IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 102 EM 2018 & 103 EM 2018

JERMONT COX and KEVIN MARINELLI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

PRELIMINARY STATEMENT REGARDING CITATIONS

The styles and citations in this reply brief conform with those used in Petitioners' initial brief.

Because the Commonwealth is represented by both the Attorney General and the District Attorney of Philadelphia in these consolidated cases, and because they take divergent positions, Petitioners herein refer to the "Attorney General" and "District Attorney" by their official titles.

Petitioners cite the briefs of the Attorney General and the Philadelphia District Attorney as "AGB" and "DAB," respectively. Petitioners cite their initial brief as "PB." Petitioners cite the amicus brief of the Pennsylvania District Attorneys Association ("PDAA") as "PDAA Br."; the amicus brief of various Republican State Senators as "GOP Sen. Br."; the amicus brief of the Republican Caucus of the Pennsylvania House of Representatives as "GOP H. Br."; the amicus brief of the Pennsylvania Lodge Fraternal Order of Police ("PAFOP") as "PAFOP Br."; and the amicus brief of Social Scientists And Researchers Catherine M. Grosso, Jules Epstein, et al., as "Soc. Sci. Br."

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

Cases

Miscellaneous

INTRODUCTION

This Court's core duty is to interpret the Pennsylvania Constitution. That duty carries particular force when the judiciary has imposed death sentences implicating a specific constitutional mandate—here, the unqualified prohibition on "cruel punishments" in Article I, Section 13. The Attorney General acknowledges that Pennsylvania's death penalty is afflicted with "serious" and "valid" problems. Nevertheless, he contends that *only* the legislature may address such systemic issues, but the legislature lacks the power to disturb Petitioners' death sentences. This Court has exclusive authority over final judgments of sentence, and it should exercise that authority by reviewing Petitioners' claim under Section 13.

The Attorney General and supporting amici fare no better on the merits of that claim. They reject the very idea of a systemic challenge, even though this Court and others have broadly recognized system-wide claims of constitutional wrongs. They ask the Court to ignore the facts invoked by Petitioner, even though those facts clearly establish the pervasive influence of race, geography, poverty and other arbitrary factors in the administration of capital punishment. They even attribute the alarming rate of judicial reversals to "federal intervention" instead of systemic dysfunction, inadequately funded and trained defense counsel, and prosecutorial overreach in case after documented case.

As Justice Chavez observed last month in the New Mexico Supreme Court's decision vacating the remaining death sentences in that state: "Theory often fails to foresee reality. Any expectations of a fairly administered death penalty scheme the drafters of the Act may have entertained forty years ago proved in practice to be wrong." *Fry v. Lopez*, --- P.3d ---, 2019 WL 2710810, *34 (N.M. 2019) (Chavez, J., specially concurring). Once seen, the defects in the administration of Pennsylvania's death penalty system cannot be unseen. The Court should squarely confront those defects and grant relief.

I. The Court May and Should Exercise King's Bench or Extraordinary Jurisdiction.

The Attorney General contends that this case does not involve judicial issues and that the Court therefore may not exercise jurisdiction. Repeating numerous times that the questions in this case are "policy" or "political," the Attorney General argues that the Legislature has "exclusive power" to decide issues concerning the statewide administration of capital punishment. *See* AGB 5-17. Several amici endorse this view. PAFOP Br. 7; GOP H. Br. 12-13; GOP Sen. Br. 3.

These arguments misapprehend the scope of Petitioners' claim and the relief they seek. Far from urging the "permanent abandonment of capital punishment," AGB 2 n.1, or "wholesale abolition of capital punishment in Pennsylvania," PDAA Br. 2, Petitioners challenge only death sentences previously imposed under the Commonwealth's current system. PB 39-40. Petitioners thus agree with the

Attorney General that "[i]t is the proper role of [the Legislature] to determine whether the people want the death penalty to continue to be an option for jurors, and to decide what changes may be needed *going forward*." AGB 5 (emphasis added).

The Legislature, however, does not have the recognized authority—let alone the "exclusive power"—to remedy systemic unreliability and arbitrariness in criminal judgments already entered. "Paramount to the separation of powers doctrine, and to the protection of the judicial branch as a coequal, distinct, and independent branch of government, is the recognition that final judgments of the judicial branch are not to be interfered with by legislative fiat in this Commonwealth." *Friends of Pa. Leadership Charter Sch. v. Chester Cty. Bd. of Assessment Appeals*, 101 A.3d 66, 73 (Pa. 2014); *accord Pennsylvania Co. v. Scott*, 29 A.2d 328, 329 (Pa. 1942). This rule "has long been established and is no longer open to serious question." *Commonwealth v. Sutley*, 378 A.2d 780, 783 (Pa. 1977).

Petitioners present a systemic challenge to final judgments of the Pennsylvania courts. PB 39-40. Petitioners take no position on whether, for future cases, the General Assembly should abolish the death penalty or adopt a fair, reliable capital punishment system; Petitioners contend only that the existing system falls short of constitutional minimums. *See id*. To be sure, the Legislature's power to amend penal laws, "when it operates on future cases and not retrospectively, is quite

legitimate," *Sutley*, 378 A.2d at 784. But this Court's exercise of jurisdiction over current death sentences would not infringe on that or any other legislative power.

