

# **Pennsylvania District Attorneys Association**



**Response to the  
Joint State Government Commission's Report on  
Capital Punishment in Pennsylvania: The Report of  
the Task Force and Advisory Committee**

**June 2018**

## **I. OVERVIEW**

Nearly seven years ago, the Pennsylvania Senate passed a Resolution tasking the Joint State Government Commission of the General Assembly with the responsibility of examining capital punishment in Pennsylvania. Individuals were selected as Advisory Committee Members and over the years worked to develop a report. The Advisory Committee was made up largely of death penalty opponents. The Senate Resolution also authorized the Justice Center for Research at Penn State University, in conjunction with the Interbranch Commission on Gender, Racial, and Ethnic Fairness, to collaborate on a study of the administration of the death penalty in Pennsylvania. Professor John Kramer led this study.

In October 2017, Professor Kramer and his team released their data-driven study, based on the examination of actual capital cases in Pennsylvania and concluded that capital punishment in Pennsylvania is not disproportionately targeted against defendants of color. Months later, on June 25, 2018, the Commission released its report, which was supposed to include, in part, the Kramer Study. This Report took many years to complete, but as we explain below failed in its task to be a full accounting of capital punishment in Pennsylvania.

No district attorney takes pleasure in pursuing a death penalty case. Decisions regarding capital punishment are made based on the facts of a case and the applicable law. Capital punishment is only sought in the most egregious and violent cases of first-degree murder.

While a majority of Pennsylvanians continues to support the death penalty, prosecutors recognize that not everyone agrees capital punishment should be part of the criminal justice system's approach to accountability and consequences. Because there are significant differences of opinion and a variety of views on the issue, any publicly funded report on the issue should be a fair and objective analysis for elected officials and those charged with public policy to consider.

Unfortunately, this Report is neither fair nor objective. Instead, this Report is long, convoluted, and inconclusive. It contains the usual litany of complaints that death penalty opponents make. The arguments are not new, and many of the sources cited have been cited time and time again. The occasional small update is just that—small and immaterial. In many areas, the Report renders no conclusion at all, only stating that the data is unclear or incomplete.

The Report also is notable for refusing to grapple with the hard questions that challenge prosecutors: What do you do with a defendant who intentionally targets and assassinates police officers? What do you do with a defendant who kills a grandmother and suffocates a baby in a suitcase for a few dollars? What do you do with a brutal serial killer that terrorizes communities?

This Report could have been much more than what it is. The contents of the Report surprisingly cover little new ground, given the length of time it took to put together and the resources available. What new ground it does cover is glossed over, which we suspect is because those findings do not fit the narrative that many of the Advisory Committee Members had hoped and expected would be revealed.

The most glaring example is the Report's singular commissioned Study directed by Professor John Kramer to determine whether there are disparities in the administration of the death penalty. This Study is a first-of-its kind data analysis in Pennsylvania. Ultimately, it concluded that capital punishment in Pennsylvania is not disproportionately targeted against defendants of color, finding that:

- No pattern of disparity to the disadvantage of Black or Hispanic defendants was found in prosecutorial decisions to seek and, if sought, to retract the death penalty.
- No pattern of disparity to the disadvantage of Black defendants with White victims was found in prosecutorial decisions to seek or to retract the death penalty.
- Cases with Black defendants and White victims were 10% less likely than other types of cases to see a death penalty filing.
- Aggravating circumstances were filed in a larger percentage of cases involving White defendants than Black defendants.
- Legally relevant factors are likely the primary factors that shape interpretations of blameworthiness and dangerousness that theoretically drive the punishment decisions examined.<sup>1</sup>

The Study did find that the race of the victim might shape definitions of blameworthiness. The Study, however, noted that this difference *was not* in combination with the race or ethnicity of the defendant. Rather, the Study specifically stated, that "Black defendants with White victims were not more likely to receive the death penalty than defendants in other types of cases."<sup>2</sup>

For so long, those who have sought to abolish the death penalty have argued that the race of the defendant plays the critical role in decisions about who gets the death penalty. This Study squarely discredits that theory, employing facts instead of agenda-

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<sup>1</sup> John Kramer, et al., Capital Punishment Decisions in Pennsylvania: 2000-2010 Implications for Racial, Ethnic and  
<sup>2</sup> *Id.* at 4.

driven rhetoric.<sup>3</sup> Yet it is given very little credence in the final Report. An even-handed examination of capital punishment in Pennsylvania would highlight and discuss these findings, particularly because they provide a data-driven conclusion proving the charges of racial disparities related to prosecutors' death penalty decisions untrue.

To the contrary, the Report minimizes and ultimately mischaracterizes the Kramer Study, despite the fact that this Study is instructional, informative and based on new data collection.

The study took many years to complete as Professor Kramer and his staff visited district attorneys' offices, looked at files, asked questions, interviewed prosecutors and defense attorneys, and ultimately put together a detailed, data-driven analysis. Yet the Report treats the Study much like an attorney would treat an unfavorable ruling that must be distinguished. It spends more time discussing older studies, in particular the Baldus study. The Baldus study was only about Philadelphia, used a less advanced form of data analysis, did not involve reviewing district attorney files, and relied on older cases from the 1980s and 1990s.<sup>4</sup> In another instance, the Report gives more credibility to a prior study while conceding that the same study lacked comprehensive data.

