AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

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TESTIMONY ON SPECIAL SESSION SENATE BILL 81

PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION

OF PENNSYLVANIA BEFORE THE HOUSE JUDICIARY COMMITTEE

AUGUST 21, 1995

Good afternoon. My name is Larry Frankel. I am the Legislative Director of the American Civil Liberties Union of Pennsylvania. I would like to thank the House Judiciary Committee for giving me this opportunity to testify regarding Special Session SB 81.

We hope that your consideration of this legislation will not become solely a debate over the merits of the death penalty. Special Session SB 81 raises important procedural issues that relate to all defendants, not just those sentenced to death. Section 1 of this legislation [pages 1-8] makes significant changes regarding postconviction review for all defendants. Section 2 [pages 8-17] creates a new procedure, entitled Capital Unitary Review, that will affect only those sentenced to death in the future.

I point that out to emphasize that this legislation involves technical questions about what procedures will be used in this Commonwealth to provide justice for improperly convicted defendants and defendants whose innocence is ascertained, years after trial, through DNA

testing, discovery of police or prosecutorial misconduct, or other means. This legislation raises questions of fairness and the capacity of this Commonwealth to provide a remedy for instances of injustice.

While the ACLU does not oppose the establishment of time limits for the filing of postconviction petitions, we believe that such limits should not be so strict that they prevent the consideration of claims involving constitutional rights and evidence that is exculpatory. However, we question the need for enacting the Capital Unitary Review proposal. Pennsylvania now has a timetable for the signing of death warrants. A defendant who is sentenced to death must file a petition under the Post Conviction Review Act (PCRA) within months after the Supreme Court affirms a death sentence. Delaying his or her postconviction attacks will be virtually impossible for a defendant on death row.

Additional costs will be incurred under Capital Unitary Review. There will be a post-conviction proceeding in every death sentence case. Usually new counsel will be appointed and an evidentiary hearing conducted. After the trial court rules, the matter will proceed to the Pennsylvania Supreme Court. That court will review issues relating to the original trial and those raised during unitary review. This new procedure will undoubtedly require substantial post-trial expenses.

Under current procedure the expenses related to unitary review are not incurred when the guilty verdict or death sentence is reversed. According to former Attorney General Ernie Preate, who testified on May 18, 1995, at a hearing before the Senate Judiciary Committee on this legislation, there have been 17 death penalty cases where the Pennsylvania Supreme Court has reversed the trial court's judgment.

If you adopt this new procedure, it will mean that in those cases reversed on direct appeal, someone will have unnecessarily incurred the extra costs associated with this unusual collateral review procedure - review that would be unnecessary were the direct appeal heard first. And, in those same cases, the delay associated with the two stages of review could be harmful not only to defendants whose cases are reversed, but also to the Commonwealth if witnesses disappear prior to a new trial.

The ACLU thinks that the creation of a unitary process will lead to unnecessary litigation, expenses and delay in a significant number of cases. We expect that this proposal will cause more problems than it solves. We believe that the legislature has already taken significant action to reduce delays in the filing of postconviction attacks. Under the new time lines for the signing of death warrants, defendants will either be filing their collateral review petitions in a timely manner or losing their opportunity to do so.

I would now like to address several specific technical issues and then discuss what we think should and could be done in this area.

Section 1.

Section 1 of this legislation makes several changes to the existing Post Conviction Relief Act that could have a major impact on the rights of many defendants. One set of changes could make it harder for defendants to obtain the right to file an appeal where prior counsel has failed to file the notice of appeal or failed to file a brief and as a result the appeal is dismissed. Under present law, if defense counsel is so negligent that defendant's appeal is not heard on its merits, a defendant can obtain PCRA relief in the nature of an order granting the defendant leave to file a notice of appeal nunc pro tunc. In the legislation, on page 3 at lines 14-15, the word

"Commonwealth", which modifies the word "officials", is deleted and replaced with the word "government." The term "government officials" is deemed to exclude defense counsel. See page 6, lines 27-29. We fear that Pennsylvania courts will interpret this change to deny a defendant the right to file a notice of appeal nunc pro tunc even though he or she is not at fault for defense counsel's failure. Absent a compelling explanation for these two changes, we would recommend that they be deleted and existing appellate rights preserved.

On page 3, at line 24, the word "affected" is deleted and replaced with the word "changed." A defendant would be required to demonstrate that newly discovered exculpatory evidence would have changed the outcome of the trial had it been introduced. We cannot understand why this modification is being proposed. We hope that it is not the intention of the proponents to create a virtually impossible hurdle for defendants to overcome. We think that the existing statutory wording is fine and recommend that the present language be maintained.

The bill attempts to strip Pennsylvania's courts of the authority to grant any relief before the filing of a petition. See, page 5, lines 16-18. This could have a profound consequence where the relief being sought is the appointment of counsel to help in the filing of a petition for a stay of an execution or a request for funds to hire an investigator. There also are specific restrictions on the authority of a court to issue a stay of execution. See page 6, line 30, through page 7, line 13. The language in these two provisions will be applied to defendants whose death sentences have already been affirmed by the Pennsylvania Supreme Court. In those cases the record can be hundreds of pages. Counsel may not be appointed or obtained until after the Governor has signed a death warrant. Does anybody really intend to prevent a court from staying an execution if there is insufficient time for new counsel to completely review the record? If these two

provisions remain in the bill, a court could be barred from entering a stay without regard to the length of the record, complexity of the legal issues and/or the need for an independent investigation of factual issues relating both to guilt and the appropriateness of the death penalty.

Section 1 also creates a one-year statute of limitations for the filing of a petition under the Post Conviction Relief Act. See page 5, line 24, through page 6, line 20. A number of exceptions to the one-year limitation are listed. Consider what this time limit will mean for an indigent defendant whose court-appointed counsel fails to file a timely notice of appeal or fails to take other necessary steps to perfect the appeal. The appeal is dismissed and neither counsel nor the courts notify the defendant. Defendant finds out about the dismissal 15 months later. It would appear that under this statute of limitations such a defendant would be precluded from seeking relief under the PCRA.

Or ponder the fate of an indigent defendant who belatedly discovers exculpatory evidence. Unless he or she can put together a well-drafted petition or find counsel to do so, he or she could be barred from presenting such evidence to a court. Will the new time limits preclude an unrepresented defendant from being able to present newly discovered DNA evidence or evidence based on a technology of which we are not even aware? The time limits set forth in the bill will severely hamper the ability of an indigent defendant who may not have the "know-how" for the filing of a pro se petition in a timely manner. In cases where an attorney is appointed to represent the defendant, will there be sufficient time for that attorney to review the record, which can be so large that it fills an entire file box, as well as evaluate and investigate the significance of such new evidence? While we do not completely oppose a reasonable statute of limitations, we believe that consideration must be given to providing greater flexibility for the raising of

claims where the defendant is not at fault for the delay in filing the petition seeking relief.

