

Reforming the Appellate Process for Pennsylvania

Capital Punishment

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INTRODUCTION

The death penalty has long been a staple of governmental punishment. It has been incorporated in the Hammurabi Code of ancient Babylon on down to the current laws of many American States. In early America, capital punishment, exercised at the local level, was ubiquitous and widely accepted.

Pennsylvania lists itself among the states currently employing the death penalty. The death penalty in Pennsylvania began in the late 1600's when the first colonists carried out public hangings as a punishment for various crimes.¹ The public nature of the punishment, initially, was intended to deter community members from committing the same crimes. However, in 1834 Pennsylvania was the first state in the union to abolish public hangings and instead conduct them within the walls of the prison. Officials hoped that conducting the capital punishment out of the public's eye would create a sense of fear that would act as a further deterrent to criminal behavior.

In 1913 the Pennsylvania State Legislature changed the method of capital punishment from hanging to electrocution. Due to delays, the electric chair was not actually available as a viable method until 1915. The state then used the electric chair from 1915 until 1962 to execute a total of 350 prisoners. Most recently Governor Casey signed

¹ Commonwealth of Pennsylvania Department of Corrections, *Information on the Execution Process*, http://www.cor.state.pa.us/portal/lib/portal/Execution_Q_&_A.pdf (last visited Nov. 29, 2005).

legislation in 1990 instituting lethal injection as the officially state-sanctioned method for capital punishment.

The last inmate executed in Pennsylvania was Gary Heidnik on July 6, 1999.² Currently there are 224 inmates on Pennsylvania's death row.³ Various courts, both state and federal, issued stays of execution for each and every inmate currently on death row. Many of the stays date back to the 1980's. Courts issue the stays and they are effective indefinitely until lifted by the courts. This paper will focus on this topic, the appellate process. I leave the debate of capital punishment propriety for other projects. Given the legality of capital punishment currently in Pennsylvania, I outline the current appellate process available to those condemned and recommend reformation to maintain proper separation of powers within the process.

APPELLATE PROCESS

The capital punishment appellate process is fairly complicated and includes both state and federal action. The state action includes a mandatory direct review by the Supreme Court of Pennsylvania, review by the Governor and potentially collateral reviews from Court of Common Pleas, the Superior Court and the Pennsylvania Supreme Court. Federal review may include Federal District, Circuit and Supreme courts. In order to analyze the process, I will categorize each level of review and provide a semblance of a map through the process.

² Id.

³ Commonwealth of Pennsylvania Department of Corrections, *Persons Sentenced to Execution in Pennsylvania as of November 1, 2005*, http://www.cor.state.pa.us/portal/lib/portal/Execution_List.pdf (last visited Nov. 29, 2005).

DIRECT APPEALS

Currently, Pennsylvania authorizes the imposition of the death penalty solely for a conviction of first-degree murder.⁴ First-degree murder trials are bifurcated, meaning there are separate guilt and sentencing phases.⁵ In order to secure a conviction and capital sentence the prosecution must convince a jury, unanimously, of the defendant's guilt beyond a reasonable doubt.⁶ During the sentencing phase, the jury must consider particular case facts meeting a list of aggravating or mitigating circumstances.⁷ In order to secure a capital sentence, the jury must find the aggravating circumstances outweigh those mitigating.⁸

Pennsylvania statute provides for a unique direct appeals process for defendants sentenced to capital punishment. Typically, a convicted criminal must file an appeal with the Superior Court within a statutory period. However, in the case of a capitally sentenced criminal there is an automatic appeal to the Supreme Court of Pennsylvania.⁹ Immediately following a capital sentence the trial court clerk must statutorily file an appeal with the Supreme Court of Pennsylvania Prothonotary.¹⁰

The Supreme Court will then consider the case and review for errors of law by the trial court. In addition to the standard review of legal error, the Court must either affirm or

⁴ 42 Pa.C.S.A. § 9711.

⁵ § 9711(a)(1).

⁶ § 9711(a)(4).

⁷ § 9711(a)(c).

⁸ Id.