It is revealing that in prior King's Bench litigation in 2015—also concerning capital punishment and the JSGC Report—the previous Attorney General, the previous Philadelphia District Attorney, and the PDAA all acknowledged that the judiciary's power over existing death sentences was exclusive of the other branches of government.[1] As this Court recounted:

> [T]he Commonwealth contends [that] the Governor is not in a position to remedy any concerns the Task Force may have with the existing death penalty statute. It asserts that even if the General Assembly were to enact subsequent remedial legislation, it would not alter Williams' final death sentence or that of any other death row inmate without violating the separation of powers doctrine.

Commonwealth v. Williams, 129 A.3d 1199, 1208 (Pa. 2015).

None of the parties or amici questioned this principle, and this Court at least assumed its validity in finding that the Commonwealth presented a "forceful" separation of powers challenge, before concluding that the Governor's postponement of executions did not, in fact, interfere with existing judgments. *Id*. at 1206, 1217-18. Here, the arguments of the Attorney General and supporting amici

[1] *See* Attorney General's Petition for Extraordinary Relief Pursuant to King's Bench Jurisdiction at 23, *Commonwealth v. Michael*, No. 78 EM 2015, 133 A.3d 290 (Pa. 2016) (per curiam); Pennsylvania District Attorneys Association Amicus Brief at 37, *Commonwealth v. Williams*, No. 14 EM 2015, 129 A.3d 1199 (Pa. 2015).

fly in the face of what the *Williams* Court, parties, and amici took to be settled law—that, with respect to existing death sentences, the judiciary's authority is preeminent.

The Attorney General's argument boils down to his view that power over the capital punishment system is "'commit[ted] exclusively to the Legislature'" and thus "'presents a non-justiciable political question.'" AGB 14 (quoting *Grimaud v. Commonwealth*, 865 A.2d 835, 847 (Pa. 2005) and *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977)). The Attorney General, however, does not discuss the political question doctrine itself.

In *Grimaud*, this Court recognized that, in being "silent on the manner of how legislative votes should be conducted," the Constitution "defer[red] the choice of procedure to the legislature" under the political question doctrine. 865 A.2d at 847. In *Sweeney*, on the other hand, where the Constitution was similarly silent on procedures for expulsion from the legislature, the Court held that the political question doctrine "does not bar judicial review of a claim that legislative action expelling a member from his seat violated his federal constitutional rights." 375 A.2d at 712. From these contours, it is self-evident that the doctrine "does not bar judicial review of a claim" that the judicial branch imposed death sentences unreliably, arbitrarily, and without adequate justification, in violation of Section 13.

Put another way, specific constitutional rights restrict legislative prerogative and warrant judicial review even in areas where legislative power is otherwise

predominant or "exclusive." A party urging resort to the political question doctrine must show the Constitution's "clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort to satisfy that constitutional mandate." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 439 (Pa. 2017). The Attorney General has not made such a showing nor, in the context of final sentences of death, is such a showing feasible.[2] The Constitution entrusts this Court—not the legislature—with assessing Section 13's "constitutional mandate" prohibiting cruel punishments.

Here, the Court should act on its "mandate to insure that government functions within the bounds of constitutional prescription" and decline the invitation to "abdicate this responsibility under the guise of our deference to a co-equal branch of government." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (Pa. 1986) (citations omitted). On an issue of such undeniable public importance, the

[2] The Attorney General likewise cannot show that Petitioners' claim implicates any of the six factors governing the political question doctrine as set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See William Penn Sch. Dist.*, 170 A.3d at 432-33 n.28 & 436-39. Section 13 precludes finding "a textually demonstrable constitutional commitment of the issue" of capital punishment to the legislature; extensive jurisprudence applying Section 13, the Eighth Amendment, and comparable guarantees provides "judicially discoverable and manageable standards for resolving" this case; when the Court considers existing court judgments, it need not make "an initial policy determination of a kind clearly for non[-]judicial discretion"; and the Court's resolution of this case will not evince a "lack of the respect due coordinate branches of government," require "unquestioning adherence to a political decision already made," or result in "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

judiciary, no less than the other branches of government, should remain faithful to its core responsibility, and this Court can assure as much by exercising jurisdiction.

II. Section 13 Provides a Strong Basis for Petitioners' Systemic Claim.

In a variation on his jurisdictional argument, the Attorney General contends that Petitioner "does not raise any legally justiciable issue," because his allegations are not confined to "claims in his own case." AGB 16-17. A capital defendant should not be heard to complain of systemic defects unless personally aggrieved by each one, because "judicial review can only reach specific, legal errors in individual cases." *Id*. at 6.[3] This argument overlooks both the well-recognized nature of systemic claims and the scope of Section 13.

