Received 2/22/2019 4:12:47 PM Supreme Court Eastern District

Filed 2/22/2019 4:12:00 PM Supreme Court Eastern District
102 EM 2018

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 102 EM 2018

Jermont Cox,

Petitioner

v.

Commonwealth of Pennsylvania,

Respondent.

BRIEF OF *AMICI CURIAE* JUSTICES, JUDGES, & PROSECUTORS IN SUPPORT OF PETITIONER

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AMICI AND THEIR INTERESTS

E. Norman Veasey, the former Chief Justice of the Supreme Court of Delaware (1992-2004), has, as an appellate judge, long been concerned that there is no cure for the infliction of the penalty of death in the event of legal error, such as evidence that should not have been admitted, or factual error, such as erroneous eye witness testimony.

Deborah T. Poritz, Chief Justice of the Supreme Court of New Jersey (Ret.) and former Attorney General of the State of New Jersey, believes the death penalty cannot meet contemporary standards of decency because it is administered unequally by race and by geography, and because the justice system is unable to prevent innocent persons from being convicted and sentenced to death.

Gregory M. Sleet, United States District Judge for the District of Delaware (retired) and former United States Attorney for the District of Delaware, believes the death penalty is contrary to contemporary standards of decency because it is arbitrarily imposed and because the process leading to its imposition is unreliable.

John Farmer, former Attorney General of New Jersey and former assistant U.S. Attorney.

Bartholomew J. Dalton, former Chief Deputy Attorney General of the State of Delaware, believes that the death penalty is contrary to contemporary standards of decency because it is arbitrarily imposed.

Michael Lawlor, former State Prosecutor, Connecticut Division of Criminal Justice and former member of the Connecticut House of Representatives, was, as both a legislator and as Governor Malloy's criminal justice advisor, one of the leading advocates for the abolition of the death penalty in Connecticut.

Adam Balick, former Deputy Attorney General for the State of Delaware, believes that punishing killing by means of further killing is inconsistent with contemporary standards of decency.

Thiru Vignarajah, former Deputy Attorney General of Maryland, former Assistant U.S. Attorney, former Law Clerk to Justice Stephen G. Breyer, believes the death penalty is inhumane, ineffective, and unconstitutional.

Peter Harvey, former Attorney General of New Jersey and a former federal prosecutor, agrees with the arguments made in this *amicus* brief.

James E. Liguori, former Chief Deputy Attorney General, Kent County Delaware, believes that the punishment of death flies in the face of our contemporary standards of decency.

Thomas A. Foley, former Deputy Attorney General, Delaware Department of Justice, believes that the death penalty is contrary to contemporary standards of decency because an enlightened nation ought not be in the business of executing human beings.

John P. Deckers, former Delaware Deputy Attorney General, has observed the death penalty's arbitrary imposition based upon perceived socio-economic disparities among defendants, as a result of which he requested to be relieved from prosecuting any further capital cases.

INTEREST OF *AMICI*

Amici are former justices, judges, and prosecutors from New Jersey, Delaware, Connecticut, and Maryland whose expertise and experiences litigating and adjudicating criminal and capital cases bear upon the issues presented in this case. Their interest in this litigation is to offer their views on how the actual experience of those States, which have halted capital punishment, bear upon an analysis of whether the death penalty is consistent with evolving standards of decency under the Eighth Amendment to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. *Amici* respectfully submit this brief pursuant to Rule of Appellate Procedure 531.[1]

INTRODUCTION

For the past six decades, this Court and courts across the country have decided numerous death penalty cases, evaluating specific statutes and criminal matters. But since 1982, when this Court upheld the constitutionality of the death penalty in *Commonwealth. v. Zettlemoyer*, 454 A.2d 937 (Pa. 1982), this Court has not availed itself of the opportunity to address the issue squarely presented in this case: whether Pennsylvania's death penalty violates Article I, Section 13, of the Pennsylvania Constitution, which prohibits cruel punishment.[2] Because, in 2019, Pennsylvania's

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* agree with Petitioner that the Pennsylvania Constitution's prohibition against cruel punishment sweeps more broadly and, thus, affords greater protection than the Eighth Amendment.

imposition of the death penalty no longer comports with contemporary standards of decency, *Amici* respectfully submit that the death penalty is no longer a constitutionally permissible punishment. Specifically, *Amici* argue below that the "extreme" punishment of death violates Article I, Section 13, because empirical evidence from New Jersey, Maryland, Illinois, Delaware, Washington, and Pennsylvania demonstrates that the death penalty is unreliable, inconsistent, incompatible with any legitimate penological purpose, and contrary to current national and international norms and practices.