⁹ § 9711(h)(1).

¹⁰ "Procedure in trial court. Upon the entry of a sentence subject to 42 Pa.C.S. § 9711(h) ...the court shall direct the official court reporter and the clerk to proceed under this chapter as if a notice of appeal had been filed 20 days after the date of entry of the sentence of death, and the clerk shall immediately give written notice of the entry of the sentence to the Administrative Office and to the Supreme Court Prothonotary's Office. The clerk shall insert at the head of the list of documents required by Rule 1931 (c)...a statement to the effect that the papers are transmitted under this rule from a sentence of death." Pa. R.A.P. 1941 (2005).

vacate the capital sentence and remand for further proceedings.¹¹ Statutorily the Court must affirm the capital sentence unless it was either “the product of passion, prejudice or any other arbitrary factor or the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).”¹² Following a review by the Supreme Court of Pennsylvania, the direct appeals process may end in one of three ways. The defendant may elect to file an appeal with the United States Supreme Court. If the United States Supreme Court either denies *certiorari* or affirms the capital sentence on review, then the direct appeal process concludes.¹³ Alternatively, the direct appeal process concludes if defendant fails to file a writ of *certiorari* or extension thereof within the statutory period.¹⁴

EXECUTIVE ACTION AND JUDICIAL STAYS OF EXECUTION

Within thirty (30) days of the direct appeal process conclusion, the Prothonotary of the Supreme Court “shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence, opinion and order by the Supreme Court.”¹⁵ Upon receiving this information from the Supreme Court, the Executive is supposed to promptly review the case. The Governor has the discretion to uphold the capital sentence, commute the sentence or pardon the defendant and he will sign an order to that effect.¹⁶ If

¹¹ 42 Pa.C.S.A. § 9711(h)(2).

¹² § 9711(h)(3).

¹³ § 9711 (i)(2)-(3).

¹⁴ § 9711 (i)(1).

¹⁵ Id. at § 9711 (i).

¹⁶ According to the Pennsylvania Supreme Court in Zook, the “[c]apital murder statute did not impermissibly place power of commutation within the hands of the governor without adequate guidelines, in violation of defendant’s due process rights; concurrence of the majority of Board of

the Governor upholds the capital sentence, then he will sign what is called a death warrant. As a part of the death warrant the Governor will also set a date of execution for that inmate.

The Pennsylvania Supreme Court criticized the promptness with which the Executive acted in signing these death warrants.¹⁷ The Pennsylvania Attorney General asked the Court to consider an Act intended to streamline the appellate process in capital punishment cases.¹⁸ I will further analyze this Act in a later section. However regarding the Executive, the Court indicated in this opinion that the Executive was the source of delay in executing capital punishment sentences.¹⁹ Although this may have been the case in 1998 when this ruling was handed down, the courts now seem to be the main source of delay.

Once the Governor issues the death warrant, the only way to stay the execution is if a court with jurisdiction reviews the case.²⁰ Given that the Executive signs the death warrant only after the direct appeals process is concluded, the stays of execution will be the product of either Post-Conviction review or Federal Habeas Corpus reviews.²¹ To grant the stay, the court must find the petition meets all of the criteria outlined in the next section and “the petitioner makes a strong showing of likelihood of success on the merits.”²² Once a court issues a stay of execution, the stay remains in effect until that court lifts it. A court will lift the stay after it fully considers the case and renders judgment.

Pardons, following a full hearing, was required before full commutation could be accomplished by the governor.” *Com. v. Zook*, 615 A.2d 1 (Pa., 1992), nt. 21.

¹⁷ *In re: Suspension of the Capital Unitary Review Act*, 554 Pa. 625, 630 (Pa. 1999).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ “The pendency of proceedings under Rule 1941 (review of a sentence of death) shall stay execution of a sentence of death.” Pa.R.A.P. 1761 (2005).

²¹ “No court shall have the authority to issue a stay of execution in any case except as allowed under this subchapter.” 42 Pa.C.S.A. § 9545(c)(1).

²² § 9545(c)(2).

