IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

103 EM 2018

KEVIN MARINELLI,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

COMMONWEALTH'S BRIEF AS RESPONDENT

On petition for King's Bench jurisdiction regarding pending application under the Post Conviction Relief Act (PCRA) before the Northumberland County Court of Common Pleas at CP-49-CR-0000451-1994.

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COUNTER STATEMENT OF THE CASE

Conrad Dumchock was murdered on April 26, 1994, by petitioner Kevin Marinelli and his accomplices when they invaded his home. During Marinelli's third, untimely PCRA petition challenging his murder conviction and death sentence, he filed the instant petition for King's Bench review. He argues that this Court should abolish the death penalty.[1] The reasons he offers for this unprecedented act, however, are not claims of legal error. They raise factually unsettled matters of policy entrusted to the legislative branch, not constitutional issues to be resolved by courts. Because his petition does not meet the requirements of King's Bench review, and indeed, does not raise legal claims properly understood, it should be denied in deference to the legislature.

Marinelli, his brother Mark, and accomplice Thomas Kirchoff knew that Mr. Dumchock owned stereo equipment. They decided to take it. They broke into Mr. Dumchock's house, and Marinelli hit him in the face with a gun. They responded to Mr. Dumchock's pleas to take what they wanted and leave him alone by continuing to beat him. As Marinelli's confederates departed with stolen items, Marinelli stayed behind in order to shoot Mr. Dumchock: once in the eye, and once between the eyes.

[1] Marinelli does not say he is only seeking systemic improvements. As shown below, moreover, his claims taken as a whole point to permanent abandonment of capital punishment. A radical departure from historically established policy of that nature calls for legislative, not judicial, consideration.

Later, the trio returned in order to steal Mr. Dumchock's motorcycle, but they could not get it started and abandoned it. The victim's body was found the next day, with his dog nearby, shaking.

On May 25, 1994, Marinelli's girlfriend turned over to police items that Marinelli had stolen from Mr. Dumchock. A witness also told the police that Marinelli had bragged about murdering the victim. When questioned, Marinelli gave them an oral and taped confession.

On May 18, 1995, a Northumberland County jury found Marinelli guilty of first degree murder, and after a further hearing sentenced him to death. He appealed. This Court affirmed. Commonwealth v. Marinelli, 690 A.2d 203, 208 (Pa. 1997). He filed a timely PCRA petition. It was denied. He appealed and this Court again affirmed. *Commonwealth v. Marinelli*, 810 A.2d 1257 (Pa. 2002) (remanding for further proceedings); *Commonwealth v. Marinelli*, 910 A.2d 672 (Pa. 2006) (OAJC). He filed a second, untimely PCRA petition. It was dismissed as untimely and this Court affirmed, per curiam. *Commonwealth v. Marinelli*, 100 A.3d 585 (Pa. 2014). He also pursued a federal habeas corpus petition, which remains open pending the disposition of his pending third, untimely PCRA petition, filed on April 25, 2013. He filed the instant King's Bench petition on August 24, 2018. This Court subsequently ordered briefing.

SUMMARY OF ARGUMENT

King's Bench review is inappropriate. Far from the record clearly establishing his rights, Marinelli's legal position depends on this Court agreeing to reject its own precedent. Nor does his claim have any basis in record fact—his "evidence" is the JSGC report, which is a legislative proposal. The findings of that report have never been tested, as could occur in litigation or in a legislative forum. An appellate court cannot find facts. Nor can the judicial branch set general sentencing policy; that is a legislative function. Marinelli's petition confuses these governmental functions. It does not meet the requirements for King's Bench review.

Nor, indeed, does the petition meet the requirements even for judicial review generally. Marinelli's supposedly unprecedented constitutional theory, which he presents as the "bedrock" foundation of his petition, has been repeatedly and consistently rejected by this Court. Short of amending the constitution, there is no legal foundation for Marinelli's petition.

What remains is a series of policy issues and recommendations derived from the JSCG report, which, again, is a legislative document written for the legislative process. The questions the report raises are important, and should be thoroughly considered and resolved, by the General Assembly.

ARGUMENT

Because Marinelli raises policy questions that are in the legislative domain, not constitutional issues for the judiciary, review should be denied.

The General Assembly is addressing myriad concerns—raised by the same legislative report on which Marinelli relies—regarding capital punishment. It is the proper role of that body to determine whether the people want the death penalty to continue to be an option for jurors, and to decide what changes may be needed going forward. In our constitutional system it is the legislature which best discerns and represents the will of a sovereign people.[2] The issues are serious—the concerns raised in the JSGC report are in many cases valid ones—but they are quintessentially legislative. This Court should therefore decline review in deference to that branch of government.

[2] "Whatever the people have not, by their constitution, restrained themselves from doing, they through their representatives in the legislature may do. This latter body represents their will, just as completely as a constitutional convention in all matters left open by the written constitution." *Commonwealth ex rel. Elkin v. Moir*, 49 A. 351, 358 (Pa. 1901); *see Basehore v. Hampden Indus. Dev. Auth*., 248 A.2d 212, 217 (Pa. 1968) ("Generally, the legislature, which is more responsive to the people and has more adequate facilities for gathering and assembling the requisite data, is in a better position to evaluate and determine public purpose than are the courts, especially at the appellate level"). It is also notable that the executive branch has made ongoing adjustments. The governor has imposed a moratorium on executions in order to facilitate legislative action; and local prosecutors have become more selective, reserving capital punishment for only the worst of murderers.

