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Regarding Pennsylvania's Death Penalty Moratorium

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Good morning Chairmen Marsico and Petrarca, and members of the House Judiciary Committee. On behalf of the District Attorneys Association, we are pleased to be testifying about death penalty procedures and law in Pennsylvania and to answer any questions you may have on this important topic. We are Ed Marsico, Dauphin County District Attorney, Craig Stedman, Lancaster District Attorney, and Ronald Eisenberg, Deputy District Attorney of the Law Division in the Philadelphia District Attorney's Office. Collectively, we have personally prosecuted many capital cases and defended them on appeal, in both state and federal courts. We firmly believe that our current system is fair and just to defendants, that the death penalty is used only in the most extreme circumstances, that the appellate process actually benefits convicted murderers at the expense of victims, and that the various claims by death penalty abolitionists are both factually and legally incorrect.

Our written testimony contains several sections. First, we discuss the statutory process by which an individual may be sentenced to death and the appellate review that is available to anyone who is actually sentenced to death. Second, we discuss many of the key policy points regarding capital punishment and attempt to debunk the erroneous arguments that the death penalty opponents raise over and over. Finally, we suggest statutory changes that will help streamline the process so that the abuses of the system at the expense of victims can be minimized as much as possible.

THE PROCESS

It is important that you understand the process of how a case becomes a capital case, including the requirements on the Commonwealth throughout the process and protections provided to the defendants. You will see that due process and other protections for defendants are built into every stage of the various criminal proceedings.

The death penalty is available for only one crime, first-degree murder, and the defendant must be an adult. First-degree murder is the intentional killing of another person, which the Commonwealth must prove beyond a reasonable doubt, and the decision by the jury must be unanimous. A first-degree murder includes the specific intent to kill as well as premeditation. A district attorney is not required to seek the death penalty in first-degree murder cases. In fact, in most cases we do not. As we will explain later, it is only in a very small minority of first degree murder cases that we seek the death penalty.

In the rare case that we seek the death penalty, if the defendant is convicted of first-degree murder, then the sentencing proceeding (or penalty phase as it is often referred to) will begin. During this phase, the Commonwealth must prove to the jury beyond a reasonable doubt that certain statutorily defined "aggravating factors" existed in the case. The defendant also has the opportunity to present evidence that any "mitigating factors" existed in the case.

What are aggravating factors? They include considerations related to both the status of the victim, as well as the nature of the crime. With regard to the victim, factors include such things as whether the victim was a child, pregnant, or a law enforcement officer. With regard to the nature of the crime, the aggravating factors include whether the defendant tortured the victim,

committed the crime while committing another felony, or created a grave risk of death to another person in addition to the victim.

What are mitigating factors? They include the defendant's mental history, age, lack of criminal history, impairment at the time of the crime, as well as any other evidence concerning his character and the circumstances of the offense. Mitigating evidence is very broad and can include any factor regarding the defendant.

Once the prosecution and defense have presented their respective evidence of both aggravating and mitigating factors, the jury then weighs this evidence to determine whether the aggravating factors outweigh the mitigating factors. The Commonwealth must prove beyond a reasonable doubt the existence of an aggravating factor, and the jury must be unanimous that the aggravating factor exists. If an aggravating circumstance is not proven, the sentence must be life in prison. With regard to mitigating factors, the jury does not have to be unanimous. One juror can find a mitigating factor exists. If the jury determines that the mitigating factors are equal to or outweigh the aggravating factors, the jury is required to sentence the defendant to life in prison. If—and only if—the jury unanimously finds that one or more of the aggravating factors outweigh the mitigating factors may the death penalty be imposed. This is, appropriately, a heavy burden for the Commonwealth.

If the verdict is a sentence of death, the case is automatically appealed directly to the Pennsylvania Supreme Court. The appellate process is lengthy and extensive, and the convicted are entitled to numerous rounds of appeals.

Initially, the Supreme Court reviews the case to determine whether the evidence that the prosecution presented was sufficient to sustain the jury's verdict. The Court also addresses any other appellate claims raised by the defendant. The Supreme Court has the authority to correct any errors that may have occurred at the trial, return the case to the trial court for additional proceedings, overturn the death sentence, or affirm the death sentence. If the Court affirms the death sentence, the defendant has the opportunity to appeal the decision to the United States Supreme Court.

If the Supreme Court affirms the Pennsylvania Supreme Court's decision, then the defendant may return to the trial court to file a post-conviction relief petition, known as a "PCRA petition." In this petition, which the defendant has a full year to file, the defendant may raise, among other things, claims about the effectiveness of his lawyer or constitutional violations that undermined the truth-determining process. The PCRA judge reviews the defendant's petition and determines whether his claims warrant a fact-finding hearing. If so, the judge will order a hearing, and the defendant will have the opportunity to substantiate his claims in court. If the defendant demonstrates, by a preponderance of the evidence, that the issue he raised has merit, the judge will grant his PCRA petition, vacate his sentence, and order a new trial.

