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DEATH-PENALTY STEWARDSHIP AND THE CURRENT STATE OF PENNSYLVANIA CAPITAL JURISPRUDENCE

*The 2013 Widener Law & Government Institute
Jurist in Residence Lecture**

Thomas G. Saylor**

I. PREFACE

I begin, as always, with my expression of gratitude to Dean Ammons and Professor Gedid for the opportunity I have had to serve as Jurist in Residence for the Law and Government Institute.

As we proceed, please remember that any viewpoints expressed here are my own and are not necessarily shared by any other Justice of the Supreme Court of Pennsylvania.

II. INTRODUCTION

This is the fourth discussion in a series we opened four years ago with some thoughts on the nature of judging. In the second installment, we turned to some considerations bearing on the

* This article is an expansion of remarks delivered on April 4, 2013 at the Jurist in Residence Lecture at the Institute of Law & Government of the Widener University School of Law in Harrisburg, Pennsylvania.

** Justice, Pennsylvania Supreme Court. B.A., 1969, University of Virginia; J.D., 1972, Columbia University School of Law; L.L.M., 2004, University of Virginia Law School.

relationship among branches of state government. Last year, we explored issues of federalism in the context of state constitutional interpretation.

Today I would like to take a directed look at Pennsylvania's capital jurisprudence. This subject cannot be broached without confronting the stark observation that the Commonwealth's executive branch has not actually carried out a sentence of death for fourteen years.¹ There are 193 prisoners on death row in Pennsylvania, and, of these, 143, or 74%, have been there for more than 10 years.² Indeed, for 32 of these prisoners, the execution of their sentences has been delayed since the 1980s.³ Additionally, over the last 15 years, approximately 100 prisoners have been removed from death row when their sentences were overturned upon appellate or collateral judicial review, and for one reason or another, they received an alternative sentence.⁴

Harkening back to the title I have chosen for this discussion, we can start with the obvious—the current state of Pennsylvania's capital jurisprudence is impaired.⁵ Indeed, a colleague sometimes

¹ The last execution in Pennsylvania was of Gary Heidnik on July 6, 1999. *See Information on the Execution Process*, PA. DEP'T OF CORRECTIONS, http://www.cor.state.pa.us/portal/server.pt/community/death_penalty/17351 (last visited Aug. 25, 2013).

² *Persons Sentenced to Execution in Pennsylvania*, PA. DEP'T OF CORRECTIONS, http://www.portal.state.pa.us/portal/server.pt/community/death_penalty/ (last updated Nov. 1, 2013) [hereinafter *Death Row Roster*].

³ *Id.* These prisoners are: George Banks, Ralph Birdsong, Scott Wayne Blystone, Mark David Breakiron, Frank Chester, Willie Clayton, Dewitt Crawley, Henry Daniels, Steven Duffey, Stephen Edmiston, Henry P. Fahy, Robert Fisher, Randy Todd Haag, Richard D. Hachett, Robert Hughes, Roger Judge, Richard Laird, James Lambert, Robert Lark, Cam Ly, Jerome Marshall, Kevin Pelzer, Ernest Porter, Roland Steele, Ralph T. Stokes, Donald Mitchell Tedford, Brian Thomas, Leroy Thomas, Herbert Watson, Robert Wharton, Terrance Williams, and Zachary Wilson. *See id.*

⁴ *See infra* note 171.

⁵ This is not to say that Pennsylvania is unique or alone in such circumstances. *See, e.g.*, Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 42 (2012) ("According to the Justice Department's Bureau of Justice Statistics, which collects and publishes data concerning both federal and state death-row inmates, the average

commented that, in Pennsylvania, we do not have the death penalty, rather, we have 'death by arteriosclerosis.'⁶ Given that prosecutors vigorously pursue the imposition of capital punishment when deemed appropriate,⁷ the question arises: Just what is wrong?

As in many other subject areas, there is no single, definitive answer. Clues abound, however, and, presently, I wish to concentrate on one evident one, namely, the quality of the defense representation provided by the Commonwealth to indigent capital defendants.⁸ This is an issue I have written on many times in appellate decisions.⁹ Indeed, the topic recently prompted me to do something I had never done before—that is to write a special concurrence to a majority opinion, which I authored.¹⁰ The concern also ties into our law-and-government theme, since capital punishment entails the exercise of the State's power to take a human life and the implementation of critical policy choices as to how this authority is to be fairly administered.¹¹

In laying the groundwork for discourse, first we will review, briefly, the background and structure of the Pennsylvania death-

condemned inmate in 2010 (the most recent year for which data are reported) spent nearly fifteen years under a sentence of death before being executed.").

⁶ *Accord* Scott W. Howe, *Can California Save Its Death Sentences? Will Californians Save the Expense?*, 33 *CARDOZO L. REV.* 1451, 1453 (2012) ("Death row may continue to grow while a large proportion of condemned inmates die from suicide, disease, old age, or murder, rather than from execution.").

⁷ *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 *FORDHAM URB. L.J.* 767, 769-70 (1998) (explaining one jurisdiction's disregard of financial costs, criminal history, or state of mind when considering the death-penalty for a particular defendant).

⁸ *See infra* Part V.A.

⁹ *See, e.g.*, *Commonwealth v. King*, 57 A.3d 607, 633-36 (Pa. 2012) (Saylor, J., concurring specially); *Commonwealth v. Hall*, 872 A.2d 1177, 1192-93 (Pa. 2005) (Saylor, J., dissenting); *Commonwealth v. Johnson*, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring).

¹⁰ *See King*, 57 A.3d at 633 (Saylor, J., concurring specially).

¹¹ *See generally* *Furman v. Georgia*, 408 U.S. 238, 240, 256-57 (1972) (Douglas, J., concurring) (speaking to the fair administration of capital punishment by the states).

penalty statute.¹² While considering the statute's framework, we will concentrate on the opportunity provided for capital defendants to make their case for the alternative of a life sentence at the penalty stage of trial through the presentation of mitigating evidence.¹³ We will then discuss the States' obligation to provide counsel for indigent criminal defendants, review the basic requirements for effective representation, and review some of the key, special obligations of capital defense counsel, again, in terms of advancing mitigation.¹⁴

I have chosen the mitigation focus because, after reviewing more than one hundred records in these cases, I think that this yields the most vivid example of a debilitating deficiency in the death-penalty regime, which remains in sore need of improvement for the system to work properly. We can then transition into a review of some of the examples of deficient stewardship while probing potential causes and solutions which may be available for consideration by policymakers.

On another prefatory note, there are many other sub-topics within the capital punishment arena, including questions of accuracy in guilt determinations, race, socioeconomics, morality, and philosophy.¹⁵ One subcategory encompasses reciprocal claims of overreaching and distortions lodged against both anti-death-penalty groups and proponents of capital punishment.¹⁶ While recognizing that these and other interrelated subjects are very important in their own right, we are taking a narrower focus today

¹² See 42 PA. CONS. STAT. § 9711 (2011).

¹³ See *id.* § 9711(a), (e).

¹⁴ See generally *infra* notes 31-32 and accompanying text (discussing factors for mitigating circumstances).

¹⁵ See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1643, 1675 (1998); Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 827 (2012).

¹⁶ See, e.g., *Commonwealth v. Spatz*, 18 A.3d 244, 335-36, 348-49 (Pa. 2011) (Castille, C.J., concurring) (reflecting the perspective of the Chief Justice of Pennsylvania that "lawyer death penalty abolitionists" abuse the capital review process).

and centering on the Commonwealth's provision of counsel to indigent capital defendants and the quality of the representation these lawyers provide, as reflected at the sentencing stage of trials.

I think you will see that it is more than I can do in an hour to even modestly cover this subject. Thus, there will be a number of issues I can only touch upon. If I am successful, however, in making the point that the area is one of substantial public concern, I am hopeful that you may follow up by reviewing the works of many other government officials, scholars, journalists, researchers, and others who have broached the topic and whose work I will build upon today.

III. THE PENNSYLVANIA DEATH-PENALTY STATUTE

A. General Background and Structure

The general framework for the present Pennsylvania death-penalty statute has been in effect since 1978.¹⁷ The Commonwealth has had previous death-penalty regimes, but their mechanics were deemed infirm in the Supreme Court of the United States' 1972 decision in *Furman v. Georgia*.¹⁸ *Furman* held that, per the Eighth and Fourteenth Amendments, death-penalty statutes "cannot leave unbridled discretion in the sentencing body to determine whether a sentence of death should be imposed in a particular case."¹⁹

¹⁷ The foundational enactment traces to 1974. *See* 1974 Pa. Laws 213 (as amended 42 PA. CONS. STAT. § 9711 (2011)). An important qualification, however, is that amendments were required to cure constitutional defects in the original statute, and these changes were implemented in 1978. *See* Commonwealth v. Robinson, 877 A.2d 433, 455 (Pa. 2005) (Saylor, J., dissenting) (elaborating on this salient history).

¹⁸ *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring).

¹⁹ Commonwealth v. Freeman, 827 A.2d 385, 397 (Pa. 2003) (citing *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring)). The Pennsylvania death-penalty statute, which immediately preceded Section 9711 of the Judicial Code was repositied in the Crimes Code and provided simply that "[a] person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment." Commonwealth v. McKenna, 383 A.2d 174, 176 n.1 (Pa. 1978) (quoting 18 PA. CONS. STAT. §1102 (superseded)). This, apparently, was designed as a temporary placeholder after the longstanding scheme of

Consistent with this federal constitutional mandate, the Pennsylvania death-penalty statute now channels sentencing discretion by limiting capital punishment to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"²⁰

Under the present statute, capital trials proceed in two phases.²¹ In the first of these—the guilt phase—jurors determine whether the defendant has committed a capital offense, namely, first-degree murder.²² If a jury returns such a conviction, and assuming the Commonwealth has met all the necessary prerequisites,²³ the case proceeds to a penalty phase.²⁴ At this stage, jurors decide between two available punishments—a sentence of life in prison or death.²⁵

In this sentencing proceeding, jurors make two overarching determinations—"eligibility" and "selection."²⁶ First, the jury must decide whether the defendant is eligible for capital punishment by

capital punishment was found to be unconstitutional, under *Furman*, in *Commonwealth v. Bradley*, 295 A.2d 842, 845 (Pa. 1972). The 1972 statute also was deemed unconstitutional, per *Furman*, in *McKenna*. See *McKenna*, 383 A.2d at 179.

²⁰ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). More colloquially, it has been said that the punishment of death is "reserved for the worst of the worst." *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

²¹ See 42 PA. CONS. STAT. § 9711(a)(1) (2011).