The legislation states that no discovery will be allowed except by leave of the court "with a showing of exceptional circumstances." See page 7, lines 23-25. This bar on discovery is also included in the section of the legislation creating the Capital Unitary Review. See, page 13, lines 13 through 16. Will a reasonable belief that the prosecution has potentially exculpatory evidence be deemed an exceptional circumstance? Will materials that should have been requested before trial, but were not asked for due to trial counsel's negligence, be discoverable under this section? Will documents that have come into the hands of the prosecution since the time of trial that relate to the factual issues at trial be discoverable? The answers to these questions are unclear.

Section 1 also contains a provision for the automatic review by the Pennsylvania Supreme Court of an order granting a defendant postconviction relief in a death penalty case. Page 8 lines 16 through 23. However, if a court denies relief to a defendant in a death penalty case, that defendant, if he or she wants the Supreme Court to review that determination, must file a petition for allowance of appeal. What is the justification for the disparate treatment in a death penalty case?

Section 2.

This kind of differential treatment, which is always favorable to the Commonwealth, can be found in several of the provisions of Section 2, the section that creates the Capital Unitary Review. For example, the legislation sets time requirements for the filing of a unitary review petition and answer. However, the Commonwealth is not required to file an answer and the failure to file an answer will not be considered an admission of any facts alleged in the petition. See page 13, line 27, through page 14, line 1.

Another provision governs the disposition of the petition without an evidentiary hearing. That section states that the court shall determine, within 20 days, if an evidentiary hearing on the allegations in the petition is necessary. If the court fails to issue a written order within 20 days, that failure "shall constitute a determination that no evidentiary hearing is warranted." Page 14, lines 12 to 15. In other words, a capital defendant will lose his or her right to a crucial hearing if a judge purposefully or inadvertently does not stick to this deadline.

Another example of a lack of evenhandedness can be found at page 15, lines 12 through 27. A petitioner who has new counsel on collateral review, must file two briefs with the Supreme Court - a collateral appeal brief and a direct appeal brief. The Commonwealth need file only one brief.

In addition to these problems, we believe that this new procedure has a significant constitutional flaw that I would like to discuss briefly. Under this new procedure, a defendant will not be represented in the unitary review process by any attorney who has previously represented the defendant at any previous stage unless the defendant waives his or her right to challenge the effectiveness of that attorney's representation. See page 11, lines 8 through 16. It is not clear that the state can force AR.defendant to make a choice between retaining previous counsel and waiving the right to assert a constitutional claim. In the interest of time, I refer you to the attached copy of my letter to Senator Greenleaf, dated April 10, 1995, which contains a full discussion of two federal court decisions that shed light on the constitutional defects in this procedure.

I predict that this rule governing counsel will produce litigation over the question of whether a capital defendant has been denied due process when trial counsel continues to

represent the defendant during collateral review with defendant's consent and that same counsel is ineffective and incompetent in handling collateral review. Will that poor defendant be deemed to have waived his or her right to challenge the effectiveness of his or her attorney when the acts of ineffectiveness have not yet occurred at the time of waiver?

I believe that it is perfectly reasonable to expect that there will be frequent claims of ineffective assistance of unitary review counsel. Such counsel will be required to assert all claims that can be raised on direct appeal as well as any claims under the revised Post Conviction Relief Act. Counsel must also consider complicated legal issues related to state and federal habeas corpus provisions. I would hazard to guess that few attorneys in Pennsylvania have sufficient experience in these areas. Given the probability that unitary review counsel will fail to bring some claims, this new procedure will probably result in a large number of collateral attacks on post-trial counsel and further litigation.

Recommendation - Appointment of Competent Counsel.

We understand that there is a concern about the delay in postconviction review of death penalty cases. We do not agree that this delay is solely attributable to deliberate planning by defendants. We believe that many capital defendants, who have previously been represented by court appointed counsel, are not even aware of the status of their cases because once the Pennsylvania Supreme affirms the death sentence, that appointment ends. There is no guarantee that a capital defendant understands that the state Supreme Court has acted and that he or she lacks representation. The defendant may not even know that the filing of a PCRA Petition, or other postconviction pleading, is timely.

There is no procedure in this Commonwealth to insure that an indigent capital defendant

is represented by competent counsel once the Supreme Court affirms a death sentence. We think that this is not only fundamentally unfair to those defendants but also to all citizens who care about the effective functioning of our criminal justice system. We sincerely believe that the General Assembly would better serve the people of the Commonwealth if it enacted legislation to make meaningful and qualified representation of inmates on death row a reality. By furnishing competent counsel in a timely manner the Commonwealth will not only satisfy its constitutional obligations but also smooth out some of the procedural bumps that currently delay these cases. Competent counsel will maintain adequate communication with the defendant, file the appropriate documents and raise the relevant claims. Incompetent counsel confuse the process and increase the public's distrust in the integrity of the process.

I have attached to my testimony a proposal for appointment of counsel in death penalty cases. That proposal also provides for the timely appointment of counsel for those whose death sentences have already been affirmed. We urge you to consider this proposal rather than the unusual collateral review procedure contemplated by Special Session Senate 81.

Earlier this year Supreme Court Justice Ronald Castille, the former District Attorney for Philadelphia County, noted in a speech to the Philadelphia Bar Association's Criminal Justice Section that there is a greater need for attorneys to represent those on death row. Former Attorney General Preate has also noted the need for the Commonwealth to do more to make sure that defendants in capital cases have adequate counsel and resources at all stages of their cases. The ACLU agrees with Justice Castille and Mr. Preate. We encourage you to pass legislation that calls for the appointment of competent counsel for death row defendants.

APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES

Amend Title 42 Pa.C.S.A. Section 9711 (h) by adding:

(5) (a) When the Supreme Court affirms the sentence of death the court shall immediately enter a written order specifically naming new counsel to assist the defendant with any further court proceedings relating to or resulting from such sentence including but not limited to proceedings under the Post Conviction Hearing Act, Title 42 Pa.C.S.A. Chap. 95, Sub-chap. B, Section 9541 et seq., 28 U.S.C.A. Chap. 153 and any further appeals.