The Report is not supposed to be an advocacy piece, and its results are not supposed to be predetermined. But that is what this Report and its findings are. It is, at its very essence, a catalogue of the long-held opinions of death penalty opponents.

Opponents of the death penalty are entitled to their opinions, and we do not question the sincerity of their beliefs. Capital punishment is a difficult subject, and robust

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<sup>3</sup> The conclusions from the Kramer Study also refute the need for a proportionality statute, which would have courts conduct analyses of racial bias in the imposition of the death penalty, a statute which the Report recommends—despite the fact that this is precisely what the Kramer Study did.

<sup>4</sup> See Kramer, *Capital Punishment Decisions in Pennsylvania* at 118.

discussions about it are warranted. Those discussions must include all perspectives, be civil and honest, and rely on factual data and information in drawing conclusions.

Unfortunately, for the reasons discussed above, we must question the legitimacy of the Report, and, therefore, its value. Its findings and conclusions are unreliable and biased. Masquerading as a thoughtful document, the Report at its core is a collection of rehashed, one-sided and at times misleading arguments that have been heard many times before from those committed to abolishing the death penalty.

This is especially true considering that, according to the Report, a majority of Pennsylvanians surveyed believe the death penalty is an appropriate sentencing option for first-degree murder, and an overwhelming number of crime victims whose offenders were under a sentence of death supported the death penalty.<sup>5</sup>

Given the Report's downplaying of extraordinarily important and, for some, unexpected conclusions, one should not really need to consider any additional portions of the Report, because its credibility and objectivity are suspect. Nonetheless, we are including responses to some of the larger points of discussion in the Report.

## **II. COP-KILLERS, BABY KILLERS, AND TORTURERS**

Context matters. Cases where murderers have been sentenced to death are brutal and violent cases with real victims and devastated families. Consider four such examples:

*Eric Frein:* On September 12, 2014, Eric Frein targeted, shot and assassinated Corporal Byron Dickson and critically injured Trooper Alex Douglass with a .308 caliber rifle. He targeted these men because they were state troopers, and Frein wanted to start a

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<sup>5</sup> A recent national poll showed support for the death penalty increased by 5 percent. See "Public Support for the Death Penalty Ticks Up," Pew Research Center, June 11, 2018. The Report, published two weeks after the PEW poll, failed to examine this report and spent a considerable amount of time examining PEW's prior survey.

revolution. Following his rampage, he evaded police and caused a 48-day manhunt, consisting ultimately of 1,000 officers. In doing so, he terrified communities until he was ultimately caught.

*Richard Poplawski:* On April 4, 2009, Pittsburgh Police responded to a domestic disturbance dispute between Poplawski and his mother. The two lived in the same house. When the first officer, Paul Sciuillo, entered the house, Poplawski instantly shot him. Another officer, Stephen Mayhle, subsequently entered the house, and Poplawski shot him. At around the same time, Officer Eric Kelly had just completed his shift and had picked his daughter up from work. They heard the radio report followed by the sound of gunfire, which was only two blocks away from Officer Kelly's house. Officer Kelly dropped his daughter off at home and drove to the crime scene. Tragically, Poplawski shot the Officer before he could even get out of his car. Officer Kelly stumbled his way to behind the rear wheel of his car, fired his weapon, and Poplawski continued to fire at him. Poplawski then stood over Officer Sciuillo, unsure if he was dead, and fired another shot into his neck. He then fired several shots into the prone body of Officer Mayhle, causing the Officer to twitch with each strike. Poplawski then fired upon an immobile Officer Kelly. Poplawski was eventually arrested (after he shot another Officer) and was treated at a nearby hospital for wounds he suffered. While there, he saw Officers guarding his room and exclaimed, "I should have killed more of you." Three brave Pittsburgh Police officers lost their lives that day.

*Raghunandan Yandamuri:* On October 22, 2012, Raghunandan Yandamuri broke into a neighbor's apartment in Montgomery County in a planned kidnapping for ransom plot in order to get money to pay his gambling debts. Inside the apartment were 10-month

old Saanvi Venna and her 61 year-old grandmother, Satyavathi. Yandamuri fatally stabbed Satyavathi, who was attempting to protect her granddaughter, and then kidnapped the baby for ransom. When the baby began to cry, he stuffed her mouth with a handkerchief and also wrapped a towel around her face to hold the handkerchief in place. He stuffed her into a suitcase, then left her at a basement gym, where she suffocated to death. According to the pathologist, the baby's death was painful.

*Leeton Thomas:* Thomas was convicted in 2017 in Lancaster County of the vengeful murder of Lisa Scheetz and her teenage daughter Hailey, who were witnesses in his sexual molestation case. Thomas wanted to silence the witnesses and victims. To accomplish this nefarious goal, he broke into the apartment belonging to the Scheetz family. He viciously, violently, and repeatedly stabbed Lisa and Hailey to death. He also stabbed Hailey's sister, who was injured and eventually testified against him for having killed her mother and sister.<sup>6</sup>

Are these the murderers who should receive the benefits of abolishing or diminishing the use of capital punishment? Are these the murderers who should have the satisfaction of knowing that they will never be executed so long as a moratorium is in place? Do we believe these murderers were erroneously convicted, victims of bias, deserving of mercy or even clemency? Or, can we all agree that these offenders are precisely the ones for whom capital punishment should apply?