ARGUMENT

I. The Death Penalty is an Extreme Punishment that No Longer Comports with Contemporary Standards of Decency.

As a preliminary matter, this Court has consistently acknowledged that the death penalty is an extreme punishment, reserved for "the worst of the worst." *See Com. v. Gibson*, 951 A.2d 1110, 1148 (Pa. 2008); *Com. v. Abu-Jamal*, 555 A.2d 846, 849 (Pa. 1989) (noting "the extreme, indeed irreversible, nature of the death penalty"); *Commonwealth v. Travaglia*, 467 A.2d 288, 299 (Pa. 1983) ("extreme penalty of death"); *see generally Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and

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This brief seeks to provide the Court with the additional perspective that, regardless of any differences between the provisions, in 2019, the death penalty in Pennsylvania is inconsistent with contemporary standards of decency that animate both constitutional prohibitions.

irrevocability."). Indeed, "[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). And because it is such an "extreme penalty," this Court and others have sought to limit its application accordingly. *See, e.g.*, *Com. v. Baker*, 614 A.2d 663, 682 (Pa. 1992) (Cappy, J., concurring and dissenting) ("Our death penalty statute provides a precise formula for narrowly considering those cases in which the extreme penalty of death should be imposed."); *see also Coker v. Georgia*, 433 U.S. 584 (1977) (barring the death penalty for rape of an adult); *Ford v. Wainwright*, 477 U.S. 399 (1986) (barring the death penalty for individuals who are insane); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the death penalty for individuals who were "mentally retarded" at the time they committed murder); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the death penalty for individuals who were juveniles at the time they committed murder); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring the death penalty for rape of a child). But the ever-growing limitations on this uniquely extreme punishment raise the critical question that the Court must reach in this case: whether Pennsylvania's death penalty remains constitutionally valid at all.

In answering this question, this Court has recognized that the "Pennsylvania prohibition against 'cruel punishments', like its federal counterpart against 'cruel and unusual punishments', is not a 'static concept.'" *Com. v. Baker*, 78 A.3d 1044,

1050 (Pa. 2013) (citation omitted). Rather, both prohibitions draw their meaning from the "'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 1050 (citation omitted); *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). In other words, the Court's evaluation of the death penalty is not judged by standards that prevailed in 1685, 1995, or even 2015, but by standards that *currently* prevail. *Atkins*, 536 U.S. at 311 ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . but rather by those that currently prevail."); *State v. Santiago*, 318 Conn. 1, 130-31 (2015) ("As we have explained, the constitutionally relevant inquiry is whether the death penalty, as *currently* administered in Connecticut . . . offends our state's *evolving* standards of decency[.]" (emphasis in original)); *see Roper*, 543 U.S. at 594 ("[S]ignificant changes in societal mores over time may require us to reevaluate a prior decision.").

Of course, the exact parameters of the prohibition on cruel punishment or the scope of the contemporary standards inquiry are not, as a result, easily defined, nor could they be since the Court's analysis must necessarily be flexible and consider "broad and idealistic concepts of dignity, civilized standards, humanity, and decency[.]" *Com. ex rel. Bryant v. Hendrick*, 280 A.2d 110, 117 (Pa. 1971) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (Blackmun, J.)). Accordingly, to discern contemporary standards of decency, the Court engages in a searching,

contextual inquiry that turns on a diverse set of factors. *See, e.g.*, *Roper*, 543 U.S. at 563 (invoking an expansive inquiry into society's evolving standards of decency); *Coker*, 433 U.S. at 603 (Powell, J., concurring and dissenting) ("careful inquiry"); *Com. v. Strunk*, 582 A.2d 1326, 1331 (Pa. Super. Ct. 1990); *Tindell v. Dep't of Corr.*, 87 A.3d 1029, 1042 (Pa. Commw. Ct. 2014) ("Whether or not the adequacy of the conditions of confinement violates our society's evolving standards of decency is a searching inquiry[.]"); *Murray v. Wetzel*, No. 542 M.D. 2017, 2018 WL 3747808, at *8 (Pa. Commw. Ct. Aug. 8, 2018) (same); *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) ("contextual inquiry").

