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IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : NO. 14 EM 2015
Petitioner

V.

TERRANCE WILLIAMS

COMMONWEALTH PETITION FOR LEAVE TO REPLY TO ANSWERS TO EMERGENCY PETITION FOR REVIEW UNDER KING'S BENCH JURISDICTION

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

R. SETH WILLIAMS, District Attorney of Philadelphia County, by his Assistants, RONALD EISENBERG, Deputy, Law Division, and HUGH J. BURNS, JR., Chief, Appeals Unit, respectfully seeks leave to file a combined reply to the Governor's and the defendant's Answers to the Commonwealth's emergency petition for review under this Court's King's Bench jurisdiction.

Leave to reply is warranted

The Commonwealth seeks leave to be permitted to offer a combined response to the answers to its petition, because this will further clarify the issues and the positions of the litigants in a situation in which time is limited. For the convenience of the Court, the Commonwealth's proposed response, should one be permitted, is set

forth below.

Reply to the Governor's answer

Critical to the Governor's assumption of a supposed moratorium power is his claim that he can do so through the reprieve power; the reprieve power, he claims, is absolutely unlimited. That this is nonsense is evident from the very next word in Article IV, § 9, "commutation." Because commutations and reprieves are *different*, reprieves are *limited* in that they (for example) cannot function as *commutations*. If they did they would not *be* reprieves. The governor cannot evade the constitutional limit on commutations by merely calling a commutation a reprieve.

Contrary to the Governor's view that the Commonwealth has "no legal foundation" for its position, that legal foundation is clearly set forth in its petition.

To reiterate, it is the Governor's duty to "take care that the laws be faithfully executed" under Article IV, § 2. Article IV, § 9 (a) grants no "moratorium" power and places strict limits on commutations and pardons. The Governor's understanding of the reprieve power as "unrestricted" and "unconditional" (Governor's answer, 5-6) erroneously fails to view these concepts together as one directive. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (2008) (constitutional provisions in *para materia* must be read and applied together). Deeming a "reprieve" an act that is "unrestricted" by those restrictions that are inherent in a reprieve illegally seeks to evade the plain

strictures of the constitution.

Morganelli v. Casey is not dicta, as the Governor would have it. In *Morganelli* a Governor sought to justify his refusal to issue death warrants as a supposed exercise of the "unlimited" reprieve power. This argument was rejected because the conduct in question – there, refusing to issue death warrants; here, imposing a "moratorium" by calling it a reprieve – was ***not*** a "reprieve" under any known definition of that term:

> 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.

Morganelli v. Casey, 641 A.2d 674, 678 (Pa. Cmwlth. 1994) (en banc).

Here, as in *Morganelli*, the Governor is refusing to comply with the law and deeming this refusal an exercise of the reprieve power, but the actual substance of the conduct is not a reprieve. The Governor does not fulfill his constitutional duty to faithfully execute the law by *failing* to execute the law and "contending that the failure ... constitutes ... a reprieve." *Id.* The power to grant a reprieve is not a power

to redefine reality merely by calling something that is not a reprieve by that name.

The Governor's assertion that whatever he deems a reprieve, is a reprieve, denies this Court's power of judicial review. Just as a reprieve is not whatever the Governor says it is, the constitution does not mean whatever he wishes it to mean. *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) ("[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts") (citations omitted). In this regard, the Governor characterizes the reprieve power as an "unequivocal" "check on ... the judiciary ... and judicial authority" (Governor's answer, 8), and presents this theory as a supposed bar to review by this Court. But there is *zero* authority for this proposition that reprieves are a check on the judiciary, much less that the *nature and extent* of the reprieve power is therefore removed from judicial review. *Commonwealth v. Michael*, 56 A.3d 899, 903 (Pa. 2012), merely explains that the judiciary cannot review clemency decisions. That is quite different from deciding what the constitutional clemency power consists of: the latter is the clear constitutional role of this Court. *Thornburgh v. Lewis*, 470 A.2d 952, 955 (Pa. 1983) (rejecting similar argument; determining the legal obligations and limitations on the Governor is distinct from involving the judiciary in the Governor's executive

decisions).[1]

It is disingenuous, moreover, for the Governor to characterize his unconstitutional conduct as a supposed means of making the judiciary do its job, given the extensive appellate and collateral review (review that supposedly should be ignored – Governor's answer, 10) to which this case has been subjected.

