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# Justice on the Cheap: The Philadelphia Story

Death Penalty Information Center

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## THE PHILADELPHIA STORY




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## The Philadelphia Story: An Introduction

"Them without the capital get the punishment" is a well-worn phrase among those who have studied the unequal application of the death penalty in America. Poor people facing society's ultimate penalty must rely on public funds to ensure they are competently represented, as the Constitution guarantees. Yet, in more and more jurisdictions, public services of all kinds are being slashed for lack of adequate funding. Philadelphia, Pennsylvania, is one such jurisdiction.

According to a recently-released survey by the National Association of Counties, fully forty percent of counties in the country with populations exceeding 100,000 face major budgetary shortfalls. All of them have been forced to trim away resources required for equal justice to prevail. At the top of the list is Philadelphia. Even a brief look at what is happening there reveals why, when resources are scarce, the constitutional protections that distinguish our system of government are first to be sacrificed.

- Philadelphia has no organized defense system to provide training or support to defend capital cases--neither a public defender system nor a capital resource center, leaving ill-trained, often ill-prepared, and inexperienced lawyers to handle the most demanding criminal cases of all;
- In a city on the verge of economic collapse such as Philadelphia, resources provided for attorneys to mount the most difficult of all criminal defenses are woefully inadequate;
- Only about 80 lawyers in a city with 8,000 lawyers both qualify and are willing to represent capitally charged defendants because to undertake such cases is to agree to work for little or nothing, and not to be paid for months or years;
- So little money is available for expert witnesses essential for the jury's understanding of the defendant they are judging and the circumstances of the crime--psychologists, psychiatrists, social history investigators--that many of the most qualified and respected in those professions refuse to provide their services under those conditions;
- The District Attorney's office seeks the death penalty in well over 50 percent of all homicides, a practice described by one Philadelphia lawyer as "the real cancer in the system," since it requires that defense counsel fully prepare to defend against a capital charge even when unwarranted by the facts;
- The use of peremptory challenges to prospective jurors by the DA, coupled with the bias some judges have exhibited on behalf of the state, has resulted not just in a disproportionate number of African-Americans sentenced to death, but an absolute majority of blacks over whites on death row.

The Philadelphia Story
An Introduction

There are more than 140 people under sentence of death in the Commonwealth of Pennsylvania. With less than 15 percent of the state's population, Philadelphia accounts for more than half of the state's condemned prisoners. Viewed from another perspective, the two counties with the state's largest cities, Philadelphia and Pittsburgh, send vastly different numbers of people to death row. While the population of Philadelphia County is just two percent larger than that of Allegheny County (Pittsburgh), the percentage of those sentenced to society's ultimate penalty is nearly eleven times (11) greater in the former than in the latter, though Philadelphia's murder rate is only about three times greater than Pittsburgh's.

Whatever one feels about the ultimate question of the moral, ethical or legal validity of capital punishment, all Americans must be concerned about basic fairness. "Equal Justice Under Law," the lofty principle inscribed in stone above the entrance to the United States Supreme Court, is but an empty slogan when the resources so fundamental to its attainment are unavailable. In Philadelphia, the birthplace of American liberty, as in so many other deteriorating American cities and towns, justice is becoming ever more just another commodity available only to the few who can afford it.

# JUSTICE ON THE CHEAP: THE PHILADELPHIA STORY

*"There's probably never been a wider gulf between the need for legal services and the provision of those services. There is a great deal to be concerned about, or even ashamed of."*

Supreme Court Justice Sandra Day O'Connor
American Bar Assoc. Annual Convention
Atlanta, GA, August 12, 1991

Hailed as the cradle of American democracy, Philadelphia, the City of Brotherly Love, has much "to be concerned about, or even ashamed of." This is strikingly evident in the disparity between what is provided versus what is needed to represent adequately those facing the death penalty.

On August 28, 1991, the National Association of Counties released the results of a survey of the 443 counties in the country with populations of 100,000 or more. It found that 40 percent faced serious budget shortfalls averaging $8.3 million. Philadelphia County, Pennsylvania, was at the top of the list.[1]

This city, like so many others, is failing to meet its financial obligations on many fronts. When one of these fronts is in the realm of legal services to indigent defendants charged with capital crimes, the consequences are literally a matter of life or death.

