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**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**No. 103 EM 2018**

**KEVIN MARINELLI,**
Petitioner

**v.**

**COMMONWEALTH OF PENNSYLVANIA,**
Respondent

# BRIEF OF AMICUS CURIAE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH

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## INTEREST OF AMICUS CURIAE

The Pennsylvania District Attorneys Association ("PDAA") is the only organization representing the interests of District Attorneys and their assistants in the Commonwealth of Pennsylvania. These prosecutors represent the collective interests of the people of the Commonwealth in criminal matters, which directly impact on citizens' well-being and safety. This Court's decision on whether the death penalty remains constitutional in Pennsylvania, and is therefore available in appropriate cases, is of special interest to prosecutors throughout Pennsylvania.

**Certification pursuant to Pa.R.A.P. 531(b)(2):**

No person or entity other than the amicus paid in whole or in part for the preparation of this brief, or authored this brief, in whole or in part.

## INTRODUCTION

Petitioner does not come before this Honorable Court alleging errors in his trial, or claiming that the death penalty statute is unconstitutional as written. Rather, Petitioner seeks the wholesale abolition of capital punishment in Pennsylvania based on the 2018 Joint State Government Commission report (hereinafter "JSGC report") commissioned by the General Assembly, and intended for the General Assembly, which is full of biased policy arguments, and misleading data.

The PDAA respectfully submits that reliance on the JGSC report to assert this constitutional claim is utterly misplaced and affords no legal basis on which to render such a judicial determination. The PDAA asks this Honorable Court to reject Petitioner's request to rule Pennsylvania's death penalty unconstitutional.

## ARGUMENT

### I. Petitioner seeks this Honorable Court to act as legislators.

When reviewing a challenge to the constitutionality of the death penalty in 1982, this Court recognized that:

> In considering such an emotionally charged, controversial and polarizing issue such as the death penalty, the legislature is peculiarly well-adapted to respond to the consensus of the people of this Commonwealth. Regardless of the personal beliefs of any member of this Court, it is manifestly not our function or prerogative to perform as a super-legislature and disturb the determination of the General Assembly absent a demonstration that the legislative enactment *clearly, palpably* and *plainly* violates some specific mandate or prohibition of the constitution.

*Commonwealth v. Zettlemoyer*, 454 A.2d 937, 959 (Pa. 1982) (emphasis in original) (citations and internal quotations omitted).

When faced with a similar task, the U.S. Supreme Court ("USSC") issued the following warning on the limited role to be played by the courts:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

*Gregg v. Georgia*, 428 U.S. 153, 174-75 (1976) (citation omitted).

While the issue at stake in this appeal incites passions, its resolution relies on the sober application of long-established principles of statutory interpretation and

constitutional analysis, including, most significantly, that "in assessing a punishment selected by a democratically elected legislature against the constitutional measure, [the court] presume[s] its validity," and those attacking it bear a heavy burden. *Gregg*, *supra*, at 175. *See also Zettlemoyer*, *supra*, at 959-60.

The constitution does not require that the legislature "select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg*, *supra*, at 175; *Zettlemoyer*, *supra*, at 960. Indeed, "[t]he imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and England." *Gregg*, *supra*, at 176. Petitioner's own account of the evolution of Article 1, Section 13 of Pennsylvania's Constitution makes plain that capital punishment for murder has also been long-accepted within the Commonwealth. *See also Zettlemoyer*, 454 A.2d at 967 (observing that the framers of the U.S. and Pennsylvania Constitutions did not consider the death penalty to be a *per se* violation of the prohibition against "cruel punishments").

The *Zettlemoyer* Court also observed that "the most accurate indicators of those 'evolving standards of decency' are the enactments of the elective representatives of the people in the legislature." *Id.* at 968. Further, jurors themselves, in choosing between a life or death sentence, "maintain a link between

contemporary community values and the penal system." *Gregg*, *supra*, at 181 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968)).

Thus, it is against this backdrop that this Court must view Petitioner's claim that Pennsylvania's death penalty offends evolving standards of decency and is unconstitutional. Where, as here, Petitioner rests his claim on misleading data and illogical or speculative arguments pulled from a report that should be properly vetted by the legislative body which commissioned it, Petitioner fails to meet his heavy burden.

## II. Pennsylvania's death penalty statute conforms to constitutional standards by appropriately channeling the discretion of prosecutors and sentencing authorities.

While the USSC and this Court have repeatedly affirmed the constitutionality of the death penalty, they have also long recognized that "death is different." As such, the USSC has "required additional protections because of the nature of the penalty at stake." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). In particular, sentencing procedures governing the imposition of the death penalty must ensure that the discretion afforded a sentencing body are "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189.