(b) The Supreme Court shall immediately enter a written order specifically naming new counsel to assist any unrepresented defendant whose death sentence has already been affirmed by the Supreme Court. That attorney shall assist the defendant with any further court proceedings relating to or resulting from the imposition of the death sentence including but not limited to proceedings under the Post Conviction Hearing Act, Title 42 Pa.C.S.A. Chap. 95, Sub-chap. B, Section 9541 et seq., 28 U.S.C.A. Chap. 153 and any further appeals.

(c) An attorney who is appointed to serve as counsel under this section shall be an experienced and active trial or appellate practitioner with at least three (3) years experience in major criminal litigation and have completed within two (2) years prior to the appointment at least five (5) hours of training in the defense of capital cases in an accredited continuing legal education course.

(d) Counsel appointed under this section shall be compensated from funds appropriated to the Pennsylvania Supreme Court. Compensation shall be in accordance with a procedure and rate schedule to be established by the Pennsylvania Supreme Court.

THE LEGAL INTELLIGENCER - Wednesday, April 19, 1995

JUSTICE RONALD CASTILLE SAYS THE COURT IS PUTTING A "HEAVIER EMPHASIS ON GETTING THE CASES OUT OF THE SYSTEM."

Castille Predicts Pa. Execution Near

More Attorneys Needed, Justice Says

BY HANK GREZLAK
Of the Legal Staff

PENNSYLVANIA WILL SEE ITS FIRST EXECUTION SINCE 1961 THIS YEAR — perhaps as early as May 2, Pennsylvania Supreme Court Justice Ronald Castille predicted yesterday. He also said the court may change the rules of appellate procedure so that death-row inmates can't sit on their appeals.

Castille, speaking before the Philadelphia Bar Association's Criminal Justice Section, said that Gov. Tom Ridge's promise to sign death warrants in a timely fashion all but assures an execution in the near future. Because more death warrants will be signed, he said, there will be a greater need for attorneys [CONTINUED ON PAGE 10]

Execution

[CONTINUED FROM P. 1]

to represent those on death row.

"There will be a lot of individuals who are looking to be appointed or are going to have to be volunteered somehow and are going to need some assistance on these cases, because I can tell you in the next two years we're probably going to see a heavier emphasis on getting the cases out of the system or at least moving them through the system," Castille said. "I can tell you, this will be the year that Pennsylvania joins the ranks of those states that have imposed the death penalty."

According to Castille, Keith Zettlemoyer will probably be the first if he "keeps up his present track," of insisting he doesn't want anymore appeals. Zettlemoyer, he said, has appealed to the state Supreme Court twice and lost both times.

"He's appealed to the Supreme Court of the United States and he's finally said that he doesn't even want to talk to the folks at the Capital Case Resource Center," he said. "So you'll probably be seeing that coming up very soon. May 2 is the date and he could be the first individual since Elmo Smith was executed in 1961."

187 ON DEATH ROW

A total of 187 individuals are on death row in Pennsylvania, Castille said, 57 of whom have their direct appeals pending before the state Supreme Court. Of those, 110 have their Post-Conviction Review Act appeals still pending, he said. That means, Castille said, that 57 of the 187 are "probably" unrepresented and 130 of them may or may not have completed their full appeals.

Castille predicted Ridge will "timely review the cases we send to him."

"The governor has also said that he is going to start a review of those individuals from the earliest person on death row since 1978 up to the latest person sent there before his election," he said. "I think he's pretty serious about it, as you can tell."

CENTER OVERWHELMED

That emphasis on signing death warrants, he said, "is going to cause problems in Pennsylvania." He said the Capital Case Resource Center is going across the state trying to recruit lawyers to defend death row inmates. The center's work, he said, is important because death row inmates need competent counsel for appeals.

Ridge's determination to act on death penalty cases, he said, contrasts sharply with former Gov. Robert Casey's approach.

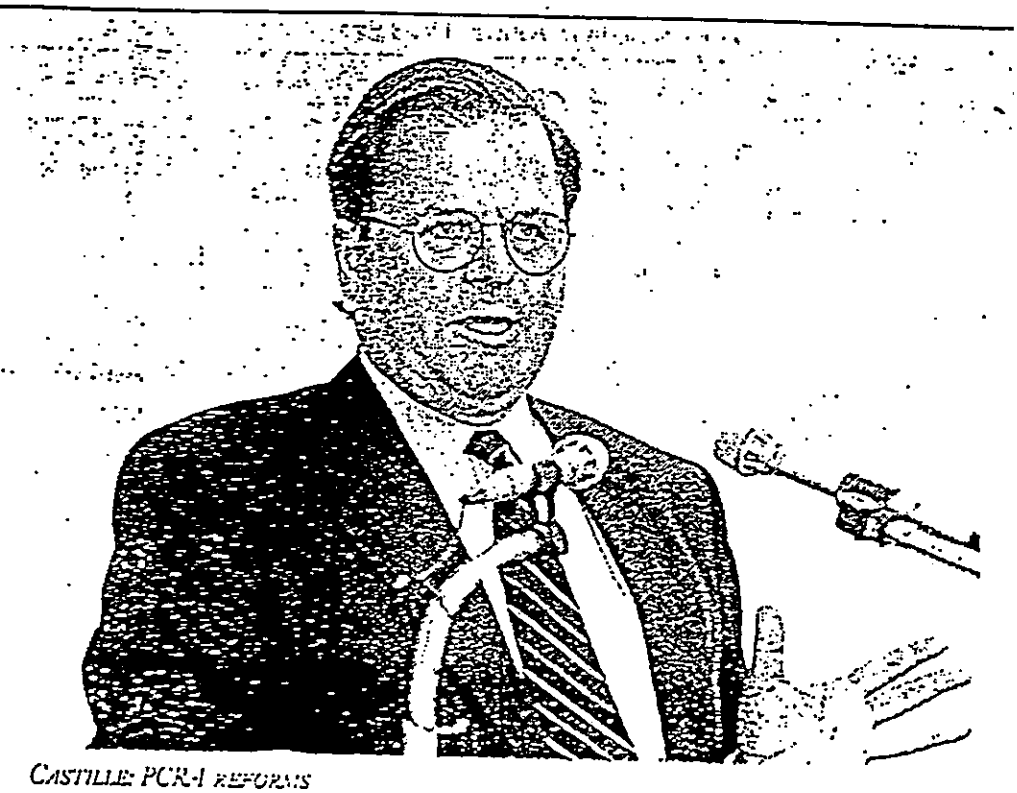
"Previously, Gov. Casey sat on most of these things for six or seven years before he would sign a death warrant," Castille said. "The going jailhouse tactics were to just sit on them and file anything until the governor signs your death warrant and then you go ahead and file your PCRA if you haven't filed it and file your habeas corpus petition if you haven't filed it."

