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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 14 EM 2015

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

TERRANCE WILLIAMS,

Respondent.

BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

The Pennsylvania District Attorneys Association (the "PDAA"), which represents the Offices of the District Attorneys of all sixty-seven counties of the Commonwealth, submits this *amicus* brief in support of Petitioner.

The Governor's unilateral policy of suspending the enforcement of the death penalty violates the Pennsylvania Constitution because his action: (i) violates the constitutional judgment that has been made in Article IV, Section 9 to remove from the Governor the power unilaterally to upset the imposition of the death penalty; (ii) violates the constitutional prohibition in Article I, Section 12 against the "suspension of laws" by any branch other than the Legislature; and (iii) violates the Governor's constitutional duty in Article IV, Section 2 to "take care that the laws be faithfully executed." The Governor's attempt to evade the clear restrictions on his power in this area by simply affixing the label of "reprieve" to his personal policy choice to suspend the enforcement of the death penalty cannot be justified under any reasonable reading of the Constitution of this Commonwealth.

Last year, while campaigning for office, Governor Wolf made known his antipathy toward the death penalty. He promised on the campaign trail that if elected he would institute a "moratorium" suspending the enforcement of the death

penalty.[1] Within weeks of his inauguration, Governor Wolf delivered on his political promise and announced his "moratorium." He took this action purportedly to allow time for the completion of a legislative study of the death penalty that has been ongoing since 2011; time thereafter for his personal "review" of the results of that legislative study; and yet further time to allow "any recommendations contained therein [to be] satisfactorily addressed"—whatever that may mean.[2] In a clear admission of his policy-making agenda, the Governor declared his express "intention to grant a reprieve in each future instance in which

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1 *See* Steve Esack, *Philly DA sues Wolf over death penalty moratorium*, The Morning Call (Feb. 18, 2015), http://www.mcall.com/news/nationworld/ pennsylvania/mc-pa-philly-da-sues-wolf-death-penalty-20150218-story.html (Governor's moratorium "fulfilled a campaign promise"); Mike Berman, *Pennsylvania's governor suspends the death penalty*, The Washington Post (Feb. 13, 2015), http://www.washingtonpost.com/news/ post-nation/wp/2015/02/13/pennsylvania-suspends-the-death-penalty/ ("While campaigning for governor last fall, Wolf said he planned to impose a moratorium on executions until the state had studied the issue."); Charles Thompson, *Gov. Tom Corbett and challenger Tom Wolf vie in last of Pennsylvania's 2014 gubernatorial debates*, The Patriot News (Oct. 8, 2014), http://www.pennlive.com/midstate/index.ssf/2014/10/corbett-wolf_make_last_pitch_t.html ("Wolf said he would seek to impose a moratorium on executions in Pennsylvania to allow for a self-examination of deeper questions about the fairness and accuracy of the death penalty's application across Pennsylvania.").

2 The Governor's Executive Order purportedly granting Terrance Williams a "reprieve" reads in relevant part:

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

Executive Order – Reprieve, Governor's Office of the Commonwealth of Pennsylvania (Feb. 13, 2015).

an execution is scheduled."[3] Hence, by linking his across-the-board policy of suspending the enforcement of the death penalty via "reprieve" to this indeterminate review process and some nebulous standards of satisfaction, the Governor effectively implemented his "moratorium."

While the Governor once enjoyed unfettered power unilaterally to grant reprieves, commutations, and pardons, over the years the People of the Commonwealth of Pennsylvania—through Constitutional Conventions—have sought to curb what they viewed as executive abuse by severely limiting the Governor's clemency power, especially in death penalty cases. For example, by constitutional amendment in 1874, commutations and pardons (*i.e.*, permanent changes to or the elimination of a sentence) were made subject to the requirement of a recommendation by a group of officials that eventually became known as the Board of Pardons. In 1991, the Constitution was amended to require that commutation or pardon in a life sentence or death penalty case be subject to the *unanimous* recommendation of the Board of Pardons, a purposefully diversified body made up of the Lieutenant Governor, the Attorney General, a victim of a crime, a corrections expert, and either a doctor of medicine, a psychiatrist, or a psychologist. *See* Pa. Const. Art. IV § 9(b). Thus, our constitutional history

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[3] *Memorandum re Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pennsylvania*, Governor's Office of the Commonwealth of Pennsylvania ("Moratorium Memorandum") 1 (Feb. 13, 2015), *available at* http://www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid =1566#.VRliI_nF-So.

teaches us that the People have consistently adhered to their view that, in this critical area, the balanced view of the Board of Pardons should prevail over the singular view of an executive elected in a political process.

That the People of the Commonwealth made this constitutional judgment to take away from the Governor the power unilaterally to upset the death penalty is particularly relevant here. And, what is more, the ***process*** by which the People have expressed that judgment lends even greater weight to the argument that the Governor should be precluded from vitiating that judgment. The People have spoken on this subject through the constitutional amendment process; that is, a multi-layered, multi-year process that requires legislative approval in two consecutive sessions of the legislature and, if it is so approved, submission to the voters for their ultimate approval at the ballot. See Pa. Const. Art. XI § 1.[4] This

[4] Article XI, Section 1 provides:

> Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so

process—driven by the People and their representatives—ensures that foundational principles are not changed at the whim of one man or woman. Surely, our fundamental constitutional judgments should not be invalidated by the mere stroke of the Governor's pen.

The Governor's reprieve power was never intended to be used to effect system-wide policy changes for the benefit of broad classes of convicts. To the contrary, a true "reprieve" is granted for a finite period of time and only for a reason that is specific to the individual recipient convict—that is, to allow time for the convict to take specific action based on the particular circumstances of his or her own case (*i.e.*, to pursue appeals or seek commutation or pardon) or to allow time for a specific mental or physical condition affecting the convict to pass or be resolved. Thus, unlike a commutation or pardon, a reprieve is not subject to the power and control of the Board of Pardons because—consistent with its common law origins and its constitutional definition—it is intended to be limited, temporary, and granted for a reason specific to the convict. By its very nature, a reprieve is intended to be severely limited in duration and purpose—and is not

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> agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.

Pa. Const. Art. XI § 1.

intended as a tool to effect an across-the-board suspension of a statutorily-created penalty or sentencing scheme.

It is for this Court to decide whether the Governor's policy of suspending the enforcement of the death penalty by "reprieve" comports with the Constitution. This Court interprets the Constitution "in its popular sense, as understood by the people when they voted on its adoption," and favors a "natural reading," one which "completely conforms to the intent of the framers."[5] At the time of the adoption of the "reprieve" power, the framers of the Constitution adhered to English common law, which defined a "reprieve" as the temporary withdrawal of a sentence for an interval of time in one of three specific scenarios: (1) where the convict requires time to apply for either an absolute or conditional pardon based on some defect in the convict's own case; (2) where a female convict is pregnant and is in need of time to allow the child to be born before executing judgment; and (3) where the convict becomes temporarily insane between the judgment and execution. In each instance, the reprieve was available only for a finite interval of time and for a definitive reason that is specific to that particular convict. The term "reprieve" as used in the Pennsylvania Constitution must therefore be interpreted and defined in accordance with these strict limitations.

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[5] *See Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (quoting *Commw. ex rel. Paulinski v. Isaac*, 397 A.2d 760, 765 (Pa. 1979)); *Robinson Twp., Washington Cnty. v. Commw.*, 83 A.3d 901, 943 (Pa. 2013).

The interpretative question presented here—*i.e.*, the scope of the "reprieve" power—should also be resolved in light of our constitutional history of ***limiting*** the Governor's power to act in death penalty cases. Interestingly, the Governor himself demonstrates the danger in abandoning the historical grounding of the reprieve power by arguing that his power in this regard is limitless: "[T]he Governor may define the reason for and duration of a reprieve as he sees fit." (Response of the Governor to Emergency Petition for Extraordinary Relief at 5.) That simply is not true. One of the most critical tenets underlying our freedom is that the law applies to everyone, even someone as powerful as the Governor. In this case, it is the Constitution—not any single human being—that defines the scope of executive power when the exercise of that power concerns the imposition of the death penalty.