In economically-strapped Philadelphia, indigent defendants facing the death penalty are represented by neither the Philadelphia Defender Association (Public Defender) nor any other organized group of lawyers trained in the difficult and highly specialized area of capital defense.

"As a result," says Philadelphia Public Defender, Stuart Schuman, "representation in these life and death cases is usually undertaken by overworked, underpaid court-appointed lawyers."

Court-appointed lawyers are forced to wait up to two years between the time of appointment and the collection of their fees. They cannot even request payment until after the sentence has been affirmed by the court, a process which usually takes about fourteen months. After filing for fees ($40 an hour for out-of-court time and $50 for in-court),[2] not only do they have to wait up

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1 "Budget shortfalls hit nation's largest counties," National Association of Counties, August 28, 1991

2 In 1988, Congress passed the Anti-Drug Abuse Act permitting the death penalty for murder committed by "drug kingpins." Following its passage, the United States Judicial Conference issued guidelines calling for compensation to defense counsel of $75-$125 an hour.

to another year to be paid, their billable time is often cut. As one respected defense attorney describes it, "We extend credit to the city for two years, so it's no wonder that most lawyers just process cases."

At the official urging of the Philadelphia Bar Association, standards for appointment for those attorneys were established just three years ago.[3] While these new standards have undoubtedly improved the quality of representation (though, as we will see, they still fall far short of adequate), they have come too late for the vast majority of those already sentenced to death--more than half from Philadelphia County which accounts for only 14 percent of the state's population. (See Figures 1a and 1b.)

Norris Gelman, long recognized as one of the most effective capital defense lawyers in Philadelphia, says, "These standards are long overdue, but they come a little bit late for people that have already been poorly represented."

Tragically, such cases are not hard to find. In 1984, the Supreme Court of Pennsylvania upheld the death sentence of Richard Stoyko despite finding that "neither (appointed) trial counsel nor additional appointed counsel formally raised <u>any</u> issues regarding the penalty phase of the proceedings." (emphasis added.)

It is during the penalty phase--following the jury's determination of guilt--that the jury hears evidence designed to guide it toward the appropriate penalty as between life in prison or death. Without any guidance at all, no jury can be expected to weigh this onerous choice fairly, and it is a travesty of justice to ask this of a jury. Yet Stoyko's jury was asked to make precisely this determination.

**"The court-appointed counsel admitted he had not read the United States Supreme Court's cases on capital punishment in preparation for this case and had never tried a homicide."**

As Associate Pennsylvania Supreme Court Justice Hutchinson noted in dissent, "The court-appointed counsel admitted... he had not read the United States Supreme Court's cases on capital punishment in preparation for this case and had never tried a homicide. This coupled with the lack of <u>any</u> argument by <u>anyone</u> regarding the penalty phase, convinces me we have here...

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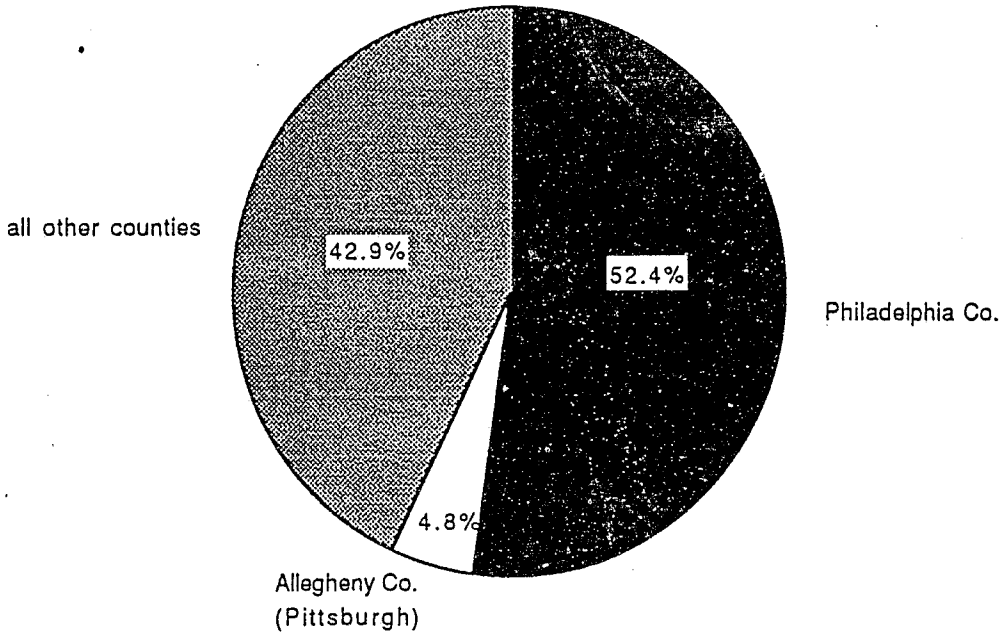
[3] Rule 406, "Standards for Appointment of Counsel," Philadelphia Bar Association, effective January 1, 1989.

