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102 EM 2018

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' BRIEF

Shawn Nolan, Esq.
Timothy Kane, Esq.
Stuart Lev, Esq.
HELEN MARINO, First Assistant
LEIGH SKIPPER, Federal Defender
Federal Community Defender Office
Suite 545 West, The Curtis Center
601 Walnut Street
Philadelphia, PA 19106
215-928-0520

Counsel for Petitioners

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INTRODUCTION

As reported by the Joint State Government Commission in June 2018, Pennsylvania administers a system of capital punishment that is replete with error, a national outlier in its design, and a mirror for the inequities and prejudices that plague American society. Although the system was intended to apply only to the worst of the worst, arbitrary factors, such as geography, poverty, mental illness, and race, best predict who ends up on death row.

Under the capital sentencing statute adopted in 1978, Pennsylvania has imposed 441 death sentences; to date, the courts have overturned a staggering 270 of them. Six death row prisoners have been exonerated, while only three prisoners have been executed, each of them voluntarily. Thirty-seven condemned men have died of natural causes or suicide.

As the Joint State Government Commission recognized, substantial reforms would be required to fix the Commonwealth's capital punishment system, including revising the 1978 statute, providing statewide indigent capital defense, and establishing statewide oversight of prosecutorial discretion. But the Legislature has not attempted to repair the system, and 131 death sentences remain in force under it. An involuntary execution under this broken system would be as capricious as a bolt of lightning from the Pennsylvania sky. *See Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

Article I, Section 13, of the Pennsylvania Constitution endows this Court with the ultimate responsibility for prohibiting cruel punishments. Indeed, when Section 13 was adopted in 1790, Pennsylvania was a world leader in eradicating cruel punishments, and the unnecessary and arbitrary infliction of the death penalty was understood as a quintessential form of cruelty.

As the Washington Supreme Court recently held, where the death penalty is administered in an "arbitrary manner" and is "unequally applied," the system "fails to serve any legitimate penological goal" and thus violates the state constitution's ban on cruel punishment. *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018). In Pennsylvania as in Washington, the evidence of systemic dysfunction in the administration of the death penalty is now overwhelming. This Court should strike down the Commonwealth's capital punishment system as a prohibited cruel punishment under Article I, Section 13.

STATEMENT OF JURISDICTION

This Court has ample authority to exercise either King's Bench or extraordinary jurisdiction in this case. Both modes of jurisdiction give the Court authority to review all matters arising in any Pennsylvania court, and this case presents "a forceful challenge to the integrity of the judicial process," *Commonwealth v. Williams*, 129 A.3d 1199, 1207 (Pa. 2015), implicating the validity of 131 death sentences in force statewide. This case is of immense public

importance, and this Court is the ultimate authority on whether the Commonwealth's death penalty system violates the Pennsylvania Constitution. Accordingly, the Court should decide Petitioners' claim without waiting for the lower courts to resolve related proceedings.

Although Petitioners believe either type of jurisdiction is appropriate, they submit that King's Bench jurisdiction is better suited for their systemic challenge and would not require the technical maneuvering involved in assuming extraordinary jurisdiction, as discussed below.

A. This Case Meets the Standards for King's Bench and Extraordinary Jurisdiction.

This Court invokes its King's Bench authority when "an issue of public importance . . . requires timely intervention . . . to avoid the deleterious effect arising from delays incident to the ordinary process of law." *Williams*, 129 A.3d at 1202 (citing *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014)).[1] Extraordinary jurisdiction is similarly appropriate when a "case raises an issue of immediate public importance and . . . an immediate appeal may well advance the ultimate determination." *Commonwealth v. $9,847.00 U.S. Currency*, 704 A.2d 612, 614 (Pa. 1997).[2] This case readily meets these standards.

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[1] *See generally* 42 Pa. C.S. § 502.10 (recognizing the Court's King's Bench power).

[2] *See generally* 42 Pa. C.S. § 726 (providing for the Court's exercise of extraordinary jurisdiction).

The parties agree that the issue raised is of immense public importance. *See* A.G. Answer at 13-14, 20, *Marinelli* (Sept. 27, 2018); D.A. Answer at 1, *Cox* (Sept. 10, 2018). Petitioners ask the Court to review evidence from a comprehensive Joint State Government Commission report ("JSGC Report") indicating that the Commonwealth's system of capital punishment is unreliable, arbitrary, and unjustified. It is fundamental that "[t]he power of sentencing is one of the most critical and important duties vested in the judiciary," *Commonwealth v. Sutley*, 378 A.2d 780, 784 (Pa. 1977), and a death sentence "is the most irremediable and unfathomable of penalties," *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Further, it is the duty of the judiciary—not the legislative or executive branch—to determine the validity of existing, final judgments of death. *See Sutley*, 378 A.2d at 783. Thus, when substantial defects in Pennsylvania's capital punishment system come to light, this Court should resolve whether the system violates the Pennsylvania Constitution. *See In re Bruno*, 101 A.3d at 675 ("The Supreme Court's principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.").

The Commonwealth's capital punishment system would benefit from the Court's timely intervention. The defects identified in the JSGC Report affect all death sentences in the state, and "the deleterious effects arising from delays incident

to the ordinary process of law," *Williams*, are nowhere more apparent than in these cases. In the last half-century, twice as many death row prisoners have been exonerated as have been executed in Pennsylvania; most death sentences imposed have later been reversed due to constitutional error; and many death row prisoners have spent most of their lives on death row. These systemic delays only exacerbate the immense costs—in resources, money, and waning public confidence—of the capital punishment system. If the JSGC Report establishes that these death sentences violate Section 13, it is incumbent on the Court to say so in a timely manner. *See Commonwealth v. Lang*, 537 A.2d 1361, 1363 n.1 (Pa. 1988) ("[I]n order to conserve judicial resources . . . and provide guidance for the lower courts as to a question that is likely to recur, we assume jurisdiction . . . ."). And regardless of how the Court ultimately resolves Petitioners' claim, its decision on the merits will obviate the need for the lower courts to address the same issue pending in various PCRA petitions,[3] and will thereby conserve significant judicial resources.

[3] To undersigned counsel's knowledge, death row prisoners in the following cases have filed PCRA petitions or amendments raising the same claim: *Commonwealth v. Brown* (Phila. Cty. No. CP-51-CR-0208091-2004), *Commonwealth v. Cox* (Phila. Cty. No. CP-51-CR-0231581-1983), *Commonwealth v. Lesko* (Wstmld. Cty. No. CP-65-CR-00681-1980), *Commonwealth v. Marinelli* (Nthmblnd. Cty. No. CP-49-CR-00451-1994), and *Commonwealth v. Philistin* (Phila. Cty. No. CP-51-CR-0709691-1993). These PCRA courts have been apprised of the instant proceeding and have not conducted substantive proceedings on the claim.

Because this case is of utmost public importance and would benefit from the Court's timely intervention, this Court should invoke King's Bench jurisdiction or extraordinary jurisdiction and review the merits of Petitioners' claim.

B. King's Bench Jurisdiction Best Accommodates Petitioners' Systemic Challenge.

While this Court may properly exercise either type of jurisdiction, King's Bench jurisdiction is best suited to Petitioners' systemic challenge.

Extraordinary jurisdiction is typically case specific; it enables the Court to assume plenary jurisdiction over "any matter pending" in a lower court. 42 Pa. C.S. § 726. The "broad" and "transcendent" King's Bench jurisdiction, by comparison, better accommodates a system-wide "challenge to the integrity of the judicial process." *Williams*, 129 A.3d at 1206-07. Petitioners' challenge to the statewide administration of capital cases is therefore properly governed by King's Bench jurisdiction, which "allows the Supreme Court to exercise authority commensurate with its ultimate responsibility for the proper administration and supervision of the judicial system." *In re Bruno*, 101 A.3d at 671 (internal quotation marks omitted).

Further, extraordinary jurisdiction would require "technical maneuvering," *see Williams*, 129 A.3d at 1205, to transfer Petitioners' PCRA petitions—and perhaps also the petitions filed by other death row prisoners, *see* n.3, *supra*—to this Court, whereas King's Bench jurisdiction enables the Court to proceed directly on the matters already pending. Because "[t]he exercise of King's Bench authority is

not limited by prescribed forms of procedure," *In re Bruno*, 101 A.3d at 669, no technical maneuvering is required. Under these circumstances, the Court should exercise King's Bench jurisdiction without resorting to extraordinary jurisdiction. *See Williams*, 129 A.3d at 1207 n.11 ("Having concluded that we possess King's Bench jurisdiction over this matter, we need not examine whether we also possess extraordinary jurisdiction").

SCOPE AND STANDARD OF REVIEW

This Court's scope and standard of review in interpreting the Pennsylvania Constitution, and in determining its own jurisdiction, is plenary and de novo. *Williams*, 129 A.3d at 1213; *In re Bruno*, 101 A.3d at 659.

QUESTIONS INVOLVED

Should this Court invoke jurisdiction to consider whether the death penalty, as administered in Pennsylvania, is a cruel punishment where substantial evidence, including a recent Joint State Government Commission report, identifies defects in the Commonwealth's capital punishment system?

Does the Cruel Punishments Clause of Article I, Section 13, of the Pennsylvania Constitution provide broader protections against the administration of capital punishment than the Eighth Amendment to the United States Constitution in light of Section 13's distinct language, unique history, and intended purpose?

Does the Commonwealth's system of capital punishment violate Section 13 where, for the last forty years, unlawful death sentences have been imposed at an astronomical rate, arbitrary factors best predict who is sentenced to death, and there is no legitimate penological justification for the current system?

STATEMENT OF THE CASE

A. Procedural Background

Petitioners are death row prisoners whose convictions and sentences were affirmed by this Court on direct appeal. *Commonwealth v. Cox*, 728 A.2d 923, 926 (Pa. 1999), *cert. denied*, 533 U.S. 904 (2001); *Commonwealth v. Marinelli*, 690 A.2d 203, 209 (Pa. 1997), *cert. denied*, 523 U.S. 1024 (1998). This Court subsequently affirmed denial of their PCRA petitions. *Commonwealth v. Cox*, 983 A.2d 666, 675 (Pa. 2009); *Commonwealth v. Marinelli*, 910 A.2d 672, 674 (Pa. 2006); *Commonwealth v. Marinelli*, 810 A.2d 1257, 1280 (Pa. 2002) (affirming in part, reversing and remanding in part). Petitioners sought habeas relief in federal court, and those proceedings remain pending. *See Cox v. Horn*, No. CV-10-2673 (E.D. Pa.); *Marinelli v. Beard*, No. CV-07-0713 (M.D. Pa.).

On August 24, 2018, Petitioners separately petitioned this Court to invoke its King's Bench jurisdiction to consider whether Pennsylvania's capital punishment system imposes cruel punishment under Article I, Section 13, of the Pennsylvania Constitution. On September 10, 2018, the District Attorney of Philadelphia filed an

Answer in *Cox*, and on September 28, 2018, the Attorney General filed an Answer in *Marinelli*.

On December 3, 2018, the Court consolidated the cases, set a briefing schedule, and ordered the parties to brief the substantive issues raised by the petitions as well as the propriety of this Court's exercise of either extraordinary or King's Bench jurisdiction.

B. The JSGC Report

In December 2011, prompted by troubling reports from the American Bar Association ("ABA") and this Court's Committee on Racial and Gender Bias in the Justice System ("SCOPA Committee"), the Pennsylvania Senate directed the Joint State Government Commission ("JSGC") "to conduct a study on capital punishment in this Commonwealth," covering eighteen specific topics and problems. Pa. Sen. Res. 6 at 2-6 (Dec. 6, 2011). On June 25, 2018, the JSGC issued its report entitled "Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee."[4]

In completing the study, the JSGC collected evidence through, inter alia, research conducted by the Penn State University Department of Sociology and

[4] Petitioners attached the JSGC Report to their initial petitions, and the report is available online at http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-06-25%20SR6%20(Capital%20Punishment%20in%20PA)%20FINAL%20REPORT%20June%2025%202018.pdf.

Criminology, information compiled by the Department of Corrections ("DOC"), and data on court proceedings in capital cases. *See* JSGC Report 4, 5, 7, 9, 25-26, 58-59, 75-90, 191-92, 255. The JSGC analyzed this evidence together with earlier reports by government and private entities. *See id.* at 3.

The Penn State research, led by Dr. John Kramer, studied first degree murder convictions in the eighteen Pennsylvania counties with the most such convictions. *Id.* at 4 n.26. Based on its data and analysis ("Kramer Report"[5]), Kramer's team found:

- "a given defendant's chance of having the death penalty sought, retracted, or imposed depends on where that defendant is prosecuted," Kramer Report 125;
- capital prosecutions show "clear evidence of race-of-victim effects," *id.* at 97-98; and
- a given defendant's mental illness correlates with increased likelihood of capital prosecution and conviction, *id.* at 144, 147, 150.

The DOC provided the JSGC with information on death row including costs, conditions, and extended delays in capital cases. *Id.* at 56, 190-92, 197-99. The DOC also made the "troubling revelation" that "as many as 14% of the Commonwealth's condemnees" may be intellectually disabled and thus ineligible for the death penalty, and the equally troubling revelations that 25% of condemnees

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[5] http://justicecenter.psu.edu/research/projects/files/the-administration-of-the-death-penalty-in-pennsylvania-pdf/view.

are being treated for serious mental illness, while "more than half of death row inmates" needed mental health treatment in the recent past. JSGC Report 9, 121.

The JSGC collected information regarding Pennsylvania capital cases and the judicial, legislative, and prosecutorial procedures that govern them. Among the remarkable statistics that the JSGC compiled: "From 1973-2013, there were 188 overturned death sentences in the Commonwealth"; and between 1978 and 2018, "150 Pennsylvania death-row inmates sentenced to death have had their convictions or sentences overturned on the basis of ineffective assistance of counsel." *Id.* at 173, 183. The JSGC reported that "less than 3% of condemnees who had their original death sentences judicially vacated and subsequently disposed of since 1995 were resentenced to death." *Id.* at 13. Among the 97% of previously condemned prisoners who were not resentenced to death, six were exonerated as innocent after spending an average of more than nine years on death row. *Id.* at 16.

The JSGC relied on the new evidence and endorsed earlier reports and recommendations, including its own 2011 Report of the Advisory Commission on Wrongful Convictions, *id.* at 3 nn.18-19, 174, and the ABA's 2003 "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" ("2003 ABA Guidelines"), *id.* at 18, 185. The JSGC Report reached a series of harsh conclusions about the Commonwealth's capital punishment system, recognizing a need to repair its system of "justice by geography," its systematic devaluation of

African American lives, its "undermin[ing of] the effectiveness of indigent defense," and its inadequate procedures "to ensure that people with intellectual disability are not being nor have been sentenced to death." *Id.* at 8, 86-87, 184. The JSGC also concluded that "[t]he only certain way to eliminate the risk of condemning and executing a factually innocent person would be to eliminate the sentence and not execute any convict." *Id.* at 17, 28.