The Governor's attempt to use the Task Force as cover for his conduct (Governor's answer, 2) is likewise disingenuous. The Task Force has no legal authority but was convened under a *resolution* by the senate; a senate resolution cannot confer on the Governor authority denied by the Constitution. The instant conduct is not somehow authorized by the existence of the Task Force.[2]

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[1] *Haugen v. Kitzhaber*, 306 P.2d 592 (Or. 2013) is not authority. Nor is it instructive, because the Oregon constitution places no limits on the clemency power. Pennsylvania's Constitution does: here, unlike in Oregon, the Governor cannot grant commutations or pardons at his sole election. This is precisely why he inaccurately attempts to characterize the reprieve power as supposedly unlimited, to achieve what could properly be done only with an unlimited pardon power.

[2] The sole purpose of the Task Force is to provide non-binding information for the consideration of the General Assembly, not to somehow justify unconstitutional conduct by the executive. On February 17, 2015, Senator John Rafferty issued a statement which said in part:

> Governor Wolf, in justifying his decision to grant this moratorium, relied heavily on a bipartisan Pennsylvania Task Force and Advisory Commission created by the Senate, entrusted with conducting a study of the effectiveness of capital punishment in Pennsylvania and

Further, the Governor himself has *contradicted*, on the record, his own claim that the moratorium/reprieve is a temporary measure pending the report of the Task Force. His own memorandum, issued with the instant alleged reprieve, states that he regards the report as merely a precursor to "working with the General Assembly" on whatever the report recommends. But even this supposed endpoint is itself an illusion, because in the same declaration the Governor reveals his intent to block capital punishment unless or until he is satisfied that the legal system is perfect ("If

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> reporting its findings back to the Senate. As a member of the Senate and the Vice Chairman of the Joint State Government Commission, the advisory commission responsible for administering this task force, I am in a unique position to know what this committee was entrusted to accomplish. I can say unequivocally that the intent of the death penalty group was not to be an excuse or tool for our governor to ignore current law. In my opinion, Governor Wolf, by granting this moratorium, is improperly holding our law hostage to a mere advisory group, the same group which has already been questioned by some as to whether it is unfairly skewed towards death penalty opponents. When the Senate passed the resolution authorizing this advisory group, the intent was not to mandate that its recommendations be reviewed and implemented as a precedent for following our duly enacted laws. Indeed, in the past the Joint State Government Commission has produced some very important work but their recommendations and findings are not binding on the legislature. In my opinion, making them binding would be an unacceptable delegation of power.

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/

the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a human being, its capital sentencing system must be infallible"). The claim that there is a clearly defined endpoint, according to the Governor's own statement, is simply false. Whatever this is, it is not a reprieve, but a categorical bar to a class of criminal penalties.

It is ironic that, having issued the instant alleged reprieve on a Friday afternoon 18 days before the scheduled execution, the Governor calls for briefing and deliberation that his own conduct prevents. Because the Constitution, which must be read "in its popular sense, as understood by the people when they voted on its adoption" with the "ordinary, natural interpretation the ratifying voter would give," *Jubelirer v. Rendell*, 953 A.2d at 528 (citations omitted), is clear, the extant pleadings constitute briefing.

The Governor adds that his conduct is irrelevant because the execution "was going to be impossible" anyway, as the Department of Corrections, for reasons that are not stated, "does not have in its possession" the necessary drugs (Governor's answer, 2 n.2). The real question, however, is not whether the DOC has the drugs now, but whether it can obtain them when it wishes to do so. Notably, the Governor is careful *not to deny* that the necessary drugs *can be obtained at will* upon the decision of the DOC to obtain them. Further, the DOC is an executive department

controlled by the Governor himself. The chief executive of the Commonwealth may not blame his refusal to faithfully execute the law on subordinates. The responsibility is his.

Finally, the Governor's remarkable protest that the history of this case should be ignored (Governor's answer, 10) is revealing. Of course the Governor is unconcerned with the facts of this case, because in his view he has assumed a personal power to impose a categorical moratorium on all death sentences in Pennsylvania, irrespective of the nature of any individual case. Only in that sense, of the Governor's unconstitutional usurpation of a nonexistent power, are the facts of Terrance Williams' murders irrelevant.