On average the Supreme Court comes up with a decision in a death penalty case within 18 months of being sent the case, he said.

STRICT DEADLINES

Regardless of Ridge's position though, Castille said, the court is looking at setting strict deadlines for inmates to file their appeals.

"We ourselves are looking at some reform in case the governor somehow changes his mind or doesn't get around to doing what he has said he is going to do," Castille said. "We're looking at some capital case docket reform ourselves in the form of changes in the rules of appellate procedures in criminal proceedings."



CASTILLE: PCRA REFORMS

One of things the court is looking at, he said, is imposing a "straight-out, one-year statute of limitations" on when an inmate can file a PCRA appeal.

"You won't be able to sit there for two, three, four years and be able to invoke your post-conviction hearing rights unless you do it in a timely fashion," he said. "We're looking at some U.S. Supreme Court cases that we think will support that kind of provision in the law."

The court is looking at potentially dividing the 130 inmates "who aren't doing anything" into groups and giving them "six months, a year, 18 months," to file their PCRA appeal, Castille said.

PCRA REFORM

"I can tell you, for the first time ever, the Supreme Court of Pennsylvania back in February denied a person PCRA because he sat in prison for six or seven years and didn't file anything," he said. "That was the first individual who was turned down for PCRA on the basis that he didn't timely file. That caused us to start looking at the whole situation of the PCRA appeals and to look at ways to reform that system, to make sure that justice is done and make sure the cases are properly tried."

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April 10, 1995

The Honorable Stewart J. Greenleaf
Senate of Pennsylvania
Harrisburg, PA 17120

RE: SPECIAL SESSION SB 81 - PCRA REVISIONS AND UNITARY REVIEW

Dear Senator Greenleaf:

The American Civil Liberties Union of Pennsylvania has many serious concerns about Special Session SB 81 (P.N. 109). I intend to discuss what we believe to be the most significant problems in this legislation as it is presently drafted. I hope that there will be a chance for further review and discussion of this entire bill as it moves forward.

The United States Supreme Court has repeatedly said for the last 20 years that **death is different.** Woodson v North Carolina 428 US 280 (1976), Gardner v Florida 430 US 349 (1977), Eddings v Oklahoma, 455 US 104 (1982) and Ford v Wainwright, 477 US 399 (1986). For example, in, Woodson, Justice Stewart, the author of the plurality opinion, wrote:

> In Furman, members of the Court acknowledged what cannot be fairly denied--that death is a punishment different from all other sanctions in kind, rather than degree. See 408 US, at 286-91, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring); id., at 306, 33 L Ed 2d 345, 92 S Ct 2726 (Stewart, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to subjected to the blind infliction of the penalty of death . . .
>
> This conclusion rests squarely on the predicate that ***the penalty of death is qualitatively different*** from a sentence of life imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year

prison term differs from one of only a year or two. *Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.*

(emphasis added)

I acknowledge that a plurality of the United States Supreme Court has held that there is no constitutional requirement that states appoint counsel for indigent death row inmates in collateral review proceedings. Murray v Giarratano, 492 US 1 (1989). Four of the justices found that the distinction between death cases and other cases did not extend to state collateral proceedings. It is not clear what a majority of the current members of the Supreme Court thinks on this issue. I can honestly say that I know of no court decision that sanctions a state providing fewer procedural protections to a death row inmate than to a noncapital defendant.

The Pennsylvania Supreme Court has recognized that death is different. Commonwealth v Billa, 555 A.2d 835 (1989) and Commonwealth v DeHart, 650 A.2d 38 (1994). Both of those decisions contain language regarding the relaxed application of waiver rules in death penalty cases. I believe that these decisions demonstrate that our Supreme Court will carefully review whatever collateral review procedure the General Assembly prescribes to ensure that no issues are deemed technically waived in death penalty cases.

In fact, we would not be the least surprised were a state or federal court to hold that the procedure set forth in Special Session SB 81 is fundamentally and constitutionally flawed. Forcing a capital defendant to pursue collateral attacks prior to affirmance on direct appeal creates procedural hurdles that noncapital defendants do not face.

One of the most troubling provisions in this legislation is Section 9572 which deals with legal representation in death penalty cases. Under subsection (B), trial counsel cannot represent the capital defendant during the unitary review proceeding "unless the court finds, after a colloquy on the record, that the petitioner has knowingly, intelligently and voluntarily waived his right to claim prior counsel's ineffectiveness." This will put a defendant in the difficult position of choosing whether to continue with an attorney who he wants to represent him thereby giving up any opportunity to claim that counsel's ineffectiveness.

This would certainly put an ethical attorney in a difficult situation. He may feel that he can do a very good job in the unitary review process. Nevertheless he may have to counsel his client to take his chances with new appointed counsel so that he may raise claims of ineffectiveness. Since there are no safeguards to guarantee the appointment of competent counsel at the unitary review stage, the original attorney is really asking his client to take a life-threatening gamble. I am not sure that the state should be putting attorneys or defendants into that kind of a bind.

Two decisions from the Third Circuit Court of Appeals show an unwillingness to countenance placing defendants in those kinds of situations. (Neither of these cases involved the

death penalty.) In United States v Garcia, 544 F.2d 681 (1976), the defendants were convicted, on guilty pleas, of narcotics charges. At the time the guilty pleas were entered, the court announced that it could not extend "clemency and lenity" or be "lenient and merciful" because neither defendant had assisted law enforcement in investigations of the illegal drug trade. The defendants appealed their sentences and the Third Circuit vacated those sentences.

The Court of Appeals held that the sentencing procedures undermined the defendants' Fifth Amendment right against self-incrimination. The Court characterized the issue thusly: "whether the principle against compelled self-incrimination was contravened by the weight accorded defendants' failure to cooperate with government authorities." 544 F. 2d at 683. Since neither defendant was given any guarantee that the information he revealed would not be used to indict him for other acts, the Court found the sentencing procedure to be unconstitutional. The Court wrote:

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellant's expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand.

544 F. 2d at 685.

The reference to a "Hobson's choice" reappeared in the Third Circuit's decision in United States ex rel. Wilcox v Johnson, 555 F.2d 115 (1977). There a Pennsylvania prisoner sought habeas corpus relief. The Court of Appeals found that the trial judge's ruling - if the defendant took the stand his counsel would be permitted to withdraw and defendant would be forced to represent himself - was an impermissible infringement on the defendant's right to testify and his Sixth Amendment right to counsel. The Court wrote:

> As in Garcia, the appellee here 'was put to a Hobson's choice': decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel. The Trial Judge thus conditioned the exercise of Mr. Wilcox's statutory right to testify upon the waiver of rights guaranteed by the Constitution. This was an impermissible infringement upon the appellee's right to testify and his Sixth Amendment right to counsel.
>
> A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

555 F. 2d at 120.

The unitary review procedure will put a defendant to a Hobson's choice. He must either discharge his counsel or give up his right to claim ineffectiveness. The two decisions from the Third Circuit demonstrate that forcing a noncapital defendant to make such a choice is probably unconstitutional. A federal court would be hard pressed to permit such a dilemma to be imposed on a capital defendant.