The JSGC recommended major procedural and structural reforms, including:

- eliminating or narrowing twelve of the eighteen aggravating circumstances under 42 Pa. C.S. § 9711, *id.* at 101-02;
- establishing a statewide bar on death sentences against people with severe mental illness, *id.* at 26;
- broadening three of the eight mitigating circumstances under section 9711 and adding a new mitigating factor regarding residual doubt, *id.* at 105-06;
- establishing statewide guidelines for and oversight of prosecutorial discretion in capital prosecutions, *id.* at 73-74, 270;
- establishing a statewide system of indigent capital defense, *id.* at 186; and
- conducting more robust judicial review, *id.* at 30-31.

Nearly all of the JSGC's recommendations are prospective. To date, none of these reforms have been enacted.

Petitioners' death sentences were influenced by problems identified in the JSGC Report. Both Mr. Cox and Mr. Marinelli are indigent, and their court-appointed attorneys presented almost no evidence at their penalty phases—only nine

transcript pages for Mr. Cox, five for Mr. Marinelli. *See Cox*, 983 A.2d at 694; *Marinelli v. Beard*, No. 4:CV-07-0173, 2012 WL 5928367, at *72 (M.D. Pa. Nov. 26, 2012). Mr. Cox's death sentence was based in part on an aggravating factor, 42 Pa. C.S. § 9711(d)(7), that the JSGC recommends limiting; Mr. Marinelli's death sentence was based in part on an aggravating factor, § 9711(d)(6), that the JSGC recommends repealing. *See* JSGC Report 102. Both Petitioners suffer from mental illness, but their sentencing juries heard no such evidence. *See Cox*, 983 A.2d at 694-96; *Marinelli*, No. 4:CV-07-0173, 2012 WL 5928367, at *71, *76. In both cases, the county of prosecution brought arbitrary factors into play. Mr. Cox, who is African American, was prosecuted in Philadelphia at a time when his race substantially increased the likelihood of a death sentence and when the District Attorney's Office engaged in racially discriminatory jury selection practices. JSGC Report 65-66. Mr. Marinelli was prosecuted in Northumberland County, which has one of the highest death-sentence-to-life-sentence ratios in the Commonwealth. *See id.* at 261.

C. The Judicial Record of Error in Pennsylvania Capital Cases

As noted, the JSGC reported on the frequency and bases of judicial reversals in Pennsylvania capital cases, but the JSGC data did not encompass all of the 441 death sentences imposed under the 1978 statute. *See, e.g., id.* at 13 (providing resentencing data only for cases since 1995). A complete list of the 264 final judicial

decisions and orders vacating death sentences imposed under the 1978 statute is included in Petitioners' Appendix ("PA") as Exhibit A. PA1-19 (chronological list); PA20-38 (alphabetical list). Exhibit B identifies six additional cases where sentencing relief has been granted but is under appeal by the Commonwealth. PA39. Three prisoners have been executed under the statute, while thirty-seven condemned prisoners have died of natural causes or suicide. *See* JSGC Report 1-2 (two condemned prisoners have died since June 2018, when the JSGC reported thirty-five non-execution deaths). The other 131 death sentences remain in force.[6]

Of the 264 overturned sentences, Pennsylvania courts granted relief in 207 cases; federal courts granted relief in the other fifty-seven cases. *See* Ex. A, PA1-38. Ineffective assistance of counsel was the basis of relief in 127 cases; prosecutorial error was found in thirty-seven cases. *See id.*

After the 264 sentences were overturned, only eleven current death row prisoners were resentenced to death (one of them twice), and four additional

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[6] *See* https://www.cor.pa.gov/About%20Us/Initiatives/Documents/Death%20Penalty/Current%20Execution%20list.pdf. As of February 1, 2019, the DOC identified 142 death row prisoners, but that list includes the six prisoners who have received non-final sentencing relief, *see* Ex. B, PA39; four prisoners who received final sentencing relief but remain on death row while challenges to their capital convictions are litigated, *see* Ex. A, PA20, 24, 29 (Aquil Bond, Dustin Briggs, Robert Fisher, Jerome Marshall); and two prisoners who were granted relief after the list was posted, *see* Ex. A, PA21, 28 (John Brown, Orlando Maisonet). The DOC list omits one condemned prisoner, James Williams, who is currently in federal custody.

prisoners died after being resentenced to death. *See id.* A death sentence might yet be re-imposed in seven of these cases, but the remaining 241 vacated death sentences have been resolved with a non-capital sentence or exoneration.[7] This equates to a 93% non-death resentencing rate, similar to the 97% rate found by the JSGC since 1995.

SUMMARY OF ARGUMENT

In light of its distinct text, unique history, and intended purpose, Article I, Section 13, provides broader protections than the Eighth Amendment in this as-applied challenge to capital punishment in Pennsylvania. Pennsylvania has recognized the potential cruelty of capital punishment since its founding; Section 13 was adopted as part of Pennsylvania's unique history in eradicating capital and other sanguinary punishments; and, at the time of Section 13's adoption, capital punishment was specifically understood to be cruel unless necessary for society's protection. For these reasons, this Court should give independent force to Section 13 in considering the cruelty of capital punishment as administered in Pennsylvania. *See* Part I, *infra*.

Pennsylvania's system of capital punishment is unreliable, and it therefore violates Section 13's Cruel Punishments Clause. In the past four decades, hundreds

[7] This includes twelve cases in which the defendant was resentenced to death and was subsequently granted relief again, before the case was finally resolved with a non-capital disposition.

of death sentences have been declared unconstitutional and six death row prisoners have been exonerated, while only three prisoners have been executed. The astronomical error rate is directly attributable to the Commonwealth's failure to provide adequate resources for indigent capital defense and the recurring problem of prosecutorial error in capital cases. *See* Part II.A, *infra*.

The Commonwealth's death penalty system also violates Section 13 because it imposes death sentences according to arbitrary circumstances. As the JSGC Report found, the sentencing statute's aggravating factors are too numerous and broad, prosecutors and jurors lack sufficient guidance in exercising discretion under the statute, and this Court's review of death sentences has become significantly less strict since 1978. The JSGC thus recognized what is increasingly obvious to all: the 131 persons who remain under sentence of death in Pennsylvania represent, not the worst of the worst, but the product of a broken system where geography, race, mental illness, and poverty best predict who is sentenced to death. *See* Part II.B, *infra*.

Pennsylvania's capital punishment system violates Section 13 for the additional reason that it lacks legitimate penological justification. It does not measurably serve the principles of deterrence or retribution, and death sentences are not imposed pursuant to any public necessity, as Section 13 requires. *See* Part II.C, *infra*.

ARGUMENT

I. SECTION 13'S "CRUEL PUNISHMENTS" CLAUSE IS BROADER THAN THE EIGHTH AMENDMENT'S "CRUEL AND UNUSUAL PUNISHMENT" CLAUSE FOR PURPOSES OF THIS AS-APPLIED CHALLENGE TO CAPITAL PUNISHMENT.

It is bedrock law that Pennsylvania may recognize broader rights under its constitution than are guaranteed by the Federal Constitution. *Commonwealth v. Arter*, 151 A.3d 149, 155-56 (Pa. 2016). The federal charter sets a floor for Pennsylvanians' rights, but the Pennsylvania Constitution provides the ceiling. *See Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983). In our federal system, "the states are not only free to, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions." *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991).

Section 13's blanket prohibition on cruel punishments—which was adopted in 1790 and has never been amended or limited—merits independent force here. The provision's language is broader than the Eighth Amendment's, and the provision derived from Pennsylvania's unique history of eradicating sanguinary punishments. State constitutions with linguistic distinctions similar to Pennsylvania's are interpreted more broadly than the Eighth Amendment, and a growing number of state supreme courts have struck down their own capital punishment systems as cruel under state law. The language, history, and purpose of Section 13's Cruel Punishments Clause demonstrate that the administration of Pennsylvania's system

of capital punishment merits stricter scrutiny under Section 13 than provided for under the Eighth Amendment.

A. This Court Has Not Previously Analyzed Pennsylvania's Capital Punishment System, as Administered, under Section 13.

In *Edmunds*, this Court "set forth a methodology to be followed in analyzing future state constitutional issues which arise under our own Constitution." 586 A.2d at 894. Although "it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution," *id.* at 895, this Court has not previously utilized *Edmunds* to analyze an as-applied challenge to the Commonwealth's capital punishment system under Section 13.

This Court has considered two distinct challenges to capital punishment under Section 13. In *Commonwealth v. Zettlemoyer*, the Court considered whether "the death penalty is inevitably 'cruel punishment' under Article I, § 13." 454 A.2d 937, 967 (Pa. 1982), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385, 400-02 (Pa. 2003). The Court reviewed historical evidence that both the framers of the United States Constitution and the framers of the Pennsylvania Constitution had not understood the death penalty to be cruel "*per se*," and the Court deemed Section 13 and the Eighth Amendment to be "co-extensive" on this question. *Id.* The Court concluded, consistent with the United States Supreme Court's view, that because capital punishment had been authorized in Pennsylvania "since its

inception," the death penalty could not be defined as "*per se* cruel." *Id.* at 968-69 (internal quotation mark omitted).

In *Commonwealth v. Means*, the Court considered whether Section 13 was violated by amendments to 42 Pa. C.S. § 9711 that permitted the jury to consider victim impact evidence at the selection stage of a capital sentencing proceeding. 773 A.2d 143, 152 (Pa. 2001) (plurality). Finding that the Court's historical analysis of the "per se" cruelty claim in *Zettlemoyer* was "distinguishable," the plurality conducted an *Edmunds* analysis specific to Means' claim. *Id.* at 151. After reviewing an extensive tradition of admitting victim impact evidence in Pennsylvania and other states, the plurality concluded:

> Pursuant to our *Edmunds* mandate, we have considered the text of the constitutional provisions at issue, the historical perspective regarding victim impact testimony in capital cases, the decisions of our sister states and the pertinent policy concerns relevant to our Commonwealth. In sum, we find no support for the trial court's conclusion that the legislation at issue violates Article 1, Section 13 of the Pennsylvania Constitution . . . .

Id. at 157. Justice Saylor concurred in the judgment but parted with the plurality on the question of whether victim impact evidence was permitted under the pre-amendment version of section 9711. *Id.* at 159-60 (Saylor, J., concurring).

Taken together, *Zettlemoyer* and *Means* confirm that this Court should conduct an *Edmunds* analysis specific to Petitioners' present claim that capital punishment, as applied in Pennsylvania, is unconstitutionally cruel. This challenge

is based on extensive evidence, arising since *Zettlemoyer* and *Means*, showing that the death penalty is administered unreliably and arbitrarily. It is also based on a post-*Edmunds* understanding of how and when provisions of the Pennsylvania Constitution should be interpreted independently from the United States Constitution. Indeed, as discussed below, Pennsylvania has recognized capital punishment as uniquely susceptible to government cruelty since its inception, and Section 13 is integral to Pennsylvania's tradition of policing and eradicating such cruelty. Petitioners' distinct claim warrants a distinct analysis of Section 13's history and meaning.

B. The *Edmunds* Factors Support Heightened Protections Here.

In determining whether a state constitutional right provides greater protection than its federal counterpart, this Court considers (1) the constitutional text, (2) the history of the provision, including case law, (3) case law from other states, and (4) policy considerations unique to Pennsylvania. *Edmunds*, 586 A.2d at 895. These factors weigh heavily in favor of finding that Section 13 provides heightened protections against the arbitrary and unreliable imposition of capital punishment.

1. Section 13's language is broader than the Eighth Amendment's.

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). The language of Section 13 bars the

Commonwealth from inflicting "cruel punishments," without qualification. Pa. Const. art. I, § 13.

By contrast, the Eighth Amendment bars only punishments that are both "cruel and unusual." U.S. Const. amend. VIII; *see Commonwealth v. Baker*, 78 A.3d 1044, 1052 (Pa. 2013) (Castille, C.J., concurring) ("Notably, the wording of Article I, Section 13, prohibiting 'cruel punishments,' is not identical to that of the Eighth Amendment which prohibits 'cruel and unusual punishments.'"). In the late eighteenth century, unusual meant "not regularly or customarily employed" or "'such as does not occur in ordinary practice.'" *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Scalia, J.) (quoting Noah Webster, *An American Dictionary of the English Language* (1828)). In omitting this term from Section 13, Pennsylvania's framers prohibited all cruel punishments, even those that were customary.

The scope of Section 13's prohibition thus depends solely on the definition of "cruel," which was (and remains) a general and qualitative judgment. *See* Webster, *An American Dictionary*, *supra* (defining "cruel" as "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness"), http://webstersdictionary1828.com /Dictionary/cruel; *see also Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (a determination of cruelty "necessarily embodies a moral judgment") (internal quotation marks omitted).

In 1790s Pennsylvania, the cruelty of capital punishment depended on its perceived necessity. In 1792, for example, Governor Thomas Mifflin asked Justice William Bradford of this Court for his views on the necessity of capital punishment in Pennsylvania. William Bradford, *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), *published in* 12 Am. J. Legal Hist. 122, 125 (1968), PA41, 44. Justice Bradford, who had previously served as Pennsylvania's Attorney General from 1780 to 1791, during which he attended Pennsylvania's constitutional convention,[8] published an extensive analysis of the question. *Id.* In discussing state constitutional provisions "[t]hat cruel punishments ought not to be inflicted," Bradford reasoned: "does not this involve the same principle [of necessity], and implicitly prohibit every punishment which is not evidently necessary?" *Id.* at PA46. Bradford proceeded to recommend abolition of capital punishment for all crimes except first degree murder. *See id.* at PA66-67. And he anticipated that even capital punishment for first degree murder would ultimately prove unnecessary as society progressed: "It is possible that the further diffusion of knowledge and melioration of manners, may render capital punishments unnecessary in all cases; but, until we have had more experience, it is safest to tread

[8] *See* Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90*, 59 Pa. Hist. 122, 129-31 (1992), https://journals.psu.edu/phj/article/view/24953/24722.

with caution on such delicate ground, and to proceed step by step in so great a work." *Id.* at PA67.

Bradford's understanding of the relationship between necessity and capital punishment was widely shared in Pennsylvania at the time. In adopting the very reforms that Bradford recommended, the Legislature explained:

> It is the duty of every government to endeavor to reform, rather than to exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety.

15 *Statutes at Large of Pennsylvania* 174 (1794), PA95. In his lecture on "[T]he Necessity and Proportion of Punishments," founding father James Wilson[9] similarly endorsed the view that a punishment must be "render[ed] necessary" by the crime. 2 James Wilson, *Lectures on Law*, *in Collected Works of James Wilson* 1087-88 (Kermit L. Hall & Mark David Hall, eds., 2007), PA120-21; *see also id.*, Vol. 1 at 628, PA111 ("To punish, and, by punishing, to prevent [crimes], is or ought to be the great end of [criminal] law.").

Cruelty under Section 13 should encompass the understanding of Pennsylvania's legislators, jurists, and leading thinkers at the time of its adoption, in which concerns for social necessity were paramount.

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[9] Wilson was a leading framer of the Pennsylvania Constitution and one of the original justices on the United States Supreme Court. *See* Foster, *supra*, at 129-31.