²² See *id.* In the text above, it is assumed that the defendant has not waived his right to a jury trial in either the guilt or the penalty stages. See generally *id.* § 9711(b) (detailing "[p]rocedure in nonjury trials and guilty pleas"); PA. R. CRIM. P. 804 (detailing "Procedure When Jury Trial is Waived").

²³ See, e.g., PA. R. CRIM. P. 804 (requiring pre-trial disclosure of the grounds asserted by the Commonwealth as establishing a defendant's eligibility for a death sentence).

²⁴ See tit. 42, § 9711(a)(1). This scheme is consistent with the preference expressed by the Supreme Court of the United States for "a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

²⁵ See tit. 42, § 9711(a).

²⁶ *Commonwealth v. Trivigno*, 750 A.2d 243, 256 (Pa. 2000) (Saylor, J., concurring) (citing *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)).

assessing whether the Commonwealth has proven at least one aggravating circumstance.²⁷ Aggravating circumstances are factors which, in the judgment of the legislature, tend to intensify the defendant's moral culpability and include such things as: the killing of a law enforcement officer in the performance of his duties, the perpetration of a contract killing, the knowing creation of a grave risk to others, killing in the perpetration of a felony, torture, and the commission of multiple murders.²⁸

If a unanimous jury finds at least one aggravating circumstance present then the deliberations proceed to a selection process, in which the individual jurors weigh the aggravating circumstance or circumstances against mitigating factors and are required to make a reasoned moral judgment concerning whether the defendant should be put to death.²⁹ One important caveat, however, is that if the jurors find at least one aggravator present and *no* mitigators, they are required to return a death verdict.³⁰

Mitigating circumstances—which are central to our topic today—are factors which may be considered to militate against the imposition of a death verdict and include such things as: an absence of any significant history on the part of the defendant of prior criminal convictions; influence of extreme mental or emotional disturbance of the defendant in connection with the killing; the defendant's age; and any other evidence concerning the defendant's character, record, and the circumstances of his offense.³¹ Under the last of these, sometimes termed the "catch-all[.]" jurors may consider "a wide range of evidence, including

²⁷ See tit. 42, § 9711(a)(2), (c), (d), (h)(3)(ii).

²⁸ See *id.* § 9711(d)(1)-(2), (6)-(8), (11).

²⁹ See *id.* § 9711(a)(2), (c)(1)(iv). See generally *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (stating that the sentence "should reflect a reasoned moral response"); *Commonwealth v. Baumhammers*, 960 A.2d 59, 101 n.4 (Pa. 2008) (Saylor, J., concurring) ("It is well established that the application of the death penalty is to be based on reasoned moral judgment.") (citing *Penry*, 492 U.S. at 319).

³⁰ See tit. 42, § 9711(c)(1)(iv) (prescribing that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance").

³¹ See *id.* § 9711(e)(1)-(2), (4), (8).

life history, mental health status, physical or psychological abuse, [and] childhood neglect."³²

Again, the importance of mitigation in a death case cannot be overstated. In the words of the Supreme Court of the United States: "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."³³ Circling back to *Furman*, and as put by one commentator, "[a] capital jury's opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court [of the United States] has endorsed to alleviate arbitrariness in the jury's decision of whether a defendant deserves to die."³⁴ Moreover, as a practical matter, because in many capital cases the Commonwealth possesses strong evidence of aggravation, mitigation proofs are absolutely essential,

³² Commonwealth v. Flor, 998 A.2d 606, 626 (Pa. 2010).

³³ Woodson v. North Carolina, 428 U.S. 280, 304 (1976); accord Commonwealth v. Moody, 382 A.2d 442, 448 (Pa. 1977) (explaining that "the sentencing authority must be given the opportunity to weigh and consider in mitigation whatever evidence might be relevant to passing an informed judgment upon the defendant"); see also *Penry*, 492 U.S. at 328 ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring)); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (relating that the Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

³⁴ Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 582 (2012); see also *Baumhammers*, 960 A.2d at 101 (Saylor, J., concurring) (citing *Tennard v. Dretke*, 542 U.S. 274, 285 (2004)) (explaining that "constitutional norms requir[e] liberal admission of mitigating evidence").

as a counterbalance, in the defense response.³⁵ Simply put, a reasoned moral judgment needs to be adequately informed.³⁶

Of course, defense attorneys may have strategic reasons for deemphasizing certain aspects of a defendant's background.³⁷ Indeed, there is much debate concerning what types of mitigating evidence are likely to impact the moral calculus of jurors in ways which may be favorable to the defendant.³⁸ Presently, I do not intend to enter into this debate but instead will simply make two observations. First, the Supreme Court of the United States has said that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."³⁹ Second, as we will discuss in greater detail in a moment, the Supreme Court of the United States has stressed the importance of a thorough mitigation investigation as a linchpin to a penalty-phase

³⁵ See *supra* note 29 and accompanying text.

³⁶ See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

³⁷ Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response In Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 247 (2007-2008) (explaining the Court's view of using strategy when attempting to introduce mitigating circumstances).

³⁸ For example, with regard to mental-health evidence, one commentator explains as follows:

In the capital context, mental illness can be powerful mitigation when jurors understand empathetically the disabilities, brain damage, and tormented psyches of a convicted killer. However, jurors also show skepticism toward defense experts, who appear to be "hired guns" unless their opinions are supported by contemporaneous information from lay witnesses. There is also a risk that mental illness will inspire fear, rather than compassion, and become an excuse to kill ("surgery to excise the cancer"), instead of a basis for reduced moral blame and mercy.

See *id.* at 256 (footnotes omitted).

³⁹ *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring)); accord *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (commenting that "the reality that [the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability").

defense.⁴⁰ Thus, in the absence of an adequate investigation—regardless of how one may feel about the usefulness of the information which might have been collected—as a matter of federal constitutional law, a death-penalty lawyer's stewardship is indisputably lacking.⁴¹

III. EFFECTIVE ASSISTANCE OF CAPITAL COUNSEL

Now I am going to shift gears to discuss federal constitutional requirements pertaining to criminal defense attorneys in general; then we will channel the discussion back into the death-penalty mitigation arena.

Fifty years ago, in *Gideon v. Wainwright*,⁴² the Supreme Court of the United States held that, under the Sixth and Fourteenth Amendments, when an indigent criminal defendant is charged with a felony, the State must provide him with legal counsel.⁴³ Several decades later, in *Strickland v. Washington*,⁴⁴ the Supreme Court of the United States announced that the Constitution also requires that appointed lawyers provide reasonably effective counsel that is consistent with prevailing professional norms.⁴⁵

Through the ensuing years, the character and quality of the representation mandated by the Constitution has been a controversial subject;⁴⁶ so I want to spend a few minutes

⁴⁰ See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 522-23, 533-34 (2003). See generally Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983) ("There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings.").

⁴¹ See *supra* note 40 and accompanying text.

⁴² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴³ See *id.* at 344-45. For death-penalty cases, the right to counsel already had been confirmed in *Powell v. Alabama*, 287 U.S. 45, 73 (1932). The right was extended to misdemeanors carrying the possibility of incarceration in *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

⁴⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴⁵ See *id.* at 687-88.

⁴⁶ See generally Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 319-20 (2011)

discussing what *Strickland*, on its face, appears to have required. Then we will turn to what some consider as a subsequent evolution in the prevailing standards governing constitutionally effective attorney stewardship, as reflected in two subsequent, milestone decisions of the Supreme Court of the United States—*Williams v. Taylor*⁴⁷ and *Wiggins v. Smith*.⁴⁸

A. The Strickland Standard

The defendant in the *Strickland* case confessed to three brutal stabbing murders and refused to follow his attorney's advice in various material respects.⁴⁹ The circumstances left the lawyer with "a sense of hopelessness about the case," and his preparations for the sentencing hearing were quite minimal, at least measured against today's guidance standards.⁵⁰ Beyond conversations with the defendant, his wife, and his mother, the attorney did not look further into evidence concerning the defendant's character or his mental and emotional state and presented no such mitigation evidence.⁵¹ The defendant was sentenced to death on each of the three murder counts.⁵²

After endorsing the general requirement of reasonably effective counsel, consistent with prevailing professional norms, the Supreme Court of the United States indicated that such norms encompassed a wide range of approaches to criminal defense.⁵³ The Court also worried that setting too high a bar would encourage litigation, could impair the ardor and independence of defense

(explaining the controversy and the analysis around the varying degrees of quality experienced by judges in the profession).

⁴⁷ *Williams v. Taylor*, 529 U.S. 362 (2000).

⁴⁸ *Wiggins v. Smith*, 539 U.S. 510 (2003).

⁴⁹ See *Strickland*, 466 U.S. at 672. For example, the defendant waived his right to a jury proceeding in connection with sentencing, against his counsel's advice. See *id.*

⁵⁰ Compare *id.* at 672-73 with Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 919, 1047 (2003).

⁵¹ See *Strickland*, 466 U.S. at 672-73.

⁵² See *id.* at 675.

⁵³ See *id.* at 688-89.

counsel, could deter acceptance of appointments, and could undermine attorney-client trust.⁵⁴ Thus, the Supreme Court of the United States admonished that judicial scrutiny of counsel's performance must be "highly deferential" and that reviewing courts are to avoid "second-guess[ing]" and the use of "hindsight."⁵⁵ In terms of attorney investigations, the Court said:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.⁵⁶

Furthermore, the Supreme Court of the United States determined that even if a criminal defendant proves that his lawyer's performance was professionally unreasonable, the Sixth Amendment does not require a new trial *per se*.⁵⁷ Rather, a defendant generally must also demonstrate that "there is a reasonable probability that, [had professionally adequate legal assistance been provided], the result of the [criminal] proceeding would have been different."⁵⁸ The overarching *Strickland* test has

⁵⁴ *Id.* at 690.

⁵⁵ *Id.* at 689-90.

⁵⁶ *Id.* at 690-91.

⁵⁷ *Strickland*, 466 U.S. at 691-92.

