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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 14 EM 2015

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS and
GOVERNOR TOM WOLF,

Respondents.

Brief of Respondent Terrance Williams

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NOTE REGARDING HISTORICAL SOURCES AND CITATIONS

This Brief cites extensive historical records, many of which were obtained from the Pennsylvania State Archives. These records are set forth in the attached Respondents' Appendix ("RA"). The RA includes copies of all cited records of Pennsylvania reprieves, copies of some newspaper articles, and excerpts from old treatises and texts.

The RA does not include debates and related materials from constitutional conventions, which are available online. Where a source is available online, an address link is provided in the Table of Authorities but is not repeated in the text of this Brief.

The appendix is cited as "RA" followed by the relevant page number(s). When an appended source of a reprieve is cited for the first time, a parenthetical will identify the specific text or archival record group ("RG"), as in "RA57 (Minutes of the Prov. Council, Vol. III at 45)" or "RA133-36 (Pa. St. Archives, RG-26)." Subsequent citations to the same text or record group will identify only the appendix page(s).

The brief of the District Attorney for Philadelphia is referred to as "DAB." The amicus brief submitted by the Pennsylvania District Attorneys Association ("PDAA") is cited as "PDAA Am. Br." The amicus brief submitted by the Republican legislative leaders is cited as "GOP Am. Br."

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INTRODUCTION

The Pennsylvania Constitution says only one thing about reprieves: the reprieve power is given solely to the Governor. Since its adoption in 1790, the Governor's "power … to grant reprieves" has never been restricted or limited in any way. In this Court's nearly 300-year existence, it has never interfered with a reprieve. And the historical use of reprieves reflects a unilateral, discretionary executive power.

Appended to this brief are records of scores of reprieves issued in Pennsylvania from colonial times through 2014. As discussed below in the Counter-Statement of the Case, these records demonstrate that, throughout Pennsylvania's history, reprieves have been granted wholly in the discretion of the executive, for a variety of reasons or no apparent reason at all, for short periods and long periods of time, and for definite and indefinite durations. Governor Wolf's reprieve of Terrance Williams fits squarely within the historical precedent.

Although heavy on rhetoric, the briefs of the Philadelphia District Attorney and his amici discuss precious little about the reprieve's history in Pennsylvania. Between their three briefs, they mention only one prior reprieve – Governor Corbett's reprieve last year, indefinitely postponing Hubert Michael's execution on account of the nationwide shortage of execution drugs. But Governor Corbett's

reprieve also fits readily within the executive's historical use of reprieves for varied reasons and varied durations.

Instead of exploring the historical use of reprieves, the District Attorney and his amici urge this Court to impose limits on the duration and purpose of reprieves, where neither the language of the Constitution nor Pennsylvania's history provides a basis for such limits. This Court should decline the invitation to judicial activism and read the Constitution for what it says: that the Governor and only the Governor has power over reprieves.

COUNTER-STATEMENT OF JURISDICTION

Pursuant to this Court's Order of March 3, 2015, Respondent addresses the propriety of the Court exercising King's Bench jurisdiction in Part I of the Argument, below.

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court accords "a judicial presumption that our sister branches take seriously their constitutional oaths." *Stilp v. Commonwealth*, 905 A.2d 918, 938 (Pa. 2006). The Court therefore applies the same deferential test in a constitutional challenge to an executive action as it does in a constitutional challenge to a statute. *Stroup v. Kapleau*, 313 A.2d 237, 240 (Pa. 1973). Under this standard, a

Governor's executive action must be upheld "unless it clearly, palpably, and plainly violates the Constitution," and "[a]ny doubts are to be resolved in favor of a finding of constitutionality." *Stilp*, 905 A.2d at 939 (citations omitted); *accord Stroup*, 313 A.2d at 240; R. Woodside, *Pennsylvania Constitutional Law* 58 (1985) (RA41).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

Should this Court, for the first time in its history, interfere with the Governor's constitutional reprieve power?

Is the reprieve issued by Governor Wolf an actual reprieve, and thus solely within the Governor's authority to grant, rescind, and modify?

COUNTER-STATEMENT OF THE CASE

> "Having consulted the Attorney General on the words of the Royal Charter relating to Reprieves . . . it was his opinion the Council might Reprieve for a definite or indefinite time, as they shou'd think fit."
>
> - *Minutes of the Provincial Council of Pennsylvania, June 23, 1748, RA66*

A. Reprieves at Common Law

At common law, a reprieve "signifie[d] the withdrawing of a sentence for an interval of time, and operate[d] in delay of execution." J. Chitty, 1 *A Practical Treatise on the Criminal Law* 757 (1819) (RA2); J. Bouvier, 2 *A Law Dictionary* 358 (1839) (RA9); *see also* N. Webster, 2 *An American Dictionary of the English Language* (unpaginated) (1828) (defining a reprieve as "[t]he temporary suspension of the execution of sentence of death on a criminal"); W. Blackstone, 4 *Commentaries on the Laws of England* 387 (1769) (RA10) ("A reprieve, from reprendre, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended."); M. Hale, 2 *History of the Pleas of the Crown* 412 (1736) (RA20) (reprieves are "stays of judgment or execution").

In England, reprieves could be issued by judges or by the king. Judicial reprieves – the forerunners to today's judicial stays of execution – could be issued in three circumstances: (1) "*ex arbitrio judicis*," in the judge's discretion, as where the indictment or verdict was flawed; (2) "*ex necessitate legis*," due to legal necessity, as where the condemned was pregnant; and (3) when the condemned

was "*non compos*," i.e., insane. *See* Blackstone, 4 *Commentaries* 387-88 (RA10-11). A royal reprieve had no such constraints and was "*ex mandato regis*," meaning "from the mere pleasure of the Crown." W. Blackstone, 4 *Commentaries on the Laws of England* 394) (1857) ("Blackstone Revised") (RA17) (citing Hale); *see also* W. Smithers, *Treatise on Executive Clemency in Pennsylvania* 78 (1909) (explaining that "the reprieve *ex mandato regis* . . . [was] bound by no technical rules and [included] reprieve[s issued] indefinitely or on condition"); Blackstone, 4 *Commentaries* 392-93 (RA13) (recounting that, after the Jacobite rebellion of 1715, the King granted reprieves to rebel leaders).

B. Reprieves in the Colonial Era, 1681-1776

On March 4, 1681, King Charles II issued a charter granting the territory of Pennsylvania to William Penn and delegating most governmental powers to him and his assigns, including the royal clemency[1] power:

> to remitt, release, pardon and abolish, whether before Judgement or after, all Crimes and Offences whatsoever committed within the said Countrey, against the said Lawes, Treason and wilfull and malicious Murder onely excepted; and in those Cases, to Grant Reprieves until Our pleasure may bee knowne therein.

[1] The term "clemency" refers to the bestowal of mercy on criminal defendants and includes pardons, commutations, reprieves, and remissions of fines. *Herrera v. Collins*, 506 U.S. 390, 412 & n.12 (1993).

RA55 ("Penn Charter"). The power was thus delegated to issue reprieves that would last until the Crown's wishes were known in murder and treason cases – which initially were the only capital crimes in provincial Pennsylvania.

Reprieves were an element of provincial law throughout the colonies, but not every royal charter delegated the power under the same terms. In the Province of Eastern New Jersey in the late seventeenth century, a reprieve could be issued only for one month. *See* W. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 499 (1977). In Massachusetts, a reprieve could initially last "until the next quarter or General Court," but that provision was later dropped and replaced with one similar to that of the Penn charter. *See id.* at 497-98. Provincial authorities in other colonies, including North Carolina, Georgia, and Maryland, were meanwhile granted unrestricted clemency powers. *See id*. at 498-500.

Historical records of the Provincial Council of Pennsylvania[2] memorialize a number of reprieves. In 1718, "one Martha Underdown, a single Woman, having . . . been Condemned for murdering her Bastard Child," was considered "a fit object of mercy," and it was thus recommended that the Governor "Reprieve her

[2] The powers granted in the Penn Charter were subsequently delegated to and exercised by Pennsylvania's Governors, Lieutenant Governors, and Provincial Council. *See* RA55 (Penn Charter granting clemency powers to Penn and "his heires and to his and their Deputies and Lieutenants"); C. Jensen, *The Pardoning Power in the American States* 8 (1922) (RA38) ("the granting of clemency was placed in the hands of the Executive Council of the province.").

for such time as he shall think fit." RA57 (Minutes of the Prov. Council, Vol. III at 45). The Governor thereafter issued a reprieve "for the space of twelve months," provided that the reprieve would terminate if the council received contrary word of "his Majesties Pleasure Relating thereunto." *Id*.[3]

As in the case of Ms. Underdown, provincial authorities seldom spelled out the reasoning for a reprieve, beyond stating that the condemned was "a fit object of mercy," or the like. A 1771 reprieve was issued simply because the condemned man was "an Object of Compassion," RA78, and a 1772 reprieve was similarly granted because the condemned men were "Objects of Pity and Compassion." RA80.

Underlying many reprieves and pardons, however, was the provincial government's perception that criminal laws were inappropriately harsh. As a result of discord with royal authorities in Britain, who retained veto authority over Pennsylvania's provincial laws, the provincial government in 1718 agreed to redefine 16 lesser offenses, including burglary, robbery, and horse stealing, as capital crimes. *See* Nat'l Council Crime and Delinquency, *Clemency in Pennsylvania*, I.26-27 (1973) (RA25-26). In the wake of the new laws, the provincial government granted reprieves and pardons to avoid what were considered inappropriately harsh sentences. *See id*. ("Like most laws not in

[3] The searched records have not revealed any cases where a king or queen actually intervened after the provincial government issued a reprieve.

concert with the sentiments of the people whose actions they are intended to regulate, the sanguinary provisions of the Compromise Act of 1718 were irregularly enforced and frequently mitigated by other means, especially executive clemency.").