This Court has recognized claims of system-wide constitutional violations in a variety of contexts. *See William Penn Sch. Dist.*, 170 A.3d at 456 (citing cases). In *Kuren v. Luzerne Cty*., 146 A.3d 715, 751 (Pa. 2016), for example, the Court recognized that an indigent criminal defendant could allege "a systematic, widespread constructive denial of counsel in contravention of the Sixth Amendment

[3] The Attorney General mistakenly alleges Petitioner Marinelli's "consistent failure to contend that he, himself, was aggrieved" by defects in Pennsylvania's capital sentencing system. AGB 16. Petitioners' Brief plainly stated that Mr. Marinelli's "death sentence[] w[as] influenced by problems identified in the JSGC Report," and specified his indigence, his mental illness (which court-appointed counsel failed to present to the sentencing jury), the sentencing statute's overbreadth, and geographic disparity. PB 12-13. Further, as the Attorney General notes, the victim in Mr. Marinelli's case was white, AGB 16, thereby implicating systemic race-of-victim disparities as well.

to the United States Constitution." Such a claim can be substantiated by showing that, "on a system-wide basis, the traditional markers of [constitutional representation] are absent or significantly compromised" and that "substantial structural limitations—such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices—cause" the system-wide problems. *Id*. at 744. Petitioners here allege similar, system-wide defects and document a much wider range of structural causes. As in *Kuren*, "[t]his is a structural claim, not an individual one." *Id*. at 746.

In 2011, this Court exercised extraordinary jurisdiction to consider a systemic challenge to Philadelphia's procedures for appointing counsel to represent indigent capital defendants. *See* Report and Recommendation at 1, 9, *Commonwealth v. McGarrell*, 77 EM 2011, 87 A.3d 809 (Pa. 2014) (per curiam). Just as in *McGarrell*, Petitioners' claim here "offers an essential opportunity for this Court to address a systemic challenge amidst much evidence that Pennsylvania's capital punishment regime is in disrepair." *McGarrell*, 87 A.3d at 811 (Saylor, J., dissenting).

Systemic challenges to the death penalty have been well-established in constitutional law since at least 1972, when the Supreme Court struck down the death penalty nationwide on the basis of systemic arbitrariness. *Furman v. Georgia*, 408 U.S. 238 (1972). Justice Stewart explained that the Eighth Amendment forbids "the infliction of a sentence of death under *legal systems* that permit this unique

penalty to be so wantonly and so freakishly imposed." *Id*. at 310 (Stewart, J., concurring) (emphasis added). The Court subsequently recognized that, because states "construct capital-sentencing systems" that may or may not operate arbitrarily, "each distinct system must be examined on an individual basis." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976); *accord Gardner v. Florida*, 430 U.S. 349, 358 (1977). Given this Eighth Amendment principle, Section 13 can guarantee no less. *See Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983).

In striking down the state's death penalty system under its Cruel Punishment Clause, the Washington Supreme Court recognized that "[c]ase-by-case review of death sentences cannot fix the constitutional deficiencies before us." *State v. Gregory*, 427 P.3d 621, 637 (Wash. 2018). Other courts have granted system-wide relief in death penalty cases for much the same reason. *See State v. Santiago*, 122 A.3d 1, 10 (Conn. 2015); *Dist. Att'y for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980). As New Mexico Justice Chavez recently explained:

> The criminal justice system includes law enforcement, prosecutors, public and private defenders of an accused, penal institutions, trial courts, and appellate courts. This Court has the responsibility to assure that criminal justice stakeholders adhere strictly to . . . the United States and New Mexico Constitutions.

Fry, 2019 WL 2710810, *32 (Chavez, J., specially concurring). This Court has the same responsibility with respect to Section 13.

In insisting that, "[s]hort of amending the constitution, there is no legal foundation for" Petitioners' claim, AGB 4, the Attorney General fails to appreciate that Section 13 is well-suited to systemic challenges. At the time of Section 13's adoption, penal laws were widely understood to be capable of system-wide cruelty. Pennsylvanians viewed the British system as a whole as "cruel" and quickly came to view their own system of public labor as "cruel" too. PB 25-28. As with other sanguinary penal laws, Pennsylvania's founders saw capital punishment as especially susceptible to cruelty, even if not inevitably so. *Id*. at 22-31. Pennsylvania's founding generation thus analyzed the cruelty of criminal punishments writ large, *see id*., without reference to "specific, legal errors in individual cases." AGB at 6.

Section 13's plain language categorically prohibits "cruel punishments" and warrants categorical analysis. That is precisely how Justice Bradford in 1793 analyzed capital punishment in *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania*. *See* PB 22-23; PA40-94. It is how this Court in 1825 analyzed the "ducking-stool" punishment at issue in *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825). *See* PB 32-33. Section 13 would be stripped of its core purpose and meaning if this Court accepted the Attorney General's position that systemic penal cruelty cannot provide a "legal foundation" for relief.