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<sup>6</sup> Consider also Kaboni Savage, who was sentenced to death in federal court in the Eastern District of Pennsylvania in 2013. Savage was a major drug kingpin in Philadelphia and killed or had killed 12 different individuals, 7 which he ordered from prison. In 2004, he firebombed the house of the mother of a witness who was scheduled to testify against him, killing 6 people, including children. Zane Memeger, who was the United States Attorney under President Obama and whose office prosecuted the case rightly said "[a]chieving justice sometimes requires us to ask the citizens on a jury to make the most difficult sentencing decision imaginable."



### **III. The Voices Of Victims Matter.**

Families of homicide victims look to the criminal justice system for justice. What defines justice for individual victims, of course, differs. And as is true for the general population, victims may or may not support the death penalty. But the real option of capital punishment has been crucial for families throughout the exercise of that justice during the prosecution of the murderer of their loved one. None of us can really predict what we may want to occur following the intentional murder of a loved one. Much depends upon our fundamental beliefs, but so much also depends upon the circumstances, manner, and duration of the killing. While it is true that families rarely find “closure” from the trial, the sentence, or even the execution, capital punishment does fulfill the victims’ need for justice, whether that be retribution, freedom from the fear that the murderer will once again kill another, or assurance that as an inmate living on death row, the murderer will not enjoy the freedoms of other inmates, even those sentenced to life imprisonment.

### **IV. Costs of Capital Cases Are Significantly Driven by Death Penalty Opponents. Eliminating the Death Penalty Will Not Reduce Costs To The Criminal Justice System, Will Deny Justice, Will Lead To Convicted Capital Murderers Living In Surprisingly Generous Conditions, And May Result In The Early Release of Convicted Capital Murderers.**

The Report considers whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole.

### *Costs Should Never Deny Justice*

The short answer to that question is that costs should never deny justice. When costs become the central focus of any reform in the criminal justice system, the results are decidedly contrary to protecting the public and doing right by victims of crime. Every criminal case has costs, from retail theft to rape, from DUI to child abuse, from bad checks to homicide. Nobody has suggested doing away with those criminal prosecutions. For these important reasons, we caution against consideration of costs as a salient factor in examining capital punishment in Pennsylvania.

We do, however, understand that there is a significant difference in cost. Prosecutors deal with important cases every day, but capital cases are on a different level. They involve defendants who are alleged to have committed a heinous first-degree murder—even more heinous than other first-degree murders, which are all disturbing, for which the death penalty is not sought. The capital cases often involve multiple murders and defendants with long histories of violent offenses. It is just and right that the necessary resources be devoted to these crimes. Likewise, the defendant's own life is also at stake, so he should have access to a capable defense with the resources it needs.

### *Existence of the Death Penalty Reduces Number of Trials*

The existence of the death penalty may in many circumstances reduce the costs to the criminal justice system. Although counterintuitive at first blush, it is a fact that having a death penalty statute encourages some guilty defendants to plead guilty to first-degree murder and receive a life sentence. Without a death penalty statute, more cases would have gone to trial.

Consider the brutal torture and homicide of three-year-old Scotty McMillan. The defendant tortured his wife's two young children, age six and three. He and his wife beat Scotty to death using homemade weapons, like a whip, curtain rod, frying pan, and aluminum strip. The defendant pled guilty and agreed to life in prison in order to avoid the death penalty, which also spared the surviving six-year old victim from having to testify. Thus, in these cases, trial costs are avoided and justice is secured.

*Death Penalty Opponents Have Played A Significant Role in Increasing Costs*

We agree that the death penalty costs too much. Unfortunately, death penalty opponents have made sure it does. The seemingly endless appeals they often file—extraordinarily long appeals which often raise any possible claim, whether legitimate or not—purposefully clog the system and make appeals as expensive as possible.

Eliminating the death penalty because of costs rewards an inappropriate strategy. Instead, we should make capital punishment a less lengthy and costly process. These goals can be accomplished while still ensuring considerable appellate review. This is no theoretical argument. The voters of California recently approved a ballot initiative that will reduce the frivolous appeals and unnecessary costs of capital cases. Pennsylvania should consider the approach that the voters of California approved.

*If the Death Penalty Were Abolished, Victims May Have to Worry That Murderers Will Someday be Paroled*

There is another fallacy to the argument that eliminating the death penalty will reduce costs to the criminal justice system. Were the death penalty to be eliminated, we would not expect any meaningful cost reduction within the criminal justice system. We would expect many of those death penalty abolitionists to shift their attention to trying to eliminate life without parole sentences. Put another way, any costs savings resulting from

the limitation of the death penalty will likely go into appeals for life without parole sentences in Pennsylvania.

Indeed, there is a concerted effort to end life sentences in Pennsylvania (SB 942) with much social media and other outreach efforts used to promote the legislation, even labelling life without parole (LWOP) sentences as “death by incarceration.” This phrase demonstrates that some believe that LWOP sentences are just as problematic as capital sentences. Indeed, the Sentencing Project, a prominent national sentencing reform group, concluded that “the increased prevalence of life sentences stands at odds with attempts to scale back mass incarceration.”<sup>7</sup> The author of the article has also said “we cannot challenge mass incarceration without including reforms to sentences on the deep end of the punishment spectrum, and including in reforms those who have committed serious crimes in their past and are serving life.”<sup>8</sup>

Were the Report to unequivocally state that LWOP sentences for first-degree murder must remain LWOP sentences and that legislation like SB 942 represents bad public policy, then any assurances that LWOP is a suitable alternative to capital punishment might be more meaningful. But the Report does not make such a recommendation.<sup>9</sup>

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<sup>7</sup> Ashley Nellis, “Still Life: America’s Increasing Use of Life and Long-Term Sentences,” Sentencing Project, May, 2017, p. 29.