⁵⁸ *See id.* at 694. The Supreme Court of the United States also recognizes that prejudice may be presumed in a narrow category of circumstances where counsel is absent or "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 659 (1984).

come to be known as the "performance-and-prejudice" standard for assessing effectiveness in the assistance of legal counsel.⁵⁹

Applying this standard, the Supreme Court of the United States concluded that the lawyer's stewardship in *Strickland* was adequate and no relief was due.⁶⁰ According to the Court, nothing in the record suggested that counsel's "sense of hopelessness distorted his professional judgment."⁶¹ The Court explained that the attorney's conversations with the defendant and family members were enough to confirm that character and psychological evidence would be of little help, and the strategy of limiting the scope of the evidence prevented the prosecution from pursuing potentially damaging rebuttal.⁶²

In *Strickland's* aftermath, the Supreme Court of the United States' apparent acceptance of a minimal investigation as adequate performance on the part of a death-penalty lawyer in the face of extensive aggravation was widely and intensely criticized as rendering the constitutional guarantee of effective counsel largely meaningless.⁶³ Advocates, academics, and researchers continue to

⁵⁹ See, e.g., *Commonwealth v. King*, 57 A.3d 607, 613 (Pa. 2012). The Supreme Court of Pennsylvania has divided the performance element into two sub-parts addressing the "arguable merit" of a claim of deficient stewardship, and whether a "reasonable basis" supported the attorney's chosen strategy. See, e.g., *Commonwealth v. Malloy*, 856 A.2d 767, 781 (Pa. 2004). In substance, however, the federal and state approaches are considered to be identical. See, e.g., *id.*

⁶⁰ *Strickland*, 466 U.S. at 698-99.

⁶¹ *Id.* at 699.

⁶² See *id.*

⁶³ See, e.g., Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 392-93 (2009) (cataloguing a range of "withering criticism" of *Strickland* and finding the standard to be "fundamentally wanting"); Steven F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 515, 520-21 (2009) (commenting that, in light of *Strickland*, in practice, "the right to effective representation has meant surprisingly little over the last two decades" and asserting that language in the decision signals that ineffectiveness "claims are to be denied if there is any conceivable basis for rationalizing the attorney's actions"); Christopher Seeds, *Strategy's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 995 (2009) ("For years, the biting criticism of *Strickland* was that the holding made effective counsel an illusory right."); Robert R. Rigg,

chronicle examples and patterns of poor lawyering in capital litigation nationwide.⁶⁴ In one infamous instance, Texas appellate

The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel, 35 PEPP. L. REV. 77, 78 (2007) ("When the Court decided *Strickland* it created a doctrine of enormous proportions, but with little impact—a legal tyrannosaurus rex without teeth."); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441 (2004) (asserting that the *Strickland* test "fails to assure even a minimal level of competence . . . by indigent defenders"); Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is it Possible to Keep Innocent People Off Death Row?*, 29 U. DAYTON L. REV. 319, 323 (2004) (characterizing *Strickland* as establishing "The Willful Blindness Standard for Evaluating Ineffective Counsel"); Amy R. Murphy, *The Constitutional Failure of the Strickland Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, 195 (2000) ("All *Strickland* did was shift the unguided discretion up a level."); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 7 (1999) ("Based on the test developed in *Strickland*, courts are often driven by the lowest common denominator regarding claims of ineffective assistance of counsel."); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) ("[T]he *Strickland* Court interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant."); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) (arguing that *Strickland* has "foster[ed] tolerance of abysmal lawyering"); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 503 (1993) (asserting that "convictions will often be upheld under *Strickland* even though, had the defendant been represented by a qualified lawyer, the outcome of the trial would have been more favorable"). See generally *Mandatory Justice: The Death Penalty Revisited*, CONST. PROJECT 7 (2006), <http://www.constitutionproject.org/wp-content/uploads/2012/08/30.pdf> ("*Strickland* is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases . . ."). It should be noted, however, that *Strickland* also has its defenders. See, e.g., J. Richard Broughton, *Capital Prejudice*, 43 U. MEM. L. REV. 135, 170 (2012) (discussing *Strickland* in terms of limits on judicial review).

⁶⁴ See, e.g., Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293, 293-95 & n.2-5 (2007) (asserting that "[v]irtually everyone involved in capital litigation recognizes and laments the poor representation afforded capital defendants at trial" and citing numerous examples); James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, 1, 5 (June 12, 2000),

courts and a panel of the United States Court of Appeals for the Fifth Circuit found that a lawyer was effective for Sixth Amendment purposes although he slept during substantial periods of his client's capital trial.⁶⁵

Indeed, seventeen years after *Strickland* was issued, its author, former Justice Sandra Day O'Connor, expressed misgivings.⁶⁶ In a speech given in 2001, Justice O'Connor recognized that there were "[s]erious questions . . . being raised about whether the death penalty is being fairly administered in this country" and wondered whether changes might be in order.⁶⁷

B. Williams and Wiggins

The other federal constitutional milestone I wish to address before we reach the Pennsylvania cases is reflected in *Williams v. Taylor*⁶⁸ and *Wiggins v. Smith*.⁶⁹ In *Williams*, a death-penalty lawyer did not begin his preparations for the penalty phase until a

law.columbia.edu/instructionalservices/liebman (asserting that death-penalty schemes are marred by "serious error" in "epidemic proportions" and highlighting "egregiously incompetent defense lawyering" as one of the most frequent reasons for reversals); Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 17-23 (1997) (citing various cases, reports, and studies, including "[a] study of homicide cases in Philadelphia which . . . found that the quality of lawyers appointed to capital cases in Philadelphia is so bad that 'even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder' ") (quoting Frederic N. Tulskey, *Big-Time Trials, Small-Time Defenses Many Lawyers, Even the Well-Connected, Do Top Work. Others Are Not Up to the Task.*, PHILA. INQUIRER, (Sept. 14, 1992), http://articles.philly.com/1992-09-14/news/26023186_1_poor-defendants-new-trial-trial-attorney).

⁶⁵ See generally Mickenberg, *supra* note 63, at 322 (discussing the history of *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc)).

⁶⁶ See Maria Elena Baca, *O'Connor Critical of Death Penalty: The First Female Supreme Court Justice Spoke in Minneapolis to a Lawyers' Group*, STAR TRIB., July 3, 2001, at A1.

⁶⁷ See *id.*; Charles Lane, *O'Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed*, WASH. POST, July 4, 2001, at A1.

⁶⁸ *Williams v. Taylor*, 529 U.S. 362 (2000).

⁶⁹ *Wiggins v. Smith*, 539 U.S. 510 (2003).

week before trial and did not conduct a thorough investigation.⁷⁰ Had he done so, the Supreme Court of the United States related:

[T]he jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely . . . beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Counsel [also] failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade⁷¹

The *Williams* Court obviously considered such evidence to have meaningful import in terms of mitigating effect.⁷² Indeed, the Court highlighted that, after hearing the additional evidence in post-conviction proceedings, "the very judge who presided at Williams' trial, and who once determined that the death penalty was 'just' and 'appropriate,' concluded that there existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence."⁷³ Likewise, the Supreme Court of the United States itself reasoned that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."⁷⁴ Accordingly, a new sentencing proceeding was required.⁷⁵

⁷⁰ See *Williams*, 529 U.S. at 395-96.

⁷¹ *Id.* (footnotes omitted).

⁷² *Id.* at 396-97.

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.* at 398 (citing *Boyd v. California*, 494 U.S. 370, 387 (1990)).

⁷⁵ Apparently, Williams secured a life sentence on remand upon the agreement of the prosecutor. See Frank Green, *Death Row Veteran's Life Spared*, RICHMOND TIMES-DISPATCH, Nov. 15, 2000, at A1.

The Supreme Court of the United States expanded on these themes in *Wiggins*, which, interestingly, was authored by Justice O'Connor two years after she expressed her process-related concerns publicly.⁷⁶ Similar to *Williams*, the attorneys for a defendant who suffered a death verdict made modest inquiry into the defendant's social history and chose not to present this sort of evidence to the sentencing jury.⁷⁷ According to the *Wiggins* Court, at the post-conviction stage, it was revealed that the defendant:

experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. [Wiggins] thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.⁷⁸

The *Wiggins* Court couched this sort of evidence as "powerful,"⁷⁹ and found that a new sentencing hearing was due because of counsel's "inattention" and "acqui[sition of] only rudimentary knowledge of [the defendant's] history from a narrow set of sources."⁸⁰

There was a forceful dissent in *Wiggins*, which among other arguments, posited that the majority had retroactively changed the rules governing death-penalty representation.⁸¹ Indeed, whereas

⁷⁶ *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *see also* Baca, *supra* note 66.

⁷⁷ *Wiggins*, 539 U.S. at 523-24.

⁷⁸ *Id.* at 535 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

⁷⁹ *Id.* at 533.

⁸⁰ *Id.* at 524, 526, 536-37.

⁸¹ *See id.* at 538-557 (Scalia, J. & Thomas, J., dissenting). *See generally* Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G R. 110, 112 (2012) (alluding to the "obvious

Strickland focused greatly on foreclosing hindsight second-guessing of attorney decision-making by post-conviction and appellate courts,⁸² *Wiggins* eschewed the use of "post hoc rationalization" to justify minimal investigations.⁸³ The majority in *Wiggins*, however, pronounced that the Court had not changed the law as established by *Strickland*, and—regardless of the reasonableness of any debate on this point—such ruling is binding as a matter of federal constitutional law.⁸⁴

There are two final observations I would like to make about *Williams* and *Wiggins*. First, in each case, capital defense attorneys selected a one-dimensional sentencing strategy, without having conducted a full mitigation investigation.⁸⁵ In *Williams*, the salient

tension" between the *Williams/Wiggins* approach and that of *Strickland*); Broughton, *supra* note 63, at 151 ("In a series of capital cases in the last decade—*Terry Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*—the Court appeared to apply a much more stringent version of the *Strickland* standard, and the prejudice prong in particular, than ever before."); Gregory J. O'Meara, *The Name is the Same, But the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687, 687 (2008) ("The Supreme Court [of the United States] has changed the law on ineffective assistance of counsel, and few commentators seem to have noticed."); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigations Specialists*, 30 OKLA. CITY U. L. REV. 23, 83 (2005) ("The Court's critical view of defense counsel's mitigation investigation, or lack thereof, is significant because the Court appeared to modify its extremely deferential treatment of defense counsel decision-making."); *cf.* Smith, *supra* note 63, at 515 (asserting that the position taken by the Supreme Court of the United States in the *Wiggins* line of decisions was "undoubtedly motivated by concerns about the proper administration of the death penalty").

⁸² See *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁸³ *Wiggins*, 539 U.S. at 526-27.

⁸⁴ *Accord* *Commonwealth v. Birdsong*, 24 A.3d 319, 347 (Pa. 2011) ("*Williams* and *Wiggins* did not establish a new federal constitutional standard by which to measure counsel's stewardship in preparing for the penalty phase; they simply applied *Strickland's* well-settled ineffectiveness standard to later cases involving the specific question of counsel's duty to investigate mitigating evidence in a capital case.>").

