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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 14 EM 2015

COMMONWEALTH OF PENNSYLVANIA
Petitioner

V.

TERRANCE WILLIAMS

TOM WOLF, GOVERNOR OF THE
COMMONWEALTH OF PENNSYLVANIA
Respondents

COMMONWEALTH'S BRIEF AND REPRODUCED RECORD

King's Bench proceeding under Pa. Const. Art. V, § 2 and Pa. Const. Sched. Art. V, § 1 regarding the Governor's moratorium and alleged reprieve issued to bar execution of the capital sentence imposed by the Court Of Common Pleas Of Philadelphia County at CP-51-CR-0823601-1984.

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Reproduced Record:

[There is no record in the sense of appellate review; this case does not involve proceedings in an inferior court, but the legitimacy of conduct of the executive branch of government. The following documents, however, have been published by the Governor, other Pennsylvania government agencies (including the General Assembly), or the government of the United States, and are relevant to these proceedings]

Governor's order of February 13, 2015

Governor's Death Penalty Moratorium Declaration, February 13, 2015

Governor's press release of February 13, 2015 – this pdf is adapted from the version that may be viewed at the Governor's official website:
http://www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid=1566

Pennsylvania Department of Corrections Position Paper

Senate Resolution 6 of 2011

House Resolution 143, Session of 2015

Steven Duffey v. Commissioner, Pennsylvania Department of Corrections,
no. 12-9004, order of the United States Court of Appeals for the
Third Circuit, February 24, 2015

Fahy v. Commissioner, Pennsylvania Department of Corrections,
nos. 14-9002 & 14-9004, order of the United States Court of Appeals for the
Third Circuit, March 2, 2015

Commonwealth v. Newell, CP-51-CR-0002642-2013
motion and order of March 12, 2015

TABLE OF CITATIONS

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Pa. Const. Art. V, § 2 (investing "supreme judicial power" in the Supreme Court) and Pa. Const. Sched. Art. V, § 1 (Supreme Court continues to have jurisdiction "now vested in the present Supreme Court"); *see* 42 Pa.C.S. § 502 (recognizing King's Bench power as constituted on and before May 22, 1722).

ORDER IN QUESTION

The Governor's order, styled as a reprieve, of February 13, 2015.

SCOPE AND STANDARD OF REVIEW

This Court's scope and standard of King's Bench review concerning the proper construction of the state constitution, as well as its own jurisdiction, is plenary and de novo. *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014); *Commonwealth v. Cromwell Township,* 32 A.3d 639, 646 (Pa. 2011).

STATEMENT OF QUESTION PRESENTED

Does the Governor have constitutional authority to unilaterally, indefinitely, and categorically suspend death sentences?

STATEMENT OF THE CASE

The Governor has imposed a unilateral and categorical suspension of capital sentences: in his own words, a moratorium. Because the Governor's moratorium negates a class of criminal judgments without authority, it violates the principle of separation of powers, as well as the constitutional mandates that he may not grant unilateral clemency; may not suspend the laws; and must faithfully execute the laws. King's Bench review is warranted on the part of this Court, as the repository of the supreme judicial power, to overturn the Governor's attempt to exercise a purported power that is withheld by, and violates, the Constitution.

Facts and procedural history

During the late afternoon on June 11, 1984, defendant and his close friend Marc Draper, both eighteen years old, were gambling near Mount Pleasant Avenue and Lincoln Drive in Philadelphia and lost their money. Defendant told Draper that he knew a man who lived nearby from whom he could extort money by threatening to tell his wife he was a homosexual. Leaving Draper nearby, defendant went to the home of fifty-six year-old Amos Norwood, and later returned with ten dollars. This money too was soon gambled away. A short time later, Mr. Norwood drove by in his blue Chrysler LeBaron. Defendant exclaimed, "There goes my uncle," went up to the car, and got in. The car drove off, but returned minutes later. Defendant got out and advised Draper, "Play it like you going home, like you want a ride home," so that they could "take some money" from the victim (N.T. 1/14/86, 68-70; N.T. 1/22/86, 664-72).

Defendant told Mr. Norwood that Draper was his cousin who needed a ride home. The two got in the car and Draper began to provide false directions to his "home." The conspirators directed their victim to a dark secluded area adjacent to Ivy Hill Cemetery. There, they grabbed Mr. Norwood – at the time of his death the victim weighed just 130 pounds (N.T. 1/24/86, 1066) – and ordered him to be quiet. They then led the victim into the cemetery and ordered him to lie facedown near a tombstone. A quick search of the victim's person revealed twenty dollars hidden in his sock. With the victim pleading for his life, defendant and Draper removed his clothing and tied him up with it; his hands were bound behind his back with his shirt, his legs were bound together with his pants, and his socks were jammed into his mouth. Draper said "Let's get out of here," but defendant refused, saying, "We're getting ready to do something." As defendant went to the car, Draper kept watch over the bound victim and taunted him for "lik[ing] boys" and being a homosexual (N.T. 1/22/86, 672-76; N.T. 1/23/86, 812-15).

Defendant returned with a tire iron and a socket wrench. He gave the wrench to Draper, who protested, but defendant angrily declared, "I'm already in a lot of trouble. I don't need no more trouble." Defendant then repeatedly hit the victim on the head with the tire iron, ordering Draper to strike him as well, because he was "in this." Draper complied. Depositing the body in a pool of blood between two tombstones, the men left in the victim's blue Chrysler LeBaron (N.T. 1/22/86, 676-82).

The assailants put the contents of the LeBaron's glove compartment in a

garbage bag and threw it in a supermarket trash bin. Defendant put on a blue jacket he found in the trunk and expressed concern that he may have left fingerprints on the body. Draper then departed for work (N.T. 1/22/86, 682-87).

Defendant went to downtown Philadelphia to meet his friend, Ronald Rucker. Both Rucker and an acquaintance, Mark Livermore, noted that defendant was driving a blue Chrysler LeBaron later identified as that of Mr. Norwood (N.T. 1/14/86, 67-68; N.T. 1/15/86, 368). Defendant seemed nervous or excited to both men. He took Rucker aside and announced that he had just "offed" a guy named Amos. Rucker noted sprinkles of red on defendant's shoes that defendant explained were bloodstains. Defendant subsequently told Rucker's sister, Renee, that he planned to get some gas from a gas station to return to the scene of the crime and burn the victim's body to render it unidentifiable (N.T. 1/15/86, 357-68; N.T. 1/16/86, 542-54, 570-82; N.T. 1/31/86, 1574).

The next morning, June 12, 1984, at 7:00 a.m., defendant drove the victim's car to meet Draper when he finished work, and said he had "taken care" of the body by returning to the cemetery, soaking it in gasoline, and setting it on fire. Using the victim's car, the two men later returned to the supermarket trash bin and retrieved the contents of the glove compartment. They found a Mastercard and an AT & T telephone card, both in the victim's name. Defendant told Draper that he knew someone, Ronald Rucker, who could tell them how to use the cards. He and Draper then went to see Rucker, who had learned how to verify a credit card from his employment in a restaurant. Defendant gave the Mastercard, bearing the name "Amos

Norwood," to Rucker, who confirmed that the card was usable. Defendant then suggested that they all go to Atlantic City. While in Atlantic City, Draper told Rucker, in defendant's presence, that he and defendant had beaten the victim at the cemetery and that Mr. Norwood had begged for his life (N.T. 1/15/86, 370-90; N.T. 1/22/86, 687-91, 702; N.T. 1/31/86, 1556-62). About a week after the murder, Ronald Rucker told an acquaintance that defendant had confessed to him that he had committed the victim's murder, but that he was afraid to go to the police (N.T. 1/31/86, 1529-32, 1544-45, 1579-80).