Pennsylvania's death penalty procedures do constitutionally direct and limit imposition of the death penalty by limiting the number of cases eligible for the death

penalty and limiting the discretion the sentencing judge or jury has in imposing such a sentence. In *Zettlemoyer*, this Honorable Court approved the procedure enacted by the legislature in 1978 and embodied in 42 Pa. C.S. §9711. 454 A.2d at 950-51. That statute includes the following safeguards:

- A split-verdict procedure that requires a separate sentencing proceeding only after the jury returns a first-degree murder conviction;[1]

- At the sentencing proceeding, each party can present additional evidence and argument relating to the statutory aggravators and mitigators and defendant can present any other evidence of mitigation relating to his character or record, or the circumstances of the offense;

- The jury can only return a verdict of death if it unanimously finds at least one aggravating circumstance and no mitigating circumstances, or unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances;[2]

- The defendant need only prove mitigating circumstances by a preponderance of the evidence, and the jurors need not be unanimous about the existence of a mitigating circumstance in order to consider it. *See Commonwealth v. O'Shea*, 567 A.2d 1023, 1035-36 (Pa. 1989) (citing *Mills v. Maryland*, 486 U.S. 367 (1988)).

- Death sentences are subject to automatic review by this Court during which, in addition to the authority to correct errors at trial, the Court is required to review whether the sentence was the product of passion, prejudice or any other arbitrary factor and whether the evidence supports the finding of an aggravating circumstances, §9711(h)(3)(i-iii).

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[1] The bifurcated guilt and sentencing proceedings aid in eliminating constitutional deficiencies by ensuring that juries have access to relevant sentencing information while avoiding any potential prejudice such information may cause in the determination of guilt. *Gregg*, 428 U.S. at 191-92.

[2] Providing jurors guidance on what aggravation and mitigation should be weighed reduces the likelihood that the sentence imposed is arbitrary or capricious. *Gregg*, *supra*, at 194-95.

In short, a death sentence may only be imposed if a defendant gets convicted of first-degree murder and if the sentencing authority unanimously finds both that at least one of the enumerated aggravating factors has been proven beyond a reasonable doubt, and that the aggravator(s) outweigh any mitigating circumstances found by any juror.

In upholding the constitutionality of §9711, the *Zettlemoyer* Court noted "that perfection is not required, nor is it possible – there is no perfect procedure for deciding in which cases governmental authority should be used to impose a sentence of death." 454 A.2d at 959. This Court also observed that by constitutionally mandating juries to consider all mitigation evidence related to a defendant's character and record, a certain amount of "flexibility" and thus "imperfection" was built into the sentencing, which was necessary "to focus the jury's attention on the particularized nature of the crime and particularized characteristics of the offender, thus channeling the jury's discretion in order to ensure that, with the assistance of appellate scrutiny, the death sentence has not been imposed in an arbitrary or capricious manner." *Id.*

The same procedure deemed constitutional in 1982 remains largely unchanged today.[3]

[3] At the time of *Zettlemoyer* there were 10 aggravators, now there are 18. Also, after *Zettlemoyer*, the USSC ruled that the Eighth Amendment does not require a proportionality review by appellate courts in order for a state's death penalty statute to pass constitutional muster. *Pulley v. Harris*,

Petitioner does not contend that §9711 fails to comply with constitutional mandates or denies an individualized sentencing procedure as the constitution requires. Rather, Petitioner claims that systemic factors render the death penalty in Pennsylvania unreliable and arbitrarily-imposed. None of Petitioner's arguments support such a conclusion.

## III. Pennsylvania's death penalty is not "pervasively unreliable," but in fact ensures that such sentences meet all constitutional standards.

"Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills*, 486 U.S. at 383-84. What ensures death as the appropriate penalty in a particular case are the standards and procedures that channel the prosecutors seeking it, and the juries or judges imposing it. *See Herrera*, 506 U.S. at 405 ("We have, of course, held that the Eighth Amendment requires increased reliability of the *process* by which capital punishment may be imposed.") (emphasis added); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("[M]any 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

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465 U.S. 37 (1984). Pennsylvania eliminated automatic proportionality review in 1997. *See* Act of June 25, 1997, No. 28, § 1 (Act 28).

reliable exercise of sentencing discretion.") (emphasis added). Pennsylvania's standards and procedures do just that.

Petitioner would have this Honorable Court conclude that because so many death sentences have been reversed on appeal, the original sentence was "unreliable." On the contrary, that appellate courts have determined that the standards or procedures were not followed in a particular case is evidence that the standards and procedures – which include a robust appellate process – work.

As previously stated, an important aspect of the special procedures provided by §9711 is automatic appeal to this Court. 42 Pa. C.S. §9711(h)(3). Given the stakes involved in capital cases, both this Court and the federal courts also naturally apply a heightened standard of scrutiny, viewing each case with a more critical eye to ensure that all constitutionally rights have been safeguarded. As the USSC observed, such robust appellate review safeguards against such sentences being "imposed capriciously or in a freakish manner." *Gregg*, 428 U.S. at 195. Thus, that death sentences have been reversed on appeal is evidence that the process is working as it should, not that the process is unreliable.[4]

[4] Given the number of death sentences that have been reversed on appeal, Petitioner' argument that the scope of appellate review in capital cases has been dangerously limited is nonsensical. The notion that meritorious challenges to such convictions have been foreclosed is belied by the very data on which Petitioner relies.