⁸⁵ *Wiggins*, 539 U.S. at 526-27; *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

strategy was simply to stress the defendant's voluntary cooperation with the police investigation.⁸⁶ In *Wiggins*, the lawyers representing the defendant in the penalty hearing hoped to generate residual doubt concerning the defendant's actual perpetration of the underlying killing.⁸⁷ In both instances, the Supreme Court of the United States stressed that these kinds of choices, among a range of potential strategies, cannot be deemed reasonable in the absence of a thorough mitigation investigation.⁸⁸ As put by one commentator:

The significance of *Wiggins* is that the United States Supreme Court has now legitimized the idea of examining a trial attorney's investigation and preparation before determining whether the lawyer's strategic choices were constitutionally ineffective. More important, the Court has, for the first time, expressed a willingness to reverse a death sentence if the attorney's inadequate preparation was the cause of the strategic decisions that failed.⁸⁹

The second point is that in *Wiggins* in particular, the Court emphasized that in assessing prejudice, reviewing courts must consider whether, with better lawyering, even a single juror might have been persuaded toward the alternative of a life sentence.⁹⁰ This follows from the requirement that a death verdict requires the

⁸⁶ See *Williams*, 529 U.S. at 369.

⁸⁷ See *Wiggins*, 539 U.S. at 515.

⁸⁸ See *id.* at 527-28 ("In light of what [a few social history] records actually revealed, . . . counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."); *Williams*, 529 U.S. at 396 (explaining that "the failure [of Williams' counsel] to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession").

⁸⁹ Mickenberg, *supra* note 63, at 326; see also Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, *supra* note 63, at 94 ("The effect of *Williams*, [and] *Wiggins*, . . . is [to require] a detailed analysis of trial counsel's preparation and investigation, especially in death penalty cases by both state and federal courts.").

⁹⁰ See *Wiggins*, 539 U.S. at 537.

unanimous support of all jurors.⁹¹ Theoretically, at least, this point of emphasis should serve to ease the prejudice requirement to a degree.

In summary, as a matter of federal constitutional law, the Supreme Court of the United States has recognized that extensive investigative and preparatory obligations rest with capital defense counsel.⁹² This point of view is entirely consistent with earlier statements by the Supreme Court of Pennsylvania. For example, in 1994, the Supreme Court of Pennsylvania admonished as follows:

Failure to prepare is not an example of foregoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel. It is not possible to provide a reasonable justification for appearing in front of a death penalty jury without thorough preparation.⁹³

We can now turn our attention to the Pennsylvania landscape.

IV. THE APPELLATE LANDSCAPE IN PENNSYLVANIA

Before talking about the stewardship of capital defense attorneys in the Commonwealth, I want to briefly review the judicial process which ensues after a death verdict is returned in Pennsylvania.

Typically, a capital case proceeds from verdict into a direct appeal, which, per statute, is considered by the Supreme Court of Pennsylvania.⁹⁴ Generally, however, issues pertaining to the effectiveness of counsel are no longer considered at the direct

⁹¹ See *id.*; see also 42 PA. CONS. STAT. § 9711(c)(1)(v) (2011).

⁹² *Williams* and *Wiggins* certainly do not contain the last word by the Supreme Court of the United States on the subject of deficient stewardship in capital trials. Subsequent decisions, however, have been said to have "a schizophrenic quality." See O'Hear, *supra* note 81, at 110. For present purposes, it is sufficient to recognize that neither *Williams* nor *Wiggins* has been specifically overruled. Subsequent jurisprudence of the Supreme Court of the United States is summarized in the O'Hear article. See *id.* at 112-13.

⁹³ Commonwealth v. Perry, 644 A.2d 705, 709 (Pa. 1994).

⁹⁴ See tit. 42, § 9711(h)(1).

appeal stage.⁹⁵ Rather, where a death verdict is affirmed on direct appeal, the prisoner has the opportunity to pursue a subsequent round of collateral review under the Post Conviction Relief Act,⁹⁶ and it is in this setting that Sixth Amendment challenges to trial counsel stewardship are considered.⁹⁷ Common pleas courts sit as the post-conviction court of original jurisdiction,⁹⁸ and appeals, again, proceed directly to the Supreme Court of Pennsylvania.⁹⁹ If the defendant loses in the state post-conviction process, he may pursue habeas corpus relief in federal court.¹⁰⁰

Given the multiple layers and tiers of review delay is inevitable. Moreover, in the late 1990s and early 2000s, the Supreme Court of Pennsylvania experienced a large influx of post-conviction appeals for a variety of reasons, including the legislative imposition of new time limits on post-conviction proceedings and the involvement of experienced federal defenders in the state post-conviction process.¹⁰¹ In any given case, forty or more claims frequently were raised.¹⁰² Given the volume, complexity, and the quality of the defense stewardship in question in a number of the cases, which we will discuss in a moment, several of the law clerks referred to the circumstances as in the nature of a "perfect storm."¹⁰³

⁹⁵ See generally *Commonwealth v. Grant*, 813 A.2d 726, 738 (2002) ("We now hold that, as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review.").

⁹⁶ 1988 Pa. Laws 336 (as amended 42 PA. CONS. STAT. §§ 9541-46 (2011)).

⁹⁷ See *Grant*, 813 A.2d at 738.

⁹⁸ See tit. 42, § 9545(a).

⁹⁹ See *id.* § 9546(d).

¹⁰⁰ See generally WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 31:22 (3d ed. 2011).

¹⁰¹ See tit 42, § 9545(b) (embodying the Post Conviction Relief Act's one-year time bar relative to the filing of post-conviction petitions).

¹⁰² See, e.g., *Commonwealth v. Spatz*, 18 A.3d 244, 333 (Pa. 2011) (Castille, C.J., concurring) (estimating that seventy claims were raised by the prisoner in a particular post-conviction appeal).

¹⁰³ *Commonwealth v. King*, 57 A.3d 607, 636-38 (Pa. 2012) (Saylor, J., concurring specially) (illustrating the voluminous issues of ineffective counsel raised on appeal).

V. DISCUSSION

A. The Problem

With this background, I would like to talk about death-penalty representation in Pennsylvania using a very recent decision of the Supreme Court of Pennsylvania, *Commonwealth v. King*,¹⁰⁴ as a framework for the discussion. This is the case in which I wrote a special concurrence to an opinion I also authored.¹⁰⁵

Twenty years ago, the defendant, Carolyn Ann King, participated in the brutal killing of Guy Goodman, a seventy-four-year-old Lebanon County man.¹⁰⁶ King was afforded the assistance of a court-appointed attorney and was tried, convicted of first-degree murder, and sentenced to death, again, about twenty years ago.¹⁰⁷ The judgment of sentence was affirmed, leading to a protracted post-conviction process.¹⁰⁸

At the hearing stage, King's trial attorney related that she had very little experience trying criminal cases and no experience trying a capital one.¹⁰⁹ In terms of readying herself for the penalty phase, the lawyer said that she did no pre-trial preparation work, since her "focus was on the [guilt] phase."¹¹⁰ Indeed, this attorney did not appreciate, until late in the trial, that a penalty phase would ensue immediately upon a conviction.¹¹¹ In the following colloquy between King's post-conviction counsel and her trial attorney, the lawyer offered her explanation for these failures:

¹⁰⁴ *See id.* at 612-13.

¹⁰⁵ *Id.* at 611, 633.

¹⁰⁶ *See Commonwealth v. King*, 721 A.2d 763, 769 (Pa. 1998).

¹⁰⁷ *See id.* at 769-70. There was no question at trial of factual innocence concerning King's participation in the killing; in this regard, the defense conceded at trial that King was guilty of at least third-degree murder. *See King*, 57 A.3d at 615 n.6.

¹⁰⁸ *King*, 57 A.3d at 611-13.

¹⁰⁹ *See id.* at 614; *Commonwealth v. King*, No. CP-38-CR-10898-1993, at 14 (C.P. Lebanon Cnty. July 23, 2010).

¹¹⁰ *King*, No. CP-38-CR-10898-1993 at 14 (quoting N.T., Nov. 21, 2006, at 23-24).

¹¹¹ *Id.*

Question: Is it accurate to say that your not knowing that the sentencing phase began immediately after the guilt phase . . . was simply a mistake in your understanding of the procedure . . . ?

Answer: Mistake, lack of energy, you can ascribe numerous words to it.¹¹²

Sudden knowledge of the lawyer's impending obligation to defend King at the penalty phase, in counsel's words, caused her to "[a]bsolutely" panic.¹¹³ To the best of the lawyer's recollection, her preparations for the penalty proceeding lasted for about one and one-half hours.¹¹⁴ The attorney did not obtain "school, employment, medical, or criminal justice records" concerning her client, and she did not contact any potential witnesses concerning mitigation.¹¹⁵ Further, counsel also observed that she was allowed attorneys' fees of \$35 per hour for out-of-court work and \$45 for court time, subject to a fee cap of \$5,000, and that a fee cap of \$500 was imposed on investigative services.¹¹⁶

The post-conviction court credited counsel's testimony that she did essentially nothing and found, based on a developed record, that there was extensive, "readily available" mitigating evidence which the lawyer should have uncovered, including evidence of serious mental-health issues, sexual abuse, child abuse, and domestic violence.¹¹⁷ The court concluded that the attorney's derelictions prejudiced King and awarded her a new sentencing hearing.¹¹⁸

¹¹² *Id.* at 16-17 (quoting N.T., Nov. 21, 2006, at 111).

¹¹³ *Id.* at 14.

¹¹⁴ *Id.* at 15.

¹¹⁵ *See id.*

¹¹⁶ *See* Commonwealth v. King, 57 A.3d 607, 615-16 (Pa. 2012) (citation omitted).

¹¹⁷ *See id.* at 613 (citation omitted).

¹¹⁸ *See id.* *See generally* Murphy, *supra* note 63, at 184 ("[O]ne of the most damaging strategic errors counsel [can] make in capital cases is to wait until the end of the guilt phase to begin thinking about how to proceed with the mitigation case.").

The Supreme Court of Pennsylvania's review of the post-conviction order in *King* concerned the guilt phase of trial only, since the prosecution abandoned an initial appeal from the award of a new sentencing hearing.¹¹⁹ Nevertheless, for reasons which are collateral to what I wish to convey today, I turned to the penalty hearing in my special concurrence.

Initially, I expressed some sympathy to trial counsel's plight in having been expected to take an appointment for which she was "plainly unprepared," "unqualified," and underpaid.¹²⁰ I observed, nonetheless, that:

Now, some twenty years after the fact, we can only observe the incalculable recourses on the part of the Commonwealth, [King's] multiple defense attorneys, and the courts which have been expended to reach the present state of no resolution. Presumably, there has been strain, as well, on the emotional reserves of the victim's family. Nevertheless, given trial counsel's gross dereliction, the Commonwealth must begin the penalty process anew or face the difficult decision of determining whether, at this juncture, enough is enough (such that a life sentence would be imposed).