1. King's Bench review requirements have not been met.

King's Bench jurisdiction is an exercise by this Court of the "supreme judicial power" conferred by the Constitution. Pa. Const. Sched. Art. V § 1; *In re Bruno*, 101 A.3d 635, 665 (Pa. 2014).[3] Yet such review must still take place within the limits of the judicial branch. Regardless of form, judicial review can only reach specific, legal errors in individual cases. It cannot decide broad questions of policy as does the legislature. Marinelli wants this Court to abolish the death penalty; but, regardless of one's view on that fundamental question, it is an inherently legislative one.

King's Bench review, moreover, has specific requirements that Marinelli has not met. This Court has explained that its discretionary authority to assume jurisdiction is available only "when the issue requires timely intervention by the court of last resort of the Commonwealth and is one of public importance." *Id.*, 101 A.3d at 670-671 (citations omitted). Yet, even "the presence of an issue of immediate public importance is not alone sufficient .... [W]e will not invoke extraordinary

[3] The provisions of the schedule "have the same force and effect as those contained in the numbered sections of [Article V]." Pa. Const. Sched., Preamble; *Bruno*, 101 A.3d at 665 n.17. Here, although the discretionary considerations are essentially the same, because there is a matter pending before a lower court the proper avenue for the kind of review Marinelli seeks is extraordinary jurisdiction, 42 Pa.C.S. § 726, not King's Bench jurisdiction. This brief will nevertheless use the latter term because that is what the petitioner has requested.

jurisdiction unless the record clearly demonstrates [the] petitioner's rights." *Commonwealth v. Morris*, 771 A.2d 721, 731 (2001) (citations omitted).

Marinelli has not accomplished even the first step of establishing that King's Bench review is available to him. His case is currently pending in a lower court where he is raising the same, purportedly constitutional, claim.[4] No execution has been scheduled. To the contrary, a gubernatorial moratorium on executions is in effect, for the specific purpose of allowing the General Assembly to consider and act upon the Joint State Government Commission (JSGC) report Marinelli cites.

The need for "timely intervention by the court of last resort" has not even been addressed, much less established, by Marinelli—he merely says it would be a "benefit" (petitioner's brief, 4). He does not say the lower court cannot cope with his claim; he merely says review by this Court will "obviate the need" for that court to decide it (*id.*, 5). Marinelli says King's Bench review will save "resources" and "money" and address what he describes as "waning public confidence" in "the capital punishment system" (*id.*). These are not reasons for King's Bench review. Systemic improvement of statutory law is a legislative task.

[4] *See Commonwealth v. Descardes*, 136 A.3d 493, 405, 503 (Pa. 2016) (reaffirming the Court's "repeatedly and uniformly" stated holding that "where a petitioner's claim is cognizable under the PCRA, the PCRA is the only method of obtaining collateral review").

Marinelli's petition is ill suited to King's Bench review precisely because he confuses judicial and legislative powers. He cites *Commonwealth v. Sutley*, 378 A.2d 780 (Pa. 1977), a case that barred legislative intrusion on individual judgments (petitioner's brief, 4); *accord Friends of Pennsylvania Leadership Charter Sch. v. Chester Cty. Bd. of Assessment Appeals*, 101 A.3d 66, 73 (Pa. 2014) ("final judgments of the judicial branch are not to be interfered with by legislative fiat"). But in fact, his argument is the mirror image of that exact error. Just as the legislature cannot alter individual judgments, courts cannot make global policy when it comes to defining criminal penalties: that is the realm of legislation. "[T]he question of whether a particular punishment is appropriate to a particular crime belongs in the first instance to the legislature." *Shoul v. Commonwealth, Dep't of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 686 (Pa. 2017) (brackets, citations, and internal quotation marks omitted).

Marinelli does not claim that the record clearly demonstrates his rights. To the contrary, he seeks to establish an unprecedented new constitutional ruling, based on purported new facts presented in the JSGC report. The report raises important policy issues, but its factual component has never been tested in an adversarial setting, as would occur before a fact-finding tribunal or (more appropriately here) a legislative committee. The report represents the policy views of four Senators, expressed for the benefit of the legislature. These views are entitled to respect, but they do not

constitute a legal "record" for the purpose of litigating a defendant's claims in King's Bench review.

His own contentions thus negate any possibility that the record could clearly demonstrate Marinelli's rights. And while he says he raises an issue of "immense public importance" (petitioner's brief, 4), not every issue of importance, even "immense" importance, is for that reason reviewable in King's Bench. Indeed, not every important issue is necessarily reviewable by a court.

King's Bench review requires the supporting facts and governing law to be clear. Here they clearly are not. Marinelli says this Court has never previously analyzed his kind of constitutional argument (petitioner's brief, 18). That would only confirm that there is no existing legal support for his petition, if it were true; but in fact, this Court has repeatedly considered and rejected his legal theory. Marinelli says "twice as many death row prisoners have been exonerated as have been executed" (petitioner's brief, 5). While that is disputable (it equates "granted a new trial" with "exonerated"),[5] it is not a claim of legal error; and because Marinelli bragged about the murder and confessed committing it, he is a poor candidate for

[5] *See* Joshua Marquis, *Innocence in Capital Sentencing: The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 508 (Winter 2005) (Concluding that many instances of purported exoneration refer to successful claims of trial or sentencing error rather than a legal ruling that the claimant was factually innocent).

exoneration. That other capital cases have been overturned for legal error does not prove there is legal error here. If Marinelli's argument is that capital punishment should be abolished because legal error is possible, or even likely (not necessarily in his own case), that is a policy dispute to be heard by the legislative branch.

