No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEANGELO ZIEGLAR, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In June 2022, the Commonwealth of Pennsylvania charged DeAngelo Zielgar ("Mr. Zieglar") with capital murder. However, since 2015, there has been a formal and indefinite moratorium on executions in Pennsylvania. Moreover, on February 16, 2023, the Governor of Pennsylvania publicly announced: "I will not issue any execution warrants during my term as Governor. When an execution warrant comes to my desk, I will sign a reprieve each and every time." In light of these circumstances, and based on this Honorable Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the trial court entered an order declining to empanel a death-qualified jury. As the trial court explained, "the jury is not going to be death-qualified and go through all of that and then be asked to listen to all of the additional evidence and then listen to the arguments when the Governor has already said it's not going to happen. It simply isn't going to happen. It's an unreasonable use of court process, in my view." The Commonwealth appealed, and the Pennsylvania Superior Court reversed the trial court's order and remanded for further proceedings. The Court concluded that the trial court's (and Mr. Zieglar's) reliance on the rationale of *Caldwell* was "premature." The question presented is:

> In light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), where a state has instituted an indefinite and formal moratorium on the death penalty, whether a jury can even constitutionally consider that punishment?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Mr. Zieglar, and the Respondent, the Commonwealth of Pennsylvania. All parties to this proceeding appear in the case's caption on the cover page.

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STATEMENT OF JURISDICTION

On August 21, 2024, the Pennsylvania Superior Court issued a published opinion, reversing the trial court's order declining to empanel a death-qualified jury based on Pennsylvania's indefinite moratorium on the death penalty and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and remanding for further proceedings. Thereafter, on September 20, 2024, Mr. Zielgar timely filed a petition for allowance of appeal to the Pennsylvania Supreme Court. His petition was denied on February 19, 2025. Accordingly, this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

For purposes of Mr. Zieglar's petition for writ of certiorari, the verbatim text of the relevant constitutional and statutory provisions is as follows:

United States Constitution

"No person shall be...deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to...an impartial jury of the State and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI.

"[N]or cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

"No State shall...deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

Pennsylvania Constitution

"In all criminal prosecutions the accused hath a right to...an impartial jury of the vicinage; he cannot be...deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." Pa. Const. art. 1, § 9.

"[N]or cruel punishments inflicted." Pa. Const. art. 1, § 13.

STATEMENT OF THE CASE

On January 20, 2022, Mr. Zieglar was arrested and charged at CC 202202096 with one count each of Criminal Homicide, 18 Pa.C.S.A. § 2501(a); Persons Not to Possess Firearms, 18 Pa.C.S.A. § 6105(a)(1); and Tampering With Physical Evidence, 18 Pa.C.S.A. § 4910(1). On March 18, 2022, following a preliminary hearing, all charges were held for trial. On April 14, 2022, the Commonwealth filed notice of its intent to seek the death penalty. The Commonwealth's notice listed five aggravating circumstances it intended to prove at sentencing should Mr. Zieglar be convicted of First-Degree Murder, 18 Pa.C.S.A. § 2502(a). (*Id.*).

On February 21, 2023, the trial court issued an order directing counsel for both parties to file, by March 13, 2023, the *voir dire* questions they intended to use for jury selection. Both parties complied with the trial court's order. Furthermore, both parties' submissions included questions relating to the death penalty.

On April 5, 2023, the trial court issued an opinion and order rejecting both Mr. Zieglar's and the Commonwealth's proposed *voir dire* questions in their entirety, concluding that it was unable to impanel a fair and impartial death-qualified jury. According to the trial court's order, "the jury selection in this case will be limited to determining the ability of each juror to be fair and impartial in deciding the verdict in this case; there will be no jury deliberations as to sentence" and "counsel for the Commonwealth and counsel for Defendant may submit proposed *voir dire* questions which do not mention or refer to the death penalty as a possible sentence in this case[.]"

Later that same day, the trial court held a status hearing to shed light on its ruling. Relevantly, the trial court explained:

> DEFENSE COUNSEL: Your Honor, I read your order this morning, and are you precluding the Commonwealth from seeking the death penalty in terms of, if they're not given any instructions, are you going to—if we go to the trial, if there's a guilty of first-degree murder, and then instruct the jury on a death penalty.
>
> TRIAL COURT: I am not going to permit a jury to be death-qualified in this case. That's the ruling.
>
> DEFENSE COUNSEL: I just wanted clarification.
>
> TRIAL COURT: Well, does it effectively prevent the Commonwealth from seeking the death penalty? It may. I'm not looking past my ruling. One would infer that it would, but I'm not saying it, because I'm not going that far with my ruling. My ruling says, it's unreasonable and fundamentally unfair to put the jury through this process when the governor has already said there's a reprieve in every case, no matter what. And so the jury is not going to be put through the process.
>
> Now, what that means, ultimately, I think in all fairness to the Commonwealth, they may want to look at this and study it a little bit and figure out what they interpret it to mean and what they want to do about it.
>
> But you notice the order doesn't say, therefore, seeking the death penalty is precluded in this case. I think effectively it is, Mr. Sullivan, but I'm not saying it is. I'm saying the jury is not going to be death-qualified and go through all of that and then be asked to listen to all of the additional evidence and then listen to the arguments when the Governor has already said it's not going to happen. It simply isn't going to happen. It's an unreasonable use of court process, in my view.
>
> So I just want that to be clear that I'm not ruling on anything but whether the jury should be put through the process, and it's a function of the discretion of the Court. And I'm exercising my discretion to say the jury will not be put through this process. And the legal authority to do that derives

> from a court order that I would have to enforce, and I'm not going to do that. That's all I'm saying.

On April 13, 2023, the Commonwealth filed a motion to reconsider and clarify, urging the trial court to rescind its April 5, 2023, order, and "consider the merits of the *voir dire* questions submitted by both parties in this case on a question-by-question basis and in light of the District Attorney of Allegheny County's discretion to seek the death penalty in this matter." The Commonwealth also inquired whether the trial court intended to "disallow ***any*** jury to be selected and death qualified at ***any*** stage of this case? More specifically, if the Commonwealth obtains a verdict of Guilty as to Murder in the First Degree, is it this Honorable Court's position and Order that the Commonwealth will be prevented from death qualifying a subsequent jury for sentencing and thus prevented from seeking the death penalty absent a change in stance from Governor Shapiro or a change in the law of the Commonwealth?" (emphasis in original).

On April 18, 2023, Mr. Zieglar filed a response to the Commonwealth's reconsideration motion. He also filed a supplemental response on April 21, 2023. In both filings, Mr. Zieglar maintained that the Commonwealth's motion should be denied.

The trial court did not rescind its April 5, 2023, order. Therefore, on May 3, 2023, the Commonwealth timely filed an interlocutory appeal to the Pennsylvania Superior Court. The trial court subsequently ordered the Commonwealth to file a concise statement of errors complained of on appeal by May 30, 2023. The

Commonwealth timely filed it on May 26, 2023, challenging the propriety of the trial court's order.

On June 28, 2023, the trial court filed its Pa.R.A.P. 1925(a) opinion. Over the course of 21 pages, the trial court thoughtfully explained how Pennsylvania's formal and indefinite moratorium on the death penalty, the governor's public proclamation to never carry out the death penalty, and case law from the United States Supreme Court and Pennsylvania Supreme Court—most notably, *Caldwell v. Mississippi*, 472 U.S. 320 (1985)—compelled the inevitable conclusion that a death-qualified jury could not be impaneled in Mr. Zieglar's case.