No presumption or platitude can sweep aside this attorney's intolerably poor performance or the damage it has caused. Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential part of such administration.¹²¹

As suggested in this passage from the special concurrence, I also wanted to relate that, in my experience, the atrocious

¹¹⁹ *King*, 57 A.3d at 613.

¹²⁰ *See id.* at 634 (Saylor, J., concurring specially).

¹²¹ *Id.* at 635.

representation provided to the indigent defendant at the penalty phase in *King* was not a mere aberration. Thus, I appended a list of cases reflecting many other troubling instances of deficient stewardship in capital cases.¹²²

For example, the appendix reflects that King's co-defendant, Bradley Martin, also garnered a new penalty hearing on a post-conviction court's findings that his attorney's deficient mitigation presentation " 'was the result of lack of attention,' and his failure to present [available] mental-health [evidence] . . . was 'unreasonable as a matter of law.' "¹²³ This award occurred in roughly the same time frame as the grant of a new sentencing hearing to King, that is, almost two decades after trial.¹²⁴

In *Commonwealth v. Keaton*,¹²⁵ an award of a new sentencing hearing was affirmed, twenty years after trial, on the findings of a post-conviction court that the defendant's trial counsel maintained a "myopic focus only on the guilt phase," failed to obtain life-history and mental-health records or otherwise conduct an adequate mitigation investigation, and ignored advice that mental-health testing was implicated.¹²⁶

In *Commonwealth v. Walker*,¹²⁷ some fourteen years after trial, a post-conviction court awarded a new penalty hearing based on the defense attorney's lack of preparation.¹²⁸ The Commonwealth initially appealed, but discontinued the appeal a year later.¹²⁹ Walker has been removed from death row,¹³⁰ as it appears that he was resentenced to life imprisonment last year.¹³¹

¹²² See *id.* at 636-38.

¹²³ *Id.* at 637; *Commonwealth v. Martin*, 5 A.3d 177, 202-03 (Pa. 2010).

¹²⁴ *Martin*, 5 A.3d at 180, 182; *King*, 57 A.3d at 613.

¹²⁵ *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012).

¹²⁶ *Id.* at 1091-93.

¹²⁷ *Commonwealth v. Walker*, 36 A.3d 1 (Pa. 2011).

¹²⁸ See *id.* at 5.

¹²⁹ See *id.* at 5 n.3.

¹³⁰ See *Death Row Roster*, *supra* note 2.

¹³¹ See Robert Brett Dunham, *The First 100 Re-Sentencings: Subsequent Dispositions of Pennsylvania Capital Cases Reversed in Post-Conviction*, DEATH PENALTY INFO. CTR. 34 (Jan. 28, 2013), <http://www.deathpenaltyinfo.org/documents/RDunhamPaReversals.pdf>.

In *Commonwealth v. Smith*,¹³² in post-conviction proceedings, thirty years after the underlying killing in 1979, "the Commonwealth stipulated that [the defendant] would be granted a new penalty . . . hearing based on the ineffectiveness of trial counsel."¹³³ Smith also was subsequently removed from death row,¹³⁴ again, being resentenced to life in prison.¹³⁵ Similar circumstances occurred in the next case listed in the appendix, *Commonwealth v. Williams*.¹³⁶

The next case, *Commonwealth v. Beasley*,¹³⁷ is another in which a capital defense attorney attested at the post-conviction stage that he was not aware that he could adduce life-history and mental-health evidence at a penalty proceeding and that he conducted no investigation along such lines.¹³⁸ I am going to relate the lawyer's entire penalty-phase closing remarks to the sentencing jurors, and, as I do, I ask you to keep in mind the lawyer's core function to advance a mitigation case. Two other relevant aspects of the background are that the Commonwealth presented evidence that the defendant committed two other murders, one of a police officer and the other which occurred in New Jersey when the defendant was a juvenile, and the defendant testified as the sole defense penalty witness.¹³⁹

Counsel's closing in the sentencing phase, in its entirety, proceeded as follows:

I am going to say very little to you at this time, because I wouldn't presume to tell you how to decide this question that is coming before you. The reason I asked Mr. Beasley to take the stand was because I felt that you should know him a little bit as I know him, having represented him.

¹³² *Commonwealth v. Smith*, 17 A.3d 873 (Pa. 2011).

¹³³ *See id.* at 882.

¹³⁴ *See Death Row Roster, supra* note 2.

¹³⁵ *See Dunham, supra* note 131, at 35.

¹³⁶ *Commonwealth v. Williams*, 980 A.2d 510, 517 (Pa. 2009).

¹³⁷ *Commonwealth v. Beasley*, 967 A.2d 376 (Pa. 2009).

¹³⁸ *See id.* at 378-79.

¹³⁹ *See id.* at 377-78.

I want to draw your attention to the fact that the case which we heard so much about for the last two weeks is the case that now finally you have heard what really happened. An officer was shot, and Mr. Beasley was convicted of that crime. That incident pervaded this trial. We felt as if we were trying that case over again. The aura of that case pervaded this one.

I am not going to tell you anything about that case, as far as the legal arguments or the positions in the case, because I don't know. I was not his attorney in that case. I just want you to know that, in that case he does have an attorney. Motions have been filed with the Court claiming that certain errors were made. I don't even know what those errors are claiming to be, and that those motions have not been decided by the Court.

Therefore, the Court has not yet given its final judgment on that case.

As far as the [New Jersey] case, I asked Mr. Beasley about it, and you heard what he said. And you can draw your own conclusions from that.

Again, I won't presume to tell you how to handle the situation. I will leave it up to you as citizens and human beings.

Thank you.¹⁴⁰

You probably can make about as much of that as I can, but apparently this lawyer wanted only to complain about his not being able to try the case free of the defendant's other crimes.¹⁴¹ He did not mention mitigation in these final remarks of a death-penalty lawyer to a sentencing jury, nor did he even so much as make a bare request for the jurors to consider sparing the defendant's

¹⁴⁰ *Id.* at 378 (quoting N.T., July 16, 1981, at 58-60).

¹⁴¹ *See id.* at 378.

life.¹⁴² This case was remanded in 2009—twenty-seven years after trial—on account of an inadequate opinion by the post-conviction court,¹⁴³ and it appears that the prisoner subsequently died of natural causes.¹⁴⁴

An even more extreme example of a death-penalty lawyer's apparent fixation on the difficulty of his task in confronting the Commonwealth's aggravating evidence occurred in *Commonwealth v. Washington*.¹⁴⁵ In that case, in the attorney's initial statement to the sentencing jurors in his client's capital trial, he said:

He's going to die. He's going to die because he already has the death sentence. Do you want to give him another death sentence? Go ahead. It won't matter.¹⁴⁶

It is difficult for me to imagine *any* strategy that would motivate capital defense counsel to goad jurors into returning a death verdict, let alone a *reasonable* strategy. Washington's case was remanded to the post-conviction court,¹⁴⁷ and, seventeen years after trial, he apparently entered a plea to a life sentence.¹⁴⁸

In *Commonwealth v. Johnson*,¹⁴⁹ the post-conviction court determined that a trial attorney "completely abrogated his duty to [the defendant]."¹⁵⁰ Cases that follow in the appendix—*Commonwealth v. Sattazahn*,¹⁵¹ *Commonwealth v. Williams*,¹⁵²

¹⁴² *Id.*

¹⁴³ *See* Beasley, 967 A.2d at 395-96.

¹⁴⁴ *Brother Charles: 1951-2010*, PRISON RADIO (July 15, 2010), <http://archive.prisonradio.org/7-25-10BrotherCharles.html>.

¹⁴⁵ *Commonwealth v. Washington*, 880 A.2d 536, 541 (Pa. 2005). This decision is not referenced in the appendix to the *King* special concurrence.

¹⁴⁶ *Id.* at 547 (Saylor, J., concurring) (quoting N.T., Dec. 6, 1994, at 50).

¹⁴⁷ *See id.* at 546.

¹⁴⁸ *See* Dunham, *supra* note 131, at 32.

¹⁴⁹ *Commonwealth v. Johnson*, 966 A.2d 523 (Pa. 2009).

¹⁵⁰ *Id.* at 530.

¹⁵¹ *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008).

¹⁵² *Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008).

Commonwealth v. Gorby,¹⁵³ *Commonwealth v. Sneed*,¹⁵⁴
Commonwealth v. May,¹⁵⁵ *Commonwealth v. Collins*,¹⁵⁶
Commonwealth v. Zook,¹⁵⁷ *Commonwealth v. Jones*,¹⁵⁸
Commonwealth v. Gribble,¹⁵⁹ *Commonwealth v. Malloy*,¹⁶⁰
Commonwealth v. Harris,¹⁶¹ *Commonwealth v. Brooks*,¹⁶²
Commonwealth v. Chambers,¹⁶³ and *Commonwealth v. O'Donnell*¹⁶⁴—all reflect paltry investigations, protracted judicial proceedings, and major reversals of course ranging between seven and twenty-six years after the defendants' crimes.¹⁶⁵ Of these

¹⁵³ *Commonwealth v. Gorby*, 909 A.2d 775 (Pa. 2006). In *Gorby*, not only did counsel's performance track the above pattern of very little investigation and presentation of mitigation, counsel failed to so much as request a jury instruction concerning the sole form of mitigation evidence he presented to the jury. *See id.* at 778, 791 & n.15.

¹⁵⁴ *Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006). *See generally* *Commonwealth v. Tedford*, 960 A.2d 1, 40 (Pa. 2008) (explaining that, in *Sneed* and *Commonwealth v. Malloy*, "counsel failed to conduct even the most cursory of investigations into his client's background for the purpose of presenting mitigation evidence at sentencing").

¹⁵⁵ *Commonwealth v. May*, 898 A.2d 559 (Pa. 2006).

¹⁵⁶ *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005).

¹⁵⁷ *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005).

¹⁵⁸ *Commonwealth v. Jones*, 876 A.2d 380 (Pa. 2005).

¹⁵⁹ *Commonwealth v. Gribble*, No. 1042 EDA 2009, 2010 WL 4338675, at *1 (Pa. Super. Ct. June 21, 2010) (Letter Brief).

¹⁶⁰ *Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004).

¹⁶¹ *Commonwealth v. Harris*, 852 A.2d 1168 (Pa. 2004).

¹⁶² *Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003).

¹⁶³ *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002).

¹⁶⁴ *Commonwealth v. O'Donnell*, 740 A.2d 198 (Pa. 1999).