The Governor's attempt to use his "reprieve" power to implement a political and personal policy of suspending the death penalty in Pennsylvania plainly violates the Constitution. The purported "reprieves" the Governor has issued and has promised to issue (i) are not for a finite interval of time and (ii) are not for one of the recognized common law reasons specific to an individual convict. At bottom, the Governor's action is simply a naked attempt to evade long-standing constitutional limitations on his power and implement a policy of suspending the

enforcement of the death penalty—despite the fact that the death penalty is the law of the land.

Finally, the Governor's use of what he claims is a limitless power of "reprieve" to implement a policy of suspending the enforcement of the death penalty is not only a direct violation of Article IV, Section 9, but it is also a violation of the constitutional prohibition against suspending the operation of laws. "No power of suspending laws shall be exercised unless by the Legislature or by its authority." Pa. Const. Art. I § 12. That is precisely what the Governor is attempting to do here by use of his "reprieve" power—he purports to suspend the enforcement of the death penalty while the legislature studies the death penalty. However, not even the Legislature, which alone has the power to suspend the laws, has taken any action to suspend the enforcement of the death penalty while their study is ongoing. And, because the Governor is acting outside of his severely limited clemency powers and is improperly suspending the enforcement of the law, he is plainly failing in his constitutional duty to "take care that the laws be faithfully executed."

For all of these reasons, and the reasons below, this Court should hold (i) that the Governor's policy of suspending the enforcement of the death penalty by use of the "reprieve" power is unconstitutional; and (ii) that the "reprieve" granted to Respondent Terrance Williams is void.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Pennsylvania Rule of Appellate Procedure 531, the Pennsylvania District Attorneys Association, as *amicus curiae* in support of the Petitioner, submits this brief. The Pennsylvania District Attorneys Association ("PDAA") was established in 1912 to promote uniformity and efficiency in the discharge of the duties and functions of this Commonwealth's sixty-seven District Attorneys, their assistants, and their offices. The PDAA is comprised of approximately 1,200 members, including sitting District Attorneys and their assistants, former District Attorneys, Deputy Attorneys General, Assistant United States Attorneys, and Chiefs of Police across the Commonwealth. One of the PDAA's most important functions is to monitor and report on legal and legislative developments that are important to the prosecutors of the Commonwealth.

The primary mission of the PDAA is to assist in the pursuit of efficient and effective justice throughout the criminal justice system, to assist in all matters of its members' duties, and to advocate the position of its members to the government and citizens of Pennsylvania. The filing of this brief is consistent with the PDAA's mission, and is undertaken to provide supplemental points and arguments in support of Petitioner. The PDAA has submitted *amicus curiae* briefs in many matters that have been adjudicated in the Commonwealth.

ARGUMENT

I. THE GOVERNOR'S SUSPENSION OF THE ENFORCEMENT OF THE DEATH PENALTY HAS CREATED AN ISSUE OF IMMEDIATE PUBLIC IMPORTANCE THAT WARRANTS THE EXERCISE OF KING'S BENCH JURISDICTION.

The PDAA joins in Petitioner's arguments that the exercise of King's Bench jurisdiction by this Court is warranted. In addition to those arguments presented by Petitioner, King's Bench jurisdiction is warranted because the Governor's unilateral moratorium and suspension of the enforcement of the death penalty creates "an issue of immediate public importance." *See Washington Cnty. Comm'rs v. Pa. Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980); *see also Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 (Pa. 1978) ("presence of an issue of immediate public importance" supports the exercise of King's Bench jurisdiction).

It is imperative that this Court define the scope of the Governor's reprieve power under the Constitution. As discussed below, the Governor's reprieve power—like all of his clemency powers—is limited. It is justified only for a finite period of time, and only warranted by compelling reasons unique to the convict at issue. Moreover, the Governor's moratorium on the enforcement of the death penalty and unjustified suspension of criminal sentences necessitate this Court's proper check on his power. *See Workman v. Bell*, 245 F.3d 849, 853–53 (6th Cir. 2001), *cited in Commw. v. Michael*, 56 A.3d 899, 903 (Pa. 2012) (explaining

"[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency").

Additionally, this Court's exercise of jurisdiction is warranted because the Governor's actions—which are unconstitutional—are impacting the administration of the criminal justice system. For example, a defendant charged with first degree murder in Monroe County recently filed a motion (i) requesting that the court strike the aggravating circumstances set forth in the Commonwealth's notice of intention to seek the death penalty and (ii) seeking to compel the Commonwealth to prosecute the case as a non-capital case. *See* Order, *Commw. v. Newell*, No. 2642 of 2013 (Pa. Ct. Com. Pl. Monroe Cnty. Mar. 12, 2015) (attached as Exhibit A). The defendant is expressly relying upon the Governor's purported moratorium as the basis for his motion:

> Governor Wolf had the courage to publish a memorandum he had to know would be very unpopular in some quarters both well-funded and vocal; the memorandum was supported by authority. We file our memorandum [and motion] relying on the Governor's memorandum, its citation to authority, and the cases we have cited.

Exhibit A at 9.

Motions like these evidence the fact that the Governor's unconstitutional actions have put Pennsylvania's system of capital punishment in limbo. And, surely this is only the beginning. Without a proper check from this Court, the

Governor's actions will have increasingly negative effects on the criminal justice system. For example, the so-called moratorium may impact plea discussions and negotiations and may impact how judges and juries view the death penalty.

This Court's review of this matter is more than appropriate—it is necessary to resolve an important constitutional question affecting the administration of the criminal justice system. And it is necessary to eliminate the uncertainty that the Governor's actions have created with respect to the enforcement of the death penalty in the Commonwealth.

II. THE GOVERNOR'S SUSPENSION OF THE ENFORCEMENT OF THE DEATH PENALTY VIOLATES ARTICLE IV, SECTION 9 OF THE CONSTITUTION.

The Governor's action implementing his policy of indefinitely suspending the enforcement of the death penalty is not a "reprieve" within the meaning of the Pennsylvania Constitution and, therefore, violates the Governor's constitutionally circumscribed clemency powers. *See, e.g., Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals*, 44 A.3d 3, 7 (Pa. 2012) (this Court has "the ultimate power and authority to interpret the Pennsylvania Constitution"); *Jubelirer v. Rendell*, 953 A.2d 514, 517–18 (Pa. 2008) (placing constitutional limits on Governor's veto power); *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Commw. 1975) ("[i]n no event . . . may an executive order be contrary to any

constitutional or statutory provision"). Accordingly, this Court should declare his action unconstitutional.[6]

A. Our Constitutional History Demonstrates The Clear Intent Of The People To Limit The Governor's Clemency Power, Especially In Death Penalty Cases.

Under the Pennsylvania Constitution, the Governor's clemency powers are specifically limited in order to prevent abuse by the Executive and to fulfill defined and limited ends. The Pennsylvania Constitution grants the Governor the power

> [i]n all criminal cases except impeachment . . . 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.