POST-CONVICTION RELIEF (COLLATERAL APPEALS)

The sole means to seek this type of relief is via the Post-Conviction Relief Act.²³ This vein of relief is state oriented and jurisdiction begins anew in the Court of Common Pleas.²⁴ The common pleas decision can be appealed as a matter of right to the Superior Court, and also as a discretionary review to the Supreme Court of Pennsylvania.

The defendant must also file for relief within one (1) year of the direct appeal process conclusion.²⁵ There are certain exceptions to the filing period deadline if the defendant alleges and proves the failure to raise the claim was “the result of interference by government officials” who presents their claim in violation of the State or Federal Constitutions.²⁶ Additionally the filing period will be waived if the facts of the case were not disclosed to the defendant and the facts were not ascertainable with due diligence.²⁷ Finally the filing period time limit will be waived if the defendant’s claim for post-conviction relief is based on a constitutional right that is developed to apply retroactively by either the Pennsylvania or United States Supreme Courts.²⁸

In order to be eligible for relief under this Act, the defendant must plead and prove the following by a preponderance of the evidence. First the defendant must show he was convicted of a crime and is currently serving his sentence.²⁹ This is typically an easy issue to plead in capital cases. If appealing a sentence while on death row, the defendant clearly has standing under this provision.

²³ 42 Pa.C.S.A. § 9542.

²⁴ 42 Pa.C.S.A. § 9545(a).

²⁵ § 9545(b)(1)-(3).

²⁶ § 9545(b)(1)(i).

²⁷ § 9545(b)(1)(ii).

²⁸ § 9545(b)(1)(iii).

²⁹ 42 Pa.C.S.A. § 9543(a)(1).

Second, the defendant must prove the conviction resulted due to at least one of the following: (a) a violation of the State or Federal Constitution; (b) ineffective assistance of counsel; (c) an unlawfully induced guilty plea; (d) improper obstruction by a government official; (e) unavailability of exculpatory evidence at the time of trial; (f) a sentence imposed in excess of the legal maximum; OR (g) the tribunal lacked jurisdiction.³⁰ This final provision is truly the meat of the post-conviction relief pleading.

Finally, the defendant must show the issue brought was not previously litigated or waived.³¹ The courts consider an issue previously litigated if “the highest court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.”³² An issue is waived “if the petitioner could have raised it but failed to do so before trial, at trial...on appeal or in a prior state post conviction proceeding.”³³

The legislature seems determined to ensure the state provides for adequate review in capital punishment cases. Hence this added level of review without any Constitutional requirement for the process. However, it does not wish to place a burden upon the courts by which they must hear the same issues twice. This seems to be a logical reason for excluding, from this level of review, all claims previously litigated or waived. In the event that a claim was neither previously litigated nor waived, the defendant must show the decision not to litigate the issue was not the result of “any rational, strategic or tactical decision by counsel.”³⁴

³⁰ § 9543(b).

³¹ § 9543(c).

³² 42 Pa.C.S.A. § 9544(a).

³³ § 9544(b).

³⁴ 42 Pa.C.S.A. § 9543(d).

This does not mean that a defendant will not be able to appeal issues previously litigated during the direct appeals process. This post-conviction relief process simply requires an added level of removal if a defendant wishes to appeal the previously litigated issue. For example, if the defendant already brought a claim for a violation of his Fourth Amendment right against an illegal state search of his home. The courts will consider the state action on direct appeal. However, the court may reconsider this issue during the post-conviction relief process if the defendant simply claims the reason the direct appeal failed was due to ineffective assistance of counsel.

Another important note regarding the post-conviction relief process is that it provides not only a second level of state review, but also a vehicle for mistake corrections years after the trial. The provision for appeal based on “unavailability of exculpatory evidence at the time of trial” provides an example of the latter purpose.³⁵ For example if evidence comes to light years after the trial, previously unknown to the defendant despite due diligence, the defendant may file for relief under this process. If that evidence is DNA evidence, the defendant must also assert his innocence in order to file a motion to test the DNA.³⁶

The Post-Conviction process is not one that concludes as conveniently as the Direct Appeal process. The Direct Appeal process ends when either the United States Supreme Court accepts and decides the case, denies *certiorari* or the defendant fails to file *certiorari*. On the contrary, the Post-Conviction process never truly ends. In the linear sense, this process ends when the either the defendant decides not to appeal any further through the

³⁵ § 9543(b).