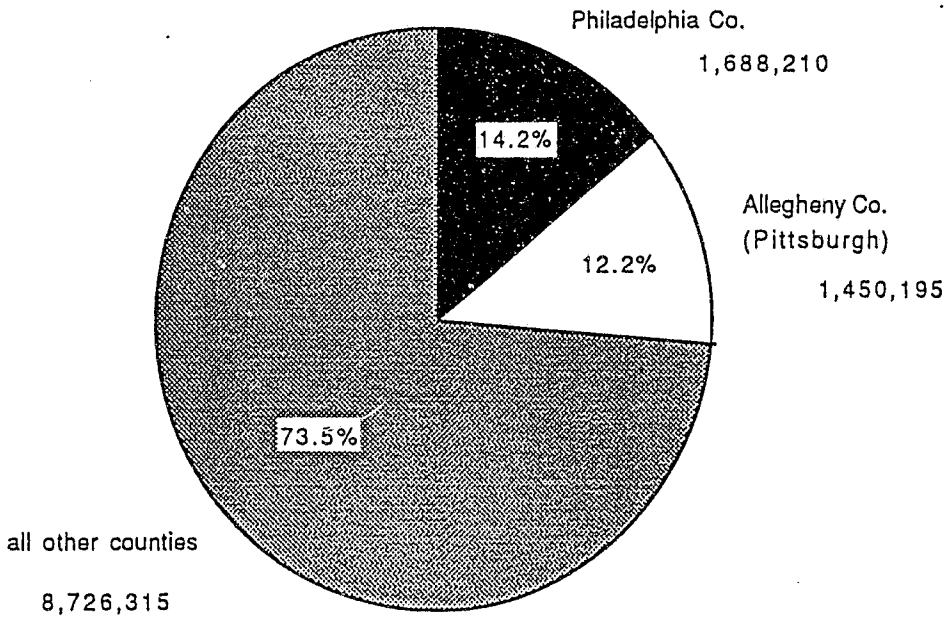
*Pennsylvania Death Row Population By County*




*as of August 15, 1991*

Fig. 1a

*Population of Pennsylvania (11,864,720)*




*1990 Census*

Fig. 1b

the absence of even minimally competent advocacy... Ineffective assistance of counsel at the penalty phase of a capital case may be quite literally a matter of life and death." (emphasis in the original.)[4]

When compensation is both insufficient and belated, experienced death penalty lawyers, knowing the amount of time necessary to prepare and present a decent defense, are extremely reluctant to take new capital cases.

"A system being held together on the backs of counsel having to beg and borrow is guaranteed to provide second-rate representation," says experienced Philadelphia trial lawyer, Samuel C. Stretton. "The best lawyers don't do them any more."

While it may be hard to summon sympathy for overworked and underpaid attorneys, the real victims of such a system are the very rights and protections we take for granted as distinguishing our form of government. Ironically, when these protections are sacrificed in the interest of cost and expediency, much larger expenditures of resources are implicated down the line.