Pa. Const. Art. IV § 9. The constitutional journey that led to the current version of Article IV, Section 9 reveals a strong and clear intention on the part of the People

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[6] A*micus* does not request that this Court review or limit the Governor's discretionary ability to invoke his clemency powers. To the contrary, this case presents a different question. What is at issue here is whether the Governor has acted outside the *scope* of his constitutionally granted clemency powers—that is, whether the Governor has acted outside of the scope of his power to grant reprieves and, in doing so, has violated the Constitution of this Commonwealth. At the core of this case, therefore, is not the question of whether the Governor should or should not have granted this reprieve, but whether he *could* or *can* grant this reprieve. Accordingly, it is the meaning of "reprieve" and the scope of the Governor's constitutional reprieve power that are at issue in this dispute—no more. It is undisputed that this Court has the authority to define the terms within and powers granted by the Constitution, including the Governor's reprieve power. *See, e.g.*, *Mesivtah Eitz Chaim*, 44 A.3d at 7 (this Court has "the ultimate power and authority to interpret the Pennsylvania Constitution"); *Stilp v. Commw.*, 905 A.2d 918, 948 (Pa. 2006) (similar).

to limit severely the Governor's powers to interfere with the imposition of the death penalty.

In Pennsylvania's first constitution, the Supreme Executive Council was empowered to grant reprieves and pardons at will. The Council enjoyed unlimited "power to grant pardons, and remit fines, in all cases whatsoever, except in cases of impeachment; and in cases of treason and murder, [the] power to grant reprieves, but not to pardon, until the end of the next sessions of assembly." Pa. Const. of 1776, Chap II § 20.[7] In the Constitution of 1790, the newly formed Executive—the Governor—was granted the independent "power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment." *Id.* This power existed well into the nineteenth century. *See* Pa. Const. of 1838, Art. II § 9 (continuing to grant the Governor the sole "power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment").

By the late 1800s, the People had become deeply suspicious of the Governor's unfettered clemency powers. Thus, Pennsylvania's post-Civil War amendments deliberately and significantly curbed the Governor's commutation

[7] Interestingly, the 1776 Constitution did not grant the Governor a commutation power. It did, however, permit the "remission or mitigation of punishments on impeachments" by an act of the Legislature. *See* Pa. Const. of 1776, Chap. II § 20. The Governor did not have the power to commute sentences until the 1874 Constitution. *See* Pa. Const. of 1874, Art. IV § 9.

and pardon powers. In 1874, the Governor's clemency powers were changed to the

> power to remit fines and forfeitures, to grant reprieves, commutation of sentence and pardons, except in cases of impeachment; but no pardon shall be granted, nor sentence commuted, except upon the recommendation in writing of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice and in open session.

Pa. Const. of 1874, Art. IV § 9. This newly-created council of four—the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and Secretary of Internal Affairs—would serve as a check on the Governor's exercise of clemency.

The council of four was subsequently replaced by the Board of Pardons. *See* Pa. Const. of 1968, Art. IV § 9 (granting the Governor the power "[i]n all criminal cases except impeachment . . . 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, after full hearing in open session, upon due public notice"). The intent behind the creation of the Board of Pardons was a recognition that the Governor, as "the sole dispenser of executive grace, was neither omniscient (able to ascertain when an application contained erroneous information) nor omnipotent (able to withstand outside pressures) but, instead, was fallible." *Hennessey v. Pa.*

Board of Pardons, 655 A.2d 218, 223 (Pa. Commw. 1995) (Friedman, J., dissenting) (footnotes omitted) (discussing history of Board of Pardons).

In light of the permanent nature of both commutations and pardons, the People of the Commonwealth established the Board of Pardons to "transform" executive clemency

> from a frequently abused system of executive grace (where the Governor alone could mete our mercy and where a grant of clemency was an act of absolute discretion, subject only to the conscience of the Governor) to a system of merit (where the Pardons Board, subject to public scrutiny, openly and objectively evaluates each application to ensure that its decision is fair to the applicant and that clemency, if granted, is earned).

Id. at 224. Thus, with the institution of the Board of Pardons, the People of the Commonwealth made clear that no one person, not even the Governor, should be permitted to change or eliminate permanently the punishment imposed upon a given convict.

In the 1990s, in an attempt to curtail any chance that a person convicted of a particularly heinous crime would be permitted back into society without justifiable reason, any commutation or pardon granted to convicts with a life or death sentence was made subject to the unanimous recommendation of the Board of Pardons. *See Pa. Prison Soc'y v. Commw.*, 776 A.2d 971, 974 (Pa. 2001); Commw. of Pa., Legislative Journal – Senate at 51 (Feb. 13, 1995) (impetus

behind amendment requiring unanimous recommendation for commutations and pardons of life and death sentences was to prevent the situation where "a person who was not appropriate to be let out of jail was let out"). Moreover, the composition of the Board of Pardons was amended to include the Lieutenant Governor, the Attorney General, and three members appointed by the Governor and approved by the Senate, one of whom must be a victim of a crime, one of whom must be a corrections expert, and one of whom must be a doctor of medicine, a psychiatrist, or a psychologist. *See* Pa. Const. Art. IV § 9(b).

The constitutionally prescribed makeup of the Board of Pardons speaks loudly and clearly to the nature of the limits imposed by the People on the Governor's power. Two members—the Lieutenant Governor and the Attorney General—are high-ranking, elected statewide political officers, who presumably have special insight into the thinking and attitudes of the populace. One member—the victim—brings the perspective of being victimized by a criminal and the personal desire for justice to be done. Another—the corrections expert—understands, truly, what it means to punish another human being, and how real-world issues arise and play out in the criminal justice system. Additionally, the requirement of a medical doctor, psychiatrist, or psychologist provides the Board with an understanding of the external and internal circumstances that can drive someone to commit a criminal offense. With such a truly diversified and qualified

body, the requirement of a ***unanimous*** recommendation from the Board of Pardons to permanently change any life or death sentence ensures a thoroughly vetted decision taking into account all relevant factors and viewpoints. And, as can be imagined, unanimity among these members of the Board of Pardons will occur rarely, and only in the most meritorious circumstances.

It is thus the constitutional judgment of the People of this Commonwealth that changes to death sentences must be subjected to this intensive review process. A Governor who wishes to make unilateral determinations on whether to enforce the death penalty, of course, will view this process as an obstacle. But this Court should not overlook the specific and drastic limits the People have placed on the Governor's clemency powers. These limits are critically relevant to this Court's interpretation of the Governor's reprieve power.

The severe limitations placed on the Governor's clemency power stand in stark contrast to the truly unfettered power granted to the executives of other states, even in death penalty matters. For example:

- Colorado: "The Governor may grant reprieves and pardons. The Governor shall have the power to grant reprieves, commutations and pardons after conviction." Colo. Const. Art. IV § 7.

- Illinois: "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper." Ill. Const. Art. V § 12.

- Oregon: "He shall have the power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason." Or. Const. Art. V § 14.

None of these states imposes any check against unilateral actions by the Governor, even in death penalty matters.

It is against this constitutional backdrop that the Governor's attempt to suspend the enforcement of the death penalty in this Commonwealth by the supposed use of his "reprieve" power should be reviewed by this Court.

B. Under The Constitution, A Reprieve May Be Granted Only For A Finite Period Of Time And For A Reason Specific To The Convict.

Under the Pennsylvania Constitution, the Governor's reprieve power is not intended to be an unlimited clemency power used to effect broad policy changes to our criminal justice system. In fact, just the opposite is true. The power of "reprieve" is limited to staying a sentence (i) for a defined interval of time and (ii) for a reason that is specific to the particular recipient.

