Testimony of Judge Carolyn Engel Temin

At the Senate Judiciary Committee Subcommittee on the Constitution Hearing entitled "The Adequacy of Representation in Capital Cases"

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Ineffective Assistance of Counsel in Death Penalty Cases:
The Problem and Some Suggested Solutions From a Trial Judge's Perspective

I have been a trial judge for over 24 years and from 1994 until 1999, I served as the Calendar Judge for all homicide cases filed in Philadelphia County. We usually average between 300-350 filings a year and of those approximately 100 are filed as capital cases. During my career I have presided over pre-trial, trial and post-trial hearings in literally hundreds of capital cases.

It is always upsetting for a judge to preside over a trial in which one of the attorneys doesn't know what he or she is doing. It is especially aggravating to preside over a capital case where this is true. Despite the fact that judges have awesome authority, during the actual trial of the case there is very little that a judge can do to affect the performance of counsel. And, until recently, it was almost impossible to attain redress for ineffective counsel at the appellate level. Courts were even willing to deny relief to defendants whose counsel had failed to prove obvious mitigating factors on the ground that it was "harmless error" due to overwhelming evidence of aggravators. In my view, there is no place for the "harmless error" doctrine in capital penalty phase jurisprudence. Experience teaches us that the jury is affected by everything they hear and no one can predict how a particular mitigator or aggravator will be weighed.

More recently, since the decision in the case of *Williams v. Taylor*, 529 U.S. 362 (2000) and the subsequent decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard, 345 U.S. 374* (2005), the Supreme Court has begun to establish minimum standards defining effective assistance of counsel. In these decisions, the Court has developed what some authors label "a checklist approach" which was advocated many years ago by Judge David Bazelon in his dissent in the case of *DeCoster III*, 624 F.2d 264-299. The experience in my jurisdiction has been that following these decisions, there have

been a great number of penalty phase reversals and grantings of new penalty phase hearings in cases tried prior to the year 2000. But the fact that defendants who have had ineffective counsel at trial can now get redressed on appeal is not really an effective solution to the problem of ineffective counsel. Among other things, this is a very expensive solution. In my jurisdiction defendants must first take a direct appeal to the Supreme Court of Pennsylvania in which they cannot raise the issue of ineffective assistance of counsel since our Supreme Court has ruled that issue must, with few exceptions, be raised in a collateral attack called a Post-Conviction Relief Act petition. It may be anywhere from two to four years before defendants are able to file such a petition since they first have to exhaust their direct appeal rights. The hearings on these petitions are extremely lengthy and expensive. At these hearings the post-conviction counsel normally present the court with all the evidence that they claim should have been presented at the initial penalty phase hearing. If a new penalty phase hearing is granted, and if that is affirmed by the Supreme Court, then a new penalty phase hearing must be held at which the same evidence will be presented but this time with the consequences of ending up with a sentencing verdict. The initial post-conviction hearing involves costs for investigators, psychiatrists, psychologists, sociologists, and the cost of transportation for witnesses from various parts of the country and correctional institutions. If the grant of a new penalty phase is affirmed, and it is usually is, then the cost of having these people testify again can be added to the total. In 99% of these cases the defendants have appointed counsel, since people who are under sentence of death rarely have funds to hire their own lawyer, so the counsel fees must also be added on to the costs of the hearings. In addition to the financial costs there are the problems of conducting a penalty phase hearing sometimes 10 or 20 years, maybe even 30 years after the initial trial. Very often records have disappeared or been destroyed, and necessary witnesses, both for the prosecution and the defense have died. Obviously, redress on appeal, although better than nothing, is an extremely laborious and expensive process. The best solution is to guarantee effective counsel from the beginning of the case. How do we do this?

In Philadelphia we are fortunate to have a Defender Association (a private non-profit organization that operates as a public defender) with a special unit of lawyers who try homicide cases. They are very experienced in the trial of capital cases and provide outstanding representation. In addition, they have their own investigators and stable of experts whom they can call upon as needed. Unfortunately, the Defender Association is only willing to accept 20% of Philadelphia's homicide cases. At the present time we have an unusually high number of 500 homicide cases awaiting trial in Philadelphia. This means that only 100 of these are represented by the Defender Association. The remaining 400 are represented by a combination of appointed counsel and privately retained counsel. For many years we have required counsel who wish to represent defendants in capital cases to be "certified". This means that they must undergo specialized training provided by the Philadelphia Bar Association and successfully complete the course. We also have a rule that requires the appointment of two defense counsel in every capital case, one of whom acts as the guilt phase counsel and the second of whom is the mitigation phase counsel. Counsel who wish to be mitigation counsel must undergo a different kind of certification process. Unfortunately, undergoing these certification courses does not necessarily produce what I consider to be effective counsel in all cases. There is more to being an effective trial lawyer than merely fulfilling a checklist of requirements or sitting through a required course. Many of the attributes of an effective trial counsel are subtle and require specialized training such as that provided by the National Institute for Trial Advocacy located in Louisville, Colorado.