2. There is no constitutional basis for the petition.

The "bedrock" of his petition (petitioner's brief, 17) is Marinelli's claim that the wording of the state constitution supports his policy arguments. That is so, he says, because instead of "cruel and unusual" punishments as in the Eighth Amendment, the state constitution bars "cruel" punishments. He adds that this Court has never "previously analyzed" this semiotic difference (*id*., 18).

In fact, the opposite is true. In *Commonwealth v. Zettlemoyer*, 454 A.2d 937 (Pa. 1982), this Court rejected the argument that the "cruel" clause of Article I, § 13 provides "broader protection than that guaranteed by the 'cruel and unusual punishment' clause of the United States Constitution." It instead held "that the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." 454 A.2d at 967.[6] Since the United States Supreme Court has upheld the death penalty under

[6] *Accord Jackson v. Hendrick*, 503 A.2d 400, 404 n.10 (Pa. 1986) ("This Court has held that Article I, section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment"); *In re King Properties*, 635 A.2d 128, 131 (Pa. 1993) ("the

the Eighth Amendment, *e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015), there is no legal basis for Marinelli's claim, raised exclusively under the state constitution, because this Court holds that the two constitutions are identical on this point.

As recently as 2013, in a unanimous decision, this Court continued to recognize that, in the death penalty context, it has "held Article I, Section 13 to be coextensive with the Eighth Amendment[.]" *Commonwealth v. Batts*, 66 A.3d 286, 298 n.5 (Pa. 2013). And it again rejected the notion, now proposed as new by Marinelli, that there is a critical difference between "cruel" and "cruel and unusual." Indeed, this unanimous Court found that textual analysis to have "little force" because (inter alia) the term "cruel and unusual" is "essentially, an amalgam." 66 A.3d at 298 (citation omitted).

The contention that this Court should conduct an *Edmunds* analysis[7] (petitioner's brief, 19) likewise overlooks *Zettlemoyer*. There, this Court explored

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rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments).

[7] *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), set forth a test for deciding whether the state constitution affords heightened protections for individual rights. *But see Commonwealth v. Gary*, 91 A.3d 102, 142 (Pa. 2014) (Todd, J., joined by Baer, J., dissenting) (finding *Edmunds* to be merely "a guide for litigants" rather than a necessary mode of constitutional analysis). Marinelli places great emphasis on the fact that an *Edmunds* analysis took place 18 years ago in *Commonwealth v. Means*, 773 A.2d 143 (Pa. 2001) (OAJC). Yet none of the opinions in that plurality ruling—not even those in dissent—concluded that the state constitution affords broader

the text and history of Article I, § 13 and determined that the framers considered capital punishment constitutional. The constitutional analysis did take place, but it negates Marinelli's argument.

Observing that "legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people," this Court found in *Zettlemoyer* that the General Assembly "since its inception" had "consistently and continually expressed its conviction that the death penalty is, for at least some intentional killings, an appropriate and necessary form of punishment." Even under the new "humane laws" of William Penn, this Court said, "capital punishment was accepted as a necessary and appropriate punishment for willful and premeditated killings," and—this Court further noted—"this Commonwealth has always operated under some legislative enactment setting the penalty for at least some first degree murders at death[.]" 454 A.2d at 968-969 (citations omitted).[8]

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rights in capital cases. As part of his *Edmunds* argument Marinelli also identifies just one state (Washington) that has nullified capital punishment under its constitution (petitioner's brief, 35-36) (In the other state he cites, Connecticut, the penalty was abolished by the legislature). But he does not explain what, if anything, in that case suggests that Pennsylvania's constitution and history are similar to that of the state of Washington. Nor does he discuss Article I, § 2, which establishes that our state government exists to secure the "safety" of the people.

[8] Marinelli's new, supposedly constitutional, idea is that in the distant past the death penalty was tolerated out of "necessity" (petitioner's brief, 22), in the sense that there was nothing to be done with violent criminals except execute them. Yet, according to Marinelli's own argument, over 200 years ago in 1790 Justice Bradford

In short, Marinelli's constitional theory is not new, but rather has been rejected by longstanding precedent of this Court. He does not acknowledge that precedent, let alone suggest that it has proven to be erroneous. *See Commonwealth v. Le,* No. 756 CAP, 2019 WL 2306709, at *10 n.17 (Pa. May 31, 2019) (explaining the binding effect of *stare decisis*, especially where moving party has not acknowledged the controlling precedent).

His "bedrock" contention based on the language of Article I, § 13—"cruel" instead of "cruel and unusual"—is critical to the question of whether Marinelli's claims should be reviewed by the General Assembly as opposed to the judiciary. This tribunal decides constitutional questions, not policy ones. But what Marinelli puts forward as the constitutional foundation for judicial review is contrary to what this Court has already decided.