1. The Term "Reprieve" Should Be Defined In Accordance With The Intent Of The Framers To Embrace English Common Law.

This Court interprets the Pennsylvania Constitution in the "ordinary, natural interpretation the ratifying voter" would have given to its provisions, avoiding a "strained or technical" reading whenever possible. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (quoting *Commw. ex rel. Paulinski v. Isaac*, 397 A.2d 760,

765 (Pa. 1979)); *see also Ieropoli v. A.C. & S. Corp.*, 842 A.2d 919, 925 (Pa. 2004) (this Court interprets the Constitution "in its popular sense, as understood by the people when they voted on its adoption"). Indeed, this Court favors "a natural reading which avoids contradictions and difficulties in implementation," and "which completely conforms to the intent of the framers." *Robinson Twp., Washington Cnty. v. Commw.*, 83 A.3d 901, 943 (Pa. 2013); *see also Isaac*, 397 A.2d at 766 (similar). In defining constitutional terms, the Court considers, *inter alia*, the "text; history (including 'constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision'); structure; [and] underlying values" of that constitutional provision. Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. Annual Survey of Am. L. 283, 290–91 (2003) (footnotes omitted); *see also Robinson Twp., Washington Cnty.*, 83 A.3d at 944.[8]

[8] *Amicus* respectfully suggests that this Court's decision in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) is inapplicable to the issue of constitutional interpretation presented by this case. This Court has observed that an *Edmunds* analysis is appropriate only in conflicts between provisions of the Federal and Pennsylvania Constitutions, which usually involve substantive civil rights. *See Jubelirer*, 953 A.2d at 523–24 (discussing cases); *see also Robinson Twp., Washington Cnty.*, 83 A.3d at 944. This case does not present a conflict between the Pennsylvania and Federal Constitutions, as the clemency powers of the President of the United States are limited to *federal* offenses, whereas the Governor's clemency powers are limited to *Pennsylvania* offenses. *See* U.S. Const. Art. II § 2 (granting President of the United States "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment").

The Pennsylvania Constitution grants the Governor the power in all criminal cases to, *inter alia*, "grant reprieves." Pa. Const. Art. IV § 9. As described above, the modern iteration of the Governor's reprieve power first appeared in the 1790 Constitution. Pa. Const. of 1790, Art. II § 9 (1790).

The Framers of the Pennsylvania Constitution enacted the Governor's clemency powers—including the power to grant reprieves—with reference to English common law. *See* William Smithers & George Thorn, Treatise on Executive Clemency in Pennsylvania ("Smithers and Thorne") 78 (1909) (Governor's clemency power "embraces all those grounds upon which by the English Common Law the courts granted reprieves"); Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, to Propose Amendments to the Constitution ("Proceedings and Debates of the 1837 Convention"), Vol. II 429 (1837) ("[T]he Constitution of Pennsylvania intended to make the Governor the shadow of the King of England."). By the late seventeenth century, the King's reprieve power had developed clearly defined bounds and specific limits as to (1) the time or duration of a reprieve and (2) the reasons for which a reprieve could be granted. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 487 (1977) (explaining that limits were placed on royal clemency powers in the late seventeenth century).

2. Under English Common Law, A "Reprieve" Could Be Granted Only For A Finite Period Of Time And For A Reason Specific To The Convict.

When English common law is relevant to interpreting the Pennsylvania Constitution, as it is here, this Court relies on Blackstone's Commentaries as authority for English common law. *See Commw. v. Hess*, 414 A.2d 1043, 1046 (Pa. 1980); *In re Petition of Pittsburgh Press*, 414 A.2d 318, 331 (Pa. 1980); *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978); *Wm. Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961); *Commw. v. Reilly*, 188 A. 574, 578 (Pa. 1936).

As Blackstone explains, at common law, a reprieve was limited explicitly to "the withdrawing of a sentence for an interval of time." 2 William Blackstone, Commentaries on the Laws of England ("Blackstone's Commentaries") 312 (1848). Unlike a full pardon or commutation, where the grant acted prospectively for all time, a reprieve was granted for a specific and finite time period. *See* Smithers and Thorn, *supra* at 67–68 ("A *reprieve* is the suspension, postponement or delay of a sentence and is commonly understood to mean only a temporary respite."); *see also Clark v. Beard*, 918 A.2d 155, 168 n.7 (Pa. Commw. 2007) ("A reprieve stays a death warrant in a particular proceeding for a period of time." (citing *Morganelli v. Casey*, 641 A.2d 674, 678 (Pa. Commw. 1994))).

Second, at common law, a reprieve had substantive limits and could be granted for only one of three reasons—each of which is specific to the convict. A reprieve could be granted "*ex arbitrio judicis*"; that is,

> where the judgment is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or [the justice] is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon.

2 Blackstone's Commentaries at 312. A reprieve could be granted "*ex necessitate legis*"; or, "where a woman is capitally convicted, and pleads her pregnancy." *Id.* And, finally, a reprieve could be granted where the offender becomes "*non compos*, between the judgment and the award of execution"; that is, where the convict becomes insane and unable to comprehend the punishment sentenced. *Id.* at 313.

At common law, failure to qualify for one of these specific reasons was fatal to the grant of a reprieve. "If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is the king's most gracious *pardon*." *Id.*[9] Thus, the "ordinary, natural interpretation" that the Framers and the ratifying

[9] Indeed, early nineteenth century legal dictionaries confirm that a reprieve was typically limited to those three instances. *See, e.g.*, Bouvier Law Dictionary 358 (1839).

voters[10] would have ascribed to the Governor's reprieve power at the time of its enactment would have conformed to these principles of English common law.

Each of the three traditional reasons for justifying a reprieve has one thing in common: that some particular issue ***specific to the convict*** justifies granting the reprieve for a specific, defined period of time in order to prevent a type of foreseeable injustice or so long as to allow a petition for a full commutation or pardon. *Cf. Morganelli v. Casey*, 641 A.2d 674, 678 (Pa. Commw. 1994) (explaining a "reprieve" is a "[t]emporary relief from or the postponement of execution of criminal punishment or sentence" that is "extended to a prisoner to afford him an opportunity to *procure some amelioration of the sentence imposed*" (emphasis added)); *see also* Proceedings and Debates of the 1837 Convention, *supra* Vol. II at 424 (in discussing the Governor's clemency powers, "[t]he only proper case for the exercise of this extraordinary power, are either in the case of after discovered innocence, or of circumstances of an unusual character rendering the further continuance of punishment unjust or improper").

In light of this historical background within which the Governor was granted his reprieve power, a "reprieve" under the Pennsylvania Constitution is an act that (i) stays the sentence of an individual convict; (ii) for a finite period of time; and (iii) for a reason that is unique and specific to the individual convict. If the

[10] *See Jubelirer*, 953 A.2d at 528; *Robinson Twp., Washington Cnty.*, 83 A.3d at 943.

Governor purports to relieve a convict of his sentence in a manner that does not meet these strict constitutional requirements, then he has not granted a "reprieve" at all. To the contrary, such action amounts to nothing but the enactment of his view of appropriate public policy by suspending a feature of the criminal justice system that is enshrined in the Constitution. This is simply not a lawful exercise of the "reprieve" power.

3. The Governor's View Of A Limitless Reprieve Power Is Contrary To The Constitution.

As noted above, the Governor argues that his power of reprieve is limitless. He states: "[T]he Governor may define the reason for and duration of a reprieve as he sees fit." (Response of the Governor to Emergency Petition for Extraordinary Relief at 5.) That simply is not true.

First, the Governor's broad and sweeping interpretation of the reprieve power is plainly at odds with the limits the People have placed on the Governor's clemency powers in general across the years, particularly in cases involving death sentences. *See supra* Part II.A. In light of those limiting amendments, and the explicit history of the reprieve power, this Court should not define the reprieve power in a wide-ranging, virtually limitless fashion. Rather, a narrow interpretation of this specific power is proper. *See Commw. v. Cunningham*, 81 A.3d 1, 14 (Pa. 2013) (Castille, C.J., concurring) (explaining "nothing in the Pennsylvania Constitution confers a right to the broadest possible interpretation

and extension" of a given constitutional provision); *accord Phila. Elec. Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 722, 732 (Pa. Commw. 1985) (where legislation was designed to serve "a very limited purpose" a "narrow interpretation of the statute is supported by the circumstances under which it was enacted"); *Commw. v. Robb*, 352 A.2d 515, 518 (Pa. Super. 1975) (rejecting interpretation of a statute which, if it were to be accepted, would cause the amendments made to that statute to "fail . . . their essential purpose").