We are also troubled by the lack of a procedure for asserting ineffective assistance of appellate (or unitary review) counsel. It is unclear that a capital defendant will have any means for asserting such a constitutional deficiency. This is particularly troubling since many capital defendants have obtained judicial relief after demonstrating that they had received ineffective assistance from trial and appellate counsel.

Similarly, it is unclear how a defendant can assert his innocence based on after acquired evidence if that defendant has already been through the unitary review process. What if the new evidence is the result of technological advances in DNA testing? What if the new evidence is the result of a previously reluctant eyewitness coming forward without prompting by the defendant? I do not think that any attorney could accurately predict the proper way to proceed based on the language of this bill.

Finally, I am aware that both Missouri and Arkansas have experimented with unitary review procedures for all criminal cases. In those states, the state Supreme Court adopted the procedure via court rules. In both states, the Supreme Court abolished the unitary review procedures because they were confusing and spawning even more litigation. I am in the process of obtaining more information about the procedure in California, which is somewhat different that what has been proposed here. I will forward that information once I receive it.

Thank you for your consideration of our views on this legislation..

Very truly yours,

Larry Frankel
Legislative Director

APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES

Amend Title 42 Pa.C.S.A. Section 9711 (h) by adding:

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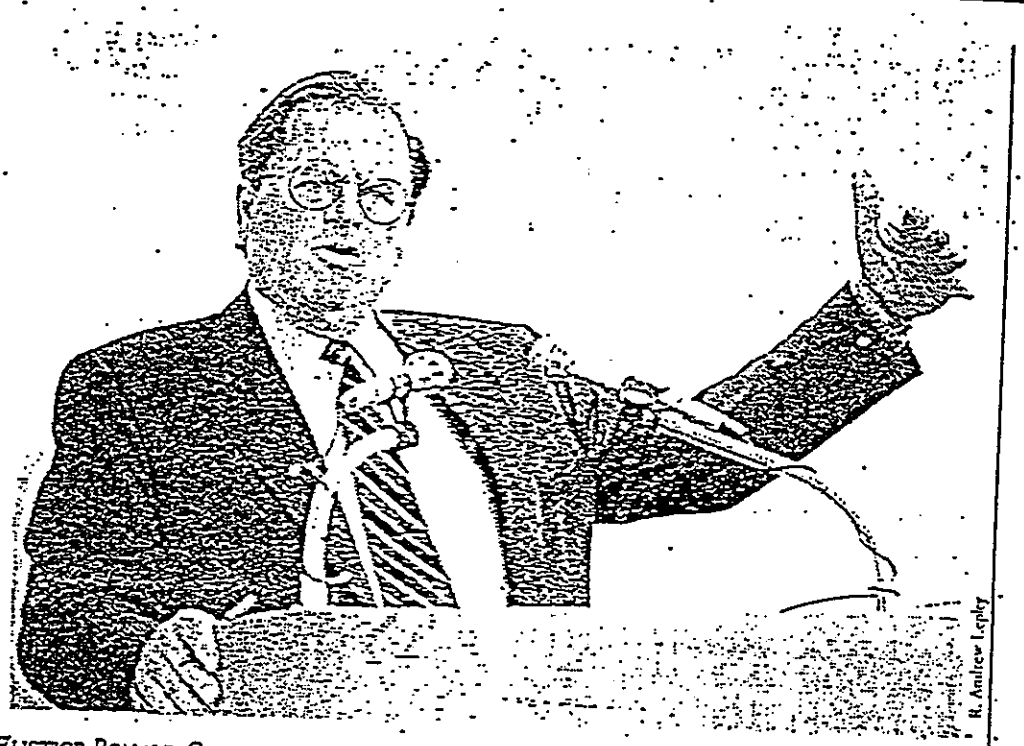

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"He's appealed to the Supreme Court of the United States and he's finally said that he doesn't even want to talk to the folks at the Capital Case Resource Center," he said. "So you'll probably be seeing that coming up very soon. May 2 is the date and he could be the first individual since Elmo Smith was executed in 1961."

187 ON DEATH ROW

A total of 187 individuals are on death row in Pennsylvania, Castille said, 57 of whom have their direct appeals pending before the state Supreme Court. Of those, 110 have their Post-Conviction Review Act appeals still pending, he said. That means, Castille said, that 57 of the 187 are "probably" unrepresented and 130 of them may or may not have completed their full appeals.

Castille predicted Ridge will "timely review the cases we send to him."

"The governor has also said that he is going to start a review of those individuals from the earliest person on death row since 1978 up to the latest person sent there before his election," he said. "I think he's pretty serious about it, as you can tell."