2. Section 13 was integral to Pennsylvania's historic leadership in penal reform.

This Court accords "special meaning" to a state right where it is intertwined with "the unique history of this Commonwealth." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 604 (Pa. 2002). At least three unique aspects of Pennsylvania's history inform the scope and meaning of Section 13 here: Pennsylvania's novel limits on capital and other sanguinary punishments dating to its colonial founding; Section 13's predecessor provisions in the Constitution of 1776; and the Commonwealth's embrace of nonviolent penal reform as a core purpose of republican government, especially in the decade surrounding Section 13's adoption.

a. Pennsylvania at its founding: "the mildest criminal code"

From its inception, Pennsylvania was a forerunner in eradicating capital and other sanguinary punishments. Pennsylvania's first criminal code, enacted in 1682 and based on Quaker ideals, was "the mildest criminal code of any continental English colony, and one much milder than England's." Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* 12 (2006), PA128. Unlike other jurisdictions, Pennsylvania treated only premeditated murder and treason as capital offenses. Negley K. Teeters, *The Cradle of the Penitentiary; the Walnut Street Jail at Philadelphia* 3 (1955) ("Teeters, *Cradle*"), PA133. "This was a radical departure from current practice throughout the world as death was the punishment for a wide variety of offenses everywhere." *Id.* Early

Pennsylvanians "abhorred the taking of human life," and resisted British law as persecutory and harsh.[10] *Id.* at 2-3, PA132-33.

In 1718, British authorities compelled Pennsylvania to redefine lesser offenses, including burglary and witchcraft, as capital crimes and continued to add harsh punishments until the Revolution. Negley K. Teeters, *Public Executions in Pennsylvania, 1682-1834*, 64(2) J. Lanc. Cty. Hist. Soc. 89 & n.13 (1960) ("Teeters, *Public Executions*"), PA139-40. However, "[l]ike most laws not in concert with the sentiments of the people whose actions they are intended to regulate, the sanguinary provisions of . . . 1718 were irregularly enforced and frequently mitigated by other means." Nat'l Council Crime & Delinq., *Clemency in Pennsylvania*, I.26-I.27 (1973), PA143-44. Thus, "[p]rovincial Pennsylvania, to enhance further its reputation for 'mildness,' made provisions for softening the draconian sentences of the courts." Teeters, *Public Executions*, *supra*, at 89, PA139. Colonial Pennsylvanians believed that British penal law contained a "shocking catalogue of unjust and cruel penalties." Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at Philadelphia and to Reform the*

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[10] Petitioners refer herein to the mild penal code governing white Pennsylvanians, particularly white males, with whom the creation and evolution of early Pennsylvania law was primarily concerned. African Americans, by contrast, were targeted and governed by a broad set of capital crimes beginning in 1700. *See* 2 *Statutes at Large of Pennsylvania* 77-79 (1700), PA238-40. White women were also sometimes subject to unique, and uniquely harsh, punishments. *See James v. Commonwealth*, 12 Serg. & Rawle 220, 225 (Pa. 1825) (discussed *infra*).

Criminal Code of Pennsylvania 8 (Phila. 1826), PA153; *see generally* Rebecca M. McLennan, *The Crisis of Imprisonment* 19 (2008), PA174.

b. The 1776 Constitution: "to make sanguinary punishments less necessary"

At the birth of independence, Pennsylvania adopted a constitution requiring less harsh punishments and creation of a prison system "to make sanguinary punishments less necessary":

> SECT. 38. The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.
>
> SECT. 39. To deter more effectually from the commission of crimes by continued visible punishments of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital . . . .

Pa. Const. of 1776.

Although the Revolutionary War delayed reform for a decade, Pennsylvania amended its penal laws pursuant to sections 38 and 39 in September 1786.[11] The Legislature began by explaining the principles underlying criminal punishment in the new republic:

> [I]t is the wish of every good government to reclaim rather than to destroy, and it being apprehended that the cause of human corruptions

[11] In 1780, Pennsylvania passed an Act for the Gradual Abolition of Slavery, which abolished the harsh penal laws targeting African Americans that Pennsylvania had adopted beginning in 1700. 10 *Statutes at Large of Pennsylvania* 70 (1780), PA175.

> proceed more from the impunity of crimes than from the moderation of punishments, and it having been found by experience that the punishments directed by the laws now in force as well for capital as other inferior offences do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences . . . .

12 *Statutes at Large of Pennsylvania* 280 (1786), PA182. In light of these principles, the Act abolished capital punishment for every crime except murder and treason, abolished other sanguinary punishments, and adopted a penal system based on incarceration and public hard labor. *Id.* at 280-90, PA182-92; *see also* Job R. Tyson, *Essay on the Penal Law of Pennsylvania* 15-16 (1827) (discussing the Act), https://archive.org/details/essayonpenallaw00philgoog/page/n1.

The new system of public labor quickly proved disastrous. Citizens harassed and heckled prisoners for sport; prisoners behaved vulgarly and violently in return; and deadly riots and escapes became commonplace. Negley K. Teeters, *They Were in Prison* 22-24 (1937), PA200-02. The system was widely condemned for being "executed with so much cruelty." Vaux, *supra*, at 22, PA167; *accord* Negley K. Teeters, *Citizen Concern and Action Over 175 Years*, 42(1) Prison J. 7 (Apr. 1962) ("Teeters, *Citizen Concern*"), PA205 ("[Benjamin Rush], with others, was shocked at the evils of a law which had been passed as a reform measure by the legislature the previous year . . . ."). The condemnation of the new system reflects that, while Pennsylvania's founders recognized the need for penal reform, they also recognized

that their well-intentioned efforts could engender new and unexpected forms of cruelty. Yet, in a sign of the times, the system's abject failure did not discourage, but in fact redoubled, the Commonwealth's commitment to reform.

c. The apex of penal reform: Pennsylvania from 1787 to 1794

In 1787, as Philadelphia prepared to host the federal constitutional convention, Pennsylvanians were exploring new ways to punish criminals through incapacitation and reform rather than corporeal violence, and to thereby differentiate themselves from the inhumane British system they had just overthrown. "The Society for Political Inquiries"—a bipartisan group of founders seeking to design effective republican governance—began meeting at Benjamin Franklin's house in March 1787, and their first "inquiry" was into penal reform. *See* Michael Vinson, *The Society for Political Inquiries: The Limits of Republican Discourse in Philadelphia on the Eve of the Constitutional Convention*, 113 Pa. Mag. Hist. & Biography 185, 187-89 & n.8, 193-94 (1989), PA219-21, 225-26.[12] In a paper that soon became famous, Benjamin Rush identified rehabilitation, deterrence, and incapacitation as the three purposes of punishment. Benjamin Rush, *An Enquiry into the Effects of Public Punishment upon Criminals and upon Society* 3 (1787), https://collections.nlm.nih.gov/ext/dw/2569014R/PDF/2569014R.pdf. He urged

[12] Numerous Pennsylvania founders were part of the society. *See id.* at 188 & n.8, PA220-21.

repeal of the new public labor provisions, advocated for incarceration as the most severe punishment for most crimes, and proposed prison reforms. *Id.* at 9, 15-18.

Rush's ideas led to the founding of a new society, the Pennsylvania Prison Society,[13] which formed so that "such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness." Teeters, *They Were in Prison*, *supra*, at 3, PA197 (quoting the Constitution of the Pennsylvania Prison Society). The society immediately began lobbying the Supreme Executive Council and the Legislature for penal reform.

Meanwhile, when Pennsylvania voted to ratify the Federal Constitution in December 1787, a substantial antifederalist minority dissented, primarily due to the federal charter's "omission of a Bill of Rights," including a guarantee that neither "cruel nor unusual punishments [be] inflicted." *The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents* 1-2 (Dec. 12, 1787), https://www.loc.gov/item/90898134/. Pennsylvania's federalists, or republicans, on the other hand, believed that these rights could be amply guaranteed by the Commonwealth. The antifederalist protest laid the groundwork for the federal prohibition of cruel and unusual punishments, which

[13] The society was originally named the Philadelphia Society for Alleviating the Miseries of Public Prisons. Vinson, *supra*, at 196. Petitioners refer to the society by its current name—the Pennsylvania Prison Society.

"was eventually enshrined in the Eighth Amendment of the U.S. Constitution and adopted along with the other federal Bill of Rights on December 15, 1791." *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1280 (Pa. 2014).

In 1789 and 1790, the Pennsylvania Legislature revised the penal laws and "enacted all of the chief recommendations" of the Pennsylvania Prison Society. Teeters, *Citizen Concern*, *supra*, at 14, PA212. The new laws further limited capital and other sanguinary punishments, abolished the public labor system, and created a centralized state penitentiary—the world's first—at the Walnut Street Jail, which sought to reform offenders through labor and solitary confinement. *See* 13 *Statutes at Large of Pennsylvania* 243, 245-46 (1789), PA241, 243-44; 13 *Statutes at Large of Pennsylvania* 511 (1790), PA250. Further reforms continued into the 1790s and resulted, inter alia, in a then-novel redefinition of murder to include varying degrees of culpability, and a restriction permitting capital punishment only for first degree murder. *See* 15 *Statutes at Large of Pennsylvania* 174-75 (1794), PA95-96; *see generally* Teeters, *Cradle*, *supra*, at 61, PA135.

These reforms reflect that, in 1790 Pennsylvania, eradicating cruel punishments, especially including unnecessary capital punishments, was understood as a core purpose of republican government. In the midst of this historic era, Pennsylvania adopted Section 13 during the constitutional convention held from November 1789 to September 1790. "The design of the Convention . . . was to

exclude arbitrary power from every branch of the government." *Craig & Blanchard v. Kline*, 65 Pa. 399, 413 (1870). Section 13's prohibition on cruel punishments was included in the original draft of Article IX's Declaration of Rights as proposed on December 23, 1789. *Minutes of the Convention that Formed the Present Constitution of Pennsylvania* 161-62 (1825) ("*Minutes*"), https://www.paconstitution.org/wp-content/uploads/2017/11/proceedings1776-1790.pdf. No objections were raised to it; only one minor stylistic revision was made;[14] and together with the rest of the constitution, it was ratified by a sixty-one-to-one vote on September 2, 1790. *Id.* at 294-96, 304.

Pennsylvania's penal reform in the decade following the Revolutionary War has been widely recognized as historic and transformative. *See, e.g.*, Teeters, *Citizen Concern*, *supra*, at 16, PA214. Pennsylvania's innovations—reducing sanguinary punishments, creating a penitentiary system, and defining murder according to degrees of culpability (and thereby further restricting capital punishment)—soon spread across the country and around the world. Teeters, *Cradle*, *supra*, at 1, PA131; Vaux, *supra*, at 23-24, PA168-69.

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[14] As initially proposed, Section 13 read: "That excessive bail shall not be required, nor excessive fines imposed, or cruel punishments inflicted." *Id.* at 174. On February, 23, 1790, the "or" was replaced with "nor," and the revised provision was subsequently adopted. *Id.* at 222-23, 243. A proposed substantive addition—"And in all criminal prosecutions no person, if acquitted, shall pay costs"—was rejected on August 27, 1790. *Id.* at 283.

d. This Court's case law confirms that Section 13 has "special meaning" in the context of capital punishment.

Edmunds requires a survey of this Court's relevant case law as part of the historical analysis of a state constitutional provision. *Edmunds*, 556 A.2d at 895. As discussed above, this Court previously analyzed distinct Section 13 challenges to capital punishment in *Zettlemoyer*, 454 A.2d at 967-69, and *Means*, 773 A.2d at 151-57. *See* Part I.A, *supra*. Several additional decisions shed light on the principles at issue here.

In one other case, the Court considered a sanguinary punishment under Section 13. *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825). In *James*, the appellant was convicted of being a "common scold" and sentenced to be thrice dunked in water while confined on a "ducking stool." *Id.* at 220-21. She challenged her sentence as a cruel punishment and as unauthorized by statute or common law. *Id.* Although this Court granted relief primarily on the latter ground, the opinion illuminates an early understanding of cruelty.

First, the Court condemned the punishment as disparately affecting women, and found that, were it inflicted, "the iniquity and injustice will be very striking." *Id.* at 226. The Court likewise condemned the punishment as inconsistent with republican ideals because "it is only the poor who were to be" subjected to it. *Id.* at 236. Second, the Court examined the punishment's history and found that it had "sunk in oblivion, in the general improvement of society, and the reformation of

criminal punishment, and been dried up by time, that great innovator." *Id.* at 225-26. The Court opined that such "long disuetude of any law amounts to its repeal." *Id.* at 228-29. Finally, the Court recognized that:

> [T]he constitutions of the United States and of this state, as to cruel and unusual punishments, . . . show the sense of the whole community. *If the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments*, nothing could be further removed from these salutary ends, than the infliction in question[, . . . which is] so barbarous an institution.

Id. at 235-36 (emphasis added). Decided just thirty-five years after Section 13 was adopted, *James* thus recognized that Section 13 is offended by the arbitrary infliction of sanguinary punishments and by punishments that do not advance the principles of rehabilitation or deterrence.

In modern times, this Court ruled in *Commonwealth v. Baker* that the prosecutor violated Section 13 in obtaining a death sentence through improper argument, but the Court did not analyze Section 13 independently of the Eighth Amendment. 511 A.2d 777, 790 (Pa. 1986).

In *Commonwealth v. Batts*, this Court declined to find that "the Pennsylvania Constitution requires a broader approach to proportionality vis-á-vis juveniles," where appellant advanced neither "theoretical distinctions based on differences between the conceptions of 'cruel' and 'unusual,'" nor acknowledged the Legislature's active role in honoring Pennsylvania's historical concern with the treatment of juvenile offenders. 66 A.3d 286, 298-99 (Pa. 2013). By contrast,

Petitioners' claim here finds textual support in the founders' omission of "unusual" from Section 13, *see* Part I.B.1, *supra*, and the Legislature has in recent decades failed to honor Pennsylvania's historical concern with eradicating unreliable, arbitrary, and unnecessary capital punishments, *see* Part II, *infra*.

Most recently, the Court has recognized the importance of giving independent effect to Section 13 where a defendant challenges the comparative or proportional intrastate use of a punishment. In *Commonwealth v. Eisenberg*, the Court employed an "intra-Pennsylvania approach" to Section 13's Excessive Fines Clause. 98 A.3d 1268, 1283 (Pa. 2014). The Court explained that the Eighth Amendment is subject to "a federalism-based constraint," whereas a petitioner raising a Section 13 claim "may allege that comparative and proportional justice is an imperative within Pennsylvania's own borders." *Id.* (quoting *Baker*, 78 A.3d at 1055 (Castille, C.J., joined by Saylor & Todd, JJ., concurring)). The Court's "intra-Pennsylvania" analysis led it to strike down the fine as prohibited under Section 13. *Id.* at 1287. As discussed in Part II, *infra*, ensuring "comparative and proportional justice . . . within Pennsylvania's own borders" is nowhere more imperative than in the context of capital punishment.

Although this Court's case law has not addressed the historical evidence discussed above, giving effect to Section 13's unique history would accord with the Court's analysis of analogous state constitutional provisions. For example, where

Pennsylvania has a "great heritage" underlying a constitutional protection, the right is properly given a broader scope consonant with that heritage. *See Commonwealth v. Tate*, 432 A.2d 1382, 1390 (Pa. 1981) (addressing freedom of speech under Article I, Section 1). Similarly, stronger state constitutional protections apply where the state right was recognized before the adoption of the federal Bill of Rights. *Blum by Blum v. Merrell Dow Pharms., Inc.*, 626 A.2d 537, 547 (Pa. 1993) (addressing right to jury trial under Article I, Section 6); *Sell*, 470 A.2d at 466 (addressing unreasonable searches and seizures under Article I, Section 8). Pennsylvania's mild penal laws at its founding, its penal reform provisions in the Constitution of 1776, and its status as the global leader of penal reform in 1790 make plain that Section 13 "is an ancestor, not a stepchild, of the [Eighth] Amendment." *Pap's A.M.*, 812 A.2d at 605. The Eighth Amendment in fact owes its existence in no small part to the advocacy of Pennsylvania's founders. *See Eisenberg*, 98 A.3d at 1280.

