IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 14 EM 2015

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

TERRANCE WILLIAMS, TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE PHILADELPHIA BAR ASSOCIATION, PENNSYLVANIANS FOR ALTERNATIVES TO THE DEATH PENALTY, AND THE JEWISH SOCIAL POLICY ACTION NETWORK, IN SUPPORT OF RESPONDENTS TERRANCE WILLIAMS AND TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA

King's Bench proceeding under Pa. Const. Art. V, § 2 and Pa. Const. Sched. Art. V, § 1 regarding the Governor's reprieve issued to bar execution of the capital sentence imposed by the Court of Common Pleas of Philadelphia County at CP-51-CR-0823601-1984.

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INTEREST OF *AMICI CURIAE*

Amicus **American Civil Liberties Union of Pennsylvania** ("ACLU-PA") is the Pennsylvania state affiliate of the American Civil Liberties Union, a nonprofit, nonpartisan organization founded in 1920 to protect and advance civil liberties throughout the United States. ACLU-PA has over 17,000 members in the Commonwealth of Pennsylvania. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty embodied in the United States and the Pennsylvania Constitutions. The ACLU-PA has a long-standing interest in the fair administration of the criminal justice system, and in particular the application of the death penalty, and in addressing racial bias within the system. Moreover, the ACLU-PA has for the past twenty years devoted substantial resources to addressing major funding deficiencies and sub-constitutional performance in Pennsylvania's indigent defense systems, filing class action lawsuits alleging systemic violations of the Sixth and Fourteenth Amendment against Allegheny and Luzerne Counties, and engaging in non-litigation advocacy in other counties and in the state legislature.

Amicus **Philadelphia Bar Association** ("Bar Association"), founded in 1802, is the oldest association of lawyers in the United States and Pennsylvania's largest local bar association. It draws its approximately 13,000 members from a number of Pennsylvania counties. The legal community looks to the Bar

Association for guidance on controversial legal issues, as well as professional support and information sharing.

The Bar Association does not often seek to become involved in litigation as amicus curiae, and does so only as to issues that have potentially far-reaching effects on the judicial system and the practice of law, issues unquestionably raised by the instant case. The Bar Association recognizes the profound issues surrounding the adequacy of representation of indigent defendants, and the effects these concerns have on the practice of law and the administration of justice. As a result, the Bar Association vigorously petitions this Court to uphold Governor Wolf's reprieve in this matter until a holistic review of Pennsylvania's death penalty system is completed.

Formed in 1909, *Amicus* **National Association for the Advancement of Colored People** ("NAACP") is a non-profit organization established with the objective of insuring the political, educational, social and economic equality of minority groups. The NAACP's mission is to eliminate race prejudice and remove all barriers of racial discrimination through democratic processes. As the nation's oldest and largest civil rights organization, the NAACP has been on the forefront of the struggle to eliminate disparities in the criminal justice system, and in particular in the application of the death penalty.

The NAACP believes that the death penalty causes harm to the families of crime victims due to the long and complicated appeals process which is highly susceptible to errors. Further, the death penalty has been disproportionately applied against minority and poor defendants, and is affected by the location where the offense occurred and whether a particular prosecutor decides to seek the ultimate punishment.

Founded in 1997, *Amicus* **Pennsylvanians for Alternatives to the Death Penalty** ("PADP") is a grassroots organization dedicated to ending capital punishment in Pennsylvania. PADP is the largest anti-death penalty organization in the state, and is the convening organization for the Pennsylvania Moratorium Coalition which is made up of 18 diverse organizations, all calling for a halt on executions.

PADP supports safe and fair alternatives to executions, and believes that the state's current capital punishment system is costly, fallible, and rife with racial, geographic and economic disparities. As a result, PADP joins this brief in support of Governor Wolf's reprieve and seeks a comprehensive review of Pennsylvania's death penalty.

Amicus **Jewish Social Policy Action Network** ("JSPAN") is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. The Jewish

pnaeople have history of more than 2000 years of struggling with the issue of capital punishment. Although some Biblical texts prescribe the death penalty for certain offenses, subsequent rabbinic interpretation and debate resulted in stringent rules that severely limited the possibility of applying the death penalty in practice. Rabbinical exchanges from the First and Second Centuries reflect the same debates that concern legal scholars to today over (1) the deterrent value of capital punishment, (2) the need to have certainty of guilt, which had to be proven by the testimony of at least two eyewitnesses, and (3) concern that the method of execution be carried out with the minimum of suffering and without offense to human dignity. Applying these principles, the Talmud[1] in tractate *Makkoth* (7a) declared:

> The Sanhedrin[2] that executes one person in seven years is called "murderous." Rabbi Elazar ben Azariah says this extends to one execution in seventy years. Rabbi Tarfon and Rabbi Akiva say, "If we had been among the Sanhedrin, no one would ever have been executed."

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[1] The Talmud, which was compiled in the Fifth Century, is the authoritative body of Jewish tradition. See Encyclopædia Britannica, http://www.britannica.com/topic/Talmud (accessed June 16, 2015).

[2] The Sanhedrin was the "supreme legislative council and highest ecclesiastical and secular tribunal of the Jews, consisting of 71 members ..." and exercising its greatest authority from the Fifth Century B.C.E. until the fall of Jerusalem to the Romans in the year 70. *See Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989).

With this tradition as background, the death penalty has been described as one of the matters of highest priority to the entire American Jewish community. Since 1959, the Central Conference of American Rabbis and the Union for Reform Judaism have formally opposed the death penalty. In 1996, the Rabbinic Assembly of the Conservative movement adopted a resolution opposing the adoption of any new death penalty laws and urging the abolition of existing death penalty laws. In 1999, a report of the National Jewish/Catholic Consultation, co-sponsored by the National Council of Synagogues and the Bishops' Committee for Ecumenical and interreligious Affairs of the National Conference of Catholic Bishops, concluded that the Jewish and Catholic communities should work together, and within their own communities, toward ending the death penalty. In 2000, the Union of Orthodox Congregations of America endorsed support for a nationwide moratorium on executions pending a comprehensive review of how the death penalty is administered in American courts.

Because JSPAN shares these concerns, it commissioned a Policy Center more than a decade ago to examine current issues involving the death penalty. As a result of that effort JSPAN has opposed the death penalty as it is currently applied in the United States. JSPAN joins in this brief supporting Governor Wolf's reprieve in furtherance of its policy that "to the extent that capital punishment remains in effect at all, the death penalty must be applied in the most restricted

manner possible, in the narrowest of circumstances, with such substantive and procedural safeguards as are adequate and sufficient to assure to the fullest extent possible that the death penalty is applied in the most accurate, fair, and equitable manner as human frailty will allow."[3] Because **none** of these standards is met in Pennsylvania at the present time, Governor Wolf's reprieve is necessary to protect constitutional liberties and civil rights, especially those of racial and other minorities who are disproportionately victimized by the current system.