Thus, in determining evolving standards, courts have looked to, for example: (1) the reliability of the process, as measured by error rates, *Com. v. Young*, 572 A.2d 1217, 1229 (Pa. 1990); *Mills v. Maryland,* 486 U.S. 367, 383-84 (1988); *Santiago*, 318 Conn. at 103-06, 130-31; (2) whether the punishment is imposed in an arbitrary or discriminatory manner, *Furman*, 408 U.S. at 310 (Stewart, J., concurring); *State v. Gregory*, 192 Wash. 2d 1, 23-24 (2018); (3) whether the punishment serves any legitimate penological purpose, *Graham v. Fla.*, 560 U.S. 48, 67 (2010); *Atkins*, 536 U.S. at 317-31; *Roper*, 543 U.S. at 563-64; (4) national norms, as demonstrated by legislative enactments and the frequency with which a punishment is practiced, *Atkins*, 536 U.S. at 311; *Graham*, 560 U.S. at 62-67; *Roper*, 543 U.S. at 562-68; and (5) foreign law and the views of the international community, *id.* at 575-78; *Atkins*,

536 U.S. at 317, n.21; *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion).

Applying these factors to Pennsylvania's death penalty today reveals that the punishment no longer comports with contemporary standards of decency. Specifically, empirical evidence and objective measures demonstrate that the death penalty, as applied, is: (1) unreliable; (2) inconsistently imposed; (3) incompatible with any legitimate penological purpose; (4) inconsistent with emerging national norms and practices; and (5) contrary to established international norms and practices. Therefore, the Court should hold that the death penalty is an unconstitutionally cruel punishment. *Cf. Santiago*, 318 Conn. at 9 (2015) (holding that the "state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose.").

A. Empirical Evidence Demonstrates that the Death Penalty is Unreliably Applied.

First, it is well-established that because the death penalty is "qualitatively different" from any other punishment administered by the American criminal justice system, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Indeed, it is axiomatic that "the execution of a legally and factually innocent person would be a constitutionally intolerable event," *Herrera v. Collins,* 506 U.S. 390, 419

(1993) (O'Connor, J., concurring), as would the execution of an individual deserving a punishment less than death. However, empirical evidence from Illinois, New Jersey, Maryland, Connecticut, and Pennsylvania makes clear that, in fact, the risk that the death penalty is or will be erroneously administered, in contravention of constitutional requirements of reliability, alone renders it contrary to evolving standards of decency. *See Young*, 572 A.2d at 1229 ("Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case (quoting *Mills,* 486 U.S. at 383-84)); *Com. v. Saranchak*, 810 A.2d 1197, 1200-01 (Pa. 2002) (stating that, in the capital context, "concerns for reliability are foremost"); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("[T]he severity of the [death] sentence mandates careful scrutiny in the review of any colorable claim of error.").

Thus, on January 31, 2000, Governor George H. Ryan of Illinois, a Republican, set off what may be considered the opening salvo of the current movement to end the death penalty because of its unreliability. Citing concerns that 13 people who had been sent to death row in Illinois had been found to be innocent, Governor Ryan indefinitely stayed all executions in Illinois until an inquiry could be conducted "into why more death row inmates have been exonerated than executed since capital punishment was reinstated in 1977." William Clairborne, *Ill. Governor, Citing Errors, Will Block Executions*, Wash. Post, Jan. 31, 2000,

https://wapo.st/2HEBzr6. Two years later, the Governor's Commission on Capital Punishment released a report in which a majority of the Commission recommended that the death penalty be abolished, in part because of the numerous errors in the way in which Illinois applied the death penalty. *See* Report of the Governor's Commission on Capital Punishment at Table 1 (April 15, 2012), https://bit.ly/2BbzZqQ ("There were 152 cases in which a reversal occurred at some point in the case prior to December 31, 2001."). On March 9, 2011, Governor Pat Quinn signed into law a bill that abolished the death penalty. In so doing, Governor Quinn lamented the unreliability of the process which culminates in capital punishment, stating:

> As a state, we cannot tolerate the executions of innocent people because such actions strike at the very legitimacy of a government. Since 1977, Illinois has seen 20 people exonerated from death row. Seven of those were exonerated since the moratorium was imposed in 2000 . . . To say that this is unacceptable does not even begin to express the profound regret and shame we, as a society, must bear for these failures of justice.

Gov. Pat Quinn on Signing Bill to Repeal Capital Punishment (March 9, 2011) (Governor's Statement), https://abc7.ws/2SfH0ka/.

Since the Illinois moratorium in 2000, intolerable risks of error have likewise galvanized other states to abolish the death penalty. In New Jersey, for example, where the legislature abolished the death penalty in 2007, a legislatively-created Commission found that "[t]he penological interest in executing a small number of

persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake." New Jersey Death Penalty Study Commission Report ("New Jersey Report") at 51 (Jan. 2007), https://bit.ly/2G8pibX. Although the New Jersey Commission noted that there had been "no exonerations from death row in New Jersey in the 24-year history of the State's modern death penalty law," it nevertheless determined that the risk of erroneously imposing the death penalty was simply too high to maintain the punishment. *Id.* at 51-55.