Petitioner further contends that because so many of those reversals result in a sentence other than death means that the original imposition of the death sentence is unreliable. Petitioner's conclusion is specious. The cases listed in Petitioner's Exhibit A they tell a different story than the one Petitioner suggests. In some of those cases, the Court automatically imposed a life sentence upon a finding of error in the sentencing process. Additionally, in nearly a hundred of those remanded, the prosecutor agreed to withdraw the death sentence or negotiated a life sentence. In the vast majority of such instances, the case had been returned to the prosecutor's office at least a decade, often two decades or more, after the original sentencing. It is hardly surprising that more often than not, prosecutors lacked the ability or resources to retry those cases after such a lengthy passage of time. This is not evidence that the defendants were undeserving of the original sentence, but rather demonstrates the practical limitations of seeking another death sentence after a lengthy appellate process.[5]

[5]As least one case listed in Exhibit A, *Commonwealth v. Alfonso Sanchez* (PA033), is erroneously listed as having been reversed and not re-sentenced to the death penalty. Because the undersigned is involved in that case, she is aware that the Commonwealth agreed to a new trial and Sanchez is awaiting a new trial date. It is unclear whether Petitioner' exhibit contains other such misrepresentations. However, assuming that the dates of original sentencing and dates of reversal are accurately reported, the exhibit confirms that in 132 cases (excluding those in which the defendant was ruled ineligible for the death penalty), at least 10 years passed between the sentencing and the final order reversing the judgment of sentence. In 50 of those cases, 20 or more years passed before the case was remanded back.

Of course, while a robust appellate process is necessary to ensure that each death sentence comports with constitutional standards, the length of such appeals is in no small part due to the tactics employed by the very attorneys who now use this delay to bolster their claim that the death penalty is unreliable. Former Chief Justice Castille often described the abusive tactics of the Federal Community Defenders Office ("FCDO"), whose goal it is to "obstruct capital punishment in Pennsylvania at all costs." *Commonwealth Spotz*, 18 A.3d 244, 331 (Pa. 2011) (Castille, C.J., concurring). Through the use of "prolix and abusive pleadings," which often contain "trivial and frivolous claims" *Spotz* at 330, 332 (Castille, C.J., concurring), as well as repeated amendments and supplements to post-conviction collateral relief petitions, *Commonwealth v. Roney*, 79 A.3d 595, 643 (Pa. 2013) (Castille, C.J., concurring), and "multiple and redundant examinations" of their cadre of experts, *Spotz* at 332, the FCDO does not seek merely to ensure capital defendants received a fair trial. Rather, as Chief Justice Castille aptly observed, the FCDO has the "resources and the luxury to pursue a more global agenda...: to impede and sabotage the death penalty in Pennsylvania." *Spotz* at 335 (Castille, C.J., concurring). That agenda obviously now includes using this Court to advance their political cause of abolishing capital punishment.

In short, while it is clear that a robust appellate process exists in death penalty cases, any complaint by Petitioner (or the JGSC) that the lengthy appellate process

and its attendant costs contribute to a "broken" death penalty system is ludicrous given that the FCDO is the one who helped "break" it.

Petitioner also decries the lack of adequate funding for capital defense. They claim that because the legislature has failed to heed the recommendations of those, including the Honorable Chief Justice Saylor, regarding the need to improve the funding for capital defendants, it is this Court's duty to take matters into its own hands and rule the death penalty unconstitutional. Yet, one does not follow from the other.

While there are unquestionably cases where defense counsel were not provided sufficient resources or training to adequately defend their clients, there are also many cases where counsel's resources were adequate and their defense constitutionally proficient. How to remedy those instances where resources or training were inadequate is a question of policy to be addressed by the legislative and executive branches.[6] Where inadequate resources, or general incompetence, has deprived a defendant of constitutionally effective assistance of counsel, this Honorable Court (or the federal courts) have reversed such sentences. That is

[6] To that end, the General Assembly in this year's FY 2019-2020 Fiscal Code provided that "$500,000 shall be used by the Commission [on Crime and Delinquency] for grants to counties, which shall be used to reimburse costs for indigent criminal defense in capital cases." *See* Act 20 of 2019 (SB 712) at Subarticle B, Section 1712-J (4)(II).

precisely the remedy appropriate for the judiciary to impose in the face of an unconstitutional judgment of sentence, whether it be in capital cases or otherwise.

Petitioner's suggestion that this Court should instead eliminate the death penalty in all cases is simply illogical. Violations of the Sixth Amendment right to effective assistance of counsel that may occur in individual capital cases, regardless of their root cause, has no bearing on whether the procedure itself violates Section 13's prohibition against cruel punishments. Petitioner conflates the two concerns, and ask this Court to make a policy determination under the guise of a constitutional one. Should the Court accept this invitation, it is a slippery slope as these same funding concerns become the basis on which to rule other sentences – such as life without parole – unconstitutional.