If the judge determines that his claims are meritless, the judge will inform the defendant that he plans to dismiss the petition and provide the grounds on which the dismissal would be based. The defendant then has the opportunity to respond to the judge's reasoning. If the judge agrees with the defendant's opposition to any of the reasons for dismissal, the judge can still order a

fact-finding hearing. If the judge dismisses the defendant's petition because it is without merit, the defendant may appeal the judge's decision to the Pennsylvania Supreme Court. Similar to the defendant's initial appeal, the Pennsylvania Supreme Court can return the case to the PCRA judge if they find errors in the case. If not, they would affirm the case and the defendant again has the opportunity to appeal to the United States Supreme Court.

If the U.S. Supreme Court affirms the Pennsylvania Supreme Court's decision, the defendant has at least two additional avenues for relief. First, if there is new evidence or a change in the law affecting his case, he can file another PCRA petition with the trial judge. If not, he can file a habeas corpus petition in federal court. The United States District Court judge essentially takes a second look at each and every claim that the defendant raised on appeal in state court and determines whether the state court's decisions were objectively reasonable. If the judge determines that any of the Pennsylvania Supreme Court's decisions in the defendant's case were objectively unreasonable, the judge can vacate the defendant's sentence or order the state court to rectify the error. The federal judge also has the authority to return the case to the state courts for an additional fact-finding hearing or may even hold the hearing in federal court.

If the federal judge affirms the sentence, the defendant can appeal the decision to a panel of judges on the United States Court of Appeals for the Third Circuit. If those judges affirm the sentence, the defendant can ask for a second round of review by all of the judges on the Third Circuit. If the defendant's efforts are unsuccessful, he can again ask the United States Supreme Court to review his case.

At this point, the defendant has the opportunity to file a second or subsequent PCRA petition, in which he can allege that there is new evidence that would have changed the outcome of the trial. The defendant has 60 days to file such a petition after discovery of the new evidence. There is no limit on the time for finding new evidence, and any PCRA petition may be freely amended after it is filed—meaning that defendants are not locked into the arguments or words or facts they put in their PCRAs (first, second, third, fourth, etc.) Petitions can be freely amended, and they routinely are.

It should come as no surprise that capital cases receive far more appellate review than any other type of case. As they should.

Moreover, we and our colleagues think very long and hard before we seek the death penalty. It is not a decision we take lightly. We in no way back away from making these decisions, but we look carefully at the evidence in the case, as well as the existing aggravators and mitigators, before we make this decision. And while different district attorneys handle some parts of this process differently, we know for a fact that the decision to seek death is rare and is only made in the worst of the worst cases.

Understanding the capital case and appellate process is only the beginning of the analysis that we ask you to consider when you think about policy issues related to the death penalty. There are many more that demonstrate the fairness of the system and that the only individuals who have legitimate grounds to complain are victims, because the process helps defendants at the expense of victims' rights.

So please consider the following policy and operational considerations:

Seeking the death penalty is selective and rare: Fewer than 1 percent of murderers in Pennsylvania receive a death sentence—demonstrating just how careful and selective we are in seeking it and just how rarely a death sentence is imposed. We do not seek the death penalty in all or even most cases where we are permitted to by law. Such discretion is important and necessary and should remind everyone that those people who are eligible for the death penalty are those that have committed the most brutal and violent crimes, again such as cop-killers and those who kill children or torture their victims.

The current appellate review process is exhaustive, more exhaustive than any other review in criminal law: The review process by the courts is extensive and detailed. The defendant's right of appeal is an important part of the proper administration of justice. Every capital case is carefully weighed during at least three sets of appeals, with multiple layers of courts involved, spanning at least a decade, if not two or three decades. Therefore, the problem is not too little study. Each case is studied individually and exhaustively, by teams of state and federal judges. There is far more due process in capital cases than in any other. Far more.

Claims of innocence are misstated: Opponents of the death penalty often claim that the death penalty is unwise because so many innocent people have allegedly been exonerated. In making these claims, death penalty opponents have revealed their inability to tell the truth. Words matter, and their deliberate use of the word "innocence" is an intentional attempt to convince the public that some blameless individual is sitting behind bars, awaiting death for a crime he or she did not commit. But in reality, in virtually every case in Pennsylvania, anyone allegedly "exonerated" has merely succeeded through a procedural mechanism that in no way calls into question the person's actual guilt or innocence. Most appeals deal with aspects of the trial unrelated to the sufficiency of the evidence. In fact, death penalty opponents cannot establish any current capital case in Pennsylvania in which the convicted person is actually innocent.