On August 8, 2023, the Commonwealth timely filed its brief for appellant. In relevant part, it stated:

> The Judicial Code provides that following the recording of a verdict of murder of the first degree and before the jury is discharged, the trial court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment. **Error! Bookmark not defined.** Additionally, the Rules of Criminal Procedure require the court to provide for a death-qualified jury under these circumstances. In this case, the court's Order that precludes the impaneling of a death-qualified jury constitutes clear error. The Rules of Criminal Procedure provide that in capital murder cases, the right to individual voir dire of the venire panel regarding their views on capital punishment and other life qualifying questions is mandatory. Moreover, the Sentencing Code explicitly requires that the same jury decide both a defendant's guilty and penalty. The trial court's Order frustrates these clear legislative intentions.

(underlining and emphasis in original). The Commonwealth additionally argued that "the jury in this case could easily be preliminarily instructed that the Governor's moratorium is temporary and linked to him personally, but, given the

current state of the law, the jury should assume that any death sentence will eventually be carried out. This was the procedure upheld by the Oregon Supreme Court in *State v. Taylor*, 364 Or. 364 (2019), cert. denied, 140 S.Ct. 505 (2019)."

On January 2, 2024, Undersigned Counsel timely filed Mr. Zieglar's brief for appellee, summarizing:

> Contrary to the Commonwealth's belief, the trial court did not abuse its discretion in deciding not to seat a death-qualified jury in Mr. Zieglar's case. While the trial court's order is unprecedented, so is the fact that there has been a formal moratorium on executions in Pennsylvania since 2015. Furthermore, on February 16, 2023, Governor Shapiro publicly announced: "I will not issue any execution warrants during my term as Governor. When an execution warrant comes to my desk, I will sign a reprieve each and every time." With that in mind, the trial court accepted the reality of the situation and reasonably determined that "the jury is not going to be death-qualified and go through all of that and then be asked to listen to all of the additional evidence and then listen to the arguments when the Governor has already said it's not going to happen. It simply isn't going to happen. It's an unreasonable use of court process, in my view." Additionally, case law from both the United States Supreme Court and Pennsylvania Supreme Court support the trial court's conclusion that "the risk of minimization of the jury's sentencing function in this case is even greater since the Governor's proclamation did not announce the continuation of a moratorium (temporary halt) but, instead, announced a total cessation of the carrying out of the death penalty." As the trial court's decision regarding the jury selection process in Mr. Zieglar's case was not driven by partiality, prejudice, bias, or ill-will against the Commonwealth, but, instead, was based on a firm foundation of reason, it did not commit an abuse of discretion. The trial court's April 5, 2023, order must be affirmed.

On March 5, 2024, the Commonwealth's appeal was orally argued before the Pennsylvania Superior Court. Subsequently, on August 21, 2024, the Court issued a published opinion, reversing the trial court's order and remanding for further

proceedings. *Commonwealth v. Zieglar*, 322 A.3d 256, 258 (Pa.Super. 2024). According to the Court, "[t]he legislature has not granted trial courts the authority to intrude into the Commonwealth's exercise of discretion [regarding the death penalty] and, consequently, we reaffirm that a trial court cannot exercise authority over the Commonwealth's discretion to seek the death penalty pre-trial, even where the Governor has imposed a moratorium on imposition of the death penalty." *Id.* at 268.

More critically, the Court held:

> Furthermore, we observe that the trial court relies upon *Caldwell* for the premise that it is unable to impanel a death jury. The trial court contends that the moratorium, imposed by Governor Shapiro as the chief executive of the Commonwealth, removes the decision regarding the death sentence from every potential juror in violation of *Caldwell*. *See* Trial Court Opinion, 6/28/23, at 9, 18-21. Additionally, the trial court determined that, in light of the conflict between Governor Shapiro's moratorium and *Caldwell*, it would be impossible to appoint a jury that could properly consider the death penalty.
>
> We find this rationale to be premature. First, the citizens of this Commonwealth are not presumptively aware of Governor Shapiro's moratorium. Furthermore, even if potential jurors **were aware**, then the proper forum to discover that alleged taint would be **at *voir dire***. Here, as we discussed, the trial court's order prevents the parties from engaging in voir dire proceedings related to the death penalty, which would make it impossible to discern whether any taint exists or what effect, if any, it may have on potential jurors. Thus, the record before us is underdeveloped for review of this argument.
>
> We further observe that Governor Shapiro's moratorium is temporary in nature. Under the laws of this Commonwealth, Governor Shapiro will not hold his position in perpetuity and, thus, we cannot agree that the moratorium will presumptively taint potential jurors in making the difficult determination of death versus life. Furthermore, we note that Governor Shapiro

> stated that he was "granting a reprieve," not a pardon or commutation of sentence. See *Commonwealth v. Williams*, 129 A.3d 1199, 1219 (Pa. 2015) ("reprieve as set forth in Article IV, Section 9(a) means the **temporary suspension of the execution of a sentence**") (emphasis added, quotation marks omitted). Consequently, any reprieve granted by Governor Shapiro does not remove the decision of death from the jury, but merely delays the implementation of any such decision. Moreover, despite Governor Shapiro's moratorium, the Commonwealth's ability to pursue the death penalty is still the law. *See* 42 Pa.C.S.A. § 9711.
>
> Finally, we presume that our legislature is aware of Governor Shapiro's moratorium, just as the legislature was aware of then-Governor Wolf's moratorium. Nevertheless, the legislature has not amended our death penalty laws. Additionally, neither our Supreme Court nor the United States Supreme Court has declared the death penalty to be unconstitutional. Consequently, unless and until either the law changes or the death penalty is determined to be unconstitutional, this Court cannot affirm the trial court's order and we consider the *Caldwell* argument to be unpersuasive and premature.

Id. at 268 n. 13 (emphasis in original).

On September 27, 2024, Mr. Zieglar, through Undersigned Counsel, timely filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Therein, he raised the following relevant issue: "In an issue of first impression and substantial public importance, in light of Pennsylvania's indefinite moratorium on the death penalty, the governor's public proclamation calling upon the General Assembly to abolish capital punishment once and for all, and *Caldwell v. Mississippi*, *Commonwealth v. Baker*, and *Commonwealth v. Jasper*, whether a trial court has the discretion to determine that a fair and impartial death-qualified jury cannot be impaneled?" The Supreme Court denied Mr. Zieglar's petition on

February 19, 2025. Therefore, pursuant to Rule 13(1) of this Honorable Court, Mr. Zieglar timely petitions for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

As a threshold matter, the Pennsylvania Superior Court noted that "the prosecutor possesses the initial discretion regarding whether to seek the death penalty in a murder prosecution." *Zieglar*, 322 A.3d at 264 (quoting *Commonwealth v. Buck*, 709 A.2d 892, 896 (Pa. 1998)). Importantly, though, the Court also observed that "the appropriateness of the death penalty is 'solely a function of the jury.'" *Id.* (quoting *Buck*, 709 A.2d at 895). Thus, the prosecutor's discretion is not unfettered.

According to the Court, the trial court's order was an attempt on its part to preclude the Commonwealth from seeking the death penalty against Mr. Zieglar, in violation of the Pennsylvania Rules of Criminal Procedure and Sentencing Code. *Id.* at 267-268. This was error, as it was an incorrect framing of the issue. Rather, the issue properly stated was whether the trial court's order was an appropriate exercise of its discretion to ensure that Mr. Zieglar, on trial for his life, would have a competent, fair, impartial, and unprejudiced jury. Indeed, regardless of state procedural rules and statutes, this Honorable Court has held: "It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (citations omitted).

Furthermore, the Pennsylvania Supreme Court has held:

> The Rules of Criminal Procedure, including Rule 631,[1] were enacted to provide for the just determination of ***every*** criminal proceeding, and shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustified expense and delay. Pa.R.Crim.P. 101. The process of selecting a jury is committed to the sound discretion of the trial judge[.]