Defendant, Draper and Rucker drove to Atlantic City in the victim's Chrysler. There, defendant slipped away from his companions and secured two cash advances on the victim's credit card of $100 each. While at the casinos, Rucker used the AT & T telephone card to make a telephone call. Upon his return to Philadelphia the next day, June 13, 1984, defendant again used the victim's Mastercard to buy two gold chains from a jewelry store on Walnut Street (N.T. 1/14/86, 79-82, 95-96; N.T. 1/15/86, 376-83; N.T. 1/16/86, 597-605; N.T. 1/22/86, 691-705; N.T. 1/23/86, 869-88; N.T. 1/24/86, 931-39).

On June 14, 1984, at approximately 6:30 p.m., a passerby discovered the charred remains of Amos Norwood's body lying between two tombstones. The body was lying on its back; its hands were tied behind its back and an object was protruding from the mouth as if something had been stuffed in it. Despite the burning and advanced decomposition, it was possible to identify the body from dental records. The victim's cause of death was determined to be multiple blunt force injuries to the

skull (N.T. 1/14/86, 180-85; N.T. 1/15/86, 238-42, 261-65, 268-70, 288, 294; N.T. 1/24/86, 1060-75).

Tracing the victim's telephone card led the police to Ronald Rucker and his sister, Renee, to whom Rucker had given the card. Before Rucker had a chance to speak to police, however, defendant contacted him and denied involvement with the victim's murder, claiming that the real killers were "Ramos Warmstead" (a name defendant invented) and Marc Draper. Defendant also told Renee Rucker to tell police that she had bought the AT & T credit card off an individual named "Ramos." On July 18 and July 19, 1984, Ronald Rucker gave two statements to police, incriminating defendant and Draper in the victim's murder (N.T. 1/15/86, 391-97; N.T. 1/16/86, 543-46; N.T. 1/24/86, 983-85).

As a result of Rucker's statement police arrested Draper on July 20, 1984 and charged him with homicide. Draper gave a statement detailing his own role and defendant's role in the victim's murder. That same day, police secured warrants to arrest defendant and search his residence, where they recovered a blue jacket, later identified as belonging to the victim, from a box in defendant's bedroom. Defendant had attempted to flee to California, but returned under a false name. Police ultimately arrested him at an attorney's office on Chestnut Street on July 23, 1984 (N.T. 1/15/86, 253-70, 396-408; N.T. 1/16/86, 545-46; N.T. 1/22/86, 706; N.T. 1/24/86, 979-91, 1007-10, 1051-52; 1060-74; N.T. 1/27/86, 1216-17, 1267).

In prison Draper was kept in protective custody and ordered to be held separately from defendant. Nevertheless, defendant managed to send Draper a series

of four letters, urging him to retract his prior statement and instead study and adopt the exclupatory "story" defendant gave in the letters. Draper turned the letters over to the Commonwealth (N.T. 1/22/86, 707-15, 726-55; N.T. 1/23/86, 842-47). On August 16, 1984, Draper entered into an agreement with the Commonwealth stating that if he testified truthfully he would be allowed to plead guilty to second degree murder, robbery and conspiracy in exchange for a life sentence, with additional charges being nolle prossed and a recommendation for a concurrent term of five to ten years for the conspiracy charge.

Commencing on January 14, 1986, defendant was tried by a jury before the Honorable David N. Savitt. Draper testified for the Commonwealth, detailing the manner in which he and defendant had lured the victim to the cemetery, robbed and bound him, and then beat him to death with a tire iron and wrench. Additionally, Draper testified to the events occurring after the murder, including defendant's confession to torching the victim's body, his use of the victim's stolen car and credit cards, and his letters attempting to convince Draper to lie for him at trial. Draper also testified to the terms of his plea agreement (N.T. 1/22/86, 660-63, 777-78). His testimony was corroborated by that of (inter alia) Ronald Rucker and Renee Rucker, that defendant had admitted killing the victim and burning his body. Ronald Rucker also testified to defendant's blood-splattered shoes, and police testified regarding the recovery of the victim's jacket from defendant's bedroom. Moreover, the four letters that defendant wrote to Draper, as well as the evidence regarding defendant's use of

the victim's Mastercard and AT & T phone card, were presented at trial.[1]

Defendant took the stand in his own defense and claimed under oath that Draper and another individual, one Michael Hopkins – a mutual friend who was conveniently dead – committed the murder (N.T. 1/27/86, 1175-1237, 1240-1301). In addition to claiming that he was elsewhere during the murder and had no role in it, defendant insisted that he did not even know Amos Norwood, had never met him before that night, "didn't know him personally," knew nothing about him, and had no reason to be angry with him or to wish him harm (N.T. 1/27/86, 1253; N.T. 1/30/86, 1376).

Also during the defense case, defendant introduced a pair of shoes with red spotting, which he identified as ketchup stains, and claimed these were the shoes he had been wearing when he saw Ronald Rucker on June 11, 1984. On rebuttal, Mr. Rucker testified that the shoes defendant offered in evidence were similar, but were not the shoes he had worn on June 11, when defendant had told him his shoes were stained with blood. Rucker also drew a diagram of the bloodstains he had seen on June 11, which did not match the stains on defendant's phony exhibit (N.T. 1/27/86, 1190-1191; N.T. 1/31/86, 1550-1555, 1573-1575).

On February 3, 1986, the jury convicted defendant of first degree murder,

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[1] Defendant's authorship of the letters was confirmed by expert handwriting analysis (N.T. 1/23/86, 769-76, 878-91). His initial "story" proposed blaming the murder on one Kevin Kershaw and Ronald Rucker. After the preliminary hearing defendant learned that Rucker could prove he was at work at the time of the murder, and so his next letter to Draper altered the story accordingly. The tone of the letters became increasingly angry as Draper failed to cooperate (N.T. 1/22/86, 726-39, 749-52).

robbery and criminal conspiracy. In the Penalty Phase the Commonwealth presented two aggravating circumstances, that defendant committed the instant murder while in the perpetration of another felony (robbery), and that he had a significant history of violent felony convictions, specifically, a prior home invasion-robbery, as well as a prior murder. Defendant presented mitigating evidence that portrayed him as a promising young man for whom the instant crime was an aberration. The jury found both aggravating circumstances, and no mitigating circumstances.[2]

This Court affirmed the judgments of sentence on direct appeal on February 8, 1990. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990). Defendant did not seek certiorari. He filed a first PCRA petition on March 24, 1995. The PCRA court denied the petition on October 20, 1998. This Court affirmed that order on December 22, 2004. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004). Defendant filed a second, untimely PCRA petition on February 18, 2005, which the court dismissed as untimely on September 27, 2006. This Court affirmed on September 27, 2006. *Commonwealth v. Williams*, 909 A.2d 297 (Pa. 2006).

On December 19, 2005, defendant filed a federal habeas corpus petition. The federal district court denied the petition on May 7, 2007. *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa., filed May 8, 2007). The Court of Appeals affirmed that ruling on March 9, 2011. *Williams v. Beard*, 637 F.3d 195 (3d Cir. 2011).

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[2] The jury in the sentencing phase heard evidence of defendant's January 1984 murder of Herbert Hamilton, as well as his violent home invasion burglary-robbery against Don and Hilda Dorfman on Christmas Eve 1982. Defendant committed the instant murder of Amos Norwood *while on bail awaiting sentencing* for that burglary.