SUMMARY OF ARGUMENT

Governor Wolf's reprieve in this case should be upheld – allowing time for death penalty reforms to be proposed and acted upon before any executions – because Pennsylvania's capital punishment system fails to provide equal justice under the law. This is not a recent development—the system has been broken for years. Indeed, the enduring failure of the capital punishment system led the Pennsylvania Senate, through Resolution No. 6 of 2011, to establish the Task Force and Advisory Committee on Capital Punishment to examine the administration of the death penalty in the Commonwealth in 17 different areas of study and report its findings. The Senate emphasized that the study was warranted because (1) "[p]ostconviction DNA testing has shown that there are wrongful

[3] Jewish Social Policy Action Network, *Criminal Justice and Death Penalty Policy Center*, http://jspan.org/content/death-penalty-policy-center (last accessed June 17, 2015).

convictions, even in capital cases"; (2) "[t]he Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System has determined that racial, ethnic and gender biases exist and that those biases significantly affect the way parties, witnesses, litigants, lawyers, court employees and potential jurors are treated"; and (3) "[t]he American Bar Association has identified several areas in which Pennsylvania's death penalty system falters in guaranteeing each capital defendant fairness and accuracy in all proceedings[.]"

On February 13, 2015, Governor Tom Wolf granted a temporary reprieve to inmate Terrance Williams because Pennsylvania's "capital punishment system has significant and widely recognized defects." The reprieve is scheduled to remain in effect until the Governor has received and reviewed the forthcoming report of the Senate's Task Force and Advisory Committee on Capital Punishment and any recommendations contained therein are satisfactorily addressed.

The Governor's actions—in addition to being authorized under Article IV, § 9 of the Constitution of Pennsylvania—are appropriate in light of the pervasive and debilitating failures of the capital punishment system. In particular, **(I)** the system fails to "get it right"—*i.e.*, it fails to prevent erroneous capital convictions and death sentences, as evidenced by the number of condemned defendants (six in Pennsylvania alone) who later were acquitted or had their capital charges dropped; **(II)** racial biases of prosecutors and juries have caused glaring disparities in death

sentences rendered in Pennsylvania; and **(III)** indigent individuals time and time again have received constitutionally inadequate representation, as evidenced by numerous comprehensive studies and the high reversal rate for death sentences in Pennsylvania.

As Governor Wolf stated in granting the temporary reprieve, "[i]f we are to continue to administer the death penalty, we must take further steps to ensure that defendants have appropriate counsel at every stage of their prosecution, that the sentence is applied fairly and proportionally, and that we eliminate the risk of executing an innocent. Anything less fails to live up to the requirements of our Constitution, and the goal of equal justice for all towards which we must continually strive."[4]

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[4] Governor Wolf is one of a number of state executives who has invoked a state constitution to halt an execution due to a system's failure to provide equal justice under the law. *See, e.g.*, ***Washington*** – Governor Inslee's remarks announcing a capital punishment moratorium, Feb. 11, 2014 ("Equal justice under the law is the state's primary responsibility. And in death penalty cases, I'm not convinced equal justice is being served."); ***Colorado*** – Executive Order D 2013-006, Death Sentence Reprieve, May 22, 2013 ("The inmates currently on death row have committed heinous crimes, but so have many others who are serving mandatory life sentences . . . . The fact that those defendants were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this State, and demonstrates that it has not been fairly or equitably imposed."); ***Oregon*** – Governor Kitzhaber Statement on Capital Punishment, Nov. 22, 2011 ("Oregonians have a fundamental belief in fairness and justice – in swift and certain justice. The death penalty as practiced in Oregon is neither fair nor just; and it is not swift or certain. It is not applied equally to all.").

ARGUMENT

I. Pennsylvania Fails To Prevent Erroneous Capital Convictions And Death Sentences.

The Commonwealth's capital sentencing system is "riddled with flaws, making it error prone, expensive, and anything but infallible."[5] Six individuals convicted and sentenced to death in Pennsylvania have been exonerated, their convictions overturned. These individuals lost many years on death row waiting for the Commonwealth to take their lives without just cause. The National Registry of Exonerations specifically lists five of these individuals in its database: [6]

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[5] *See* Governor Wolf's Memorandum, *available at* http://www.governor.pa.gov/Pages/Pressroom_details.aspx?newsid=1566#.VX8UOsjD-Hs (last visited June 16, 2015).

[6] With respect to the definition of "exoneration," the Registry provides that:

> A person has been ***exonerated*** if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action . . . .

See National Registry of Exonerations – Glossary (emphasis added), *available at* https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited June 16, 2015).

- ***Nicholas Yarris*** was convicted in 1982 and exonerated in 2003 because of DNA evidence,[7] a false confession, perjury or false accusation, and official misconduct.

- ***Jay Smith*** was convicted in 1986 and exonerated when his murder conviction was overturned and this Court in 1992 forbade a retrial. Smith was exonerated because of perjury or false accusation, false or misleading forensic evidence, and official misconduct.

- ***William Nieves*** was convicted in 1994 and exonerated in 2000 when he was acquitted after he was granted a new trial. Nieves was exonerated due to mistaken witness identification, perjury or false accusation, and official misconduct.

- ***Thomas Kimbell*** was convicted in 1998 and exonerated in 2002 when he was acquitted after he was granted a new trial. Kimbell was exonerated because of perjury or false accusation.

- ***Harold Wilson*** was convicted in 1989 and exonerated in 2005 when he was acquitted after his second retrial. Wilson was exonerated because of DNA evidence and official misconduct.

See National Registry of Exonerations.[8]

While not within the scope of the Registry's definition of "exoneration," Neil Ferber was also wrongfully convicted, and his case serves as an example of

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[7] *See* National Registry of Exonerations – Glossary, *available at* https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited June 16, 2015) (*defining each of the contributing factors*)

[8] *Available at* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 16, 2015); *see also* https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited June 16, 2015) (defining each of the contributing factors).

the flaws in the current system in Pennsylvania. *See Exonerated in Pennsylvania*, Reading Eagle, Dec. 15, 2014.[9] Ferber was sentenced to death in 1982. It was later revealed that police had given a polygraph to the jailhouse informant who had testified against Ferber. The informant failed the test, but police never passed on the information to the District Attorney or Ferber's defense attorneys. Additionally, a police department sketch artist used a mug shot of Ferber to develop a sketch of the person identified by a witness. In 1986, the charges against Ferber were dropped after his conviction was overturned. *Id.*

Although the Commonwealth's brief, at footnote 4, claims a semantic distinction between innocence and exoneration, even the Commonwealth cannot dispute that repeated instances of prosecutorial misconduct, false accusations, and withheld exculpatory evidence would have led to these individuals' execution if those failures had not later been uncovered by the courts. *See* D.A. Br. at 14 n.4. The District Attorney may want to claim "they were bad guys anyway," but must concede—at a minimum—absence of proof of guilt beyond a reasonable doubt.