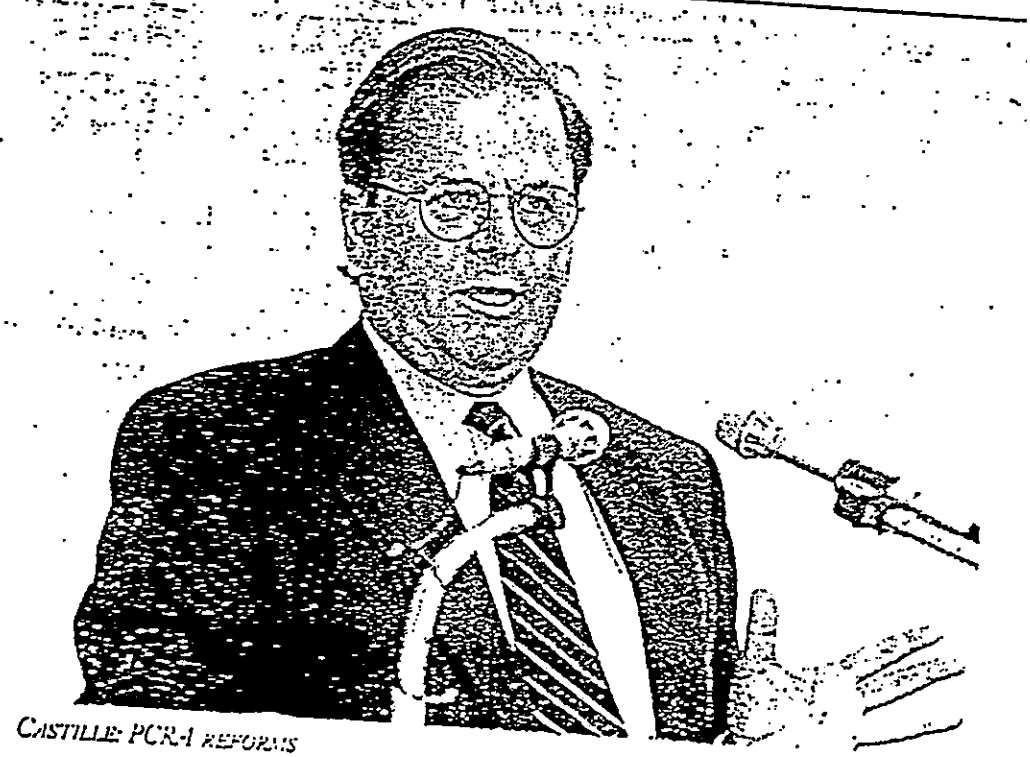
CENTER OVERWHELMED

That emphasis on signing death warrants, he said, "is going to cause problems in Pennsylvania." He said the Capital Case Resource Center is going across the state trying to recruit lawyers to defend death row inmates. The center's work, he said, is important because death row inmates need competent counsel for appeals.

Ridge's determination to act on death penalty cases, he said, contrasts sharply with former Gov. Robert Casey's approach.

"Previously, Gov. Casey sat on most of these things for six or seven years before he would sign a death warrant," Castille said. "The going jailhouse tactics were to just sit on them and file anything until the governor signs your death warrant and then you go ahead and file your PCRA if you haven't filed it and file your habeas corpus petition if you haven't filed it."

On average the Supreme Court comes up with a decision in a death penalty case within 18 months of being sent the case, he said.



CASTILLE: PCRA REFORMS

STRICT DEADLINES

Regardless of Ridge's position though, Castille said, the court is looking at setting strict deadlines for inmates to file their appeals.

"We ourselves are looking at some reform in case the governor somehow changes his mind or doesn't get around to doing what he has said he is going to do," Castille said. "We're looking at some capital case docket reform ourselves in the form of changes in the rules of appellate procedures in criminal proceedings."

One of things the court is looking at, he said, is imposing a "straight-out, one-year statute of limitations" on when an inmate can file a PCRA appeal.

"You won't be able to sit there for two, three, four years and be able to invoke your post-conviction hearing rights unless you do it in a timely fashion," he said. "We're looking at some U.S. Supreme Court cases that we think will support that kind of provision in the law."

The court is looking at potentially dividing the 130 inmates "who aren't doing anything" into groups and giving them "six months, a year, 18 months," to file their PCRA appeal, Castille said.

PCRA REFORM

"I can tell you, for the first time ever, the Supreme Court of Pennsylvania back in February denied a person PCRA because he sat in prison for six or seven years and didn't file anything," he said. "That was the first individual who was turned down for PCRA on the basis that he didn't timely file. That caused us to start looking at the whole situation of the PCRA appeals and to look at ways to reform that system, to make sure that justice is done and make sure the cases are properly tried."

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April 10, 1995

The Honorable Stewart J. Greenleaf
Senate of Pennsylvania
Harrisburg, PA 17120

RE: SPECIAL SESSION SB 81 - PCRA REVISIONS AND UNITARY REVIEW

Dear Senator Greenleaf:

The American Civil Liberties Union of Pennsylvania has many serious concerns about Special Session SB 81 (P.N. 109). I intend to discuss what we believe to be the most significant problems in this legislation as it is presently drafted. I hope that there will be a chance for further review and discussion of this entire bill as it moves forward.

The United States Supreme Court has repeatedly said for the last 20 years that **death is different.** Woodson v North Carolina 428 US 280 (1976), Gardner v Florida 430 US 349 (1977), Eddings v Oklahoma, 455 US 104 (1982) and Ford v Wainwright, 477 US 399 (1986). For example, in, Woodson, Justice Stewart, the author of the plurality opinion, wrote:

> In Furman, members of the Court acknowledged what cannot be fairly denied--that death is a punishment different from all other sanctions in kind, rather than degree. See 408 US, at 286-91, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan, J., concurring); id., at 306, 33 L Ed 2d 345, 92 S Ct 2726 (Stewart, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to subjected to the blind infliction of the penalty of death . . .
>
> This conclusion rests squarely on the predicate that ***the penalty of death is qualitatively different*** from a sentence of life imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year

prison term differs from one of only a year or two. *Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.*

(emphasis added)

I acknowledge that a plurality of the United States Supreme Court has held that there is no constitutional requirement that states appoint counsel for indigent death row inmates in collateral review proceedings. Murray v Giarratano, 492 US 1 (1989). Four of the justices found that the distinction between death cases and other cases did not extend to state collateral proceedings. It is not clear what a majority of the current members of the Supreme Court thinks on this issue. I can honestly say that I know of no court decision that sanctions a state providing fewer procedural protections to a death row inmate than to a noncapital defendant.

The Pennsylvania Supreme Court has recognized that death is different. Commonwealth v Billa, 555 A.2d 835 (1989) and Commonwealth v DeHart, 650 A.2d 38 (1994). Both of those decisions contain language regarding the relaxed application of waiver rules in death penalty cases. I believe that these decisions demonstrate that our Supreme Court will carefully review whatever collateral review procedure the General Assembly prescribes to ensure that no issues are deemed technically waived in death penalty cases.

In fact, we would not be the least surprised were a state or federal court to hold that the procedure set forth in Special Session SB 81 is fundamentally and constitutionally flawed. Forcing a capital defendant to pursue collateral attacks prior to affirmance on direct appeal creates procedural hurdles that noncapital defendants do not face.

One of the most troubling provisions in this legislation is Section 9572 which deals with legal representation in death penalty cases. Under subsection (B), trial counsel cannot represent the capital defendant during the unitary review proceeding "unless the court finds, after a colloquy on the record, that the petitioner has knowingly, intelligently and voluntarily waived his right to claim prior counsel's ineffectiveness." This will put a defendant in the difficult position of choosing whether to continue with an attorney who he wants to represent him thereby giving up any opportunity to claim that counsel's ineffectiveness.

This would certainly put an ethical attorney in a difficult situation. He may feel that he can do a very good job in the unitary review process. Nevertheless he may have to counsel his client to take his chances with new appointed counsel so that he may raise claims of ineffectiveness. Since there are no safeguards to guarantee the appointment of competent counsel at the unitary review stage, the original attorney is really asking his client to take a life-threatening gamble. I am not sure that the state should be putting attorneys or defendants into that kind of a bind.