Defendant filed a certiorari petition that was denied on June 29, 2012.[3]

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[3] Although lengthy, the Third Circuit's account of defendant's chilling prior criminal career, which his recycled plea of sexual abuse was supposed to have counterbalanced, is worthy of recitation:

> The story of Terrance Williams is reminiscent of Dr. Jekyll and Mr. Hyde. As Dr. Jekyll, Williams was a local football star, the quarterback of the Germantown High School team that won the Philadelphia Public League championship in 1982. He was presented with the sportsman of the year award by the Philadelphia Board of Sports Officials, and he was recruited by at least eight different collegiate institutions. Nearly all of Williams' coaches and teachers described him as mild-mannered, law-abiding, and honest. In 1983, Williams graduated from Germantown High and matriculated to Cheney State College in Philadelphia. In the estimation of one of his instructors, Williams was "highly respected and admired by his teacher[s] and all of his classmates." He was "[n]ot only . . . the star of the school's football team, but [was] also . . . a classmate and student who showed respect for others and accepted his popularity with modesty."
>
> But apparently Terrance Williams had a sinister side. In the dead of night on Christmas Eve in 1982, a sixteen-year-old Williams broke into the Philadelphia residence of Don and Hilda Dorfman, aged sixty-nine and sixty-four, respectively. He entered Mrs. Dorfman's bedroom, wakened her by pressing a .22 caliber Winchester rifle to her neck, and then pulled a bedsheet over her face. When Mrs. Dorfman attempted to remove the sheet, Williams ordered her to stop "or her fucking head would be blown off." Williams then fired the rifle three times into the wall to show the victims he was serious. Williams and an accomplice ransacked the home before making off with cash, jewelry, and the Dorfmans' automobile.
>
> It was not long before Williams was apprehended and criminally charged for robbing and terrorizing the Dorfmans. Although his age placed him under the jurisdiction of the juvenile court, the Commonwealth moved to certify Williams as an adult. In an attempt to avoid certification, Williams produced no fewer than eight witnesses who attested to his stable home life, loving parents, and supportive extended family. Every character witness interviewed by the Commonwealth believed Williams to be innocent. Even his own attorney would testify years later, "I didn't feel in my own mind of

(continued...)

[3](...continued)
mind[s] and heart of hearts that [Williams] was involved in the matter." Such was the nature of Williams' dual existence.

In spite of the efforts to avoid it, Williams was certified to stand trial as an adult. He was released pending trial, however, and in January of 1984, he embarked in earnest on a crime spree that would continue for the better part of six months. Williams' next victim was a fifty-one-year-old man named Herbert Hamilton, an individual from whom Williams had been receiving money in exchange for sex. This relationship, like much else in Williams' life, was kept hidden from most who knew him. Hamilton apparently threatened to publicize the secret, so Williams took action.

On January 26, 1984, Williams called on Hamilton at his home. The two eventually retired to the bedroom and, as they proceeded toward the bed, Williams withdrew a concealed ten-inch butcher knife and attempted to stab Hamilton. Hamilton fought back, wrestled the knife from Williams, and stabbed Williams in the chest. Hamilton then dropped the knife and ran into the kitchen to telephone for assistance. Meanwhile, Williams retrieved a nearby baseball bat, chased after Hamilton, and beat him with the bat until Hamilton was bloody and severely wounded. Williams then recovered the butcher knife and stabbed Hamilton approximately twenty times—twice in the head, ten times in the back, once in the neck, four times in the chest, and once each in the abdomen, arm, and thumb. Finally, Williams drove the butcher knife through the back of Hamilton's neck until it protruded through the other side. He then doused Hamilton's body with kerosene and unsuccessfully attempted to set fire to it. When police officers later entered the apartment, they found Hamilton's kerosene-soaked body with the knife jammed through his neck; on the bathroom mirror, the phrase "I loved you" was scrawled in toothpaste. Williams was then seventeen.

The Hamilton murder remained unsolved at the time that Williams went to trial for the Dorfman robbery in February of 1984. Williams maintained his innocence of the robbery throughout trial. He and his counsel mustered at least nine character witnesses who testified that Williams was a peaceful, law-abiding, and honest young man. The jury was not persuaded. They returned a conviction for two counts of robbery as felonies of the first degree, one count of burglary, one count of simple assault, one count of unauthorized use of an automobile, and one count

(continued...)

On March 9, 2012, defendant filed an untimely third PCRA petition. The PCRA court, acting without jurisdiction, issued a stay of the then-pending warrant of execution which was scheduled for October 2013.

The ensuing litigation consumed over a year, during which defendant sought a recommendation of pardon or commutation from the Board of Pardons. The Board denied that petition.

On December 15, 2014, this Court reversed the PCRA ruling, holding that defendant's latest claim was "built on perjury." *Commonwealth v. Williams*, 105 A.3d 1234, 1244 (Pa. 2014).

On January 13, 2015, Governor Tom Corbett issued a warrant scheduling defendant's execution for March 4, 2015.

Governor Tom Wolf was inaugurated on January 20, 2015. On February 13, 2015, as the new and current Governor, he issued an order of reprieve for defendant, the operative portion of which stated that his execution would be barred unless and until undefined concerns were "satisfactorily addressed":

> NOW THEREFORE, I, Tom Wolf, as Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me under the Constitution and the Laws of the Commonwealth, do hereby grant 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.

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[3](...continued)
of conspiracy. Williams was nevertheless released pending sentencing. Tragically, his crime spree continued.

Williams v. Beard, 637 F.3d at 198-200.

Simultaneously the Governor published a formal, five-page declaration regarding this order – the Death Penalty Moratorium Declaration – stating that he would not permit a death penalty to operate in Pennsylvania unless the criminal justice process could be made "infallible."[4]

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[4] The declaration is published on (inter alia) the Governor's website: http://www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid=1566; *link to* http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration

While the wisdom, as opposed to the constitutional legitimacy, of the Governor's moratorium is irrelevant, the Commonwealth regrets to note that this declaration cites and relies on sources and reasoning that are misleading or false.

The Governor cites the so-called "innocence" list of an anti-death-penalty interest group, the "Death Penalty Information Center." But the list is sheer propaganda. *See* Joshua Marquis, *Innocence in Capital Sentencing: The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 508 (Winter 2005) ("To call someone 'innocent' when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been 'exonerated'"). It includes, for example, the notorious murderer Jay Smith, who was entirely guilty but released due to prosecutorial error. *See Smith v. Holtz*, 210 F.3d 186, 189 (3d Cir. 2000) ("Our confidence in Smith's convictions for the murder of Suzan Reinert and her two children is not the least bit diminished"). Other examples are William Nieves and Thomas Kimball, convicted killers who were granted new trials due to procedural errors by their own lawyers and found not guilty on retrial. Such a verdict does not pronounce "innocence" but only that guilt was not proven beyond a reasonable doubt. Similarly, Nicholas Yarris was convicted of rape and murder in 1983. In 1985 he escaped to Florida where he committed several new crimes including armed robbery. In 2003 DNA testing excluded Yarris as the source of biological material found on and near the murder victim. This gave Yarris a new trial, not "innocence," since even in his own accounts he admitted committing the crime with an accomplice. Because prosecutors had portrayed Yarris as a lone actor, they elected not to retry him without new evidence. Yarris was never "exonerated."

Another embarrassing error is the Governor's assertion that "one third of the African Americans on death row from Philadelphia would not have received the death penalty were they not African American" (Moratorium Declaration, p.3). This false accusation relies on the discredited "Baldus Study," which has been widely

(continued...)

The Governor also published a press release announcing a "moratorium" on capital punishment in Pennsylvania and stating that the purported reprieve in this case is merely the "first step" in "establishing an effective moratorium":

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[4](...continued)
recognized as unreliable and methodologically defective beginning as long ago as 1985. Professor Baldus claims to control for subjective variables such as culpability and in this manner attributes capital sentences to suppose racism. As the en banc 11th Circuit explained, the Baldus study:

> ... ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion.