In addition to the cases already mentioned, the case of death row inmate James Dennis recently made headlines. In *Dennis v. Wetzel*, Judge Brody of the U.S. District Court for the Eastern District of Pennsylvania overturned Dennis'

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[9] *Available at* http://readingeagle.com/news/article/exonerated-in-pennsylvania (last visited June 16, 2015).

conviction, stating that he was "sentenced to die for a crime in all probability he did not commit." 966 F. Supp. 2d 489, 490 (E.D. Pa. 2013), *vacated and remanded sub nom, Dennis v. Sec'y, Pa. Dep't of Corr.*, 777 F.3d 642 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (May 6, 2015).[10] Judge Brody found errors in all facets of the case, noting that "improper police work characterized nearly the entirety of the investigation." *Id.* at 494. She described the prosecution as a "grave miscarriage of justice" and criticized the defense for failing to adequately investigate the evidence. *Id.* at 497. Dennis has been on death row for over 20 years following a conviction for the 1991 murder of a high school student. *Id.* at 518. Judge Brody ordered the Commonwealth to retry him in six months or set him free. *Id.* at 490-91.

The types of problems that Judge Brody identified in *Dennis* are systemic. In particular, *Brady* violations by prosecutors in Pennsylvania have resulted in courts granting new trials in capital cases on numerous occasions. *See, e.g.*, *Commonwealth v. Strong*, 761 A.2d 1167, 1175 (Pa. 2000) (reversing trial court's denial of PCRA relief to defendant based on Commonwealth's failure to disclose understanding between government and key witness that witness would be treated with considerable leniency in exchange for his testimony against defendant);

[10] This case is scheduled to be heard *en banc* by the U.S. Court of Appeals for the Third Circuit.

Commonwealth v. Green, 640 A.2d 1242, 1245-46 (Pa. 1994) (reversing capital sentence and remanding for new trial where prosecution violated both *Brady* and corresponding procedural rule by failing to disclose witness's statements about accomplice's alleged out-of-court statements in which accomplice claimed responsibility for murder); *Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3d Cir. 2011) (vacating a capital conviction and stating that "[we] are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense").

In addition to prosecutorial misconduct, the allowance of misleading or inaccurate forensic evidence in capital cases has also led to wrongful convictions. *See* National Registry of Exonerations (listing contributing factors that led to the exoneration of numerous individuals sentenced to death in Pennsylvania).[11] Indeed, the FBI recently agreed to conduct a review of criminal cases involving microscopic hair analysis after three men were exonerated when it was discovered that their convictions rested, at least in part, on the flawed testimony of three different FBI hair examiners. *See* Federal Bureau of Investigation, *FBI Testimony*

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[11] *Available at* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 16, 2015)

on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, Apr. 20, 2015.[12] The FBI review revealed that examiners' testimony in at least 90% of the trial transcripts analyzed contained erroneous statements. *Id.* Of particular relevance here, 29 of the trials analyzed by the FBI took place in Pennsylvania, and 6 of the trials in Pennsylvania sent people to death row.[13]

These cases in which convictions were erroneously obtained due to prosecutorial misconduct, flawed investigations, and/or shoddy forensics show that Pennsylvania's capital sentencing system has failed on multiple occasions and is anything but infallible. It cannot be disputed that those exonerated death row inmates could have been executed if DNA evidence had not been discovered or recantations had not occurred. Indeed, more people could be facing execution at this moment because of such errors. The Governor's reprieve is necessary in light of these pervasive and debilitating failures so that the Commonwealth can work towards eliminating the risk of executing an innocent.

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[12] *Available at* https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review (last visited June 16, 2015).

[13] Adam Hersh, *FBI: We Gave Flawed Testimony in 6 Pennsylvania Death Row Cases*, Philadelphia Magazine, Apr. 22, 2015, http://www.phillymag.com/news/2015/04/22/fbi-hair-analysis-pennsylvania-death-row-cases/ (last visited June 16, 2015)

II. Racial Biases Of Prosecutors And Juries Have Caused Disparities In Death Sentences In Pennsylvania.

Even under the most careful of death penalty regimes, race continues to play a major role in determining who shall live and who shall die. It is simpler to believe that racism is an artifact of the past, a fight won. Yet even as explicit race-based decisions have declined, empirical studies consistently demonstrate that race discrimination remains in the administration of the death penalty within the United States, including in Pennsylvania.

A. Pennsylvania's Capital Punishment System Has Been—And Continues To Be—Plagued By Racial Bias.

In granting the temporary reprieve to Terrance Williams, Governor Wolf explained that numerous recent studies "suggest that inherent biases affect the makeup of death row" and 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." Despite these strong indications that race plays a role in the imposition of the death penalty, it has been over twelve years since Pennsylvania last examined the impact of race on capital punishment within the Commonwealth. It is for just that reason that the Senate's Task Force and Advisory Committee on Capital Punishment needs to complete its comprehensive review of race and the

death penalty in Pennsylvania before the Commonwealth continues with any executions.

The last comprehensive review of this topic was completed in 2003 by the Committee on Racial and Gender Bias in the Justice System—a Committee appointed by this Court in 1999 to study the role racial bias played in the Pennsylvania justice system. The Committee's final report revealed that racial bias affects the system in many ways—both overtly and covertly. *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System* (2003) ("Racial and Gender Bias Report") at 199-227. The Committee examined empirical studies conducted in Pennsylvania and found that, at least in some counties, "race plays a major, if not overwhelming, role in the imposition of the death penalty." *Id.* at 218. To reach this conclusion, the Committee relied on studies showing that:

- African American jurors were underrepresented in Philadelphia, Allegheny, Montgomery, and Lehigh counties—all of the counties sampled in a particular study. *Id.* at 70.
- In Philadelphia, the most extensively studied county, race was a major factor in capital jury selection. *Id.* at 201.
- In Philadelphia, African American defendants were sentenced to death at a significantly higher rate than similarly situated non-African Americans. *Id.*
- In Pennsylvania as a whole, jurors are more likely to determine death is the appropriate punishment early in proceedings for non-white defendants—this occurred 37% of the time for non-white defendants versus 8% of the time for white defendants. *Id.* at 208.