Commonwealth v. Noel, 104 A.3d 1156, 1169 (Pa. 2014) (brackets, bracket text, internal footnote, and emphasis added). *See Commonwealth v. Pittman*, 466 A.2d 1370, 1373 (Pa.Super. 1983) ("The trial judges of this Commonwealth exercise broad powers while presiding at the trial of cases assigned to them. .... Likewise, the process of selecting a jury is committed to the sound discretion of the trial judge.").

That the Commonwealth has sought the death penalty against Mr. Zieglar did not diminish his constitutional rights to due process, a fair trial, and an impartial jury. Nor did that fact eliminate the trial court's duty to safeguard Mr. Zieglar's constitutional rights. To the contrary, the potential for a death sentence intensified the trial court's efforts and exercise of discretion. This Honorable Court has made abundantly clear that, because "execution is the most irremediable and unfathomable of penalties[,] ... death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citations omitted). So, too, has the Pennsylvania Supreme Court, acknowledging the existence of "death is different" jurisprudence. *Commonwealth v. Fletcher*, 896 A.2d 508, 519 (Pa. 2006).

II.

The Pennsylvania Superior Court ultimately held that, because the Commonwealth elected to seek the death penalty against Mr. Zieglar, the Rules of

[1] *See* Pa.R.Crim.P. 631 (Examination and Challenges of Trial Jurors).

Criminal Procedure and Sentencing Code required the trial court to impanel a death-qualified jury, come hell or high water. *Zieglar*, 322 A.3d at 267-268. The Court, therefore, refused to consider any argument implicating Pennsylvania's formal and indefinite moratorium on capital punishment, the governor's public proclamation calling for its abolition, and *Caldwell v. Mississippi*. *Id.* at 268 n. 13.

Respectfully, this was error of constitutional magnitude.

A.

The Court speculated that "the citizens of this Commonwealth are not presumptively aware of Governor Shapiro's moratorium. Furthermore, even if potential jurors **were aware**, then the proper forum to discover that alleged taint would be **at *voir dire***." *Id.* (emphasis in original).

On the contrary, the Court itself has previously held: "We cite the well-known legal maxim that ***everyone*** is presumed to know the law[.]" *Commonwealth v. McBryde*, 909 A.2d 835, 838 (Pa.Super. 2006) (citations omitted; emphasis added). Besides, the salient fact remains that all prospective jurors in Mr. Zieglar's case, in order to determine whether they could be fair and impartial with respect to punishment, ***must*** be made aware of Pennsylvania's moratorium and Governor Shapiro's public proclamation. Knowing that, the Court erred by ignoring them in its evaluation of the trial court's order.

B.

The Court further erred by claiming that Governor Shapiro's moratorium is merely "temporary in nature." *Zieglar*, 322 A.3d at 268 n. 13. The Court was also

inaccurate in its conclusion that "Governor Shapiro will not hold his position in perpetuity[.]" *Id.*

In relevant part, the governor's exact words, in his public proclamation issued on February 16, 2023, were:

> As Attorney General, I had the privilege of seeing our criminal justice system up close as the chief law enforcement officer.
>
> Through that experience, two critical truths became clear to me about the capital sentencing system in our Commonwealth: The system is fallible, and the outcome is irreversible.
>
> I have painstakingly considered every aspect of Pennsylvania's capital sentencing system, reflected on my own conscience, and weighed the tremendous responsibilities I have as Governor.
>
> ***And I am here today in this Church to tell you I will not issue any execution warrants during my term as Governor.***
>
> ***When an execution warrant comes to my desk, I will sign a reprieve each and every time.***
>
> ***But I want to go further.***
>
> Through many administrations, Governors have called on lawmakers to reform the system.
>
> To study what changes could look like.
>
> They've been open to the idea that our capital sentencing system is flawed, but fixable.
>
> I believe that misses the mark.
>
> ***That's why today, I'm respectfully calling on the General Assembly to work with me to abolish the death penalty in Pennsylvania—once and for all.***

...

> ***Pennsylvania should do what 25 other states have done in outlawing the death penalty or refusing to impose it—including many of our neighbors such as New Jersey, Maryland, and West Virginia.***
>
> ...
>
> ***The Commonwealth's shouldn't be in the business of putting people to death. Period.***
>
> ***I believe that in my heart.***
>
> ***This is a fundamental statement of morality. Of what's right and wrong.***
>
> ***And I believe Pennsylvania must be on the right side of this issue.***

https://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty/ (last visited September 19, 2024) (emphasis added).

Simply put, not only is Governor Shapiro seeking to end capital punishment in Pennsylvania ***forever***, but he clearly will ***never*** back down in his attempt to achieve that end.

C.

According to the Court, regardless of the moratorium and the governor's public proclamation, a jury should always assume that a sentence of death eventually will be carried out based simply on the fact that "the death penalty is still the law." *Zieglar*, 322 A.3d at 268 n. 13.

However, this Honorable Court has held that where, as here, constitutional rights directly affecting the ascertainment of guilt or punishment are implicated, statutes and procedural rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Consequently, circumstances such as reality and the current state of affairs cannot be lightly cast aside.

Therefore, and beyond Pennsylvania's indefinite moratorium and the governor's public proclamation, *State v. Taylor*, 434 P.3d 331 (Or. 2019) and its aftermath cannot be ignored.[2]

In *Taylor*, Oregon Governor Brown stated, upon taking office in 2015, that she would continue the death penalty moratorium instituted by her predecessor, Governor Kitzhaber. *Id.* at 346 n. 13. The defendant argued that "a jury cannot constitutionally vote to impose the death penalty during a time when the Governor has imposed a moratorium on the carrying out of such sentences." *Id.* at 345. The Oregon Supreme Court rejected the defendant's argument because the trial court specifically cautioned the jury on the moratorium that the governor had imposed on carrying out the death penalty. *Id.* The Court reasoned:

> The court instructed the jury that, "[i]n legal terms," the Governor's moratorium granted "temporary reprieves of existing death sentences" but that the jury "should assume that death sentences handed down while he is Governor will ultimately be carried out." That instruction corrected any impression that the jurors may have had about the meaning of the moratorium and reinforced that, if they voted to sentence defendant to death, that sentence would "ultimately be carried out."

[2] The Commonwealth's Superior Court brief raised *Taylor*. Additionally, counsel for both parties discussed *Taylor* and its aftermath at length during oral argument.

Id. at 346.

Here, while Governor Brown left open the possibility that she might reverse course on the moratorium, Governor Shapiro has stated in no uncertain terms that he will ***never*** carry out a death sentence. Moreover, he has formally called upon the General Assembly to ***abolish*** the death penalty in Pennsylvania once and for all. Therefore, here, unlike in *Taylor*, ***no*** cautionary instruction or *voir dire* question could ever persuade Mr. Zieglar's jury that, if it voted to sentence him to death, the sentence would "ultimately be carried out." This is true even if the jury was specifically instructed to disregard the moratorium and the governor's public proclamation in its deliberations.[3]

The import of *Taylor* does not end at this point, though. In 2022, with just weeks left in office, Governor Brown commuted all death sentences to life imprisonment without the possibility of parole. http://www.npr.org/2022/12/15/1143002545/oregon-death-sentence-governor-kate-brown (last visited September 19, 2024).[4]

Like Oregon, the laws of Pennsylvania empower Governor Shapiro to take steps to commute every death row inmate's sentence to life with no chance of parole.