McCleskey v. Kemp, 753 F.2d 877, 899 (11th Cir.1985) (en banc).

In 2004 Professor Baldus testified in a Philadelphia capital case, *Commonwealth v. Arrington*, CP-51-CR-0812071-1998, *aff'd Commonwealth v. Arrington*, 86 A.3d 831 (Pa. 2014), and admitted that his study actually *could not say* that racial discrimination was the determinative factor in capital sentencing in Philadelphia. He instead claimed to discern that racial animus *may* influence jurors in capital cases involving "low levels and medium levels of culpability" (N.T. 12/13/04, 144). But there is no objective definition of "low to medium" culpability, no capital case of "low to medium" culpability has ever been identified, and it is simply ridiculous to claim that any first degree murder with aggravating circumstances can ever be a matter of "low to medium culpability."

Finally, the Governor finds fault with the Pennsylvania justice system on the ground that some executions have been delayed "for more than three decades." Apparently the Governor is unaware that these delays result almost exclusively from legal proceedings initiated by the offenders themselves, in both state and federal courts, in an effort to avoid their sentences. That he cites these offender-sought delays as a reason for his unilateral imposition of even greater delay is at best self-contradicting.

> **Today, Governor Tom Wolf announced a moratorium** on the death penalty in Pennsylvania that will remain in effect until the governor has received and reviewed the forthcoming report of the Pennsylvania Task Force and Advisory Commission on Capital Punishment, established under Senate Resolution 6 of 2011, and there is an opportunity to address all concerns satisfactorily.
>
> "Today's action comes after significant consideration and reflection," said Governor Wolf. "This **moratorium** is in no way an expression of sympathy for the guilty on death row, all of whom have been convicted of committing heinous crimes. This decision is based on a flawed system that has been proven to be an endless cycle of court proceedings as well as ineffective, unjust, and expensive. Since the reinstatement of the death penalty, 150 people have been exonerated from death row nationwide, including six men in Pennsylvania. Recognizing the seriousness of these concerns, the Senate established the bipartisan Pennsylvania Task Force and Advisory Commission to conduct a study of the effectiveness of capital punishment in Pennsylvania. Today's moratorium will remain in effect until this commission has produced its recommendation and all concerns are addressed satisfactorily."
>
> "This morning, Gov. Wolf took the **first step in placing a moratorium on the death penalty** by granting a temporary reprieve to inmate Terrance Williams, who was scheduled to be executed on March 4, 2015. Governor Wolf will grant a reprieve – not a commutation – in each future instance in which an execution for a death row inmate is scheduled, **establishing an effective moratorium** on the death penalty in Pennsylvania. For death row inmates, the conditions and confinement will not change."

(Emphasis added).[5]

Other units of Pennsylvania government have published their own official acknowledgement that the Governor has imposed a moratorium. E.g., February 2015

[5] While the Governor before this Court will undoubtedly acknowledge his own public acts and statements that he himself has published, this Court may also take judicial notice thereof under Pa.R.E. 201 (permitting, at any time and in any proceeding, judicial notice of facts not subject to reasonable dispute, generally known within the jurisdiction or that can readily be determined from sources that cannot reasonably be questioned).

Position Paper, *Pennsylvania Department of Corrections* ("On February 13, 2015, Governor Wolf announced a moratorium on the death penalty"; reprieve in this case was "the first step in the moratorium"); *Pennsylvania Office Of The Victim Advocate* ("On Friday, February 13, Governor Tom Wolf announced a moratorium on the death penalty in Pennsylvania"). On March 4, 2015, 44 members of the General Assembly introduced a resolution to condemn the Governor's "unconstitutional action" in "declaring a moratorium on capital punishment in Pennsylvania."[6]

The Governor's declaration of a moratorium has also been officially noted by the government of the United States, via the Court of Appeals for the Third Circuit (*Steven Duffey v. Commissioner, Pennsylvania Department of Corrections*, no. 12-9004, order of February 24, 2015 ["Governor Wolf announced a moratorium on executions within the Commonwealth of Pennsylvania"]; *Fahy v. Commissioner, Pennsylvania Department of Corrections*, nos. 14-9002 & 14-9004, order of March 2, 2015 [same]).

On February 18, 2015, with defendant's scheduled execution two weeks away, the Commonwealth filed in this Court an emergency petition for extraordinary relief

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[6] Respectively:

https://www.google.com/url?q=http://www.cor.pa.gov/Administration/General%2520Information/Documents/Position%2520Statement.doc&sa=U&ei=N3cJVYXHEobIsQTv9YCQAQ&ved=0CAoQFjAD&client=internal-uds-cse&usg=AFQjCNFJNE2FL6sBKTJT4zBRjl1s3Mj_RQ;

http://www.ova.pa.gov/Pages/default.aspx;

House Resolution 143, Session of 2015

under this Court's King's Bench power. The petition contended that the Governor's alleged reprieve is not, in substance, a reprieve, but rather an attempted exercise of a nonexistent moratorium power; and that this action impermissibly negates judgments of the judicial branch of government and violates the Governor's constitutional obligation to faithfully execute the laws of the Commonwealth.

On March 3, 2015, this Court granted the petition for review, and ordered briefing on the propriety of exercising King's Bench jurisdiction and the merits of the issues raised in the petition.

SUMMARY OF ARGUMENT

This Court should review and overturn the Governor's exercise of a putative moratorium power. This supposed power is withheld by the Constitution, and its illegal exercise violates Article I, § 12, Article IV, § 2, Article IV, § 9, and the doctrine of separation of powers.

The moratorium cannot be justified as an exercise of the reprieve power. A moratorium is not a reprieve, and calling it one does not make it one. The Governor's action in this case does not meet the definition of reprieve established by binding Pennsylvania precedent that he has decided to ignore, or even the definition that he himself cites. Indeed, a "reprieve" that lasts indefinitely is not a reprieve under *any* known definition. In reality the moratorium is a permanent commutation, because the terminating event is the arbitrary fiat of the Governor. A sentence unilaterally barred by the Governor until he decides to allow it, if he ever does, has been commuted without the consent of the Board of Pardons, in direct violation of (inter alia) Article IV, § 9.

If the Governor can appoint to himself a power to review and reverse a sentence in capital cases, he can apply this same power in any and every kind of criminal case. Legitimizing such an assumption of executive power withheld by the Constitution would also invite the invention of other new, equally unconstitutional powers as yet unknown. In any case, the Constitution clearly does not permit the Governor to wield powers expressly assigned to the judicial branch.

This Court should correct this constitutional violation.

ARGUMENT

I. King's Bench review is warranted where the chief executive unconstitutionally purports to wield a nonexistent power to negate a class of criminal judgments.

> 'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'
>
> – Lewis Carroll, *Through The Looking Glass*

The question is whether the Governor of Pennsylvania may impose a "moratorium" and effectively reverse criminal penalties by deeming it a "reprieve." The Governor has stated that his power to grant reprieves is "unconditional" and "accords to [him] alone a check" on the legislature and the judiciary (Response of the Governor to Emergency Petition for Extraordinary Relief, p. 20). It is therefore essential to determine whether a moratorium really is a "reprieve" that the Governor may unilaterally exercise as a check on – and indeed a substitute for – judicial review. This Court should exercise its King's Bench power to reach this constitutionally important question.