Claims about "error rates" contradict the calls of abolition: Anti-death penalty activists frequently note the large number of death sentences that have been overturned by federal courts sitting in Pennsylvania. They argue that if so many cases are reversed, the "system" must be "broken." Actually the opposite is true. The reversal rate shows the strict scrutiny exercised by our federal judges. Those cases that are upheld after such review are the least deserving of any further delay. That reversal rate, moreover, is an ideological anomaly, not a sign of genuine error rates compared to other states. In many states—Texas, Mississippi, Alabama, and Florida, for example—very few death sentences are overturned by federal courts. These courts are staffed by federal judges of equal rank to those here, applying exactly the same federal laws. Yet no one would say (certainly no death penalty opponent) that the capital justice "system" in the South must be practically perfect, because the "error rate" there is so low. The "error rate" argument is a false one.

Claims that there is little money spent to defend capital murderers are patently false: Those subjected to the death penalty receive more representation and file more appeals than any other group of criminals. By virtue of having been sentenced to death, their sentences receive

more review than if they had simply been convicted of murder and sentenced to life in prison. A group known as the Federal Capital Defense Organization (FCDO) spends over $15 million in federal appropriations per year in Pennsylvania to defend capital murderers throughout the process. Their representatives begin to assist many of their clients at the trial stage in state court. Their work continues on direct appeal in state court and then continues throughout the federal appellate review process—all notwithstanding the fact that they are not actually permitted to represent defendants in state court since the funding for the FCDO is for federal court work. But the point is that tens of millions of dollars per year are spent defending capital defendants, far more money than the Commonwealth spends.

This reality is often distorted by the claim that in Pennsylvania, unlike elsewhere, there is no state funding for capital defense. The intended implication is that the government does not support this important work. But this argument is knowingly deceptive. In Pennsylvania, funding for defense lawyers is provided at the county level—in exactly the same way that funding for police and prosecutors is provided at the county level. The funding is not deficient merely because it is budgeted at a different level of government. And, as noted above, there is one particular kind of defense lawyering—capital defense—that is supplemented by the federal government, to the tune of millions of dollars each year. As a consequence, the total amount spent on capital defense in Pennsylvania is not less than in most states—it is considerably more than in most states.

As an additional matter, the ethical conduct of the FCDO is so atrocious that the Pennsylvania Supreme Court in its last opinion of 2014 labeled the FCDO's behavior as "intolerable." The Court noted that the claims raised by the FCDO in the case it was reviewing were "beyond lacking merit," and "patently frivolous and deliberately incoherent." The Court actually rebuked the organization for its "predictable tactics designed merely to impede the already deliberate wheels of justice." The unscrupulous efforts of the FCDO have been a concern of the Supreme Court for years. The opinion of the Court gained the voice of almost every justice on the Court and now represents the majority and binding conclusion.

Costs of a death penalty trial are somewhat higher than other murder trials due to the use of mitigation specialists for the defense in these cases. However, the costs are nowhere near the numbers quoted by many death penalty opponents. From a prosecution perspective, our appellate lawyers get a salary whether their time is spent on a capital appeal or appeals of other cases. Additionally, many defendants plead guilty to a life sentence when faced with the potential of a death sentence, saving dollars, if that analysis must be reviewed.

Many anti-death penalty advocates are engaged in a shell-game:
Georgetown Law Professor Bill Otis and Justice Antonin Scalia have highlighted the cynical shell game that many of those who work toward abolishing the death penalty are engaged in. Recently, both have pointed out that abolitionists demanded for years that, if we must have the death penalty, we move toward lethal injection. Largely, the country accommodated their demand. The abolitionists have then tried to make it nearly impossible to obtain drugs that can be used to carry out the death penalty with little or no pain. Therefore, some states have been reduced to using drugs which give rise to legal arguments about disputes on whether every possibility of pain is eliminated. If the abolitionists actually just cared about making sure the

drugs used did not cause pain, then they would work with states to acquire those drugs that exist that do not cause pain. But that is the opposite of what they have done: they have effectively blocked those drugs in many states because the cause of ending capital punishment is far more important than actually ensuring that those executed do not feel pain.

Death penalty opponents also claim that life imprisonment is sufficient punishment. However, many of those same advocates claim that elderly prisoners are no longer a threat to society, cost taxpayer dollars with medical issues, and should be released at a certain age.

Claims that the death penalty is racially biased are flawed and debunked:
We also respectfully caution you to be wary of studies that opponents of capital punishment cite as reasons why the death penalty is flawed. By way of example, death penalty opponents have spent decades citing a study by the late Professor David Baldus as evidence that the death penalty is racist and unfair to minorities. Death penalty opponents relied on it numerous times—so much so that we know of at least 19 cases where the Pennsylvania Supreme Court addressed claims based on the Baldus study. But this study was grossly inaccurate. A subsequent Cornell University study (by death penalty opponents) concluded that a white murderer sentenced to death was twice as likely to be executed as a black person sentenced to death.