I would like to suggest three measures that I think would go very far toward guaranteeing that every defendant in a capital case is provided with effective trained and experienced counsel. First, I would like to suggest that all persons accused of capital crimes be eligible for appointed counsel regardless of their financial condition. This would mean that we would remove the indigency requirements in capital cases and that any defendant who wanted an appointed lawyer would be entitled to one. This is, obviously, not presently constitutionally required. Nevertheless, it is something that the legislature could enact. It may

seem revolutionary, but actually it is being done in other parts of the world. I have worked as an international judge and currently work as a short-term consultant in the country of Bosnia and Herzegovina. This is a country which arose out of a communist regime and the legal system appurtenant thereto to go through an horrendous war and survive as a growing democracy. Its current Code of Criminal Procedure was enacted in 2003. Although the death penalty has been abolished under the constitution of Bosnia which incorporates the European Convention on Human Rights, nevertheless, anyone charged with an offense punishable by more than 10 years is entitled to have court-appointed counsel, of their own choice, regardless of their economic condition. Presently, in the United States, although everyone charged with a crime is entitled to counsel, a person must prove that they are indigent before receiving court-appointed counsel and of course, they do not get counsel of their own choice. I am not suggesting that we go as far as providing counsel, "of their own choice". In fact, I have suggested to the authorities running the system of justice in Bosnia that this goes far beyond what justice requires and creates a situation where lawyers are sometimes double-dipping by getting paid by clients and then also appointed by the Court. I am strongly suggesting, however, that everyone charged with a capital offense be entitled regardless of financial condition to court-appointed counsel.

Second, I suggest that the *ABA Standards for the Appointment and Performance of Defense Counsel in Death Cases (February 2003)* be enacted into law as the minimum requirements for counsel in capital cases.

Third, I suggest that funds be provided to establish capital public defender offices in those states which do not have them or to provide additional funds to existing public defender systems which have already proven their excellence such as the one in the State of Colorado and the one in Philadelphia, just to name a few. It has already been demonstrated that these specialized units of existing defender offices or specialized capital defender offices provide both the training, experience and the necessary adjunct staff of

experts to ensure that defendants are given more than the constitutionally mandated requirements for effective counsel.

I hope that these suggestions are helpful to the Committee and I will be glad to answer any questions that you may have concerning my comments.

Judge Carolyn Engel Temin

Judge Temin is a graduate of the University of Pennsylvania (BFA 1955) and University of Pennsylvania Law School (JD 1958). She began her career as the first woman to be hired on the staff of the Defender Association of Philadelphia and later served as Chief Counsel to the Pennsylvania Board of Probation and Parole, and as an Assistant District Attorney. She was elected to the bench of the Court of Common Pleas of Philadelphia County (the court of general jurisdiction) in 1983 , retained for a second ten year term in 1993 and a third term in 2003. She has served in both the civil and criminal divisions of the court and from 1994 to 1999 she served as Chief Criminal Calendar Judge. In 1992 Judge Temin became the first woman to be elected President of the Pennsylvania Conference of State Trial Judges. She is the principal author of the *Pennsylvania Benchbook for Criminal Proceedings*. This book, which is presently in its third edition, is published by Lexis-Nexis and updated three times a year. It is distributed to all trial judges in Pennsylvania and is the official Criminal Benchbook of the Pennsylvania Conference of State Trial Judges. Judge Temin is active in many professional and community organizations, including the, National Council on Crime and Delinquency, Supreme Court of Pennsylvania Committee on Racial and Gender Bias in the Justice System, the Jewish Publication Society , the Philadelphia Arts and Education Partnership, and the American Law Institute. She served as Chair of the National Conference of State Trial Judges of the American Bar Association's Judicial Division from 2002-2003, and as President of the National Association of Women Judges from 2003-2004.

Judge Temin has served on the faculty of the National Judicial College and has frequently served as a panelist for continuing legal education programs, judicial training sessions, and as a featured speaker at various national symposia and conferences.

Her numerous awards include the President's Distinguished Service Award from the Pennsylvania Conference of State Trial Judges, the Thurgood Marshall Award from the Criminal Justice Section of the Philadelphia Bar Association, an award from the Joseph J. Peters Institute for fifteen years service as President of the Board, The Lifeguard on Duty Award for Justice and Equality from Blacks Networking for Progress, Inc., the Anne X. Alpern Award from the Pennsylvania Bar Association Commission on Women in the Profession, the Hon. Sylvia H. Rambo Award from The Dickinson School of Law, the Cesare Beccarria award from the Justinian Society and the Criminal Justice Section of the Philadelphia Bar Association and the 2007 Honoree of the Year Award from the National Association of Women Judges.

From September 2004-November 2005 Judge Temin served as an International Judge on the I Court of Bosnia and Herzegovina. Since March 2006 she has served as a Senior Judge on the Court of Common Pleas in Philadelphia assigned to the Homicide Division. She also serves as a short-term consultant for the Justice Sector Development Project , a USAID supported project in Bosnia and Herzegovina, training judges in civil and criminal case management and assisting judges in that country to prepare Civil and Criminal Benchbooks.