Discussing *Commonwealth v. Zettlemoyer*, 454 A.2d 937 (Pa. 1982), and *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), the Attorney General also argues that stare decisis binds the Court to find that Section 13 does not provide broader protections than the Eighth Amendment. AGB 10-13. The Attorney General mistakenly claims that Petitioner "does not acknowledge that precedent, let alone suggest that it has proven to be erroneous." *Id*. at 13. Petitioners addressed *Zettlemoyer* and *Batts* in detail in their brief, explaining that they counsel *in favor of* a case-specific *Edmunds* analysis, and demonstrating why those decisions do not govern this as-applied challenge to the administration of the death penalty. PB 18-20, 33-34. The Attorney General's brief does not acknowledge, let alone rebut, Petitioners' arguments.

Even assuming, arguendo, that those decisions were inconsistent with granting relief here, this Court is "not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments," *William Penn Sch. Dist.*, 170 A.3d at 456, and the systemic dysfunction in administering the death penalty since *Zettlemoyer* establishes such "subsequent developments." As with the Washington Supreme Court, this Court "need not decide whether the prior cases were incorrect and harmful at the time they were decided," but, "[w]here new, objective information is presented for our consideration, we must account for it." *Gregory*, 427 P.3d at 633.

III. Pennsylvania Systematically Administers Capital Punishment in Violation of Section 13.

Pennsylvania administers capital punishment unreliably, arbitrarily, and without adequate justification. The evidence of systemic dysfunction has been growing for years, and is now too great to ignore. The Attorney General and amici do not dispute many of the systemic problems, but nonetheless urge the Court to uphold the status quo. The Court should directly confront the problems and hold that the current system of capital punishment is cruel.

A. The Systemic Unreliability of Death Sentences Violates Section 13.

Petitioners' Brief detailed the astronomical error rate afflicting Pennsylvania death sentences imposed under the 1978 statute: 270 of 441 death sentences have been ruled unlawful; there have been twice as many exonerations as executions; and well over 90% of cases with vacated death sentences are resolved with a non-capital disposition. PB 14-15, 40-42. While addressed in the JSGC Report, the evidence of unreliability derives from judicial records in Pennsylvania capital cases and is therefore not subject to reasonable dispute. *See id.*; *see also* JSGC Report 13, 88, 153, 183-84; PA1-38. Under both Eighth Amendment minimums and Section 13's independent meaning, such systemic unreliability is unconstitutional. PB 42-43.

Although the Attorney General and amici do not dispute the constitutional requirement of heightened reliability in capital sentencing schemes, they question whether systemic unreliability is even a problem in Pennsylvania. The Attorney

General posits that the error rate "is in fact a consequence of federal intervention in Pennsylvania's criminal justice system," and chides Petitioners for purportedly "not say[ing] how many capital cases were . . . ultimately overturned—thus supposedly proving the unreliability of the death penalty—by a federal court that directly contradicted a constitutional ruling by this Court." AGB 21-22. As Petitioners stated clearly, however, "[o]f the 264 [final] overturned sentences, Pennsylvania courts granted relief in 207 cases; federal courts granted relief in the other fifty-seven cases." PB 14; *see* PA1-38. Because Pennsylvania courts have granted relief in nearly *four times* as many cases as federal courts, the Attorney General's hypothesis that the error rate is "a consequence of federal intervention" is untenable.

To illustrate the supposed federal intervention, the Attorney General cites only *Dennis v. Sec'y, Pa. Dep't of Corr*., 834 F.3d 263 (3d Cir. 2016) (*en banc*), AGB 21, but *Dennis* merely underscores the unreliability of Pennsylvania's system. There, the federal habeas court determined that the Commonwealth violated due process by suppressing multiple pieces of exculpatory evidence. *Dennis v. Wetzel*, 966 F. Supp. 2d 489, 517 (E.D. Pa. 2013). The court concluded that Mr. Dennis was "wrongly convicted and sentenced to die for a crime in all probability he did not commit." *Id.* at 490. The Court of Appeals, sitting *en banc*, affirmed, finding that the suppressed exculpatory evidence "effectively gutted the Commonwealth's case against Dennis." *Dennis*, 834 F.3d at 268. Thereafter, the Philadelphia District Attorney's Office

(prior to Larry Krasner's election) declined to seek review in the United States Supreme Court and negotiated a disposition in which Mr. Dennis pled *nolo contendere* to a lesser charge in exchange for a time-served sentence—after spending more than 20 years on death row. Mr. Dennis maintains his innocence to this day, and his case exemplifies the problems with the death penalty in Pennsylvania, including the grave risk that an innocent person might one day be executed for a crime he did not commit.[4]

For its part, the PDAA claims that Pennsylvania's astronomical error rate "is evidence that the process is working as it should, not that the process is unreliable." PDAA Br. 9; *see also* AGB 24. This argument suggests that even a 100% error rate would demonstrate systemic reliability, and discounts to irrelevance the harm of erroneously condemning a person to death. "To pass constitutional muster, a capital sentencing scheme *must genuinely narrow the class of persons eligible for the death penalty* and *must reasonably justify the imposition of a more severe sentence* on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (emphasis added) (internal quotation marks omitted).