<sup>8</sup> Ashley Nellis, quoted in David J. Krajicek, “Prisons are Packed With 200,000 Dead End Lifers: Study,” in The Crime Report, May 3, 2017.

<sup>9</sup> An en banc panel of the Pennsylvania Superior Court is considering whether life imprisonment for a person who murdered another individual when he was 18 constitutes cruel and unusual punishment (*Commonwealth v. Avis Lee*, No. 1891 WDA 2016). Further, on June 19, 2018, the Pennsylvania Supreme Court granted an appeal on a case in which the issue is whether a sentence of 50 years to life for a juvenile murderer constitutes a de facto life sentence (*Commonwealth v. Michael Felder*, 41 EAL 2018).

In short, should the death penalty be abolished, crime victims would have to reasonably worry that the person who murdered their loved one might someday be paroled or otherwise released.

*Having The Death Penalty Helps Solve Homicides.*

Having a death penalty literally helps law enforcement solve often brutal homicides. There are times when murderers will not cooperate with law enforcement unless they agree to remove the death penalty as an option. This was precisely the case recently in Bucks County. Just last year, two individuals killed four men there. For days, officials desperately tried to find the bodies of the victims, as their loved ones huddled, waiting and hoping for some break in the case. Although some of the bodies of the young men were being uncovered as the District Attorney was negotiating with one of the murderers for the recovery of all four buried young men, the break finally came when the District Attorney's Office agreed with him to not seek the death penalty if he revealed where he and his co-conspirator buried all four of the young men. He did, and all four victims were found. If there were no capital punishment in Pennsylvania, there is a very strong chance that not all four of those young men would have ever been found. Imagine the added pain and suffering of those family members had the bodies of their loved ones never been recovered.

**V. The Federal Defenders Spend A Considerable Amount of Time And Money On Capital Appeals, And There Is No Accounting For The Vast Amounts Of Money They Spend.**

It must be noted that the costs of capital cases are almost always purposefully inflated by the Federal Community Defender Office. It has a budget of over \$20 million for

cases on Pennsylvania post-conviction review. A trial judge spoke eloquently of the dangers of such incomparable resources, coupled with an ideologically driven litigation strategy, as follows:

If ever there were a criminal deserving of the death penalty it is John Charles Eichinger. His murders of three women and a three-year-old girl were carefully planned, executed and attempts to conceal the murders were employed. There is no doubt that Appellant is guilty of these killings. There is overwhelming evidence of his guilt, including multiple admissions to police, incriminating journal entries detailing the murders written in Appellant's own handwriting and DNA evidence.

We recognize that all criminal defendants have the right to zealous advocacy at all stages of their criminal proceedings. A lawyer has a sacred duty to defend his or her client. Our codes of professional responsibility additionally call upon lawyers to serve as guardians of the law, to play a vital role in the preservation of society, and to adhere to the highest standards of ethical and moral conduct. Simply stated, we all are called upon to promote respect for the law, our profession, and to do public good. Consistent with these guiding principles, the tactics used in this case require the Court to speak with candor. This case has caused me to reasonably question where the line exists between a zealous defense and an agenda-driven litigation strategy, such as the budget-breaking resource-breaking strategy on display in this case. Here, the cost to the people and to the trial Court was very high. This Court had to devote twenty-two full and partial days to hearings. To carry out the daily business of this Court visiting Senior Judges were brought in. The District Attorney's capital litigation had to have been impacted. With seemingly unlimited access to funding, the Federal Defender came with two or three attorneys, and usually two assistants. They flew in witnesses from around the Country. Additionally, they raised overlapping issues, issues that were previously litigated, and issues that were contrary to Pennsylvania Supreme Court holdings or otherwise lacked merit.<sup>10</sup>

These extraordinary federal resources would be better served at the front-end—at trial—so that a defendant may be sure of having competent counsel in the first instance. This, perhaps, would reduce the subsequent post-conviction litigation that generally drags on for multiple decades.

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<sup>10</sup> *Commonwealth v. Eichinger*, 108 A.3d 821, 851-852(Pa. 2014) (quoting Opinion, Carpenter, J., July 25, 2012, at 1-2).

*Murderers Not Sentenced to Death Have Considerable Freedom in General Population*

For many, even though capital punishment is rarely used in Pennsylvania, the fact that convicted capital offenders must serve their time on death row provides many survivor's families some peace of mind. Were the death penalty to be abolished, it is likely that these offenders, and those future murderers convicted of first-degree murder who would have been sentenced to death, would be assigned to general population. General population is nothing like death row. The conditions are far superior.