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[3] Although the law presumes that the jury will follow a cautionary instruction issued by the trial court, this presumption is not unassailable. In *Bruton v. United States*, 391 U.S. 123 (1968), this Honorable Court recognized that "there are some instances where 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135. *See Eagle Pharms., Inc. v. Hospira, Inc.*, 424 F.Supp.3d 355, 361 (D. Del. 2019) ("There is no way to unring a bell that has already rung.").

[4] Undersigned Counsel brought this up at oral argument before the Pennsylvania Superior Court.

Pa. Const. art. 4, § 9.[5] Every prospective juror in a capital case in Pennsylvania ***must*** be made aware of this extremely real possibility, particularly in light of the moratorium and the governor's public proclamation.

All this is to say, a capital jury in Pennsylvania simply ***cannot*** assume that a sentence of death inevitably will be carried out.

D.

Unlike the Pennsylvania Superior Court, the trial court refused to disregard the above, given that Mr. Zieglar's constitutional rights and life were at stake. The trial court also refused to ignore case law from this Honorable Court (as well as the Pennsylvania Supreme Court) that directly impacted the matter.

In *Caldwell v. Mississippi*, *supra*, this Honorable Court invalidated a death sentence because the sentencing jury was improperly led to believe that the responsibility for determining the appropriateness of the death sentence rested elsewhere (appellate courts). 472 U.S. at 341. "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that they jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id.* at 333. The Court concluded:

> [T]his Court has described as "the principal concern" of our jurisprudence regarding the death penalty, the "procedure by which the State imposes the death sentence." *California v.*

[5] Undersigned Counsel mentioned this at oral argument as well.

> *Ramos*, 463 U.S. [992,] 999 [(1983)]. In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. [280,] 305 [(1976)] (plurality opinion). Such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment.
>
> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 340-341 (brackets and bracketed text added).

In *Commonwealth v. Baker*, 511 A.2d 777 (Pa. 1986), the Pennsylvania Supreme Court, relying on *Caldwell*, vacated a death sentence under the same set of circumstances, explaining:

> The Assistant District Attorney's comments to which Appellant objects attempted to minimize the jury's sense of responsibility for a verdict of death and to minimize their expectations that such a verdict would ever be carried out[.] .... We conclude that the inherent bias and prejudice to Appellant engendered by the Assistant District Attorney's remarks necessitates reversal of the death sentence in the instant case, and that under the circumstances said remarks also violated Appellant's rights under the Eighth Amendment of the United States Constitution as set forth in *Caldwell v. Mississippi*, *supra*, as well as violating Appellant's rights under Article I, § 13, of the Constitution of the Commonwealth of Pennsylvania.

511 A.2d at 787-790 (unnecessary paragraphing omitted).

Finally, in *Commonwealth v. Jasper*, 737 A.2d 196 (Pa. 1999), the Pennsylvania Supreme Court again set aside a sentence of death because the jury's sense of responsibility was minimized. 737 A.2d at 196. The trial court instructed the jurors that they were not the final arbiter of the sentence, stating: "Now, with regard to death penalty, you know what that implies. Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out. I won't go into all the various reviews that we have. That shouldn't concern you at this point." *Id.* (citations omitted). Despite the inherently erroneous nature of this instruction, the trial court correctly informed the jury three times that its determination was not merely a recommendation, but that it was actually deciding the sentence that would be imposed. *Id.* at 197. This Court held that the trial court's additional instructions did not cure the error, "for the plain import of the court's remarks is that although the jury may impose the death penalty, it may not be carried out, thus removing from the jury the responsibility for imposing the death penalty." *Id. See Commonwealth v. Montalvo*, 205 A.3d 274 (Pa. 2019) (same).

E.

Although deemed "unpersuasive and premature" by the Pennsylvania Superior Court, *Zieglar*, 322 A.3d at 268 n. 13, the trial court's Rule 1925(a) opinion more than adequately explained why a fair and impartial death-qualified jury simply could not be impaneled in Mr. Zieglar's case:

> In this Court's view, the prospective jury in this case, if it were permitted to deliberate as to sentence, will have been

informed by Governor Shapiro's proclamation that the responsibility for any determination as to whether Defendant will actually receive the death penalty has already been made by a respected Pennsylvania legal authority who, the juror(s) may perceive, has a greater right to make that determination. Deliberating jurors who might be reluctant to vote for a death sentence could nevertheless give in, knowing that Governor Shapiro has already made the ultimate decision. The possibility that the jury or any particular member of the jury might rely on Governor Shapiro's authority without opening acknowledging that the Governor's proclamation had an effect on the juror's decision, thereby causing a bias toward returning a death sentence, is simply too great. To borrow from the *Jasper* Court:

> [T]he plain import of the [Governor's proclamation] is that although the jury may impose the death penalty, it [will] not be carried out, thus removing from the jury responsibility for imposing the death penalty.

The argument that a new governor with a different view of the death penalty may be elected in four or eight years is of no avail. The risk presented currently is that a capital case jury deliberating as to sentence while Governor Shapiro is in office, particularly at the beginning of his first term, may be influenced by Governor Shapiro's proclamation. The exact result forbidden by *Caldwell*, *Jasper*, *Baker*, and *Montalvo* could occur if the jury, having been improperly affected by the Governor's proclamation, returns a death sentence, the case proceeds through the appeal process over a period of years during which a new governor is elected and then the new governor signs the execution based on the tainted death sentence.

This Court understands that this Opinion relies on a degree of speculation as to how Governor Shapiro's proclamation might affect a capital case jury's sentencing deliberations. That same degree of speculation, in this Court's view, was the foundation for the holdings in *Caldwell*, *Jasper*, *Baker*, and *Montalvo*. In all of those cases, the Supreme Court of the United States and the Supreme Court of Pennsylvania invalidated capital case jury death sentences without proof that improper argument made by a prosecutor and/or improper and/or inconsistent instructions given by a trial judge actually affected

the jury's decision. All of the decisions in these cases were premised on the presumption that the jury did not adequately appreciate or understand the importance of its role in sentencing because the defective comments and/or instructions could have caused a minimization, in the mind of at least one juror, of the jury's sentencing function.[10] This Court believes the risk of minimization of the jury's sentencing function in this case is even greater since the Governor's proclamation did not announce the continuation of a moratorium (temporary halt) but, instead, announced a total cessation of the carrying out of the death penalty.

> [10] The jury's having heard the improper comments/instructions was enough to cause the High Courts to overturn the death sentences in those cases. Whether by design or otherwise, Governor Shapiro's proclamation was delivered in a way to ensure that citizens of Pennsylvania, the pool from which jurors are chosen, were made aware of his intentions as to how he will exercise his ultimate authority in death penalty cases.

Even were the jury to be instructed by the court to not let the Governor's proclamation affect their deliberations, a death sentence verdict would still be subject to question. As has been observed by the United States Supreme Court, and endorsed by the Pennsylvania Supreme Court:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

See Commonwealth v. Rainey, 593 Pa. 67, 86 928 A.2d 215, 227 (2007), quoting, *Bruton v. United States*, 391 U.S. 123, 135-136, 88 S.Ct 1620 (1968). This Court is of the view that no pre-sentencing deliberation instruction given by this Court can assure that the Governor's proclamation will not cause a result otherwise not reached by a capital case sentencing jury.

...

Requiring citizens to undergo the intensive and intrusive process of death qualification and sentencing deliberations, when the outcome has already been determined, is patently unreasonable and fundamentally unfair. All juries should be shown the same respect for their critically important role in all parts of a trial, from impanelment through verdict. Instructing jurors to ignore the public pronouncement of the highest-ranking executive officer in the Commonwealth, who has the ultimate authority to carry out the death penalty, is unrealistic, if not outright disingenuous.[11]

> [11] In effect we are asking jurors to respect an instruction that tells them to disregard the fact the Governor Shapiro will not respect their decision if it doesn't align with his personal sense of morality, regardless of its legality.