Second, the Governor's interpretation is contrary to the legislative procedure prescribing the Governor's course of action whenever a death warrant is to be issued, which necessarily contemplates that all reprieves will terminate on a specific and contemplated date. *See* 61 Pa. C.S. § 4302(a)(2) ("If, because of a reprieve or a judicial stay of the execution, the date of execution passes without imposition of the death penalty, unless a pardon or commutation has been issued, the Governor shall, within 30 days after receiving notice of the termination of the reprieve or the judicial stay, reissue a warrant specifying a day for execution which shall be no later than 60 days after the date of reissuance of the warrant.").

And, finally, to adopt the Governor's view that the reprieve power is limitless would contravene the Constitution and would lead to absurd results. *See In re Lewis*, 29 Pa. 518, 520 (Pa. 1857) ("The constitution was never meant to produce results so absurd and unjust."); *accord Zimmerman v. O'Bannon*, 442

A.2d 674, 676 (Pa. 1982) (explaining statutes are not to be interpreted in a way to allow "a result that is absurd or unreasonable"); *Schoffstall v. Prudential Prop. & Cas. Ins. Co.*, 667 A.2d 748, 750 (Pa. Super. 1995) (similar).

For instance, an unharnessed and limitless reprieve power, permitting the Governor to grant reprieves for any reason and without a practical and foreseeable end date, would allow him to circumvent the limits placed on his power to commute or pardon sentences. The Governor may not grant a pardon or a commutation in a death penalty case unless a unanimous Board of Pardons first gives him permission to take such action. *See* Pa. Const. Art. IV § 9. In contrast, the Governor may grant reprieves unilaterally, without a check from the Board of Pardons. *Id.* To accept the Governor's view of an unlimited reprieve power would be to allow him to unilaterally rewrite the Constitution.

Without specifically defined limits, the Governor could use the reprieve power to grant reprieves for whatever reason he wanted (*e.g.*, because he does not politically or morally agree with the punishment, as is the case here, or, *inter alia*, because he has a personal relationship with the convict) for however long he wanted—indefinitely even, rendering a reprieve a pseudo-commutation or pseudo-pardon, while bypassing the specific constitutional requirements for granting such clemency relief. Such a broad-ranging reprieve power would have been quickly dismissed by the Framers and ratifying voters of the Pennsylvania Constitution

who, as is clear, granted the Governor the power to issue reprieves for only a limited time and for a reason specific to the convict.[11] It was never intended to be used as a device to bypass constitutional judgments about commutation and pardon in order to implement the policy choices of one elected official.

Thus, this Court should limit the Governor's constitutional reprieve power to its intended scope, and permit him to grant reprieves only to temporarily suspend a convict's sentence for a finite and specific period of time and only where some particular issue unique to the convict and/or his circumstances justifies that temporary relief.[12]

C. The Governor's Suspension Of The Enforcement Of The Death Penalty By "Reprieve" Plainly Violates The Constitution.

Regardless of the political sentiment that some may attach to the Governor's action in using the "reprieve" power to suspend the enforcement of the death penalty, the Governor's action must be invalidated because it is not a true

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[11] Moreover, the Constitution is silent on whether the Governor may grant a reprieve absent a formal petition or application for clemency by the convict at issue. *See* Pa. Const. Art IV § 9; 71 P.S. § 299; 37 Pa. Code § 81.201 *et seq*. Thus, the Governor's ability to begin the clemency process on his own is of questionable legitimacy. *See* 37 Pa. Code § 81.211 (explaining the Board of Pardons "acts upon *applications*" for pardons and commutations by convicts (emphasis added)).

[12] To the extent the Governor relies upon *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) to support an argument that his reprieve power is unlimited, that case is not applicable here. As discussed *supra*, the Oregon Constitution is substantially different than the Pennsylvania Constitution, insofar as the Oregon Constitution grants unlimited clemency power to the executive, even in death penalty matters. *See* Or. Const. Art. V § 14. In contrast, the clemency powers of the Governor of Pennsylvania, as has been made clear above, are quite limited.

"reprieve" as defined by the Pennsylvania Constitution. "[N]o matter how desirable the act may appear or how worthy the objective, it cannot be sustained if it is interdicted by the Constitution." *Pittsburgh Rys. Co. v. Port of Allegheny Cnty. Auth.*, 202 A.2d 816, 820 (Pa. 1964); *see also Miller v. City of Beaver Falls*, 82 A.2d 34, 36 (Pa. 1951) (same). The Governor's moratorium or policy of suspending the enforcement of the death penalty cannot be sustained under the Constitution.

1. The Purported "Reprieve" Is Not Supported By Any Reason Specific To Any Convict.

The purported "reprieve" granted to Terrance Williams and the threatened future "reprieves" contemplated by the Governor's moratorium are not supported by any reasons specific to the recipient or prospective recipient.[13] The "reprieves" are not being granted because the convicts are of unsound mind or are suffering some other mental or physical condition; and are not being granted so that the

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[13] The Governor's Executive Order purportedly granting Terrance Williams a "reprieve" reads in relevant part:

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

Executive Order – Reprieve, Governor's Office of the Commonwealth of Pennsylvania (Feb. 13, 2015).

convicts may conduct further proceedings in their specific case. In fact, with respect to Terrance Williams, multiple courts, including this Court, have affirmed the jury's verdict and death sentence.[14] Thus, the Governor's action has nothing to do with anything about due process, nor time to accomplish further acts on behalf of Terrance Williams personally, nor anything else connected to the vicious murder that Terrance Williams committed (*i.e.*, the bludgeoning of a helpless man in a cemetery). Instead, the suspension of Williams's sentence is based solely on the Governor's policy decision to institute a "moratorium" on the enforcement of the death penalty.

The Governor seems to insinuate that the death sentence of Terrance Williams may somehow be affected by the forthcoming report from the Pennsylvania Task Force and Advisory Committee on Capital Punishment ("Task Force"). But that report has nothing to do—at all—with Terrance Williams, specifically. It deals only with death sentences, generally, across Pennsylvania, and is not tailored in any way to Williams himself or the specific circumstances of his case. *See* Senate Resolution 6 (Dec. 6, 2011); *see also* Moratorium Memorandum (explaining reasons for suspending Williams's sentence and

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[14] *See Commw. v. Williams*, 570 A.2d 75, 84 (Pa. 1990); *Commw. v. Williams*, 863 A.2d 505 (Pa. 2004); *Commw. v. Williams*, 909 A.2d 297 (Pa. 2006); *Commw. v. Williams*, 962 A.2d 609 (Pa. 2009); *Williams v. Beard*, No. 05-03486, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa. May 8, 2007); *Williams v. Beard*, 637 F.3d 195 (3d Cir. 2011); *Williams v. Wetzel*, 133 S. Ct. 65 (2012). *See also Commw. v. Williams*, 105 A.3d 1234 (Pa. 2014).

moratorium on death penalty, none of which deal with Terrance Williams, specifically).[15]

Thus, as noted above, the suspension of Williams's sentence and corresponding moratorium on the death penalty are completely disconnected from the specific circumstances of the crime committed by Terrance Williams. Instead, the Governor's moratorium is grounded entirely on his *political* and *personal* policy choices.[16] This Court should exercise special care here to respect the constitutional judgments about the underlying reasons for the removal of limitless power from the Governor in this area. *See* Proceedings and Debates of the 1837 Convention, *supra* Vol. II 435 (one delegate made clear that "[h]e hoped that no Executive would be guided by *political interests* in the dispensing of *mercy*"); *see also* Commw. of Pa., Legislative Journal – Senate at 47 (Feb. 13, 1995) ("Obviously, it is not likely to happen very often, but we certainly want to be sure that someone is not [in making clemency decisions], instead of looking at the facts and instead of looking at the individual situation, instead thinking how is this going

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15 In 2011, a Senate resolution was passed purportedly authorizing the Joint State Government Commission to form the Task Force, but placed a two-year deadline for the return of its report—a deadline which passed December 20, 2013. *See* Senate Resolution 6 (Dec. 6, 2011). The parallel House of Representative resolution introduced to authorize the formation of the Task Force never made it out of committee. *See* House Resolution 413 (Sept. 28, 2011). Therefore, besides being almost two years overdue, whatever stock the Governor gives the Task Force's forthcoming report, it will not enjoy the joint authority of both legislative houses.

