of non-arbitrary treatment the Supreme Court of the United States has been looking for since *Furman*." Saylor, *supra*, at 40. Chief Justice Saylor has suggested that these pervasive failures may call into question the integrity of the system itself. *See, e.g., King*, 57 A.3d at 635 (Saylor, J., concurring specially) ("Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential component of such administration."). *See also Com. v. Martin*, 5 A.3d 177, 217 (Pa. 2010) (Saylor, J., concurring) ("The issue of alleged systemic deficiencies in the provision of counsel for indigent capital defense … merits the Court's continuing attention"). This Court should now finally recognize that the death penalty system in Pennsylvania, due to the crisis in indigent capital representation among other reasons, is irreparably broken.

Given the vast disparities in county funding systems, it comes as no surprise that Pennsylvania has the highest intrastate disparity between population and death sentences of any state in the country. JSGC at 67, 89, 261. For decades, Philadelphia County sent an outsized number of people to Pennsylvania's death row, even considering its larger population. *Id.* at 67.

Even within counties, the differences between the representation by the private and public bar can be striking. In a comprehensive review of Philadelphia County homicide cases from 1993 to 2005, researchers found that that whether a capital defendant receives a public defender "has an important impact on case outcomes" and one "that is completely unrelated to the culpability or conduct of the defendant." Anderson & Heaton, *supra*, at 206. In Philadelphia, for example, the Defender Association has not received a single death verdict in its capital cases since 1993, when it first began taking capital cases. *Id.* at 159; Saylor, *supra*, at 34. The researchers chiefly attributed the success of the Defender Association to the following factors: 1) the defenders were salaried; 2) they received intensive and regular training; 3) they had investigators and mitigation specialists on staff; and 4) they had access to funds to hire experts, rather than having to seek funding from the court. Anderson & Heaton, *supra*, at 161.

The researchers concluded that their findings "raise questions as to whether current commonly-used methods for providing indigent defense satisfy Sixth

Amendment standards for effective assistance of counsel and Eighth Amendment prohibitions against arbitrariness in punishment." *Id.* at 159-60. The findings not only raised questions, they provide clear answers: whether a defendant in Philadelphia receives the death penalty turns not on the facts of the crime or the accused's level of culpability, but on the luck of the draw. If they are among the 20% of cases handled by the Defender Association, their lives may be saved; if not, they could be executed. Outside of Philadelphia, the trends are reversed, but great disparities persist. Capital defendants assigned public defenders were 5-7% more likely to be sentenced to death than privately retained attorneys. Penn. State Study, at 105.

While the failures of the indigent defense system are the responsibility of this state as a whole, the costs of the failure have not been born equally. Its damage has fallen disproportionately on defendants of color. The Supreme Court Committee found that "[t]he impact of the deficiencies indigent defense programs in Pennsylvania falls disproportionately upon racial and ethnic minorities." Committee, at 165. *See also id.* at 218. It observed the gross over-representation of people of color in the Pennsylvania criminal legal system generally but also specifically on death row. Committee, at 218.[15] "It is the Commonwealth's most vulnerable citizens, including the poor, minorities, and women, who feel most

[15] *See* Execution List, *supra.*

acutely the impact of inadequate legal representation." *Id.* at 166. Because more than 80% of people involved in the state's criminal legal system are indigent, it is "clear that the quality of indigent defense counsel affects the legitimacy of the system as a whole." *Id.* at 166.

With these considerations in mind, the Committee concluded that "[p]roviding adequate capital counsel is an indispensable step to preventing discrimination." Committee, at 218. Time and again, Pennsylvania has failed to take this step, leaving in place an indisputably arbitrary and discriminatory system.

These arbitrary and discriminatory results are constitutionally intolerable. *See State v. Gregory,* 192 Wash. 2d 1, 15 (2018) (striking the death penalty as unconstitutionally arbitrary and discriminatory under the state constitution because "the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant."); *State v. Santiago*, 122 A.3d 1, 140 (Conn. 2015) (the application of the death penalty fails to comport "with our abiding freedom from cruel and unusual punishment" for a multitude of reasons, including the "racial, ethnic, and socio-economic biases that likely are inherent in any discretionary death penalty system"); *Dist. Att'y for the Suffolk Distr. v. Watson*, 411 N.E. 2d 1274, 1286-87 (Mass. 1980) (the "death penalty requires special scrutiny for constitutionality" and thus the persistence of arbitrariness and

discrimination, including racial bias, in its application mandates its invalidation under the state constitution); *Glossip*, 135 S. Ct. at 2761-62 (Breyer and Ginsburg, JJ.) ("[W]hether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as 'egregiousness'—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily."); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race … or class, or if it is imposed under a procedure that gives room for the play of such prejudices.").

This Court now has the opportunity, proceeding on King's Bench or extraordinary jurisdiction, to recognize that this long-lasting tension can no longer withstand constitutional scrutiny.

Amici therefore urge this Court to hold, as other states have, that the death penalty as currently applied in Pennsylvania is arbitrary and discriminatory, due to its failure to uphold the constitutional mandate of adequate indigent defense, among other reasons, and therefore unconstitutional under the state constitution.

See Dist. Atty. for Suffolk Dist., 411 N.E. 2d at 1283; *Santiago*, 122 A.3d at 10; *Gregory*, 192 Wash. 2d at 15.

CONCLUSION

For these reasons, as well as those ably addressed by Petitioners Marinelli and Cox and other *amici curiae* parties, the American Civil Liberties Union respectfully asks this Court to find the death penalty as currently applied unconstitutional under Article 1, § 13 of the Pennsylvania Constitution.

Respectfully submitted,

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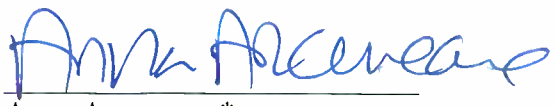

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CERTIFICATES

Certification Pursuant to Rule 531

I hereby certify that no person or entity other than staff of the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania ("ACLU") has: (1) paid in whole or part for the preparation of the *amicus curiae* brief filed by the ACLU in this matter, or (2) authored, in whole or in part, the amicus curiae brief filed by the ACLU in this matter.

Dated: February 22, 2019 */s/ Mary Catherine Roper*
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Certification of Word Count

I hereby certify that this brief contains 6995 words, exclusive of cove, tables and certifications, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: February 22, 2019 */s/ Mary Catherine Roper*
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Certificate of Compliance with Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing

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Certificate of Service

I hereby certify that I caused true and correct copies of the foregoing Amicus Brief to be served upon the persons indicated below by PACFile and First Class Mail, which service satisfies the requirements of Pennsylvania Rules of Appellate Procedure 121:

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