Following New Jersey's lead, in 2008, the Maryland Commission on Capital Punishment found that from 1995 to 2007, the reversal rate in capital cases was eighty percent. *See* Final Report to the General Assembly, Maryland Commission on Capital Punishment ("Maryland Report") at 62-63 (Dec. 12, 2008), https://bit.ly/2HFEEaa. On retrial, the Commission noted that *every single one* of the cases—except for those of two individuals who died of natural causes—resulted in a sentence of less than death. *Id.* at 63-64. Jeffrey Fagan, a Professor at Columbia University and Columbia Law School, testified that the following factors contributed to the high error rate in death penalty cases: "failure to thoroughly investigate evidence and mitigation; *Brady* violations resulting from the withholding of potentially exculpatory evidence; prejudicial decisions by judges; failure to prove the requisite aggravating circumstance in a felony murder case; and involuntary confessions." *Id.* at 63 (footnotes omitted). The Maryland Commission concluded

that "the numerous exonerations and reversals in capital cases in recent years have led to a decline in public support for the death penalty and have eroded the trust and confidence of some citizens in the judicial system." *Id.* 79-81.

In 2012, Connecticut legislatively abolished the death penalty, in meaningful part because of concerns about executing an innocent person. Thus, the legislative history of the Connecticut abolition bill highlighted that "[n]umerous individuals have been convicted of crimes who are subsequently found innocent through DNA and additional evidence . . . The State of Connecticut should not have the power to extinguish life, given the inaccuracies inherent in the current system." Judiciary Committee, Analysis of S.B. 280, Connecticut Committee Report, 2012 Feb. Sess. (March 21, 2012). And the Connecticut Supreme Court, in concluding that the death penalty was unconstitutional, determined that the "legal and moral legitimacy of any future executions would be undermined by the ever present risk that an innocent person will be wrongly executed." *Santiago*, 318 Conn. at 106 (footnote omitted).

Empirical evidence now makes clear that similar fatal flaws infect Pennsylvania's administration of the death penalty. The bipartisan legislative report issued by the Joint State Government Commission ("Pennsylvania Commission") on June 25, 2018 found that, "[f]rom 1973-2013, there were 188 overturned death sentences in the Commonwealth, or about 45% of all death sentences imposed during this time period." Joint State Government Commission, *Capital Punishment*

in Pennsylvania: The Report of the Task Force and Advisory Committee ("JSGC Report") at 173 (June 2018) (footnote omitted). And the Pennsylvania Commission highlighted that, since 1963, six individuals had been exonerated after being sentenced to death in the Commonwealth, including Nicholas Yarris, who spent 21 years on death row. *Id.* at 171. In fact, the six Pennsylvania exonerees spent, on average, *nine* years on death row before being exonerated. *Id.* As a result of these errors, the Pennsylvania Commission concluded that "[i]t is not possible to put adequate procedural protections in place to prevent the execution of an innocent person." *Id.* at 171.

This risk—indeed, based upon error rates in the administration of Pennsylvania's death penalty, the reality that the death penalty may be erroneously imposed upon a defendant—renders the death penalty constitutionally impermissible in Pennsylvania, just as it was found to be in Illinois, New Jersey, Maryland, and Connecticut. That is, in Pennsylvania, a defendant has almost a 50% chance of wrongfully being sentenced to death. "Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Young*, 572 A.2d at 1229 (quoting *Mills,* 486 U.S. at 383-84). Because Pennsylvania's death penalty regime falls well short of the constitutional minimum requirements for reliability, it is contrary to evolving standards of decency, and ought not be permitted

to continue in effect as a matter of constitutional law. *See Com. v. Hoss*, 283 A.2d 58, 69 (Pa. 1971) ("In a capital case where a man's life is at stake, it is imperative that the death penalty be imposed only on the most reliable evidence."); *Deck v. Missouri*, 544 U.S. 622, 632 (2005) ("The Court has stressed the 'acute need' for reliable decisionmaking when the death penalty is at issue." (citation omitted)).

B. Empirical Evidence Demonstrates that the Death Penalty is Inconsistently Applied.

Nearly 47 years since the United States Supreme Court's decision in *Furman*, and despite many attempts by this Court and others to ensure consistent application of the death penalty, empirical evidence shows that the death penalty is inconsistently applied. In *Furman*, the Supreme Court sought to limit the arbitrary application of the death penalty. *Gregg*, 428 U.S. at 206. *Furman* identified a legal regime in which being sentenced to death was "unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). Despite judicial attempts to encourage and guide legislatures to adopt more consistent death penalty regimes in subsequent Supreme Court decisions, *see, e.g.*, *Sumner v. Shuman*, 483 U.S. 66, 70-85 (1987); *Gregg*, 428 U.S. at 189-207, and in decisions of this Court, *see, e.g.*, *Com. v. Gribble*,

703 A.2d 426, 441 (Pa. 1997), *abrogated by Com. v. Burke*, 781 A.2d 1136 (2001); *Commonwealth v. DeHart*, 516 A.2d 656 (Pa. 1986), the extreme punishment of death is still "wantonly and so freakishly imposed" today, *Furman*, 408 U.S. at 310 (Stewart, J., concurring); *see Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) ("Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.,* without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands." (citation omitted)), that it cannot survive.