[4] The Attorney General states that Petitioners' Brief "equates 'granted a new trial' with 'exonerated.'" AGB 9. This is incorrect. The JSGC Report and Petitioners' Brief identify only six exonerations. JSGC Report 16; PB 11. By comparison, of the 264 final capital case reversals Petitioners identified, *seventy-five* included a grant of a new trial, and nine additional defendants were granted new trials after their death sentences were vacated. *See* PA1-38. In other words, roughly 32% of Pennsylvania's vacated death sentences were based on faulty capital convictions.

Pennsylvania's capital sentencing scheme has consistently failed to perform this narrowing function and has erroneously imposed hundreds of death sentences. Subsequent relief by appellate or postconviction courts cannot "reasonably justify the imposition" of erroneous death sentences in the first place, and Pennsylvania's system therefore does not "pass constitutional muster."[5]

Importantly, the Attorney General and amici do not dispute that the primary cause of Pennsylvania's high error rate is the system-wide failure to provide adequate legal representation for indigent capital defendants. *See* PB 46-52. They merely insist that the judiciary may not address such systemic problems, AGB 25-26, PDAA Br. 12, but Petitioners have refuted that contention above. In a properly functioning capital sentencing system, grants of relief due to ineffective assistance of counsel should be rare outliers. In Pennsylvania, they are both commonplace and directly attributable to the Commonwealth's failure to provide adequate

[5] The PDAA alleges that the case of Alfonso Sanchez "is erroneously listed as having been reversed and not re-sentenced to the death penalty," and suggests that Petitioners may have made "other such misrepresentations" in Exhibit A to their brief. PDAA Br. 10 n.5. The PDAA errs. Mr. Sanchez's convictions and death sentence were vacated on January 27, 2017, he is awaiting retrial, and he therefore has not been re-sentenced to death. *See* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-09-CR-0001136-2008&dnh=TxxD61B%2bWFbGDyxUj%2brdYQ%3d%3d. Exhibit A accurately reports his case status and includes neither error nor misrepresentation. *See* PA018, PA033. Petitioners' Brief further explained that "[a] death sentence might yet be re-imposed in seven of these [overturned] cases," and Petitioners accordingly did not include those cases in calculating the 93% non-death resentencing rate in final cases. PB 15. Mr. Sanchez is the defendant in one of those seven non-final cases.

representation for indigent men and women on trial for their lives. The unreliability of Pennsylvania's capital punishment system violates Section 13.

B. The Systemic Arbitrariness of Death Sentences Violates Section 13.

Pennsylvania fails to reserve death sentences for the worst of the worst. Longstanding structural defects—including an overbroad statute, the lack of prosecutorial guidelines or oversight, and inadequate indigent defense—permit arbitrary factors like geography, race, mental illness, and indigence to influence death sentences. These system-wide defects violate Section 13. PB 56-90. The Attorney General and amici raise various challenges to these allegations.

1. The Overbroad Sentencing Statute

The JSGC observed that Pennsylvania's statutory aggravators "are so broad and so numerous that most murders are arguably death eligible, which thwarts consistency in sentencing." JSGC Report 112. Petitioners provided a detailed analysis of the aggravators' overbreadth. PB 64-68. The PDAA disputes this analysis by claiming that "4,274 murders were charged between 2000 and 2010; of those, only 1,115 were eligible for the death penalty." PDAA Br. 18 (citing Kramer Report 38). The PDAA concludes that "[t]hese statistics clearly demonstrate that the discretion of prosecutors and sentencing authorities alike are being channeled as the statute directs and the constitution demands, despite the number of aggravating circumstances." *Id*.

The PDAA misreads the Kramer Report and thus compares apples to oranges. The number 4,274 represents the total of "cases with criminal homicide charges," of any kind in the counties studied. Kramer Report 31, 51. In contrast, the number 1,115 is the total of "cases with at least one first-degree murder *conviction*." *Id*. at 32; *see also id*. at 33, 153. Kramer studied only these first-degree murder convictions "because these are the cases that are potentially exposed to the death penalty." *Id.* at 153.

Of the 4,274 total homicides charged, 1,260 did not result in any homicide conviction, and 1,868 resulted in a homicide conviction of less than first-degree murder. *Id*. at 33, 51. As to these acquittals and lesser convictions, Kramer did *not* "assess the processes (such as acquittals or plea bargaining to lesser charges) by which some criminal homicide cases that are death-eligible result in first-degree murder convictions and other[s] do not." *Id*. at 51-52. In other words, Kramer did not attempt to determine how many of the 4,274 charged homicides were death-eligible at the charging stage; he only studied the cases that remained death-eligible as a result of a first-degree murder conviction. The PDAA's argument that the sentencing statute effectively channels prosecutorial discretion finds no support in the Kramer Report.

2. Geography

Kramer determined that geographic factors are a prime determinant of death sentences in Pennsylvania:

> 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. If uniform prosecution and application of the death penalty under a common statewide framework of criminal law is a goal of Pennsylvania's criminal justice system, these findings raise questions about the administration of the death penalty in the Commonwealth.

Kramer Report 125. The Attorney General lauds the Kramer Report as a "most comprehensive, timely, and scientific study," AGB 18, but disputes the import of geographic disparities.