3. Persuasive authority

Other states addressing their anticruelty clauses have concluded that their constitutions offer broader protections than the Eighth Amendment, and several have applied those protections to strike down their systems of capital punishment.

In interpreting its anticruelty clause, which, like Pennsylvania's, bans any "cruel punishment," the Washington Supreme Court recently explained:

> Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers

> intended an identical interpretation. The historical evidence reveals that the framers . . . were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual."

State v. Gregory, 427 P.3d 621, 631 (Wash. 2018). The court thus recognized that, at least in certain circumstances, its clause provides more robust protection than the Eighth Amendment. *Id.* at 14-16 & n.6. Based on this broader right, the court struck down the state's death penalty laws, not because the death penalty is "per se unconstitutional," but in light of "the arbitrary manner in which the death penalty is generally administered." *Id.* at 5.

In *District Attorney for the Suffolk District v. Watson*, the Massachusetts Supreme Judicial Court similarly found that the state's capital punishment system ran afoul of the state "constitutional prohibition of 'cruel' punishments" because it was "inevitable that the death penalty will be applied arbitrarily." 411 N.E.2d 1274, 1281, 1283 (Mass. 1980). In *State v. Santiago*, the Connecticut Supreme Court held that its state prohibition independently required that the state's existing death sentences be vacated. 122 A.3d 1, 10 (Conn. 2015). Although Connecticut incorporates an "unusual" prong in its prohibition and relies on federal standards, the court nonetheless reviewed extensive historical evidence of capital punishment in the state, *see id.* at 20-27, 35-39, 79-81, and concluded: "That our history reveals a particular sensitivity to such concerns [regarding capital punishment] warrants our

scrupulous and independent review of allegedly cruel and unusual practices and punishments, and informs our analysis thereof." *Id.* at 27.

In different contexts, at least four states with constitutional provisions banning "cruel *or* unusual punishments"—as opposed to "cruel *and* unusual punishments" under the Eighth Amendment—have recognized the significance of the linguistic distinction. *See People v. Carmony*, 26 Cal. Rptr. 3d 365, 378 (Cal. Ct. App. 2005); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000); *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992); *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998). This precedent supports the conclusion that Section 13's omission of an "unusual" prong reflects that cruel punishments in Pennsylvania can include those that were "usual" or customary in 1790.

4. Policy reasons support Section 13's independent application.

In creating an independent republic in 1776, Pennsylvanians seized the broad power to police and punish, and we have never ceded that power. *See* Pa. Const. of 1776, Decl. of Rights, art. III ("[T]he people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."). It remains true today that, "[i]n our federal system, States possess primary authority for defining and enforcing criminal laws, including those prohibiting the gravest crimes." *Torres v. Lynch*, 136 S. Ct. 1619, 1629 n.9 (2016) (internal quotation marks omitted). "Our federal system recognizes the independent power of a State to

articulate societal norms through criminal law." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

Because states have primary responsibility for imposing criminal punishments, this Court rightly exercises ultimate authority over the cruelty of punishments administered in, and by, the Commonwealth. *See Gregory*, 427 P.3d at 631 (recognizing "a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law" (internal quotation marks omitted)); *see generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press 2018) (urging state supreme courts to assert independence in interpreting state constitutional provisions); *Elliott v. State*, No. S18A1204, 2019 WL 654178, at *6 (Ga. Feb. 18, 2019) (recognizing the widespread view that state constitutional review was designed to independently protect individual rights, citing Sutton, *supra*). In contrast, the Eighth Amendment incorporates deference to a state's prerogative because "[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1993) (Kennedy, J., concurring).

Finally, Section 13 is part of Pennsylvania's Declaration of Rights, which "lends considerable force to the argument it provides even more protection than its

federal counterpart." *Commonwealth v. Muniz*, 164 A.3d 1189, 1220 (Pa. 2017). These rights are "inviolable" and belong to the citizens themselves. *Pap's A.M.*, 812 A.2d at 604. Both the structure of our federal system and the dictates of our state constitution thus compel a policy whereby this Court exercises primary oversight of the cruelty of the Commonwealth's capital punishment system.

II. CAPITAL PUNISHMENT AS ADMINISTERED IN PENNSYLVANIA IS A CRUEL PUNISHMENT UNDER ARTICLE I, SECTION 13.

Death sentences constitute cruel punishment where they violate any of three principles. First, they must have heightened reliability consonant with the severity of the punishment. Second, they must be imposed only against the most culpable offenders, not according to arbitrary factors. Third, the Commonwealth must establish legitimate penological reasons to resort to the death penalty.

As administered, Pennsylvania's system of capital punishment violates all three principles. Rather than having heightened reliability, most Pennsylvania death sentences issued since 1978 have been ruled unlawful. And even where death sentences have not been found to contain constitutional flaws sufficient to prompt reversal, every death sentence in Pennsylvania is a product of the same broken system in which unreliable procedures have remained unaddressed for decades.

Nor are death sentences imposed only against the most culpable defendants. Instead, arbitrary factors such as geography, race, mental illness, and indigence best predict the offenders who end up on death row. Longstanding systemic deficiencies

also explain the arbitrariness with which Pennsylvania's death sentences are imposed.

Finally, because its capital punishment system is characterized by error, arbitrariness, and delay, and because the punishment of life imprisonment amply serves the purposes of retribution, deterrence, and incapacitation, the Commonwealth lacks sufficient penological interests to justify capital punishment.

In his four-justice concurrence explaining the Washington Supreme Court's decision to strike down the state's death penalty system, Justice Johnson concluded:

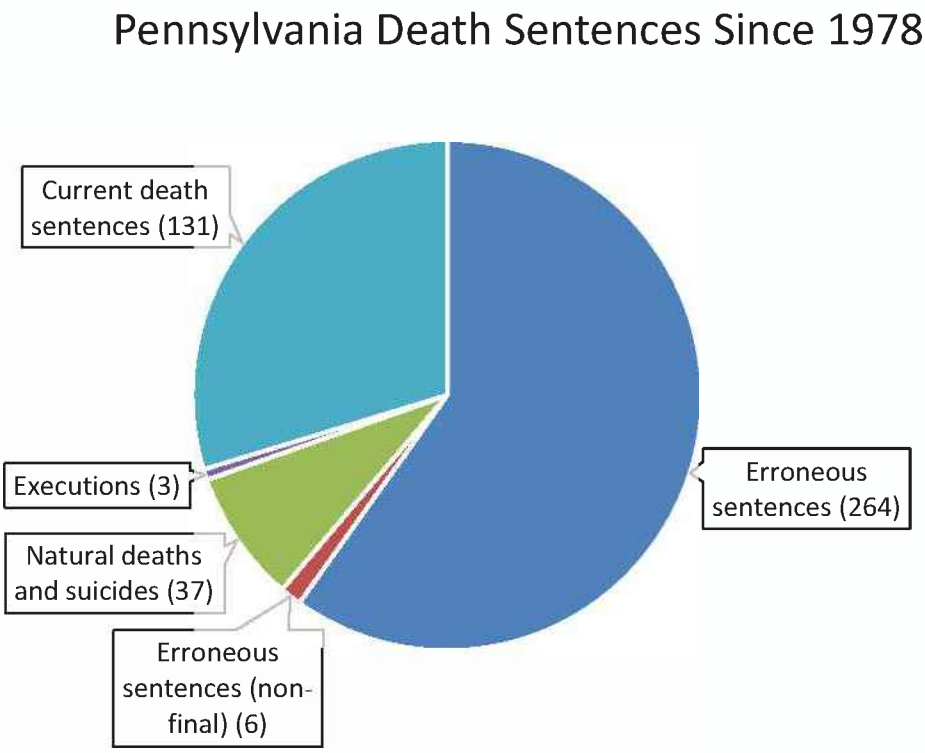
> Under article I, section 14 of our state constitution, where a system exists permeated with arbitrary decision-making, random imposition of the death penalty, unreliability, geographic rarity, and excessive delays, such a system cannot constitutionally stand. The combination of these flaws in the system support our conclusion that the death penalty is unconstitutional.

Gregory, 472 P.3d at 647. The same combination of flaws permeates Pennsylvania's death penalty system, and they lead to the inexorable conclusion that our system too is cruel.

A. The Pervasive Unreliability of Capital Punishment Violates Section 13.

Since 1978, Pennsylvania courts have issued 441 death sentences. State and federal courts later held 270 (61%) of these sentences to be unconstitutional or otherwise unlawfully imposed. *See* Ex. A, PA1-38. Only three prisoners have been executed, while six prisoners have been exonerated, and thirty-seven prisoners have

died of suicide or natural causes on death row. *See* JSGC Report 1-2, 171. The remaining 131 death sentences are at issue in this case.



The vast majority of defendants whose death sentences were overturned were not resentenced to death. *See* JSGC Report 13 (after their death sentences were vacated in post-conviction proceedings since 1995, "less than 3%" of prisoners were resentenced to death); *see also* Statement of the Case, *supra* at 14-15 (non-capital resolutions followed 93% of vacated death sentences under the 1978 statute). In other words, with constitutional error removed from their cases, previously condemned individuals have overwhelmingly been deemed worthy of life, including

at least fifteen people who were convicted of lesser charges or exonerated altogether. *See* JSGC Report 153; *see also* Ex. A, PA1-38.

These facts shock equally the conscience and the belief in effective governance. The judicial record confirms that most death sentences issued in Pennsylvania since 1978 have been fundamentally unreliable.

1. Section 13 prohibits an unreliable system of capital punishment.

In administering capital punishment so unreliably, Pennsylvania violates Section 13's cruelty prohibition. Even under the Eighth Amendment's federal minimum, "[e]volving 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," *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988), and likewise require "increased reliability of the process by which capital punishment may be imposed," *Herrera v. Collins*, 506 U.S. 390, 405 (1993) (citing cases). The Supreme Court has explained that "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (citing cases); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Supreme Court has not specified how

"high" the reliability requirement is, but it cannot possibly be met where *most* death sentences are imposed in error, as in Pennsylvania.

Section 13 requires even greater reliability in capital punishment because the "evolving" nature of the Eighth Amendment does not fully capture the Pennsylvania founders' understanding of cruelty. Under Section 13, there is an affirmative duty to eradicate unnecessary sanguinary punishments. *See* Bradford, *supra*, at 127, 147-48, PA46, 66-67; Part I.B, *supra*. That duty is squarely implicated here because Pennsylvania's modern system regularly produces unreliable death sentences while conducting executions with extreme rarity; because exonerations occur at double the rate of executions; and because the sentence of life imprisonment amply protects society from the most culpable offenders. The Commonwealth's error-prone capital punishment system is manifestly unnecessary.

2. Evolving standards of decency are undermined by the known unreliability in capital sentencing.

Evolving standards of decency in Pennsylvania and around the nation further demonstrate the need for systemic reliability under Section 13. Neither Pennsylvania nor any other northeastern state has conducted a non-consensual execution in the past half century.[15] Because of reliability concerns, Governor Tom

[15] Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&region%5B%5D=N&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All (last visited Feb. 19, 2019).

Wolf has maintained a moratorium on executions for four years. *See Commonwealth v. Williams*, 129 A.3d 1199, 1202 (Pa. 2015). He has explained that "Pennsylvania's [capital sentencing] system is riddled with flaws, making it error prone, expensive, and anything but infallible." Gov. Wolf, Death Penalty Moratorium Declaration, at 2 (Feb. 13, 2015), https://www.governor.pa.gov/moratorium-on-the-death-penalty-in-pennsylvania ("Wolf Declaration").

Reliability concerns also underlie other states' decisions to abandon the death penalty in recent years. As Washington's Justice Johnson explained in his four-justice concurrence in *Gregory*: "Where the vast majority of death sentences are reversed on appeal and ultimately result in life without parole, reliability and confidence in the process evaporates." 427 P.3d at 646. The same conclusion applies with equal force in Pennsylvania. *See also State v. Santiago*, 122 A.3d 1, 29 (Conn. 2015) (striking down capital punishment because "there is an overarching concern for consistency and reliability in the imposition of the death penalty under our state constitution") (internal quotation marks omitted); *People v. LaValle*, 817 N.E.2d 341, 365 (N.Y. 2004) (relying on "the heightened standard of reliability required by our State Constitution" to strike down capital sentencing statute).

3. Systemic defects undermine the reliability of death sentences.

Just as this Court has previously struck down individual death sentences under the principle of heightened reliability, *see, e.g.*, *Commonwealth v. Baker*, 511 A.2d

777, 790 (Pa. 1986), the accumulated evidence of dysfunction now warrants condemnation of the Commonwealth's capital sentencing process as a whole under the Eighth Amendment and Section 13. This is especially true because Pennsylvania's high error rate is directly attributable to state governmental failures.

As the JSGC Report recognized, Pennsylvania's error rate in capital cases derives from systemic deficiencies that require significant reforms. Approximately half of these death sentences—127 of them—were overturned because counsel for a capital defendant failed to provide constitutionally adequate professional assistance, most typically by failing to investigate the client's mental health and personal history. *See* Ex. A, PA1-38; *see also* JSGC Report 183-84. Another thirty-seven sentences were overturned as a result of prosecutorial error that included suppressing evidence, employing racial discrimination in jury selection, and improper argument. *See* Ex. A, PA1-38. The remaining errors included various types of court error and jury misconduct. *See id.*

Each branch of the Commonwealth government has been aware of these problems for years, but has failed to heed clarion calls for reform. To construct a reliable capital punishment system, Pennsylvania should, at minimum, adopt the recommendations set forth in the JSGC Report—including statewide programs to ensure adequate indigent capital defense, statewide oversight of prosecutorial discretion, and a statutory mitigator (or absolute bar to the death penalty) where the

jury has residual doubt as to its guilt verdict. *See* JSGC Report 73-74, 106, 186. The death sentences levied under Pennsylvania's existing system, however, are tainted by unreliability and would not be rendered reliable by such prospective reforms.

a. Inadequate counsel

In the forty years since the death penalty was reintroduced in Pennsylvania, the Commonwealth has failed to fund or otherwise provide for the adequate defense of indigent capital defendants. JSGC Report 183-86. During that time, there have been numerous reports that Pennsylvania was failing to provide adequate legal representation in capital cases. Despite those warnings, only minor changes have been made, and the Commonwealth's continuing lack of support for defense services "undermines the effectiveness of indigent defense." *Id.* at 28.

Pennsylvania's system for capital defense is balkanized and under-funded. Each county provides for indigent capital defense services without state support. *Id.* at 185. There are no statewide standards for court funding, nor is there any coordination of defense services. *See id.* at 28. This total absence of state support makes Pennsylvania an outlier among jurisdictions with capital punishment:

> Pennsylvania is unique among the states in that the individual counties are solely responsible for the costs of indigent defense. In every other state, the state itself either funds a statewide public defender program or contributes to the costs of county public defender programs.