Indeed, nationwide as well as state-level evidence establishes that the death penalty is administered in an unequal way, impermissibly and indefensibly depending on factors like race and geography. For example, numerous studies have found that murder cases involving white victims—as opposed to minority victims—are more likely to result in the defendant receiving the death penalty. *See, e.g.*, U.S. Government Accountability Office, Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (GAO/GGD–90–57, 1990) (highlighting that 28 studies between 1972 and 1990 found that the race of the victim influenced capital murder charge or death sentence, a "finding . . . remarkably consistent across data sets, states, data collection methods, and analytic techniques"); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with*

Statistics: Furman, McCleskey, *and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1245-1251 (2013) (same, based on 20 plus studies between 1990 and 2013). And since 1976, when the Supreme Court revived the death penalty in *Gregg*, 34.2% (511 of 1,492) of individuals executed have been African American, despite the fact that African-Americans comprise only 13.4% of census respondents. Facts about the Death Penalty, Death Penalty Information Center ("DPIC"), Feb. 11, 2019, https://bit.ly/2yiSHKz; Quick Facts, U.S. Census Bureau (last accessed Feb. 18, 2019), https://bit.ly/2Rrs0iX.

Similarly, geography, a factor that should have no impact on a defendant's punishment, plays a significant role in determining who receives the death penalty. From 2004 to 2009, for instance, "fewer than 1% of counties in the country . . . account[ed] for roughly 44% of all death sentences." Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 233 (2012). And in 2012, fewer than 2% of counties in the country, or just 59 counties, accounted for all nationwide death sentences. DPIC, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All* at 9 (Oct. 2013), https://bit.ly/2SG8pNe.

State-specific studies further confirm that the death penalty is arbitrarily imposed. In New Jersey, for instance, the specially empaneled commission highlighted an analysis of 600 proportionality reviews that found that:

> Despite a numbing similarity in the circumstances of the large number of [murder] cases . . . there is no uniformity in the way the cases are charged and prosecuted. The resulting unfairness leaves one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison or were not even prosecuted capitally . . . It is not just that there is no significant difference between the crimes to be punished by death and the crimes to be punished by life in prison; sometimes the crime for which defendants spend life in prison, are *worse*.

New Jersey Report at 46-47 (citation and quotation omitted) (emphasis in original). Accordingly, the New Jersey Commission found that, "despite the best efforts of the State, the risk remains that similar murder cases are being treated differently in the death penalty context thereby elevating the probability that the death penalty is being administered 'freakishly' and arbitrarily. Given the finality of the punishment of death, this risk is unacceptable." New Jersey Report at 50.

Similar disparities were also found in Delaware and Maryland. In Delaware, 4 years before the Delaware Supreme Court held that the State's capital sentencing scheme was unconstitutional, a study found that "[b]lack defendants who kill white victims are more than six times as likely to receive the death penalty as are black defendants who kill black victims"; and "black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims." Sheri Lynn Johnson, *et. al.*, *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925, 1940 (2012). A Maryland Commission similarly found that "cases in which there is a Caucasian victim are more likely to

have a death notice filed, be prosecuted, have a death penalty sought, and have a death penalty sentenced." Maryland Report at 29. In contrast, since 1978, *none* of the victims in cases that resulted in a death sentence were African-American, "despite the fact that 43% of death-eligible cases involve African-American victims." *Id.*

With regard to jurisdictional disparities, the Maryland Commission heard testimony that the likelihood that a prosecutor would seek the death sentence could be 5, 11, or 13 times greater when committed in some counties than in others, even after controlling for the possibility that crimes in different counties are more serious than in others. *Id.* at 36-37. Maryland's jurisdictional disparities were particularly pronounced at the point at which the death sentence was imposed. For example, "[t]he probability of receiving a death sentence in Baltimore County is almost twenty-three times higher than the probability of receiving a death sentence for a similar crime in Baltimore City. The probability of a death sentence being imposed in Baltimore County is nearly fourteen times higher than the probability of a death sentence in Montgomery County being imposed for a crime of similar seriousness." *Id.* at 37. Indeed, the racial and jurisdictional inconsistencies were so problematic that the Maryland Commission concluded that the problems could not be rectified through procedural guidelines, changes, or *any* other reform efforts the Commission could conceive. *See id.* at 35 ("Considering all of the manifestations of racial bias

with regard to capital cases, the Commission does not find that these biases can be rectified through procedural guidelines or changes to the current administration of capital sentencing."); *id.* at 40 ("The problem of jurisdictional disparities as portrayed by the witnesses is evidently so deep as to confound any efforts at reform that the Commission can conceive.").