In testimony on behalf of the American Bar Association, Columbia University Associate Professor of law, James S. Liebman, reported to Congress on the findings of the ABA Task Force on Death Penalty Habeas Corpus:

"Poor compensation almost inevitably means that only inexperienced and ill-prepared lawyers will be available to handle capital cases, and that lawyers will not develop expertise because they will be financially unable to handle more than one capital case. Not surprisingly, therefore, the inexperienced and inexpert counsel who handle many of the cases frequently conduct inadequate factual investigations, are unable to keep abreast of the complex and constantly changing legal doctrines that apply in capital litigation, and mistakenly fail to make timely objections to improper procedures."[5]

**"A system being held together on the backs of counsel having to beg and borrow is guaranteed to provide second-rate representation."**

Habeas corpus is the time-honored right of the imprisoned to ensure their convictions were not tainted by unconstitutional violations by the state.

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[4] Commonwealth of PA v. Stoyko, 475 A2d 714 (1984)

[5] Testimony of Professor James Liebman, for the American Bar Association, before U.S. House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice. May 24, 1990.

As Professor Liebman explained to Congress the findings of the ABA Death Penalty Task Force on Habeas Corpus, "...the high level of constitutional error implanted in capital trials and appeals by uncompensated, inexpert and ill-prepared counsel has required the federal courts to overturn and order retrials of more than 40 percent of the post-1976 death sentences that they have reviewed... Moreover, the expensive and time-consuming proceedings necessary to uncover that astonishing number of constitutional violations and to retry and review all those cases is without doubt the single largest cause of delay in capital litigation.[6]

Few lawyers can afford to take these court-appointed cases, which, in addition to being a great financial burden, are always emotionally draining. With over 500 homicide cases a year in Philadelphia, the number of lawyers handling them is already woefully inadequate. There are only about eighty qualified homicide attorneys willing to be appointed to capital cases. As Judge William Manfredi, the Homicide Calendar judge who determines the initial allocation of resources in death penalty trials says, "Eighty competent attorneys out of 8,000 attorneys is outrageous."

While Judge Manfredi believes the large law firms should and could significantly increase the number of qualified attorneys willing to take such cases, they are very unlikely to do so. Instead, the number will shrink even more as already overburdened lawyers remove themselves from the list, choosing instead to make a living.

While the pool of qualified defense counsel grows smaller, the number of cases the district attorney prosecutes capitally grows larger, further stretching an already overburdened system. Indeed, many Philadelphia lawyers identify the DA's practice of overcharging in homicide cases--pursuing the death penalty where it is not warranted by the facts--as among the most pernicious aspects of Philadelphia's death penalty process. There are approximately 300 capital cases tried annually in Philadelphia, well over 50 percent of all homicides.

Once the DA alerts the court that it intends to seek the death penalty, the jury must be "death qualified." This means that any prospective juror opposed to the death penalty as a matter of principle is automatically barred from serving. Once these exclusions take place, the jury that is seated is characterized by criminologists as "death prone"--far more likely to convict than a jury which includes a fair cross-section of death penalty opponents.

"The indiscriminate move by prosecutors to select death qualified jurors is the real cancer in the system," says veteran defense attorney Daniel Greene.

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[6] Id.

Judge David Savitt, one of 15 Common Pleas judges in Philadelphia presiding in death penalty trials, is also concerned. "The tendency has been for the DA to death qualify the jury even when they have no intention to seek the death penalty;" he says, "because they know that a death-qualified jury is a guilt-prone jury."

## Experts and Investigators

In death penalty trials, juries are required to make the most important decision any citizen can be called on to make about a criminal defendant: first, is he or she guilty of the charge of murder, and second, what is the appropriate penalty, as between life in prison or death by the state. To make these critical judgments, juries have a right to know not only the detailed circumstances of the crime, but as much about the defendant as possible. Is he or she mentally competent? Was he motivated by greed or self-interest, or did he act under the control of drugs or alcohol or psychosis? Is he mentally retarded or dominated by another? Are the circumstances that led to the crime likely to recur? Was the defendant responding to an abusive situation, or shaped by a lifetime of abuse? Is he remorseful?