There are further problems with this Baldus study, which again the same death penalty opponents have cited as evidence of racial bias. A federal court in Georgia (*McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Georgia 1984)) found that there were inherent inaccuracies in the study's data: the questionnaire could not capture every nuance of the case; there were differences in judgment among those reviewing each case; many of the relevant details in the case that were known to the court and juries were not known to researchers; and the statistical model Baldus used to form his conclusions was unreliable. Why are we including all this information about the debunked Baldus study? Because it demonstrates that death penalty opponents will ignore the truth and simply fudge data in order to end the death penalty. The collective unethical, dishonest behavior of the anti-death penalty leaders should not be rewarded.

When it comes to race and the death penalty, there is one inescapable statistical fact: almost all murder is intra-racial. Almost all black murderers kill other blacks; almost all white murderers kill other whites. If we stop the death penalty to "protect" black defendants, we are denying justice to the black victims whom they killed. A moratorium does not address perceived racism in the death penalty. It simply says that the lives and deaths of victims—black or white—aren't that important.

Governor Wolf's Illegal Death Penalty Moratorium:
Governor Wolf's death penalty moratorium is illegal, and he has grossly exceeded his powers in enacting it. He has used this moratorium by granting reprieves in two cases, *Commonwealth v. Terrance Williams* in Philadelphia and *Commonwealth v. Hubert Michael* in York County. The issue of the legality of the moratorium is before the Pennsylvania Supreme Court and will be decided, we hope, soon.

But we want to ask that you consider another aspect of the moratorium. As you are aware, when Governor Wolf announced the imposition of his moratorium, he stated that it would remain in existence until the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment, established by the Joint State Government Commission pursuant to Senate Resolution 6. This entity of the Joint State Government Commission is a mere advisory group whose role in this matter exists only because of a Senate vote on a resolution. When the Senate passed the resolution authorizing this advisory group, its intent was not to mandate its recommendations be reviewed and implemented in order for our existing laws to be implemented. Additionally, we can tell unequivocally, this Committee is biased. Supporters of capital punishment are outnumbered by those who believe capital punishment should be abolished. The results are pre-ordained, and therefore the whole process is illegitimate. There does not seem to have been any logic to ensure that there was ideological balance as to whom was selected. How disturbing and undemocratic—and all this is funded with taxpayer dollars. If one really wanted a fair discussion about capital punishment, then the appointment process to the Advisory Committee would have been done similar to the processes during the Interbranch Commission on Juvenile Justice and the Child Protection Task Force, where each caucus and the Governor made appropriate and balanced appointments. We even wrote a letter to the Commission explaining our concerns about the makeup of the Advisory Committee, and the response was essentially a non-response.

Needed Legislation:

We ask that you consider legislation to improve the capital appeals process. While this is not the forum to spend a lot of time discussing details, we believe legislation streamlining the appellate process so it mirrors the federal system is entirely appropriate and will help provide more clarity, predictability and fairness in the appellate system. Most important would be to provide that before a second or successive petition is filed in any capital case, a defendant must move in the Pennsylvania Supreme Court for an order authorizing the appropriate Court of Common Pleas to consider the petition. If the Pennsylvania Supreme Court finds that the petitioner has made a prima facie showing that the petition in a capital case satisfies the requirements of this section, the defendant may file this petition. This proposal tracks the rules in federal courts and would help to ensure that defendants cannot do what they do now—which is file petition after petition simply to slow the process down. This would also ensure that the Court initially reviews a defendant's application and allows it to be filed if there is a showing the application meets the statutory requirements.

Our current system of death penalty warrants also needs to be revised. It makes no logical sense that warrants are signed, and then if there is an appeal, they effectively expire, then if the defendant loses his appeal, the Governor has to sign a new warrant (although Governor Wolf is not signing warrants, but instead Secretary Wetzel is now signing warrants). It would be much simpler if our statutes provided that once a warrant is signed, perhaps following the completion of the first round of appeals, the warrant would effectively be active throughout the whole appellate process, except when a case is being appealed, in which case it would be temporarily stayed. But once the appeal concluded, the warrant would be valid and active (until another appeal is filed).

In closing, we hope that we have given you a clear outline of the death penalty process—including the extreme nature of the cases in which we seek the death penalty and the numerous rounds of appeal guaranteed to each defendant—debunked the arguments of death penalty opponents, and provided suggestions as to ways in which the system can be improved. Thank you again for the opportunity to testify on this important topic.