James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154, 160

(2012) (footnote omitted); *see also Commonwealth v. McGarrell*, 87 A.3d 809, 811 n.3 (Pa. 2014) (Saylor, J., dissenting) ("State-level funding for indigent defense services—presently lacking in Pennsylvania and only one other state in the nation—is at the core of nearly every reform recommendation.").

Ineffective legal assistance is the primary cause of overturned death sentences and capital convictions in Pennsylvania, despite the fact that such claims are difficult to prove: the condemned prisoner must show both that counsel's performance fell below the standard of care of a professionally reasonable attorney, and that there is a reasonable likelihood of a different outcome but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 684, 691 (1984); *Commonwealth v. Pierce*, 527 A.2d 973, 974-76 (Pa. 1987). Since 1996, in order to obtain federal habeas relief, a petitioner must also show that a state court denial of such a claim was objectively unreasonable. 28 U.S.C. § 2254(d).

Nevertheless, 127 death sentences have been overturned on the basis of ineffective assistance of counsel, with the greatest number (ninety-three) overturned due to counsel's failure to investigate and present mitigating evidence in the penalty phase. *See* Ex. A, PA1-38; JSGC Report 183-84 & n.1250. Further, "[i]n nearly a quarter of the cases, *no mitigating circumstances* were filed by the defense," raising obvious constitutional concerns. JSGC Report 88 (emphasis added) (internal quotation marks omitted).

That these numbers reflect an unacceptable breakdown of indigent capital defense has been widely recognized, most notably by Chief Justice Saylor. *See, e.g.*, *McGarrell*, 87 A.3d at 810-11 (Saylor, J., dissenting); Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 Widener L.J. 1 (2013) ("*Death Penalty Stewardship*"); *Commonwealth v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring). It should be emphasized, however, that these numbers do not tell the whole story. Logically, there must be even more cases in which the defendants did not receive an adequate defense, much less the high quality defense that should be expected when the stakes are life or death. *See King*, 57 A.3d at 635 (Saylor, J., concurring) (observing that there would be far more capital cases of lawyer ineffectiveness if we included "the many instances in which severe derelictions have been alleged but the defendant . . . [was] denied the opportunity to adduce supporting evidence based on other considerations, such as waiver, or a finding of insufficient prejudice").

The results in the limited circumstances where quality capital defense is provided are yet another measure of the systemic breakdown. Since 1993, the Defender Association of Philadelphia has represented about one-fifth of all defendants charged capitally in Philadelphia. During this quarter-century, ninety death sentences were imposed in Philadelphia, *but not a single death sentence was imposed on a defendant represented by the Defender Association. See generally*

Anderson & Heaton, *How Much Difference*, *supra*. Significantly, unlike most capital defense lawyers in Philadelphia and statewide, the Defender Association represents its clients pursuant to the ABA's guidelines for capital defense counsel. *See McGarrell*, 87 A.3d at 810 n.2 (Saylor, J., dissenting).

The inadequacy of indigent capital defense has been a problem since 1978, and numerous reports have called attention to it. For example, in 1990, a joint task force of the Third Circuit and this Court reported an "absence of any widely accepted method for the identification, training, and appointment of counsel who are qualified to handle capital cases at the state and federal trial, appellate and post-conviction levels." Joint Task Force on Death Penalty Litigation in Pennsylvania, Report at 4, PA300. The report recommended, inter alia, adoption of statewide standards for death penalty litigators, and a statewide certification board to apply those standards. *Id.* at 22, PA318.

In 2003, the SCOPA Committee issued a "Final Report" recommending: "statewide standards for an independent appointment process of selecting capital counsel for all stages of the prosecution, including trial, appeal, and postconviction hearings," at a minimum, by incorporating the ABA Guidelines; "reasonable minimum compensation standards for capital counsel throughout Pennsylvania and . . . sufficient resources for experts and investigators"; and the creation of a capital defense office "to assist in, and where local resources are inadequate, undertake the

representation of, capitally charged defendants and those currently under sentence of death." JSGC Report, App. M 268-69.

In 2003, the ABA revised its Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases. The 2003 ABA Guidelines included detailed recommendations to provide, fund, and supervise capital defense. In 2007, the ABA conducted a study of Pennsylvania's death penalty system. ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report* (2007) ("ABA Report"), https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/pennsylvania/finalreport.authcheckdam.pdf. The ABA found that Pennsylvania "falls far short of complying with" the 2003 ABA Guidelines, in part because there were no statewide appointing authority, standards, or funding. *Id.* at xv. The ABA recommended that Pennsylvania rectify those deficiencies. *Id.*

In 2011, a challenge was brought to the system of appointing and funding capital trial counsel in Philadelphia, the largest jurisdiction in the state. This Court appointed a special master, who subsequently:

> reported his findings that the dynamics of the appointment system are "woefully inadequate," "completely inconsistent with how competent trial lawyers work," "punish[] counsel for handling these cases correctly," and unacceptably "increase[] the risk of ineffective assistance of counsel" in individual cases.

Saylor, *Death Penalty Stewardship*, 23 Widener L.J. at 33 (footnote omitted). After the special master issued his report, some modest changes were made to capital defense funding in Philadelphia, *id.* at 39-40, but nothing changed in the remainder of the state.

Most recently, the JSGC Report recommended that capital defense counsel throughout Pennsylvania follow the 2003 ABA Guidelines, JSGC Report 18, 185-86, and that the Commonwealth create "a state-funded capital defender office to represent all persons charged or convicted of capital crimes." *Id.* at 186.

The widespread calls for reform have gone largely unheeded, and the Commonwealth has not adopted any of the principal recommendations noted above. In 2004, this Court did adopt Pa. R. Crim. P. 801, requiring that capital defense counsel meet minimal standards of experience and continuing legal education. Rule 801, however, does not contain performance standards or provide for any review of deficient performance. No judicial, legislative, or executive body has ever adopted such performance standards, including those promulgated by the ABA. And despite the low bar set by Rule 801, more than a third of Pennsylvania counties do not have a single attorney who meets its requirements. JSGC Report 185.

The Commonwealth's systemic failure to provide adequate capital defense counsel violates Section 13. Rather than meeting the "high requirement of reliability," *Mills*, 486 U.S. at 383-84, Pennsylvania's capital sentencing system

"undermines the effectiveness of indigent defense." JSGC Report 28. Pennsylvania's outlier capital defense system falls short of what is required under modern society's standards of decency.

Pennsylvania's inadequate system for providing counsel to capital defendants creates a system-wide defect analogous to the one that led this Court to invalidate the previous capital sentencing statute in 1977—a defect that "precludes the jury from a constitutionally adequate consideration of the character and record of the defendant." *Commonwealth v. Moody*, 382 A.2d 442, 447 (Pa. 1977). In case after case, ineffective lawyers prevent capital sentencing juries from a full and exhaustive inquiry into the defendant. JSGC Report 183-84 & n.1250. And in a quarter of cases, counsel's ineffectiveness forecloses any individualized inquiry, because defense counsel present nothing at all in mitigation. *Id.* at 88. Just as the statute was unconstitutionally cruel in *Moody*, so too the statewide system is here.

b. Prosecutorial error

Although the endemic defects in Pennsylvania's capital defense system themselves establish statewide unreliability in violation of Section 13, recurring prosecutorial error further undermines reliable capital sentencing. The factors unique to death penalty trials—including the emotion, expense, publicity, and political implications—create an impetus for prosecutors to overstep the bounds of fair play. *See* James Liebman, *The Overproduction of Death*, 100 Colum. L. Rev.

2030, 2078-82 (2000). This problem is borne out by the thirty-seven court decisions vacating death sentences or capital convictions on the grounds of prosecutorial error. *See* Ex. A, PA1-38.

Two types of prosecutorial error are especially troubling: racially discriminatory jury selection practices under *Batson v. Kentucky*, 476 U.S. 79, 100 (1986), and the suppression of favorable defense evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[16] With respect to the former, in 2003, the SCOPA Committee "concluded that the evidence suggested pervasive discrimination, particularly against African Americans" in capital case jury selection. JSGC Report 65.[17] With respect to *Brady* cases, the ABA's 2007 review of the Pennsylvania death penalty found that Commonwealth prosecutors are "[a]t best . . . only in partial compliance" with their obligations to make full and timely disclosures to the

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[16] Improper prosecutorial argument has led to the reversal of fourteen Pennsylvania death sentences. *See* Ex. A, PA1-38. This problem has persisted in spite of this Court's clear directives. *See, e.g.*, *Commonwealth v. DeJesus*, 860 A.2d 102, 118 (Pa. 2004).

[17] In Philadelphia, this finding was unsurprising in light of the District Attorney's Office's history of training prosecutors to racially engineer jury composition while evading the strictures of *Batson*. *See Commonwealth v. Basemore*, 744 A.2d 717, 729-32 (Pa. 2000). In the era when Philadelphia led the country in imposing death sentences, race was "a major factor in capital jury selection, with the prosecution striking African Americans from the jury twice as often as non-African Americans." JSGC Report 65; *accord* Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 n.209 (2001).

defense. In fact, state and federal courts have overturned at least eighteen death sentences or capital convictions based on the prosecution's suppression of evidence. *See* Ex. A, PA1-38.

As with ineffective assistance of counsel claims, however, the number of vacated death sentences understates the problem. *Batson* requires proof of the prosecutor's subjective discriminatory intent, which is extraordinarily difficult to show. *See Commonwealth v. Cook*, 952 A.2d 594, 634-35 & nn.1-2 (Pa. 2008) (Saylor, J., dissenting) (recounting racially offensive statements and conduct of capital trial prosecutor where the Court nonetheless denied *Batson* claim). *Brady* claims are also inherently difficult to prove—by definition they are based on evidence concealed in prosecution or police files.

Thus, even where a court does not grant relief based on *Batson*[18] or *Brady*,[19] these problems undermine the reliability of death sentences. Racially engineered jury panels undermine reliability because, as the JSGC recognized, "the racial composition of juries [is] associated with the frequency with which death sentences [are] imposed." JSGC Report 65-66 (internal quotation marks omitted). And *Brady*

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[18] *See, e.g.*, *Cook*, *supra*.

[19] *See, e.g.*, *Commonwealth v. Natividad*, 2019 WL 286564, at *16 (Pa. 2019) (denying relief where "[t]here is no dispute the Commonwealth failed to disclose these materials to the defense prior to trial, and some of them were plainly exculpatory on their face").

violations frequently come to light years or even decades after a defendant is sentenced to death. *See, e.g.*, *Commonwealth v. Johnson*, 174 A.3d 1050, 1058-59 (Pa. 2017); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 313 (3d Cir. 2016); *Lambert v. Beard*, 537 F. App'x 78, 87 (3d Cir. 2013); *Breakiron v. Horn*, 642 F.3d 126, 135 (3rd Cir. 2011). This raises the question of how many *Brady* violations will never come to light, and it undermines public faith in the capital punishment system as a whole.

Significant reforms are necessary to address these problems. The JSGC recommends that the Commonwealth adopt a Racial Justice Act to permit defendants to challenge racially disparate jury composition, even where they cannot prove the subjective intent of the prosecutor. JSGC Report 12, 31, 149. The JSGC further recommends that a prosecutor's decision to capitally prosecute a defendant be subject to statewide oversight. *Id.* at 73-74, 270. But until these and related problems are meaningfully addressed, prosecutorial error will continue to undermine the reliability of Pennsylvania death sentences.

Perhaps no statistic more convincingly shows how inadequate existing procedures are for remedying unreliable death sentences than the fact that less than 7% of prisoners whose death sentences were vacated have been subsequently resentenced to death. *See* Ex. A, PA1-38; JSGC Report 13. It is hard not to wonder

whether the death resentencing rate would be any higher if the 131 current death row prisoners were granted another opportunity at life.

Because Pennsylvania fails to provide "increased reliability of the process by which capital punishment may be imposed," *Herrera*, 506 U.S. at 405, its capital punishment system falls short of the Eighth Amendment's "acute need for reliability," *Monge v. California*, 524 U.S. 721, 732 (1998), and implicates the core duty that Section 13 imposes on this Court to eradicate unnecessary sanguinary punishments. This Court should strike down Pennsylvania's system of capital punishment on the basis of its unreliability alone. When considered in conjunction with the arbitrary factors that lead to death sentences, the cruelty of Pennsylvania's system is even more pronounced.

B. Pennsylvania Imposes Capital Punishment Arbitrarily, in Violation of Section 13.

Systemic defects lead to arbitrary death sentences in Pennsylvania. As the JSGC recognized, Pennsylvania's statutory aggravating factors are too many and too broad; prosecutors are provided neither guidance nor oversight in exercising discretion under the statute; indigent defense representation is inadequate; and this Court's review of death sentences has become notably less strict since 1978.

Under this system, the JSGC Report found that geography, the race of the victim, and the indigence of the defendant strongly affect the likelihood that a murder defendant is capitally prosecuted and sentenced to death. The JSGC further

reported shockingly high rates of intellectual disability and mental illness on Pennsylvania's death row, and discussed substantial evidence that the race of the defendant has influenced death sentences as well. This evidence demonstrates that Pennsylvania imposes death sentences arbitrarily, in violation of Section 13.

1. Section 13 prohibits arbitrary infliction of capital punishment.

In *Furman v. Georgia*, the United States Supreme Court invalidated the death penalty as then administered nationwide. 408 U.S. 238, 239-40 (1972). The Court held that a capital sentencing scheme violates the Eighth Amendment if "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).[20] This is especially true where, "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 309-10 (Stewart, J., concurring). Under *Furman* and its progeny, the Eighth Amendment thus mandates that, "where discretion is afforded a sentencing body on a matter so grave as [life and death], discretion must be suitably directed and limited so as to

[20] "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White." *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality).

minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

Furman abrogated Pennsylvania's extant capital sentencing statute. *Commonwealth v. Bradley*, 295 A.2d 842, 845 (Pa. 1972). This Court then struck down two subsequent statutes as violating the Eighth Amendment—the first for giving "unbridled discretion" to the capital sentencer, *Commonwealth v. McKenna*, 383 A.2d 174, 178 (Pa. 1978), and the second for failing to permit adequate consideration of mitigating evidence, *Moody*, 382 A.2d at 445, 449.

In 1978, Pennsylvania joined other states in adopting capital sentencing statutes that sought to limit the discretion of prosecutors, judges, and juries "by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence." *Gregg*, 428 U.S. at 180. The Supreme Court upheld this approach with the understanding that such "guided discretion" would prevent arbitrary, capricious, or biased decision-making. *See id.* at 188-89, 207. The *Gregg* Court specifically credited the American Law Institute's ("ALI") Model Penal Code as exemplifying a statutory structure that could simultaneously permit discretion yet eradicate caprice and bias. *Id.* at 193.

While incorporating these Eighth Amendment minimums, Section 13 provides particularly broad protections against arbitrarily imposed death sentences. By 1825, this Court had already condemned, as contrary to republican ideals, the

infliction of sanguinary punishment based on arbitrary classifications like poverty or gender. *See James*, 12 Serg. & Rawle at 226, 236. Pennsylvania has likewise honored the promise of individualized capital sentencing since long before the Eighth Amendment so required. *See Moody*, 382 A.2d at 449; *see also Commonwealth v. Green*, 151 A.2d 241, 247 (Pa. 1959) (citing cases). Today, these principles are undermined by systemic failures to ensure that death sentences are imposed only on the most culpable offenders. Under such circumstances, it is essential for this Court to utilize an "intra-Pennsylvania approach" to enforcing Section 13. *See Eisenberg*, 98 A.3d at 1283.