As to Kramer's conclusion that, "[i]n many Pennsylvania counties the death penalty is simply not utilized at all," the Attorney General posits that this is unremarkable because "in some counties murders are extremely rare," while others have "no murders at all." *Id*. at 27. The Kramer Report, however, examined only "the 18 counties with 10 or more first-degree murder convictions," which constituted "87% of all first-degree murder convictions statewide." Kramer Report iii. Its analysis did not address counties with "extremely rare" or "no murders." *See id*. Rather, Kramer found extreme geographic discrepancies among the counties in which murders are not rare.

The PDAA similarly discounts the JSGC Report, including its finding that, as of 2010, "Philadelphia County accounted for 106 of the 223 inmates on death row, while only eleven death row inmates were from Allegheny County." JSGC Report 67. The PDAA counters that, in 2018, Allegheny had only 93 homicides compared to Philadelphia's 359 homicides, with similar numbers in 2017. PDAA Br. 21-22. But the fact that Philadelphia County averages nearly four times as many homicides as Allegheny County does not explain why it would have nearly *ten* times the number of condemned prisoners. *See* JSGC Report 67.

Ultimately, the Attorney General and PDAA dismiss geographic disparity as an inevitable byproduct of delegating prosecutorial discretion to 67 different local district attorneys. *See* AGB 27; PDAA Br. 23-25. But their argument simply begs the question of whether a capital sentencing system obliged to select only the worst of the worst can pass constitutional muster where some prosecutors find that threshold easily met and others find it never met at all. *Cf. Kuren*, 146 A.3d at 749 ("At the most fundamental level, compliance with *Gideon* should not—cannot—depend upon the county in which a crime is alleged."). Indeed, the Attorney General credits the Governor's moratorium for the recent development that "local prosecutors have been more selective, reserving capital punishment for only the worse of offenders," AGB 5 n.2, all but admitting the lack of such selectivity in preceding years. Pennsylvania's stark geographic disparities violate Section 13.

3. Race

Pennsylvania's capital punishment system systematically undervalues the lives of African-Americans. PB 78. The presence of a white victim has a stronger impact on whether a defendant receives a death sentence than all but two statutory aggravating factors, and African-Americans are highly overrepresented on death row. PB 79, 84.

The Attorney General minimizes these disparities and misstates the significance of the Kramer Report's findings on the impact of a defendant's race. The Attorney General maintains that "[t]he Kramer Report does not point to" disparities like those found in *Gregory*. AGB 19. In fact, Kramer found race-of-victim effects that *exceed* the race-of-defendant effects the *Gregory* court relied on to invalidate Washington's death penalty. The key findings in *Gregory* showed that a black defendant's likelihood of receiving a death sentence was between 3.5 and 4.6 times that of a non-black defendant. 427 P.3d at 633. Kramer reported that, in Pennsylvania, a case involving a white victim had between 4.5 and 5.4 times the odds of receiving a death sentence compared to a case involving a black victim. *See* Kramer Report 151; PB 80 & n.25; PA286.

The Kramer Report described these results as "robust" and "significant," finding that race-of-victim effects persisted "across multiple analysis methods, even after accounting for a host of control variables," and observing that they were

"consistent with much of the literature" covering studies in other jurisdictions. Kramer Report 122-24; s*ee also* Soc. Sci. Br. 11 & n.3 (the "overwhelming majority of the studies found that defendants whose victims are white are treated more punitively than similarly situated defendants whose victims are black"). The sheer magnitude of race-of-victim disparities compels the conclusion that race plays an arbitrary and unconstitutional role in Pennsylvania's capital sentencing system. *See Santiago*, 122 A.3d at 149-52 (holding that death penalty violates state constitution based in part on studies showing higher death sentencing rates in cases with white victims).

The highly disproportionate representation of African Americans on Pennsylvania's death row also violates Section 13. Because the constitutionality of capital punishment depends on the retributive and deterrent message that it sends, *see* PB 90-94, this Court should not tolerate a system that disproportionately directs this message toward a racial group that has been discriminated against since the Commonwealth's founding. Although the Attorney General and amici contend that assessing such penological justifications for the death penalty "is a nuanced and complex policy issue that is in the realm of the General Assembly," AGB 32-33, it is widely recognized that courts should analyze deterrence and retribution when considering the cruelty of a criminal punishment. *See, e.g.*, *Commonwealth v. Batts*, 163 A.3d 410, 429-30 (Pa. 2017); *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008);

Gregory, 427 P.3d at 636; *Santiago*, 122 A.3d at 56-57; *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007).

The District Attorney's recent review of Philadelphia cases further demonstrates the disparate racial application of capital sentences. Despite accounting for less than 45% of the population, 82% of death row prisoners from Philadelphia are African American, and more than 90% are from a racial minority. DAB 35. These data accord with statewide statistics in which "Blacks are highly overrepresented on Pennsylvania's death row relative to their proportion of the state population." Kramer Report 1. Petitioners agree that "the appearance of discrimination in such cases is intolerable because, to many citizens, the state's very legitimacy is called into question when it appears to single out one group more than any other for the imposition of this severest of all penalties." DAB 36.