16 *See supra* note 1.

to appear when I speak next week or how is this going to appear when I run for higher office?").

2. The Purported "Reprieve" Is Indefinite.

The suspension of Terrance Williams's sentence—and the threatened future suspensions contemplated by the moratorium—has no real finite end. The Task Force began its work in 2011 and its report has already been pushed back years since its first scheduled end date, currently having a targeted deadline of mid-2016. Upon the issuance of that report—assuming it is in fact completed—it is unclear what recommendations might be made, whether those recommendations could be implemented at the pleasure of the Governor, or whether further legislative action or judicial reform would be necessary. Indeed, the recommendations would simply be the starting point for many more years of political and legislative debate. One can easily imagine a scenario in which statutory or constitutional amendments would be required and thus take years and years to accomplish, or a scenario in which any proposed recommendations fail or are specifically rejected. All of this potentially adds years to the condition the Governor has placed on the moratorium, which is not to terminate until "any recommendations contained [in the Task Force's report] are satisfactorily addressed."

The fact that the Governor's declaration of his intent to suspend the enforcement of the death penalty on its face states that the suspension policy will

last until the recommendations, whatever they are, are "satisfactorily addressed" is equally troubling. In other words, the Governor will apparently be the sole arbiter of whether the matters are "satisfactorily addressed." He can always claim that they are not "satisfactorily addressed" and thus his policy of suspending the death penalty will continue. The notion that the "reprieve" he granted—and those he promises in the future—are somehow only "temporary" is contrary to common sense.

For these reasons, the policy of suspending enforcement of the death penalty via "reprieve" cannot be sustained under the Constitution. It is not a "reprieve" as that term is defined in the Constitution. It is not an act intended to grant a temporary stay of finite duration for a reason specific to the convict. It is a naked attempt to implement a policy of indefinitely suspending the enforcement of the death penalty for an entire population of convicts. Therefore, the Governor's moratorium and his suspension of the death penalty should be declared invalid under the Pennsylvania Constitution.[17]

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[17] Moreover, the suspensions that the Governor has granted and has promised to grant in the future are so open-ended, unbounded, and groundless that they in essence amount to the commutation of death sentences. Assuming, hypothetically, that the Governor serves two terms, these suspensions could well run for eight years. Beyond this, a successor Governor with the same antipathy toward the death penalty could allow all of the suspensions to continue indefinitely. Thus, Terrance Williams, who was scheduled for execution on March 4, 2015, may live a decade or more beyond the date of his lawfully scheduled execution. This is hardly the type of temporary reprieve envisoned by the Framers and allowed by the Constitution. Indeed, if these indefinite suspensions of sentences by "reprieve" pass muster, then anything will pass muster, including, for

III. THE GOVERNOR'S SUSPENSION OF THE ENFORCEMENT OF THE DEATH PENALTY ALSO VIOLATES THE PROHIBITION AGAINST THE SUSPENSION OF LAWS IN ARTICLE I, SECTION 12 AND VIOLATES HIS DUTY TO FAITHFULLY EXECUTE THE LAWS UNDER ARTICLE IV, SECTION 2.

The Governor's announced "moratorium" policy operates as a suspension of death sentences duly authorized by positive Pennsylvania law and imposed by Commonwealth juries and courts. Thus, the Governor's conduct violates the Constitutional prohibition against "suspension of laws" and violates his duty to "faithfully execute" the laws.

The Constitution declares that "[n]o power of suspending laws shall be exercised unless by the Legislature or by its authority." Pa. Const. Art. 1 § 12; *see also Commw. Dep't of Health v. Hanes*, 78 A.3d 676, 692 (Pa. Commw. 2013) ("only the General Assembly may suspend its own statutes . . . a public official '[i]s without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is presumptively constitutional until declared otherwise by the Judiciary" (quoting *Hetherington v. McHale*, 311 A.2d 162, 168 (Pa. Commw. 1973))).

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example, a "reprieve" of a 35-year-old convict sentenced to death "until such time as he attains the age of 100."

The prohibition against the suspension of laws originated in England and was part of the common law. The purpose was to ensure that the King did not suspend the laws for his own purpose:

> In England, particularly prior to the Revolution of 1688, it was not uncommon for the king to suspend the operation or execution of laws for the purpose of carrying out some temporary and arbitrary intention of his own. Such action was really illegal, and in fraud of the rights of the citizens, but was nevertheless persisted in until finally forbidden by the Bill of Rights, providing "That the pretended power of suspending laws, by regal authority, without consent of Parliament is illegal."

Thomas Raeburn White, Commentaries on the Constitution of Pennsylvania 161 (1907); *see also Nicolette v. Caruso*, 315 F. Supp. 2d 710, 726 (W.D. Pa. 2003) (explaining the prohibition on extra-legislative suspension of laws "traces its roots back to the English Bill of Rights passed after the Glorious Revolution in 1689 . . . [which] stated: That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal" (internal quotation marks omitted)).

The Pennsylvania Constitution also declares that the Governor "shall take care that the laws be faithfully executed." Pa. Const. Art. IV § 2. Courts within this Commonwealth have found that where the Governor has clearly violated the Pennsylvania Constitution he has violated his duty to "take care that the laws be faithfully executed." *See, e.g., Pa. Sch. Bd. Ass'n, Inc. v. Commw. Ass'n of Sch.*

Adm'rs, Teamsters Local 502, 696 A.2d 859, 870–71 (Pa. Commw. 1997) (explaining a "clear violation" of a constitutional provision would violate Governor's duty to take care that the laws be faithfully executed).

Capital punishment is a lawful sentence explicitly authorized by positive Pennsylvania law. For crimes of murder in the first degree, the General Assembly has authorized that convicts may be sentenced to death if, after considering both aggravating and mitigating factors, the jury finds such a sentence is warranted by the circumstances of the case. 42 Pa. C.S. § 9711; *see also Commw. v. Reyes*, 963 A.2d 436, 441 (Pa. 2009) (refusing to re-evaluate jury's sentence of death because that determination "is exclusively the function of the jury"); *Commw. v. Moser*, 549 A.2d 76, 80 (Pa. 1988) (determination of capital punishment is "exclusively" a question for the factfinder (quoting *Commw. v. Fahy*, 516 A.2d 689, 698 (Pa. 1986))). The sole function of the executive branch in Pennsylvania's death penalty scheme is to determine whether to seek a death sentence in a given case (the prosecutor's discretion) and to sign the death warrant (the Governor's duty). *See Commw. v. Parker White Metal Co.*, 515 A.2d 1358, 1368 (Pa. 1986) ("[T]his Court has consistently upheld, against due process challenges, the authority of a prosecutor to choose between procedures and sentencing alternatives."); *Commw. v. Zettlemoyer*, 454 A.2d 937, 957 (Pa. 1982) (acknowledging legitimacy of prosecutor's discretion to seek death penalty in first degree murder case),

abrogated on other grounds as recognized by Commw. v. Freeman, 827 A.2d 385 (Pa. 2003); 61 Pa. C.S. § 4302.