Reply to defendant's answer

Defendant adds little to the Governor's arguments. Again, merely calling something a reprieve does not make it one. The substance of the act, not how it is characterized, must govern the question of whether it is lawful and constitutional. Thus, it is a non-sequitur for defendant to argue at length, as he does, that a Governor may grant reprieves. The instant act is not a reprieve.

Defendant argues that "the concept of *para materia* applies only when construing separate provisions" (Defendant's answer, 7), but he cites nothing to substantiate this assertion except *Jubelirer v. Rendell*, which says no such thing; and

1 Pa.C.S. § 1932, which says exactly the opposite ("statutes *or parts of statutes* are in para materia when...") (emphasis added).

And of course, defendant's argument makes no sense. The constitutional imposition of restrictions on commutations and pardons but not reprieves would be irrational if a reprieve could serve as a *de facto* pardon. *See* 1 Pa.C.S. § 1922 (presumption against constructions that are absurd or unreasonable). The absence of those restrictions on reprieves reflects recognition of what defendant and the Governor pointedly ignore: a reprieve, by definition, is restricted by time and purpose, and given those built-in limits does not require the additional limits on pardons and commutations. These aspects of Article IV, § 9 (a), are indeed in *para materia* and must be considered together.

Defendant's claim that *Morganelli* somehow *supports* the Governor's action here (Defendant's answer, 9) is simply at odds with reality. As noted, that case holds that a Governor may not refuse to execute his constitutional duty to carry out the law by characterizing it as an exercise of the reprieve power, where the reprieve power by definition does not encompass the conduct he seeks to justify. Defendant's argument that the action does not nullify the judgment or usurp any judicial function (*Id.*, 10) likewise ignores reality. His execution and all executions are suspended until the Governor decides otherwise, until they satisfy his personal standard of perfect due

process, which of course they never will. That nullifies the judgment and usurps the judicial function.

Like the Governor, defendant attempts to deny this Court's power of judicial review (*Id.*, 10-11). Review in this case does not entail deciding how the Governor should use a power granted by the constitution, but only whether a power he claims to possess and has purported to exercise is *denied* by the constitution and so is illegal and prohibited. Such review is perfectly legitimate. *Robinson Twp., Washington Cnty. v. Commonwealth*, *id.* This is not "interfering with" the Governor's constitutional powers (Defendant's answer, 13). Only this Court can determine whether or not the Governor *actually possesses* the supposed constitutional power to impose a moratorium on a class of criminal penalties. If indeed the constitution grants the claimed authority the Governor can exercise it however he likes; if not, its exercise is illegal and should immediately be stopped.

Finally, it goes without saying that this Court's King's Bench power is not somehow restricted by the jurisdiction of the Commonwealth Court (Defendant's answer, 12). The "supreme judicial power" vested in this Court by the Pennsylvania Constitution in Article 1 § 2 obviously is not limited by the jurisdiction of lower courts. The jurisdiction of the Commonwealth Court is necessarily subject to the jurisdiction of this Court, which is appropriately exercised in a case of this nature. It

is the obligation of the Governor is to faithfully execute the law; he has no authority to declare what the law is.

Respectfully submitted

/s/

Hugh J. Burns, Jr.
Chief, Appeals Unit

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GOVERNOR TOM WOLF

MEMORANDUM

Pursuant to authority granted in Article IV, § 9 of the Constitution of Pennsylvania, I am today exercising my power as Governor to grant a temporary reprieve to inmate Terrence Williams. A death warrant for this case was signed on January 13, 2015 by my predecessor, acting pursuant to Section 4302 of the Pennsylvania Prisons and Parole Code. The execution was scheduled for March 4, 2015.

The reprieve announced today shall remain in effect until I have received and reviewed the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment (established under Senate Resolution 6 of 2011), and any recommendations contained therein are satisfactorily addressed. In addition, it is my intention to grant a reprieve in each future instance in which an execution is scheduled, until this condition is met.

I take this action only after significant consideration and reflection. There is perhaps no more weighty a responsibility assigned to the Governor than his or her role as the final check in the capital punishment process. Given the gravity of this responsibility, and the significance of the action announced herein, I believe it necessary to outline the principles that have led me to this conclusion.