³⁶ § 9543.1(c)(b)(2)(i).

ascending court system, or the Pennsylvania Supreme Court denies *allocutor* or relief. However, the process never truly ends due to the one (1) year filing deadline exceptions.

FEDERAL APPEALS

Following the Post-Conviction vein of relief, the defendant may pursue relief in the Federal Courts under a writ of habeas corpus. However, the focus of this paper is on reformation of the appellate process specifically in the Pennsylvania State system. Therefore, I mention the Federal forms of relief *in passim* with an invitation to those interested to further research the Federal statutes and appellate procedures for this form of relief.

UNITARY REVIEW ACT or "CURA"

In 1995 the Pennsylvania legislature created the Capital Unitary Review Act (hereinafter "CURA"). In essence CURA streamlined the state appellate proceedings in capital punishment cases. According to the Zook court, the "driving force behind the enactment of CURA was undoubtedly the inordinate delay that...existed...between the imposition of the sentence of death by the jury and the carrying out of the death penalty."³⁷

CURA begins by approaching the Direct and Post-Conviction appellate processes in a unique fashion. Instead of allowing the defendant to pursue each process in a continuous linear pattern (i.e. direct appeal and, upon completion, post-conviction relief), CURA provides for simultaneous appeals.³⁸ The Act strictly limited the scope of appeal for each of

³⁷ Zook, 615 A.2d at 9.

³⁸ 42 Pa.C.S.A. § 9571(c) (suspended 1997).

these processes. Direct appeal is limited to “those claims that were preserved at trial and that may be resolved on the basis of the record created up to and including sentencing.”³⁹ Post-Conviction relief issues are limited to “claims that were preserved in the collateral proceeding in the trial court and to any other claim that could not have been raised previously, including claims of ineffective assistance of counsel on direct appeal.”⁴⁰

At the conclusion of these simultaneous levels of review, the State appellate process concluded for the defendant.⁴¹ There were exceptions available to the bar on further appeals in the limited instances of (a) the defendant failed to bring a claim due to interference by government officials; (b) the facts forming the basis of the new appeal were neither known to the defendant nor discoverable with due diligence; OR (c) the new appeal would assert a newly recognized right intended for retroactive application by the United States or Pennsylvania Supreme Courts.⁴² In order to assert any of these exceptions the defendant would have to invoke his privilege to bring the appeal within sixty (60) days “of the date the claim could have been presented.”⁴³

The limitation on both exceptions to the continuing appellate process and the time in which a defendant can file for an exception indicate a sense of legislative desire for expedience. It is clear the legislature intended CURA to speed up the process of capital punishment appeals. In its opinion suspending CURA application, the Pennsylvania Supreme Court stated it believed the delay in the capital sentence execution process was

³⁹ Id.

⁴⁰ Id.

⁴¹ § 9571(d).

⁴² 42 Pa.C.S.A. § 9578(a) (suspended 1997).

⁴³ § 9578 (d).

due to the judiciary but rather the executive.⁴⁴ The court proceeded to cite provisions passed subsequent to CURA that ordered the executive to sign death warrants within ninety (90) days of receipt.⁴⁵ Currently there are no time limitations associated with the amount of time an executive may consider a case prior to signing a death warrant or a court may continue a stay of execution.

REFORMING THE CURRENT PROCESS

In order to adequately assess reformation possibilities, there must be a focus on weaknesses in the current process. My outline for reforming the appellate process in Pennsylvania capital punishment cases begins with statistics from the Pennsylvania Department of Corrections.⁴⁶ Following observations regarding delays in the appellate process for capital sentences, I will outline suggestions for reform. These suggestions will focus on both the judiciary and the executive actions, and placing time limits on the length of delays each branch can impose on the processes.