- In Pennsylvania as a whole, among white jurors reporting doubt after a decision to convict, that doubt was more likely to affect sentencing decisions for white defendants. *Id.*

While the twelve-year-old Racial and Gender Bias Report is limited in scope to just four counties within the Commonwealth, recent death row demographic information published by the Pennsylvania Department of Corrections—showing that, of the 181 individuals currently on death row, 115 are non-white—suggests that its findings hold true for counties across the Commonwealth today. Moreover, the primary issues of racial bias identified in the Racial and Gender Bias Report—*i.e.*, (1) racial bias in the context of jury selection and prosecutorial strikes and (2) racial bias amongst jurors themselves—undermine all notions of fairness in Pennsylvania's capital punishment system.

B. Explicit Racial Bias In The Selection of Juries Undermines The Fairness Of Pennsylvania's Capital Punishment System.

Despite precedent from the U.S. Supreme Court proscribing the use of race in the prosecutorial use of peremptory strikes—most notably *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny—race still infects the juror selection process, throughout the United States, and specifically in Pennsylvania.[14]

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[14] The potential impact of race on jury selection is, for example, illustrated by the Terrance Williams case. At his trial, the prosecutor used 14 of 16 peremptory strikes on black juror members. This is grossly out of proportion to the overall venire of 111 persons, which included 43 black members. In fact, the prosecutor struck black persons at a rate that is seven times greater than her rate of

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In Pennsylvania specifically, a review of jury selection for 317 capital cases in Philadelphia between 1981 and 1997 showed prosecutorial strikes used for 51% of black venire members compared to 26% of white venire members. *See* David C. Baldus, *et al.*, *The Use Of Peremptory Challenges In Capital Murder Trials: A Legal And Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 121-30 (Feb. 2001);[15] *see also* Testimony of David Baldus, Philadelphia Public Hearing Transcript, at 67, 85 (2001) ("Baldus Testimony"). While this data is over a decade old, there is no more recent data showing that race is no longer used in jury selection in Pennsylvania. To the contrary, Pennsylvania courts have continued to find instances in which prosecutors used race as a basis for peremptory strikes. *See Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004) (concluding that the prosecutor's

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striking white persons. *See* Petitioner's Mem. in Reply to Resp'ts Resp. to Guilt Phase Claims and Resp'ts Resp. to Penalty Phase Claims, *Williams v. Beard*, 2:05-cv-03486-MMB, Dkt. 31, at 43, 45-48.

[15] This is not the "Baldus Study" that formed the evidentiary basis for the discrimination claim brought in *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc), which the District Attorney's brief incorrectly suggests is cited in support of the Governor's temporary reprieve. See D.A. Br. at 14-15, n. 4; Baldus, David C., et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. OF CRIM. LAW AND CRIMINOLOGY 661 (1983). In fact, the Governor's statement that "one third of the African Americans on death row from Philadelphia would not have received the death penalty were they not African American" was taken from this Court's Committee on Racial and Gender Bias in the Justice System Final Report. See Governor Wolf's Memorandum at 3; Racial and Gender Bias Report at 201-02, 205-09.

use of 11 of 12 peremptory strikes against potential black jurors was sufficient to establish a *prima facie* showing of discrimination); *Hardcastle v. Horn*, 368 F.3d 246, 258 (3d Cir. 2004) (holding that the prosecution's assertion that the striking of two prospective jurors was race neutral merely because the prosecutor had an opportunity to observe them during *voir dire* was inadequate on its face and amounted to no more than a blanket assertion that the prosecutor acted on nondiscriminatory intuition, which was insufficient to meet the *Batson* stage-two requirement); *Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005) (concluding that a *Batson* violation occurs even if "the prosecutor passes up the opportunity to strike some African American jurors" where the prosecutor used 12 of his 14 peremptory strikes against African Americans).

More recent non-Pennsylvania data suggests that, in an effort to avoid *Batson* challenges, prosecutors still engage in aggressive questioning of black jurors to find a race-neutral reason to strike. *See* Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy*, at 16-18 (2010). For example, prosecutors have described the grisly details of an execution only to non-white potential jurors or asked those potential jurors whether they have a problem

with law enforcement—in an apparent effort to create "race neutral" reasons to strike non-white venire members. *See id.*[16]

This problem of racial bias in the use of peremptory strikes is one that has persisted for many years in Pennsylvania. As this Court is well aware, in 1986, a Philadelphia Assistant District Attorney trained district attorneys to exclude people of color from juries as a prosecutorial strategy. On the training videotape, he explicitly instructed his audience to use race-based stereotypes and biases to select juries:

> And that is—and, let's face it—there's the blacks from the low-income areas are less likely to convict. It's just—I understand it. It's understandable proposition. There is a resentment for law enforcement, there's a resentment for authority, and, as a result, you don't want those people on your jury. And it may appear as if you're being racist or whatnot, but, again, you are just being realistic. You're just trying to win the case.

Wilson v. Beard, 426 F.3d 653, 656 (3d Cir. 2005) (quoting the McMahon tape).

The videotape garnered national attention. *See Former Philadelphia Prosecutor Accused of Racial Bias*, N.Y. Times (Apr. 3, 1997).[17] Because some of

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[16] In one notable example, the prosecutors in Thomas Joe Miller-El's murder trial explained to 53% of black venire members, in graphic detail, the mechanics of execution in Texas as a predicate question to determining their view of the death penalty. This description and question was asked of only 6% of white venire members. *See* Baldus, *et al.*, *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*. 97 IOWA L. REV. 1425, 1436 (2011-2012).

the individuals currently sitting on death row in Pennsylvania, including Terrance Williams, were tried and sentenced during this era, the Assistant District Attorney's comments still resonate even though the training occurred thirty years ago.

The utter failure of the capital punishment system in Pennsylvania to guarantee equal justice under the law has been contributed to, in part, by racially motivated peremptory strikes and a resulting lack of diversity on juries. This is evidenced by a Capital Jury Project study, wherein researchers interviewed 74 jurors from Pennsylvania capital cases, reflecting 27 different trials, and determined that juries with 6 or more white male members resulted in significantly higher death sentencing rates (100% versus 47%). *See* Wanda D. Foglia, *Report on Capital Decision-Making in Pennsylvania for Committee on Racial and Gender Bias in the Justice System* (2002).

Thus, racial bias in the selection of juries—which is still very much a problem in Pennsylvania—undermines the notion that the Commonwealth's capital punishment system guarantees equal justice under the law.

(continued...)

[17] *Available at* http://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html (last visited June 16, 2015).