¹⁶⁵ *See* *Commonwealth v. Sattazahn*, 952 A.2d 640, 645, 649, 670 (Pa. 2008); *Commonwealth v. Williams*, 950 A.2d 294, 297, 305 (Pa. 2008); *Commonwealth v. Gorby*, 909 A.2d 775, 776, 791 (Pa. 2006); *Commonwealth v. Sneed*, 899 A.2d 1067, 1070, 1083 (Pa. 2006); *Commonwealth v. May*, 898 A.2d 559, 562, 576-77 (Pa. 2006); *Commonwealth v. Collins*, 888 A.2d 564, 567, 582 (Pa. 2005); *Commonwealth v. Zook*, 887 A.2d 1218, 1222, 1235 (Pa. 2005); *Commonwealth v. Jones*, 876 A.2d 380, 383-84 (Pa. 2005); *Commonwealth v. Gribble*, No. 1042 EDA 2009, 2010 WL 4338675, at *2, *9 (Pa. Super. Ct. June 21, 2010); *Malloy*, 856 A.2d at 767, 772, 786; *Harris*, 852 A.2d at 1168, 1170-71; *Brooks*, 839 A.2d at 245, 247, 249; *Chambers*, 807 A.2d at 872, 876, 883; *O'Donnell*, 740 A.2d at 198, 201, 214 n.13.

defendants, only Sattazahn and May are listed by the Department of Corrections as remaining on death row.¹⁶⁶

*Commonwealth v. Cooper*¹⁶⁷ presents one of the more bizarre examples of failures made on the part of a death-penalty attorney. The author of a recent article appearing in the *Philadelphia Inquirer* entitled *In Life and Death Cases, Costly Mistakes* summarized the circumstances, succinctly, this way:

Willie Cooper, convicted of strangling his brother's girlfriend to death in a Germantown apartment was awaiting a jury's decision on whether he should be sentenced to death, when his lawyer rose to speak on his behalf.

Citing to the biblical passage "an eye for an eye," the lawyer told jurors that the ancient edict called for the death penalty only in the killing of a pregnant woman.

Cooper had killed a pregnant woman.

Inexplicably, his lawyer had forgotten that.

The jury voted to impose the death penalty.

[At the post-conviction hearing the lawyer] said he made the biblical argument "out of habit" because he routinely used it to discourage juries from sentencing defendants to death. In [Cooper's] case, he said, he realized he had made "a terrible error."¹⁶⁸

The newspaper recounted that Cooper's case "is among more than 125 capital murder trials in Pennsylvania—69 in Philadelphia alone—that state and federal appeals courts have reversed or sent

¹⁶⁶ See *Death Row Roster*, *supra* note 2.

¹⁶⁷ *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007).

¹⁶⁸ Nancy Phillips, *In Life and Death Cases, Costly Mistakes*, PHILA. INQUIRER, (Oct 23, 2011, 5:41 AM) <http://mobile.philly.com/news/?id=132389898>; see also *Cooper*, 941 A.2d at 663.

back for new hearings because mistakes by defense lawyers deprived the accused of a fair trial[, including errors in sentencing hearings]."¹⁶⁹ Notably, this account is consistent with other sources reporting subsequent dispositions of capital cases.¹⁷⁰ Moreover, according to such other sources, the vast majority of the prisoners in these cases have attained an alternative disposition of a life sentence or less.¹⁷¹

¹⁶⁹ See Phillips, *supra* note 168; Cooper, 941 A.2d at 664.

¹⁷⁰ See Dunham, *supra* note 131, 25-38.

¹⁷¹ See *id.* (reporting such disposition for prisoners: Mumia Abu-Jamal, Martin Appel, William Basemore, Robert Bryant, Roger Buehl, James Carpenter, Samuel Carson, Lawrence Christy, Ronald Clark, Rodney Collins, Ronald Collins, Sherman Craver, Paul David Crews, Robert DeHart, Junious Diggs, Daniel Dougherty, George Edwards, Arthur Faulkner, Jonathan Fisher, Lester Fletcher, Kenneth Ford, Robert Freeman, Roderick Frye, Dell Gease, Thomas Gorby, William Gribble, Rodney Griffin, Johnny Ray Harris, Joseph Henry, Donnetta Hill, Steven Hutchinson, Frederick Jermyn, James Jones, Damon Jones, Matthew Kemp, Reginald Lewis, Steven McCrae, Tyrone Moore, Salvador Morales, Willard Moran, Jerry Marshall, Jr., Nathaniel McNair, John Ockenhouse, Al Peoples, Otis Peterkin, Roger Proctor, Alan Pursell; Michael Rainey, Wilfredo Ramos, Angel Reyes, Dolores Rivers, Florencio Rolan, Saharris Rollins, Timothy Rice, Ronald Rompilla, Dino Rucci, Salvador Santiago, Clifford Smith, James Melvin Smith, Willie Sneed, James Strong, Joseph Szuchon, Benjamin Terry, Louis Thompson, William Wallace, Shawn Walker, Vinson Washington, Craig Williams, Kenneth Williams, and Robert Zook).

The following former death-row prisoners are reported as having received an award of a life sentence based upon a subsequent determination of death ineligibility per *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (precluding execution of persons suffering from mental retardation), or *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (foreclosing execution of prisoners who were minors as of the commission of an otherwise capital crime): Karl Chambers, Jerome Gibson, Harrison Graham, Kevin Hughes, Peter Michael Karenbauer, Percy Lee, Jose Marrero, Joseph Miller, Simon Pirela, Nathan Scott, Raymond Whitney, and Connie Williams. See Dunham, *supra* note 131, at 26-31, 35.

The following prisoners are reported as no longer being at risk of a first-degree murder conviction: Lee Baker (reported as entering a plea to third-degree murder); Dennis Counterman (pled to third-degree murder); Donald Hardcastle (pled to third-degree murders); Arnold Holloway (pled to third-degree murder); Raymond Johnson (pled to third-degree murder); Ramon Sanchez (conviction reduced to third-degree murder); Ernest Simmons (pled to third-degree murder); Morris Spence (pled to third-degree murder); Andre Thompson (pled to third-

In my special concurrence in *King*, I also observed that the list of capital cases manifesting lawyer ineffectiveness "would be far longer were it to catalogue the many instances in which severe derelictions have been alleged but the defendant . . . [was] denied the opportunity to adduce supporting evidence based on other considerations, such as waiver, or a finding of insufficient prejudice."¹⁷² In terms of a more complete listing, I also commented that there are many cases of apparent ineffectiveness on the part of capital defense attorneys at the appellate stage.¹⁷³ For example, in *Commonwealth v. Walter*,¹⁷⁴ a capital defendant's claims in a counseled direct appeal were rejected because the arguments presented were deemed "unintelligible," underdeveloped, "vague and confusing," waived, "incomprehensible," and "incapable of review."¹⁷⁵

Recently, a systemic challenge to Philadelphia's system for appointing counsel to represent indigent capital defendants arrived in the Supreme Court of Pennsylvania.¹⁷⁶ Philadelphia, of course, is far and away the largest contributor to the death-row population

degree murder); Harold Wilson (acquitted); Nicholas Yarris (retrial *nolle prosequi* – released). See Dunham, *supra* note 131, at 27-32.

Finally, the Commonwealth is reported as no longer pursuing a capital sentence with regard to Zachary Wilson, however, the Department of Corrections reports that this prisoner remains on death row as of August 1, 2013. See *Death Row Roster*, *supra* note 2.

¹⁷² See *Commonwealth v. King*, 57 A.3d 607, 635-36 (Pa. 2012) (Saylor, J., concurring specially) (citing, *inter alia*, *Commonwealth v. Hall*, 872 A.2d 1177, 1192-95 (Pa. 2005) (Saylor, J., dissenting) (commenting on an instance in which waiver was invoked, in part, by a majority of the Supreme Court of Pennsylvania to justify a post-conviction court's decision to summarily deny a claim involving trial counsel's alleged failure to conduct a mitigation investigation)).

¹⁷³ *Id.* at 636.

¹⁷⁴ *Commonwealth v. Walter*, 966 A.2d 560 (Pa. 2009).

¹⁷⁵ *Id.* at 563, 566-67; see also *Commonwealth v. Johnson*, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring) (expressing "continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide the professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claims").

¹⁷⁶ See Report and Recommendations in *Commonwealth v. McGarrell*, 77 EM 2011, 1, 9 (Pa. June 8, 2011).

in the Commonwealth.¹⁷⁷ In response, the Supreme Court of Pennsylvania commissioned a Philadelphia homicide judge as a special master, who reported his findings that the dynamics of the appointment system are "woefully inadequate," "completely inconsistent with how competent trial lawyers work," "punish[] counsel for handling these cases correctly," and unacceptably "increase[] the risk of ineffective assistance of counsel" in individual cases.¹⁷⁸ While the Supreme Court of Pennsylvania has not formally reviewed these findings to this point, the findings certainly resonate against the anecdotal evidence suggesting a serious problem in Pennsylvania.¹⁷⁹

In October of last year, two RAND Corporation researchers published an essay in the *Yale Law Journal* discussing their findings concerning differences in degree-of-success rates in homicide cases and comparing the Defender Association of Philadelphia and court-appointed attorneys, such as many of the lawyers we have discussed previously.¹⁸⁰ The Defender Association is a well-regarded, professional, nonprofit public defense organization under contract with the City of Philadelphia.¹⁸¹ Notably, none of the cases I have discussed above

¹⁷⁷ See *Death Row Roster*, *supra* note 2.

¹⁷⁸ Report and Recommendations in *McGarrell*, 77 EM 2011, at 11, 17.

¹⁷⁹ *Accord* *Commonwealth v. King*, 57 A.3d 607, 633-34 (Pa. 2012) (Saylor, J., concurring specially); *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1154 (Pa. 2012) (Saylor, J., concurring) ("I maintain grave concerns with the quality of the stewardship we have seen in a number of the capital post-conviction cases, including [this] one.").

¹⁸⁰ See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 *YALE L.J.* 154, 159 (2012).