Because its foundation is sand, the edifice of the King's Bench petition collapses. Without the necessary constitutional grounding for Marinelli's policy

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recommended abolition of capital punishment for all crimes "*except* first degree murder" (*id*.). What this demonstrates is that it was *not* "necessity" in the sense Marinelli assumes that justified capital punishment—something other than death was obviously available for "all crimes" *other than* first degree murder, even in 1790. Rather, capital punishment for first degree murder was understood to be "necessary" in the sense that lesser penalties are disproportionate to deliberate murder. The principle that punishment should be proportionate to the offense is not something that changes over time. Nor does it suggest a constitutional difference between "cruel" versus "cruel and unusual."

arguments, there is no legal avenue for this Court's review. The petition is simply a series of legislative recommendations, based on a legislative report, written by legislators for the legislature. Indeed, such reports constitute a decidedly *legislative* practice. "A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a non-justiciable political question." *Grimaud v. Commonwealth*, 865 A.2d 835, 847 (Pa. 2005) (internal quotation marks omitted); *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977). This Court should so rule.[9]

[9] Even if there were some basis in law for the petition (though there is none), moreover, legislative acts are not subject to revision on the basis of novel constitutional theories. Rather, "[e]very presumption is in favor of the constitutionality of legislative acts, and statutes are to be construed whenever possible to uphold their constitutionality." *In re William L.*, 383 A.2d 1228, 1231 (Pa. 1978) (citation omitted). A legislative enactment is valid unless it "clearly, plainly, and palpably violates the constitution." *Commonwealth v. Olivo*, 127 A.3d 769, 777 (Pa. 2015). Here again, Marinelli's policy arguments are just that—they should be addressed to the General Assembly. *Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth.*, 928 A.2d 1013, 1017-1018 (Pa. 2007) ("courts should not lose sight of the respective roles of the General Assembly and the courts … it is the Legislature's chief function to set public policy"); *Benson ex rel. Patterson v. Patterson*, 830 A.2d 966, 968 (Pa. 2003) ("it is not the role of the judiciary to legislate changes the legislature has declined to adopt"); *Parker v. Children's Hospital of Philadelphia*, 394 A.2d 932, 937 (Pa. 1978) (a court does not "substitute its judgment as to public policy for that of the legislature").

3. Marinelli's claims are legislative.

Marinelli's policy arguments criticizing the death penalty as currently administered are not precisely his own. They originate in the JSGC report (Joint State Government Commission; *Capital punishment in Pennsylvania; The report of the task force and advisory committee*). The report is of four state Senators, supported by an advisory committee, although it acknowledges that its conclusions do not "necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation" (JSCG report, n.2). The report is directed, as are all JSGC reports, "to the General Assembly" (*id*., ii). It concerns matters of analysis and opinion, along with factual assertions, value judgments, and conclusions of the kind typically addressed by the General Assembly.

This Court has recognized that "the adjudicatory process does not translate readily into the field of broad-scale policymaking. … [U]nlike the legislative process, the adjudicatory process is structured to cast a narrow focus" on matters arising from litigation, presented "in a highly directed fashion." In contrast, "the Legislature possesses superior policymaking tools" and "is better suited to examine … significant policy issues." *Lance v. Wyeth*, 85 A.3d 434, 454 (Pa. 2014) (brackets, internal quotation marks and citation omitted); *Naylor v. Twp. of Hellam*, 773 A.2d 770, 777 (Pa. 2001). In particular, the legislature "has more adequate facilities for

gathering and assembling the requisite data," and "is in a better position to evaluate and determine public purpose than are the courts, especially at the appellate level." *Basehore v. Hampden Indus. Dev. Auth*., 433 Pa. 40, 49, 248 A.2d 212, 217 (1968).

That Marinelli's arguments are pure policy objections is confirmed by his consistent failure to contend that he, himself, was aggrieved by them in his own case. He does not, for example, claim that he suffered from racial prejudice (he is a white man, as was his victim), or that he was prejudiced by personal poverty, or that he was prejudiced by a review process in his case that was systemically flawed. *See, e.g.*, *Commonwealth v. Rios*, 591 Pa. 583, 920 A.2d 790 (2007) (appellant provided no "evidence to show that the allegedly pervasive discriminatory atmosphere affected his individual case"); *Commonwealth v. Martin*, 5 A.3d 177, 193 (Pa. 2010) (rejecting putative constitutional claim of inadequate standards and financial support for appointed capital counsel given appellant's failure to show "structural defects that tainted the entire mechanism of his trial and sentencing"); *Commonwealth v. Crews*, 552 Pa. 659, 663-664, 717 A.2d 487 (1998) (same; claim based on statistical data purporting to show that the death penalty is predominately imposed on poor persons); *see also Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005) ("judicial intervention is appropriate only when the underlying controversy is real and concrete"). Because it does not directly concern claims in his

own case, Marinelli's petition is an abstraction. It does not raise any legally justiciable issue.

Another significant barrier to King's Bench review—which is, of course, appellate review—is the absence of settled facts. No accurate legal or statistical analysis is possible where the underlying facts are subject to dispute. Fact finding requires adversarial testing, including testimony from both fact witnesses and experts with competing points of view. That can occur in a fact-finding court, or—here, more correctly—in a legislative setting. It cannot occur at all in an appellate court. "[I]t is not the function of the appellate court to find facts[.]" *O'Rourke v. Commonwealth*, 778 A.2d 1194, 1199 n.6 (Pa. 2001).