C. Implicit Racial Biases Of Juries Undermines The Fairness Of Pennsylvania's Capital Punishment System.

The implicit racial bias found in jurors—and especially found in majority-white juries—compounds the racial effects of the widespread exclusion of people of color from capital juries. Implicit bias is a stereotype or an attitude that operates inside an individual's mind without their awareness, intention or control. *See* Jerry Kang, *Implicit Bias: A Primer for Courts* (2009). As a result, a person can sincerely believe that he or she is race neutral yet still can be subject to implicit bias in his or her decision-making. Decisions that are highly subjective—such as whether an individual should be sentenced to death—are particularly vulnerable to implicit bias.

Despite a juror's best efforts, he or she will ultimately rely on his or her personal experience during deliberations. This phenomenon, wherein a person maintains a bias in favor of his or her group, is called "ingroup bias." When a white juror experiences ingroup bias based on race, he or she has a favorable implicit bias toward a white defendant while feeling unable to connect with a black defendant. Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)* in *Implicit Racial Bias Across the Law* (ed. Justin D. Levinson & Robert J. Smith), 229, 239 (2012); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol., 597, 606

(2006) (discussing the benefits of diverse juries); Sara Gordon, *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*, 48 Ind. L. Rev. 415 (2015) (discussing issues of conformity in jury deliberations). As a result, "[i]mplicit bias colors the way that jurors evaluate the evidence." Smith & Cohen, *supra* at 234. And, of several explanatory variables, a defendant's race remains an important predictor of jury sentencing decisions.

Research suggests that white jurors evaluating a black defendant are more likely to find the defendant to appear more dangerous than if he had been white. Put differently, when race is not salient—that is, when race is not an important or conscious issue in a criminal case—white mock jurors perceive black defendants to be more criminally-inclined. *See* S. Sommers & P. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, PSYCHOLOGY, PUBLIC POLICY, AND LAW, Vol. 7, No. 1 (2001). These jurors are then more likely to convict black defendants. Likewise, they are more likely to impose a severe sentence. In fact, black defendants with stronger Afro-centric features are more likely to be sentenced to death by white jurors than black defendants with less stereotypically black features. *See* Jennifer Eberhardt, *et al.*, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes* (2006) ("Controlling for a wide array of factors, [they] found that in cases involving a White victim, the more stereotypically Black

a defendant is perceived to be, the more likely that person is to be sentenced to death.").[18]

The implicit bias of jurors is particularly dangerous—and uncontrolled—in the sentencing phase of a capital case. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected.").[19] Not only does this phase rely heavily on jurors' subjective decision-making, but it requires jurors to rely on community-based standards to evaluate aggravating and mitigating factors. As noted above, when white jurors look at a black man, they are more likely to conclude that he appears more

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[18] Implicit bias can also act to dehumanize black defendants. One study exploring the frequency of animalistic references to capital defendants in 600 capital cases prosecuted in Philadelphia between 1979 and 1999 found that there were four times as many dehumanizing references for black defendants in comparison to white defendants in news articles covering capital cases. *See* Philip A. Goff, *et al.*, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psychol., 292, 292, 303 (2008). Disturbingly, the study also found a strong correlation between the number of dehumanizing references in an article and the likelihood that a defendant ultimately would be sentenced to death.

[19] The Court continued, "[o]n the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id.*

dangerous. *See* Eberhardt, *supra*; Smith & Cohen, *supra* at 235. It is a simple step from that implicit attitude to a conclusion that an aggravating factor, such as that the murder was committed by means of torture, is present in a particular case. Indeed, when a defendant is black, race has been shown to have the same aggravating effect on jury sentencing decisions as the presence of two legitimate aggravating circumstances. *See* Baldus Testimony at 64. So too are white jurors less likely to find mitigating factors present for a black defendant. His experience is not theirs; he does not look like their brother or father. A lack of shared experiences makes it more difficult to readily identify with any proposed mitigation circumstances.

Empirical research repeatedly demonstrates the effect of implicit bias in jury decision-making. A study examining capital case sentencing in Philadelphia between 1983 and 1993 suggests that black defendants are treated more punitively than white defendants. *See* 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) (comparing proportion of black defendants to all death-eligible defendants, 0.78, against proportion sentenced to death by the jury, 0.85). That study is consistent with a national meta-analysis of studies examining racial bias in juror decision-making across the United States, which found a significant effect of racial bias in juror

verdicts and sentencing. *See* T. Mitchell, R. Haw, J. Pfeifer, C. Meissener, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, Law and Human Behavior, Vol. 29, No. 6 (Dec. 2005). The effect of a non-racially diverse jury is, in short, a denial of a defendant's right to a fair trial through the removal of deliberative thoroughness based on different viewpoints.

The unavailability of more recent studies on the effect of race in Pennsylvania's capital justice system underscores the importance of the Senate's Task Force and Advisory Committee on Capital Punishment project. In short, the Governor's temporary reprieve is necessary to allow the Task Force to assess the extent to which race plays a role in the operation of the death penalty in Pennsylvania. Both the Governor and the Legislature appropriately want to act based on evidence, not supposition, in addressing the Commonwealth's capital justice system—the Senate Task Force's final report and recommendations will allow them to do just that.

III. Pennsylvania Systematically Fails To Provide Constitutionally Adequate Representation to Capital Defendants.

It is indisputable that the extreme sanction of capital punishment should not be used if the accused is not provided fully effective counsel before, during, and after trial. "The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes 'effective assistance' be applied especially stringently

in capital sentencing proceedings." *Strickland v. Washington*, 466 U.S. 668, 715-16 (1984) (Marshall, J., dissenting).

Unfortunately, Pennsylvania fails to guarantee constitutionally effective assistance of counsel in cases of life and death. Until the systemic problems with capital representation are addressed, the Governor's decision to halt executions is the only fair result.

A. Pennsylvania Is Not Meeting Its Constitutional Mandate To Provide Effective Assistance Of Counsel In Capital Cases.

"Between eighty (80%), and ninety (90%) percent of the defendants in [capital] cases are indigent and require court appointed counsel." *Commonwealth v. McGarrell*, No. 77 EM 20011, at 9 (Feb. 21, 2012) (Lerner, J., Report and Recommendation). *See also* American Bar Association, *Evaluating Fairness and Accuracy In State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report*, at 112 (Oct. 2007) ("ABA Report") (noting that the large majority of capital defendants statewide are unable to pay for their own defense).