The King's Bench power clearly allows such review. It confers "the power generally to minister justice for all persons and to exercise the powers of the Court of King's Bench, Common Pleas and Exchequer, at Westminister, or any of them, could or might do on May 22, 1722." 42 Pa.C.S. § 502 (derived from Judiciary Act of May 22, 1722, 1 Smith's Law 131), and has continued through various enactments

and revisions of the Pennsylvania Constitution. Pa. Const. Art. V, § 2 (investing "supreme judicial power" in the Supreme Court); Pa. Const. Sched. Art. V, § 1 (Supreme Court continues to have jurisdiction "now vested in the present Supreme Court"). *In re Bruno*, 101 A.3d 635, 665 (Pa. 2014).[7] The King's Bench power comprises "every judicial power that the people of the Commonwealth can bestow," *Stander v. Kelly*, 250 A.2d 474, 484 (Pa. 1969) (Roberts, J., with Jones and Pomeroy, J.J., concurring), and is "a trust for the people of Pennsylvania[.]" *Chase v. Miller*, 41 Pa. 403, 411 (1862). Among other things it permits review of the constitutional validity of an exercise of gubernatorial power. *E.g., Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57 (Pa. 1971) (King's Bench review of validity of Governor's appointment of judges). Under its King's Bench power this Court may assume plenary jurisdiction over a matter even where no action is pending before any lower court. *Id.; Bruno*, 101 A.3d at 669.

This Court therefore has discretion to assume jurisdiction. It will generally exercise that discretion "when the issue requires timely intervention by the court of last resort of the Commonwealth and is one of public importance," especially where "delays incident to the ordinary process of law" would have a "deleterious effect upon the public interest." *Id.*, 101 A.3d at 670-671 (citations omitted).

In *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001), this Court explained that while an extraordinary exercise of jurisdiction should be rare, it is

[7] The schedule is a part of the Constitution and it is intended that its provisions "have the same force and effect as those contained in the numbered sections of [Article V]." Pa. Const. Sched. Preamble; *Id.* at n.17.

properly invoked in a capital case where, as here, an imminent execution was scheduled; the Commonwealth can clearly demonstrate its right; ordinary channels of review are inadequate and time is short; the matter is of great public importance; and judicial resources will be conserved and confusion of lower courts avoided on recurring questions.[8] These elements are present here.

This case is important, first, because the Governor's action calls this Court's own authority into question. He has deemed the reprieve power an "unconditional" gubernatorial check on the authority of the judiciary (Response of the Governor to Emergency Petition for Extraordinary Relief, p. 20). He also construes "reprieve" to include a power to impose a unilateral moratorium on a class of criminal sentences that is unlimited by time or purpose. This exercise of supposedly unlimited executive authority implicates several express constitutional limitations, and also, as shown in more detail below, the principles of judicial review and separation of powers.

The importance of this proceeding is further reflected in the constitutional provisions involved. Article I, § 12 forbids the chief executive from suspending laws enacted by the General Assembly ("No power suspending laws shall be exercised unless by the Legislature or by its authority"); and it is the duty and obligation of the chief executive to "take care that the laws be faithfully executed" under Article IV, § 2. Article IV, § 9 permits unilateral reprieves, but it forbids unilateral pardons or

[8] *Morris* concerned extraordinary jurisdiction under 42 Pa.C.S. § 726, by which this Court may remove a matter pending before a lower court. The discretionary considerations are similar, except the King's Bench power may be exercised when no matter is pending in an inferior tribunal. *In Re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997).

commutations, and includes no "moratorium" power. The Governor, in contrast, has stated that the alleged reprieve in this case is in fact a "first step" in creating "an effective moratorium" on one kind of criminal sentence (Governor's press release of February 13, 2015).

Where withheld by the Constitution, an executive prerogative to rescind criminal judgments usurps judicial authority. In *Commonwealth v. Sutley*, 378 A.2d 780 (Pa. 1977), the General Assembly passed legislation to require certain drug offenders with final criminal judgments to be granted new, lesser penalties. This Court voided that law as unconstitutional, holding that for the legislature to exercise a power "to alter final judgments" would be "repugnant" to the principle of separation of powers. While the branches of government are subject to "a degree of interdependence and reciprocity," there can be no justification for the other branches, without constitutional authority, to disturb "final judgments of the judicial branch," especially with regard to sentencing, "one of the most critical and important duties vested in the judiciary." *See also Commonwealth v. Halloway*, 42 Pa. 446, 449 (1862) ("Any interference" with a sentence "except by a court of superior jurisdiction, or by the executive power of pardon" would violate separation of powers and "would be highly unconstitutional"). Here the Governor has undertaken the same, equally unauthorized action forbidden to the legislature, in derogation of the exclusive authority of the judicial branch. The principle of separation of power is vital to the proper functioning of constitutional government.

Another important public interest at issue in this case is that the Governor's

exercise of a supposed moratorium power conflicts with finality by effectively imposing an indefinite or permanent negation of final criminal judgments. *Commonwealth v. Sam*, 952 A.2d 565, 575 (Pa. 2008) (finding that important societal interest in finality of judgments in capital cases, which is "essential" to the proper functioning of the criminal laws, was "particularly strong" where delay of over 15 years was excessive and issue involved a ruling that had in essence "stayed th[e] proceedings forever"). The constitutional questions raised here will recur, from case to case, as the Governor's moratorium unfolds. *Commonwealth v. Martorano*, 634 A.2d 1063, 1067 & n.6 (Pa. 1993)(alternative holding; King's Bench review warranted to conserve judicial resources and "avoid further delay" where capital case had been "in the courts since 1984" and issue of whether death penalty remained available on retrial was one of public importance); *accord Commonwealth v. Lang*, 537 A.2d 1361, 1363 n.1 (Pa. 1988) ("in order to conserve judicial resources, speed the criminal trial in this case, and provide guidance for the lower courts as to a question that is likely to recur, we assume jurisdiction of the case pursuant to our King's Bench Powers"). This Court's guidance on the constitutional questions raised here is therefore essential.

Time also remains of the essence. All avenues of due process have been exhausted in this case, including a petition for clemency rejected by the board. The Governor has acknowledged that there is no possibility of a claim of innocence and no doubt as to defendant's guilt (Governor's Death Penalty Moratorium Declaration, p. 1, announcing that the Governor "does not question Williams' guilt"). Defendant's

execution was duly ordered for March 4, 2015. With 19 days remaining the Governor barred the execution, even while deploring delays from the "frustrating pace" of judicial review initiated by capital defendants (Governor's Death Penalty Moratorium Declaration, 2). It therefore appears entirely undisputed that still further delay should not be illegally imposed.

This case concerns all existing and future capital cases in Pennsylvania, and raises fundamental constitutional questions regarding the constitutional scope of the power of the executive branch and the exclusive authority of the judiciary. Direct and collateral appellate review of capital cases is ordinarily in this Court, and, as the repository of the supreme judicial power, it is highly appropriate for this Court to promptly conduct judicial review of constitutionally disputed conduct of the chief executive.

Because this Court's jurisdiction under the King's Bench power is appropriate and sound, it should review the issues presented in this case.

II. The Governor may not impose a moratorium on capital sentences by characterizing his conduct as a reprieve.

A gubernatorial moratorium power is withheld from the chief executive and violates the Constitution in several ways. It defies the constitutional prohibition of unilateral commutation. It contradicts the Governor's duty to faithfully execute the law. It suspends laws enacted by the General Assembly. And it overrides final criminal judgments in violation of the separation of powers.