Because this Court is not the appropriate forum for raising, much less settling, issues of fact, the Commonwealth will not attempt to argue such issues here. For illustrative purposes, it will instead point out some important areas in which Marinelli's policy claims, if not necessarily wrong, are unsettled, and so unsuitable for review in this forum.

3(a). Racial discrimination claims.

Racial discrimination cannot be tolerated in any aspect of the justice system. The Kramer Report,[10] on which the JSGC report relies, did not identify specific occurrences of racial discrimination in Pennsylvania's capital sentencing system. The Kramer Report was incorporated into the Senate Resolution that created the JSGC, which delayed its findings in order to implement this most comprehensive, timely, and scientific study on the subject in this state's 300-year history. The Kramer Report's conclusion, that capital punishment in Pennsylvania is not disproportionate or targeted against defendants of color,[11] does not alter the fact that

[10] *Capital Punishment Decisions In Pennsylvania: 2000-2010 Implications for Racial, Ethnic and Other Disparate Impacts*; Report to the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, September 2017; John Kramer, Ph.D., Penn State Department of Sociology & Criminology; Jeffrey Ulmer, Ph.D., Penn State Department of Sociology & Criminology; Gary Zajac, Ph.D., Penn State Justice Center for Research (herein, the Kramer Report).

[11] The findings of the Kramer Report include that:

• There is no pattern of disparity to the disadvantage of Black or Hispanic defendants in prosecutorial decisions to seek the death penalty.

• There is no pattern of disparity to the disadvantage of Black defendants with White victims in prosecutorial decisions to seek the death penalty.

• Cases with Black defendants and White victims were 10% less likely to result in a prosecution decision to seek the death penalty.

• Aggravating circumstances were filed in a larger percentage of cases involving White defendants than Black defendants.

• Legally relevant factors are likely the primary factors that shape the interpretations of blameworthiness and dangerousness that drive punishment decisions.

racial discrimination remains a matter of utmost importance. Indeed, the report confirms that this is a vital and complex societal problem, and thus, one properly committed to legislative action.

The situation in Pennsylvania contrasts sharply with that in *State v. Gregory*, 427 P.3d 621, 633 (Wash. 2018), where that court found that, in the state of Washington, a Black defendant was "between 3.5 and 4.6 times as likely" as a non-Black defendant to be sentenced to death. The Kramer report does not point to such findings in this state. It disagrees with earlier reports, such as those by Professor Baldus, who was misled by incomplete data (Kramer Report, 118, 122). There is much more work to do in order to combat racial discrimination in Pennsylvania, but *State v. Gregory* represents unique factual findings which render that case inapposite. Again, this is an area of legislative concern.

Marinelli—who, as already noted, is a white man who murdered a white victim—argues that the Kramer Report indicates "evidence of race-of-victim effects" (petitioner's brief, 10). By using the term "race … effects" Marinelli implies "race discrimination effects" (albeit ones that cannot have prejudiced him); but the Kramer Report states that "Black defendants with Black victims and Black defendants with White victims are less likely to receive the death penalty than any defendants with White victims, and White defendants with White victims" (Kramer

Report, 124 n.33). The report, therefore, indicates that it did not find the racially discriminatory victim effect on which Marinelli bases his argument.[12]

None of this suggests that the fight against racial discrimination in the justice system is by any means over. The JSGC report is a starting point in this regard. The General Assembly, as this Court has recognized, is well positioned to pursue a broad and searching inquiry that courts are not similarly able to pursue. Racial discrimination is a vitally important matter that warrants such legislative priority.

[12] The Report further stated,

> [W]e do not find an overall pattern of disparity to the disadvantage of Black or Hispanic defendants in the decision to seek the death penalty, the decision to retract the death penalty once filed, or the decision to impose the death penalty. Furthermore, we do not find disparity in these decisions to the disadvantage of defendants in cases with Black defendants and White victims. In fact, in the overall model (Table 23), cases with Black defendants and White victims were 10% less likely than other types of cases to see a death penalty filing, and this effect bordered on conventional statistical significance.

Kramer Report, 117-118.

> [O]ur finding that Black defendants with White victims were not at greater risk to receive the death penalty contrasts with [prior] literature, including the Baldus, et. al. (1997-1998) study of Philadelphia. […] Our findings are largely consistent with the notion that legally relevant factors are likely the primary factors that shape interpretations of blameworthiness and dangerousness that theoretically drive the punishment decisions we examined.

Id., 122.

3(b). Unreliability claims.

Marinelli asserts that capital punishment in Pennsylvania "is characterized by error, arbitrariness and delay," and that life imprisonment "amply serves … penological interests" (petitioner's brief, 40). Both assertions are policy judgments. Only the former purports to have a basis in factual events, yet that basis is not clear. Marinelli appears to claim that the capital punishment system is unreliable because capital cases are frequently overturned. Yet in making this assertion he does not address specific capital cases or why they were overturned. Nor does he claim that the review process in his own case was "unreliable" in any way he can identify—obviously, if legal error occurred in his own case, Marinelli could litigate that without filing a King's Bench petition.