Death is different.[12] All death sentences otherwise issued in compliance with all legal requirements must be free from doubt that even one member of the jury deferred to the authority of the Governor in arriving at the decision to sentence another person to death. Governor Shapiro's proclamation, as it stands currently, makes any death penalty sentence issued after the date of the Governor's proclamation suspect under the Eighth Amendment of the United States Constitution and under Article 1, § 13 of the Constitution of the Commonwealth of Pennsylvania.

> [12] Because "execution is the most irremediable and unfathomable of penalties...death is different." *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595 (1986).

(Trial Court's Opinion, 6/28/2023, 18-21).

F.

As the above illustrates, the trial court was not oblivious to the Pennsylvania Rules of Criminal Procedure or the Sentencing Code. Nor was it motivated by

partiality, prejudice, bias, or ill-will against the Commonwealth. On the contrary, the trial court exercised its discretion upon a clear foundation of reason, which was supported by this Honorable Court's (and the Pennsylvania Supreme Court's) case law when applied to the unique and unavoidable facts that there is an indefinite moratorium on the death penalty in Pennsylvania, the governor has public proclaimed that he will never carry out a sentence of death, and the governor has formally called upon the General Assembly to abolish capital punishment once and for all. In the face of all this, the trial court reasonably concluded that a competent, fair, impartial, and unprejudiced death-qualified jury simply could not be impaneled in Mr. Zieglar's case. Because the trial court's actions were necessary to protect Mr. Zieglar's constitutional rights, the trial court did not err. The Pennsylvania Superior Court's opinion holding otherwise must be reversed and vacated.

CONCLUSION

The sum and substance of the Pennsylvania Superior Court's opinion has clearly and manifestly violated Mr. Zieglar's constitutional rights pursuant to *Caldwell v. Mississippi* and its progeny. This Honorable Court should grant certiorari in order to make clear that if a state has instituted an indefinite and formal moratorium on the death penalty, no jury can constitutionally consider that punishment.

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322 A.3d 256
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant
v.
Deangelo ZIEGLAR

No. 515 WDA 2023
|
Argued March 5, 2024
|
Filed August 21, 2024

Synopsis

Background: Defendant was charged with criminal homicide and other offenses for the shooting death of victim, and Commonwealth filed notice of intention to seek death penalty and notice of aggravating circumstances. Following hearing on proposed voir dire questions, the Court of Common Pleas, Allegheny County, Criminal Division, No. CP-02-CR-0002096-2022, Anthony M. Mariani, J., issued an order rejecting voir dire questions filed by Commonwealth and defendant and limiting jury selection to jurors' ability to be fair and impartial without deliberation as to death penalty as a possible sentence. Commonwealth appealed.

Holdings: The Superior Court, No. 515 WDA 2023, Lazarus, J., held that:

[1] trial court's order granting Commonwealth's motion to reconsider order denying proposed voir dire questions was not an express grant of reconsideration that vacated the previous order;

[2] as a matter of first impression, trial court's order denying proposed voir dire questions effectively prohibited Commonwealth from exercising discretion to seek the death penalty; and

[3] trial court's denial of voir dire questions relating to death and life qualification denied Commonwealth and defendant's ability to death or life-qualify the jury in violation of sentencing code.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion.

West Headnotes (11)

[1] **Criminal Law**⇨Time of Giving

Trial court's order granting Commonwealth's motion to reconsider previous order, which had denied proposed voir dire questions mentioning or referring to the death penalty in defendant's criminal homicide case, was not an express grant of reconsideration that vacated the previous order, and thus, Commonwealth's notice of appeal of previous order was timely filed to preserve its appellate rights; grant of motion to reconsider was merely a grant for a hearing at which the parties could argue their respective positions. Pa. R. App. P. 903(a).

[2] **Criminal Law**⇨Time of Giving

Generally, when an appellant files a motion for reconsideration of a final order, they must file a protective notice of appeal to ensure preservation of their appellate rights if the court does not expressly grant reconsideration within the thirty-day appeal period. Pa. R. App. P. 903(a).

1 Case that cites this headnote

[3] **Criminal Law**⇨Excuse for delay; extension of time and relief from default

Upon the filing of a motion for reconsideration, a trial court's action in granting a rule to show cause and setting a hearing date is insufficient to toll the appeal period; rather the trial court must

APPENDIX A

expressly grant reconsideration within thirty days of entry of its order. Pa. R. App. P. 903(a).

[4] **Criminal Law**⇐Effect of transfer or proceedings therefor

Failure to expressly grant reconsideration within the time set by the rules for filing an appeal will cause the trial court to lose its power to act on the application for reconsideration. Pa. R. App. P. 903(a).

[5] **Criminal Law**⇐Relating to jury

Trial court's order denying proposed voir dire questions mentioning or referring to the death penalty in defendant's criminal homicide case effectively prohibited Commonwealth from exercising its discretion to seek the death penalty, and thus Commonwealth's interlocutory appeal was proper; Commonwealth included requisite certification that order substantially limited its prosecution and prohibiting appeal could have impliedly permitted Commonwealth to seek relief post-conviction in violation of double jeopardy protections. U.S. Const. Amend. 5; Pa. R. App. P. 311(d).

[6] **Sentencing and Punishment**⇐Authority or discretion of prosecutor

The prosecutor possesses the initial discretion regarding whether to seek the death penalty in a murder prosecution.

[7] **Constitutional Law**⇐Judicial encroachment on executive acts taken under statutory authority

Where the legislature has granted a prosecutor discretionary powers, the trial court may review those powers only if the legislature has expressly granted the court authority to review them.

[8] **Sentencing and Punishment**⇐Scope of review

Whether a trial court may deny a prosecutor's ability to seek the death penalty is a question of law, for which an appellate court's standard of review is de novo, and its scope of review is plenary.

[9] **Jury**⇐View of capital punishment

Trial court's denial of all voir dire questions relating to death and life qualification in defendant's criminal homicide case denied Commonwealth and defendant's ability to death or life-qualify the jury in violation of sentencing code, even though governor had instituted moratorium on imposition of the death penalty; trial court expressly stated that there would be no jury deliberations as to sentence, and moratorium was temporary in nature absent amendment to death penalty laws by legislature or declaration of unconstitutionality by United States Supreme Court. 42 Pa. Cons. Stat. Ann. § 9711.

[10] **Jury**⇐View of capital punishment

"Death qualification" is the process by which counsel or the court identifies and excludes prospective jurors who stated that they would not under any circumstances vote for the death penalty.

[11] **Jury**⇐View of capital punishment

"Life qualification" refers to the process by which counsel or the court identifies and excludes prospective jurors who have a fixed opinion that a sentence of death should always be imposed for a conviction of first-degree murder.

***257** Appeal from the Order Entered April 5, 2023, In the Court of Common Pleas of Allegheny County, Criminal Division, at No(s): CP-02-CR-0002096-2022, Anthony M. Mariani, J.

Attorneys and Law Firms

Amy E. Constantine, Assistant District Attorney, Pittsburgh, for Commonwealth, appellant.

Brandon P. Ging, Deputy Director, Public Defenders Office, Pittsburgh, for appellee.

BEFORE: LAZARUS, P.J., PANELLA, P.J.E., and BECK, J.

Opinion

OPINION BY LAZARUS, P.J.:

***258** The Commonwealth of Pennsylvania appeals from the order, entered in the Court of Common Pleas of Allegheny County, denying its request to impanel a death-qualified jury. After careful review, we reverse and remand for further proceedings.