For instance, in 1739, two women condemned for burglary, "one of [whom] pleaded guilty and appeared very penitent, and the other [of whom was] very aged," were granted a reprieve. RA61-62. The reprieve was to remain in effect for an indefinite time period and "upon Condition that they would transport themselves out of the Province and not return to it again." *Id*.; *see also, e.g*., RA75 (Governor granting indefinite reprieve in 1769 in burglary case).

In 1748, the provincial council raised the question of whether "indefinite" reprieves were in fact authorized by law. The council requested an opinion from the Attorney General, and the council minutes report:

> Having consulted the Attorney General on the words of the Royal Charter relating to Reprieves . . . it was his opinion the Council might Reprieve for a definite or indefinite time, as they shou'd think fit.

RA66. Based on the Attorney General's advice, the council issued a reprieve for a condemned prisoner, directing the sheriff of Philadelphia to "abstain [from conducting the execution] until our Pleasure be further known." RA67.

The council issued other reprieves for indefinite time periods, both before and after receiving the Attorney General's opinion. Reprieves issued in 1747 and

1757 directed the Philadelphia sheriff to "abstain" from executions, without setting a time limit. RA64; RA70 (Pa. Archives, 4th Series, Vol. II at 777-78). Near the end of a five-month reprieve in 1769, the Governor issued an additional, indefinite reprieve to persist "during Pleasure." RA75. In 1772, the Governor likewise granted a reprieve to three condemned men "during his Pleasure." RA80; *see also Commonwealth v. Hill*, 39 A. 1055, 1056 (Pa. 1898) (recounting colonial-era case where reprieve was issued "until further order"). On other occasions, provincial authorities granted reprieves for specific time periods. *See, e.g.*, RA69 (reprieve issued in 1752 for one week); RA73 (reprieve issued in 1767 for one year).

As in the 1739 case of the two women who received a reprieve, the council and Governor sometimes issued reprieves that would remain effective in perpetuity so long as the condemned citizens left and did not return to Pennsylvania. *See* RA61-62 (discussed *supra*). In 1771, the council issued another such reprieve to a condemned robber "on Condition that he remove from this Province, and never return into it." RA78.

When the Governor and council were issuing these reprieves in the 1760s and 1770s, council members included historic figures who made significant contributions to the development of Pennsylvania's legal system both before and after the Revolution. For example, Benjamin Chew, the most prominent lawyer in Pennsylvania in the mid-eighteenth century, was one of the council members at the

time of the 1769, 1771, and 1772 indefinite reprieves. *See* RA75-80. Chew served as Pennsylvania Attorney General from 1755 to 1769, as Chief Justice of this Court from 1774 to 1777, and as President of the High Court of Errors and Appeals from 1791 to 1808. *See* B. Konkle, *Benjamin Chew, Head of the Pennsylvania Judiciary System under Colony and Commonwealth* (1932). Edward Shippen IV was a councilmember when the 1771 and 1772 reprieves were issued. RA77, RA80. He was Prothonotary of this Court from 1762 to 1777, a Justice on this Court from 1791 to 1799, and Chief Justice of this Court from 1799 to 1804. *See* G.S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684-1809* (1994).

C. Reprieves under the Supreme Executive Council, 1776-1790

The Pennsylvania Constitution of 1776 vested executive power in the Supreme Executive Council (SEC) and gave the SEC clemency powers, including authority in cases of treason and murder "to grant reprieves . . . but not to pardon, until the end of the next sessions of assembly." Pa. Const. of 1776, ch. 2, § 20.[4]

[4] The 1776 Constitution also created a Council of Censors, which was responsible for determining the constitutionality of government actions. Pa. Const. of 1776, ch. 2, § 47. In 1784, the Council adopted a compliance report about clemency. *The Proceedings Relative to Calling the Conventions of 1776 and 1790*, 83, 105 (1825). The Council interpreted the Constitution as *not* giving the legislature any authority to "intermeddle" in granting clemency. *Id*. at 105. Any such legislative actions were "unauthorised" and "infringements of the constitution." *Id.* Rather, the clemency clause was intended only to give the SEC an "opportunity" to consult with legislators about a case. *Id.* The SEC retained complete executive authority

Under the new Constitution, the SEC continued to issue reprieves for varied time periods and varied reasons. In 1779, the SEC ordered that "a reprieve be issued for George Harding until further order, and that the Sheriff be directed to permit him to go out of Prison until further orders." RA83 (Minutes of the SEC, Vol. XII at 149). The council granted some reprieves that would last "until the end of the next Sessions of the General Assembly." *E.g.*, RA88; RA127-28; RA 131. The council granted an indefinite reprieve for another condemned man but ordered the Sherriff "not to make [the reprieve] known to him until he be taken under the gallows." RA87. Other indefinite reprieves were granted "until further order" from the SEC. RA88-a-b; RA129-30; RA132. The council granted still another reprieve because the condemned man's mother had "taken ill of a fever, and it is apprehended that she cannot survive the execution of her son should it take place to-morrow." RA90.

As the provincial council had done, the SEC sometimes issued multiple reprieves in the same case. For example, in February 1783, the SEC granted a 30-day reprieve to convicted burglar John Dorset. RA84-a. Then in March 1783:

> The Council taking into consideration that the reprieve lately granted to John Dorset, now confined in the old gaol, will shortly expire,

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over clemency, and the Constitution "exclude[d] all interference therein." *Id.* The Council explained that it was "indeed one of the great advantages of our frame of government, that there is in it a body so purely executive, that mercy can be extended in proper cases, without that solecism which must arise where those who make the laws, or those who judge, have the power of remission." *Id*.

> *Ordered*, That the said John Dorset be reprieved for the further term of sixty days from the expiration of the first mentioned reprieve.

RA85. The council did not indicate its reason for issuing either reprieve, except that it issued the second one because the first one was expiring. *See id*.

Unsurprisingly, the SEC was composed of men who shaped the Commonwealth's legal system during and after the Revolution. Benjamin Franklin was President of the SEC from 1785 to 1788, during which time several of the above reprieves were issued. *See* RA88-a-b. Thomas Mifflin succeeded Franklin as President of the SEC, then served as President of the state constitutional convention of 1789-90 and the first Governor of the state under the 1790 Constitution. F. Drake, *Dictionary of American Biography* 619 (1879).

D. Reprieves under the Pennsylvania Constitution of 1790

In the wake of the Revolution, decentralized government proved inadequate in Pennsylvania and the nation as a whole. The federal constitutional convention in Philadelphia in 1787 thus sought to replace the confederacy with a union that would establish a centralized government with a strong executive. *Clemency in Pennsylvania* at I.28-29 (RA27-28). The federal Constitution as initially proposed gave the President clemency authority, including the unilateral power to grant reprieves and pardons. *See* J. Madison, 5 *The Debates on the Adoption of the Federal Constitution in the Convention held at Philadelphia in 1787*, 532-33 (1827). During the debates, an amendment was introduced to limit the duration of

Presidential reprieves "until the ensuing session of the Senate." *Id*. at 532. The amendment was rejected by a vote of 8 to 1, with the Pennsylvania delegation voting in the majority. *Id*.[5] As ultimately adopted, the federal Constitution gave the President the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. Const., art. II, § 2.

Two years later, Pennsylvania convened its own constitutional convention in Philadelphia. As with the federal convention, Pennsylvania sought to establish a stronger executive, as reliance on the SEC had proved unworkable. *Clemency in Pennsylvania* at I.29 (RA28). Pennsylvania's convention thus decided to return executive authority, including clemency powers, to an individual Governor. *See* Pa. Const. of 1790, art. II, § I. In language mirroring the federal Constitution, the new state Constitution gave the Governor the "power to . . . grant reprieves and pardons, except in cases of impeachment." Pa. Const. of 1790, art. II, § IX.

Under the new Constitution, Governors continued granting reprieves similar to those granted in colonial and revolutionary times.[6] On December 23, 1797, for

[5] The Pennsylvania delegation included Franklin and Mifflin.

[6] Although not a reprieve, the first noteworthy exercise of clemency under the 1790 Constitution came in 1795 in the wake of the Whiskey Rebellion. President Washington had recently issued a pardon, in exchange for oaths of loyalty, to those who had broken federal laws by participating in the uprising. Governor Mifflin wished to "pursue a like policy as well on account of its humanity as for the sake of preserving uniformity in the proceedings of the General and State Governments." RA97 (Pa. Archives, 9th Series, Vol. II at 1006). On August 26,

example, after receiving recommendations from his jailers and "a great number of Citizens," Governor Mifflin issued a reprieve for convicted murderer Owen O'Hara, delaying his execution for one month. RA100-01 (Pa. Archives, 9th Series, Vol. II at 1330-31). The next month, Governor Mifflin granted O'Hara another reprieve for an additional six months in light of unidentified "circumstances appearing to justify the granting to him a further reprieve." RA103. In July 1798, Governor Mifflin granted O'Hara, without explanation, "a further Reprieve" for six more months. RA104. In January 1799, Governor Mifflin noted that "the last reprieve, which was granted to him is nearly expired," and thus "granted a further reprieve to him until the last Saturday in the year [1800]" – nearly two years later and a year after the end of Mifflin's third and final term. RA105.

A comparable sequence occurred in the case of John Zimmerman, whose execution was reprieved in 1824 because of "divers reasons having occurred rendering it inexpedient to execute the sentence." RA107. Governor Shulze then issued nine additional reprieves in October, November, and December 1824; in March, May, and November 1825; in May and October 1826; and in April 1827 – the final reprieve extending until June 1828. RA108-20. These reprieves were

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1795, Governor Mifflin accordingly granted, in exchange for oaths of allegiance, a pardon "to all persons" for any related state-law offenses committed in western Pennsylvania between July 14 and August 22, 1794. RA97-98.

issued either without explanation or for the same unidentified "reasons which induced" the initial reprieve. *See id*.