2. Evolving standards of decency are undermined by known arbitrariness in capital sentencing.

Local, national, and international trends confirm that arbitrary imposition of the death penalty offends contemporary standards of decency and is therefore cruel under Section 13. In imposing a moratorium on executions in 2015, Governor Wolf emphasized that "there are strong indications that a person is more likely to be charged with a capital offense and sentenced to death if he is poor or of a minority racial group, and particularly where the victim of the crime was Caucasian." Wolf Declaration 2. He indicated that he would continue to halt any executions until the Commonwealth ensures "that the sentence is applied fairly and proportionally." *Id.* at 4.

Nationally, ten states have abolished capital punishment since *Gregg*, and the governors in Colorado and Oregon have imposed moratoria citing problems like those seen in Pennsylvania.[21] Internationally, dozens of countries have abolished capital punishment, including Canada and every European Union nation.[22]

Most recently, in *Gregory*, the Washington Supreme Court concluded that its system of capital punishment was unconstitutionally arbitrary in violation of the state constitutional protection against cruel punishment:

> Washington's death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner. Given the manner in which it is imposed, the death penalty also fails to serve any legitimate penological goals.

427 P.3d at 642. Nevertheless, the *Gregory* court acknowledged that its decision was limited. The court did not declare the death penalty unconstitutional per se and left open the possibility that the legislature could correct the identifiable flaws. *Id.* at 636-37. Still, the court was compelled to act in a systemic way: "Case-by-case review of death sentences cannot fix the constitutional deficiencies before us." *Id.* at 637.

Justice Johnson's concurring opinion, joined by three other justices, further explained the court's concerns. Just as this Court has been presented with new,

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[21] http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

[22] http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries.

comprehensive information compiled by the JSGC, so too was the court in *Gregory*. *Id.* at 633 ("Where new, objective information is presented for our consideration, we must account for it. Therefore, Gregory's constitutional claim must be examined in light of the newly available evidence presently before us"). Based on that new information, Justice Johnson found that "[i]t is now apparent that Washington's death penalty is administered in an arbitrary and racially biased manner." *Id.*

Although racial discrimination played an important part in the court's decision, a number of other factors rendered the system arbitrary. Just as in Pennsylvania, geographical analysis showed that most death sentences were imposed by only a few of Washington's counties. "*Where* a crime is committed is the deciding factor, and not the facts or the defendant." *Id.* at 646. In addition, again like Pennsylvania, the large number of appellate reversals, and subsequent non-capital resentencings, injected further arbitrariness into the system, and "[t]he delay inherent in death sentence cases raises additional concerns." *Id.*

Gregory does not stand alone in its reliance on the state constitution to address the arbitrary application of the death penalty. In *Santiago*, the Connecticut Supreme Court explained that "the constitutionally relevant inquiry is whether the death penalty, as *currently* administered in Connecticut, . . . offends our state's evolving standards of decency, and whether that punishment continues to satisfy any legitimate penological objective." 122 A.3d at 79. The court observed that "the

selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias." *Id.* at 66. The "exercise of unfettered discretion at key decision points in the process has meant that the ultimate punishment has not been reserved for the worst of the worst offenders." *Id.* at 71.

In *District Attorney for the Suffolk District v. Watson*, the Supreme Judicial Court of Massachusetts held that the death penalty was invalid because it was inevitable that it would be applied arbitrarily. 411 N.E.2d 1274, 1283 (Mass. 1980). The court predicted that "arbitrariness in sentencing will continue even under the discipline of a post-*Furman* statute." *Id.* at 1284. This is because "*Furman* and subsequent cases do not address the discretionary powers exercised at other points in the criminal justice process," such as: "police officers, prosecutors, defense counsel, and trial judges." *Id.* at 1285.

Finally, the ALI has withdrawn capital sentencing provisions from the Model Penal Code because "real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process." ALI, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* 5 (2009), http://www.ali.org/projects/show/sentencing/. Several concerns motivated the decision, including: (1) the "near impossibility" of addressing "conscious or unconscious racial bias" in a statute; (2) "the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a

number of state statutes now) a larger percentage of murderers"; and (3) the tension between the requirements of fair sentencing and individualized sentencing. *Id.* The ALI's abandonment of the death penalty is particularly significant because the Supreme Court relied on its model code to sanction legislative schemes, like Pennsylvania's, that were intended to avert arbitrary death sentences. *See Gregg*, 428 U.S. at 193.

3. Systemic defects engender arbitrary death sentences in Pennsylvania.

Since this Court's decision in *Zettlemoyer*, the Commonwealth's capital punishment law has developed in ways that increase the risk of its arbitrary imposition and decrease the safety net that was designed to protect against arbitrariness. Two trends stand out in particular. On one hand, the number and scope of aggravating circumstances has greatly increased, and this Court has tended to interpret the circumstances broadly. As a result, aggravating circumstances apply to most murders, thus undermining the narrowing function they were intended to serve. But this development has not been accompanied by any guidance for or oversight of prosecutorial discretion in capital cases, and prosecutors have nearly unfettered discretion to pursue the death penalty in any specific murder. Pennsylvania likewise fails to provide appropriate guidance to capital sentencing jurors, many of whom labor under the false impression that opting for a sentence of life imprisonment will facilitate the defendant's eventual release from prison.

Meanwhile, legislative and judicial decisions have decreased the nature and scope of this Court's appellate review in capital cases, thus limiting the Court's role as a safety net to protect against the arbitrary application of the death penalty. *Zettlemoyer* recognized how important robust appellate review is to a constitutional system of capital punishment. 454 A.2d at 960. At the time, the Legislature had given this Court broad powers of proportionality review, as well as review for passion, prejudice, or other arbitrary factors; this Court forbade capital resentencing when a death sentence had been unconstitutionally imposed; and the Court employed a relaxed waiver practice in capital cases to permit review of unpreserved issues. Since then, however, all of these safeguards have been eliminated or sharply limited.

a. Broad and numerous aggravating circumstances

When *Zettlemoyer* was decided, there were ten aggravating circumstances. Today, there are eighteen, which is among the highest number in the nation. JSGC Report 6. The JSGC recognized 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.

The increasing number of aggravating factors has coincided with "a marked tendency, on the part of this Court, to construe aggravating circumstances broadly." *Commonwealth v. Johnson*, 107 A.3d 52, 98 (Pa. 2014) (Saylor, J., concurring). Although these interpretations may be logical in isolation, the trend has increasingly

undermined the narrowing function of the statute as a whole. *See Commonwealth v. Daniels*, 104 A.3d 267, 320 & n.3 (Pa. 2014) (Saylor, J., concurring and dissenting) (expressing concern with a broad interpretation of the aggravator under 42 Pa. C.S. § 9711(d)(5) and recommending that the Court adopt a more narrowing approach to conform to constitutional standards).

Johnson followed several holdings rejecting efforts to narrow the scope of the section 9711(d)(6) "felony murder" aggravator. These cases held, based upon the plain language of the statute, that the aggravator is applicable for any felony. *See Commonwealth v. Robinson*, 877 A.2d 433, 446 (Pa. 2005) (unlawful possession of a firearm "felony" for purposes of (d)(6)); *Commonwealth v. Walker*, 656 A.2d 90, 101 (Pa. 1995) (holding jury may consider underlying felony conviction of criminal trespass as felony for purposes of the (d)(6) aggravator). Thus, any intentional murder committed in Pennsylvania while unlawfully possessing a firearm is death eligible.

The section 9711(d)(9) "significant history" aggravator has also been interpreted broadly. The aggravator can be found based on juvenile adjudications, *Commonwealth v. Baker*, 614 A.2d 663, 675 (Pa. 1992), a single crime committed *after* the murder, *Commonwealth v. May*, 31 A.3d 668, 674 (Pa. 2011), and convictions for conspiracy, *Commonwealth v. Rice*, 795 A.2d 340, 349-50 (Pa. 2002). In addition, the Court has held that burglary and criminal trespass are always

crimes of violence under (d)(9), even though the elements of those crimes require no use or threat of violence, and even where the facts show that there was no violence or threat of violence. *Commonwealth v. Pruitt*, 951 A.2d 307, 321 (Pa. 2008); *Commonwealth v. Rios*, 920 A.2d 790, 814 (Pa. 2007); *Commonwealth v. King*, 721 A.2d 763, 782-83 (Pa. 1998).

The Court's precedent interpreting the section 9711(d)(7) "grave risk" aggravator has become increasingly broad as well. Some cases have imposed a narrowing construction. *E.g.*, *Commonwealth v. Bolden*, 753 A.2d 793, 798-99 (Pa. 2000) (no grave risk where person who entered the house after the killing was also shot); *Commonwealth v. Paolello*, 665 A.2d 439, 456 (Pa. 1995) (no grave risk where severely beaten witness left the scene of the murder before the killing). More recent cases, however, conclude that the grave risk aggravator may apply "where there is potential for an errant, ricochet, or pass-through bullet; the endangered bystander need not be in the direct line of fire to be in grave risk of death." *Commonwealth v. Brown*, 987 A.2d 699, 707 (Pa. 2009); *see Commonwealth v. Roney*, 79 A.3d 595, 637-48 (Pa. 2013) (grave risk applicable because woman lying on floor of bank during robbery was in zone of danger when defendant shot police officer coming through the front door); *see generally* Thomas L. Dybdahl, *Grave Risk of Injustice: Pennsylvania's Vague "Grave Risk of Death" Aggravator in Capital Cases*, 72 Temple L. Rev. 1 (1999).

Although each of these decisions may be correct standing alone, the JSGC recognized that the number and breadth of aggravating circumstances risk arbitrary application by failing to adequately narrow the class of persons subject to the death penalty and by including aggravators that can have a disproportionate effect against racial and ethnic minorities. JSGC Report 98. The report therefore recommended eliminating or narrowing *twelve* aggravating circumstances—42 Pa. C.S. § 9711 (d)(4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), and (15). *Id.* at 101-02. Most current death row prisoners were sentenced to death based on one or more of the aggravators that the report recommended eliminating or narrowing.[23]

b. Broad prosecutorial discretion

The unfettered discretion given to Pennsylvania's district attorneys exacerbates the arbitrariness inherent in the expansive statutory scheme. Sixty-seven different district attorneys decide who should be arrested, what crimes to charge, whether or not to seek the death penalty, what aggravators to charge, what plea bargains to offer, and what pleas to accept. *See* 16 P.S. § 1402. As the JSGC explained: "The Commonwealth's large number (18) of statutory aggravating circumstances[,] . . . along with the numerosity of Pennsylvania's 67 counties, can

[23] In contrast to its aggravating circumstances, Pennsylvania's mitigating circumstances are overly restrictive and thereby further increase the risk of arbitrarily selecting defendants who receive the death penalty, especially mentally ill defendants. *See infra* at 88.

easily result in significant differences in proportionality." JSGC Report 6. And because almost all of Pennsylvania's elected district attorneys are white, the report recognizes the risk that "unconscious bias" may play in the exercise of discretion. *Id.* at 74.

Yet, these decisions are subject neither to statewide "standards and procedures" nor to review by any statewide authority. *See* JSGC Report 270. The SCOPA Committee recommended adopting such procedures in 2003 "with the goal of ensuring geographic consistency in the application of the death penalty," but the recommendations were never adopted. *See id.* The JSGC similarly recommends creating a statewide committee to oversee capital prosecutions, just as other jurisdictions use to channel prosecutorial discretion. *See id.* at 73-74, 270. But to date these recommendations have fallen on deaf ears. Instead, the broad prosecutorial discretion in Pennsylvania's death penalty process has created an unreasonable risk of arbitrariness.

c. Juror misperceptions

Just as the Commonwealth's prosecutors exercise discretion without adequate guidance, so do its capital sentencing juries. Pennsylvania is one of only two states in the nation that provides capital sentencing juries with a choice between a sentence of death and life imprisonment, but fails to instruct the jurors that a life imprisonment verdict will preclude the defendant's eventual release on parole. *See* JSGC Report

12-13 & n.96. This omission exacerbates jurors' misperceptions about their capital sentencing verdicts.

The JSGC Report reviewed studies of interviews with scores of capital sentencing jurors in Pennsylvania. JSGC Report 149. The interviews revealed that "[a]lmost 75% of the jurors estimated that life-sentenced prisoners would be paroled or otherwise released" and that "the median estimate for how long someone usually spends in prison if they don't get death" varied from fifteen to twenty-five years. *Id.* at 149-50. Other misperceptions—for example, that "a mitigating circumstance required unanimity to consider"—were likewise widespread. *Id.*

The JSGC recognized that "the law that should be guiding jurors' discretion and eliminating arbitrary decisions often does not work." *Id.* at 150 (brackets and internal quotation marks omitted). In order for jurors to "understand and apply" the law correctly, the Commonwealth would need to routinely collect empirical data and revise standard jury instructions based on that data, and with assistance of linguists, social scientists, and psychologists. *Id.* at 152.

d. Limitations on the nature and scope of appellate review

As this Court recognized in *Zettlemoyer*, robust appellate review plays a very important role in protecting against arbitrary imposition of the death penalty:

> It is certain that the United States Supreme Court considers meaningful appellate review by a court having statewide jurisdiction to be at least a very important factor (perhaps a *sine qua non*) in a constitutionally permissible legislative scheme for imposition of the death penalty,

> because such review is, in effect, a "last line of defense" to guard against arbitrary sentencing by a jury.

454 A.2d at 960. At that time, this Court was tasked with performing proportionality review in all capital cases. *Id.* at 961-62. The statute also required the Court to determine whether a death sentence was the product of passion, prejudice, or any other arbitrary factor. *See* 42 Pa. C.S. § 9711(h)(3).

Further, when a death sentence was overturned, the defendant was automatically resentenced to life imprisonment. *Commonwealth v. Story*, 440 A.2d 488, 492 (Pa. 1981) (in "all of the Pennsylvania cases where the death penalty ha[d] been unconstitutionally entered," it has been "this Court's unvarying practice to vacate the sentence of death and impose a sentence of life imprisonment"). This Court also developed a practice of relaxed waiver to allow review of claims that were not properly preserved at trial. *See, e.g.*, *Walker*, 656 A.2d at 98-99 ("[This] issue is waived. However, since this Court has developed a relaxed standard regarding waiver rules in capital cases, we will address the underlying claim."); *Commonwealth v. Nelson*, 523 A.2d 728 (Pa. 1986) ("[I]n capital cases we have relaxed the traditional waiver concepts because of the uniqueness of the penalty involved, and permit an assessment of the alleged error on its merits.").

Subsequent developments eliminated most of these safeguards. In 1988, the Legislature amended 42 Pa. C.S. § 9711(h)(4) to require resentencing proceedings in most cases where a death sentence was vacated. *See Commonwealth v. Lesko*,

719 A.2d 217, 219-20 (Pa. 1998). In 1997, the Legislature repealed the requirement of proportionality review. *See Commonwealth v. Gribble*, 703 A.2d 426, 438-39 (Pa. 1997). This Court abandoned the practice of relaxed waiver, both on direct appeal and in PCRA. *Commonwealth v. Freeman*, 827 A.2d 385, 392 (Pa. 2003) (direct appeal); *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1997) (PCRA).