Pennsylvania has no single system for providing capital defense. In many counties, capital defendants are represented by county public defender offices—often by part-time assistant public defenders. In other counties, the court will appoint counsel for capital defendants, either at a flat rate or at an hourly rate with or without a cap, depending on the custom in that county. And in Philadelphia, 20% of indigent homicide case defendants are assigned to the Defender

Association of Philadelphia, where the cases are handled by an expert team of specialists. The remaining 80% are represented by court appointed counsel from the private bar who are paid a flat rate to prepare the case, then paid per diem for trial.[20] *McGarrell*, No. 77 EM 20011, at 9 (Lerner, J., Report and Recommendation); *see also* 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, 159, 161 (2012).

Numerous surveys of the quality of capital representation across the Commonwealth—as well as this Court's experience—establish that the prosecution and defense of capital cases in Pennsylvania is rife with avoidable error. The first of these studies—published in 2000—looked at capital convictions from 1979 through 1995, and found that 29% were reversed by Pennsylvania courts on direct appeal or post-conviction relief petitions, while 40% were reversed on federal habeas petitions (with some overlap in the cases), with a combined failure rate of 57%. *See* James S. Liebman *et al.*, *A Broken System: Error Rates in*

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[20] Until recently, the flat fee to prepare a capital case for trial was $2,000. *See* 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, 163 n.25 (2012); Joseph A. Slobodzian, *Phila. courts increase pay for capital defense*, The Philadelphia Inquirer, Feb. 29, 2012, *available at* http://articles.philly.com/2012-02-29/news/31111129_1_court-appointed-lawyers-defense-lawyers-court-appointments (last visited June 16, 2015).

Capital Cases, 1973-1995, State Report Card, Pennsylvania.[21] The Liebman study noted that, nationally, the most common error prompting reversal involved "egregiously incompetent defense lawyers who didn't even look for—and demonstrably missed—important evidence that the defendant was innocent or did not deserve to die." Liebman *et al.* at ii, 5.

More recent surveys have used slightly different measurements and reached different conclusions as to the rate of reversal of capital convictions in the Commonwealth, but all of them show a very high rate of error. For instance, in October 2011, the *Philadelphia Inquirer* reported that nearly one-third of the 391 capital convictions in Pennsylvania since the modern death penalty took effect in 1978 resulted in reversals or remands for new hearings because defense lawyers' mistakes deprived the accused of a fair trial. *See* Nancy Phillips, *In life and death cases, costly mistakes*, The Philadelphia Inquirer, Oct. 23, 2011.[22]

A later survey by the Department of Justice's Bureau of Justice Statistics found that, of the 417 individuals who were sentenced to death in Pennsylvania between 1973 and 2013, 188 had their sentence or conviction overturned—that is more than 45%. *See* U.S. Department of Justice, Bureau of Justice Statistics,

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[21] *Available at* http://www2.law.columbia.edu/instructionalservices/liebman (last visited June 16, 2015).

[22] *Available at* http://mobile.philly.com/news/?id=132389898 (last visited June 16, 2015).

Capital Punishment, 2013 – Statistical Tables, Table 17 (revised December 19, 2014). *See also* Naomi Creason, *Defense attorneys: Pennsylvania's death penalty system puts unfair cost burden on counties*, The Sentinel, Mar. 29, 2015.[23] In sum, "[n]early as many death convictions are overturned in Pennsylvania as are handed down each year, the majority of them due to ineffective assistance of counsel." Elena Scotti, *Pennsylvania's Legal Injection Fiasco*, The Daily Beast, Sept. 18, 2014.[24]

Beginning in 2004, this Court required that capital counsel meet increasingly stringent prerequisites in terms of training and experience. *See* Rule 801 of the Pennsylvania Rules of Criminal Procedure. The Court intended these training requirements to enforce minimum and uniform standards for capital defense statewide in an effort to ensure that capital defense counsel possess the knowledge and experience to provide competent and professional representation for capital defendants. *See* Pa. R. Crim. P. 801 cmt. Those requirements were sorely needed, but clearly have not eliminated the pattern of errors in capital cases.

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[23] *Available at* http://cumberlink.com/news/local/defense-attorneys-pennsylvania-s-death-penalty-system-puts-unfair-cost/article_11378b7b-6fbf-5f8b-806f-154bf18bd1af.html (last visited June 16, 2015).

[24] *Available at* http://www.thedailybeast.com/articles/2014/09/18/pennsylvania-s-lethal-injection-fiasco.html (last visited June 16, 2015).

From these recent data, it appears that the conclusion reached by the American Bar Association in 2001 remains true: "[d]espite the best efforts of the many principled and thoughtful actors who play roles in the criminal justice process in the Commonwealth of Pennsylvania, our research establishes that, at this point in time, Pennsylvania cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed." ABA Report at vi. In particular, the ABA observed that "[t]he Pennsylvania indigent defense system falls far short of complying with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)." *Id.* at xv.

This Court has, of course, dealt with these problems first-hand and, moreover, has made clear that a large part of the problem lies with the quality of capital defense. *See Commonwealth v. McGarrell*, 87 A.3d 809, 810 (Pa. 2014) (Saylor, J., dissenting, with Todd, J., and McCaffery, J., joining) ("During my tenure on the Court I have been dismayed by the deficient performance of defense counsel in numerous Pennsylvania death-penalty cases."); *id.* at 811-12 (McCaffery, J., dissenting, with Todd, J., joining) ("[A]lthough the reforms instituted thus far have had the salutary intended effect of improving somewhat the system for providing legal services to indigent capital defendants, the work is certainly not done . . ."); *Commonwealth v. King*, 57 A.3d 607, 635-38 (Pa. 2012)

(attaching "a partial list of [25] cases in which sentencing relief has been granted over the last ten years in the Pennsylvania state courts based on deficient stewardship of capital defense attorneys.") (Saylor, J., concurring); *Commonwealth v. Johnson*, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring) ("My only comment is to express continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide the professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claims.") (citation omitted). [25]

These are not problems that crop up in cases sporadically—they are systemic and show that our criminal justice system is failing consistently in exactly the type of case where failure of due process is unthinkable. "Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential component

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[25] This problem is not limited, of course, to capital representation. On October 15, 1999, this Court appointed the Committee on Racial and Gender Bias in the Justice System to undertake a study to determine whether racial or gender bias plays a role in the Pennsylvania's justice system. In so undertaking, the Committee also examined the indigent defense system and, in 2003, reported that "[d]espite the expansive procedural rights afforded under law, indigent criminal defendants in Pennsylvania are not assured of receiving adequate, effective representation." Racial and Gender Bias Report at 164.

of such administration." *King*, 57 A.3d at 635 (Saylor, J., concurring). The Governor's decision to hold off on executions while searching for a solution is manifestly reasonable—indeed, any other path is difficult to justify.