Under the separation-of-powers doctrine, the executive branch cannot unilaterally refuse to enforce a legislative enactment or authorization, regardless of any disagreement with the policy behind such legislation. *See, e.g.*, *Hetherington v. McHale*, 311 A.2d 162, 166–68 (Pa. Commw. 1973) (separation of powers prevents Pennsylvania attorney general from unilaterally declaring a law unconstitutional, as that power is reserved solely for the judiciary and would create a suspension of the laws), *rev'd on other grounds by* 329 A.2d 250 (Pa. 1974); *see also Hanes*, 78 A.3d at 692 (similar).

Similarly, no other branch may interfere with the judicial branch's judgments and orders, especially final judgments. *See, e.g.*, *Friends of Pa. Leadership Charter Sch. v. Chester Cnty. Bd. of Assessment Appeals*, 101 A.3d 66, 73 (Pa. 2014) ("[p]aramount to the separation of powers doctrine . . . is the recognition that final judgments of the judicial branch are not to be interfered with" (internal quotation mark omitted) (quoting *Commw. v. Sutley*, 378 A.2d 780, 783 (Pa. 1977))); *see also Menges v. Dentler*, 33 Pa. 495, 498–99 (Pa. 1859) ("When, therefore, the constitution declares that it is the exclusive function of the courts to try private cases of disputed right, and that they shall administer justice 'by the law of the land,' and 'by due course of law;' it means to say, that the law relating to the

transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; that that the case shall not be altered, in its substance, by any subsequent law.").[18]

Because the Governor in this case has announced a moratorium on the enforcement of the death penalty—*i.e.*, that he intends to indefinitely suspend every death sentence until an illusory deadline comes to pass (which, in fact, may never occur at all)—and because he has taken the first step of enforcing that moratorium by granting an unconstitutional suspension of Terrance Williams's sentence, he has violated the separation of powers inherent in the Pennsylvania Constitution.

The Governor has clearly violated his duty to "faithfully execute" the laws. *See, e.g.*, *Pa. Sch. Bd. Ass'n, Inc.*, 696 A.2d at 871. Even if, in good faith, the Governor believes that the forthcoming report from the Task Force will recommend the abolishment, or serious curtailment, of Pennsylvania's scheme of capital punishment, he cannot circumvent the Constitution to create a "stop-gap" where a legislative fix has yet to be enacted. *Accord United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 786 (W.D. Pa. 2014) (executive action "may not serve as a stop-gap or a bargaining chip" to be used against other branches).

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[18] Indeed, even later courts may not generally review a jury's finding that capital punishment is appropriate. *See Reyes*, 963 A.2d at 441 (explaining that not even the Supreme Court can generally review a jury's sentence of capital punishment); *Commw. v. Dennis Miller*, 724 A.2d 895, 902 (Pa. 1999) (same).

"While 'the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by [the legislature] that arise during the law's administration,' it does not include unilateral implementation of legislative policies." *Id.* (quoting *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014)).

The Governor's unilateral moratorium on the death penalty violates the prohibition against the suspension of laws and his duty to faithfully execute the laws of this Commonwealth. Therefore, the Governor's actions are unconstitutional and should be declared void.

CONCLUSION

The Governor's unilateral suspension of the enforcement of the death penalty by use of his "reprieve" power is unconstitutional because (i) his action plainly does not constitute a "reprieve" within the meaning of Article IV, Section 9 of the Constitution and (ii) his policy of suspending the enforcement of the death penalty violates the Constitutional prohibition in Article I, Section 12 against the "suspension of laws" by any branch other than the Legislature and violates his duty to "faithfully execute" the laws under Article IV, Section 2.

Dated: April 13, 2015

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CERTIFICATE OF COMPLIANCE WITH PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2135(a)(1)

This brief complies with the word count limits of Pa. R. App. P. 2135(a)(1) because, according to the word processing software used to prepare this brief, it contains less than 14,000 words.

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CERTIFICATE OF SERVICE

I, Michael L. Kichline, hereby certify that on this 13th day of April, 2015, I caused a copy of the foregoing Brief of *Amicus Curiae* the Pennsylvania District Attorneys Association in Support of Petitioner to be served via Federal Express upon the following counsel of record noted below in a manner that satisfies the requirements of Pa. R. App. P. 121 and 2187:

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EXHIBIT A

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	**NO. 2642 of 2013**
V.	
ROCKNE NEWELL	

ORDER

AND NOW, this ***12th day of March, 2015***, upon consideration of the Defendant's Motion to Dismiss Aggravating Circumstances with accompanying memorandum of law; the following is **ORDERED**:

1. The parties shall be prepared to provide this Court with a factual basis for its Order addressing the instant motion either by stipulation of the parties or by a hearing on **Tuesday, April 28, 2015** at **10:00 A. M.** in a courtroom to be announced at the Monroe County Courthouse.

2. Argument on the instant motion shall occur immediately thereafter. In addition to the arguments made on April 28, 2015, this Court may require the parties to submit written memoranda of law or supplemental memoranda of law in support of their respective positions.

3. The Defendant shall be transported by the appropriate authorities to the Monroe County Courthouse for the proceeding.

BY THE COURT:

On behalf of **JOSEPH P. CRONIN, JR. S.J.**

2015 MAR 17 PM 3 33
MONROE COUNTY, PA
CLERK OF COURTS

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COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :

v. :

ROCKNE WARREN NEWELL, :
Defendant : NO. 2642 OF 2013

MOTION TO DISMISS AGGRAVATING CIRCUMSTANCES AND TO PROCEED WITH COM. V. NEWELL AS A NON CAPITAL CASE

Counsel on behalf of Rockne Newell are moving the Court to dismiss the Aggravating Circumstances filed by the D.A. of Monroe County and to proceed with the instant matter as a non-capital case; in support of that motion undersigned counsel avers as follows:

1. On November 13, 2014, the D.A. of Monroe County filed a Notice of the Commonwealth of its intention to seek the death penalty and of the aggravating circumstances in connection therewith.

2. The aggravating circumstances listed in the notice were: (1) knowingly creating a grave risk of others, 42 Pa.C.S. § 9711(d)(7); (2) Defendant offenses has been convicted of other offenses for which life imprisonment or death was possible. 42 Pa.C.S. § 9711(d)(10); (3) The Defendant has been convicted of one or more murders committed at the time of the offense. 42 Pa.C.S. § 9711(d)(11).

3. On February 13, 2015, the Governor of Pennsylvania Tom Wolf issued a memorandum granting a reprieve for Terrence Williams, a death row inmate in Pennsylvania whose execution was scheduled for March 4, 2015.

4. In addition to the above referenced reprieve for Mr. Williams, Governor Wolf announced his intention "to grant a reprieve in each future instance in which an execution is scheduled, until this condition [Pa. Task Force and Advisory Committee on Capital Punishment report and recommendations] is addressed.

5. In his memorandum Governor Wolf set forth the rationale for his actions in granting the reprieves; "I take this action because the capital punishment system has significant and widely recognized defects." (See attached memorandum P. 1 Para. 5.)

6. Additionally Governor Wolf sets forth support for the aforementioned rationale. Since reinstatement of the death penalty, 150 people have been have been exonerated from death row, many inmates sentenced to death have been resentenced to life in prison due to flaws in penalty phases of their trials. Numerous recent studies have called into question the accuracy and fundamental fairness of Pennsylvania's capital sentencing system. (See id at P.2 for additional supporting facts and footnote citations.)

7. The Pennsylvania Supreme Court's Committee on Racial and Gender Bias in the Justice System reported "strong indications that Pennsylvania's Capital system does not operate in an evenhanded manner." (Id. P.3 citation omitted.)

8. The Pennsylvania death penalty system, according to the American Bar Assessment Team, is in substantial noncompliance with the A.B.A.'s recommendations. (Id. P.4, Para. 2)

9. Pennsylvania Governors have signed 434 death warrants, all but three have been stayed by a Court. The 3 were issued and carried out for prisoners who withdrew their appeals and essentially volunteered to be executed.