The Attorney General nonetheless maintains that Kramer found that the death penalty is not "targeted against people of color." AGB 18. The PDAA takes an even more extreme position, insisting that Kramer "refutes" any contention that the race of the defendant impacts capital sentencing decisions. PDAA Br. 26, 28. These arguments fail.

Although Kramer did not find an "overall pattern of disparity to the disadvantage of Black or Hispanic defendants" in eighteen counties between 2000 and 2010, the report did not "refute" studies David Baldus conducted of Philadelphia

cases from the 1980s and 1990s. As the Kramer Report made clear, the study covered a different time frame, a different geographical area, and a different set of prosecutors and defendants than Baldus. Kramer Report iv, 117. Particularly given the well-documented geographic disparities in Pennsylvania capital cases, it is not surprising that prominent effects in one county would not be apparent in an aggregate analysis. Further, Kramer examined only cases with first-degree murder convictions and did not study "the process by which some death-eligible cases result in first-degree murder convictions and some do not." JSGC Report 83-84. Within that very process, Baldus identified significant race-of-defendant effects. *See* JSGC Report 65-66.

Baldus's study remains authoritative and reveals troubling race-of-defendant disparities. The District Attorney's recent review corroborates these disparities. Alone and in combination, Pennsylvania's race-of-victim and race-of-defendant disparities in capital sentencing violate Section 13.

4. Mental Illness and Intellectual Disability

The Attorney General acknowledges that a capital defendant's mental illness is a "serious issue," but asserts that the Kramer Report's finding that a defendant's mental illness makes a death sentence more likely is, "at the least, subject to dispute." AGB 28-29; *see also* PDAA Br. 20. The Attorney General offers no evidence or analysis to undermine either Kramer's data or the JSGC Report's observation that

jurors are more "prone to treat[] mental illness as an aggravating rather than a mitigating factor, partly because they erroneously view mentally ill defendants as more dangerous than other defendants." JSGC Report 133 (citation omitted). The troubling fact remains that a defendant's mental illness at the time of the crime strongly correlates with a prosecutor's decision to file a death notice, substantially reduces the chances of the prosecutor retracting the notice, and increases the likelihood of a death sentence. *See* PB 87.

The PDAA argues that data the DOC provided to the JSGC indicating "[t]hat death row inmates disproportionately suffer from mental illness and/or intellectual disability is speculative and misleading" and "wholly disingenuous." PDAA Br. 19-20. The PDAA especially criticizes the JSGC for reporting on condemned prisoners' IQ scores, without evidence relating to the other two prongs of an intellectual disability diagnosis. *Id*. These arguments exaggerate Petitioners' reliance on the DOC data. *See*, *e.g.*, PB 85 (arguing only that "'*as many as* 14% of the Commonwealth's condemnees' *may* qualify for this diagnosis") (emphasis added). The data are nonetheless significant for two reasons: first, they corroborate the Kramer Report's findings that mental illness increases the likelihood of a death sentence; and second, they illuminate the consequences of a system of indigent representation that fails to ensure adequate investigation of the mental health and

impairments of capital defendants. The evidence that capital defendants' mental illnesses systematically predispose them to be sentenced to death is overwhelming.

5. Indigence

In response to Petitioners' allegation that indigence increases the likelihood that a capital defendant will be sentenced to death in Pennsylvania, the Attorney General and amici emphasize that a one-time $500,000 state appropriation to the Pennsylvania Commission on Crime and Delinquency was approved earlier this month by the General Assembly. AGB 29; PDAA Br. 12 n.6; GOP Sen. Br. 6 n.1. This appropriation will reimburse counties "for indigent criminal defense in capital cases" in the upcoming fiscal year. AGB 29. Petitioners join the Attorney General in commending this legislative "first step," *id.* at 26, in addressing the Commonwealth's broken capital sentencing system. Petitioners note, however, that a one-time appropriation of $500,000 is the proverbial drop-in-the-bucket where prosecutors pursue many capital prosecutions each year. More importantly, this allocation has no impact on previously sentenced death row prisoners and thus does not affect the analysis of Petitioners' instant claim.

Similarly, the Attorney General's suggestion for this Court to "restrict attorneys who have been found constitutionally ineffective from representing defendants in capital cases," AGB 30-31, would have no effect on capital defendants already sentenced to death. The suggestion merely underscores that many current

death row prisoners were represented by counsel who were found to have provided constitutionally ineffective assistance in other capital cases, as the District Attorney's recent case review demonstrates. *See* DAB 5.

C. The Court May and Should Consider the JSGC Report.

Petitioners' claim for relief incorporates records and analysis from a variety of authoritative sources: the Kramer Report, the American Bar Association, this Court's Committee on Racial and Gender Bias in the Justice System, learned scholars, and extensive judicial records. *See* PB 9-10, 50-51, 73-89. The JSGC compiled, examined, and reported on all of these sources, and its June 2018 report is the most comprehensive ever published on the administration of the death penalty in this Commonwealth. As would be expected in any study of how a criminal justice system operates, the bulk of the data underlying the JSGC Report was originally collected from the judiciary and from executive branch agencies like district attorney offices and the DOC. Just as the JSGC thoroughly examined the available data, so too should this Court.

