APPENDIX C:
PENNSYLVANIA'S PUBLIC DEFENSE CRISIS

Appendix C describes how Pennsylvania's indigent defense services system has created a crisis in representation.

Until 2023, Pennsylvania remained one of only two states nationwide that provided no funding for public defense, leaving it to individual counties to fulfill the constitutional demand.[1] To cope with this deficit, judicial districts throughout the Commonwealth adopted some of the lowest fee caps for court-appointed defense counsel in the country. For example, in Philadelphia in the 1990s, appointed capital trial counsel were entitled to be paid a maximum of $2,000 for proceeding to trial and $400 for every court day lasting more than three hours.[2] Adjusted for cost of living, this is less than capital counsel would have earned in Mississippi, Arkansas, Tennessee, Montana, or South Carolina and was assailed as "outrageous even by Southern standards" by the former president of the Southern Center for Human Rights.[3]

Despite these caps, Philadelphia has always disproportionately relied on court-appointed defense counsel in homicide cases. Prior to April 1993, all indigent people charged with a homicide in Philadelphia were appointed a lawyer from the private bar, who was subject to a fee cap.[4] When the Defender Association of Philadelphia—which has long represented almost all indigent defendants charged with non-homicide offenses in Philadelphia—first proposed representing some homicide defendants in the 1980s, the Philadelphia Bar Association opposed the measure.[5] In April 1993, however, the Defender Association started taking 20% of homicide cases, still leaving most indigent homicide defendants with underpaid, court-appointed defense counsel.[6]

Court-appointed counsel are demonstrably less effective than the Defender Association. Compared to court-appointed counsel between 1994 and 2005, Philadelphia public defenders

[1] Funding for public defense in Pennsylvania remains inadequate. The 2023-24 state budget made just $6.75 million available to support public defense across all 67 counties in the Commonwealth. *See* Danielle Ohl, *State advisory committee releases plan for historic public defense money*, SPOTLIGHT PA (Apr. 29, 2024), https://www.spotlightpa.org/news/2024/04/state-advisory-committee-releases-plan-for-historic-public-defense-money/. In Philadelphia, Pennsylvania's largest county, this new appropriation made $141,720 available to support public defense, and every other county was eligible for less state funds. *See id.* This level of state funding blinks the reality of public defense funding needs.

[2] *See* James Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 162–63 (2012).

[3] *See id.* at 163 & 164 n.28.

[4] *See id.* at 160–61.

[5] *See id.* at 161.

[6] *See id.*

reduced the murder conviction rate by 19%, reduced the probability of life sentences by 62%, and reduced overall expected prison-time by 24%.[7] Yet Philadelphia continues to provide 80% of indigent individuals charged with homicide with undercompensated lawyers who achieve worse outcomes for their clients.

This over-reliance on court-appointed counsel permeates every step of homicide adjudications in Pennsylvania, including pre-trial, trial, appeal, and post-conviction. In Philadelphia today, the maximum fee awardable to an appointed defense lawyer in either a homicide appeal or a homicide Post-Conviction Review Act (PCRA) proceeding is $6,000 total at an hourly rate of $85.[8] This level of funding implies that a homicide defense attorney should spend no more than 70 hours and 35 minutes: reading the record; identifying, investigating, and researching legal claims; drafting and revising the petition; researching and drafting reply and supplemental briefing; and preparing for and appearing at all court hearings and arguments.[9] And post-conviction lawyers have "the additional burden of raising any extra-record claims that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during trial and at sentencing." *See Commonwealth v. Grant*, 813 A.2d 726, 737 (Pa. 2002). These tasks have long been recognized to consume far more than 70.5 hours, especially in capital cases. *See* Richard Wilson & Robert Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336 (1989) (listing median attorney hours expended to litigate capital post-conviction cases in state trial court in Virginia, North Carolina, and Florida: 450 hours, 482 hours, and 500 hours, respectively).

Court-appointed attorneys operating under low fee caps are conflicted in a way that incentivizes deficient lawyering. To put their dramatic undercompensation in context, if an appointed defense lawyer in Philadelphia expended the national average of 400 hours[10] to litigate a capital post-conviction case in the state trial court, then over 329 hours (82.4%) of her time would be uncompensated—an expenditure of time worth about $28,000 under the current fee schedule.

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[7] *Id.* at 159.
[8] Order No. 01 of 2017 ¶ 2(b), *In Re*: First Judicial District of Pennsylvania Court-Appointed Counsel, Investigative and Expert Witness Fee Schedule, First Judicial District of Pennsylvania Administrative Governing Board (June 26, 2017), https://www.courts.phila.gov/pdf/regs/2017/AGB-01-of-2017-4.pdf.
[9] For non-homicide felony cases, the amount of compensable time is nearly halved. The maximum fee awardable to appointed PCRA counsel in a non-homicide felony is $2,400 total at an hourly rate of $65. *Id.* at ¶2(a). This implies that counsel should spend no more than 36 hours and 56 minutes on all aspects of the post-conviction case.
[10] *See id.*

On the one hand, without getting compensated for most of her work, counsel could spend the many hours over 70.5 that are necessary to adequately litigate her client's post-conviction petition. On the other, she could heed her financial self-interest (or self-preservation), reduce her level of representation far below the national average, and work on matters that will bring in money to keep her practice financially afloat. Fee caps create this conflict between competent representation and an attorney's self-interest.