Indeed, Petitioner's reliance on *Commonwealth v. Moody*, 382 A.2d 442 (Pa. 1977) illustrates this conflation. *See* Pet. Brief, p. 52. *Moody* ruled that Pennsylvania's then-extent death penalty statute was unconstitutional because the statute limited the mitigating circumstances (of which there were only three), that the jury could consider, and thus "preclude[d] the jury from a constitutionally adequate consideration of the character and record of the defendant." 382 A.2d at 447.

Here, there is no allegation that §9711 impermissibly limits a jury's consideration of mitigation evidence. It does not. Rather, Petitioner alleges that

inadequate funding has led to the failure of counsel in certain instances to present adequate mitigation evidence. Reviewing courts, such as this Court, have addressed this Sixth Amendment issue when it arises. It does not, however, reflect on the constitutionality of the process itself under Section 13.

The PDAA wholly supports adequate funding and training for capital defense. Prosecutors know that no one suffers more when a judgment of sentence is overturned on appeal than the family of murdered victims – especially years after the trial when the families believed they had closure. But prosecutors also know that certain cases cry out for the most severe punishment. To have the possibility of such a sentence removed entirely from the criminal justice system because some of those sentences will ultimately be overturned is to make the system less just.

Finally, Petitioner also claims that prosecutors routinely engage in prosecutorial misconduct in capital cases, suggesting the "emotion, expense, publicity, and political implications" incentivize unethical behavior. Pet. Brief, p. 52. Notably, according to Petitioner's Exhibit A – which encompasses all 264 reversals of capital cases since 1978 – only 18 cases were vacated due to *Brady* violations and four for *Batson* violations (all from the 1970s and 1980s). Thus, to support their argument, Petitioner resorts to the speculative assertion that these numbers understate the problem. Pet. Brief, p. 54. His only "support" for this self-serving assertion is that *Batson* and *Brady* claims are difficult to prove.

Petitioner's claim rests not on evidence, but on the cynical premise that prosecutors are routinely in the practice of picking juries based on race and hiding evidence from the defense. Every prosecutor should be offended when one of their fellow prosecutors engages in such a practice. But to suggest that it regularly occurs and yet remains hidden from view is pure fiction.

Petitioner contends that the allegedly unknown number of *Brady* and *Batson* violations "undermines public faith in the capital punishment system as a whole." Pet. Brief, p. 55. In fact, feeding the narrative that police and prosecutors routinely act unethically to secure convictions is what undermines public faith in the capital punishment system, and in the criminal justice system as a whole. When that narrative is built on anecdotal evidence and conjecture, propped up with outdated data, it is the very proponents of that narrative that do harm to public confidence in our justice system.

## IV. There is no credible evidence that the discretion of prosecutors and sentencing authorities is used in a discriminatory fashion.

Petitioner is simply wrong when he claims that there is too much unfettered discretion in Pennsylvania's death penalty scheme. First, there are entire groups of individuals against whom prosecutors may not seek the death penalty no matter how horrific the crime: the criminally insane, *Ford v. Wainwright*, 477 U.S. 399 (1986); the intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002); and juvenile offenders, *Roper v. Simmons*, 543 U.S. 551 (2005). In addition, there are specific

statutorily-enumerated aggravating factors, at least one of which must be provable beyond a reasonable doubt in order for a first-degree murder to qualify as a capital murder. As the USSC stated in upholding Pennsylvania's death penalty, "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by the jury." *Blystone v. Pennsylvania,* 494 U.S. 299, 206-07 (1990).

The *Gregg* Court addressed a similar argument regarding prosecutorial discretion:

> At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration of a candidate for the death penalty. [...] Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* [*v. Georgia*, 408 U.S. 238, 308 (1972)] held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

*Gregg, supra,* at 200.

Justice White went even further, stating as follows:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the

> death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.

*Id.* at 225 (White, J., concurring). This Honorable Court agreed with this reasoning in *Commonwealth v. DeHart*, 516 A.2d 656 (Pa. 1986), and rejected the claim that the exercise of prosecutorial discretion – "the heart of the prosecution function" – rendered the death penalty cruel and unusual punishment. *Id.* at 670.

Nevertheless, Petitioner claims that discretion in the death penalty system is not sufficiently channeled and is based on impermissible factors. The various arguments asserted by Petitioner to support this claim are meritless.

### A. The number of aggravating factors does not result in arbitrary or capricious death sentences.

Petitioner complains that there are too many aggravating circumstances such that virtually all first-degree murders qualify for the death penalty. Of course, there is absolutely no authority for the proposition that there is a constitutional maximum on the number of aggravating circumstances a statute can enumerate. There is not.