On January 19, 2022, police officers responded to a report of a shooting at the intersection of Lincoln and Sheridan Avenues in Pittsburgh. Upon arrival, police encountered Rachel Dowden, who had been shot multiple times. Dowden was transported to Allegheny General Hospital and was pronounced deceased at 9:18 p.m. that same day. The ensuing police investigation revealed that Dowden had a final Protection from Abuse (PFA) order against Appellee Deangelo Zieglar. On October 20, 2022, after additional investigation not relevant to this appeal, the Commonwealth charged Zieglar with multiple offenses, including criminal homicide,[1] for the shooting death of Dowden.

As part of the pre-trial proceedings in this matter, the Commonwealth, on April 14, 2022, filed a Notice of Intention to Seek Death Penalty and Notice of Aggravating Circumstances Pursuant to Pa.R.Crim.P. 802[2] and 42 Pa.C.S.A. § 9711 (hereinafter, "Notice"). In its Notice, the Commonwealth set forth the following five aggravating circumstances/factors:

> 1. The victim was a prosecution witness to a murder or other felony committed by [Zieglar] and was killed for the purpose of preventing [her] testimony against [Zieglar] in any grand jury or criminal proceeding involving such offenses. 42 Pa.C.S.[A.] § 9711(d)(5).
>
> 2. [Zieglar] committed the killing while in the perpetration of a felony. [***Id.*** at] § [ ](d)(6).
>
> 3. In the commission of the offense[, Zieglar] knowingly created a grave risk of death to another person in addition to [the] homicide victim. [***Id.*** at] § [ ](d)(7).
>
> 4. [Zieglar] has a significant history of felony convictions involving the use or threat of violence to the [victim]. [***Id.*** at] § [ ](d)(9).
>
> 5. At the time of the killing, [Zieglar] was subject to a court order restricting in any way [his] behavior toward the victim pursuant to 23 Pa.C.S.[A.] Ch. 61 or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from [Zieglar]. 42 Pa.C.S.[A.] § 9711(d)(18).

Notice, 4/14/22, at 1-2.

During one of many status conferences, the trial court indicated that it would *sua sponte* order a hearing,[3] at which it would require the Commonwealth to prove the

aggravating factors set forth in its Notice. ***See*** Order and Opinion, 4/5/23, at 1-2 (detailing case's procedural history); Commonwealth's Motion to Reconsider, 10/31/22, at 1-5 (requesting trial court reconsider *sua sponte* decision to hold hearing on death penalty factors). The Commonwealth filed a motion to reconsider, to ***259** which, on November 2, 2022, the trial court ordered Zieglar file a response.

On November 6, 2022, Zieglar filed his response. ***See*** Defendant's Response to Commonwealth's Motion to Reconsider Order to Prove Aggravators of Death Penalty Notice, 11/6/22, at 1-5. In his response, Zieglar conceded that "under current law it is improper for this Honorable Court to challenge the Commonwealth's exercise of discretion in seeking the death penalty." ***Id.*** at 3. Additionally, Zieglar "raise[d] a claim that the Commonwealth [was] abusing its discretion in seeking the death penalty without providing, in evidence, a factual underpinning for each aggravating factor." ***Id.*** Ultimately, the trial court did not hold an evidentiary hearing after concluding that "absent a challenge put forth by [Zieglar]'s attorneys, this [c]ourt has no authority to order such an evidentiary hearing." Order and Opinion, 4/5/23, at 4.

After pre-trial procedure not relevant to the instant appeal, the case proceeded to *voir dire*. On March 13, 2023, both parties filed their respective proposed *voir dire* questions. ***See*** Commonwealth's Proposed *Voir Dire* Questions: Death Penalty, 3/13/23, at 1-9 (unpaginated); Defendant's Proposed *Voir Dire* Questions, 3/13/23, at 4-20. The Commonwealth filed 34 proposed *voir dire* questions and Zieglar filed 70 proposed *voir dire* questions. Both parties' proposed questions pertained almost exclusively to the death penalty. ***See*** Trial Court Opinion, 6/28/23, at 4-5 (summarizing proposed *voir dire* questions). Additionally, we note that Zieglar did not oppose the Commonwealth's pursuit of the death penalty at this time.

On April 3, 2023, the trial court conducted a hearing on the parties' proposed *voir dire* questions. After argument, the trial court took the matter under advisement. On April 5, 2023, the trial court issued the following order:

> a) the 34 *voir dire* questions filed by the Commonwealth on March 13, 2023[,] will not be permitted to be used during jury selection in this case;
>
> b) the 70 questions filed by [Zieglar] on March 13, 2023, will not be permitted to be used during jury selection in this case;
>
> c) the jury selection in this case will be limited to determining the ability of each juror to be fair and impartial in deciding the verdict in this case; **there will be no deliberations as to sentence**;
>
> d) within the next 40 days, counsel for the Commonwealth and counsel for [Zieglar] may submit proposed *voir dire* questions **which do not mention or refer to the death penalty as a possible sentence in this case**;
>
> e) after the [c]ourt has received all re-submitted proposed *voir dire* questions, a status conference will be scheduled within 10 days, to address any outstanding discovery issues and jury selection procedures;
>
> f) the scheduling times set forth above will be stayed should either party timely file a request for appellate review of this Order[.]

Order, 4/5/23, at 1-2 (emphasis added).

Additionally, the trial court attached an opinion explaining its reasoning for denying the proposed *voir dire* questions. ***See*** Opinion and Order, 4/5/23, at 1-10. In particular, the trial court considered that Governor Josh Shapiro had continued then-Governor Tom Wolf's moratorium on the death penalty[4] and found that the moratorium has made it functionally impossible ***260** for a jury to impose the death penalty. ***See id.*** at 3-9. Additionally, the trial court further concluded that, in light of the moratorium, it was compelled to act on behalf of the citizens of Allegheny County who may be called for jury duty, to prevent them from undergoing the harrowing ordeal of deciding whether a fellow citizen lives or dies where the Governor's stated refusal to sign a death warrant has effectively removed the decision from the jury. ***See id.*** at 6, 8-10.

On April 13, 2023, the Commonwealth filed a "Motion to Reconsider and Clarify," in which it argued that the trial court's order effectively prohibited the Commonwealth from exercising its discretion to impanel a death-qualified jury. ***See*** Commonwealth's Motion to Reconsider and Clarify, 4/13/23, at 4-8. Additionally, the Commonwealth contended that the trial court's order was in direct conflict with prevailing case law because a trial court has no authority to challenge the Commonwealth's pursuit of the death penalty. ***See id.*** (citing ***Commonwealth v. Buck***, 551 Pa. 184, 709 A.2d 892, 896 (1998) (Supreme Court recognizing prosecutor possesses initial discretion regarding whether to pursue death penalty); ***Commonwealth v. Buonopane***, 410 Pa.Super. 215, 599 A.2d 681 (1991) (trial court's pre-trial determination that interfered with prosecutor's discretionary functions, absent threshold showing of valid claim of purposeful

abuse, violated constitutional principle of separation of powers, and courts will not review executive branch actions involving exercises of discretion absent showing of bad faith, fraud, capricious action or abuse of power, "nor will they inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution")). Further, as part of its "Motion to Clarify," the Commonwealth requested that the trial court clarify whether it would "[ ]allow **any** jury to be selected and death[-]qualified at **any** stage of this case[.]" Motion to Reconsider and Clarify, 4/13/23, at 7 (unpaginated) (emphasis in original).