Juries are composed of ordinary citizens with no special training or expertise in making these determinations. To do so fairly, they must rely on trained investigators and qualified medical, psychiatric and forensic experts. The U.S. Supreme Court held in Ake v. Oklahoma[7] that an indigent defendant is entitled to all expert services reasonably necessary for an effective defense. What this really means is that juries have a right to all the information they need to make informed life--or-death judgments about the defendants before them.

But, given Philadelphia's financial constraints, the prescription of Ake is very difficult to fill. Judge Manfredi, the presiding calendar judge of the Court of Common Pleas describes the judges' job as balancing "the competing interests of quality representation with the economic situation of Philadelphia."

For the families of poor, capitally-charged defendants--and the death penalty seems reserved exclusively for the poor--this "balancing act" leaves them watching helplessly as their loved ones face the possibility of execution without the assistance of the kind of experts we would all demand for ourselves or our loved ones in similar circumstances.

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7 470 U.S. 68 (1985)

Anthony Reid was such a defendant. Abandoned by his parents before his first birthday and raised in poverty with seven foster brothers and sisters, Mr. Reid was charged with homicide committed at the age of 20. Unable to afford counsel, the court appointed Samuel Stretton.

At the beginning of his trial, attorney Stretton asked that his client be examined by a psychologist who might uncover facets of Reid's life that could help the jury get a more complete picture of who he is. Presiding Judge Albert Sabo denied the motion on the grounds that it was an unwarranted expense--at least until Mr. Reid was convicted and the jury was faced with determining his appropriate sentence.

**"People with a lot of money are always going to get better services. But we are not in the business of correcting every social problem."**

On January 9, 1991, Mr. Reid was convicted. The next day, the penalty phase began, and Mr. Stretton renewed his request for a psychological evaluation and testimony.

"Your client told me... that he has no problems at all so what are we going to look for?" Judge Sabo asked the startled defense attorney.

Dr. Gerald Cook, an experienced forensic psychologist, was in the courtroom at Mr. Stretton's request, ready and willing to conduct the examination of Mr. Reid.

"I want the jury to understand his personality... his intellect... I am looking for mitigating circumstances..."

"Why don't you dig for gold while you're at it," the presiding judge interrupted.

Before ruling on Stretton's request for the expert witness, Judge Sabo turned to the prosecuting attorney and asked his opinion. Like the judge, he, too, relied on the "expertise" of the 22-year-old Reid, himself, who swore "under oath that he has no psychological problems."

Stretton protested. "I have retained a psychologist."

"Take care of it out of your fee," the judge replied, sarcastically. "There is no basis for me to expend public funds needlessly."

"I am court-appointed," the defense attorney protested one last time. "There is a good chance we will never be paid..."

"A good chance he would never be paid, either," Judge Sabo said, dismissing the request.

Thus, in the crucial penalty phase, during which the defendant is allowed to provide any information for the jury to consider in mitigation of the crime,

the jury heard only the predictable pleas for mercy of Mr. Reid's foster sisters, begging for his life.

"I am just asking for his life, just don't take his life," Lydia Banks begged. "He's only 22. He can change. He's suffering. Our family are all suffering... I'm just asking for you not to take his physical life!"

Lydia Banks ran out of the courtroom, weeping. Another sister, also hysterical, was ordered removed.

Without the benefit or guidance of a professional evaluation, with no expert psychological testimony to assess, the jury sentenced Mr. Reid to die by lethal injection.[8]

The problem is made worse by its unpredictability. "I always grant money for experts," says homicide judge, David Savitt. But he admits that other judges routinely deny such requests. Because there is no institutional system governing either the request or the response, both the quality of defense and the outcome are widely divergent.

Some experts simply no longer provide their services to the defense. One psychiatrist who requested anonymity, and who, in the past, has testified equally for both the prosecution and the defense, now generally declines requests by defense attorneys to evaluate their clients. "Court-appointed lawyers are handcuffed," he says.

Dr. Robert Sadoff, will no longer serve as an expert for the defense in court-appointed cases in Philadelphia--though he continues to testify in New Jersey, Ohio, Alabama and Mississippi--because he cannot rely on promises of payment down the road. "I'm standing on the sidelines until a reliable and fair fee schedule, paid on time, is a regular part of the system," he says.