Furthermore, the data does not support Petitioner's fear-mongering. The 2017 study conducted by John Kramer and his colleagues at Pennsylvania State University (hereinafter "the Kramer report")[7] found that for the 18 counties included in the

[7] John Kramer et al., "Capital Punishment Decisions in Pa.: 2000-2010" (Sept. 2017), available at https://justicecenter.la.psu.edu/research/projects/files/the-administration-of-the-death-penalty-in-pennsylvania-pdf.

study (which covered more than 80% of the first-degree murders in Pennsylvania during the time period) 4,274 murders were charged between 2000 and 2010; of those, only 1,115 were eligible for the death penalty. *See* Kramer report, p. 38; *see also id.* at 114 ("The large majority of defendants in first-degree murder cases do not face the death penalty.") According to the statistics cited by the JGSC, of those cases in which the death penalty was originally pursued between 2011 and 2017, only 5.6% of them resulted in the imposition of the death sentence. *See* JGSC Report, p. 237. These statistics clearly demonstrate that the discretion of prosecutors and sentencing authorities alike are being channeled as the statute directs and the constitution demands, despite the number of aggravating circumstances.

Moreover, as demonstrated in the table attached hereto as Exhibit A, the number of aggravating factors does not correlate with the percentage of the population on death row. Several states that have fewer aggravating circumstances than Pennsylvania have a higher percentage of death row inmates, including Nevada (14 aggravators), Arizona (14 aggravators), North Carolina (11 aggravators), Louisiana (9 aggravators), and Mississippi (8 aggravators). Utah, with its 19 aggravators, has a lower percentage of its population on death row. Thus, there is no correlation between the number of aggravating circumstances and the number of defendants on death row.

Constitutional challenges to various specific aggravators have been made to this Court, and rejected. Whether certain aggravating circumstances should be eliminated from §9711 as a matter of policy is an argument to be made to the legislature. Asking this Court to abolish the death penalty entirely based on the number of aggravators has no basis in law or reason.

**B. <u>That death row inmates disproportionately suffer from mental illness and/or intellectual disability is speculative and misleading.</u>**

Petitioner relies on the JGSC report to suggest that death row is disproportionately filled with those who are mentally ill and/or intellectually disabled, and that this "fact" is another arbitrary factor undermining Pennsylvania's death penalty. Even a cursory review of JGSC's analysis of these factors, however, reveals that it is inaccurate and unreliable, as are Petitioner's arguments based thereon.

The JGSC report relies on Pennsylvania Department of Corrections' ("DOC") data regarding inmates' IQ scores and suggests that these numbers are meaningful. They are not. As the JGSC itself acknowledges, albeit in a footnote, a diagnosis of intellectual disability ("ID") cannot rest on IQ alone. *See* JGSC Report, p. 121 n. 832. Rather, an ID diagnosis requires three prongs: (1) an IQ score of approximately 70 or below (with a standard error measurement of plus or minus 5); (2) significant adaptive deficits; and (3) onset during the developmental period (pre-18). DSM-V, Intellectual Disability, p. 37. Moreover, cognitive functioning can

diminish over time due to chronic substance abuse. *See* Thomas J. Gould, *Addiction and Cognition*, 5(2) Addiction Science & Clinical Practice 4, 7 (2010) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3120118).

Procedures exist for defendants to assert their ineligibility for the death penalty based on ID, both prior to sentencing and post-conviction, and have been successfully utilized as evidenced by Petitioner's Exhibit A. The suggestion, based solely on IQ scores contained in DOC records, that as many as 14% of current death row inmates may have ID is wholly disingenuous.

Equally unavailing is the attempt of the JGSC and Petitioner to inflate the number of death row inmates with "severe mental illness" based on current diagnoses by the DOC and conflate mental illness with incompetency or insanity. The criminal justice system accounts for the role of mental illness in a variety of ways: providing legal insanity as a defense to a criminal act; accounting for mental illness as a mitigating factor at sentencing, 42 Pa. C.S. §§9711(e)(2) and (e)(3); ensuring that those who are legally insane are not executed; and suspending criminal proceedings or a death sentence where a defendant is incompetent.

Yet, Petitioner contends this is insufficient. He seeks an exemption from the death penalty for those who are mentally ill, suggesting that such defendants, like those with ID, are less culpable and less deserving of execution. Pet. Brief, p. 89. This proposition not only lacks legal support, but is also disturbing as a practical

matter. The term "mental illness" is vast and includes "illnesses" such as pedophilic disorder, narcissistic personality disorder, antisocial personality disorder, and substance abuse disorder. *See, generally,* DSM-V. Were mental illnesses such as these to become a basis for diminishing moral culpability and individual responsibility for even the most heinous of crimes, hired experts would become the arbiters of justice and public confidence in the criminal justice system would crumble. Should the legislature so decide, it is their prerogative. But to ask this Court to make a constitutional ruling on this basis is untenable.

### C. JGSC's statistics on county-to-county disparities are unreliable and, even where county differences exist, such differences are not unconstitutional.