In his pleadings to this Court the Governor has not referenced his moratorium, nor claimed that a moratorium is really a variety of reprieve. What he has instead asserted is that, in this case, he has merely "exercised his constitutional power of reprieve" (Response of the Governor to Emergency Petition for Extraordinary Relief, p. 3). But to the extent he would justify the moratorium as a reprieve or series of reprieves, it follows that, to be lawful, it must actually *be* a reprieve. Otherwise it would facially violate (inter alia) Article IV, § 9 of the Constitution, because other forms of clemency (other than remission of fines and forfeitures) require consent of the Board of Pardons.[9] An act of clemency does not constitute a reprieve merely

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[9] Pa. Const. article IV § 9 states, in pertinent part:

> (a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in

(continued...)

because it is labeled as such. It must be one in substance, and not merely in name.[10]

In *Morganelli v. Casey*, 641 A.2d 674, 678 (Pa. Cmwlth. 1994) (en banc), the chief executive similarly contended that he had a constitutional power to refuse to issue warrants of execution as an exercise of the reprieve power. In rejecting that contention the Commonwealth Court concluded that such conduct did not constitute, and could not be justified as, a reprieve (emphasis added):

> As defined in Black's Law Dictionary, 1170 (5th Ed.1979), a "reprieve" is:
>
> > Temporary relief from or the postponement of execution of criminal punishment or sentence. **It does no more than stay the execution of a sentence for a time**, and is ordinarily an act of clemency extended to a prisoner **to afford him an opportunity to procure some amelioration of the sentence imposed**.
>
> Thus, the power to reprieve also resides *within* the executive's phase of responsibility in dealing with death sentences. The executive branch does not undertake that responsibility until its acceptance is marked by the issuance of the death warrant, and hence the power to grant a reprieve is not relevant until after the issuance of the death warrant, from the completion of which the reprieve affords a delay.

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[9](...continued)
the office of the Lieutenant Governor in a docket kept for that purpose.

[10] 67A C.J.S. Pardon & Parole § 5 ("it is the substance of the proclamation and not the name by which it is designated that controls its effect ... a proclamation having all the elements of a reprieve will be so considered regardless of its designation; and conversely, the fact that an executive order is designated a 'reprieve' will not constitute one where it is not one in substance") (footnotes omitted); *e.g., Jones v. Morrow*, 121 P.2d 219, 223 (Kan. 1942) (because "[t]he real nature of an act of clemency is not changed by what it is called. Its effect is determined by what it is," reprieve was really a commutation); *Ex parte Black*, 59 S.W.2d 828, 829 (Tex. Crim. 1933) (alleged furlough was really a reprieve; "We are in agreement with the relator to the effect that it is the substance of the proclamation of the Governor and not the name by which it is designated that controls its effect").

> In accordance with the clear concept of a reprieve, **it exists only to stay a death warrant with reference to a particular proceeding**, whether that particular proceeding be **in the nature of clemency action, such as pardon or commutation** involving the Board of Pardons, or even some resumption of judicial investigation pursuant to a petition for habeas corpus.
>
> The conclusion must be that the Governor cannot forsake his obligation to "take care that the laws be faithfully executed" by contending that the failure to do what the law says that he "shall" do, constitutes the performance of the affirmative and definitive action known to the law as a reprieve.

A reprieve "does no more than stay the execution of a sentence for a time" and "exists only to stay a death warrant with reference to a particular proceeding," such as a clemency proceeding before the board of pardons, or a resumption of collateral review. The en banc Commonwealth Court reiterated the same definition in rejecting the Governor's subsequent motion to reopen the proceedings, concluding that the chief executive could not justify as a "reprieve" conduct that was not a reprieve. *Morganelli v. Casey*, 646 A.2d 744 (Pa. Cmwlth. 1994) (en banc).

Morganelli did not reach this definition arbitrarily. The same understanding of a reprieve has existed in Pennsylvania since before the Declaration of Independence. A reprieve served to impose delay in order to, for example, permit appeal to English courts. *See* Herbert William Keith Fitzroy, *The Punishment Of Crime In Provincial Pennsylvania* (1936) p. 255 (as opposed to granting a pardon a Governor could issue a reprieve "until the royal will were known").[11]

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[11]

> Although the courts showed no reluctance to convict persons, either male or female, of offences for which the penalty was death, there were
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> (continued...)

Executive clemency has rarely been without limits in Pennsylvania history. Under the first Constitution of 1776 the power to grant clemency was not unilateral but vested in a Supreme Executive Council of which the President (Governor) was a member. Unrestricted clemency power was vested in the Governor alone under the Constitutions of 1790 and 1838. But this unrestricted power did not last. It was circumscribed by the Constitution of 1874, which established a Board of Pardons and prohibited commutations and pardons unless recommended in writing by the board. The Constitution of 1968 prohibited pardons and commutations except on majority vote of the board. And on November 4, 1997, the people imposed still greater restrictions on executive clemency by amending the current Article IV § 9 to prohibit pardons and commutations in capital cases absent the *unanimous* consent of the board

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[11](...continued)

> two mitigating forces present and functioning in the [Pennsylvania] colony. The first and most important was the governor, who, by the charter, was granted power to pardon all crimes save murder and treason. The governor exercised this power through his council and invariably acted upon the recommendations of the judges who tried the culprits. In the same way where appeals were taken to England or colonial officials desired royal instruction the governor might grant a reprieve until the royal will were known.

(Footnote omitted).

http://journals.psu.edu/pmhb/article/viewFile/28414/28170

The need for the Crown to review all sentences of death was eliminated prior to the Declaration, and the residual power of judicial review passed to this Court by virtue of the King's Bench power. Smithers, *infra*, 79-80 (explaining that the king's "right to direct knowledge and control of convictions and executions" was eliminated by statute in 1718, while power of review possessed by the Court of King's Bench was recognized in the Pennsylvania Supreme Court by the Act of May 22, 1722).

(Joint Resolution No. 2, Special Session No. 1 of 1995). The "plain English" statement by the Attorney General under 25 P.S. § 2621.1 that accompanied the ballot question on the 1997 amendment to Article IV, § 9 informed the electors that the point of requiring unanimous consent of the board was "to make it more difficult for an individual sentenced to death or life imprisonment to obtain a pardon or commutation of sentence." *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971, 983-84 (Pa. 2001).

Such restrictions are unnecessary to true reprieves because their limits are inherent. As early as the constitutional convention of 1872-1873, when similar limits on the Governor's clemency powers were first adopted, reprieves were exempted from the public hearing and board approval requirements because these would be inconsistent with affording prompt delays to permit eleventh-hour appeals. *Debates of the Convention to Amend the Constitution of Pennsylvania*, volume II, pp. 383-384 (1873) (arguing that reprieves are necessary should evidence of innocence be found just before an execution).[12] The structural limitation stemming from the definition of reprieve is reflected in the text of Article IV, § 9, which restricts the (non-monetary) forms of clemency that are permanent and final, while not so restricting reprieves, which are a temporary or emergency measure to afford time to seek final relief.

The text of Article IV, § 9, must also be read in a common sense manner and as a unified whole. *In re Bruno*, 101 A.3d at 659 (constitutional language "must be

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12 https://books.google.com/books?id=VKErAQAAMAAJ&printsec=frontcover#v=onepage&q&f=false

interpreted in its popular sense, as understood by the people when they voted on its adoption"); *Jubelirer v. Rendell*, 953 A.2d 514, 528 (2008) (same). Moreover, because constitutional provisions in *para materia* must be read and applied together, *id.*, it must be presumed that clemency provisions are treated differently in the text because they are different in substance. Commutations and pardons are limited because unlike reprieves they are final and definitive, while reprieves are non-final and limited in time and purpose. If the practical effect of commutation could be achieved via reprieve, requiring unanimous consent of the board for the former but not the latter would be an act of futility. *See* 1 Pa.C.S. § 1922 (presumption against constructions that are absurd or unreasonable).[13]

The definition of reprieve as an intrinsically limited instrument is also found in the treatise cited by the Governor himself in his response to the Commonwealth's petition for review (Response of the Governor to Emergency Petition for Extraordinary Relief, p. 5, *citing* William West Smithers, *Treatise on Executive Clemency in Pennsylvania* (1909), pp. 67-68, 181) (footnotes omitted): "A reprieve is the suspension, postponement or delay of a sentence and is commonly understood