On April 13, 2023, the trial court ordered Zieglar to file a response to the Commonwealth's motion to reconsider. On April 18, 2023, Zieglar filed a response, in which he argued that the trial court was correct to preclude the impaneling of a capital jury because of the ongoing moratorium. ***See*** Defendant's Response to Commonwealth's Motion to Reconsider and Clarify, 4/18/23, at 1-8 (emphasis in original). Additionally, Zieglar contended that, just as the Commonwealth may death-qualify a jury, a defendant also has the right to life-qualify a jury. ***See id.*** at 3-4 (citing ***Commonwealth v. Boxley***, 575 Pa. 611, 838 A.2d 608, 619 (2003) ("During individual *voir dire*[,] a capital defendant is also permitted to ask life[-]qualifying questions."); ***Morgan v. Illinois***, 504 U.S. 719, 733, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (courts must not restrict *voir dire* in any way that limits defendant's "ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt"); ***Wainwright v. Witt***, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) ("The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror.")). Zieglar argued that, considering then-Governor Wolf's death penalty moratorium, and now-Governor Shapiro's ongoing death penalty moratorium, "[Governor Shapiro] issued his statement with the intent that the citizens of Pennsylvania believe it and, hence, rely on it." ***See*** Defendant's Response to Commonwealth's ****261*** Motion to Reconsider and Clarify, 4/18/23, at 4. Further, Zieglar claimed that

> [i]n light of the Governor's proclamation, no juror could reasonably believe that their decision in the sentencing phase [would have] any impact on whether or not [ ] Zieglar is actually executed. This directly undermines 'the truly awesome responsibility of decreeing death for a fellow human' that is implicit within the idea of jury service and necessary under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Id. at 4-6 (citing ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)).[5]

On April 18, 2023, the trial court issued an order granting a hearing relative to the Commonwealth's Motion to Reconsider and Clarify and scheduling said hearing for April 24, 2023. ***See*** Order, 4/18/23, at 1. The trial court further directed that both parties be prepared to address all matters raised in the Commonwealth's motion, "including, but not limited [to,] whether the [c]ourt's order of April 5, 2023, is appealable." ***Id.***

On April 21, 2023, Zieglar filed a supplemental response to the Commonwealth's Motion to Reconsider and Clarify. ***See*** Defendant's Supplement to Defendant's Response to Commonwealth's Motion to Reconsider and Clarify, 4/21/23, at 1-4. In this supplement, Zieglar argued that, due to Governor Shapiro's ongoing moratorium, proceeding with *voir dire* to death-qualify a jury would unconstitutionally invade on the privacy rights of the citizens of Allegheny County. ***See id.*** Zieglar contended that the death-qualifying *voir dire* process is intensely invasive into personal matters for a purpose that may never come to fruition because of the ongoing moratorium. ***See id.***

Ultimately, for reasons unclear from the record, the April 24, 2023 hearing was never held. Instead, on May 3, 2023, the Commonwealth filed the instant notice of appeal[6] from the trial court's April 5, 2023 order. On May 26, 2023, the Commonwealth filed a court-ordered Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

The Commonwealth now raises the following claims for our review:

> 1. Whether the trial court abused its discretion and/or committed an error of law by ignoring its duty under the [S]entencing [C]ode and the [R]ules of [C]riminal [P]rocedure to seat a death-qualified jury in a prosecution where the death penalty is sought?
>
> 2. Whether the trial court's refusal to permit the assembly of a death-qualified jury constitutes interference with the prosecutor's discretionary functions and violates the constitutional principle of separation of powers, which provides that no branch of government should exercise the functions exclusively committed to another branch?

Commonwealth's Brief, at 1.

[1]Prior to addressing the Commonwealth's claims, we must *sua sponte* address our jurisdiction to hear this appeal. ***262** ***See Commonwealth v. Kennedy***, 583 Pa. 208, 876 A.2d 939, 943 (2005) (appellate courts lack jurisdiction over non-appealable order); ***Commonwealth v. Jones***, 826 A.2d 900, 903 (Pa. Super. 2003) (en banc) (challenge to appellate court's authority to conduct review of pre-trial order is jurisdictional matter); ***see also Commonwealth v. Gaines***, 127 A.3d 15, 17 (Pa. Super. 2015) (en banc) ("We may raise issues concerning our appellate jurisdiction *sua sponte*.").

[2] [3] [4]We must address whether the trial court's April 24, 2023 order properly granted reconsideration, which bears on whether this Court has jurisdiction over the instant appeal. Generally, when an appellant files a motion for reconsideration of a final order, they must file a protective notice of appeal to ensure preservation of their appellate rights if the court does not expressly grant reconsideration within the thirty-day appeal period prescribed under Pa.R.A.P. 903(a). ***See Commonwealth v. Moir***, 766 A.2d 1253, 1254 (Pa. Super. 2000). In other words, the mere filing of a motion for reconsideration does not toll the thirty-day appeal period:

> It is well-settled that, upon the filing of a motion for reconsideration, a trial court's action in granting a rule to show cause and setting a hearing date is insufficient to toll the appeal period. Rather, the trial court must expressly grant reconsideration within thirty days of entry of its order. Failure to expressly grant reconsideration within the time set by the rules for filing an appeal will cause the trial court to lose its power to act on the application for reconsideration.

Id. (citations omitted).

Instantly, on April 18, 2024, within 30 days of its April 5, 2024 order, the trial court ordered "that a hearing relative to the Commonwealth's Motion to Reconsider and Clarify filed on April 13, 2023, is scheduled for April 24, 2023." Order, 4/18/23, at 1. Additionally, the trial court ordered that the parties be prepared to address, *inter alia*, "whether the [ ] April 5, 2023 [order] is appealable." ***Id.***

We observe that the April 18, 2023 order was entered onto the docket as an "Order Granting Commonwealth Motion to Reconsider Order." Nevertheless, considering ***Moir***, we conclude that this order is **not** an express grant of reconsideration, but rather a grant for a hearing at which the parties might argue their respective positions. ***See Moir***, ***supra***. In reaching this conclusion, we emphasize that the trial court did not vacate the April 5, 2023 order. ***See Commonwealth v. Butler***, 566 A.2d 1209, 1211 (Pa. Super. 1989) (if trial court desires additional time to reexamine ruling, it must expressly grant reconsideration or vacate its order within thirty days). Further, one of the issues the trial court wished to address at the scheduled hearing on the Commonwealth's motion was whether the April 5, 2023 order was appealable. Therefore, we conclude that the Commonwealth's notice of appeal was timely filed as a protective notice of appeal to preserve its appellate rights. ***See Moir***, ***supra***.

[5]Next, we observe that the case before us presents an issue of first impression. Consequently, there are no cases or rules discussing whether the Commonwealth may appeal as of right, pursuant to Pa.R.A.P. 311(d), from the trial court's order denying the proposed capital *voir dire* questions.