¹⁸¹ See, e.g., Samantha Melamed, *50 Years After Establishing the Right to Counsel, Is Justice Still Being Served?*, PHILA. CITY PAPER (Mar. 14, 2013, 12:00 AM), <http://www.citypaper.net/article.php?50-Years-After-Establishing-the-Right-to-Counsel-Is-Justice-Still-Being-Served-11963>, ("Poor people accused of crimes in Philly are relatively lucky: Despite limited funds, Philly's Defender Association is considered a national model."); see also Anderson & Heaton, *supra* note 180, at 161 ("The homicide unit of the Defender Association consists of a group of about ten experienced public defenders who have considerable experience practicing in the Philadelphia court system. Every case

involved representation by the salaried attorneys of the Defender Association—since the Association began representing one out of every five homicide defendants in 1993, no jury has ever returned a death verdict against a defendant represented by a lawyer of the organization.¹⁸²

In addition to this anecdotal evidence of better performance, according to these researchers, representation by the Defender Association increases the probability that a homicide defendant will secure a sentence of a term of years, as opposed to a life sentence, by sixty-two percent.¹⁸³ The researchers relate:

Our findings, from the fifth-largest city in the United States, raise questions regarding the fundamental fairness of the criminal justice system and whether it provides equal justice under the law. The findings also raise questions as to whether current commonly used methods of providing indigent defense satisfy Sixth Amendment standards for effective assistance of counsel and Eighth Amendment prohibitions against arbitrariness in punishment.¹⁸⁴

I offer no representations concerning the accuracy of this study or the validity of the conclusions. I will say, however, that combined with the anecdotal evidence I have discussed, the results are deeply troubling to me.

is staffed with teams of two lawyers and one or more investigators and mitigation specialists . . . as needed.") (footnote omitted).

¹⁸² See Anderson & Heaton, *supra* note 180, at 161, 182.

¹⁸³ *Id.* at 159; cf. Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 431 (2004) (asserting that "[e]mpirical evidence shows that in certain states, three-quarters of those convicted of capital murder while represented by court-appointed lawyers were sentenced to death, while only about one-third of those represented by private attorneys received the death penalty").

¹⁸⁴ Anderson & Heaton, *supra* note 180, at 159-60.

Similar concerns are reported nationwide in indigent defense systems.¹⁸⁵ Along the lines of my presentation relative to Pennsylvania, commentators observe that in other states, as well, "[c]apital representation disaster stories are well known."¹⁸⁶ To prove the point, commentators have catalogued many examples of "obviously outrageous deficiencies in representation, including

¹⁸⁵ Stephen B. Bright, *Glimpses at a Dream Yet to be Realized*, CHAMPION: NAT'L ASS'N CRIM. DEF. LAW., (March 1998) <http://www.nacdl.org/CHAMPION/ARTICLES/98mar01.htm>.

¹⁸⁶ Robert H. Robinson, Jr., *Improving Process in Virginia Capital Cases*, 12 CAP. DEF. J. 363, 367 (2000); *see also* Chhablani, *supra* note 63, at 365-68 (indicating that "[n]umerous reports, articles in journals and newspapers have catalogued the shocking representation being provided to indigent defendants in state courts across the country" and citing examples); Statement of Stephen B. Bright Regarding the Innocence Protection Act before the Subcommittee on Crime, Terrorism and Homeland Security, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES 5 (Sept. 22, 2009), <http://judiciary.house.gov/hearings/pdf/bright090922.pdf> (detailing examples of poor stewardship in capital cases and asserting, "[t]he dismal failure to provide competent counsel in capital and other criminal cases since . . . *Gideon* . . . has been well documented by the American Bar Association, independent organizations, law professors, journalists and anyone else who has looked into it"); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1035 (2006) (asserting that "[e]ntire [public defense] systems have been viewed as essentially incapable of preserving fundamental constitutional rights"); *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, AM. BAR ASS'N STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS iv (2004) (concluding that "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation"). *See generally* Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 487 (2010) ("For decades, scholars and practitioners have criticized the deplorable quality of legal representation available to poor criminal defendants across the country."); Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 443 (2010) ("Despite the Sixth Amendment guarantee of the right to counsel, commentators have been documenting the shortcomings of indigent defense systems across the nation for decades[.]"); Stephen B. Bright, *The Right to Counsel In Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 17-18 (2010).

cases in which death-sentenced inmates were represented by sleeping, intoxicated, jailed, . . . or disbarred attorneys."¹⁸⁷

In 2009, the National Right to Counsel Committee, "a bipartisan committee of independent experts representing all segments of [the Nation's] justice system," issued a report entitled: *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.¹⁸⁸ Summarizing its 200-page report, the Committee said this:

[T]oday, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the *Gideon* decision and the Supreme Court [of the United States'] soaring rhetoric. . . . Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems. In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.¹⁸⁹

¹⁸⁷ Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293, 306-07 (2007).

¹⁸⁸ National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, CONST. PROJECT 2-3 (2009), <http://www.constitutionproject.org/manage/file/139.pdf>.

¹⁸⁹ *Id.* at 2. More specific to the capital litigation context, a 2006 report by the Constitution Project recounted: "In case after case, attorneys who failed to present any mitigation evidence at all, or who have presented a bare minimum of such evidence, were found to have satisfied *Strickland*. Yet mitigation evidence is an absolutely essential part of the punishment phase." Mandatory Justice, *supra* note 63, at 8 (footnotes omitted).

B. The Path Forward

I have spent a fair amount of time describing the difficulties Pennsylvania has experienced with attorney performance in capital cases¹⁹⁰ because I wanted you to have a feel for the scope and urgency of the problem. This, of course, has limited our time for illuminating the path forward. In any event, I could no more cover the range of potential remedial responses in an hour than I could discuss all of the death-penalty cases in which ineffectiveness has been made manifest. There is inherent complexity because the difficulties facing governments in satisfying their constitutional obligations relative to the poor are political, controversial, intractable, and immeasurable.¹⁹¹ Since I am unable to offer a comprehensive solution, what I hope to do at this juncture is simply to identify some underlying causes and suggest some potential strategies and interventions. Again, in many instances, the ideas are not my own but have been proposed by others who have been engaged in this line of discourse for a very long time.

1. Awareness

One cause, I believe, is insufficient public awareness. Speaking to the ills afflicting public defense systems in America, the Attorney General of the United States recently had this to say:

I continue to believe that if our fellow citizens knew about the extent of this problem, they would be as troubled as you and I. Public education about this issue is critical. For when equal justice is denied, we all lose. . . .

But problems in our criminal defense system aren't just morally untenable. They are also economically unsustainable. Every taxpayer should be seriously concerned about the systemic costs of inadequate defense

¹⁹⁰ See *supra* notes 122-75 and accompanying text.

¹⁹¹ See *Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010*, DEP'T OF JUSTICE (Feb. 18, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

for the poor. When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense.¹⁹²

2. Funding

Funding of indigent defense services, obviously, is a major source of concern.¹⁹³ There are vast compilations of literature containing evidence of long-standing, chronic underfunding of public defense systems in the United States.¹⁹⁴ The predictable effect on the delivery of legal services seems to me to be obvious—as put by the National Right to Counsel Committee, "it is totally unrealistic to expect that effective representation will be delivered unless systems of public defense are adequately funded."¹⁹⁵ The United States Court of Appeals for the Fifth Circuit said it this way in reversing a death verdict in *Martinez-Macias v. Collins*.¹⁹⁶ "We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for."¹⁹⁷

¹⁹² *Id.*

¹⁹³ See, e.g., Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defense System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 402 (2012) ("[I]n the great majority of jurisdictions in the United States, those responsible for funding indigent legal services have failed to provide the funds needed for counsel to undertake their duties responsibly."); Drinan, *supra* note 186, at 491 ("There are many symptoms of the public defense crisis, but its primary cause is a lack of adequate funding."); Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 904 (2010) ("Today, it is widely recognized that insufficient funding by state legislatures is a root cause of the ongoing indigent defense crisis.").

¹⁹⁴ See, e.g., *Justice Denied*, *supra* note 188, at 31.

¹⁹⁵ *Commonwealth v. King*, 57 A.3d 607, 634 (Pa. 2012) (Saylor, J., concurring specially). For a different perspective, see *id.* at 632-33 (Castille, C.J., concurring).

¹⁹⁶ *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

¹⁹⁷ *Id.* at 1067.

By way of a more proximate example, as reported by the special master appointed by the Supreme Court of Pennsylvania, since 1997, lead counsel in a homicide case in Philadelphia has been paid "a flat 'preparation fee' of \$2,000."¹⁹⁸ This included the first half-day of trial, and attorneys would be paid \$200 per half-day and \$400 per day through the remaining days of trial.¹⁹⁹ There was also a preparation fee of \$1,700 for separate "penalty phase" counsel.²⁰⁰

According to the special master:

These rates were woefully inadequate when first implemented. They are even more so today. . . . Capital defendants and their court appointed counsel are ill-served by a compensation system which favors the longest possible trial over the most comprehensive preparation and intensive negotiations. Moreover, such a system also ignores the interest of the victims' families, the prosecutor and the court in obtaining dispositions which are both fair and efficient.²⁰¹

Funding is obviously a political issue, and in today's landscape of economic challenges facing government, finding sources of financing has become most difficult.²⁰² Nevertheless, and as a postscript, it appears that the increased awareness coinciding with the systemic challenge in Philadelphia has contributed to some progress.²⁰³ Immediately after the special master issued his report,

¹⁹⁸ Report and Recommendations in *Commonwealth v. McGarrell*, 77 EM 2011, 1, 10-11 (Pa. June 8, 2011).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 11, 13 (couching Philadelphia's then-existing compensation schedule for death-penalty attorneys as "incomparably inadequate"). Notably, the system adopted in 1997, which the special master deemed inadequate, is an enhanced one as compared with the previous system, under which many of the cases we have discussed were litigated. *See id.* at 11.

²⁰² *See Justice Denied*, *supra* note 188, at 31.

²⁰³ *See Strides Made in Decreasing Buildup of Pending Philadelphia Homicide Trials*, PA. FOR MODERN CTS. (July 12, 2013), <http://www.pmconline.org/node/1000>.

the guaranteed fee for capital defense service appointments in Philadelphia was increased about five fold.²⁰⁴

On a broader scale, it has been observed that the Sixth Amendment right to counsel and the attendant requirement of effective stewardship serve as an unfunded federal mandate on the states.²⁰⁵ Therefore, according to the National Right to Counsel Committee, at least, "it is entirely fitting that the federal government assist in its implementation."²⁰⁶ I am quite certain that Pennsylvania would welcome a greater contribution from the tier of government which is the source of the salient constitutional obligation and which collects a lion's share of the taxing revenues.²⁰⁷

Failing that, it obviously falls to the states to assure that their own constitutional houses are in order. Apparently, Pennsylvania and Utah are the only two states in the nation that do not participate directly in funding indigent defense services, but rather delegate that expense to county governments.²⁰⁸ This kind of a decentralized arrangement risks inequalities, in tension with the kind of non-arbitrary treatment the Supreme Court of the United States has been looking for since *Furman*.²⁰⁹ Accordingly, it is a recommendation of the National Right to Counsel Committee that appropriate funding should originate from the state level and there

²⁰⁴ See *Justice Denied*, *supra* note 188, at 163 n.25. As related by the District Attorney's office in Philadelphia: "After the [special master's] report was filed the First Judicial District introduced a guaranteed flat fee of \$10,000 for lead counsel and \$7,500 for penalty phase counsel, covering both preparation and trial, and payable regardless of whether the case is tried to verdict." Report and Recommendations in *Commonwealth v. McGarrell*, 77 EM 2011, 3 n.1 (Pa. June 8, 2011).