Most recently, in 2012, scientists and economists at RAND published a study in the Yale Law Journal pertaining to the indigent defense system in Philadelphia, referencing cases from 1994 to 2005. According to the study, compared to appointed counsel, attorneys of the Defender Association of Philadelphia—who are randomly assigned 20% of indigent homicide defendants—have much greater success in preventing wrongful convictions in comparison to appointed counsel. *See* 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, 154, 159 (2012). The researchers concluded that their findings "raise questions as to whether current commonly-used methods for providing indigent defense satisfy Sixth Amendment legal tests for effective counsel and Eighth Amendment prohibitions against arbitrariness in punishment." *Id.* at 159-60.[26]

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[26] The case of Terrance Williams is indicative of the capital defense system's failures in this regard, as highlighted in these comprehensive reports. For example, Williams' attorney met Williams for the first time only two days before the start of voir dire, a week and two days prior to the start of the taking of evidence, and a mere 28 days before the penalty phase started and ended. *See Williams v. Beard*, No. 2:05-cv-03486 (E.D. Pa.), Dkt. 31 at 8-9. This occurred even though

(continued...)

B. The Flaws In Pennsylvania's Representation For Capital Defendants Cannot Be Fixed Through Appellate Review Or On A Case-by-Case Basis.

These problems described above are not ones that can be effectively addressed through case-by-case judicial review. They require fundamental changes in the way defense is provided for indigent capital defendants. There are successful models of capital defense, but until such services are available to all defendants across the Commonwealth, a capital defendant's life may be saved or lost depending on the location of the prosecutions or, quite literally, the turn of a wheel.

As noted above, Pennsylvania has no state-wide system for ensuring adequate defense for indigent defendants, capital or otherwise, and no consistent system for appointing or paying lawyers for the indigent. *See McGarrell*, 87 A.3d at 810 (Saylor, J., dissenting) ("Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the *ad hoc* fashion by which indigent defense services are funded from the local government level.").

(continued...)

Williams' attorney was assigned to represent Williams some sixteen months before he decided to meet with Williams. *Id.* at 9 n.12.

As a Joint State Government Commission Advisory Committee concluded in 2011, "the indigent defense system (IDS) of the Commonwealth is inadequate to reliably afford defendants the rights they are guaranteed under the Constitutions of the United States and of Pennsylvania." *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania, Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants* (2011) ("Services to Indigent Criminal Defendants Report") at 13. Capital defense mirrors the same problems that plague all indigent defense in Pennsylvania.[27] *See also* Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 Widener L.J. 1, 11 (2013) ("Funding of indigent defense services, obviously, is a major source of concern."). As stated by

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[27] In its report, the Advisory Committee commented on the Commonwealth's progress (or lack thereof) since the Racial and Gender Bias Report was issued in 2003. The Advisory Committee noted that, in 2003, Pennsylvania, South Dakota, and Utah were the only states that provided no state funds to ensure that indigent citizens are afforded adequate criminal defense services and "[i]n the intervening eight years, the only significant change is that South Dakota and Utah now do provide some state funding for indigent defense, leaving Pennsylvania as the *only state* that does not appropriate or provide for so much as a penny toward assisting the counties in complying with *Gideon*'s mandate." Services to Indigent Criminal Defendants Report at 2. "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 state-wide public defender program or contributes to the costs of county public defender programs." Anderson & Heaton, 122 Yale L.J. at 160.

the National Right to Counsel Committee, "'it is totally unrealistic to expect that effective representation will be delivered unless systems of public defense are adequately funded.'" *Id.* (quoting Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (Apr. 2009)).

Particularly in capital cases, a proper defense comes with substantial cost—especially the cost of investigation. *See Commonwealth v. Sanchez*, 36 A.3d 24, 80 (Pa. 2011) ("Indeed, it is no secret that capital cases are more time-consuming and expensive than non-capital cases.") (Orie Melvin, J., concurring and dissenting) (joined by Todd, J.). "[A]s a matter of federal constitutional law, the Supreme Court of the United States has recognized that extensive investigative and preparatory obligations rest with capital defense counsel." Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 Widener L.J. 1, 20 (2013) (citing *Wiggins v. Smith*, 539 U.S. 510 526-27 (2003) and *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

Indeed, in a capital case, the investment in investigation is at least as crucial for the sentencing phase as it is for conviction. "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at at 398. As recognized by the U.S. Supreme Court, "investigations into mitigating

evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) at 93 (1989)). "[I]n the absence of an adequate investigation—regardless of how one may feel about the usefulness of the information which might have been collected—as a matter of federal constitutional law, a death-penalty lawyer's stewardship is indisputably lacking." Saylor, 23 Widener L.J. at 9 (citing *Wiggins*, 539 U.S. at 522-23).

As noted above, the most common reason for the reversal of capital convictions is the failure of capital defense lawyers to perform adequate investigation: "defense lawyers who didn't even look for—*and demonstrably missed*—important evidence that the defendant was innocent or did not deserve to die." Liebman *et al.* at ii, 5 (emphasis in original). Comprehensive preparation for criminal defense—and particularly capital defense—requires access to social workers, independent investigators, and secretarial staff. *See* Services to Indigent Criminal Defendants Report at 91. However, "[b]oth nationally and in Pennsylvania, many indigent defense lawyers must make do without sufficient—or in some cases any—assistance from such staff." *Id.* In 2011, the Advisory Committee of the Joint State Government Commission reported that many county

Public Defender Offices lack any investigators and some are forced to make do without *any staff* besides the Chief Public Defender and the assistants. *Id.* This situation ultimately results in significant prejudice to defendants in capital trials.

The situation is often no better for capital defendants represented by court appointed attorneys rather than public defenders. Many court-appointed lawyers work for a flat fee, or for a nominal hourly rate. The dangers of that type of arrangement were laid out in disturbing detail in the recent review of capital defense in Philadelphia. On September 28, 2011, this Court directed Judge Benjamin Lerner to address the alleged inadequacies in Philadelphia's capital defense fee schedule. *See Commonwealth v. McGarrell*, No. 77 EM 20011 (Feb. 21, 2012) (Lerner, J., Report and Recommendation). Judge Lerner found that "the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate, both as to the dollar amount of the compensation and as to the compensation schedule provided by the present fee system . . . ." *Id.* Judge Lerner recommended establishing hourly compensation (in contrast to flat fee compensation) at a rate of $90 per hour for attorneys appointed to defend a capital case. *Id.*

Following Judge Lerner's report, the flat fee for preparing a capital case for trial was substantially increased. *See* Notice to all Capital Defense Counsel and Members of the Criminal Defense Bar, John W. Herron, Chair of the

Administrative Governing Board, Feb. 22, 2012. Nonetheless, the schedule as enforced in Philadelphia County remains highly problematic. Notably, the new fee schedule disregards Judge Lerner's most significant recommendation—that an hourly compensation system be implemented. Moreover, the addition of a per diem payment, which is provided only after a lawyer expends five days in a courtroom, does not cure the backward incentives of the flat fee schedule.