During a House Judiciary Committee hearing in 2016, we learned from Professor Robert Blecker of the New York Law School that the conditions of confinement for those sentenced to life in prison without parole are unexpectedly generous. According to Professor Blecker, those in general population at Graterford<sup>11</sup> can generally be out of their cells from 6:30 am to 9 pm, where they are working their jobs, in the day room (on the phone, playing cards, showering, or playing chess), they are not isolated or segregated, many can open their own cell doors when they want. Even after 9 p.m., when they are not allowed outside of their cells, they can watch cable television and leave their lights on in their own cell. They have access to the commissary, volleyball court, softball field, can buy ice cream and can smoke outside.<sup>12</sup>

If the death penalty is abolished, then it is likely that most capital murderers will be able to be in general population where they can play cards, chat on the phone, leave their cells when they want and be able to hang out with their fellow inmates for much of the day. Try explaining that to the families of those slaughtered by Eric Frein, Richard Poplawski,

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<sup>11</sup> SCI Graterford is closing, and its replacement, SCI Phoenix is opening soon. Conditions are not likely different in any meaningful way.

<sup>12</sup> Testimony of Robert Blecker before House Judiciary Committee, June 11, 2015.

Raghunandan Yandamuri, and Leeton Thomas. They could well be playing cards in the recreation room, free to walk in and out of their cells when they feel like it. Is that justice?

**VI. There are Significant Protections In Place To Ensure The Intellectually Disabled Are Not Subject To The Death Penalty. The Report's Suggestions To The Contrary Are Not Grounded In Fact Or Reality.**

The Report presents arguments that there are insufficient procedural protections in place to assure that people with intellectual disabilities are not being sentenced to death. These arguments are misplaced and ignore well-established caselaw and procedure.

Consider that a defendant may raise a defense to the death penalty that he or she is intellectually disabled. He may establish it by showing by a preponderance of the evidence that he has limited intellectual functioning, significant adaptive limitations, and the onset of his subaverage intellectual functioning began before he turned 18-years-old. An IQ score is insufficient by itself to demonstrate an intellectual disability.

A defendant may also use evidence of limited intellectual functioning, which might fall short of intellectual disability, as a basis for three mitigating factors. First, he may show that he was under extreme mental or emotional disturbance. Second, he may also show that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Finally, he may use evidence of his limited intellectual functioning under the catch-all mitigating factor. These procedures adequately protect against the possibility of the execution of an individual with an intellectual disability.



*The Report's Recommendation of Shifting Determinations of Intellectual Disabilities Away from a Jury Would Cause Delays, Increase Witness Intimidation, and Let Murderers Go Free.*

The Report suggests that the determination of an intellectual disability be made prior to trial by a judge. The rationale is that this process would save money and judicial resources because the case could not proceed capitally if the defendant were found to have an intellectual disability.

This proposal is disconcerting and antithetical to victim protection. It will lead to more witness intimidation, extra delays, additional frivolous motions, added and unnecessary expense, and less justice.

Making this determination after trial seems to be more appropriate because if the defendant is convicted of a lesser degree of murder or acquitted, the intellectual disability issue need not be addressed at all.<sup>13</sup>

The recommendation by the Report to shift to a pre-trial determination would also be devastating to victims' families by creating numerous delays. The interruption of pre-trial proceedings to conduct a hearing on being intellectually disabled would be long and costly, making the living relatives of the slain victim the ones who truly suffer through the wait. These delays would cause them additional and unnecessary pain and suffering while they wait for the opportunity to seek justice and try to find closure for their murdered loved ones.

The pre-trial delays would result in additional cases of witness intimidation. During this unnecessarily prolonged process, while the victims' families and society wait for the

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<sup>13</sup> Pa Rules of Criminal Procedure 840-845, promulgated in 2013, set forth the process for determining intellectual disability.

chance to seek justice, we are likely to see witnesses to the case subject to intimidation and threats by the killer and his or her cohorts. In the Commonwealth it is difficult enough to protect and provide assurances for witnesses in the standard delay of a homicide trial. Adding to the delay would, unfortunately, make witness intimidation far easier. The longer a trial goes on, the more opportunities there are to intimidate victims and witnesses.

Juries should decide the issue of intellectual disability. We have always placed our trust in a system where a jury acts as a fact-finder and has the ability to reach a fair and just verdict based on the evidence presented. When it comes to the death penalty, we give even more responsibility to the jury, relegating to the jurors the sentencing function, a function traditionally reserved for the judge. We trust juries to decide factual issues, especially those that concern the level of culpability of a criminal defendant. We trust juries to determine whether a defendant is insane. We trust juries to decide when a defendant is mentally ill. We trust juries to decide when a defendant is acting under duress, in self-defense, or in response to entrapment. In fact, we leave no decision regarding culpability in the hands of the judge alone.

A defendant's conduct during the commission of a crime is entirely relevant to determining whether he or she has an intellectual disability. It particularly makes sense to have the jury determine intellectual disability after the trial at the sentencing hearing, since the defendant's conduct during the commission of the crime may well bolster, or undermine, the defendant's claim of an intellectual disability. Factors that demonstrate culpability—such as planning a crime, covering a crime up, decision making, or complexity of a criminal conspiracy— are entirely relevant to addressing intellectual disability.

Shifting to a pre-trial determination would encourage criminal defense attorneys and defendants to file claims of intellectual disability even if no cognizable evidence exists. For them, there is no downside to filing such a claim, and there is no doubt they would be willing to exploit any measure possible to avoid the death penalty. To the citizens of the Commonwealth and victims of their crimes, however, filing such claims will be detrimental to public safety, for many of the reasons stated above. Law enforcement experience in capital litigation shows that claims are now filed without regard to their viability, in order to prevent appellate counsel from raising the failure to do so as evidence of ineffectiveness. Therefore, allowing claims of intellectual disability to be done pre-trial will greatly increase these filings as a way of preventing such ineffectiveness of counsel claims on appeal.