In Connecticut, a 457-page report by Stanford Law Professor John Donohue documented the State's arbitrary imposition of the death penalty. *See* John J. Donohue III, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution* ("Donohue Report") (Oct. 15, 2011), https://bit.ly/2GjhGmT. Rather than selectively identifying death-eligible defendants whose alleged crimes may have most warranted the penalty of execution, Professor Donohue concluded that the death penalty regime in Connecticut "haphazardly singles out a handful [of defendants] for execution. *Id.* at 2. The Donohue Report's "regression analysis showed that harsher treatment was given to cases in which minorities killed whites and that this difference could not be explained by legitimate factors such as the nature of the crime, the strength of the evidence, the judicial district in which it occurred, the number of victims, or other characteristics of the crime or defendant." John J. Donohue III, *The Demise of the Death Penalty in Connecticut*, Stanford Law School, June 7, 2016, https://stanford.io/2DNpJ9T. In a follow-up empirical evaluation, Professor

Donohue found that "the single most important influence from 1973-2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [Judicial District]." John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 J. Empirical Legal Studies 637, 637 (2014). Accordingly, Professor Donohue concluded that, "[d]espite all the elaborate processes and procedures designed to eliminate arbitrariness in the infliction of the ultimate sanction, the Connecticut death penalty regime still is marred by the defects that prompted *Furman*. Donohue Report at 399; *id.* at 399-400 ("The end result is that identical murders within Connecticut will be treated very differently depending on illegitimate factors, such as race or judicial district.").

And most recently, the Washington Supreme Court held that the death penalty was invalid explicitly "because it is imposed in an arbitrary and racially biased manner." *Gregory*, 192 Wash. 2d at 5. In so doing, the Court credited a study that found that, from "December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account." *Id.* at 19 (citations and quotations omitted). Given the empirical

evidence, the Washington Court was "confident that the association between race and the death penalty is *not* attributed to random chance." *Id.* at 22 (emphasis in original). Therefore, the Court held that "[t]he arbitrary and race based imposition of the death penalty cannot withstand the evolving standards of decency that mark the progress of a maturing society." *Id.* at 23 (citations and quotations omitted).

This Court should similarly hold here, where empirical evidence pellucidly establishes that Pennsylvania's death penalty system, like that of New Jersey, Delaware, Maryland, Connecticut, and Washington, is inconsistently applied. Thus, the Pennsylvania Commission highlighted an eight-year research study by Pennsylvania State University researchers that found that: "*In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends on where that defendant is prosecuted and tried.* In many counties of Pennsylvania, the death penalty is simply not utilized at all. In others, it is sought frequently." JSGC Report at 90 (emphasis in original) (quoting John Kramer, *et al.*, *Capital Punishment Decisions in Pa.: 2000-2010* ("PSU Report"), at 125 (Oct. 2017), https://bit.ly/2S4bpxL). These researchers also found that, controlling for a variety of variables, cases with black victims "were less likely to receive the death penalty than defendants of any race or ethnicity with White victims and White defendants with White victims." PSU Report at 123.

This type of jurisdictional and racial variability should not be judicially countenanced. Standing independently, the statistically significant jurisdictional disparities require judicial action. *See* Maryland Report at 13 (quoting former New Jersey Supreme Court Chief Justice Deborah T. Poritz) ("We are of the view that county variability should not be judicially countenanced . . . Whether viewed as a constitutional imperative, a requirement of statutory policy, or simply a matter of fundamental fairness, we submit that county variability is a basis for judicial intervention."). But in Pennsylvania, there is also meaningful evidence of racial disparities that invoke the very same concerns raised by Justice Stewart in 1972, when he denounced the death penalty as "wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310. This case provides an opportunity for this Court to join its sister States, where *amici* served, in holding that, due to the pernicious racial and jurisdictional disparities within Pennsylvania's death penalty regime, the punishment violates contemporary standards of decency. *See Gregory*, 192 Wash. 2d at 5 ("While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered.").