Two decisions from the Third Circuit Court of Appeals show an unwillingness to countenance placing defendants in those kinds of situations. (Neither of these cases involved the

death penalty.) In United States v Garcia, 544 F.2d 681 (1976), the defendants were convicted, on guilty pleas, of narcotics charges. At the time the guilty pleas were entered, the court announced that it could not extend "clemency and lenity" or be "lenient and merciful" because neither defendant had assisted law enforcement in investigations of the illegal drug trade. The defendants appealed their sentences and the Third Circuit vacated those sentences.

The Court of Appeals held that the sentencing procedures undermined the defendants' Fifth Amendment right against self-incrimination. The Court characterized the issue thusly: "whether the principle against compelled self-incrimination was contravened by the weight accorded defendants' failure to cooperate with government authorities." 544 F. 2d at 683. Since neither defendant was given any guarantee that the information he revealed would not be used to indict him for other acts, the Court found the sentencing procedure to be unconstitutional. The Court wrote:

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellant's expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand.

544 F. 2d at 685.

The reference to a "Hobson's choice" reappeared in the Third Circuit's decision in United States ex rel. Wilcox v Johnson, 555 F.2d 115 (1977). There a Pennsylvania prisoner sought habeas corpus relief. The Court of Appeals found that the trial judge's ruling - if the defendant took the stand his counsel would be permitted to withdraw and defendant would be forced to represent himself - was an impermissible infringement on the defendant's right to testify and his Sixth Amendment right to counsel. The Court wrote:

> As in Garcia, the appellee here 'was put to a Hobson's choice': decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel. The Trial Judge thus conditioned the exercise of Mr. Wilcox's statutory right to testify upon the waiver of rights guaranteed by the Constitution. This was an impermissible infringement upon the appellee's right to testify and his Sixth Amendment right to counsel.
>
> A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

555 F. 2d at 120.

The unitary review procedure will put a defendant to a Hobson's choice. He must either discharge his counsel or give up his right to claim ineffectiveness. The two decisions from the Third Circuit demonstrate that forcing a noncapital defendant to make such a choice is probably unconstitutional. A federal court would be hard pressed to permit such a dilemma to be imposed on a capital defendant.

We are also troubled by the lack of a procedure for asserting ineffective assistance of appellate (or unitary review) counsel. It is unclear that a capital defendant will have any means for asserting such a constitutional deficiency. This is particularly troubling since many capital defendants have obtained judicial relief after demonstrating that they had received ineffective assistance from trial and appellate counsel.

Similarly, it is unclear how a defendant can assert his innocence based on after acquired evidence if that defendant has already been through the unitary review process. What if the new evidence is the result of technological advances in DNA testing? What if the new evidence is the result of a previously reluctant eyewitness coming forward without prompting by the defendant? I do not think that any attorney could accurately predict the proper way to proceed based on the language of this bill.

Finally, I am aware that both Missouri and Arkansas have experimented with unitary review procedures for all criminal cases. In those states, the state Supreme Court adopted the procedure via court rules. In both states, the Supreme Court abolished the unitary review procedures because they were confusing and spawning even more litigation. I am in the process of obtaining more information about the procedure in California, which is somewhat different that what has been proposed here. I will forward that information once I receive it.

Thank you for your consideration of our views on this legislation..

Very truly yours,

Larry Frankel
Legislative Director

Facts and Procedural History

Petitioner Joseph Henry was found guilty of first degree murder and related felony charges on April 25, 1987, in the Northampton County Court of Common Pleas. On April 27, 1987, the sentencing phase of the trial began, and on the following day, the jury returned a verdict of death. This court denied Joseph Henry's post-verdict motions on June 30, 1988; and on July 22, 1988, the Honorable Michael V. Franciosa, Judge of this Court, sentenced Henry to death. Joseph Henry's automatic direct appeal to the Pennsylvania Supreme Court was denied on February 8, 1990. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990).

On February 28, 1995, Pennsylvania Governor Thomas Ridge signed a death warrant scheduling Joseph Henry's execution by the Department of Corrections for the week of April 16, 1995.

Joseph Henry is not currently represented by counsel for purposes of post-conviction collateral attack proceedings, and no attorney has represented him for this purpose since the Pennsylvania Supreme Court affirmed his conviction and sentence on direct appeal in 1990. Henry has never filed a petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, et seq.[2] Henry intends to file a PCRA petition challenging his conviction and sentence, but claims he is not able to do so without the effective assistance of counsel. Henry is indigent and cannot afford to retain counsel. An order of this court permitting

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[2] Post Conviction Relief Act. As amended 1988, April 13, P.L. 336, No. 47, § 3, imd. effective.

Henry to proceed in forma pauperis was signed March 27, 1995.

Discussion

Under Pennsylvania law, Joseph Henry is entitled to representation of able counsel in the preparation, filing and advancement of a collateral attack on his conviction, appeal, and death sentence. This right is absolute, and is not impaired because it was not filed until after a death warrant issued. See Pa. Const. art. I, § 14; 42 Pa.C.S. § 9541, et seq.; Commonwealth v. Albert, 522 Pa. 331, 334; 561 A.2d 736, 738 (1989). Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981).

Relief under Pennsylvania's Post Conviction Relief Act is in the nature of a common law writ of habeas corpus constitutionally guaranteed, and not available to defendant unless he is provided the time and representation to file a counselled petition under the act. Joseph Henry cannot meaningfully assist his counsel in the preparation of a petition for collateral post-conviction relief without sufficient time necessary to meet with counsel and examine the issues. See Commonwealth v. Rolan, Nos. 8402-2893, 2896 (Phila. C.P.), Commonwealth v. Rolan, 83 Cap. App. Dkt., 1994 (Pa. Jan. 26, 1995) (per curiam); Commonwealth v. Lark, January Term 1980, Nos. 2012, 2013, 2015, 2022 (Phila. C.P.), Commonwealth v. Lark, 77 Cap. App. Dkt. 1994 (Nov. 10, 1994), Lark v. Lehman, Civ. A. No. 94-6762, slip op. (E.D. Pa., Nov. 10, 1994); Commonwealth v. Terry, No. 1563-79 (Mtgy. C.P.) Aug. 1994.