Although the ten reprieves in the Zimmerman case were granted until specific dates, some nineteenth century reprieves were open-ended, just as they had been in colonial and revolutionary times. Thus, in October 1829, Governor Shulze reprieved a condemned man "until it shall be otherwise ordered by the Governor." RA121.

1. The Constitutional Convention of 1837 and Its Aftermath

By 1837, the Governor's pardon powers had become a matter of controversy. It was widely believed that Governors issued pardons to the well-connected for purely political reasons. *See Clemency in Pennsylvania* at I.36 (RA29). The constitutional convention recorded that "there was no part of the patronage of the Executive which was so much complained of as the exercise of the pardoning power." *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania*, Vol. II at 420 ("*1837 Debates*"). Delegates thus proposed various amendments to limit the Governor's clemency powers.

Delegate William Hiester proposed an amendment requiring the Governor to "assign his reasons for all reprieves and pardons granted, and for the remission of all fines and forfeitures annually to the Legislature." *Id.* at 400. Hiester believed that requiring the executive to report his reasons would provide public

accountability and a "sufficient check" on the Governor granting clemency "unless there were good and sufficient reasons for doing so." *Id.* at 400-01.[7]

An extensive debate ensued. Hiester's amendment garnered support from some delegates who agreed that an accounting of reasons for reprieves and pardons would check what had previously been an unrestrained power. Other delegates opposed the amendment, reasoning that clemency should remain in the hands of the executive without any interference: "Let it preserve the character of mercy—if extended, unmerited mercy. The moment you fix restraints, there is the end of it." *Id.* Opponents were particularly skeptical that an accounting of a Governor's reasons for clemency would even be feasible:

> What is required by the amendment? That the Governor shall give his reasons. How long would it take him to throw out all his reasons? How many nameless circumstances may have operated upon him, which it would be difficult to place on paper? . . . Discretion must be vested somewhere. We must suppose the Governor to be a man of honor, that he may be trusted.

Id. at 421-22. Another opponent observed that the true check on the clemency powers lay in the democratic process: "If the people were to be judges of the conduct of the Governor, and, if they continued to elect him to the office with a

[7] A second proposal would have precluded the Governor from pardoning "offences punishable by imprisonment" except "with the advice and consent of the Senate." *Id.* at 420. A third proposed amendment would have given the courts a formal role in the pardon process. *Id.* at 434. These proposals were rejected. *Id.* at 434, 438.

view to his competency for it, as long as the Constitution remained, so long would there be a sufficient check upon the exercise of this power." *Id.* at 433.

After further debate, the convention rejected the Hiester amendment by a vote of 67 to 51. *Id.* at 440. The Governor's clemency powers remained undisturbed, without any requirement that he state his reasons for granting a reprieve. *See* Pa. Const. of 1838, art. II, § IX.

The Governor's reprieve power also remained unchanged in practice. Governors continued to issue reprieves for a variety of reasons. For example, Governor Porter issued a reprieve on December 24, 1841, because "an effort is about to be made at the ensuing Session of the Legislature to abolish punishment by death," and various citizens were "earnestly requesting me to grant a respite to the said Thomas H. Shuster until the action of the Legislature shall be ascertained." RA133-36 (Pa. St. Archives, RG-26).[8] Governor Porter thus granted Shuster a five-month reprieve. *Id.*

[8] Reprieves from this era have not been compiled in published archives. The RA therefore reproduces handwritten reprieves that have been photographed, photocopied, and/or scanned by counsel. Key portions of the reprieves are reproduced in close-ups. Although this Court's electronic filing system does not permit submission of "jpeg" files, jpeg photographs of the 1841, 1861, and 1882 reprieves discussed herein are available to view at: https://drive.google.com/file/d/0B1LFfr8Iqz_7d2lfTVBzWFRrZHM/view?usp=sharing (1841); https://drive.google.com/file/d/0B1LFfr8Iqz_7b2U0am5PT0hxUUk/view?usp=sharing (1861); and https://drive.google.com/file/d/0B1LFfr8Iqz_7NjExdERLZDFVXzg/view?usp=sharing (1882).

On November 5, 1844, Governor Porter issued a two-month reprieve in another case because, according to various citizens, the condemned inmate was "by no means prepared to meet his maker." RA150-52. The Governor postponed the execution "in the hope that, if more time be allowed, the teaching and prayers of his pious friends may better [] prepare him to meet his awful doom." *Id.*

On April 10, 1848, Governor Shunk issued a six-month reprieve because "the jail of [Bradford] County is in an unfinished state, there being no yard inclosed by Walls, and consequently the sentence of the [prisoner] cannot be carried into execution according to law." RA155-56. In September, the jail was "still in an unfinished state," and Governor Shunk granted another reprieve. RA157-59.

Other reprieves were issued because of concerns about the condemned prisoner's guilt, *e.g.*, RA162-65 (July 30, 1853); because it was "believed that the arrest and trial [of a co-defendant] . . . might cast additional light on the case of [the condemned,]" RA160-61 (November 5, 1852); or simply because "in [the Governor's] opinion, [it was] manifestly just and proper" to issue a reprieve. RA178-81 (June 26, 1861); *see also* RA185 (Governor Curtin issuing a reprieve on August 10, 1865, because he was "satisfied . . . of the propriety" of doing so).

As in earlier times, Governors sometimes issued reprieves of a specific and definite duration. *E.g.*, RA155-56 (April 10, 1848, six-month reprieve); RA160-61

(November 5, 1852, one-month reprieve); RA185 (August 10, 1865, six-week reprieve). Governors also continued granting indefinite reprieves, using varied terminology to do so. Governor Porter issued a reprieve "until further direction be given." RA142-49 (April 14, 1843). Governor Bigler issued some reprieves "for the present." RA162-69 (July 30, 1953, August 22, 1853, and July 9, 1854). Governor Pollock issued a reprieve "until such future period as may be fixed." RA170-72 (November 19, 1857). Governor Packer likewise granted a reprieve "until such future period as shall be fixed by me or other lawful authority." RA175-76 (September 29, 1858). Governor Curtin issued one reprieve "until such further period as shall be fixed," RA178-81 (June 26, 1861), and other reprieves "until such time as may be designated under further orders." RA182-84 (October 22, 1863); RA188-89 (October 14, 1865).

2. The Constitutional Convention of 1872-73 and Its Aftermath

Continued dissatisfaction with pardons led to calls for reform during the constitutional convention of 1872 to 1873. *See Debates of the Convention to Amend the Constitution of Pennsylvania, 1872-73*, Vol. II at 359-60 ("*1872-73 Debates*"). Early in the convention, delegates proposed a number of amendments to the clemency powers, some of which would have curtailed the Governor's reprieve power. *See, e.g., id.*, Vol. I at 112-13 (proposal to take clemency out of the Governor's hands and give it to men "above the reach of temptation"); *id.* at

146 (proposal that "no reprieve or pardon shall be granted without the recommendation, in writing, of all the members of the court before whom the person applying for a reprieve or pardon was convicted, and of the Attorney General or district attorney who prosecuted for the Commonwealth"). These proposals were later dropped.

An amendment was nonetheless introduced that would have authorized the Governor to issue reprieves, pardons, and commutations only with a recommendation from a committee of executive branch officials. *Id.*, Vol. II at 351. The provision would have required the committee to state its reasons for recommending clemency, though the Governor was still not required to state his reasons. *See id.*

As in 1837, some delegates opposed any incursion into the Governor's clemency powers, while others favored more severe restrictions. For example, one delegate proposed that the Chief Justice of this Court have a seat on the committee. *See id.* at 351. In response, former Governor Curtin criticized those who were seeking to make clemency "inaccessible, except through difficult and tortuous ways." *Id.* at 353. He opposed court involvement because the pardoning power "is not a judicial proceeding. It is a subject which appeals *solely to the conscience of*

the Executive, and its exercise does not require a judicial inquiry and decision." *Id.* (emphasis added). The proposal was withdrawn. *Id.* at 355.[9]

A final proposal sought to remove reprieves from the purview of the amendment and instead to leave the power solely in the Governor's hands. *Id.* at 383. Delegate Bailey explained that it was possible a Governor would issue an execution warrant before learning of a defendant's innocence and then would need to issue an emergency reprieve – but that the executive committee might not be able to act as quickly as circumstances required. *Id.* at 384. The convention accepted the proposal that kept the reprieve power solely in the Governor's hands, while adopting the amendment of the pardon and commutation powers. *Id.* The Governor's power to grant pardons and commutations, which remained solely in the province of the executive branch, was restricted to require a majority recommendation from the committee, which would later become the Board of Pardons. Pa. Const. of 1874, art. IV, § 9. As at the convention of 1837, the 1874 Constitution thus did not adopt any of the proposed limits to a Governor's reprieve power. And since 1874, no restrictions on the Governor's constitutional reprieve power have been formally proposed.[10] The Reprieves Clause continues to provide

[9] The delegates also debated whether to restrict the issuance of pardons until "after conviction." *See id.* at 362. The proposed restriction was rejected. *Id.* at 383.

[10] The clemency powers have been amended three times since 1874. *See* Pa. Const. of 1874, art. IV, § 9 (as amended in 1967) (establishing Board of Pardons); Pa.

what it provided in 1790: "the Governor shall have power . . . to grant reprieves." Pa. Const., art. IV, § 9.

Under the 1874 Constitution, Governors continued to grant reprieves for varied reasons or no stated reason at all. Governor Hartranft issued a reprieve on May 21, 1878, because the condemned prisoner's spiritual advisor believed that the time until the execution was "entirely too short for [the prisoner's] preparation for death." RA194 (Pa. St. Archives, RG-15). Governor Hartranft issued a reprieve in 1877 to permit an inquiry into the condemned prisoner's mental condition. RA192. He issued others simply because he was "satisfied of the propriety of granting a reprieve" in those cases, RA191, RA193, while for other reprieves he gave no reason at all. RA195-96. Succeeding Governors likewise issued some reprieves without indicating a reason. *See, e.g.*, RA199 (March 20, 1884, reprieve by Governor Pattison); RA200-01 (March 20, 1889, reprieve by Governor Beaver).