The Attorney General and amici urge the Court not to consider the JSGC Report. While acknowledging that the "issues are serious [and] the concerns raised in the JSGC report are in many cases valid ones," the Attorney General contends that the report is "unsuitable for review in this forum." AGB 4-5, 17. The House GOP leaders agree that the report is not subject to judicial review due to "the bounds

of legislative agency work product." GOP H. Br. 1. The PAFOP says that the JSGC Report is "to be used as an aid to the General Assembly and the Governor in deciding the answer to the ultimate question[of] the maintenance of the death penalty," but that this Court may not consider it. PAFOP Br. 8. At bottom, these arguments urge the Court to see and hear no evil.

This Court can appropriately consider the JSGC Report, as well as the studies and data addressed therein, just as other courts have done in evaluating how capital punishment systems operate. *See, e.g., Furman*, 408 U.S. at 307-10 & nn.7, 12, 14 (Stewart, J., concurring) (relying on scholarly studies on race, "inconclusive empirical evidence" concerning deterrence, and congressional testimony regarding arbitrariness); *Gregory*, 427 P.3d at 633 ("afford[ing] great weight" to studies of Washington's capital cases); *Santiago*, 122 A.3d at 48-50 (evaluating Connecticut's "actual practice" in death penalty cases in light of empirical studies, legislative testimony, and publicly available data).

Amici provide no authority for the novel legislative privilege they invoke to preclude the Court from reviewing the JSGC Report. In fact, this Court routinely considers and relies on legislative agency reports. *See, e.g.*, *William Penn Sch. Dist.*, 170 A.3d at 448 (explaining that the Court "has access" to a "study ordered and obtained by the General Assembly" and concluding: "This study may be used to determine whether the state's financial support, in its magnitude and distribution,

provides the opportunity to succeed relative to the state's own benchmarks."); *Tr. Under Agreement of Taylor*, 164 A.3d 1147, 1153, 1157 (Pa. 2017) (relying on comments of a JSGC advisory committee); *Zauflik v. Pennsbury Sch. Dist*., 104 A.3d 1096, 1124 (Pa. 2014) (deferring to statute where its "provisions were based on a report and recommendations prepared in 1978 by the General Assembly's Joint State Government Commission, after a detailed study by a task force consisting of judges, attorneys and citizens"); *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986) (crediting the view of the "Final Report of the Joint State Government Commission Task Force on the Office of the Elected Attorney General" over the position of the Attorney General himself); *see also Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs, Teamsters Local 502*, 805 A.2d 476, 484 (Pa. 2002) ("courts have routinely taken judicial notice of legislative journals as well as various versions of bills ultimately enacted into law.") (citing cases). This well-established tradition belies any suggestion that the Court's review of the JSGC Report would chill future legislative research. *See* GOP Sen. Br. 7.

It would be particularly incongruous for the Court to first decide *in this case* that such reports are "unsuitable for review," AGB 17, because the JSGC Report examines the judiciary's central role in the administration of capital sentencing. Moreover, the JSGC is uniquely capable of informing this Court's analysis of how the Commonwealth's death penalty operates. The commission has the "power to

call upon any department or agency of the State Government for such information as it deems pertinent to the studies in which it is engaged." 46 Pa. Stat. Ann. § 65. The commission used that power here by, for example, obtaining information from DOC regarding death row mental impairment rates, costs, and conditions. The commission also has the "power to employ . . . such professional, technical, clerical and other assistance as may be deemed necessary," 46 Pa. Stat. Ann. § 65, which it utilized here to incorporate findings from the Kramer Report—acknowledged by the Attorney General to be a "most comprehensive, timely, and scientific study." AGB 18. Incidentally, the Kramer Report was prepared for the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, *see* Kramer Report i, which, as its name implies, garners "appointments from all three branches of government in a joint mission to address issues of gender, racial, and ethnic fairness." Hon. Maureen Lally-Green, Chief Justice Ralph Cappy, 47 Duq. L. Rev. 555, 557 (2009).

As the Connecticut Supreme Court ruled in evaluating the administration of capital punishment there, "the sociological research and historical facts on which we rely far exceed the governing more likely than not true standard, and they are not subject to reasonable dispute." *Santiago*, 122 A.3d at 78. The same is true of nearly all of the research and data set forth in the JSGC Report. In exhaustively documenting the arbitrariness and unreliability of the death penalty in Pennsylvania, the JSGC Report merits serious judicial consideration.

CONCLUSION

Pennsylvania's death row houses 131 prisoners condemned to death through the operation of a system that is demonstrably unreliable, arbitrary, and unnecessary. This Court has the power and the duty to confront and remedy this reality. For the above reasons and those set forth in their prior submissions, Petitioners ask this Court to rule that Pennsylvania's system of capital punishment, as administered, violates Article I, Section 13, of the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

Undersigned counsel hereby certifies that the foregoing *Petitioners' Reply Brief* contains 6,995 words, as calculated by the word processing system used to prepare the brief, and is therefore within the word limit for reply briefs set by Pa. R.A.P. 2135(a).

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