[13] The structure of Pennsylvania's constitution contrasts with that of states in which the gubernatorial clemency power has no substantive limit. For example, the Oregon constitution allows the governor of that state the power to unilaterally impose every form of clemency (except in cases of treason). A unilateral power to impose outright pardon might subsume a power to indefinitely suspend executions, but such is not the case here. Further, even those states would acknowledge that a reprieve is a specific and narrow form of clemency defined by, inter alia, the text and context of the relevant constitutional provision. *See Haugen v. Kitzhaber*, 306 P.3d 592, 598-599 (Or. 2013) (en banc) ("The word 'reprieve,' of course, does not appear in isolation ... and the text surrounding that word provides important context").

to mean only a temporary respite. … the withdrawing of a sentence for an interval of time, whereby the execution is suspended." A reprieve specifies "a definite period of respite." Commutation, in contrast, is "the change, substitution or reduction of a penalty whereby the punishment prescribed is made less severe[.]" The same understanding is generally accepted throughout the United States. *E.g.*, 59 Am. Jur. 2d Pardon and Parole § 4 ("the withdrawing of a sentence for an interval of time whereby the execution is suspended. It is merely the postponement of the execution of a sentence for a definite time or to a day certain") (footnote omitted). Indeed, the Governor's own order of February 13, 2015 describes a "temporary reprieve," although this is redundant since reprieves are temporary by definition, including the definition he himself cites.

The characteristics of reprieves as being issued to permit "a particular [clemency or review] proceeding" to take place, *Morganelli*, 641 A.2d at 678, and enduring for a limited time, are interrelated: the *purpose* of the reprieve defines its *duration*. A reprieve issued to allow, for example, a PCRA proceeding based on previously unavailable evidence, need not predict a precise end date, but would be temporally and functionally limited by the associated proceeding. *E.g., Commonwealth v. Haag*, 809 A.2d 271, 276 (Pa. 2002) (reprieve issued "pending the resolution of Haag's PCRA proceedings").

Conversely, a purported reprieve in a capital case that was effective, for example, "until things change," or "unless decided otherwise," would be without the defining characteristics of a reprieve, and would not be a reprieve.

These defining characteristics are absent from the Governor's "moratorium reprieve." To begin with, the Governor in his answer to the Commonwealth's petition for review *denies* that this, or any, reprieve need be subject to any temporal limitation (Response of the Governor to Emergency Petition for Extraordinary Relief, p. 5, contending that there is "no limitation on the duration of reprieves"). He further states that the reprieve here is in any event granted only "to await receipt and review of the anticipated report of the Task Force established by the Pennsylvania Senate" (*Id.*, 6). But these statements are demonstrably incorrect.

The falsity of the Governor's assertion in his response that there need be no "limitation on the duration of reprieves" is established by, among other things, his own pleading (*Id.*, p.5, *citing* Smithers, *Treatise on Executive Clemency in Pennsylvania*, pp. 67-68, 181, defining reprieve as "only a temporary respite" for a "definite period"). His denial that reprieves must be limited in time also ignores *Morganelli*, which, while subject to possible modification by this Court as a higher tribunal, is a statement of Pennsylvania law *that is binding on the Governor*.[14] The

[14] The Governor's refusal to comply with the law is not restricted to his refusal to comply with the definition of reprieve in *Morganelli*. On March 12, 2015, the secretary of the department of corrections – not the Governor – issued a death warrant in *Commonwealth v. Arrington*, 516 CAP. An identical warrant was issued on March 23, 2015, again by the secretary and not by the Governor, in *Commonwealth v. Reid*, 563 & 564 CAP. But by statute, 61 Pa.C.S. § 4302, the Governor is required to issue such warrants personally. The law requires the secretary to do so only if the Governor "fails to timely comply"; it does not authorize or excuse deliberate noncompliance by the Governor.

In addition, 71 Pa.C.S. § 299(a) requires a reprieve request to first be considered by the Board of Pardons, to allow the board to make written (continued...)

holding of *Morganelli* is that a reprieve *by definition* is limited in *duration* and *purpose* – the duration of the reprieve depends on the avenue of relief it allows the offender to pursue. 641 A.2d at 678. The Governor was not free to purport to redefine what "reprieve" means notwithstanding Pennsylvania law as stated in *Morganelli*.

The Governor's assertion that reprieves have no inherent limits also ignores the text of Article IV, § 9, which manifests a clear intent to restrict the availability of clemency that would alter or eliminate a capital sentence. The difference in treatment implicitly recognizes that reprieves are limited by their nature. The Governor's argument similarly ignores that, in each iteration of the Pennsylvania Constitution from 1874 through 1997, reprieves would have been understood by the ratifying voters in their ordinary sense, as a "temporary respite" to allow judicial review or an application for commutation or pardon. When the electors amended the Constitution in 1997, they were officially informed that amending Article IV § 9 would "make it more difficult for an individual sentenced to death or life imprisonment to obtain a pardon or commutation of sentence." *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d at 983-84. The People were *not* told that the amendment could *not* actually make commutations more difficult to obtain, because the Governor could bypass the

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[14](...continued)
recommendations to the Governor. *See also* 37 Pa.Code. § 81.301 (application must be presented at public hearing). Initial review by the board in this advisory role is not optional, but required by law. The Governor, however, has simply disregarded that law. There was no hearing or application before the board on the question of reprieve in this case. *See State ex rel. Maurer v. Sheward*, 71 Ohio. St. 3d 513, 526 (1994) (where procedural requirements imposed by legislature were bypassed, "[t]he pardon purportedly granted was invalid from the outset").

amendment by claiming that a commutation is a reprieve.

It also simply is not true that, as the Governor states in his pleading, the instant reprieve order persists only until "receipt and review of the anticipated report of the Task Force [the Pennsylvania Task Force and Advisory Committee on Capital Punishment] established by the Pennsylvania Senate" (Governor's response, p. 6). To the contrary, the text of the reprieve plainly states that it will remain in force "until [the Governor has] received and reviewed the forthcoming report ... *and any recommendations contained therein are satisfactorily addressed*" (Governor's order of 2/13/15, emphasis added).

Not only does the Governor's use of the passive voice obscure who is to decide whether anything has been "satisfactorily addressed": the duration of the stay is at best unknowable, and for practical purposes infinite. It is unknown *what* will satisfy whoever is to be satisfied, or indeed if *anything* can. The order, by its terms, permits the result that no satisfaction will be forthcoming, such that the suspension is not merely indefinite but permanent.[15]

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[15] In addition to the fact that it does not suggest any real end point to the alleged reprieve, opinions of the Pennsylvania Task Force and Advisory Committee on Capital Punishment are without legal effect. That body was convened not by legislation but by a resolution of the Senate (only) (Senate Resolution No. 6, Session of 2011, adopted December 6, 2011), to "conduct a study of capital punishment" and report "findings and recommendations" that the General Assembly is free to consider or disregard as it sees fit. A Senate resolution cannot confer legal authority on anyone to do anything, much less confer upon the Governor a power not granted under the Constitution. Moreover, Senate Resolution 6 of 2011, which is the sole legislative authorization for the Task Force (a similar House proposal was not adopted), shows that even this limited authorization actually expired over a year ago, on December 6, 2013 (*see* p. 6, lines 28-30, stating that Task Force is to issue its final report "no later (continued...)