To be clear at the outset, this reprieve is in no way an expression of sympathy for the guilty on death row, all of whom have been convicted of committing heinous crimes, and all of whom must be held to account. The guilty deserve no compassion, and receive none from me. I have nothing but the deepest appreciation for the work of victim advocates, and sympathize and stand with all those who have suffered at the hands of those in our society who turn to violence.

In this case, there is no question that Terrence Williams committed a grievous act of violence. Williams was sentenced to death in 1986 for a murder he committed three months after his eighteenth birthday. In the years of appeals that have followed, there has been no contention that he is innocent of the crime of which he was convicted. The reprieve announced today does not question Williams' guilt. Rather, I take this action because the capital punishment system has significant and widely recognized defects.

There are currently 186 individuals on Pennsylvania's death row. Despite having the fifth largest death row in the nation, the death penalty has rarely been imposed in modern times. In the nearly forty years since the Pennsylvania General Assembly reinstated the death penalty, the Commonwealth has executed three people, all of whom voluntarily abandoned their right to further due process.

In that same period, Governors have signed 434 death warrants. All but the three noted above have subsequently been stayed by a court. One inmate has been scheduled for execution six times, each of

which has been cancelled due to a state or federal appeal. Two inmates have remained on death row for more than three decades.

This unending cycle of death warrants and appeals diverts resources from the judicial system and forces the families and loved ones of victims to relive their tragedies each time a new round of warrants and appeals commences. The only certainty in the current system is that the process will be drawn out, expensive, and painful for all involved.

While the pace of the process frustrates some, the fail-safes of appellate review are essential in avoiding a catastrophic miscarriage of justice. Since reinstatement of the death penalty, 150 people have been exonerated from death row nationwide, including six men in Pennsylvania.[1] One of these men, Harold Wilson, twice had death warrants signed against him – meaning Pennsylvania came within days of executing an innocent man, and might well have done so but for judicial stays. A second man, Nicholas Yarris, was exonerated by newly available DNA evidence after serving twenty-one years on death row. Many more inmates have been resentenced to life in prison after reviewing courts found mitigating circumstances, or flaws in the penalty phases of their trials.

If the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a human being, its capital sentencing system must be infallible. Pennsylvania's system is riddled with flaws, making it error prone, expensive, and anything but infallible.[2]

Numerous recent studies have called into question the accuracy, and fundamental fairness of Pennsylvania's capital sentencing system. These studies suggest that inherent biases affect the makeup of death row. While data is incomplete, there are strong indications that a person is more likely to be charged with a capital offense and sentenced to death if he is poor or of a minority racial group, and particularly where the victim of the crime was Caucasian.[3]

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[1] *See* DEATH PENALTY INFORMATION CENTER, THE INNOCENCE LIST, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110.

[2] *See* PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT, (2003)(hereinafter FINAL REPORT).

[3] *See* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT, 235 (2007) (hereinafter ABA REPORT). *See also*, Thomas J. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 WIDENER L.J. 1(2013) (Justice Saylor notes that anecdotal evidence "suggest[s] a serious problem in Pennsylvania" with appointed capital counsel); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012); (TASK FORCE AND ADVISORY COMMITTEE ON SERVICES TO INDIGENT CRIMINAL DEFENDANTS, A CONSTITUTIONAL DEFAULT: SERVICES TO INDIGENT CRIMINAL DEFENDANTS IN PENNSYLVANIA (2011) (noting that "Pennsylvania [is] the only state that does

In 2003, the Pennsylvania Supreme Court's Committee on Racial and Gender Bias in the Justice System issued an extensive Final Report, including a section examining the effects of racial and gender bias on the state's capital justice system.

The Committee reported "strong indications that Pennsylvania's capital system does not operate in an evenhanded manner."[4] While Pennsylvania's minority population at the time was eleven percent, over two-thirds of the inmates on death row were minorities. The Committee noted multiple factors contributing to this disparity, including the inadequacy of public defender or appointed counsel services available to indigent capital defendants, racial bias in juror selection, and the lack of uniform standards to guide prosecutors in exercising discretion about whether to seek the death penalty in capital eligible cases.