The Department of Corrections provides a summary of each inmate on death row. This summary lists the sentencing date, date the warrant was signed, the scheduled date for execution and the stay of execution date.⁴⁷ The first date gap lies between the date when a defendant is sentenced to the date the Governor signs his death warrant. Typically there is at least a several year delay between these two dates. This delay is predominantly due to the direct appeals process. This includes the mandatory review by the Pennsylvania

⁴⁴ In re: Suspension of the Capital Unitary Review Act, 554 Pa. at 630.

⁴⁵ 42 Pa.C.S.A. § 9541(h) (repealed); see also, Id. at 630-31.

⁴⁶ Commonwealth of Pennsylvania Department of Corrections, *Execution Warrants Issued by Governor (1985 to Present)*, http://www.cor.state.pa.us/portal/lib/portal/Warrants_by_Governor.pdf (last visited Nov. 29, 2005).

⁴⁷Id.

Supreme Court and a potential discretionary review by the United States Supreme Court. The remainder of this time period is due to the case review and clemency considerations by the Governor himself. I am not aware of any available statistics outlining the average time a Governor considers a capital case prior to signing the death warrant. The delay can be as short as two (2) years and as long as fifteen (15). However, the delay seems to be less of a problem currently than it was under previous Governors. Currently a defendant can expect about a five (5) to six (6) year delay between their conviction and death warrant issuance. This is significantly shorter than the eight (8) to ten (10) years under the Casey and Thornburgh administrations.

There are no longer statutory provisions limiting the time frame for the executive to consider a case prior to signing the death warrant.⁴⁸ However, the lack of time constraints on the executive does not seem to be a major cause for delay in the current process. Therefore constraints on the executive to expedite its process of signing death warrants may not be a ripe issue. Certainly a more compelling case would be made if the executive delay were a major problem or concern.

As with any legislative constraint, there must be both the mandate or provision and then a method for enforcing it. Without an enforcement method, either by carrots or sticks, there is little or no hope of compliance. In the case of constraints on the executive branch, I would simply suggest a two (2) year time limit on the opportunity to review a capital punishment case for death warrant approval. Exceptions to the time limit would be

⁴⁸ The provision limiting the Executive to a 90-day window when considering whether to sign a death warrant was repealed by the Pennsylvania Legislature, along with provision (j)-(o) of 42 Pa.C.S.A. § 9541, on June 18, 1998 by P.L. 622, No. 80.

identical to other provisions in the sentencing procedure. These exceptions would include: (a) if the defendant alleges and proves the failure to raise the claim was the result of interference by government officials who present their claim in violation of the State or Federal Constitutions; (b) if the facts of the case were not disclosed to the defendant and the facts were not ascertainable with due diligence; OR (c) if the defendant's claim for post-conviction relief is based on a constitutional right that is developed to apply retroactively by either the Pennsylvania or United States Supreme Courts.

Absent one of these exceptions, either the county prosecutor that filed the case against the defendant or the state attorney general could file a motion with the Pennsylvania Supreme Court to compel action on the part of the Governor. This process to compel the executive is relatively weak, simply because there is no threat that the court can offer if the executive fails to comply with the court's order to act. Another potential way to compel the executive is through the use of legislative censures. Again, this is not the most effective measure to compel action. However, the legislature could provide for censure to a sitting governor who refuses to act on either signing death warrants or following the proper procedure to commute a sentence. In effect, the legislature would censure a governor who is unwilling to act. As stated before, mandated executive action is an unripe issue at this point. Executives are not the major source of delay in our current system.

The second relevant statistic revealed by the Department of Corrections website is the number of cases where a court holds a pending stay of execution.⁴⁹ According to the Pennsylvania Department of Corrections website, the state death row currently holds 224

⁴⁹ Id.

inmates.⁵⁰ In each case, a governor signed a death warrant and either a state or federal court issued a stay of execution.⁵¹ A court may issue a stay of execution when considering a “petition for post conviction relief which meets all the requirements of this subchapter has been filed and is pending and the petitioner makes a **strong showing of likelihood of success on the merits** [emphasis added].”⁵² It is unlikely if not impossible that each and every one of the 224 death row inmates met the stated burden of proof for the court to properly grant a stay of execution.