It appears, moreover, that what Marinelli calls "unreliability" is in fact a consequence of federal intervention in Pennsylvania's criminal justice system. Since an in-depth analysis is not possible in this setting, the Commonwealth will refer to one illustrative case, though there are a great many similar ones. In *Dennis v. Sec'y, Pennsylvania Dep't of Corr*., 834 F.3d 263, 357 (3d Cir. 2016) (*en banc*). James Dennis was sentenced to death in 1992 for the 1991 shooting of a 17-year-old girl. Three eyewitnesses had clear and prolonged views of him, and identified him from a photo array, at a line-up, and at trial. On the night after the shooting he brandished what looked like the same gun. His conviction was upheld by this Court, three times.

But in 2016, the Third Circuit *en banc* held this Court had misapplied constitutional law. It granted a new trial, though four dissenting judges said the evidence of guilt was strong and that the majority misapplied the standard of review.[13]

Marinelli does not say how many capital cases were, like *Dennis*, ultimately overturned—thus supposedly proving the unreliability of the death penalty—by a federal court that directly contradicted a constitutional ruling by this Court. That, however, is problematic.

This Court has repeatedly explained that decisions of federal courts inferior to the Supreme Court of the United States are without precedential force or effect in Pennsylvania. For the Third Circuit to contradict a ruling of this Court on an issue of constitutional law, even in the same case, does not establish that this Court's ruling was incorrect. The law, in fact, is precisely to the contrary. *See, e.g.*, *Commonwealth v. Brown*, 196 A.3d 130, 188-190 (Pa. 2018) (refusing to follow Third Circuit holding that prosecution reference in capital sentencing to a defendant's lack of remorse improperly condemns the right to remain silent; federal court's ruling "is not binding on this Court and does not reflect the law of this

[13] Dennis later entered a nolo contendere (i.e., guilty) plea. *See Commonwealth v. Norton*, 201 A.3d 112, 114 n.1 (Pa. 2019) ("for purposes of a criminal case, a plea of nolo contendere is equivalent to a plea of guilty").

Commonwealth").[14] While local federal courts overturn this Court's constitutional rulings in capital cases with considerable frequency, moreover, the controlling federal statute prohibits that if "fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citation and internal quotation marks omitted); *see* 28 U.S.C. § 2254(d).[15]

[14] *Accord In re Stevenson*, 40 A.3d 1212, 1221 (Pa. 2012) (even where judgments of inferior federal courts have res judicata effect, their reasoning does not; on questions of federal law their pronouncements "have only persuasive, not binding, effect" on Pennsylvania courts); *Hall v. Pennsylvania Board of Probation and Parole*, 851 A.2d 859, 865 (Pa. 2004) (explaining why "[w]ithin our federal system of governance, there is only one judicial body vested with the authority to overrule a decision that this Court reaches on a matter of federal law: the United States Supreme Court"; rulings of this Court on constitutional issues are correct "[a]bsent a contrary ruling from that tribunal") (although a plurality decision on the merits, the dissenting and lead opinions agreed, and *Hall* is a majority ruling, on this point); *Commonwealth v. Laird*, 726 A.2d 346, 359 n.12 (Pa. 1999) (refusing to follow Third Circuit decision on identical constitutional issue governing capital sentencing).

[15] In response to the first World Trade Center attack in 1993 and the Oklahoma City bombing in 1995, Congress and President Bill Clinton enacted the Antiterrorism and Effective Death Penalty Act (or "AEDPA") of 1996. The law was passed with broad bipartisan support, and greatly restricts the authority of federal habeas courts over state criminal judgments. In particular, it prohibits a federal court from granting the writ on the basis of an issue decided on the merits by a state court, unless the state court applied clearly-established federal law unreasonably. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous. We have held precisely the opposite") (citations and internal quotation marks omitted).

This means that, under the terms of Marinelli's argument, the death penalty is "reliable" in states such as Texas, Alabama, and Florida, where state court decisions in capital cases are regularly upheld by local federal courts. But, he says, the penalty supposedly is "unreliable" in Pennsylvania, where this Court's decisions in capital cases are often contradicted by local federal courts. These facts suggest that the question Marinelli raises is not really one of "unreliability" at all, as opposed to one of regional idiosyncrasies of federal courts and their relative fidelity to federal statutory law.[16]

It is also true that capital cases are reviewed more thoroughly than other kinds of cases. Such exacting review takes time—Marinelli calls this "delay"—but is designed to make the system more reliable, not "unreliable." It is the opposite of "arbitrary," and is of obvious benefit to the individual capital offender.[17] Perhaps less review, or a different kind of review process, would be preferable to Marinelli. But such a searching examination of all aspects of the system is precisely what he

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[16] AEDPA notwithstanding, federal habeas petitions are granted in capital cases at 35 times the rate in non-capital ones. Marah Stith McLeod, *The Death Penalty As Incapacitation*, 104 Va. L. Rev. 1123, 1154 & n.154 (2018).