Given its outsized contribution to the composition of death row, Philadelphia was selected for intensive study. The Committee found that even after controlling for the seriousness of offenses and other non-racial factors, African American defendants were sentenced to death at a significantly higher rate than similarly situated members of other racial groups. Researchers determined that one third of the African Americans on death row from Philadelphia would not have received the death penalty were they not African American. These statistics create a moral crisis for people of good will on all sides of this issue.

The Committee recommended a number of changes to address the disparities it identified. But it also noted that its efforts to understand the full scope of the problem were hampered by the lack of systematically collected data related to capital charging and sentencing in Pennsylvania.

In 1997, the legislature repealed a law that required the courts to vacate death sentences found to be "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant."[5] In order to facilitate its proportionality review, the Pennsylvania Supreme Court had required judges to submit forms with data about all cases resulting in first-degree murder convictions. These forms were compiled into a database by the Administrative Office of Pennsylvania Courts, and the database was used to analyze trends in sentencing.

When the provision was repealed, the tracking of the statistics ceased. Since that time Pennsylvania has had no comprehensive data collection system which would allow rigorous analysis of the effects of racial

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not appropriate or provide for so much as a penny toward assisting the counties in complying with Gideon's mandate.")

[4] *See* FINAL REPORT, at 201.

[5] This statutory provision, previously codified at 42 Pa. C.S. § 9711 (h)(3), was repealed by the Act of June 25, 1997 (P.L. 293, No. 28), § 1.

and gender bias on capital sentencing. While the figures from Philadelphia cited by the Supreme Court Committee cause concern, given the lack of data, we simply do not understand the scale of this problem.

More recently, in 2007, the American Bar Association ("ABA") appointed a Pennsylvania Death Penalty Assessment Team to review the state's compliance with ABA recommended best practices in capital charging, sentencing, and the appellate process.

Like the Supreme Court Committee, the Assessment Team found numerous areas of concern, including inadequate procedures to protect the innocent, failure to protect against poor defense lawyering, the lack of state funding for capital indigent defendants, significant capital juror confusion, a lack of statewide data to analyze proportionality in charging and sentencing, and numerous others. Ultimately, the Team concluded that "the Commonwealth of Pennsylvania fails to comply or only partially complies with the many of the ABA's Recommendations and that many of these shortcomings are substantial."[6]

Finally, administering the death penalty, with all the necessary legal appeals and safeguards as well as extra security and individual cells on death row, is extremely expensive. A recent analysis conducted by the Reading Eagle estimates that the capital justice apparatus has cost taxpayers at least $315 million, but noted that this figure was very likely low.[7] Other estimates have suggested the cost to be $600 million or more. The Commonwealth has received very little, if any, benefit from this massive expenditure.

Recognizing the seriousness of these concerns, the Senate passed Resolution 6 in 2011, which authorized the creation of a bipartisan Pennsylvania Task Force and Advisory Committee on Capital Punishment.

The Task Force is co-chaired by Senators Leach and Greenleaf and composed of representatives from law enforcement, prosecutors, defense attorneys, family of victims, clergy, and legislators. Resolution 6 directs the Task Force to conduct a comprehensive study of the effectiveness of capital punishment in the Commonwealth, and to report findings and recommendations. In September 2012, the Task Force called on Governor Corbett to suspend executions, until it had the opportunity to conclude its study and report.

If we are to continue to administer the death penalty, we must take further steps to ensure that defendants have appropriate counsel at every stage of their prosecution, that the sentence is applied fairly and proportionally, and that we eliminate the risk of executing an innocent. Anything less fails to live up to the requirements of our Constitution, and the goal of equal justice for all towards which we must continually strive.

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[6] *See* ABA REPORT, at iii.

[7] Nicole Brambilla, et al., *Capital Punishment in Pennsylvania: When Death Means Life*, READING EAGLE, Dec. 14, 2014, *available at* http://readingeagle.com/news/article/capital-punishment-in-pennsylvania-when-death-means-life.

Given these principles, both my duty as Governor and my conscience require that I proceed with great caution, and with all relevant facts at hand. I also take very seriously my responsibility to the victims of violent crime. Ensuring that justice is served for victims and the families and friends who have endured so much is my first priority. With all this in mind, I look forward to carefully reviewing the report and recommendations of the Task Force and Advisory Committee on Capital Punishment, and to working with the General Assembly and representatives of victims to address concerns which it may raise.