There have been no executions in Pennsylvania in over thirty (30) years, and Pennsylvania courts have regularly granted stays of

execution to permit convicted murderers sentanced to death to pursue an initial counselled post-conviction petition for collateral relief.[3]

In the single case brought to the attention of this court where the Pennsylvania Supreme Court sustained common pleas denial

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[3] Commonwealth v. Lesko, No. 681 C, 1980 Term (Westm. C.P.) (stay issued Nov. 12, 1985 for execution scheduled Nov. 19, 1985); Commonwealth v. Travaglia, Nos. 684 C, 1980 Term (Westm. C.P.) (stay issued Nov. 13, 1985 for execution scheduled Nov. 19, 1985); Commonwealth v. Zettlemoyer, No. 639 819, 1979 Term (Dauph. C.P.) (stay issued Nov. 12, 1985 for execution scheduled Dec. 3, 1985); Commonwealth v. Beasley, Nos. 2175-2178, July Term 1980 (Phila. C.P.) (stay issued Nov. 26, 1986 for execution scheduled Dec. 2, 1986); Commonwealth v. Frey, No. 169, 1980 Term (Lanc. C.P.) (stay issued June 9, 1988 for execution scheduled June 14, 1988); Commonwealth v. Maxwell, Nos. 1080-86, March Term 1981 (Phila. C.P.) (stay issued Sept. 7, 1989 for execution scheduled Sept. 19, 1989); Commonwealth v. Cross, No. 565 A, B, C of 1981 (Beaver C.P.) (stay issued Sept. 20, 1990 for execution scheduled Oct. 2, 1990); Commonwealth v. Whitney, Nos. 1416-1429, Nov. Term 1981 (Phila. C.P.) (stay issued Nov. 29, 1990 for execution scheduled Dec. 13, 1990); Commonwealth v. Griffin, Nos. 1555-84 (Del. C.P.) (stay issued June 11, 1991 for execution scheduled June 25, 1991); Commonwealth v. Albrecht, Nos. 408-11, 1980 Term (Bucks C.P.) (stay issued May 13, 1991 for execution scheduled July 16, 1991); Commonwealth v. Fahy, Nos. 2284, 2286, 2288, 2289, Feb. Term 1981 (Phila. C.P.) (stay issued Jan. 13, 1992 for execution scheduled Jan. 14, 1992); Commonwealth v. Christy, No. 0270, a, b, c 1983 (Cambria C.P.) (stay issued Nov. 9, 1992 for execution scheduled Nov. 17, 1992); Commonwealth v. Terry, No. 1563-79 (Mtgy. C.P.) (stay issued Aug. 9, 1994 for execution scheduled Aug. 16, 1994; Commonwealth v. Holland, Nos. 1430, 1437, 1439, 1441, Oct. Term, 1984 (Phila. C.P.) (stay issued Oct. 7, 1994 for execution scheduled for Oct. 16, 1994); Commonwealth v. Lark, 77 Cap. App. Dkt. 1994 (Pa. Nov. 10, 1994) (per curiam) (summarily reversing orders of Court of Common Pleas and issuing a stay of execution Nov. 10, 1994 for execution scheduled Nov. 13, 1994) (Lark v. Lehman, Civ. A. No. 94-6762 (E.D. Pa. Nov. 10, 1994) (stay issued Nov. 10, 1994 for execution scheduled Nov. 13, 1994); Commonwealth v. Rolan, 83 Cap. App. Dkt. 1994 (Pa. Jan. 6, 1995) (Montemuro, J., in chambers) (temporary state issued Jan. 6, 1995 for execution scheduled Jan. 10, 1995); id. (Pa. Jan. 26, 1995) (summarily reversing order of Court of Common Pleas and issuing stay of execution). But see Commonwealth v. Duffey, 78 Cap. App. Dkt. 1994 (Pa. Dec. 5, 1994).

of a stay of execution, the stay was nevertheless granted and counsel appointed to pursue post-conviction relief in a collateral proceeding, by the United States District Court for the Middle District of Pennsylvania.[4]

The Supreme Court of Pennsylvania requires the appointment of PCRA counsel for a pro se petitioner. See Pa.R.C.P. No. 1504(a). The Pennsylvania Capital Case Resource Center, initiated in July, 1994, is now a Community Defender Organization under 18 U.S.C. § 3006A of the Criminal Justice Act, without sufficient resources to represent this petitioner in contemplated PCRA proceedings.

Attorneys Dunham and Bradley who assisted in the preparation of the pro se petition for stay of execution are not familiar with the Joseph Henry trial, or the substance of the direct appeal; they are thus unable to file a PCRA petition for Joseph Henry at this time. Further, Henry's private trial counsel for pretrial, trial, and direct appeal may not represent Henry on a collateral attack on conviction and sentence, and direct appeal because trial counsel cannot litigate the question of his own ineffectiveness. Commonwealth v. Albert, supra.

For Joseph Henry the judicial trial process concluded with imposition of the death sentence in 1988. The direct appellate review process concluded with the timely opinion and order of the Pennsylvania Supreme Court affirming the death penalty in 1990. The execution process requires thereafter the governor's signature

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[4] See Commonwealth v. Duffey, No. 78 Cap. App. Dkt. Supreme Court of Pennsylvania; see also Duffey v. Lehman, 1995 WL 103359 (M.D. Pa.).

on a death warrant. It appears clear that the full spectrum of Henry's constitutionally guaranteed rights to post-conviction collateral review of the trial, direct appeal, and warrant process, including effectiveness of counsel does not ripen until the death warrant issues. The warrant issued here on February 28, 1995, less than thirty (30) days before petitioner comes before the court seeking an opportunity to have the court conduct a meaningful review.

Henry cannot receive effective and meaningful assistance of counsel, as required in McFarland v. Scott, 114 S. Ct. 2568 (1994), under the pressure of an execution date approximately three weeks from the time counsel appears in the case.

The court notes the five-year delay in issuing the death warrant here is not of petitioner's making, or due to any interruption or abuse of the constitutionally guaranteed judicial process. The court continues to address this most serious of issues with all due dispatch contemplated by death penalty legislation, giving due regard to the necessary review that must accompany imposition of the irreversible penalty of death. Henry's absolute right to collateral review may not be infringed to accommodate a desire to bring a quicker end to legal proceedings surrounding this tragic episode that deeply and irrevocably affects us all, but none more than the families of the victim, and principals involved.

We cannot ignore that there is an "overwhelming public interest [in] insuring that capital punishment in this Commonwealth

comports with the Constitution." Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Entry of a stay of execution does not rest on an evaluation of any alleged prior procedural or substantive error. The stay empowers the petitioner to employ the means necessary to procure a counselled opportunity for judicial review to determine if any prejudicial error occurred.

Under these facts and circumstances, the court will grant a reasonable limited stay of execution and appoint counsel immediately for purposes of pursuing defendant's PCRA relief forthwith.