Governors at the end of the nineteenth century also continued granting reprieves for definite periods, *e.g.*, RA199, or indefinitely, as with an 1882 reprieve granted "until our further command shall be made known." RA197-98.

Const. of 1968, art. IV, § 9 (as amended in 1975) (altering method for confirmation of members of Board of Pardons); Pa. Const. of 1968, art. IV, § 9 (as amended in 1997) (requiring unanimity for commutation or pardon of inmate under death or life sentence, and altering composition of board). All of these amendments concerned the executive branch's pardon and commutation powers; none has addressed the Governor's reprieve power.

Governors continued issuing serial reprieves as well. RA202-03 (five-week reprieve, no reason given, followed by a two-month reprieve, no reason given).

3. Reprieves in the Modern Era

As extended appeals became commonplace in the twentieth century, serial reprieves were sometimes quite protracted. For example, condemned prisoner David Darcy received numerous reprieves in the 1950s, postponing his execution for years. RA206-08. Edward Hough received at least 33 reprieves over the better part of a decade. RA209-10; *see also* RA212-13 (28th reprieves issued to Harold Foster and Harry Zietz).

In lieu of serial definite reprieves, some Governors issued indefinite reprieves to extend during appeals. *E.g.*, RA226-27 (Governor Ridge granting reprieve "until such time as the stay ordered by the [federal court] may be lifted"); RA222-23 (Governor Casey granting reprieve without end-date); RA205 (Governor Earle granting reprieve "until the motion for new trial now pending . . . is finally disposed of and definite date for execution thereafter fixed by me."); RA204 (Governor Earle, after granting a prior 90-day reprieve, granting a reprieve "until the appeal now pending in the Supreme Court of Pennsylvania . . . has been finally determined and definite date of execution thereafter fixed by me."); *see also* RA224-25 (Governor Ridge granting reprieve without stated end-date or reason).

Governors also recognized that reprieves could be used to impose moratoria on executions. In 1961, Governor Lawrence thus announced that he would establish a moratorium on executions while a legislative committee studied capital punishment and the legislature considered abolishing the death penalty. *Lawrence 'Freezes' Executions; Carroll Opposes Abolition*, THE PHILA. INQUIRER, Mar. 24, 1961, at 1 (RA214-15); *see also* B. Siglin, *Death Penalty, A Governor Is Not Powerless*, SUNDAY PATRIOT-NEWS, Jan. 3, 1971, at B9 (RA218-20) ("Lawrence's dislike of capital punishment led him to use his gubernatorial powers to effect a two-year moratorium on executions in 1959-61."). Governor Shapp adopted the same policy during the 1970s. *Death Penalty Is Back, But Shapp Won't Use It*, PHILA. DAILY NEWS, Jan. 22, 1971, at 3 (RA221) ("I will grant respites throughout my term."); *Death Penalty, A Governor Is Not Powerless*, *supra* (RA218-20) (discussing Shapp's moratorium and explaining that "the Constitution gives him the power at all times and in all cases 'to grant reprieves.'").

Governors in the modern era have also issued reprieves for unique reasons. On September 12, 2014, Governor Corbett issued a reprieve to Hubert Michael "until another warrant is issued." RA228. The reprieve explained that the Department of Corrections "must complete its acquisition of the injection agents required to carry out lethal injection as prescribed under Pennsylvania state law."

Id.[11] Governor Corbett thus ordered the Department of Corrections to provide written notice when it "has completed its acquisition of injection agents." *Id*. Although the Department did not and cannot acquire the lethal injection drugs currently required under state law (*see* n.11), Governor Corbett rescinded the reprieve shortly before leaving office because Mr. Michael had been granted a stay of execution from a federal court. RA229.

E. *Commonwealth v. Terrance Williams*

Terrance Williams was convicted of murder in the 1986 killing of Amos Norwood, an offense committed three months after Mr. Williams turned 18 years old. In deciding whether to sentence Mr. Williams to death, the jury of twelve citizens was informed that he had an earlier conviction for the murder of Herbert

[11] Since 1990, Pennsylvania law has required that the death penalty be inflicted by injecting a lethal combination of two types of drugs – "an ultrashort-acting barbiturate" and "chemical paralytic agents." 61 Pa. C.S.A. § 4304(a)(1). Ultrashort-acting barbiturates, including sodium thiopental, are no longer available for executions nationwide. *See Cook v. Food & Drug Admin*., 733 F.3d 1, 4, 10-11 (D.C. Cir. 2013) (explaining that "[i]n 2009 the last domestic manufacturer of thiopental stopped making it" and holding that the FDA was compelled by law to prohibit its importation); *Pavatt v. Jones*, 627 F.3d 1336, 1338 n.1 (10th Cir. 2010) ("sodium thiopental is now effectively unobtainable anywhere in the United States, thus requiring Oklahoma and 17 other death-penalty states to revise their lethal injection protocols"). Most states that had lethal injection laws similar to Pennsylvania's therefore amended their statutes to provide a feasible means of execution. *See, e.g*., Okla. Stat. tit. 22, § 1014 (requiring that executions be conducted using a "lethal quantity of a drug or drugs" – revised in 2011 to omit requirement of "an ultrashort-acting barbiturate in combination with a chemical paralytic agent"). Pennsylvania has not revised its statute, although the lethal injection process is among the topics being studied by the Pennsylvania Task Force and Advisory Committee on Capital Punishment.

Hamilton, which occurred when Mr. Williams was 17 years old. The jury was not informed, however, that Hamilton and Norwood had sexually abused Mr. Williams as a boy.

In 2012, Governor Corbett issued an execution warrant in this case. During subsequent litigation, it was disclosed that the Philadelphia District Attorney's Office – the Petitioner in this proceeding – had information and records corroborating the sexually predatory behavior of Hamilton and Norwood, and had information that Mr. Williams' crimes were motivated by his own boyhood victimization at the hands of Hamilton and Norwood. The information and records had been in the possession of the Philadelphia District Attorney's Office since before trial, but were not disclosed to the jury, the public, or the defense.

With his date of execution approaching in 2012, Mr. Williams petitioned the Board of Pardons to recommend commuting his sentence to life imprisonment. On September 17, 2012, the Board held a clemency hearing. The information submitted to the Board included the following:

- Mr. Norwood's widow, Mamie Norwood, has forgiven Mr. Williams and does not want him to be executed;

- Five jurors urged that Mr. Williams' life be spared. In sworn statements, they recounted that they were not told at trial that Mr. Williams was exploited and sexually assaulted by the men he killed and that, if they had known the truth, they would not have exercised their power as citizens to sentence Mr. Williams to death;

- Expert testimony was presented regarding the nightmarish boyhood abuse Mr. Williams suffered and the devastating psychological impact it had on him; and

- Dozens of child advocates, activists against sexual violence, former judges, and former prosecutors urged that Mr. Williams' life be spared.

Three of five Board members voted in favor of clemency, but clemency was initially denied because, in capital cases, the Board's support must be unanimous. *See* Pa. Const. Art. IV, § 9(a). Soon thereafter, Mr. Williams provided the Board with evidence indicating that the Philadelphia District Attorney's lawyer had made false representations to the Board, and that his office had suppressed evidence of Norwood's sexually predatory behavior. In response, the Board voted on September 27, 2012, to reconsider its clemency decision. A new hearing was then held, after which the Board took Mr. Williams' clemency application under advisement. The application remains pending before the Board.

Meanwhile, in PCRA litigation, the Philadelphia Court of Common Pleas ruled that the Philadelphia District Attorney's Office had suppressed information about Norwood's sexual predation, Hamilton's sexual predation, and other favorable evidence, and that the prosecution's misconduct undermined confidence in the jury's death sentence. Accordingly, on September 28, 2012, the court vacated the death sentence and issued a stay of execution.

On December 15, 2014, this Court vacated the stay and reinstated the death sentence, ruling that the lower court lacked jurisdiction under the PCRA to

entertain Mr. Williams' successive petition. *Commonwealth v. Williams*, 105 A.3d 1234 (Pa. 2014). On June 12, 2015, Mr. Williams filed a petition for writ of certiorari in the United States Supreme Court asking that it review this Court's decision.

On January 13, 2015, a week before he left office, Governor Corbett issued an execution warrant scheduling Mr. Williams' execution for March 4, 2015.

On February 13, 2015, Governor Wolf invoked his constitutional "power to. . . grant reprieves" and issued a "temporary reprieve of the execution unto Terrance Williams until I have received and reviewed the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment, and any recommendations contained therein are satisfactorily addressed." RA230.[12] On the same date, Governor Wolf released a statement in which he explained his decision to grant the temporary reprieve and stated his intention to suspend executions by granting reprieves in other capital cases until the task force's work is complete.

The Philadelphia District Attorney subsequently petitioned this Court to intervene.

[12] In 2011, the Senate passed Resolution 6, establishing a bipartisan task force and advisory committee to study capital punishment in Pennsylvania and report their findings and recommendations.

SUMMARY OF ARGUMENT

Pennsylvania's Constitution of 1790 placed no limits on the reprieve power and delegated the power exclusively to the Governor. Each subsequent constitutional convention to consider restricting the reprieve power has decided to leave the power unfettered and solely in the Governor's hands. Today, the Reprieves Clause remains as adopted in 1790.

For centuries, Pennsylvania Governors have thus granted reprieves for definite and indefinite durations and for reasons that have ranged from political to personal to religious – or for no stated reason at all. The use of the reprieve power by Pennsylvania Governors is consistent with the practice and understanding throughout the United States. Governor Wolf's reprieve of Terrance Williams fits squarely within this historical practice.

The plain language of the Constitution, historical precedent, and persuasive authority all establish the constitutionality of Governor Wolf's reprieve. As a valid exercise of his exclusive power, Governor Wolf's reprieve is beyond this Court's purview. Indeed, no court in the nation's history has struck down an executive reprieve, and the District Attorney's arguments do not justify a radical new course.