Petitioner, in reliance on the JGSC report, claims that statewide geographical disparities render the death penalty arbitrary. To support this claim, the JGSC report compares Allegheny and Philadelphia counties because they have similar populations. *See* JGSC Report, p. 67. Yet, the rate of imposition of death versus life sentences for eligible first-degree murders as compared to the overall population of the county is a meaningless statistic. To understand whether disparity exists in seeking the death penalty, one need know the number of death-eligible murders committed during that same time period. According to Pennsylvania's Uniform Crime Reporting System, in 2018, Allegheny County had 93 criminal homicides, compared to Philadelphia County's 359. Similar numbers existed in 2017: 97

homicides in Allegheny; 319 in Philadelphia. *See* https://ucr.psp.state.pa.us. While those represent all homicides generally, it plainly demonstrates that county population is not an indicator of how many murders occurred, let alone how many death-eligible murders occurred.

Similarly flawed is the chart generated by the JGSC in their report (Appendix K, p. 261), which purports to show disparate ratios of death to life sentences by county based upon the 2015 inmate population. If, as the name suggests, it simply looked at the inmate population in 2015 by county, that number too is statistically meaningless. Life sentences may have been imposed for felony murders, or for first degree murders that were not death-eligible. Inmates serving life sentences in 2015 may have been sentenced decades ago. Without being able to compare the rate of death-eligible murders to the rate of death sentences imposed in a specific time frame, the ratios contained in that chart tell us nothing. Yet, Petitioner relies on it to assert that "Mr. Marinelli was prosecuted in Northumberland County, which has one of the highest death-sentence-to-life-sentence ratios in the Commonwealth." Pet. Brief, p. 13.

The Kramer report, using a propensity score weighting model, does conclude that between 2000 and 2010, Allegheny County was less likely to seek the death penalty than the other counties included in the study. Kramer report, p. 100. In addition, prosecutors retracted notices of intent to seek the death penalty far more

often in Philadelphia than in the other 17 counties in the field study. *Id.* at v. Moreover, defendants in Philadelphia and Allegheny County were less likely to receive the death penalty than in the other 16 counties in Kramer's study. *Id.* While the reasons behind these statistics are not clear, the numbers themselves are no indication that any group of prosecutors, judges, or juries from any county based their decisions on impermissible factors.

Petitioner nevertheless asserts that the mere existence of intra-state differences renders the death penalty unconstitutionally arbitrary. While the legislature may decide that uniformity of the death penalty under a common state-wide framework is desirable, there is no constitutional mandate to do so. Residency is not a constitutionally protected status. Prosecutors exercising discretion in charging decisions within their respective counties has never before been deemed unconstitutional in the absence of such discretion being exercised in a discriminatory fashion. Indeed, were the existence of discretion in the criminal justice system itself a basis for excluding a particular sentence from consideration, no sentence would be safe from such an attack.[8]

[8] Petitioner suggests that this Court's dicta in *Commonwealth v. Eisenberg*, 98 A.3d 1268 (Pa. 2014), supports county-by-county comparisons of death sentences as a valid basis on which to analyze sentencing proportionality. Pet. Brief, p. 76. This reliance is misplaced and misleading. The *Eisenberg* Court, in suggesting that an "intra-Pennsylvania approach" might be persuasive, was referring to comparison of the mandatory fine imposed in that case as compared to the fines imposable for other crimes in Pennsylvania. 98 A.2d at 1283. The Court did not suggest that comparing imposition of a certain sentence across counties was persuasive evidence that a sentence was constitutionally disproportionate.

Discretion cannot be eliminated, nor should it be. It is discretion that permits the prosecutor not to seek the death sentence when circumstances warrant even when aggravating factors exist; it is the discretion of judges and juries that often results in life sentences rather than death sentences. As *Gregg* observed, acts of mercy in the exercise of discretion do not render the death penalty unconstitutional so long as the discretion to seek and impose the death sentence is appropriately channeled by reference to legal and discernible standards. *Id.* at 199. Pennsylvania's statute does just that.

Many factors go into the calculation of whether to seek the death penalty in the first instance, even in those cases where aggravating circumstances exist. For example, the prosecutor may be aware early on of compelling mitigation evidence that warrants against seeking death. He or she may agree not to seek the death penalty in exchange for vital information (such as the location of the victim's body), cooperation against a more culpable defendant, or for a plea, which spares the victim's family of the ordeal of trial. The prosecutor may conclude, as a case develops, that there is insufficient evidence to pursue aggravating circumstances.[9]

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[9] Petitioner seems to suggest that there is something nefarious or arbitrary about the decision to withdraw notice of aggravating factors after it is filed. However, the law requires the prosecutor to file notice early in the case – at or before the time of arraignment. *See* Pa. R.Crim.P. 802. It is hardly surprising that a prosecutor will file notice in order to preserve the Commonwealth's ability to pursue the death penalty where aggravating circumstances exist, and then later determine – for a variety of valid, nondiscriminatory reasons – not to pursue it.

The material question is not whether disparity exists among prosecutors in seeking the death penalty, or among juries and judges in imposing it. The material question for purposes of determining whether Pennsylvania's death penalty is unconstitutional is whether that discretion is exercised based on constitutionally impermissible factors. The data does not support Petitioner's assertion that it is.

### D. The role of race and indigency, while complex, does not support a finding that death sentences are based on race or poverty.