The required review for passion, prejudice, or other arbitrary factors has likewise changed. The requirement was initially treated broadly and as giving this Court the power to consider "significant issues perceived sua sponte by this Court, or raised by the parties." *Zettlemoyer*, 454 A.2d at 955 n.19; *see also Commonwealth v. Stoyko*, 475 A.2d 714, 721 (Pa. 1984). However, this Court subsequently determined that only issues preserved by counsel at trial can be subject to review under this section. *May*, 31 A.3d at 517-18; *Commonwealth v. Chambers*, 980 A.2d 35, 58-59 (Pa. 2009). With these limitations, the distinction between consideration of preserved issues in the normal course of appellate review, and review under the passion, prejudice, or other arbitrary factor requirement, is murky at best.

Viewed as a whole, this Court's review of capital cases has become far more limited over the years, with a greater reliance on PCRA review, which contains strict procedural requirements and generally reviews claims under the onerous constitutional threshold of ineffective assistance of counsel. The JSGC concluded that, after the elimination of proportionality review, "[t]here is no process for

determining whether the crimes for which the defendants receive the death penalty differ from the crimes for which the defendants receive life imprisonment (without parole)." JSGC Report 25. The absence of any such process, which the report recommended correcting, *see id.* at 66, leaves the Pennsylvania death penalty scheme without a critical safeguard necessary to protect against the arbitrary imposition of the death penalty. In addition, in light of the high number of appellate reversals leading to the imposition of non-capital sentences in the vast majority of the reversed cases, the JSGC Report recommends "reinstating the practice of relaxed waiver on direct capital appeals as it was employed [by the Pennsylvania Supreme Court] in the 1980s and 1990s." *Id.*; *see also id.* at 13-14, 31, 154, 158.

The bottom line is this: without a genuinely narrow statute, any oversight of prosecutorial discretion, the safety net of robust appellate review, and a system for adequate indigent capital defense (*see* Part II.A, *supra*), the arbitrary factors described below play an impermissible role in the administration of capital punishment in Pennsylvania.

4. Arbitrary factors influence the imposition of capital punishment.

As could be predicted in light of the systemic deficiencies in Pennsylvania's death penalty procedures, de facto arbitrary factors strongly influence which murder defendants are capitally prosecuted and sentenced to death. Rather than being reserved for the most culpable offenders, death sentences are disproportionately

imposed based on geographic happenstance, the race of the victim or defendant, or the defendant's intellectual disability, mental illness, or indigence. Individually and in combination, these arbitrary factors render Pennsylvania's capital punishment system cruel under Section 13 and the Eighth Amendment.

a. Geography

"*In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends on where [in Pennsylvania] that defendant is prosecuted and tried.*" JSGC Report 90 (quoting Kramer Report 125). Although such county-to-county disparities are increasingly a nationwide phenomenon, Pennsylvania had, as of 2010, "the highest intrastate disparity between population and death penalty cases of any state nationally." JSGC Report 67. Such extreme disparity plainly undermines the Section 13 principle that "comparative and proportional justice is an imperative within Pennsylvania's own borders." *Eisenberg*, 98 A.3d at 1283 (internal quotation marks omitted).

As a result of the Commonwealth's decentralized and unstandardized charging procedures, "[i]n many counties of Pennsylvania, the death penalty is simply not utilized at all. In others, it is sought frequently." JSGC Report 90 (internal quotation marks omitted). In thirty-three of Pennsylvania's sixty-seven counties, no death sentences were in force as of 2015, despite accounting for 287 life sentences for murder. *See* JSGC Report, App. K 261. Berks and York Counties,

by comparison, accounted for twenty-three death sentences despite only 225 life sentences. *Id.* Similarly, although Philadelphia and Allegheny counties boast comparable populations, "Philadelphia County accounted for 106 of the 223 inmates on death row [in 2010], while only eleven death row inmates were from Allegheny County." *Id.* at 67.

The disparate impact of geography, however, is not limited to the number of death-sentenced inmates from each county. Geographic location affects numerous aspects of capital cases including the decision to pursue a death sentence, the decision to retract a death notice, the impact of representation by a public defender, and the influence of race. For example, Allegheny County prosecutors were significantly (20%) less likely to seek the death penalty than prosecutors in the other counties studied, including Philadelphia. *Id.* at 100. Philadelphia prosecutors, meanwhile, were significantly (31%) more likely to retract a death notice, a practice that can be used strategically to induce a guilty plea. *Id.* at 96, 101, 116-17, 149.

Large institutional public defender offices have much higher rates of success defending capital cases than public defenders in small counties, at least in part due to their adherence to the ABA guidelines for capital defense. *See McGarrell*, 87 A.3d at 810 n.2 (Saylor, J., dissenting). Presumably aware of this success, prosecutors seek the death penalty at "significantly lower" rates against defendants represented by public defenders in Allegheny and Philadelphia counties. JSGC

Report 87. Yet, despite the success of those two offices, defendants statewide are still more likely to be sentenced to death when represented by a public defender. *Id.* The JSGC Report thus endorsed the recommendation that "to avoid justice by geography, a predominance of state [capital defense] funding is necessary to a successful system." *Id.* at 184. But rather than a predominance of state funding, Pennsylvania is an outlier in providing no such funding. *See* Part II.A.3.a, *supra*.

The effect of race on capital case progression, from death notice to death sentence, also varies geographically. For example, white defendants were significantly less likely to receive death notices in Allegheny County than white defendants elsewhere. Kramer Report 95, 146. And in Philadelphia, cases with African American defendants and victims, or with any defendant/victim combination involving African Americans, were much more likely to have a death penalty notice filed and then retracted. *Id.* at 96, 149. Thus, Philadelphia prosecutors' strategic practice of filing then withdrawing death notices appeared to be concentrated in cases involving African Americans.

Based on the extensive evidence of geographic disparities, the Kramer Report concluded:

> 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.

Id. at 125. The JSGC Report echoed these concerns. JSGC Report 68. In light of the death penalty's severity and finality, this Court should confirm that "uniform prosecution and application of the death penalty under a common statewide framework" is mandatory under Section 13.

To be sure, the Eighth Amendment already requires that Pennsylvania "ensure against its arbitrary and capricious application" by confining the death penalty "to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420, 447 (2008) (internal quotation marks omitted). But where "the death penalty is simply not utilized at all" in some counties, while in other counties "it is sought frequently," JSGC Report 90, Pennsylvania cannot possibly follow this constitutional command. The Commonwealth thus needs a common statewide framework for capital prosecutions, which is precisely what the SCOPA Committee recommended in 2003. *Id.* at 270. The failure to heed those recommendations has resulted in continuing arbitrariness in Pennsylvania's capital punishment system.

This Court has recognized that an "intra-Pennsylvania approach" to Section 13 "is particularly persuasive" in certain cases "where sentencing proportionality is at issue." *Eisenberg*, 98 A.3d at 1283 (internal quotation marks omitted). For some criminal penalties, "comparative and proportional justice is an imperative within

Pennsylvania's own borders." *Id.* In light of the extensive evidence of disparities set forth in the JSGC Report and the ultimate nature of the death penalty, this Court should apply the same principle here and hold that Pennsylvania's system of capital punishment fails to guarantee "comparative and proportional justice."

Such a holding would accord with the growing recognition of the geographical arbitrariness of the death penalty. In striking down Washington's death sentencing regime in *Gregory*, the Washington Supreme Court explained that the "underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered," including "by where the crime took place, or the county of residence." *Gregory*, 427 P.3d at 627; *see also id.* at 647 (Johnson, J., concurring) (noting that a "combination of flaws," including "geographic rarity," permeate the state's death penalty system). Other jurists have taken note of the same problem. *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) (recognizing that intrastate "[g]eography also plays an important role in determining who is sentenced to death" and that the research showing this "county-by-county" disparity "suggests that the death penalty is imposed arbitrarily"); *State v. Bush*, 423 P.3d 370, 398-99 (Ariz. 2018) (Winthrop, J., concurring and dissenting) (opining that the death penalty is unconstitutional because of its arbitrary application, including geographic disparities); *People v. Cahill*, 809 N.E.2d 561, 612 (N.Y. 2003) (Smith, J., concurring) (discussing the threat of arbitrariness in death penalty

scheme, including the "startling" geographic disparities where "upstate counties experience approximately 19% of all homicides" but "account for 61% of all capital prosecutions").

b. Race

In combination with the problem of racially discriminatory jury selection, *see* Part II.A.3.b, *supra*, race operates as an arbitrary factor in Pennsylvania's capital punishment system in two additional ways: cases with white victims are substantially more likely to result in death sentences than cases with African American victims, and some African American defendants have been substantially more likely to be capitally prosecuted and sentenced to death than white defendants. Each of these racial disparities systematically devalues the lives of African Americans; each has functioned as a highly aggravating circumstance in capital cases; and each supports a finding that Pennsylvania administers its death penalty in violation of Section 13.

1. Race of victim

There is strong, consistent, and statistically significant evidence that defendants in capital cases with white victims are substantially more likely to receive death sentences than in those with African American victims. As reflected in the JSGC Report, Penn State researchers led by Dr. John Kramer studied hundreds of first degree murder cases from arrest through sentencing and concluded that a capital

defendant, regardless of his or her own race, is significantly more likely to receive a death sentence if the victim was white. Even after controlling for a host of legitimate case characteristics, the race of the victim was a more powerful predictor of a death sentence *than sixteen of the eighteen statutory aggravating circumstances*. Kramer Report, Table B7, 150. The only circumstances that better predicted a death sentence than the race of victim were a defendant's commission of another murder, *see* 42 Pa. C.S. § 9711(d)(11), or commission of a contemporaneous felony involving a rape or other sexual offense, *see* 42 Pa. C.S. § 9711(d)(6). *Id.* This conclusion is damning—Pennsylvania's capital punishment system devalues African American victims while disproportionately imposing death sentences where the victim was white.

Kramer's team first examined simple percentages among cases in which the defendants had received first degree murder convictions. The data showed that prosecutors sought the death penalty in 41% of white victim cases (114/280), but only 30% of black victim cases (156/512). There was an even greater disparity in the rate at which the two groups received death sentences at trial: 45% (31/69) for white victim cases, but only 20% (15/74) for black victim cases. *See* Kramer Report, Table 21, 78. The disparity was equally dramatic when comparing death sentencing rates among all the first degree murder prosecutions (as opposed to convictions): 11% of white victim cases (32/282), but only 3% of non-white victim cases (19/598),

received the death penalty.[24] Kramer's conclusion was straightforward: "Cases involving . . . white victims have a greater probability of receiving the death penalty." *Id.* at 79.

Kramer's team examined whether other variables could account for the racial disparity—if, for example, white victim cases were on the whole more aggravated. Using two different statistical techniques, they controlled for forty-two legally relevant case characteristics (e.g., aggravating factors) and case processing factors (e.g., whether defendant had private counsel). In both models, they still found that white victim cases were significantly more likely, and black victim cases significantly less likely, to receive the death penalty. Kramer Report, Table 25, 96, 151. One model indicated that defendants with white victims faced, on average, odds of receiving a death sentence that were 5.4 times the odds of similarly situated defendants whose victims were black.[25]

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[24] This result appears in a supplemental table that Kramer's team generated using the data from their report. *See* J. Ullner & G. Zajac, Supplemental Tables, Cross-tabulation of race of defendant and then race of victim, by death penalty outcomes, *on file with* Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, PA283.

[25] *See* J. Ullner & G. Zajac, Supplemental Tables, Logistic regression for "sentence0" outcome, *on file with* Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, PA286. In the main report, Kramer's team reported the likelihood for a death sentence in a black victim case to be .22 as compared with a white victim case. Kramer Report, Table B8, 151. This equates to a likelihood of a death sentence 4.5 times as great in white victim cases as in black victim cases.

Acknowledging that the results of their study were consistent with findings of fellow researchers in other jurisdictions, Kramer and his colleagues explained: "Thus, we see clear evidence of race-of-victim effects discussed earlier in the literature review." Kramer Report 98. They characterized the findings as "notable differences," and emphasized that they were "fairly robust in terms of the different modeling methods used." *Id.* The Task Force adopted this finding as "clear evidence" that race of victim plays a role in capital sentencing outcomes in Pennsylvania. *See* JSGC Report 86.[26]

2. Race of defendant

There is also substantial evidence of racial discrimination against certain African American capital defendants. "More than half of the inmates under a sentence of death in our Commonwealth are black, while almost 12% of the overall state population is black, which makes blacks 'highly overrepresented on Pennsylvania's death row relative to their proportion in the state population.'" JSGC Report 76 (quoting Kramer Report). Two major studies have now examined the role of a defendant's race in Pennsylvania's capital punishment system: the first by David Baldus, as addressed in the SCOPA Committee's Final Report, covering

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[26] *See also* SCOPA Committee Final Report, at 206 ("When the victim was white, juries were significantly more likely to find no mitigation than when the victim was not white.") (discussing Baldus study), http://www.pa-interbranchcommission.com/_pdfs/finalreport.pdf.

Philadelphia cases from charging through sentencing from 1983 to 1994, and the second by Dr. Kramer, as addressed in the JSGC Report, covering first degree murder convictions in eighteen counties from 2000 to 2010. The former identified stark indicators of racial discrimination, while the latter did not, but the aggregate evidence indicates that numerous death sentences in Pennsylvania have been influenced by discrimination on the basis of the defendant's race.

Baldus employed multiple measures to assess how capital cases in Philadelphia were treated as they progressed through the system. His principal findings indicated that, on average, a defendant's odds of receiving a death sentence in a penalty trial were several times greater if the defendant was black. David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: an Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1674, 1726 (1998). He compared racial categories while taking into account the culpability of individual defendants and found that the average African American defendant's probability of receiving a death sentence was 1.6 times as great as that of a similarly situated white defendant. *Id.* at 1726-27.

The effects were even more pronounced when the analysis was limited to jury "weighing" cases (i.e., where juries found both aggravating and mitigating factors and had to weigh them to decide sentence). *Id.* at 1695. The race-of-defendant disparity in death-sentencing rates in these cases was twenty-one points (.33 versus

.12) and reflected that African Americans were 2.7 times as likely to be sentenced to death as white defendants. Baldus's alternative measures confirmed the disparity. He concluded that the race of the defendant is "a substantial influence in the Philadelphia capital charging and sentencing system, particularly in jury penalty trials." *Id.* at 1714. The SCOPA Committee later summarized these findings:

> Professor Baldus found substantial race-of-defendant effects in Philadelphia County. He likened the impact of being African American to being saddled with an extra aggravating factor, that is, on average, being African American increased the chance of a defendant receiving a death sentence to the same degree that the presence of the aggravating circumstance of "torture" or "grave risk of death" increased the chance of a non-African American getting a death sentence. Baldus concluded that one-third of the African Americans on death row in Philadelphia would have received life sentences were they not African American.

Final Report 206; *see also* JSGC Report 65-66.