In petitioning this Court to take the unprecedented action of interfering with an act of clemency, the District Attorney starts from the premise that the "gubernatorial order in this case is not a reprieve." DAB 38; *see also id*. at 3, 19,

26-41. The "purported reprieve," according to the District Attorney, is really "an effective commutation" that "negates a class of criminal judgments without authority." *See id*. at 3, 15, 39 n.16. In support of this premise, the District Attorney asserts that "[t]he same understanding of a reprieve has existed in Pennsylvania since before the Declaration of Independence." *Id*. at 28. Under this purported understanding, "a 'reprieve' that lasts indefinitely is not a reprieve under *any* known definition," and a reprieve may be granted only to facilitate a formal proceeding "such as a clemency proceeding before the board of pardons, or . . . collateral review." *Id*. at 19, 28 (emphasis in original).

From his premise that the reprieve is not an actual reprieve, the District Attorney ushers in a parade of horribles: the Governor's action is an "illegal exercise" of power that "suspends laws enacted by the General Assembly," violates the separation of powers, and "contradicts the Governor's duty to faithfully execute the law." *Id*. at 19, 26, 39-41.

As is clear from the Counter-Statement of the Case, however, the District Attorney's premise is wrong. Governor Wolf's reprieve is, in fact and law, a reprieve. Its plain terms identify it as such. Its legal effect is that of a reprieve, not of a commutation or pardon. And the "understanding of a reprieve [that] has existed in Pennsylvania since before the Declaration of Independence" *actually* reflects that reprieves have been granted for definite and indefinite time periods,

for a variety of reasons or for no reason at all. Moreover, even if reprieves must be "limited in time and purpose," as the District Attorney claims, *id*. at 31, 37, Governor Wolf's reprieve plainly fits that description.

Because the District Attorney's premise is wrong, his parade of horribles is illusory. And the District Attorney does not argue that this Court has any reason – or any authority – to interfere with the Governor's exercise of discretion where, as here, a reprieve *is* a lawful reprieve.

As the District Attorney cannot establish a clear right to relief, this Court should decline to exercise King's Bench jurisdiction. The petition should be denied.

ARGUMENT

I. Jurisdiction

Regardless of its precise contours, King's Bench jurisdiction is discretionary, and this Court exercises it only where the petitioner clearly establishes a right to relief. Here, because Governor Wolf's reprieve is a valid exercise of his unilateral power, the District Attorney cannot establish a clear right to relief, and the Court should decline to exercise its King's Bench power.

There are two interpretations of King's Bench jurisdiction. Under the narrow view, the Court may only supervise lower judicial tribunals and judges. Under the broad view, this Court may invoke jurisdiction to address allegations

that another branch of government has encroached on the judicial power. If the Court adopts the broad view in this case, it arguably could invoke King's Bench jurisdiction in light of the District Attorney's allegation that Governor Wolf is "usurping the power of the judiciary." DAB at 41. Even if the Court adopts the broad view in this case, however, it would not benefit the District Attorney, as his substantive allegations do not withstand scrutiny.

A. The Standards for King's Bench Jurisdiction

This Court has traditionally understood its King's Bench jurisdiction as enabling a "superintendency" power over inferior judicial tribunals and jurists. *See Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) ("King's Bench jurisdiction . . . allows [the Court] to exercise power of general superintendency over inferior tribunals even when no matter is pending before a lower court"); *In re Dauphin County Fourth Investigating Grand Jury*, 943 A.2d 929 (Pa. 2007) (same); STANDARD PA. PRACTICE § 2:134 (same).

The vast majority of cases in which this Court has invoked King's Bench jurisdiction are consistent with this understanding. *E.g.*, *In re Merlo*, 17 A.3d 869, 871 (Pa. 2011) (suspending district judge for misconduct); *In re Assignment of Avellino*, 690 A.2d 1138, 1140-41 (Pa. 1997) (resolving dispute over judicial assignments); *President Judge Determination Cases*, 216 A.2d 326 (Pa. 1966) (deciding priority of commission of common pleas court judges); *In re Bell's*

Petition, 152 A.2d 731 (Pa. 1959) (reviewing lower court decision despite absence of right to appeal); *Apex Hosiery Co. v. Phila. Cnty.*, 200 A. 598 (Pa. 1938) (ordering change of venue in civil case); *In re First Cong. Dist. Election*, 144 A. 735 (Pa. 1928) (exercising supervisory authority over quasi-judicial tribunal); *Schmuck v. Hartman*, 70 A. 1091 (Pa. 1908) (reviewing lower court decision despite absence of right to appeal); *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886) (asserting jurisdiction over criminal case pending in lower court).

Some justices of this Court have opined that King's Bench jurisdiction does not extend beyond such narrow "superintendency." *See Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1275 (Pa. 2007) (Castille, J., dissenting); *Deer Creek Drainage Basin Auth. v. Cnty. Bd. of Elections*, 381 A.2d 103, 112 n.8 (Pa. 1977) (Pomeroy, J., dissenting); *see also* B. Scherer, *The Supreme Court of Pennsylvania and the Origins of King's Bench Power*, 32 Duq. L. Rev. 525, 526 (1993-94).[13] Under this narrow view, which Respondent urges this Court to adopt, jurisdiction does not lie because this case does not involve supervision of the judiciary.

On a few occasions, this Court has invoked King's Bench jurisdiction more broadly to address alleged encroachments on the judicial power writ large. *See In*

[13] The view that this jurisdiction extends *only* over inferior tribunals accords with the common law practice in which the King's Bench in England was overseen by the King and the House of Lords. *See* 3 Blackstone, *Commentaries*, 42-43; Woodside at 431-32 (RA51-52).

re 42 Pa.C.S. § 1703, 394 A.2d 444 (Pa. 1978) (addressing a legislative incursion into judicial rule-making powers); *Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57, 58 (Pa. 1971) (per curiam) (exercising King's Bench jurisdiction to review validity of Governor's judicial appointments); *see also School Dist. of Newport Twp. v. State Tax Equalization Bd.*, 79 A.2d 641, 644 (1951) (recognizing that King's Bench jurisdiction extends to "inferior judicial tribunals, judicial officers *or bodies exercising judicial acts*") (emphasis added). These cases suggest a broader view of King's Bench jurisdiction through which the Court "possesses every judicial power that the people of the Commonwealth can bestow." *In re Bruno*, 101 A.3d 635, 666 (Pa. 2014) (quotation omitted).

Assuming that this Court follows the broader view, the District Attorney's allegations might bring this case under the purview of King's Bench jurisdiction.[14] The District Attorney has alleged that Governor Wolf's reprieve is actually "not a reprieve." DAB 38. Instead, the "order" has "negate[d] a class of criminal judgments without authority." *Id.* at 3. The "purported reprieve" thus "wields powers expressly assigned to the judicial branch." *Id*. at 19, 39. At bottom, the

[14] There is little question that this matter could have been filed as an original action in Commonwealth Court, *see* 42 Pa. C.S. § 761(a)(1), and that this Court thereafter could have assumed extraordinary jurisdiction over it, *see* 42 Pa. C.S. § 726. At least one Justice of this Court has opined that, in such a situation, it may be proper to assert King's Bench jurisdiction rather than insist on the "procedural maneuvering" of first filing in a lower court. *Pa. Gaming Control Bd.*, 928 A.2d at 1272 (Baer, J., concurring).

District Attorney contends that Governor Wolf is "usurping the power of the judiciary," *id*. at 41, in other words, "exercising judicial acts." *School Dist. of Newport*, 79 A.2d at 644. The broad view of King's Bench jurisdiction may permit the Court to address such allegations.

B. This Court Should Not Exercise Discretionary Jurisdiction Because Governor Wolf's Reprieve Is a Reprieve as a Matter of Law

Even assuming this Court *may* exercise King's Bench jurisdiction, "it is a very different question of whether and when, in our discretion, we *should* exercise that power." *Bruno*, 101 A.3d at 684 (emphasis added). King's Bench power is "exercised with extreme caution," *Balph*, 3 A. at 230, and "only in circumstances where the record clearly demonstrates the petitioners' rights." *Bd. of Revision of Taxes*, 4 A.3d at 620. The District Attorney cannot meet this demanding standard.

Here, the linchpin of any jurisdiction is the District Attorney's allegation that Governor Wolf's reprieve is not an actual reprieve but rather an exercise of judicial power. Absent this allegation, the District Attorney makes no argument that this Court has authority to review a reprieve, and a lawful reprieve is indeed beyond this Court's purview. *See Commonwealth v. Michael*, 56 A.3d 899, 903 (Pa. 2012) ("The Pennsylvania Constitution entrusts clemency decisions to the sole discretion of the executive branch."); *Commmonwealth ex rel. Cater v. Myers*, 194 A.2d 185, 187 (Pa. 1963) ("we do not believe that this Court can impinge upon the

exclusive jurisdiction of the executive branch of the government in showing clemency."); *Hester v. Commonwealth*, 85 Pa. 139, 1878 WL 13829 (Pa. 1878) (recognizing that in clemency matters this Court is "bound to accept the executive action as controlling and conclusive."). In Part II, below, Respondent establishes that Governor Wolf's reprieve is a lawful reprieve. Accordingly, the District Attorney cannot "clearly demonstrate" his right to relief, and this Court should not exercise its King's Bench power.

II. The Reprieve of Terrance Williams Is a Reprieve

Although the District Attorney seeks to frame this case as a question of *whether* the Governor exercised his unilateral reprieve power, the District Attorney is really asking this Court to oversee the Governor's issuance of reprieves. In its almost-three-century existence, this Court has never interfered with a clemency action, and this case provides no justification for altering course.

The crux of the District Attorney's argument is that a reprieve must have an end-date and must be issued for the purpose of permitting a formal proceeding before the Board of Pardons or a court. Because, in the District Attorney's view, Governor Wolf's reprieve does not follow these strictures, it is a commutation and not a reprieve. The District Attorney's argument does not withstand scrutiny.