10. Given the intentions of Governor Wolf in granting a general reprieve and the facts in support, a long period of time will elapse before the question of the fundamental fairness of Pennsylvania's death penalty system is decided.

11. A distinct possibility exists that the system will be found infirm.

12. Under either of the above two scenarios, the death penalty in Pennsylvania as sought on Rockne Newell is unconstitutional under the U.S. Constitution and Pennsylvania Constitution.

WHEREFORE, this Court should strike the aggravating circumstances set forth in Commonwealth's Notice of Intention to seek death and to proceed to trial here as a non-capital case.

Respectfully submitted,

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Sic Judge Conlin

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :

v. :

ROCKNE WARREN NEWELL, :
Defendant : NO. 2642 OF 2013

MEMORANDUM OF LAW IN SUPPORT OF THE ACCOMPANYING MOTION TO STRIKE

The within motion sets forth in summary the tenor and facts in the Governor's Memorandum of February 13, 2015 calling for a moratorium on Pennsylvania's executions. The moratorium will in effect render the death penalty in Pennsylvania a nullity. The effect will be immediate and may be viable for years to come in view of the Governor's intention to keep the reprieves forthcoming until he gets and reviews the report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment (Task Force hereinafter).

The Task Force report may indicate that various flaws in the Pennsylvania death penalty procedures combine to render the death penalty as applied fundamentally unfair. The Governor and legislature may agree with the report, and that would mean the death penalty procedures must be changed or the death penalty abolished. This memorandum contends that the system is and has been broken beyond repair. Moreover, the Governor's intentions as set forth in his Memorandum indicates that the death penalty cannot be imposed on Mr. Newell or other capital Defendants at this time.

Currently, this Court will be conducting a competency hearing for Mr. Newell. After the Court's competency determination, counsel intends to file other motions and memoranda

challenging the death penalty. However, counsel files their memorandum to address and review the concerns set forth by Governor Wolf on February 13, 2015.

Initially this memorandum will address the Governor's concerns as set forth in his memorandum. The Governor points out at that there are currently 186 individuals on Pennsylvania's death row. The Commonwealth has executed only 3 people since the Pennsylvania legislature reinstated the death penalty nearly 40 years ago. The fact that the death penalty is so rarely imposed in Pennsylvania despite its large population of death row inmates raises a question of the fairness of the procedures used in the conduct of trial and sentencing phases of capital trials.

The large amount of stays issued by the Pennsylvania and Federal Courts indicates that at the very least appealing Defendants have raised meritorious issues which must be examined by a panel or one judge. The U.S. Court of Appeals has reversed Pennsylvania capital cases for trial and penalty phase error on a regular basis. At any rate, the Commonwealth of Pennsylvania does not regularly and consistently carry out death sentences. Moreover, given the various filing deadlines for direct appeals and statutes of limitations in federal and state post-convictions of litigation, Defendants cannot solely be responsible for infinite delays.

In Furman v. Georgia, 428 U.S. 238, 286-291 (1972), members of the Court recognized that death is a punishment different from all other sanctions. (Brennan, J. concurring). The Supreme Court as well as a majority of the individual justices has recognized that the qualitative difference of death from all other penalties requires a corresponding degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992, 998-999 (1983). In capital proceedings, fact finding proceedings aspire to a heightened standard of reliability. Ford v.

Wainwright, 977 U.S. 399, 411 (1986). This special concern is a national consequence that execution is most irremediable; "death is different". [Marshall, J. concurring].

The heightened scrutiny spawned in Furman analyzed the rationales for just punishment. One of the rationales underlying justification for the death penalty in compliance with Furman's dictates is deterrence. Justice White in his concurrence considers "a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." Furman, at 311 [White, J. concurring].

Justice White reasons further that a punishment so seldom imposed makes no contribution to the other goals of punishment such as retribution, nor will community values be measurably reinforced by a penalty so rarely invoked. Id.

Pennsylvania's death penalty so infrequently imposed cannot meet the Constitutional requirement set forth in Furman. As applied in Pennsylvania and brought to our attention in the Governor's memorandum, its infrequency runs afoul of the prohibition against imposition of a wantonly and freakishly imposed death sentence Such penalty will be set aside. Gregg v. Georgia, 428 U.S. 153, 156 (1976). [White, J. concurring joined by Warren, C.J. and Rehngrist, J.].

Governor Wolf reasons that an unending cycle of death warrants directs resources and imposes intolerable burdens on victims' families. The process is painful for all involved. We agree. A life sentence, especially pursuant to a guilty plea would, in almost all cases, end the appeals and give the victims' families the opportunity to get the Court proceedings, but sadly not their own grief behind them.

Surely a trial does not end the cycle. However, appeals are the only way for a wrongly convicted or innocent person to vindicate herself/himself. Often times the Defendants must exhaust state remedies to get hearings in Federal Court. Moreover, many Federal Court 2254 proceedings examine meritorious Brady claims of Defendants related to withholding of exculpatory evidence by law enforcement. See e.g. Lambert v. Beard, 537 Fed. Appx. 78 (3d Cir. 2013) Johnson v. Folino, 705 F.3d 117 (3d Cir. 2013).

The Governor asserts that a system that executes a human being must be infallible. The many exonerations of innocent death sentenced inmates militates in favor of abolishment or at least a lengthy suspension of a system that puts innocent people in jeopardy. The present flawed system has imposed death sentences on factually innocent people. This is intolerable.

The memorandum mentions inadequacy of public defender or appointed counsel services, racial bias in jury selection. The Third Circuit and U.S. Supreme Courts, and Pennsylvania Supreme Court have reversed Pennsylvania cases for ineffective assistance and racial bias in jury selection. See e.g. Com. v. Bardo, 105 A.3d 678 (Pa. 2014); Lark v. Beard, 2012 WL 3089356 (E.D. Pa. July 30, 2012), Affirmed Lark v. Secretary Pa. Dept. of Corrections, 566 Fed. Appx. 161 (3d Cir. 2014) Cert. Denied, Wetzel v. Lark, 2015 WE 133495, 83 USLW 3149 (2015).

The memorandum refers to costs of maintaining the death penalty and fairly administering it. Whether the cost 315 or 600 million, or something between those numbers, the numbers are staggering. Yet the system is still flawed, and one of the things that causes the flaws is insufficient funds for defense experts, counsel, and investigators. More money will not cure flaws such as lying jail house informants, faulty eye witnesses, and false confessions, three of the main causes of convictions of innocent Defendants.

Governor Wolf had the courage to publish a memorandum he had to know would be very unpopular in some quarters both well-funded and vocal; the memorandum was supported by authority. We file our memorandum relying on the Governor's memorandum, its citation to authority, and the cases we have cited. The Pennsylvania capital system is flawed, and the general reprieves are necessary despite further delay and will add weight to a flawed system.

The longer delay the weaker the justification for imposing the death penalty in terms of the punishment's basic retributive or deterrent purposes. Lackey v. Texas, 214 U.S. 1045 (1995) (Mem.) In Gregg v. Georgia, 428 U.S. 153, 196 (1976) (opinion of Stewart, Powell, and Stevens, JJ) the Justices reasoned that the death penalty to pass constitutional muster must serve as retribution and deterrence. When the death penalty ceases realistically to further these purposes... its imposition would be pointless." Furman at 212. (opinion concurring in judgment).

The death penalty machinery in Pennsylvania as applied and with the flaws as described in the Governor's Memorandum does not comport with the "evolving standards of decency which mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). "The Eighth Amendment is not fastened to the obsolete, but may acquire meaning as public opinion

becomes enlightened by a humane justice." Hall v. Florida, _____ U.S. _____, 134 S.Ct. 1986, 1993 (2014), quoting Trop at 101.

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