Fee caps also create other perverse incentives. Most straightforwardly, paying lawyers too little for cases incentivizes them to take more cases than they can competently handle, leading to overwhelmed lawyers missing filing deadlines, defaulting claims, foregoing investigations, and abandoning clients. These attorney errors both severely prejudice clients' rights and create massive inefficiencies. For example, private post-conviction counsel are regularly appointed solely to litigate the reinstatement of direct appeal rights because appointed direct appeal counsel failed to file a brief. *See Commonwealth v. Jones*, 960 A.2d 481, 486–87 (Pa. Super. Ct. 2008); *Commonwealth v. Brown*, No. 1542 EDA 2020, 2021 WL 2472960, at *2 (Pa. Super. Ct. June 17, 2021).

Philadelphia exacerbates the issue of excessive attorney workloads by failing to cap the number of complex cases a lawyer can take. Because capital cases, for example, are extremely complex, the American Bar Association has long recognized that capital caseloads should be regulated by each jurisdiction to ensure quality representation.[11] In Philadelphia, however, instead of capping the number of capital cases a lawyer may take, the Administrative Governing Board simply raised the flat fee for capital trial counsel to $10,000 in 2012.[12] This relatively small flat fee for extremely high-stakes and complex litigation creates an intolerably high risk of attorney error. Paired with the lack of a cap on the number of capital cases a lawyer may take, it generates a chronically overstretched homicide defense bar.[13] The steeply discounted rate, which does not even cover basic expenses, also discourages experienced counsel from taking capital cases.

Furthermore, fee caps disincentivize both creative and thorough lawyering. When deciding what claims to present to the court, an attorney subject to a low fee cap is not incentivized to

[11] *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 965 (2003).
[12] *See* Anderson & Heaton, *supra* note 1, at 163 n.25.
[13] *See id.* at 164 ("Numerous interviewees noted that because there is no cap on the number of cases that counsel can accept, the relatively small pool of attorneys who are willing to take appointed cases take on many more cases than they can adequately prepare.").

develop an inventive claim that requires time to investigate, research, frame, revise, and defend at oral argument. Instead, attorneys are incentivized to woodenly plug their court-appointed clients' claims into static legal boxes that are familiar to the lawyer and the judge—a phenomenon evidenced by the frequent filing of substantially identical template briefs, which are regularly mislabeled with the wrong court-appointed client's name. In a common law system that grows in maturity and depth by relating new facts to law, this stagnation threatens the vitality of constitutional principles in a changing world. Criminal defense lawyers are at the forefront of determining how cherished constitutional rights will (or will not) be honored in the 21st century. Fee caps, however, incentivize defense lawyers to shirk this weighty task, and both the law and American liberties are the poorer for them.

Chronically deficient defense lawyering in capital cases has drawn harsh criticism from the Pennsylvania Supreme Court. Assailing the "dismal advocacy" of one defense lawyer, Justice McCaffery acknowledged "long-standing issues with capital representation in Pennsylvania and the great harm ineffective lawyering poses to capital defendants." *Commonwealth v. Anderson*, 323 A.3d 744, 762 (Pa. 2024) (McCaffery, J., concurring). Former Chief Justice Saylor also called out the "pattern of deficient representation that we have seen in capital litigation in Pennsylvania." *Commonwealth v. Cousar*, 154 A.3d 287, 314 (Pa. 2017) (Saylor, C.J., concurring and dissenting); *see also Commonwealth v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring) (doubting the "accuracy" of the presumption of effective capital defense representation); *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"). This pattern of deficient defense lawyering is the direct result of financially incentivizing deficient lawyering in homicide cases. In individual cases, this pattern reveals the presumption of attorney competence to be a hollow fiction. *See King*, 57 A.3d at 635 (Saylor, J., concurring) ("No presumption or platitude can sweep aside this attorney's intolerably poor performance or the damage it has caused."). System-wide, this pattern impugns the Commonwealth's ability to fairly administer the law. *See id.* ("[T]hese 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[.]"); *see also id.* at 635–38 (listing 25 cases in which Pennsylvania courts granted relief between 2002 and 2012

"based on deficient stewardship of capital defense attorneys").

Unconstitutional lawyering at trial is compounded in post-conviction. Indigent defendants have a federal constitutional right to an effective lawyer at the trial and appellate stages. But defendants in Pennsylvania cannot raise their counsel's ineffectiveness until the post-conviction stage, where they have but a statutory right to counsel. The Pennsylvania Supreme Court has procedurally assigned ineffective assistance of counsel claims to post-conviction review in recognition of the "Herculean task" of investigating extra-record claims. *See Grant*, 813 A.2d at 737. Yet, in Philadelphia, indigent post-conviction representation is handled entirely by appointed counsel, who operate under fee caps that make the task impossible.

Pennsylvania's layered system of reliance on court-appointed defense counsel operating under low fee caps at the trial, direct appeal, and post-conviction stages has created a crisis of representation in the Commonwealth.