In claiming that Pennsylvania's death penalty system is infected with racial bias, Petitioner, like the JGSC, supports his argument in large part by relying on data from one county – Philadelphia – from the 1980s and 1990s. *See* Pet. Brief, pp. 82-83 (citing David 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 (1998)). Petitioner and the JGSC minimize the findings of the more recent Kramer report, which analyzes data from 18 counties (including Philadelphia) from a more recent time period, 2000 to 2010. Kramer's findings do not support the position that race is a significant factor in Pennsylvania's death penalty system.

While Black male defendants undoubtedly are overrepresented on death row in comparison to their percentage of the population, Kramer also observed that of the 552 arrests for murder that occurred in 2010 (the last year of their data set), 92% were male and 68% were Black. Kramer report, p. 3. Once charged, however,

prosecutors sought the death penalty at lower rates for Black defendants (33%) than for White defendants (36%) or Hispanic defendants (56%). *Id.* at 64. Among the 313 cases in which prosecutors initially filed death penalty motions, prosecutors retracted those filings in 36% (27/76) of cases with White defendants, 49% (97/197) of cases with Black defendants, and 54% (19/35) of cases with Hispanic defendants. *Id.* at 65. Finally, Kramer's data showed that 39% of White defendants, 25% of Black defendants, and 38% of Hispanic defendants who faced the death penalty received it. *Id.* at 66. It is no wonder, then, that Kramer and his colleagues unequivocally concluded that "[n]o pattern of disparity to the disadvantage of Black or Hispanic defendants was found in prosecutorial decisions to seek and, if sought, to retract the death penalty." *Id.* at iv.

Petitioner seeks the extraordinary intervention of this Court purporting to have new evidence that the death penalty in Pennsylvania is based on arbitrary factors that render it unconstitutional. Yet, in the face of new data that refutes his claim that race of the defendant affects decision-making in capital cases, Petitioner instead relies on outdated data from a narrower cohort of defendants.

The Kramer report did find that race of the victim was a factor as to when prosecutors sought the death penalty, but the data tells a more complicated story than Petitioner portrays. Prosecutors were 21% more likely to seek the death penalty in cases involving Hispanic victims than in cases involving either White or Black

victims. Kramer report, p. iv. Defendants of any race with White victims were 8% more likely to receive the death penalty, while defendants with Black victims were 6% less likely to receive the death penalty. *Id.* at v. However, Black defendants with White victims were not more likely to receive the death penalty than defendants in other types of cases. *Id.* at iv.

Similarly, the statistics on indigency (specifically public versus private defense counsel) found by Kramer and his colleagues also suggests a more nuanced analysis than Petitioner portrays. While defendants represented by privately-retained attorneys were 4-5% less likely to receive the death penalty, prosecutors were 7-8% less likely to file a death penalty motion against a defendant represented by a public defender. Kramer report, pp. iv, 119-20. Though in death penalty cases, approximately 38% of White defendants were represented by privately-retained attorneys, compared to 30% of Black defendants and 29% of Hispanic defendants, *id.* at 74, this did not result in a higher proportion of White defendants receiving a life sentence. *Id.* at 66.

It cannot be denied that race, gender, poverty, education, and mental health play a role in why crimes are committed, against whom, how defendants and victims approach the criminal justice system, and how the criminal justice system approaches them. But there is simply no new, reliable data on which to conclude that such factors significantly or impermissibly affect how the death penalty is

administered in Pennsylvania. In fact, the newest objective data demonstrates race of defendants is not a significant factor.

Moreover, the impact of race, indigency, and the like is hardly limited to death penalty cases. To suggest that the presence of such factors renders the death penalty unconstitutional is to impugn the whole of the criminal justice system, which necessarily relies on human beings – and all our imperfections – to administer it. Of course "death is different," and it is tempting to thus conclude that these imperfections warrant an end to the death penalty. Yet, prosecutors know too well that the kinds of murders that warrant a death sentence are also different. By attempting to balance out imperfections in the criminal justice system by removing the death penalty entirely is to create an imbalance of a different kind for the victims, families and communities that fall prey to the most depraved and inhumane of crimes.

Petitioner contends that retribution for such exceptional crimes by way of the death penalty is mere vengeance, and life without parole is always an adequate punishment. Implicit in this proposition is that all murders and murderers are created equal. Prosecutors know better, and so do the communities they serve.

As the USSC observed decades ago:

> [C]apital punishment is an expression of society's moral outrage at particularly offense conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.

*Gregg*, 418 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J. concurring)). This is no less true today.

Distinguishing those murders that are exceptional in their brutality or offensiveness and imposing an exceptional sentence in such cases is not barbaric or vengeful, but is at the very core of the validity of the justice system. To dismiss it, especially by judicial fiat as Petitioner asks this Court to do, is legally wrong and morally dangerous.[10]

Petitioner contends that public confidence in the death penalty system is diminished, yet ignore the effect on public confidence in the criminal justice system – and government generally – of asking the judiciary to upend the death penalty scheme enacted by the legislature, entitled to a presumption of constitutionality, and

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[10] Whether the death penalty has a deterrent effect is more complicated. Thus, the PDAA respectfully submits that this Court should heed the following wisdom:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with the flexibility of approach that is not available to the courts.