"Flat fees, caps on compensation, and lump-sum contracts" are presumptively inappropriate in death penalty cases. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 9.1. B (rev. ed. 2003). The flat fee schedule provides an incentive for court-appointed lawyers to ignore their duties to their clients. *See* Affidavit of Lawrence J. Fox at 10-15, *Commonwealth v. McGarrell*, Nos. 77–79 EM 2011, 57 A.3d 639 (Pa. 2012). "When assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 9.1 (rev. ed. 2003), comment.

The history of capital representation in Philadelphia is highly instructive. One in five indigent murder defendants in Philadelphia is randomly assigned

representation by public defenders; the rest receive court-appointed private attorneys. *McGarrell*, No. 77 EM 20011, at 9 (Lerner, J., Report and Recommendation); Anderson & Heaton, 122 Yale L.J. at 154, 159. The homicide unit of the Defender Association consists of experienced public defenders, and every case is staffed with a team of two lawyers and one or more salaried investigators and mitigation specialists—*i.e.*, non-lawyer legal professionals who are trained to develop mitigation evidence usually introduced during the penalty phase of a capital trial. *See* Anderson & Heaton, 122 Yale L.J. at 161-62. The unit also has funds to hire expert witnesses without having to seek approval and funding from a judge, as appointed attorneys are required to do. *Id.*

The differing results of the cases assigned to the Philadelphia public defender and those assigned to private counsel are stark. To begin with, "since the Association began representing one out of every five homicide defendants in 1993, no jury has ever returned a death verdict against a defendant represented by a lawyer of the organization." Saylor, 23 Widener L.J. at 34. As researchers at RAND reported, compared to appointed counsel, defendants represented by the Philadelphia public defender were 19% less likely to be convicted of murder and 62% less likely to receive a life sentence than those represented by private counsel. *See* Anderson & Heaton, 122 Yale L.J. at 154, 159. "This suggests that the defense counsel function makes an enormous difference in the outcome of cases,

even in the most serious of cases where one might hope that it would matter least." *Id.* at 159.

The benefits of dedicated and expert capital defense counsel who have sufficient resources have also been demonstrated in Virginia. In 2002, Virginia confronted an astoundingly high rate of homicide cases that resulted in imposition of the death penalty. From 1976 to 2003, Virginia tried 166 defendants in capital trials, 140 of whom were sentenced to death—a death sentence rate of 84%. *See* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Virginia Death Penalty Assessment Report* ("Virginia Report"), at 142 (August 2013). During this time, a number of studies reported that Virginia had the lowest compensation for court-appointed counsel in the country. *See* The Spangenberg Group, *A Comprehensive Review of Indigent Defense in Virginia*, at 7 (January 2004).

However, in 2002, the Virginia General Assembly authorized the creation of four Regional Capital Defender offices to represent indigent capital defendants and death row inmates. Virginia Report at 142. Also in 2002, in light of a report issued by the Virginia General Assembly's Joint Legislative and Audit Review Commission finding compensation for capital cases to be inadequate, attorneys' fees for indigent capital defense were increased to $125 per hour, with no cap on total compensation. *Id.* at 146. As a result, the ABA found that, from 2005 to

2011, far fewer capital cases resulted in death sentences. During this period, a capital case was brought to trial in 17 instances, and a death sentence was imposed in 8 of those instances—a death sentence rate of 47% (down from 84%). *Id.* at 142.

"It is no accident that the decline in death sentencing [in Virginia] coincides with these reforms. A capable and vigorous defense clearly makes a difference, and that defense no doubt accounts—at least in part—for the increased willingness of prosecutors to resolve capital cases short of death." John G. Douglass, *Death as a Bargaining Chip: Plea Bargaining and the Future of Virginia's Death Penalty*, 49 U. Rich. L. Rev. 873, 887 (2015). The Virginia example shows the importance of regional/state oversight and adequate funding to an indigent defense system for capital crimes.[28]

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[28] Results in the federal system also indicate what can be accomplished with proper funding. Appointed counsel for federal death penalty cases are compensated up to $181 per hour. *See* 18 U.S.C. § 3599(g)(1); Guide to Judicial Policy, Vol. 7, Ch. 6 § 630.10(a) (2015). A 2010 Report to the Committee on Defender Services Judicial Conference of the United States on the Cost and Quality of Defense Representation in Federal Death Penalty Cases "found judges to be extremely satisfied with the quality of representation provided by trial lawyers in federal death penalty cases." Jon B. Gould and Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* at 66 (Sept. 2010).

Conviction or exoneration and a sentence of life or death shouldn't be dependent on who is appointed counsel or as arbitrary as the Pennsylvania lottery. "Under nearly every normative theory of punishment or criminal responsibility, the characteristics of the offender's defense counsel should make no difference in the outcome of the process." Anderson & Heaton, 122 Yale L.J. at 156.

These realities of the status quo demonstrate that the Senate was correct to order a review of the administration of the death penalty in Pennsylvania—and that the Governor's decision to halt executions tainted by this history of bias and inadequate representation until all of the failings described above are fully addressed is manifestly correct.

CONCLUSION

The Governor's temporary reprieve of Terrance Williams—in addition to being authorized under Article IV, § 9 of the Constitution of Pennsylvania—is not only appropriate, but essential in light of the pervasive and debilitating failures of the capital punishment system. This Court should deny the Petitioner's request to vacate the Governor's reprieve.

Dated: June 17, 2015

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CERTIFICATE OF SERVICE

I, Ginevra Ventre, hereby certify that, on June 17, 2015, I served a true and correct copy of Brief for *Amici Curiae The American Civil Liberties Union of Pennsylvania, The National Association for the Advancement of Colored People, The Philadelphia Bar Association, Pennsylvanians For Alternatives To The Death Penalty, and The Jewish Social Policy Action Network*, in Support of Respondents Terrance Williams and Tom Wolf, Governor of the Commonwealth of Pennsylvania, by first class mail on the following:

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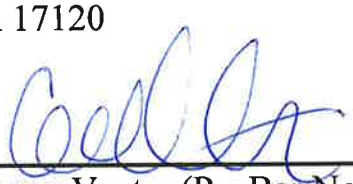

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CERTIFICATE OF COMPLIANCE

Aforesaid counsel for *amici curiae* hereby certifies that this brief complies with the 14,000 word count limit of Pa.R.A.P. 2135 based on the word count (10,099) of the word processing system used to prepare it.

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