Former President Jimmy Carter once observed that "life isn't fair." In the case of the death penalty, however, that unfairness can result in the execution of some for their inability to buy the expert assistance many of us take for granted. "People with a lot of money are always going to get better services," says Judge Savitt. "But we aren't in the business of correcting every social problem."

The question is: Are we in the business of providing equal justice under law?

## A Tale of Two Cities

As mentioned before, in 1989 the Philadelphia court established new standards to qualify lawyers to defend those charged with homicide. Under

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[8] Commonwealth v. Anthony Reid, In the Court of Common Please, First Judicial District of Pennsylvania, Criminal Trial Division. January 10, 1991, Penalty Phase and Verdict, Volume VIII,

these standards, for example, for the first time, lawyers representing defendants facing the death penalty must have participated in at least one previous homicide trial. Another new qualification requires that homicide lawyers have participated in at least one death penalty training program within the past two years.

The standards, though welcome innovations, are themselves seriously limited. In the words of one Philadelphia lawyer who participated in the development of the new standards, "They quantify. They do not qualify. They ask how many cases you've handled, not how well you handled them."

The Philadelphia District Attorney's Office which zealously prosecutes death penalty cases insists on far more onerous standards for its team of prosecutors than any imposed on defense attorneys. Every new recruit in the DA's office, for example, gets a three-week training course in general criminal law and Philadelphia procedures. Beyond that, according to just-appointed Chief of Homicide, Assistant District Attorney David Webb, to qualify for the homicide unit, an assistant DA must have at least five years as a prosecutor, with 25-30 major felony prosecutions.

Only after they have worked within the homicide unit for a year are they assigned their first capital case, and then as assisting counsel, or second chair, not as lead prosecutor. The goal is to recruit and train the best team of homicide prosecutors they can get.

To seasoned capital defense attorney Norris Gelman, the difference is stark. "Their search for excellence is applauded," he notes. "Our search for bare competence is swept under the rug."

The contrast between Philadelphia and Pittsburgh is also stark. Philadelphia County accounts for about 14 percent of the state's population, but more than 50 percent of death row. Allegheny County (Pittsburgh) accounts for about 12 percent of the state's population, but less than 5 percent of death row. (See Fig. 1a and 1b.)

The difference can be attributed, at least in part, to a homicide defense team organized within the Pittsburgh Public Defender's office that has established ongoing litigation training and support.

In hearings before the Judiciary Committee of the Commonwealth of Pennsylvania, Lester G. Nauhaus, Director of the Public Defender's Office of Allegheny County, testified: "Two lawyers always work on every capital case... I am astounded that lawyers try capital cases in major metropolitan areas with only one attorney.[9]

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[9] Philadelphia's new standards for appointment of counsel permit the court to name a second counsel to assist, consistent with the ABA standards that require the appointment of two attorneys in all capital cases. However, because of the scarcity of qualified attorneys willing to take these cases, and the budgetary squeeze, the standard has little practical application.

In an attempt to address this glaring disparity in quality of representation, the Philadelphia Bar Association passed a resolution in March, 1991, permitting the city's Defender Association for the first time to represent up to 20 percent of indigent homicide defendants. However, funds have not been allocated for this purpose, no cases have yet been assigned them, and none is anticipated for months or even years.[10]

## The Intractable Problem of Race

Not all areas of serious concern are related to the appalling lack of resources. Another serious problem unrelated to finances is one that plagues the application of the death penalty in far too many places: the destructive influence of race.

Many point to the record of Judge Sabo--the same judge who refused to allow a psychologist to examine black defendant Anthony Reid--as an example of that influence. Sitting as a homicide judge since 1974, he has sentenced more people to death than any judge in the state: 26 death sentences, accounting for 40 percent of all those sentenced to death from Philadelphia and more than 20 percent of all condemned prisoners in the Pennsylvania. A whopping 24 out of the 26--more than 92 percent--are black men. (See Fig. 2.)

A more recent example of blatant racism came to light in July, 1991, during a congressional hearing concerning the federal crime bill then being debated in the Congress.