Kramer's study examined cases from eighteen Pennsylvania counties from 2000 to 2010. The study, while broader geographically, encompassed a different time period and a narrower set of cases, focusing only on first degree murder *convictions*. Based on this limited sample, the Kramer team did not find an "overall pattern of disparity to the disadvantage of" either African American or Hispanic defendants. Kramer Report 117; JSGC Report 89. As the JSGC described, the contrast in findings with Baldus's study may derive from changing practices over time or from the fact that Kramer's approach "did not allow study of the process by which some death-eligible cases result in first-degree murder convictions and some

do not." JSGC Report 83-84. The aggregate evidence shows that Pennsylvania's capital punishment system has discriminated according to the race of the defendant.

This Court should not tolerate intrastate racial disparities in the administration of capital punishment. It is fundamental "that capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

Tellingly, the JSGC recommended "enactment of a Racial Justice Act to statutorily allow death sentences to be challenged on a statistical basis instead of on the basis of purposeful discrimination." JSGC Report 12; *see id.* at 31, 149. This Court's Committee had previously recommended the same. *See id.* at 66-67. Employing such statistical analysis of the system as a whole leads to the inexorable conclusion that Pennsylvania engenders arbitrary death sentences on the basis of race.

In light of evidence of racial disparities in their state systems, other state supreme courts have struck down capital punishment as arbitrary and cruel. The Washington Supreme Court determined that, where "the association between race and the death penalty is not attributed to random chance," the "arbitrary and race based imposition of the death penalty cannot withstand the evolving standards of

decency that mark the progress of a maturing society." *Gregory*, 427 P.3d at 635. In vacating the death sentences in Connecticut, the state supreme court similarly reasoned: "To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race . . . rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order." *Santiago*, 122 A.3d at 66. Neither court required mathematical certainty of race discrimination to justify relief. *See Gregory*, 427 P.3d at 634 ("[W]e decline to require indisputably true social science to prove that our death penalty is impermissibly imposed based on race."); *Santiago*, 122 A.3d at 78 (relying on scientific and sociological studies that "far exceed the governing more likely than not true standard" while explaining that they need not be "indisputably true").

This Court should reach the same conclusion and rule that racial disparities in the imposition of Pennsylvania death sentences violate Section 13.

c. Mental illness and intellectual disability

As with African Americans and defendants from a handful of counties, mentally ill and intellectually disabled individuals are highly overrepresented on Pennsylvania's death row. JSGC Report 123-26. Intellectually disabled defendants are constitutionally ineligible to be sentenced to death in the first place, yet "as many as 14% of the Commonwealth's condemnees" may qualify for this diagnosis. *Id.* at 8. Meanwhile, prisoners with active, severe mental illness represent 25% of those

on death row, while more than half have a history of treatment for mental illness. *Id.* at 9. The JSGC Report concluded that "the proportion of inmates on death row suffering from some type of mental illness is likely much greater than in the general population." *Id.* at 125.

These facts further demonstrate that Pennsylvania's death sentences are not reserved for "the worst of the worst." *Id.* at 136 (a mentally ill defendant "would not be appropriate for the death penalty, as he would not be among the worst of the worst"). Intellectually disabled defendants are ineligible for the death penalty because their impairments render them "less morally culpable," less able to control their conduct, and at "special risk of wrongful execution." *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). "[T]he same or similar judicial rationale" should likewise exempt severely mentally ill defendants from the death penalty. JSGC Report 125.

Indeed, severely mentally ill defendants suffer from "cognitive and behavioral impairments" similar to those of the intellectually disabled. *Id.* at 128-30. They are often unable to meaningfully assist their lawyers in their own defense, particularly in developing and presenting mitigating evidence to the jury. JSGC Report 130 (quoting Lyn Entzeroth, *The Challenge & Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 Akron L. Rev. 529, 557-59 (2011)). It is therefore not surprising that "[m]any capital cases have been overturned on appeal for inadequate representation

due to defense counsel not raising mental health issues at trial." JSGC Report 127. It is manifest that severely mentally ill defendants "'may be at a greater risk of an unfair trial or inadequate defense.'" *Id.* at 130 (quoting Entzeroth, *supra*, at 557-59).

Rather than reducing or eliminating the likelihood of a death sentence, severe mental illness makes a death sentence more likely in Pennsylvania. *Id.* at 9, 133. A defendant's mental illness strongly correlates with a prosecutor's decision to file a death notice, substantially reduces the odds of the prosecutor's later retracting the notice, and is frequently viewed as an *aggravating* factor at sentencing. *See* Kramer Report 144 (Table B1), 147 (Table B4), 150 (Table B7) (measuring the effect of defendants' "extreme mental or emotional disturbance" at each juncture). 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).

In light of the "troubling revelation[s]" regarding Pennsylvania's death row population, and the "parallels . . . between intellectual disability and . . . the effects of severe mental illness," *id.* at 121, 129, the JSGC recommended a host of reforms to Pennsylvania's death penalty system, including:

- amending the Rules of Criminal Procedure to require a pretrial judicial determination of intellectual disability, *id.* at 30;

- "extending a version of guilty but mentally ill[27] as a bar to imposition of the death penalty," *id*. at 10; and

- broadening the statutory mitigating circumstances set forth in 42 Pa.C.S. § 9711(e)(2), (3) & (5) to better inform the jury of a defendant's mental or emotional disturbance, conduct impairment, and duress, respectively, *id*. at 105.

Each of these recommendations accords with the principles underlying Section 13,[28] and the evidence discussed in the JSGC Report establishes just how necessary such reforms are. Had these measures been adopted together with the 1978 statute, many, and perhaps most, of today's death row prisoners would not have been sentenced to death.[29] Instead, the current system over-selects mentally ill people for the death penalty and is unable to "ensure that people with intellectual disability are not being nor have been sentenced to death." JSGC Report 121.

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[27] Under Pennsylvania law, defendants can be found "guilty but mentally ill" in non-capital cases. 18 Pa. C.S. § 314(a). This verdict is unavailable in capital cases. *Commonwealth v. Stevens*, 739 A.2d 507, 514 (Pa. 1999).

[28] *See Commonwealth v. Baumhammers*, 960 A.2d 59, 102-08 & nn.1, 9 (Pa. 2008) (Todd., J, concurring) (indicating that those with serious mental illnesses may be exempt from capital punishment under Section 13); *see also* ABA, *Severe Mental Illness & the Death Penalty* 1-2 (2016), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

[29] The only three prisoners executed under the 1978 statute were mentally ill, and each facilitated his own execution by abandoning his appeals. JSGC Report 153 & n.1073.

Mentally ill and intellectually disabled defendants lack the "extreme culpability" that would make them "the most deserving of execution." *Kennedy*, 554 U.S. at 420, 447 (internal quotation marks omitted). Their over-representation on death row reflects yet another arbitrary factor establishing capital punishment's cruelty in Pennsylvania.

d. Indigence

Finally, a capital defendant's indigence places him at heightened risk of receiving a death sentence, and "[a]bout 80% of capital defendants are indigent and are represented by the public defender or other free counsel." JSGC Report 75. The systemic problems associated with indigent capital defense in Pennsylvania were previously discussed in Part II.A.3.a, *supra*, and are incorporated here by reference.

In failing to train, supervise, and adequately fund lawyers representing indigent capital defendants, the Commonwealth "undermines the effectiveness of indigent defense." JSGC Report 17. Ineffective indigent defense, in turn, leads to an astronomical error rate and undermines confidence in even those death sentences that do not meet the substantial legal thresholds for judicial relief. *See* Part II.A.3.a, *supra*.

Needless to say, indigence is not a valid basis upon which to impose death sentences. *See generally McGarrell*, 87 A.3d at 810-11 (Saylor, J., dissenting); *cf. James*, 12 Serg. & Rawle at 236 (condemning sanguinary punishment where "it is

only the poor who were to be" subjected to it). Just as the Commonwealth's failure to provide an adequate system of capital defense undermines the reliability of its capital punishment system, so too it renders a defendant's indigence an arbitrary factor that substantially, and impermissibly, increases the likelihood of a death sentence.

Alone and in combination, geography, race, mental impairment, and indigence constitute arbitrary factors that predispose defendants to be capitally prosecuted and sentenced to death, in violation of Section 13.

C. Pennsylvania's Capital Punishment System Lacks Valid Penological Justification.

As administered, Pennsylvania's capital punishment system serves no valid purpose. Capital punishment may be justified only by the principles of deterrence and retribution.[30] *Kennedy*, 554 U.S. at 441; *Gregg*, 428 U.S. at 183. "Unless the death penalty measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018) (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1986)) (internal quotation marks

[30] In the modern era, where states can imprison people for life, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461 (1984), *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016); *cf. Graham v. Florida*, 560 U.S. 48, 72 (2010) (recognizing incapacitation as a "legitimate reason for imprisonment").

omitted). But Pennsylvania's current death penalty system fails to measurably serve either principle. Section 13 cruelty incorporates a principle of necessity to justify capital punishment, *see* Part I.B.1, *supra*, but the Commonwealth's capital punishment system is demonstrably unnecessary to serve the principles of deterrence or retribution today. Because Pennsylvania's current death sentences do not meaningfully advance any legitimate penological goal, they violate Section 13 and the Eighth Amendment.

1. Deterrence

In theory, capital punishment may be necessary and justified if it prevents people from committing violent crimes. *See Kennedy*, 554 U.S. at 441. This theory, however, is supported by no evidence in Pennsylvania. Discussing a comprehensive report from the National Research Council, "a wide consensus among America's top criminologists," and a variety of other studies, the JSGC concluded:

> [T]here is no substantial evidence that the death penalty significantly advances the deterrence purpose. . . . In particular, it is unlikely that any difference in deterrent effect between life imprisonment without parole and the death penalty will dissuade a significant proportion of would-be murderers from carrying out the act.

JSGC Report 168.

Pennsylvania's founders in fact observed the opposite phenomenon: violent crime under their mild system of punishment compared favorably with harsher regimes, and reforms away from capital punishment precipitated drops in violent

crime. *See* Gov. Mifflin, Opening Address to Legislature (1792), Pa. Archives, Series 4, Vol. 4 at 241-42 ("It must be flattering to the judgment, and grateful to the humanity of the Legislature, to learn, from satisfactory evidence, that the experiment in rendering the penal laws of Pennsylvania less sanguinary, has been attended with an obvious decrease of the number and atrocity of offences."), https://archive.org/stream/4thpennsylvaniaarch04harruoft#page/318/mode/2up; Wilson, *supra*, Vol. 2, at 1107, PA122 (rejecting the "unfounded and pernicious" view that "the number of crimes is diminished by the severity of punishments"). Section 13 was adopted, not only for moral reasons, but also out of pragmatism and experience. In light of Pennsylvania's unique anticruelty history, any theoretical deterrent benefits of capital punishment should therefore be weighed against its potential to rationalize and catalyze violence.

But regardless of how the Court analyzes deterrence in theory, it is plain that Pennsylvania's current system of capital punishment lacks any such benefit. There have been upwards of 25,000 murders in Pennsylvania since the death penalty was reinstituted in 1978;[31] death sentences have been imposed 441 times (i.e., in approximately 2% of murders); there have been three executions (i.e., approximately 0.012% of murders have resulted in executions) but none against any prisoner

[31] *See* https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-20 (2017); http://www.disastercenter.com/crime/pacrime.htm (1978-2016).

contesting his conviction or sentence. *Cf. Gregory*, 427 P.3d at 646 (Johnson, J., concurring) ("Since 1987, five executions have occurred, three of which occurred when the defendants waived their right to challenge their convictions and sentences."). For Pennsylvania's actual death penalty system to foster deterrence, then, a potential murderer would need to restrain himself based on an infinitesimal risk of being executed many years in the future. As the JSGC explained:

> In a state like Pennsylvania with a relatively large number of death sentences but almost no executions, the deterrent effect of the death penalty is attenuated, regardless of whether a more vigorously applied death penalty would have a deterrent effect.

JSGC Report 166.

In reality, most murderers "act out of impulse, or, if the crime is planned in advance, they delude themselves that they are unlikely to be caught. When they are formulating the intent to murder, they do not fully take account of consequences." *Id.* at 168. As administered, Pennsylvania's system of capital punishment does not meaningfully serve, and is not necessitated by, the principle of deterrence.

2. Retribution

The principle of retribution, or vengeance, also fails to justify Pennsylvania's death penalty system. As set forth in Part I.B.1, *supra*, when Section 13 was adopted, capital punishment was understood to be inhumane unless "absolutely necessary to the public safety." 15 *Statutes at Large of Pennsylvania* 174 (1794), PA95. Vengeance alone, however, does not establish such necessity, particularly where a

lesser punishment can serve the same purpose. *See* JSGC Report 165; *see also Commonwealth v. Ritter*, 13 Pa. D. & C. 285, 290-91 (Phila. Cty. O. & T. 1930) (Stern, P.J.) (recognizing that "the works of all the standard penologists and moral philosophers of almost every country and of every age, especially in these latter days of greater humanitarianism," reject "the theory of retribution as a proper basis upon which to impose [the death penalty]"). As the JSGC Report put it: "The death penalty advances the purpose of retribution, but . . . life imprisonment without parole does this sufficiently to obviate the need for the death penalty." *Id.* at 165. And without "the need for the death penalty," Pennsylvania's capital punishment system violates Section 13.

Finally, even assuming that Section 13 tolerates the death penalty based solely on retribution, the arbitrary and unreliable manner in which death sentences are imposed, the decades-long delay in executing death sentences, and the extreme rarity of executions—even among death row prisoners—undermine any retributive benefit. The last time Pennsylvania obtained this supposed benefit was two decades ago, when three mentally ill death row prisoners waived their appeals and consented to execution during the 1990s. The last time Pennsylvania obtained any retributive benefit from an involuntary execution was in 1962. It would defy credulity to conclude that Pennsylvania's current death penalty system meaningfully advances the purpose of retribution.

CONCLUSION

Petitioners ask this Court to vacate their death sentences and the other death sentences in force in the Commonwealth; to order that all condemned prisoners be resentenced to life imprisonment; and to hold that, unless and until the Legislature repairs the system's deficiencies, Pennsylvania's system of capital punishment, as administered, violates Article I, Section 13, of the Pennsylvania Constitution.

Respectfully submitted,

/s/ Shawn Nolan
Shawn Nolan, Esq.
Timothy Kane, Esq.
Stuart Lev, Esq.
HELEN MARINO, First Assistant
LEIGH SKIPPER, Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis Center, Suite 545 W
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioners

Dated: February 22, 2019

CERTIFICATE PURSUANT TO RULE 2135

Undersigned counsel hereby certifies that the foregoing *Petitioners' Brief* contains 21,562 words as calculated by the word processing system used to prepare the brief. Counsel further certifies that an unopposed motion for leave to exceed the word limit of Pa. R.A.P. 2135 is being filed together with this brief.

/s/ Shawn Nolan
Shawn Nolan

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents different than non-confidential information and documents.

/s/ Shawn Nolan
Shawn Nolan

CERTFICATE OF SERVICE

I, Shawn Nolan, hereby certify that on this 22nd day of February, 2019, I filed the foregoing *Petitioners' Brief* through the Court's PACFile electronic filing system and thereby served the following:

Josh Shapiro, Attorney General
James Barker, Senior Deputy Attorney General
William Stoycos, Senior Deputy Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Larry Krasner, District Attorney
Paul George, Assistant Supervisor, Law Division
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107-3499

/s/ Shawn Nolan
Shawn Nolan