In analyzing a provision like the Reprieves Clause, this Court looks first to the plain language of the Constitution, then to historical precedent, and then to

persuasive authority from other jurisdictions. *Jubelirer v. Rendell*, 953 A.2d 514, 522, 525 n.12 (Pa. 2008). Here, the plain language, historical precedent, and persuasive authority uniformly demonstrate that Governor Wolf's reprieve is a lawful reprieve. Accordingly, the District Attorney cannot overcome the presumption of constitutionality because he cannot demonstrate that the Governor's reprieve "clearly, palpably, and plainly violates the Constitution." *Stilp*, 905 A.2d at 939.

A. Plain Language

The Reprieves Clause provides that "[i]n all criminal cases except impeachment the Governor shall have power . . . to grant reprieves." Pa. Const. Art IV, § 9. A reprieve was defined in the eighteenth century (and today) as a temporary suspension or postponement of a criminal sentence. *See* Hale, 2 *History* 412 (1736) (RA20); Blackstone, 4 *Commentaries* 387 (1769) (RA10); Webster, 2 *An American Dictionary* (1828); Bouvier, 2 *A Law Dictionary* 358 (1839) (RA9); *see also Haugen v. Kitzhaber*, 306 P.3d 592, 598 (Or. 2013) ("most definitions merely note that a reprieve is temporary and delays execution of the recipient's sentence."); *accord* Woodside at 391 (RA48); *Pruitt v. State*, 834 N.E.2d 90, 118 (Ind. 2005).

The plain language of the Reprieves Clause thus means that the Governor may postpone executions, and the Constitution does not elsewhere mention

reprieves. The clause does not contain any limits on the duration, number, or purpose of reprieves that a Governor may issue. The clause grants the reprieve power solely to the Governor and does not authorize interference by the judiciary or legislature.

In light of the plain language, the Attorney General has opined that "the Governor has unfettered discretion to grant a reprieve." 1981-84 Pa. Op. Atty. Gen. 32 (Feb. 14, 1983). Commentators have reached the same conclusion:

> [T]here is no limitation upon the number or nature of reprieves [the Governor] may grant. His power embraces . . . the reprieve *ex mandato regis*, which . . . [is] bound by no technical rules and [includes] reprieve[s granted] indefinitely or on condition. . . . His discretion alone controls.

Smithers at 78; *see also* Woodside at 404-05 (RA49-50).

Governor Wolf's reprieve temporarily postpones Terrance Williams' execution until the task force report is completed and any recommendations are addressed. RA230. The reprieve does not purport to disturb the judgment of conviction and sentence. To the contrary, the reprieve recounts that Mr. Williams has been "found guilty of Murder in the First Degree," has been "sentenced by the Court to suffer death," and that this Court has "upheld the constitutionality of the death penalty as well as affirmed its imposition upon said Terrance Williams." *Id*. Today, Mr. Williams remains on death row under sentence of death. His sentence

has not been commuted,[15] and his conviction has not been pardoned. The reprieve does nothing more than postpone Mr. Williams' execution. It is therefore a valid exercise of power under the plain language of the Reprieves Clause.

B. Historical Precedent

Even if the plain language of the Reprieves Clause left any doubt about this case, the historical precedent would erase it. A constitutional provision "must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Bruno*, 101 A.3d at 659; *Stilp*, 905 A.2d at 939. The Reprieves Clause was adopted in 1790 and has never been amended. Thus, the Reprieves Clause must be interpreted according to how it was understood in 1790.

In 1790, it was well-understood that reprieves could be issued for an indefinite duration, or until some future event, or until a specific future date. Reprieves could also be granted for a variety of reasons or for no reason at all. These understandings are demonstrated in several ways.

First, the historical record demonstrates that, in the years leading up to 1790, reprieves were regularly granted for indefinite durations, as when the provincial council and SEC granted reprieves without any time limit, RA64; RA70; "during Pleasure," RA75; "until our Pleasure be further known," RA67; and "until further

[15] A commutation permanently alters a defendant's judgment of sentence. *See, e.g.*, *Makowski v. Governor*, 852 N.W.2d 61, 74 (Mich. 2014). Governor Wolf's reprieve does not purport to alter Mr. Williams' sentence and is therefore not a commutation.

order." RA83; RA88-a-b.[16] Reprieves were likewise granted until some event at an unspecified future date, as when prisoners were reprieved unless and until they returned to Pennsylvania, RA61-62; RA78; or "until the end of the next Sessions of the General Assembly." RA88; RA127-28; RA 131. Other reprieves were granted until a specific date. RA73; RA85. This varied practice demonstrates that there was no inherent limit in the duration of a reprieve. Further, the practice of issuing serial reprieves – sometimes multiple definite reprieves, *see* RA85, and sometimes definite reprieves followed by an indefinite one, *see* RA75 – likewise refutes the argument that a Governor's power to postpone an execution is "limited in time." DAB 31, 33, 37. It would make little sense to limit the duration of reprieves where the Governor may grant an infinite number of them.

The historical practice also reflects that provincial authorities and the SEC granted reprieves for vague reasons, including because the condemned was "a fit object of mercy," RA57; for no stated reason, RA83; and for unique reasons, as when the condemned prisoner's mother "had taken ill of a fever." RA90. Further, the widespread view that colonial criminal laws were unduly harsh underlay the decisions to grant many reprieves. *See* Clemency in Pennsylvania at I.27 (RA26); *see also* Smithers at 28 ("the records of the Executive Council of the Province

[16] These and similar examples refute the District Attorney's assertion that a reprieve granted "'unless decided otherwise' would be without the defining characteristics of a reprieve, and would not be a reprieve." DAB 32.

show many grants of clemency, indicating a policy of leniency, extenuation and repugnance to undue severity."). Thus, the historical practice leading up to 1790 reflects the broad scope of the reprieve power.

Second, the Attorney General's 1748 opinion that colonial authorities could issue reprieves "for a definite or indefinite time, as they shou'd think fit," expressed the predominant view of reprieves in eighteenth century Pennsylvania. RA66. Absent a constitutional restriction, reprieves were understood as subject only to the discretion of the issuing authority.

Third, eighteenth century Pennsylvanians were undoubtedly familiar with constitutional provisions limiting the scope and duration of reprieves, but they declined to adopt any such limits in 1790. In murder and treason cases, the Penn Charter and the 1776 Pennsylvania Constitution themselves limited the duration of reprieves until, respectively, the Crown's "pleasure" was known and "the end of the next sessions of assembly." In other colonies, the reprieve power was either limited by constitutional law, or unlimited. *See* Duker, 18 Wm. & Mary L. Rev. at 497-500. In declining to include any such limits in the 1790 Constitution, the framers intended to give the Governor unfettered discretion in granting reprieves regardless of purpose or duration. *Accord Hoffa v. Saxbe*, 378 F. Supp. 1221, 1231 (D.D.C. 1974) ("It would appear abundantly clear that the framers intended to repose with the President the fullest extent of that authority which the words

'reprieves and pardons' have historically encompassed. The framers were concededly aware of the various limitations which had been imposed on the King's prerogative by Parliament, as well as the limitation imposed by the state constitutions, but deliberately chose to limit the President's authority in one particular only, viz., in cases of impeachment.").

Finally, this understanding is confirmed by the historical record *after* 1790. The practice of granting reprieves for varied durations and reasons continued throughout Pennsylvania's history. *See supra* at 13-25. And because the Constitution grants clemency powers solely to the executive branch, this Court has never interfered with a reprieve, or with any act of clemency. *See Michael*, 56 A.3d at 903; *Cater*, 194 A.2d at 187; *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 900 (Pa. 1942); *Hester*, 85 Pa. 139; *see also Cnty. Com'n v. Dodrill*, 385 S.E.2d 248, 250 (W.Va. 1989) (the Governor "has the power to reprieve in all cases of felony where necessity requires his intervention. Of this necessity he is the sole and final judge, and his conclusions are not reviewable by the courts.") (quotation marks omitted).

Moreover, the constitutional conventions of 1837 and 1872-73 demonstrated the contemporaneous understanding that Governors were not limited in the reasons for which reprieves could be granted and, indeed, need not provide any reason at all. In 1837, the convention rejected a proposal to require the Governor even to

explain his reasons for granting a reprieve. *See supra* at 15-17. In considering this proposal, the delegates took for granted that the 1790 Constitution did *not* require a Governor to state his reasons, let alone to state a particular *type* of reason.

The same understanding persisted at the 1872-73 convention. The convention added a requirement that the committee of executive officials (now the Board of Pardons) state its reasons for recommending clemency. Pa. Const. of 1874, art. IV, § 9. The convention made no mention, however, of any distinction between proper and improper reasons. More particularly, the convention did not require *the Governor* to state his reasons for granting clemency, including reprieves. *See id*. The convention instead recognized that clemency was subject "solely to the conscience of the Executive." *1872-73 Debates*, Vol. II at 353.

Governor Wolf's reprieve fits comfortably within the historical precedent. The reprieve will endure until a future event – when he has "received and reviewed" the report of Task Force and Advisory Committee on Capital Punishment and "any recommendations contained therein are satisfactorily addressed." RA230. The duration of the reprieve is thus comparable to early reprieves that lasted until some future event, but is not nearly as open-ended as the indefinite reprieves that have been properly issued since colonial times. Governor Wolf's stated reasons for the reprieve – well-documented problems in Pennsylvania's capital punishment system – are likewise permissible, especially

given that Governors need not state *any* reason for granting a reprieve. Governor Wolf's explanation, in fact, echoes Governor Porter's 1841 reprieve to permit the legislature to consider abolishing the death penalty and Governor Lawrence's 1961 reprieve to permit the legislature to study and consider abolishing the death penalty. *See* RA133-36; RA214-21.