Pre-trial filings could permit defendants who have an intellectual disability to even escape prosecution for murder. If a defendant is found pre-trial to have an intellectual disability, the defense attorney could argue during the underlying murder trial that any statement the defendant gave to police was given involuntarily because the defendant is intellectually disabled. Defense counsel could also argue to the jury that it is simply impossible for the defendant to have engaged in any complicated crime or covering-up behavior because he, as a matter of law, has an intellectual disability. Such negative collateral consequences of a pre-trial finding of an intellectual disability can be avoided by making the determination post-trial.

**VII. The Bulk Of The Report’s Analysis About The Number Of Intellectually Disabled Death Row Inmates Is Misleading; In Fact, Much Of Its Analysis Has Been Rejected By Both The United States And Pennsylvania Supreme Courts.**

In advancing its unsupported claims about the mental health of death row inmates, the Report comes very close to doing something that both the U.S. and Pennsylvania Supreme Courts have rejected: basing whether an inmate has an intellectual disability exclusively on IQ score. Indeed, Pennsylvania’s Supreme Court this year held that, “a low IQ score is not, in and of itself, sufficient to support a classification of intellectually disabled” and it would “not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”<sup>14</sup>

Despite this clear and recent caselaw, the Report posits that there could be as many as 14% of death row inmates who could be constitutionally ineligible for a death sentence because of an intellectual disability. This estimation is based solely on IQ score. While the Report acknowledges that these other factors must be considered, it nonetheless trumpets in a misleading fashion this conclusion as if it were meaningful and something more than speculation.

This kind of misleading policy analysis demonstrates that the Report is intended to persuade the reader to support abolishing the death penalty, rather than providing an accurate, non-misleading discussion about important issues. In short, the Report is trying to imply something that is really nothing, other than misleading.

The Report also arbitrarily raises the IQ score that it believes equals intellectual disability from 70 to 75. This advocacy tactic is misleading. As our Courts have concluded, an IQ score of 75 is in no way dispositive of intellectual disability. It is on the upper level of the margin of error of what could equate to an intellectual disability if and only if the other

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<sup>14</sup> See *Commonwealth v. Van Divner*, 178 A.3d 108, 115-116 (Pa. 2018); *Commonwealth v. Miller*, 585 PA. 144, 155 (2005).

two factors are met. The United States Supreme Court would not find a convicted killer to have an intellectual disability based solely on his IQ score of 75. Instead, it conducted a rigorous review of whether the other two factors applied.<sup>15</sup>

Whether an offender suffers from an intellectual disability is an extraordinarily important issue in our judicial system and especially in capital cases. District Attorneys would never want to see someone with an intellectual disability executed. We recognize that there are sometimes disagreements on whether an individual suffers from such a disability, but the analysis on this put forth in the Report is highly subjective and based primarily on anti-death penalty bias by those opposed to the death penalty.

### **VIII. The Report's Suggestion That Courts Do Not Adequately Consider A Capital's Defendant's Competency After Sentencing Is Entirely Incorrect As A Matter Of Law And Practice.**

The Report spends a significant amount of time concerned that current law does not protect the severely mentally ill who cannot appreciate the nature of their conduct, exercise rational judgment related to the offense, or conform their conduct to the law's requirements in connection with their crime.

What is clear is that the question of a capital defendant's mental illness severity is considered at all stages of a case.

The Report fails to seriously consider that even after sentencing the courts continue to consider a defendant's competency to be executed. Our Courts have made it abundantly clear that the Eighth Amendment requires a person subject to the death penalty to have both a factual understanding of the penalty and the reasons for it. Courts must determine

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<sup>15</sup> See *Hall v. Florida*, 134 S.Ct. 1986 (2014).

whether the offender suffers from a mental illness which prevents him from factually or rationally understanding the reasons for the death penalty or its implications.<sup>16</sup>

There are additional protections because many restrictions work to ensure that the mental illness of a capital defendant is appropriately considered at all stages of a case including after sentencing and while awaiting execution. The Eighth Amendment also prohibits a State from carrying out a sentence of death upon a prisoner who is insane.<sup>17</sup> Capital defendants who plead an insanity defense at trial and are not successful may still argue that they are guilty but mentally ill during the penalty phase.<sup>18</sup>

All of this means that a capital defendant may raise an insanity defense at trial and if that defense fails, he may argue during the penalty phase that he is guilty but mentally ill.<sup>19</sup>

The Report also suggests that a new law similar to the existing “guilty but mentally ill” statute be enacted in order to better protect certain defendants even though our courts have already explained the shortcomings of this argument and why guilty-but-mentally ill is unavailable as a matter of law in the guilt phase of a capital case. Guilty but mentally ill reflects a penological concern that should be considered in determining the appropriate sanction for the offense. Guilty but mentally ill is an exception to the general rule that judges determine the sentence and the jury determines guilt. Guilty but mentally ill allows the jury to advise the court to consider the fact of mental illness in the exercise of the judge’s sentencing decision. What is significant and unique in capital cases is that the jury and not the judge determines the penalty. Considering a verdict of guilty but mentally ill is, as our Courts have held, a matter that would appropriately be rendered by a jury in a

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<sup>16</sup> *Hall v. Florida*, 134 S.Ct. 1986 (2014).