²⁰⁵ See, e.g., *Justice Denied*, *supra* note 188, at 30 (explaining that, "[t]aken together, the [United States Supreme] Court's historic rulings, based upon the *federal* Constitution's Sixth Amendment counsel provision, are a significant, high-cost, unfunded mandate imposed upon state and/or local governments" (footnote omitted)).

²⁰⁶ See, e.g., *id.* at 10.

²⁰⁷ See *id.* (explaining the different options for funding available today).

²⁰⁸ See *id.* at 54 ("Only Pennsylvania and Utah still require their counties to fund all indigent defense expenses.").

²⁰⁹ See generally *supra* notes 18-20 and accompanying text.

should be substantial state oversight to assure reasonable uniformity and constitutional compliance.²¹⁰

Notably, the Joint State Government Commission in Pennsylvania recently established a bipartisan task force and an advisory committee to conduct a study of capital punishment in the Commonwealth, and one of the delineated tasks is to review "[t]he quality of counsel provided to indigent capital defendants and whether such counsel and the process for providing counsel assures the reliability and fairness of capital trials."²¹¹ One of the most promising solutions, in my view, is to consider creating an adequately financed, statewide capital trial unit akin to the homicide unit of the Defender Association of Philadelphia.²¹²

Consistent with the comments of the United States Attorney General,²¹³ which I related previously, I believe that some longer-term thinking in the above regards will result in a more cost-effective and fair justice system.

3. Guidelines

In terms of causes, another source of attorney under-performance cited in the literature is insufficient standards to guide the capital defense undertaking.²¹⁴ The opinion Justice O'Connor authored in *Strickland* in 1984 downplayed such guidelines, while instead prioritizing flexibility and independence on the part of trial counsel.²¹⁵ Seventeen years later, however, when she expressed her

²¹⁰ See *Justice Denied*, *supra* note 188, at 11-12.

²¹¹ Pa. S. Res. 6, 2011 Gen. Assemb., 2011 Sess. (as amended Dec. 6, 2011).

²¹² See generally Catherine Greene Burnett, *Guidelines and Standards for Texas Capital Counsel: The Dilemma of Enforcement*, 34 AM. J. CRIM. L. 165, 196 (2007) (suggesting such a possibility relative to the system of public defense in capital cases in Texas).

²¹³ See DEP'T OF JUSTICE, *supra* note 191.

²¹⁴ See, e.g., Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 101 (2010) (asserting that "perhaps the most significant factor contributing to the incompetent state of representation in capital trials arises from the lack of any meaningful standards by which to govern the performance of attorneys in capital trials").

²¹⁵ See *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

misgivings about fairness in death-penalty administration, Justice O'Connor said that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases."²¹⁶

The American Bar Association has published extensive recommended standards for the conduct of capital cases by defense counsel;²¹⁷ however, in Pennsylvania, our standards are limited to some experience and qualification criteria and are quite modest by comparison.²¹⁸ To the extent we continue to see failures in the investigation and presentation of mitigating evidence, more focused, substantive guidelines certainly should be considered as an option.

4. Better Judicial Decision-Making

It is also apparent that we need to continue to improve the quality of the judicial decision-making in the capital arena.²¹⁹ At the trial level, in each one of the instances I have cited in which nothing was done to prepare a mitigation case, a common pleas judge sat by and watched circumstances unfold that would give rise to a new sentencing hearing award a decade or more later.²²⁰ While certainly it is not the place of trial judges to school advocates engaged in ongoing litigation, credible proposals have been made for judges to take a more active role in cases of obvious and "egregious [attorney] ineffectiveness" in criminal proceedings.²²¹ Particularly given the extensive time lag that we have seen in many cases between trial and the subsequent judicial

²¹⁶ Editorial, *Justice O'Connor on Executions*, N.Y. TIMES (July 5, 2001), <http://www.nytimes.com/2001/07/05/opinion/justice-o-connor-on-executions.html>.

²¹⁷ See Am. Bar Ass'n, *supra* note 50, at 1005-06, 1023-24.

²¹⁸ See 234 PA. CODE § 801 (2013).

²¹⁹ Bensom-Amram, *supra* note 183, at 429.

²²⁰ *Commonwealth v. King*, 57 A.3d 607, 636-38 (Pa. 2012) (Saylor, J., concurring specially) (citing several examples where trial counsel did not prepare a mitigation case).

²²¹ See, e.g., Bensom-Amram, *supra* note 183, at 429 (advocating the imposition of an obligation on trial courts to inquire into instances of "egregious ineffectiveness" occurring before them).

review of ineffective-assistance-of-counsel claims,²²² I believe such proposals merit serious consideration.

I also think that post-conviction and appellate judges need to be vigilant in maintaining fair and regular procedures for reviewing these cases.²²³ Certainly, there is inertia inherent in judicial review of a judgment of a sentence secured by the Commonwealth during regular judicial proceedings. The underlying crimes are almost always heinous, and there is a concern with the impact of delay on the victims' families.²²⁴ Obviously, there is substantial time and expense involved in retrials.²²⁵ Judges may be reluctant to criticize attorneys for their performance.²²⁶

Nevertheless, in my view, the credibility of the courts is in issue. In preparing for this discussion, I was candidly overwhelmed with the extent and tone of the charges of willful blindness on the part of the courts in the performance of judicial review of capital litigation.²²⁷ Stephen B. Bright, President and Senior Counsel for the Southern Center for Human Rights, tells law students and others that "[c]ourts have completely lost sight of justice in a tangle of procedural rules and administrative concerns so that now finality, not justice, is the ultimate goal of the system."²²⁸ I have a different perspective, and I suppose it would be possible to simply

²²² *Id.* at 428.

²²³ *Accord, e.g., Commonwealth v. Hutchinson*, 25 A.3d 277, 325 (Pa. 2011) (Saylor, J., dissenting) ("In summary, and in line with many of my previous expressions, I believe that the appropriate way for this Court to address the intractable difficulties which have arisen in the death penalty arena is to consistently enforce the requirement of an evidentiary hearing where material facts are in issue; to require appropriately developed factual findings and legal conclusions of the [post-conviction] courts; and to apply consistent and fair review criteria on appeal. It is my considered position that there remains a great need for improvement in each of these areas.").

²²⁴ *See supra* note 121 and accompanying text.

²²⁵ *Death Penalty Cost*, AMNESTY INT'L USA (Aug. 25, 2013), www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-cost.

²²⁶ *See Justice Denied, supra* note 188, at 39.

²²⁷ *See generally supra* note 63 (citing several instances of such criticism).

²²⁸ Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 709 (2010).

dismiss these very serious assertions out of hand as mere posturing by an interest advocate. Considering the inconsistencies—and the number of very poorly litigated capital cases I have seen in Pennsylvania alone—however, I am unable to be so dismissive of these concerns.

Since *Williams* and *Wiggins*, at least, it is clear that if a capital defense attorney did not perform or supervise a mitigation investigation, or conducted only a paltry one, there has been a failure in the representation.²²⁹ If the reviewing court is unable to say with confidence that there is no reasonable probability that such failure would have changed the mind of at least one sentencing juror, then the judgment of the sentence must be vacated and a new penalty hearing awarded.²³⁰ I believe that prompt, consistent action on the part of the appellate and post-conviction courts to such ends, where necessary, would send an essential message discouraging poor performance in other cases, while effectuating essential justice, maintaining the courts' credibility, and serving the best interest of the public for the long term. On the other hand, when the record reflects that fundamental fairness was maintained through the rendition of professional services by appointed counsel and otherwise, the appellate courts will sustain a just death verdict.

Certainly, there are no perfect trials. But there are fair ones, and we know there have been unfair ones as well²³¹—our goal must remain to distinguish, credibly and consistently, between the two. We all want results we think are right, but the consequences are too great if we disregard the essential process.

Professor Eric M. Freedman offered an analogous point in his introduction to a reprinting of the ABA guidelines for the performance of counsel in capital cases, as follows: "All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of

²²⁹ This assumes counsel's efforts were not thwarted by refusal to cooperate on the part of the defendant. *See Schriro v. Landrigan*, 550 U.S. 465, 476-77 (2007).

²³⁰ *See Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003).

²³¹ *See Commonwealth v. King*, 57 A.2d 607, 636-38 (Pa. 2012)(Saylor, J., concurring specially).

defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed."²³²

I very much agree.

VI. CONCLUSION

I will conclude with just a few personal observations. First, I want to recognize that there are some very effective capital defense attorneys in Pennsylvania. Many of the cases we have discussed in which we saw poor performance had their origins in the 1980s and 1990s.²³³ The Supreme Court of Pennsylvania now has in place some experiential and training standards governing the appointment of counsel, and certainly there are now better educational opportunities available from professional organizations.²³⁴ I also believe that now there is a more universal awareness of defense counsels' duties to investigate, prepare, and present a mitigation case at the sentencing stage of a death-penalty trial.²³⁵

There is much evidence, however, that more needs to be done, and the current state of Pennsylvania capital jurisprudence is in continued need of improvement. As I am sure you can see, since coming to the Supreme Court of Pennsylvania, I have been very disappointed, and frankly disheartened, with the quality of the representation accorded to indigent capital defendants in far too many of these cases. Presently, I am hopeful that, through cooperation between the legislative, judicial, and executive branches, we can implement policies and commit the resources necessary to ensure consistent compliance in the Commonwealth

²³² Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003) (quoting Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989)).

²³³ See, e.g., *King*, 57 A.2d at 636-38.

²³⁴ See Am. Bar Ass'n, *supra* note 50, at 941-42.

²³⁵ *Commonwealth v. Johnson*, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 677-78 (2008).

with the federal constitutional requirement of effective counsel in death-penalty cases and otherwise.²³⁶

²³⁶ In a recent concurrence, I put this point as follows:

My only comment is to express continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide the professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claim. . . . This is a matter which certainly merits ongoing monitoring by this Court in its supervisory capacity. The close attention of the Legislature is warranted as well, at the very least in terms of ensuring the availability of appropriate funding to provide the resources necessary to continue to reconcile its scheme of capital punishment with the constitutional mandate of an adequate defense for indigent individuals whom the State seeks to put to death.

Johnson, 985 A.2d at 928 (Saylor, J., concurring).