[17] Marinelli also says that less than 7% of murderers who obtain a new penalty hearing are resentenced to death (petitioner's brief, 55), as if this confirms that the penalty in such cases was not justified in the first place. But it is unsurprising that, if a new sentencing proceeding is ordered after decades have passed, essential witnesses and evidence may no longer be available.

would avoid by pursuing King's Bench review. That kind of global policy inquiry is available only in the General Assembly. Indeed, he observes that many capital cases have been overturned due to ineffective assistance of counsel,[18] and recommends as-yet-unfunded "statewide programs to ensure adequate indigent capital defense," a "state-funded capital defender office," and a new "statutory mitigator" (petitioner's brief, 45, 51). Recently, the General Assembly allocated, and the Governor signed

[18] He accuses not just defense attorneys, but also prosecutors, of undermining capital cases; he says the latter do so by violating *Brady v. Maryland*. But in fact, exculpatory evidence may be "suppressed" in the constitutional sense even if the prosecutor did not know about it. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (*Brady* applies where the evidence "was not disclosed even to the prosecutor"). Moreover, that problems which can arise in any kind of case also arise in capital cases is not evidence that there is something uniquely wrong with capital cases.

Oddly, Marinelli suggests no provision for preventing lawyers who have been found ineffective from representing capital defendants. That is something this Court could put in place on its own authority, regardless of whether Marinelli's policy arguments are reviewable.

Another policy solution Marinelli overlooks is that many Pennsylvania capital defendants are represented by the excellent, federally-funded Federal Community Defender Organization in the PCRA stage and thereafter, but not at trial. Many of the concerns Marinelli raises about defense representation would be removed if the FCDO appeared at the trial stage rather than in the PCRA stage. The Third Circuit has already cleared the way for this by holding that the FCDO effectively may decide for itself when and how to appear in Pennsylvania courts in capital cases in order to exhaust federal habeas claims. *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 477 (3d Cir. 2015), *as amended* (June 16, 2015), *cert. denied*, 136 S. Ct. 980, 994 (2016). There is nothing preventing the FCDO from representing indigent capital defendants, at any stage, in Pennsylvania courts.

into law, $500,000 in grants to counties to support indigent defense in capital cases.[19] Certainly, more needs to be done, and that is but a significant first step; but such matters are exactly what this Court, which cannot allocate state spending or create or amend statutes, cannot provide, but the General Assembly could.

3(c). Geographic claims.

Marinelli repeats the geographic observation raised in the Kramer Report and in the JSGC report (petitioner's brief, 72), that use of the death penalty varies greatly among the 67 counties of Pennsylvania. Marinelli notes that he chose to murder Conrad Dumchock in Northumberland County with a high "death-sentence-to-life-sentence" ratio of 1:6 (petitioner's brief, 13). But he offers nothing to substantiate his apparent theory that the location of the murder, rather than the facts, determines the sentence. By his reasoning a county with 2 murders and only 1 capital sentence would have a very high ratio of 1:2, while one with 100 murders and 10 death sentences (ten times as many as the other county) would have a lower ratio of 1:10. Philadelphia has the highest number of murders (2,835) and the highest number of death sentences (69), but a very low ratio of 1:40 (JSGC report, 240).

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19 https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0712&pn=1085

The Kramer Report concluded that, to the extent "uniform prosecution" is a goal of the criminal justice system, "questions" were raised because "[i]n many counties … the death penalty is simply not utilized at all," but in others "it is sought frequently" (Kramer Report, 125). But in some counties murders are extremely rare, and it is therefore unsurprising that resort to capital punishment should vary greatly with location. The 2017 Pennsylvania Uniform Crime Report, at Appendix A, shows that some counties, such as Bradford, Sullivan, and Tioga (and many others), had no murders at all. Lehigh had 20 murders, while Philadelphia had 316, which represents a large portion of all the murders in the state (738).[20] Local prosecutors presumably take into consideration the local crime rate, the impact of a particular murder on the community, and other case-specific factors in deciding whether capital punishment should be pursued.

Marinelli also does not explain why a central death-penalty authority should be considered so essential that its absence should bar capital punishment. Currently, the people of Pennsylvania have decided through their legislature to commit most discretionary prosecutorial decision making to county District Attorneys. Whether or not that should change is a policy question for the General Assembly.

[20] http://ucr.psp.state.pa.us/UCR/Reporting/Annual/AnnualFrames.asp?year=2017

3(d). Mental health issues.

The JSGC report, Marinelli says, concludes that "25% of those on death row" have "active, severe mental illness" (petitioner's brief, 86). Marinelli says he has a mental illness, that he does not describe, about which he presented no evidence at sentencing (*id.*, 13). If his alleged mental illness is the basis for a claim, however, he could litigate it in the PCRA process. Further, the term "mental illness" encompasses a wide variety of situations and may include conditions that developed before or after the murder, or after the offender was sentenced. Currently, the sentencing statute makes "extreme mental or emotional disturbance" a mitigating factor, 42 Pa.C.S. § 9711(e)(2), under which the vote of a single juror can bar a capital sentence. An inmate may become incompetent to be executed due to mental illness after being sentenced. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Executing the "intellectually disabled," a condition formerly known as mental retardation, is barred by *Atkins v. Virginia*, 536 U.S. 304 (2002). Contrary to Marinelli's puzzling allegation that Pennsylvania murderers sentenced to death were "often unable to meaningfully assist their lawyers in their own defense" (petitioner's brief, 86), it has long been the law that a person who is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense" may not be "tried, convicted or sentenced so long as such incapacity continues."

Commonwealth v. Jermyn, 652 A.2d 821, 822 (Pa. 1995) (emphasis omitted); 50 P.S. § 7402(a).