<sup>17</sup> *Ford v. Wainwright*, 477 U.S. 399, 409–410 (1986).

<sup>18</sup> 42 Pa.C.S. § 9711(e)(2) and (e)(3).

<sup>19</sup> *Commonwealth v. Baumhammers*, 92 A.3d 708, 727–28 (Pa. 2014).

capital case during the sentencing phase as opposed to the guilt phase. Juries are permitted to rule on this penological concern during the guilt phase in all other cases simply because they have no opportunity for input in the sentencing phase. That consideration is not present in capital cases.<sup>20</sup>

*The Report Recommends Further Clogging and Slowing Capital Appeals*

Despite the seemingly endless appeals by capital defendants, the often-frivolous claims they make, and the vast resources unleashed by the Federal Public Defenders, the Report suggests that Pennsylvania should have a standard of relaxed waiver in capital appeals. This suggestion flies in the face of logic.

As an initial matter, it is surprising that the Report does not take seriously the endless appeals that capital defendants often file. It is without question that for some defense attorneys, the goal is to slow the system down, utilize their resources (including the tens of millions of dollars of the Federal Defenders) to grind appeals to a halt, and make claim after claim after claim regardless of the merits –all because the goal is to do everything possible to avoid imposition of the death penalty.

The Pennsylvania Supreme Court’s original prior practice of relaxed waiver was not intended to permit a capital defendant to bring any alleged error before the court. Relaxed waiver as a doctrine was intended to allow the resolution of “significant issues” if feasible and which were addressed in the official record. Our courts have written that counsel should not use relaxed waiver to place before the Court, “[a] litany of newly developed challenges not raised or objected to before the lower court.” Unfortunately, this is exactly what did occur and could occur again under the Report’s proposal to reinstate relaxed

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<sup>20</sup> *Commonwealth v. Young*, 524 Pa. 373, 572 A.2d 1217 (1990); *Commonwealth v. Baumhammers*, 625 Pa. 354, 385–89, 92 A.3d 708, 727–29 (2014).

waiver. A capital defendant should not be allowed to use relaxed waiver to raise for the first time on appeal every possible error. Indeed, this is one of the reasons the Court pulled back from relaxed waiver. As Pennsylvania's Supreme Court has stated, "[t]he relaxed waiver rule became common in direct capital appeals and has been employed to reach a wide variety of claims." "In practice, ... the [relaxed waiver] rule has become such a matter of routine that it is invoked to capture a myriad of claims, no matter how comparatively minor or routine."<sup>21</sup> Many alleged errors did not and would not rise to the appropriate level permitting review and/or would be without a sufficient factual basis in the record such that the court would be able to adequately understand and address their merits.<sup>22</sup>

Further, issues raised before the Supreme Court in the first instance deny a trial court the opportunity to present an opinion addressing the issues. This is especially of concern if the error is based on the facts of record as the trial court would be the only court to have heard live testimony and been in a position to consider the many factors at play in judging credibility.

The current practice which requires the Supreme Court on direct appeal and regardless of other issues raised by the defendant to conduct a sufficiency review of the evidence as well as a statutory review of the death sentence is appropriate. The right to raise allegations of error remains through the post-conviction practice permitting meaningful appellate review while limiting the unfounded practice of raising issues *carte blanche*. Justice for the deceased victim, the victim's family and society in general requires

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<sup>21</sup> *Commonwealth v. Freeman*, 827 A.2d 385, 400-01 (Pa. 2003).

<sup>22</sup> In fact, relaxed waiver was a relatively old practice developed in the very first death penalty cases following *Furman v. Georgia*, 408 U.S. 238 (1972) because at that time, post-conviction death penalty practice was undeveloped. Now that we know that capital defendants will in fact receive multiple levels and decades of review, relaxed waiver is thoroughly unnecessary.



a balance in how our appellate practice is employed for capital defendants and that balance is properly struck through the current system.

**IX. The Report's Analysis Of Whether Capital Defendants Receive Adequate Representation Ignores The Funding Provided By Federal Defenders, Fails To Conduct Any Meaningful Analysis Of Representative Cases, And Fails To Recommend That Ineffective Defense Attorneys Be Precluded From Representing Capital Defendants In The Future.**

The Report relies on a previous study by the Joint State Government Commission that some indigent defense practitioners too often failed to meet professional standards and that the Commonwealth failed to provide adequate support for these attorneys. Consequently, according to the Report, the creation of a state capital defender office should be created.

This recommendation is problematic and, if adopted, would result in the wasteful and inefficient use of taxpayer dollars.

While there is no direct evidence that convicted capital murderers receive inadequate representation, we strongly believe that we should ensure that these defendants receive adequate representation. Our legal system functions properly when the accused are well represented. But the notion that we should establish a brand new capital defender's office is misguided.

Resources could more efficiently be spent to ensure that those already handling capital cases are appropriately compensated, such as increasing fees paid to court-appointed counsel. Whether providing such additional resources is necessary would be dependent upon analyzing the current schedule of fees that court-appointed counsel

receive. Money would be better spent to pay for attorneys directly rather than establishing a new state bureaucracy.