Assuming that the decider of satisfaction is the Governor himself (and not some undefined assortment of deciders) does nothing to dispel the conclusion that his stay is, in substance, a permanent commutation. Quite to the contrary: the Governor has published official statements explaining that the instant reprieve is only the "first step" in "establishing an effective moratorium" (Governor's press release of February 13, 2015). In his "Death Penalty Moratorium Declaration" promulgated with the alleged reprieve in this case, he promises "to grant a reprieve in each future instance in which an execution is scheduled, until this condition is met" (Moratorium Declaration, p.1), where "this condition" refers to matters having been "satisfactorily addressed" (*id.*). Thus, "in each future instance" a purported reprieve in every capital case not otherwise stayed will issue, and will remain in force until the Governor decides otherwise – if he ever does. In all cases the Governor at his sole discretion can render the supposedly temporary delay permanent merely by withholding his satisfaction.

The Governor also stated in his Moratorium Declaration that "[i]f the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a

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[15](...continued)
than two years after the date this resolution is adopted"). Finally, on February 17, 2015, Senator John Rafferty, Vice Chairman of the Joint State Government Commission that administers the Task Force, confirmed that it is "a mere advisory group," the findings of which "are not binding on the legislature." The statement criticized the Governor for "improperly holding our law hostage" by enacting his moratorium:

http://www.pasenategop.com/blog/2015/02/17/statement-by-senator-john-rafferty-r-44-on-gov-wolfs-decision-to-implement-a-moratorium-on-pennsylvania-death-penalty/

human being, its capital sentencing system must be infallible" (*Id.*, 2). But he cites no authority that would permit him to impose an "infallibility" requirement on any aspect of Pennsylvania law. Only the General Assembly can pass laws. And in any event, infallibility being something no mere human institution can attain, he might equally have said that his moratorium will continue until lambs eat lions. He cannot maintain that his order is limited in time and purpose, and so is really a reprieve, where it will persist until an impossible event occurs.

The Governor should be taken at his word; but even if his reference to an "infallibility" requirement were to be dismissed as mere hyperbole, there would still be no point at which the alleged reprieve must expire. To the contrary, the stated object of the moratorium, other than the attainment of infallibility, is "working with the General Assembly" to "satisfactorily" address anticipated recommendations (Order of February 13, 2015, stating that reprieve will remain until the report and recommendations of the Task Force are "satisfactorily addressed"; Moratorium Declaration, p. 5, referring to "working with the General Assembly" to address report). This reference to working with the General Assembly can only refer to some legislative effort to render the current system of capital punishment, if not infallible, then at least "satisfactory."

But this only confirms that the delay is both permanent and purposeless. As a matter of constitutional law, no legislative action can alter current sentences. A legislative attempt to do so would violate the separation of powers. As noted above in section I, in *Commonwealth v. Sutley* this Court held that for the legislature to

exercise a power "to alter final judgments" would be "repugnant" to the principle of separation of powers. Absent constitutional authority, other branches of government are not permitted to disturb "final judgments of the judicial branch," especially with regard to sentencing, "one of the most critical and important duties vested in the judiciary."

Here, just as there is no longer any avenue of collateral attack on defendant's judgment in any court, there is no possibility of any *legislative* attack on his final judgment. The instant alleged reprieve purports to be *premised on* eventual legislative alteration of existing sentences *that can never lawfully occur*. It is without purpose and without end, because it depends on a supposed legislative event that can have *no effect* on the case it indefinitely delays. Nothing can be accomplished, other than unending delay for its own sake, by suspending this case for imagined legislation that, if the General Assembly ever were so heedless of the Constitution as to actually enact it, would be void *ab initio*.

The gubernatorial order in this case is not a reprieve. It has no time limitation, because the supposed terminating event is either the Governor's satisfaction, that he may permanently withhold; or speculative legislative action that, even if it took place, would be unconstitutional and void on its face. Since the duration of the supposed reprieve depends on accomplishing the impossible, it is not temporary but permanent. And since its purported purpose is to await imagined legislation that can have no effect on the judgment, it is effectively purposeless. The real-world result of the moratorium is unilateral and categorical commutation of death sentences, without the

consent of the Parole Board.[16]

This is unconstitutional. Bypassing the board obviously violates Article IV, § 9. By assuming a nonexistent "moratorium" power to suspend all capital sentences, moreover, the Governor has suspended laws enacted by the General Assembly, in violation of Article I, § 12 ("No power suspending laws shall be exercised unless by the Legislature or by its authority"). And by refusing to carry out lawful sentences the Governor has violated his constitutional duty to "take care that the laws be faithfully executed" under Article IV, § 2.

The moratorium also overturns final criminal judgments in violation of the separation of powers, exactly as did the legislation in *Sutley*. One has only to exchange the chief executive for the legislature to demonstrate that *Sutley* is directly controlling on this point. In that case this Court specifically rejected a claim that alteration of final criminal judgments was permitted by a power of commutation or pardon that had not been granted to the legislature. "[A] power does not inhere in the legislature if it has specifically been withheld or entrusted to another co-equal branch of government." 378 A.2d at 261-263, 265 n.7, 273. Likewise here, while commutation and pardon powers reside in the executive branch, they are withheld from the chief executive absent the consent of the Board of Pardons. Indeed, Article

[16] The finality of the supposed reprieve is not altered by the fact a succeeding Governor might alter or vacate it, any more than the fact that the current Governor might change his mind. A final judgment of a court likewise may be subject to ultimate reversal on collateral review decades later, but is no less final due to that possibility. The effective commutation here is in the same way permanent and final, even though various contingencies (including the defendant's death from natural causes) could conceivably render it void or moot.

IV was amended in 1997 *for the specific purpose of preventing* such unilateral gubernatorial pardons or commutations. The power exercised by the Governor in this case "has specifically been withheld." 378 A.2d at 273. Thus, under *Sutley* the Governor's constitutionally-barred, unilateral order effectively reducing defendant's sentence constitutes "a direct assault upon the power of the judicial branch." *Id.* at 264.

If anything, the Governor's moratorium is an even more direct assault on the judicial function than the legislation voided in *Sutley*. This is reflected in the pending pretrial motion in a Monroe County capital case, *Commonwealth v. Newell*, CP-51-CR-0002642-2013. Newell argues that the death penalty should be categorically unavailable in his case despite being charged with three aggravating circumstances, because the *Governor* has found the death penalty to be "unconstitutional" (motion to dismiss aggravating circumstances, ¶ 12, claiming that Governor's moratorium and supporting declarations show that "the death penalty in Pennsylvania ... is unconstitutional under the U.S. Constitution and Pennsylvania Constitution"). The trial court has ordered the parties to address this issue, and so takes seriously Newell's contention that the Governor may declare 42 Pa.C.S. § 9711 – a provision repeatedly and consistently upheld as constitutional by this Court – to be unconstitutional.

Moreover, if a Governor could exercise a self-appointed power to bar the penalty in capital cases by the expedient of calling such a bar a reprieve, he could also do the same in any category of criminal case. A Governor could decide that criminal

penalties for drug trafficking, or prostitution, or campaign finance violation, or any other kind of crime, failed to satisfy subjective personal standards, and could eliminate the penalties for those offenses by suspending them indefinitely. That the current Governor has so far applied his putative moratorium power only to capital sentences does not imply that it is *limited* to capital sentences. And indeed, if this "moratorium" power is left undisturbed, time alone can tell what *other* putative extra-constitutional powers, as yet unheard of, might be discovered by the chief executive.

In short, the Governor's conduct in this case is not merely (in his own words) "the first step" in his moratorium: it is the first step in usurping the power of the judiciary, if not rewriting the Constitution. This Court should vacate the Governor's unconstitutional order.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to vacate the order of the Governor.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLAINCE

Aforesaid counsel for the Commonwealth hereby certifies that this brief complies with the 14,000 word count limit of Pa.R.A.P. 2135 based on the word count (12,291) of the word processing system used to prepare it.