In light of the historical precedent, eighteenth century Pennsylvanians would have understood Governor Wolf's reprieve to be well within his unilateral reprieve powers under the 1790 Constitution. This Court should reach the same conclusion. In the words of Justice Oliver Wendell Holmes, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case" to overturn it. *Jackman v. Rosenbaum Co*., 260 U.S. 22, 31 (1922).

C. Persuasive Authority

Just as the historical practice in Pennsylvania refutes the District Attorney's claim that Governor Wolf's reprieve "is not a reprieve under *any* known definition," the practice and case law in other jurisdictions also contradict the claim. This persuasive authority further demonstrates that this Court should deny the petition. *See Jubelirer*, 953 A.2d at 525 n.12 ("In construing a constitutional provision, . . . to the extent other states have identical or similar provisions, extrajurisdictional caselaw may be helpful and persuasive.").

Forty-six state Constitutions and the federal Constitution grant reprieve power to the executive branch. *See* RA242-44 (chart of state constitutional provisions regarding reprieves). *None of these Constitutions provides a more robust and unfettered reprieve power than the Pennsylvania Constitution. See id*. The Pennsylvania Constitution, like the Constitutions of thirteen other states (and the federal government), grants an unrestricted reprieve power solely to the Governor. *Id.*

At the other end of the spectrum, five states limit the duration of gubernatorial reprieves to between 30 days and 6 months, with the Texas Constitution being the most restrictive in permitting only one 30-day reprieve absent approval for longer reprieves from the Board of Pardons. *Id.* Eight states grant their Boards of Pardons a shared role in granting reprieves, while a ninth, Georgia, grants the reprieve power solely to the Board. *Id.* Eight other state Constitutions subject the reprieve power to some degree of legislative regulation. *Id.*

In the middle of the spectrum, some states have adopted largely ceremonial limits on the reprieve power. For example, two state Constitutions provide for a non-binding recommendation from the Board of Pardons. *Id.* Fifteen states require the Governor to report his reasons for granting a reprieve, most commonly

to the state legislature. *Id.*[17] Even these states, however, do not limit the kinds of reasons a Governor may invoke in granting clemency. *See, e.g.*, *State v. Williams*, 60 N.W. 410, 412 (S.D. 1894).

Despite constitutional limitations on the reprieve power in more than thirty states, no state court has ever struck down a reprieve. *See Dodrill*, 385 S.E.2d at 250 (citing cases). And no court in the nation has ever imposed limits on reprieves, as the District Attorney urges here, where the state Constitution does not itself impose them.

The Oregon Supreme Court is the only court to address squarely the arguments advanced by the District Attorney here. *Haugen*, 306 P.3d at 597. As part of a moratorium on executions, Governor Kitzhaber granted a reprieve "for the duration of Kitzhaber's service as Governor." *Id*. at 594. Haugen objected on multiple grounds, and as set forth by the court:

> This case requires us to determine what constitutes a reprieve under that constitutional provision. Specifically, we must decide whether a reprieve must have a stated end date [and] whether it may be granted only for particular purposes . . .

Id.

After reviewing the language of the state Constitution and the history of reprieves in England and America, the court unanimously rejected Haugen's

[17] A sixteenth state, New York, requires the Governor to report to the legislature the fact of, but not the reasons for, any reprieve. *See id*.

argument that the reprieve was invalid because it "lack[ed] an expiration date" and thereby "suspend[ed] the laws" of the state. *Id*. at 597, 600. The court found that the language and context of the Constitution established no requirement of an end date, *id*. at 601, and that, in historical practice, "nothing suggests that reprieves were required to carry a stated end date," *id*. at 603. The same conclusions are inescapable here.

The *Haugen* court also unanimously rejected Haugen's contention that the reprieve was invalid because it was "not based on Haugen's individual circumstances." *Id*. at 597. The court observed that the constitutional language imposed no such limits, *id*. at 601, 604, and found that, "historically, governors and presidents have granted clemency for a wide range of reasons, including reasons that may be political, personal, or private, and that many such decisions . . . may be animated by both public and private concerns." *Id*. at 608. While recognizing that "several recurring reasons tended to be the reason for granting reprieves," the court ruled that "nothing suggests that an act of clemency had to be granted for one of those historical reasons to qualify as a reprieve." *Id*. at 603. This Court should follow the *Haugen* court's well-reasoned analysis.[18]

[18] The District Attorney discusses *Haugen* only in a footnote and claims it is inapposite because the Oregon Constitution "has no substantive limit" on clemency power, unlike the Pennsylvania Constitution. DAB 31 n.13; *see also* PDAA Am. Br. 28 n.12 (making the same argument). But in the context of reprieves, the opposite is true. The Oregon Constitution authorizes legislative regulation of, and

Governors in other states – including states with restricted reprieve powers – have established moratoria on executions by issuing reprieves.[19] For example, Governor Brown used a reprieve to establish a moratorium on executions in California in 1961. *See* E. Brown & D. Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* 40 (1989). In 2000, Illinois Governor Ryan imposed a moratorium by reprieve while a commission on capital punishment studied the state's system. *See People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting on unrelated grounds) ("the Governor was forced to invoke his constitutional authority to grant reprieves . . . and declared an indefinite moratorium on future executions."). Maryland Governor Glendening established a moratorium in 2002 "while a study is done on whether the death penalty is meted out in a racially discriminatory way." Associated Press, *Maryland Governor Halts Executions Pending Study*, NEWSDAY, May 10, 2002, at A16 (RA231-32). In 2007, Governor Bredesen issued reprieves in Tennessee to establish a moratorium while the corrections department undertook "a comprehensive review of the manner in which death sentences are administered." RA233-34. Colorado Governor Hickenlooper granted a reprieve in 2013 because of, *inter alia*, "the

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requires the Governor to report his reasons for issuing, reprieves. Or. Const., art V, § 14. The Pennsylvania Constitution provides no such restrictions. Pa. Const., art. IV, § 9.

[19] *See generally Brown v. State*, 264 So.2d 549, 550-51 (Ala. 1971).

arbitrary nature of the death penalty in this State." RA236-39. Washington Governor Inslee imposed a moratorium via reprieve in 2014. RA240. Similarly, in 2000, President Clinton issued a reprieve while the Justice Department studied "the racial and geographic disparities in Federal death penalty prosecutions." RA241.

The District Attorney's premise that Governor Wolf's reprieve "is not a reprieve under *any* known definition" overlooks the widespread practice and understanding of reprieves throughout the United States. Persuasive authority demonstrates that the District Attorney's petition should be denied.

D. The Remaining Arguments of the District Attorney and His Amici Are Unpersuasive

The above discussion amply demonstrates that reprieves are valid regardless of their purpose or duration, and that even if a reprieve must be limited in time and purpose, Governor Wolf's reprieve fits that description. The major premise of the District Attorney's petition is therefore wrong. Other arguments raised by the District Attorney are likewise unavailing.

1. *Morganelli v. Casey* Does Not Govern Here

The District Attorney relies heavily on *Morganelli v. Casey*, 641 A.2d 674 (Pa. Cmwlth. 1994), and claims that "[t]he holding of *Morganelli* is that a reprieve by definition is limited in duration and purpose." DAB 33-34. *Morganelli* held no such thing. *Morganelli* "present[ed] an important question of statutory

interpretation" with respect to Pennsylvania's mandatory warrant statute. 641 A.2d at 675. The question was whether the Governor's duty to issue warrants was discretionary or mandatory, and the court "conclude[d] that the Governor's duty is mandatory" under the statute. *Id*. at 677.

The *Morganelli* court rejected Governor Casey's argument that *failing* to sign an execution warrant was itself an exercise of the reprieve power and instead found that the reprieve power "is *not relevant* until an execution has been scheduled – namely by issuance of a death warrant." *Id*. at 678 (emphasis added). The court thus declined to defer to the Governor's reprieve power where Governor Casey had not taken "the affirmative and definitive action known to the law as a reprieve." *Id*.

Here, unlike in *Morganelli*, a death warrant *was* issued, and Governor Wolf *has taken* "the affirmative and definitive action" of issuing a formal reprieve. This case does *not* raise a "question of statutory interpretation" but rather a constitutional question. And, whereas the Governor's reprieve power was "not relevant" in *Morganelli*, it is dispositive here.

It is true that, in dicta, the *Morganelli* court quoted the definition of a reprieve from the 1979 edition of Black's Law Dictionary, which included the explanation that a reprieve is "ordinarily an act of clemency extended to a prisoner to afford him an opportunity to procure some amelioration of the sentence

imposed." *Id*. *But see Haugen*, 306 P.3d at 598 ("most definitions merely note that a reprieve is temporary and delays execution of the recipient's sentence."). The *Morganelli* court then commented that a reprieve "exists only to stay a death warrant with reference to a particular proceeding," such as an application to the Board of Pardons or a petition for habeas corpus. 641 A.2d at 678. The District Attorney seizes on this dictum and seeks to transform it into a prerequisite for constitutional validity. *See* DAB 27-28, 33-34.

The District Attorney's argument should be rejected. The *Morganelli* court did not address any questions raised by the actual issuance of a reprieve. Accordingly, the *Morganelli* court did not analyze the plain language of the Reprieves Clause, historical precedent, or persuasive authority, as this Court must do here.

Moreover, in the context of this case, it is inconsequential how the 1979 edition of Black's Law Dictionary described the "ordinary" purpose of reprieves.[20] This Court must look to the Reprieves Clause as it was understood in 1790 by the people of Pennsylvania. *See Bruno*, 101 A.3d at 659; *Stilp*, 905 A.2d at 939. The historical practice in 1790 is set forth in detail above and need not be repeated here. It suffices to say that reprieves could be and were issued for purposes other

[20] The 2009 edition of Black's Law Dictionary does not include this description and defines a reprieve simply as "[t]emporary postponement of the carrying out of a criminal sentence, esp. a death sentence."

than formal court or clemency proceedings. Indeed, in 1790, appellate and post-conviction proceedings were exceedingly rare, and formal clemency proceedings did not exist. Black's Law Dictionary in 1979 thus did not purport to describe the "ordinary" purpose of reprieves in 1790, and it should not be read to legitimize constitutional limits that the people did not adopt.