With that said, we must note that the appeals process for capital cases is rigorous. To conclude that our appellate courts would permit any capital defendant whose trial attorney rendered ineffective assistance of counsel to be executed is fiction. Capital cases are the most rigorously reviewed cases—reviewed by our Supreme Court on no less than two separate occasions and by our federal courts. The repeated reviews by our courts ensure that capital cases receive the detailed scrutiny they should receive. For anyone to suggest that conduct by trial counsel which is substandard would not be reviewed carefully by both state and federal appellate courts, as well as by the common pleas court on the initial PCRA, would be to ignore the reality of post-conviction capital case litigation in Pennsylvania.

Additionally, and as discussed above, entities like the Federal Defenders provide zealous and aggressive representation to their clients. In fact, we know that on some occasions the Federal Defenders assist trial counsel during capital cases. Therefore, any analysis of representation of capital defendants must include the time and efforts that the Federal Defenders provide.

We also must wonder why some of the money from the Federal Defenders—which has an available budget for Pennsylvania of more than \$20 million of taxpayer dollars—could not be used during the trial stage. Put differently, there is extra money available, and that money rests with the Federal Defenders. To ask that additional taxpayer dollars be used at the trial level without first utilizing some of the money from the Federal Defenders represents fiscal irresponsibility. Therefore, we believe the Report should have concluded

or even meaningfully considered that with the considerable efforts and resources that the Federal Defenders expend in their appellate work on capital cases, they could use some of their funds to provide assistance on the front-end.<sup>23</sup>

Anyone concerned about unqualified attorneys representing capital defendants should support legislation or a change to the Rules of Criminal Procedure that any attorney found to have rendered ineffective assistance of counsel should be precluded from representing capital defendants for a specified period of time, during which that attorney should be required to successfully complete an appropriate remedial training in order to ensure that he or she provides legally acceptable representation in the future. We would expect some in the defense bar to object to this proposal. It is known that some defense attorneys “concede” on appeal that they did not provide adequate representation during the trial because their goal is to ensure that their client gets a new trial, even if it means “admitting” they provided ineffective assistance when in fact they provided a good defense. At present, there is no consequence for providing ineffective assistance.<sup>24</sup>

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<sup>23</sup> While the funds for the Federal Defenders are supposed to be restricted to federal post-conviction petitions, the fact that the funds are used in state Post Conviction Relief Act petitions demonstrates that the funds could be available for use at the trial level.

<sup>24</sup> There is no question that the quality of capital representation by defense attorneys has improved. In fact, in 2004, the Pennsylvania Supreme Court established minimum qualification standards for all attorneys representing defendants in Pennsylvania who may be subject to the death penalty.<sup>24</sup> The cases examined in the Kramer Study were from 2000-2010. Therefore, a significant number of attorneys representing defendants in these cases were likely not subject to the new Supreme Court Rule. Additionally, the Study found that defendants represented by public defenders were less likely to have the death penalty filed against them. While the Study could not find a “clear indication” that the type of representation affects the decision, the Study did not preclude such a conclusion. Indeed, we are not sure how one could reasonably analyze whether there is a cause and effect relationship related to this issue. With regard to the finding that defendants represented by public defenders were 5-7% more likely to receive the death penalty, the Study does not conclude that the correlation between type of representation results in the causation of inadequate representation. It is not clear whether these were cases handled before the new Supreme Court rules regarding minimum qualification standards were put into place in 2004. Finally, 5-7% is not a particularly large percentage, meaning that examining the facts of each of these cases to determine why a particular defendant received the death penalty while another one did not is critically important.

**X. The Report's Proposed Easing Of Clemency Requirements Fails To Reflect The Seriousness of Capital Murder Convictions And Is Instead Based On Its Conclusion That Not Enough Murderers Have Been Pardoned Or Received Clemency.**

The Report is critical of the clemency process because in its view not enough murderers have been successful in getting their sentences reduced. Among other things, it considers the suggestions of removing the unanimity requirement for pardons. Decisions about whether to commute the sentence of a murderer on death row are extraordinarily serious. There are victims in each case; there is a jury finding of guilt and a sentence of death in each case. There are many appellate reviews, by both our state and appellate courts. Yet the Report wants to go further and make it easier for convicted murderers—the worst of the worst—to have their sentences commuted or to even be pardoned. Unanimity in these cases ensures that relief be granted in the cases where it is clear that relief is justified. Unanimity ensures that ambiguities are recognized, technical arguments are not exploited, and the opinions of victims' families have an impact.

**Conclusion**

This Report should find its way to the back of bookshelves of policymakers. Lacking credibility, it is little more than a catalogue of criticisms of death penalty opponents. Lacking balance, it fails to meaningfully and adequately consider the viewpoint of those who support or otherwise do not oppose capital punishment. Lacking fairness, it minimizes and mischaracterizes the results by the first-of-its-kind data analysis by

Professor John Kramer, which concluded that race does not play a critical role in the decision-making about who should get the death penalty.

This Report is an advocacy piece. We hope that those seeking a robust and considered analysis look elsewhere for guidance, including and especially those thinking about whether the death penalty moratorium in Pennsylvania should continue.

## **Final Note**

Carol Lavery, former Victim Advocate for the Commonwealth of Pennsylvania and Pamela Grosh, Program Director, Victim Witness Services Office of the District Attorney of Lancaster County note their support of this response. Both were members of the Advisory Committee.