In 1986, the Supreme Court held that systematic exclusion of blacks from juries violates the Constitution.[11] However, the Court refused to apply the principle retroactively. An amendment to the crime bill under consideration at the hearing, the Berman Amendment, would have rectified this by permitting pre-1986 prisoners one year in which to raise claims that blacks had been unconstitutionally excluded from their juries.

The Philadelphia DA's office dispatched Assistant district attorneys, Gaele Barthold and Elizabeth Chambers, to testify against the amendment. Committee Chairman Don Edwards asked, "Do you believe there is racism in the criminal justice system, especially in capital cases?" Assistant DA Barthold

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[10] Ironically, under the new standards requiring homicide trial experience to qualify, the Defender Association may find itself in a Catch-22 situation even if they get the funding necessary to undertake a limited number of capital trials. Since they have been prevented from handling homicide cases up to now, they do not possess the newly-required experience.

[11] Batson vs. Kentucky, 476 U.S. 79 (1986)

replied, "I don't believe that this is something we see in Pennsylvania."[12]

What both DAs had seen in Pennsylvania, however, was just such an unconstitutional, systematic exclusion of blacks by the head of the Philadelphia homicide unit, Assistant DA Barbara Christie.[13] Indeed, Elizabeth Chambers, sitting next to Ms. Barthold at the hearing, had recently--and unsuccessfully--defended the practice before a federal magistrate.

Described by a defense attorney as "a vicious guided missile" whose prosecution tactics have been characterized by one homicide judge as "outlandish" and "out of control," Ms. Christie had three-times prosecuted accused murderer Charles Diggs.[14] Three times she used her discretionary peremptory challenges systematically to exclude black jurors. In the second and third trials, she succeeded in seating all-white juries.

In March, 1991, Federal Magistrate Richard Powers, III, recommended to the U.S. District Court that it grant habeas corpus relief in the case because prosecutor Christie used all 15 of her discretionary strikes to seat an all-white jury, a practice prohibited by the Constitution.

"Given the inescapable fact that members of the black race accounted for approximately one-third of Philadelphia's total population at the time of petitioner's trial, it is incredible that the assistant DA could not find one satisfactory black juror capable of fairly sitting in judgment of the petitioner," the Magistrate wrote.

"Assistant DA (Christie)... kept a running tabulation of the number of blacks left on the jury after each challenge was exercised... a telling indication of (her) predisposed prejudice toward blacks on the jury... particularly when no white jurors were challenged for any reasons whatsoever... The Assistant District Attorney testified that she never used race as a factor to exclude a black from a jury... I find that... unworthy of belief."[15]

On March 27, 1991, the U.S. District Court Chief Judge, John P. Fullam, accepted the recommendation of his magistrate, and granted the writ for habeas corpus.

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[12] Hearings on the Berman Amendment before the House Judiciary Subcommittee on Civil and Constitutional Rights, July 11, 1991.

[13] After six years in this position, Ms. Christie was recently transferred to investigations.

[14] Because mistrials were declared in the first two prosecutions, Mr. Diggs went to trial three times. The third trial, which went to the jury, resulted in a life sentence.

[15] Report-Recommendation of U.S. Magistrate, Richard A. Powers, III, in the matter of Charles Diggs, March 8, 1991.

## Conclusion

When former U.S. Supreme Court Justice William Brennan said of the death penalty; "It smacks of little more than a lottery system," he might well have had Philadelphia in mind. There, the poverty of individual defendants is matched by the poverty of the city. This dual impoverishment starves the system of justice itself.

When you are poor in Philadelphia, and charged with a capital crime, two rolls of the dice go a long way in determining your fate. The first determines the lawyer who will represent you. The second determines the judge who will preside.

As unfair as this initial crap shoot may be, any pretense to equal justice of law is fatally undermined by the lack of available resources and their uneven distribution. When justice is defined differently for the poor than for the rest of society, justice ceases to be a vaunted principle and becomes instead an empty slogan. In the realm of the death penalty, such inequality of application is intolerable to a just society. Like a house divided, justice divided cannot stand.