2. The Validity of This Reprieve Is Unaffected by Governor Wolf's Policy of Issuing Reprieves as Part of a Moratorium

Contrary to the arguments of the District Attorney and his amici, a reprieve does not lose its validity where it is issued pursuant to a gubernatorial policy of establishing a temporary moratorium. *See* DAB 19, 26, 33; PDAA Am. Br. at 8, 10, 39. Indeed, in providing a detailed explanation of his reasons for issuing this reprieve, Governor Wolf went well beyond anything the Constitution requires. He also subjected his policy to the only proper forum for review – that of public scrutiny and discussion.[21]

As established above, neither the plain language of the Constitution nor historical precedent supports any limitation to the reprieve power where it is

[21] The moratorium came as no surprise to the public. During his campaign, Wolf consistently announced his intention to establish a moratorium on executions while problems with Pennsylvania's capital punishment system are studied. *See, e.g.*, *Where McCord, McGinty, Schwartz and Wolf Stand*, Associated Press (May 17, 2014). In his televised debate with Governor Corbett on October 8, 2014, Wolf stated that he "would use [ ] reprieves to create a moratorium [and] actually make sure what we are doing is working and working fairly." *See* http://www.c-span.org/video/?321896-1/pennsylvania-governors-debate. Less than a month later, the citizens of Pennsylvania elected Wolf as their Governor.

invoked to establish a moratorium. Governors may issue reprieves for any reason or for no reason at all. *See supra* at 6-24, 40-43. Accordingly, prior Governors in Pennsylvania and nationwide have imposed moratoria on executions by using the reprieve power, even in states like Oregon with more restrained reprieve powers than in Pennsylvania. *See supra* at 45-49. No court has ever interfered with such a moratorium, and the only court to be asked to do so unanimously refused. *See Haugen*, *supra*.

It strains credulity that this Court would begin reviewing press statements in order to adjudicate the validity of a gubernatorial policy. *See* DAB at 15-16 & n.5. A Governor's policy in exercising his clemency powers is checked by his own conscience and by the democratic process, not by the courts. *See Michael*, 56 A.3d at 903; *Cater*, 194 A.2d at 187; *Hester,* 85 Pa. 139. This Court should not embroil itself in a political disagreement between the Governor on one side, and certain district attorneys and Republican legislative leaders on the other. The democratic process is well-suited to resolve their disagreement.

3. The Reprieves Clause Derives from the Royal Clemency Power and Therefore Is Not Subject to Judicial Standards

As part of their challenge to the "putative moratorium power," the District Attorney and his amici argue that this Court should read various limits and

prerequisites into the Reprieves Clause. DAB 19.[22] Their arguments imply that a Governor may not postpone an execution unless and until some judicial standard has been met. This misconstrues the nature of executive clemency.

The reprieve power derives, not from a judicial power, but from the English Crown's clemency power. When the American colonies established independence, they retained the clemency power and delegated it to the executive. *See Cope v. Commonwealth*, 28 Pa. 297, 1857 WL 7377, at *2 (1857) ("The power of the governor, under the constitution, 'to remit fines and forfeitures and grant reprieves and pardons,' is clear; this power is very analogous to that of the king in England."); *see also Hoffa*, 378 F. Supp. at 1231; *Dodrill*, 385 S.E.2d at 250; Smithers at 87; *Clemency in Pennsylvania* at I.29.

The royal reprieve power was *ex mandato regis*, i.e., of the King's mandate or "from the mere pleasure of the Crown." Blackstone Revised, 4 *Commentaries* 394 (RA17). Needless to say, such power was not cabined by any legal standard;

[22] Tellingly, the District Attorney and his amici discern different constitutional limits to the Reprieves Clause. For example, the District Attorney asserts that a reprieve may be granted only to facilitate a formal proceeding "such as a clemency proceeding before the board of pardons, or . . . collateral review." DAB at 28. The PDAA, by contrast, believes that a reprieve may be issued "for a reason that is unique and specific to the individual convict." PDAA Am. Br. at 24. Meanwhile, the GOP Amicus Brief argues that "the vesting of the power to 'reprieve' in the Governor is solely to address those limited circumstances where specific, enumerated evidence . . . arise[s] so late in the process that a board of pardons cannot be convened." GOP Am. Br. at 11. Such inconsistencies are among the perils of fashioning constitutional rules out of whole cloth.

the King's discretion alone controlled. Smithers at 78. The same power now resides in the Office of the Governor. *Id.; see Cope*, 28 Pa. 297, 1857 WL 7377, at *2.

The PDAA Amicus Brief nonetheless quotes from Blackstone's discussion of *judicial* reprieves and argues that the common law limits to judicial reprieves should now apply to gubernatorial reprieves. *See* PDAA Am. Br. at 23-24. Although Blackstone did not analyze royal reprieves, they were well-established at common law. *See* Smithers at 78; *Dodrill*, 385 S.E.2d at 250. Indeed, Blackstone cites Hale's chapter on reprieves, which itself began with a discussion of *ex mandato regis* reprieves. *See* Blackstone, 4 *Commentaries* 387 (citing 2 Hale P. C. 412) (RA10); Hale, 2 *History* 412 (RA20).[23] And Blackstone himself was well aware of royal reprieves, recounting the King's politically savvy use of them in the wake of the Jacobite rebellion. *See* Blackstone, 4 *Commentaries* 392-93.

In short, the District Attorney and his amici argue in favor of importing a judicial standard into the arena of executive reprieves. These arguments misconstrue the source and nature of the Governor's reprieve power.

[23] Subsequent revised versions of Blackstone's *Commentaries* cited Hale's discussion of *ex mandato regis* reprieves as being "the mode in which reprieves are generally granted." *See* Blackstone Revised, 4 *Commentaries on the Laws of England* 394 (1857) (RA17).

4. The 1874 Constitution Did Not Alter the Reprieves Clause

Whereas the PDAA Amicus Brief focuses on Blackstone's discussion of judicial reprieves, the GOP Amicus Brief focuses on delegate comments during the 1872-73 constitutional convention. Despite quoting Woodside's apt account of the convention – "the only important change made in executive authority" concerned the Governor's pardon and commutation powers, GOP Am. Br. at 6 – the GOP Amicus Brief argues that the delegates' debate should be read to sharply limit the Reprieves Clause. *See id*. at 6-11. The argument misapprehends both the nature and the legal relevance of the debate.

The amicus brief recounts that the constitutional amendment as initially proposed would have brought pardons, commutations, *and* reprieves under the purview of (what would later become) the Board of Pardons. *Id*. at 7-9. Before adoption, Delegate Bailey proposed exempting reprieves from the amendment and instead keeping the reprieve power vested solely in the Governor. *Id*. at 9-10. Bailey explained that "there might be a case" where an eleventh-hour reprieve was sought, but the Board would be incapable of acting on it. *Id*. The convention agreed to keep the reprieve power vested solely in the Governor, while creating a Board to share the executive authority for issuing pardons and commutations. *Id*. at 10; *see also supra* at 19-21. Thereafter, the Pennsylvania voters ratified the amendment, and the Reprieves Clause remained as adopted in 1790.

From this history, the GOP Amicus Brief concludes:

> [T]he debates make clear [that] the vesting of the power to 'reprieve' in the Governor is *solely* to address those limited circumstances where specific, enumerated evidence of innocence or other extrinsic mitigating factors concerning an identified individual arise so late in the process that a board of pardons cannot be convened.

GOP Am. Br. at 11 (emphasis added). But Delegate Bailey never suggested that *only* eleventh-hour reprieves were authorized under the Constitution.[24] Rather, he observed that the Board may be poorly suited to issue that particular type of emergency reprieve. In other words, Delegate Bailey said nothing about the *scope* of the reprieve power; his concern was with *who* could best exercise it.

Even assuming that Bailey believed reprieves should be limited to eleventh-hour emergency reprieves, his view would have no effect on the Reprieves Clause. Constitutional provisions are interpreted according to the understanding of the citizenry that voted to ratify them. *Bruno*, 101 A.3d at 659; *Stilp*, 905 A.2d at 939. The 1874 Constitution did not change the Reprieves Clause, and no principle of law permits a constitutional provision to be overruled or amended *sub silentio*. Lest there be any doubt, Governors in the wake of the 1874 constitutional amendments continued to grant reprieves for a variety of reasons and durations, consistent with the earlier practice. *See supra* at 22-25.

[24] Had Bailey made such an argument, former Governor Curtin, who had issued numerous reprieves for a variety of reasons, *see supra* at 18-19, surely would have disagreed. *See 1872-73 Debates*, Vol. II at 353-55.

CONCLUSION

For the better part of a millennium, Anglo American law has upheld the executive's power to bestow mercy on persons sentenced to death. This Court has respected the clemency power for nearly three centuries. It should continue to do so here.

To reject the District Attorney's petition, this Court need not choose between the conflicting policies advocated by the Governor and the Philadelphia District Attorney. That would accord with neither the Court's role nor its expertise. The Court should merely recognize that the Governor has exercised his unilateral reprieve power, and dispense with the petition on that ground.

To justify interference with the Governor's reprieve power, the District Attorney must clearly establish his right to relief. The District Attorney has not come close to meeting his burden.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

Undersigned counsel hereby certifies that the foregoing *Brief of Respondent Terrance Williams* complies with 14,000 word limit of Pa.R.A.P. 2135 in that the brief contains 13,717 words, as calculated by the word processing system used to prepare the brief.

/s/ Shawn Nolan
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CERTIFICATE OF SERVICE

I, Shawn Nolan, hereby certify that on this 17th day of June, 2015, I served the above *Brief of Respondent Terrance Williams* upon the following persons by United States First Class Mail, postage prepaid, and electronically:

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