C. The Death Penalty Serves No Legitimate Penological Purpose.

Given that empirical evidence demonstrates that the death penalty is both unreliably and inconsistently administered, and thus cannot serve a retributive

function, *see Santiago*, 318 Conn. at 103-115 (concluding that Connecticut's death penalty serves no retributive function because of the possibility of error and arbitrary and biased administration); *Gregory*, 192 Wash. 2d at 24 -25 (same), it follows that if the death penalty does not measurably serve a deterrent function, the punishment is unconstitutional. *See Atkins*, 536 U.S. at 319 (identifying "'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty" (citation omitted)). Today, the evidence that the death penalty neither deters crime nor contributes to a safer community is nearly uncontroverted. *See, e.g.*, National Research Council, *Deterrence and the Death Penalty* (D. Nagin & J. Pepper eds. 2012) ("[C]laims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment."); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 843 (2005) ("The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates."); Craig E. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. Pitt. L. Rev. 321 (1999) (reviewing prior studies and new data demonstrating that the presence or use of a capital punishment statute in a state has no effect on the homicide rate); Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83

Cornell L. Rev. 1431, 1431 (1998) ("Scholars conducting valid studies on the subject of deterrence have failed to find any deterrent effect from capital punishment."); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. Crim. L. & Criminology 1, 10 (1996) ("[T]here is a wide consensus among America's top criminologists that scholarly research has demonstrated that the death penalty does, and can do, little to reduce rates of criminal violence").

These findings are further substantiated by state commission reports from New Jersey, Maryland, Connecticut, as well as here in Pennsylvania. *See* New Jersey Report at 24-30 ("There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent."); Maryland Report at 22 ("The Commission finds that there is no persuasive evidence that the death penalty deters homicides in Maryland."); Donohue Report at 2 & n.2 ("The lack of any deterrence effect of the death penalty in Connecticut is widely acknowledged by knowledgeable researchers."); JSGC Report at 166-168 ("[T]he deterrent effect of the death penalty is attenuated, regardless of whether a more vigorously applied death penalty would have a deterrent effect").

Further underscoring the lack of deterrent value, a recent panel hosted jointly by the American and New York City Bar Associations highlighted that abolishing the death penalty does not make a difference in murder rate trends. Robert Dunham,

the Executive Director of the Death Penalty Information Center, specifically pointed to statistical evidence showing that abolishing the death penalty "has no distinctive effect on murder rates, and a predicted surge in murders does not materialize." Robert Dunham, *Life After the Death Penalty: Implications for Retentionist States*, at 23 (Aug. 14, 2017), https://bit.ly/2S3FwFG. There was also "no discernible relationship between having or not having the death penalty and trends related to murders generally or murders of police officers in particular." *Id.* at 28. That is, in addition to showing no discernible deterrent effect, statistical evidence also indicates that abolishing the death penalty does not result in additional murders.

The death penalty's lack of retributive and deterrent value demonstrates that the punishment is inconsistent with evolving standards of decency.[3] *See Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). Because executing defendants will not measurably advance any legitimate penological purpose, and because of the punishment's unreliability and inconsistency, the Court should conclude that Pennsylvania's death penalty is no longer constitutional. *See Santiago*, 318 Conn. at 118 ("For all of these reasons, the death penalty no longer serves any legitimate penological goal in our state."); *Gregory*, 192 Wash. at 35 ("Given the manner in

[3] Our own experiences as former justices, judges, and prosecutors—specifically in witnessing firsthand the unreliable and arbitrary aspects of our system of capital punishment—further confirm the death penalty's lack of penological value.

which it is imposed, the death penalty also fails to serve any legitimate penological goals.").

D. The American Public Increasingly Disapproves of the Death Penalty.

Over the past 20 years, the American public has demonstrated that it increasingly disapproves of the death penalty, an important factor in ascertaining whether it comports with evolving standards of decency. *See Atkins*, 536 U.S. at 311; *Roper*, 543 U.S. at 562-68; *Graham*, 560 U.S. at 62-67. The clearest indication of the public's disapproval, of course, is the rarity with which the punishment is administered. *See id.* at 62 ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). Today, 20 states and the District of Columbia have either abolished the death penalty or left no lawful means to carry out the punishment. *See, e.g.*, Mark Berman, *Washington Supreme Court strikes down state's death penalty, saying it is 'arbitrary and racially biased'*, Wash. Post, Oct. 11, 2018, https://wapo.st/2NdoUdX. In addition to these 20 states and the District of Columbia, three states, including Pennsylvania, have imposed moratoria on capital punishment. Ken Armstrong, *Another Death Penalty Moratorium*, The Marshall Project, Feb. 13, 2015, https://bit.ly/2Ea9dBe. And since 2013, only 13 states have carried out executions, with only eight states conducting executions in 2018. *See* Number of Executions by State and Region Since 1976, DPIC, https://bit.ly/2TRVQen. Tellingly, in ten states where the death penalty is still legal,

including Pennsylvania, no executions have been carried out in at least a decade. Casey Leins, *Many States Aren't Using Their Death Penalty, Report Shows*, U.S. News, Aug. 15, 2018, https://bit.ly/2SGlkyA.