*Gregg*, 428 U.S. at 186 (citing *Furman*, 408 U.S. at 403-04 (Burger, C.J., dissenting)).

upheld for decades, based on biased data and illogical arguments. The PDAA therefore urges this Court to reject Petitioner's constitutional challenge to Pennsylvania's death penalty.

## CONCLUSION

For these reasons, the PDAA requests that this Court deny Petitioner's request to declare Pennsylvania's death penalty unconstitutional under Article I, Section 13 of the Pennsylvania Constitution.

Respectfully submitted,

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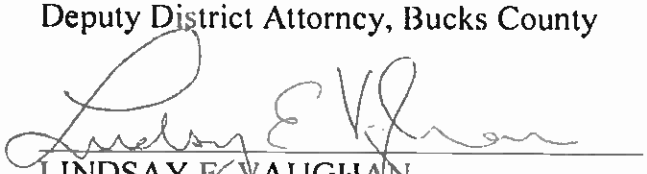

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## CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with Pa. R.A.P. 2135(d) (certificate of compliance) and Pa. R.A.P. 531(b)(3) (length of amicus briefs), as it contains not more than 7,000 words, but contains 6896 words, excluding all supplementary matters that may be excluded under Rule 2135(b).

## CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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# EXHIBIT A

Table 1: States organized by number of aggravating factors:

| State | Other DP Crimes? | # of Aggravating Factors | # of Mitigating Factors | Death Row Prisoners | Population | % of Population on Death Row |
|---|---|---|---|---|---|---|
| California | Yes | 22 | 11 | 740 | 39,557,045 | 0.0018707% |
| Alabama | No | 19 | 7 | 182 | 4,887,871 | 0.0037235% |
| Utah | No | 19 | 3 | 9 | 3,161,105 | 0.0002847% |
| Pennsylvania | No | 18 | 7 | 158 | 12,807,060 | 0.0012337% |
| Colorado | Yes | 17 | 12 | 3 | 5,695,564 | 0.0000527% |
| Missouri | No | 17 | 7 | 25 | 6,126,452 | 0.0004081% |
| Florida | Yes | 16 | 8 | 354 | 21,299,325 | 0.0016620% |
| Indiana | No | 16 | 8 | 11 | 6,691,878 | 0.0001644% |
| Virginia | No | 15 | 6 | 3 | 8,517,685 | 0.0000352% |
| Tennessee | No | 15 | 0 | 61 | 6,770,010 | 0.0009010% |
| Nevada | No | 14 | 6 | 76 | 3,034,392 | 0.0025046% |
| Arizona | Yes | 14 | 5 | 121 | 7,171,646 | 0.0016872% |
| South Carolina | No | 12 | 10 | 39 | 5,024,369 | 0.0007762% |
| Wyoming | No | 12 | 7 | 1 | 577,737 | 0.0001731% |
| Oregon | No | 12 | 0 | 33 | 4,190,713 | 0.0007875% |
| North Carolina | No | 11 | 8 | 143 | 10,383,620 | 0.0013772% |
| Georgia | Yes | 11 | 0 | 56 | 10,519,475 | 0.0005323% |
| Idaho | Yes | 11 | 0 | 9 | 1,754,208 | 0.0005131% |
| Arkansas | Yes | 10 | 6 | 32 | 3,013,825 | 0.0010618% |
| Ohio | No | 10 | 6 | 142 | 11,689,442 | 0.0012148% |
| South Dakota | No | 10 | 0 | 3 | 882,235 | 0.0003400% |
| Louisiana | No | 9 | 8 | 70 | 4,659,978 | 0.0015022% |
| Nebraska | No | 9 | 7 | 12 | 1,929,268 | 0.0006220% |
| Texas | No | 9 | 0 | 228 | 28,701,845 | 0.0007944% |
| Kentucky | Yes | 8 | 8 | 31 | 4,468,402 | 0.0006938% |
| Mississippi | Yes | 8 | 7 | 46 | 2,986,530 | 0.0015402% |
| Oklahoma | No | 8 | 2 | 48 | 3,943,079 | 0.0012173% |
| Kansas | No | 7 | 9 | 10 | 2,911,505 | 0.0003435% |
| Montana | Yes | 4 | 7 | 2 | 1,062,305 | 0.0001883% |

Sources: Death Penalty Information Center, AGGRAVATING FACTORS FOR CAPITAL PUNISHMENT BY STATE, https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state (last visited June 13, 2019);
Lenamon, Terry, List of State Death Penalty Mitigation Statutes, https://www.jdsupra.com/post/documentViewer.aspx?fid=d61d8c7b-896b-4c1a-bd87-f86425206b45 (last visited June 12, 2019). (cited by Death Penalty Information Center);
NAACP Legal Defense Fund, "Death Row USA" (October 1, 2018);
U.S. Census Bureau, Population Division, "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018" (December 2018).