The fact that every inmate is granted an indefinite stay of execution suggests a tension in the separation of powers between the legislature and judiciary. It is fundamental constitutional law that the legislature creates laws and the judiciary interprets the laws. Obviously there are significant nuances to this principle, but it does provide a guiding doctrine. In the case of capital punishment, the legislature has clearly approved and authorized death sentences in certain cases. The purpose of the judiciary is then to interpret and apply the death sentence as outlined by the legislature. However, in the cases of each of the 224 current death row inmates, courts issue indefinite stays of execution blocking his sentence.

It is the indefinite time periods of these stays that most vividly violate the separation of powers doctrine. Clearly a court would be within its province if it actually ruled on a capital case. It could choose to either uphold the capital sentence, vacate the sentence and

⁵⁰ Commonwealth of Pennsylvania Department of Corrections, *Persons Sentenced to Execution in Pennsylvania as of November 1, 2005*, http://www.cor.state.pa.us/portal/lib/portal/Execution_List.pdf (last visited Nov. 29, 2005).

⁵¹ Commonwealth of Pennsylvania Department of Corrections, *Execution Warrants Issued by Governor (1985 to Present)*, http://www.cor.state.pa.us/portal/lib/portal/Warrants_by_Governor.pdf (last visited Nov. 29, 2005).

⁵² 42 Pa.C.S.A. § 9545 (c)(2).

remand it for further proceedings or, in the most extreme circumstance, rule capital punishment is in violation of the prohibition on cruel and unusual punishment. Any one of these options would end the stay of execution placed on each death row inmate's current sentence. The practice of an unlimited time frame for a judicial stay of execution allows the courts to hijack the legislative process instead of make a decision on a case.

In the case of capital sentence reviews, the judiciary seems to be the primary hindrance. In order to reform this process I would follow a similar structure as suggested for the executive. Again, I would simply suggest a two (2) year time limit on the opportunity to review a capital punishment case for each court. This would mean that each court would have two (2) years to consider the case; beginning on the day the case entered its docket and ending the day that particular court issued a decision. Exceptions to the time limit would be identical to those imposed on the executive.⁵³ Absent one of these exceptions, either the county prosecutor that filed the case against the defendant or the state attorney general could file a motion with the tardy court to compel action.

The court is not likely to welcome such a limit on its power with zeal. It is likely to resist the change for the same reasons it resisted CURA. The Pennsylvania Constitution "imposes an affirmative obligation on [the Pennsylvania Supreme] Court to suspend any statute which is inconsistent with pre-existing procedural rules promulgated by this

⁵³ The exceptions include: (a) if the defendant alleges and proves the failure to raise the claim was the result of interference by government officials who present their claim in violation of the State or Federal Constitutions; (b) if the facts of the case were not disclosed to the defendant and the facts were not ascertainable with due diligence; OR (c) if the defendant's claim for post-conviction relief is based on a constitutional right that is developed to apply retroactively by either the Pennsylvania or United States Supreme Courts.

Court.”⁵⁴ Clearly the Court would view a two (2) year limit as an infringement on its authority to procure procedural rules. However, the Court must consider how delays in the legislative process are little more than an attempt to usurp the legislative authority to create criminal statutes and punishments. Our three-branch system delicately rests on the principle that no one branch has absolute power and each branch respects the authority of the other. When any one branch attempts to usurp power from another, it risks unnecessary calamity among all branches. In this case the judiciary must respect the authority of the legislature to implement capital punishment. To use inaction as a form of disapproval is not an appropriate reaction and make reform necessary. Necessary not only for a smooth process in capital punishment appeals but to the greater balance of power among our three branches of government.

⁵⁴ In re: Suspension of the Capital Unitary Review Act, 554 Pa. at 626; quoting, Pa. Const. Art. V, Sec. 10.