National and Pennsylvania-specific opinion polls also reflect society's growing unease with the death penalty. Gallup, which has been tracking opposition to the death penalty since 1938, found that support for the punishment is near 45-year lows. Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, Gallup, Oct. 26, 2017, https://bit.ly/2Kyc1Ij; Death Penalty, Gallup, https://bit.ly/2Ea2Uxr. More specifically, less than half of Americans now think that the death penalty is fairly applied. *Id.* These trends are also reflected at the state level in Pennsylvania. The most recent available poll, from 2015, "found 54 percent of respondents preferred life in prison with no chance of parole or a chance of parole after at least 20 years or 40 years while 42 percent said the death penalty was their preferred sentence for convicted murderers." Jan Murphy *Death penalty losing public support in Pa., poll shows*, The Patriot-News, March 25, 2015, https://bit.ly/2DDho7D. The increasing rarity with which states administer the death penalty, combined with the growing public opposition to the punishment—particularly in Pennsylvania—demonstrates the growing consensus against the practice.

E. The United States Increasingly Stands Isolated Among Nations in Imposing the Death Penalty.

Finally, by any international comparative measure, the U.S. stands out among Western democracies in adhering to the death penalty, a significant factor in determining whether a punishment amounts to cruel and unusual punishment. *See Roper*, 543 U.S. at 575-78 (consulting foreign law and international norms in evaluating the constitutionality of the death penalty for a category of defendants); *Atkins*, 536 U.S. at 317, n.21 (same); *Thompson*, 487 U.S. at 830-31 & n.31 (plurality opinion) (same); *see, e.g.*, Katherine Corry Eastman, *The Progress of Our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 Washburn L. J. 526, 526 (2000). In the Americas, only three countries still impose the death penalty: Guyana, Trinidad and Tobago, and the U.S. The Death Penalty in 2017: Facts and Figures, Amnesty International, April 12, 2018, https://bit.ly/2K2FhGM. But even that statistic understates the U.S.'s *sui generis* adherence to the death penalty. As of 2017, the U.S., for the ninth consecutive year, "remained the only country to carry out executions in the region." *Id.* Stated differently, of the 35 member states of the Organization of American States, the main political, juridical, and social governmental forum in the western hemisphere, only the U.S. carried out executions. Amnesty International Global Report, *Death Sentences and Executions 2017* at 7 (2018), https://bit.ly/2HcONKh; *cf. Roper*, 543 U.S. at 577 ("In sum, it is fair to say

that the United States now stands alone in a world that has turned its face against the juvenile death penalty.").

An international perspective further highlights the U.S.'s unusual use of the death penalty. Worldwide, at least 142 countries, out of 193 U.N. member states (or 73.57% of all countries in the world), have abolished the death penalty either in law or in practice. *Death penalty: How many countries still have it?*, BBC News, Oct. 14, 2018, https://bbc.in/2Aer4ob. In 2017, the U.S. was 8th in the number of carried out executions, behind only the authoritarian, despotic, and/or militaristic regimes of China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, and Somalia. *Id.* And in 2016, the U.S. was one of just 23 countries worldwide to carry out an execution. Death Penalty, Amnesty USA, https://bit.ly/2tpDOEw. Starkly, of the 57 member states of the Organization for Security and Co-operation in Europe, the world's largest security-oriented intergovernmental organization, only Belarus and the U.S. carried out executions. Amnesty International Global Report, *Death Sentences and Executions 2017* (2018) at 7, https://bit.ly/2HcONKh.

Thus, growing disapproval of the death penalty within the U.S., and the rarity with which the punishment is imposed and carried out internationally, provide additional objective measures of the death penalty's incompatibility with contemporary standards of decency. Viewed in conjunction with empirical evidence that demonstrates that the punishment is unreliable, inconsistent, and incompatible

with any legitimate penological purpose, it is clear that Pennsylvania's death penalty is no longer a constitutionally permissible punishment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully submit that the death penalty is no longer consistent with evolving standards of decency and, thus, the Court should conclude that the punishment violates Article I, Section 13, of the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that this filing complies with Rule of Appellate Procedure 531(b)(3) because this *amicus* brief is 6,999 words, below the 7,000 word limit.

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