In short, mental illness is a serious issue, but Marinelli's view that "mental illness makes a death sentence more likely" (petitioner's brief, 87) is, at the least, subject to dispute. There are a number of ways in which a defendant can raise mental illness in order to reduce the possibility of a death sentence. As a policy matter there is certainly more to be said, but questions of policy are appropriate for legislative consideration.

3(e). Indigence.

Marinelli cites the recommendation of the JSCG report to the General Assembly that 80% of capital defendants are indigent, and so represented by appointed counsel who have, in his view, an unacceptably high rate of ineffective assistance. He does not, however, claim that he himself suffered financial disadvantage, or that he was prejudiced in his own case by his personal poverty.

This, once again, is a policy claim and not one of legal error. As already noted, the legislature has taken one positive step in allocating $500,000 to indigent capital defense. Moreover, in terms of appellate review, a defendant who claims that inadequate appointment or compensation standards effectively denied the right to counsel must establish that these alleged conditions actually harmed him, in his own

case: "structural defects that tainted the entire mechanism of his trial and sentencing." *Commonwealth v. Martin*, 5 A.3d 177, 193 (Pa. 2010); *Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008) (doctrine of presumed prejudice did not apply despite appointed counsel's low rate of payment where counsel in fact subjected prosecution case to meaningful adversarial testing); *see United States v. Cronic*, 466 U.S. 648, 662, 665-666 (1984) (because he did not establish a "breakdown in the adversarial process" in his case, respondent had to raise "specific errors made by trial counsel" to establish ineffective assistance). Marinelli's general claims, that indigence is widespread among death-eligible offenders and that retained counsel arguably outperform publicly-funded counsel, do not accomplish that.[21]

A defendant who was actually denied effective representation in his own case, whether due to extreme structural defects or specific failures on the part of counsel, would be entitled to claim relief on that basis, with no need to raise issues in the abstract. The Commonwealth nevertheless agrees, as a policy recommendation, that capital defense resources and standards should be greatly enhanced. One practical

[21] The advantage of having private counsel is not entirely clear. The Kramer Report states that prosecutors are less likely to seek the death penalty in the first place in cases involving public defenders. Where the penalty is sought, moreover, the advantage of having private counsel is no more than 5% (Kramer Report, 119-120). That speaks well of private counsel in general, but may be of little practical benefit to an individual defendant.

step, immediately available to this Court under its exclusive authority to govern the practice of law under Article V, § 10(c), would be to restrict attorneys who have been found constitutionally ineffective from representing defendants in capital cases. Further measures, however, are likely to require additional state funding and statutory enactments that this Court is unable to provide, and are properly left to the General Assembly.

3(f). Penological justification.

Marinelli argues that the death penalty does not deter murder, and that instead its abolition can be expected to reduce violent crime (petitioner's brief, 91-92). He himself, however, does not suggest that he is somehow legally entitled to personal relief due to the fact that Pennsylvania made what he considers an unwise decision in maintaining capital punishment. His position addresses a complex policy question that remains unsettled. *E.g.*, Bessette, J., *How and why the death penalty deters murder in contemporary America* (January 4, 2018);[22] Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Applied Econ. 163, 166

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[22] https://www.catholicworldreport.com/2018/01/04/how-and-why-the-death-penalty-deters-murder-in-contemporary-america/

One 2012 survey by the National Research Council, *deterrence and the death penalty*, concluded that it was impossible to prove whether or not capital punishment deters murder:

http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13363

(2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average").

Deterrence as a penological value is a matter appropriate for legislative debate, not judicial resolution. Further, the validity of Marinelli's view that the cessation of capital punishment decreases violent crime is not self-evident. As noted, in February 2015, Governor Wolf imposed a moratorium barring Pennsylvania executions for the laudable purpose of allowing the legislature to consider and act on the JSGC report. Under Marinelli's reasoning, this moratorium should have reduced all violent crime, including murders. But current crime rate data do not appear to support that hypothesis.[23]

Marinelli also denies that retribution is a valid state interest (petitioner's brief, 94), but that too is a policy decision. Retribution is a component of all criminal punishments; it is a societal expression of intolerance for crime, and in that sense serves to uphold public order. Many believe that some few murders can be so

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[23] • *Philadelphia homicide rate climbs, highest in over a decade*

https://philadelphia.cbslocal.com/2018/12/17/philadelphia-homicide-rate-climbs-highest-in-over-a-decade/

• "*The shooting* [of 10 victims] *outside of Deja Vu nightclub is one of the worst mass shootings in Lehigh Valley history.*"

https://www.ydr.com/story/news/2019/06/20/largest-mass-shootings-pennsylvania-history-allentown-pa-deja-vu-nightclub/1509247001/

horrendous—multiple killings in mass shootings, for example—that a penalty less than death would impermissibly disparage their severity. Courts have cited retribution and deterrence as justifications for capital punishment. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) (retribution constitutionally justifies the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (same); *cf. Commonwealth v. Batts*, 163 A.3d 410, 429 (Pa. 2017) (same, acknowledging cited decisions). Marinelli argues that should not be so, but this is a nuanced and complex policy issue that is in the realm of the General Assembly.

CONCLUSION

For these reasons, the Commonwealth requests this Court to deny the petition.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with Pa. R. App. P. 2135(a)(1) (word limit) and (d) (certificate of compliance), as it contains fewer than 14,000 words.

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*, which require that confidential information and documents be filed differently than non-confidential information and documents.

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