Rule 311(d) provides that "[i]n a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that **does not end the entire case** where the Commonwealth certifies in the notice of appeal ***263** that the order will terminate or substantially handicap the prosecution." Pa.R.A.P. 311(d). Typically, Rule 311(d) is "invoked in appeals addressing the admission or exclusion of evidence." ***Commonwealth v. Woodard***, 136 A.3d 1003, 1005 (Pa. Super. 2016) (citation omitted); ***see also Commonwealth v. James***, 620 Pa. 465, 69 A.3d 180, 185 (2013) (Commonwealth's appeal of suppression order proper where Commonwealth certifies in good faith that order substantially handicaps prosecution). Additionally, appellate courts have recognized the right of the Commonwealth to appeal several types of non-evidentiary pre-trial orders under Rule 311. ***See Woodard***, ***supra***; ***see also Jones***, 826 A.2d at 906 ("If the Commonwealth has no opportunity to obtain appellate review of an adverse pre-trial interlocutory order implicating double jeopardy concerns, such review will never occur because the Commonwealth cannot try a defendant for a second time if the first prosecution results in an acquittal."); ***Commonwealth v. Johnson***, 542 Pa. 568, 669 A.2d 315 (1995) (order transferring case from criminal to juvenile court appealable under Rule 311); ***Buonopane***, ***supra*** (order

precluding Commonwealth from seeking death penalty appealable as of right);[7]

Instantly, the Commonwealth included the requisite Rule 311(d) certification that the trial court's order has substantially handicapped or terminated its prosecution of the case. ***See*** Notice of Appeal – Certification, 5/9/23, at 1. In its certification, the Commonwealth stated that the trial court's order "preclud[ed] the impaneling of a death-qualified jury, substantially handicap[ping] the prosecution of [Zieglar] on the specified charges, as it annuls the trial court's duty in a first-degree murder trial to impanel such a jury [as specified in the Judicial Code.]" ***See id.*** (citing 42 Pa.C.S.A. § 9711(a)(1)).

In our view, the trial court's order effectively prohibits the Commonwealth from exercising its discretion to seek the death penalty and, therefore, the Commonwealth may properly appeal as of right pursuant to Rule 311(d). ***See Buonopane***, ***supra***; ***Woodard***, ***supra***. Indeed, to hold otherwise could impliedly permit the Commonwealth to seek relief under these circumstances post-conviction, which could violate our double jeopardy protections. ***See Jones***, 826 A.2d at 906. Considering the foregoing, we conclude that the Commonwealth's appeal is properly before us.

In its first issue, the Commonwealth claims that the trial court violated the Sentencing Code when it refused to allow *voir dire* questions pertaining to the death penalty. ***See*** Commonwealth's Brief, at 6-23. The Commonwealth asserts that 42 Pa.C.S.A. § 9711(a)(1) and Pa.R.Crim.P. 802, 810, and 631(F), when read together, compel a trial court to conduct *voir dire* questioning when the Commonwealth has satisfied the aggravated factors requirements of Rule 802 and subsections 9711(a)(1) and (d). ***See*** Commonwealth's Brief, at 6-23. The Commonwealth further argues that it filed the requisite Rule 802 Notice and listed five aggravating factors, as required by law to exercise its discretion to seek the death penalty. ***See id.*** Therefore, the Commonwealth contends that the trial court's refusal to allow *voir dire* questions pertaining to the death penalty constitutes an error of law where the relevant law compels the trial court to conduct *voir dire* on death penalty questions. ***See id.*** at 21-23. After review, we agree.

264** First, we must determine the applicable standard of review. We begin by observing that our Supreme Court has previously stated that a "prosecutor's decision to seek the death penalty is limited by the confines of [s]ection 9711[.]" ***Commonwealth v. Chamberlain, 612 Pa. 107, 30 A.3d 381, 425 (2011). Indeed, our Supreme Court has reaffirmed that the legislature, pursuant to section 9711, has determined that the appropriateness of the death penalty is "solely a function of the jury."[8] ***Buck***, 709 A.2d at 895-97 (citing and reaffirming ***Com. ex rel. Fitzpatrick v. Bullock***, 471 Pa. 292, 370 A.2d 309 (1977)).[9] In ***Buck***, the Court held that section 9711 "continues to provide that the **jury shall act as the factfinder, weigh evidence of aggravating and mitigating circumstances[,] and determine the appropriate sentence in a capital case.**" ***Buck***, 709 A.2d at 896 (citing 42 Pa.C.S.A. §§ 9711(a)(1), (c)(1)(iv), (f)(1), and (g)) (emphasis added). Additionally, the Court acknowledged that the only notable difference in section 9711, following ***Bullock***, is that the Commonwealth is now required to provide notice of its intent to seek the death penalty at, or prior to, arraignment. ***See Buck***, 709 A.2d at 896.

[6]Further, "the prosecutor possesses the initial discretion regarding whether to seek the death penalty in a murder prosecution." ***Id.*** (citing ***Commonwealth v. DeHart***, 512 Pa. 235, 516 A.2d 656 (1986)). This Court has made clear it is the **prosecutor's** discretion, not that of the trial court. ***See Buonopane***, ***supra*** (trial court has no authority to review prosecutor's alleged aggravating factors pre-trial).

[7]Moreover, we observe that, where the legislature has granted the prosecutor discretionary powers, the trial court may review those powers only if the legislature has expressly granted the court authority to review them. ***See id.*** at 684; ***see also Bullock***, ***supra*** (absent pertinent statute empowering trial court to review pre-trial procedure, there was no authority for such action); ***see also Commonwealth v. Johnson***, 507 Pa. 27, 487 A.2d 1320 (1985) (interpreting 42 Pa.C.S.A. § 5947 and determining where legislature granted district attorney sole discretion over immunity, trial court had no discretion or authority to deny prosecutor's request for grant of immunity).

[8]Our review of the foregoing leads us to the inevitable conclusion that whether a trial court may deny a prosecutor's ability to seek the death penalty is a question of law, for which our standard of review is *de novo*, and our scope of review is plenary. ***See In re Wilson***, 879 A.2d 199, 214 (Pa. Super. 2005) ("As with all questions of law, the appellate standard of review is *de novo*, and the appellate scope of review is plenary.").

Regarding the process of *voir dire* for capital juries, we provide the following backdrop from our Rules of Criminal Procedure, which provide, in relevant parts, as follows:

Notice of Aggravating Circumstances

***265** The attorney for the Commonwealth shall file a

Notice of Aggravating Circumstances that the Commonwealth **intends to submit at the sentencing hearing** and contemporaneously provide the defendant with a copy of such Notice of Aggravating Circumstances. Notice shall be filed at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown.

Comment: This rule provides for pre-trial disclosure of those aggravating circumstances that the Commonwealth intends to prove at the sentencing hearing. ***See*** Sentencing Code, 42 Pa.C.S.A. § 9711(d).

Pa.R.Crim.P. 802 & Cmt. (emphasis added).

Sentence

In all cases in which a verdict of murder of the first degree has been returned, once a sentence has been determined, the court may immediately impose that sentence.

Pa.R.Crim.P. 810.

Examinations and Challenges of Trial Jurors

(A) *Voir dire* of prospective trial jurors and prospective alternate jurors **shall** be conducted, and the jurors **shall** be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

* * *

(C) Upon completion of the oath, the judge **shall instruct the prospective jurors upon their duties and restrictions while serving as jurors**, and of any sanctions for violation of those duties and restrictions, including those provided in [Pa.R.Crim.P.] 626(C) and [ ] 627.

* * *

(F) In capital cases, the individual *voir dire* method must be used, unless the defendant waives that alternative[.]

(1) *Individual Voir Dire and Challenge System*

(a) *Voir dire* of prospective jurors shall be conducted individually and may be conducted beyond the hearing and presence of other jurors.

(b) Challenges, both peremptory and for cause, shall be exercised alternately, beginning with the attorney for the Commonwealth, until all jurors are chosen. Challenges shall be exercised immediately after the prospective juror is examined. Once accepted by all parties, a prospective juror shall not be removed by peremptory challenge. Without declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected, or the defendant consents to be tried by a jury of fewer than 12, pursuant to Rule 641.

* * *

Comment: This rule applies to **all cases**, regardless of potential sentence. ...

If Alternative (F)(1) is used, examination continues until all peremptory challenges are exhausted or until 12 jurors and 2 alternates are accepted. Challenges must be exercised after the prospective juror is questioned. **In capital cases, only Alternative (F)(1) may be used** unless affirmatively waived by all defendants and the Commonwealth, with the approval of the trial judge.

Pa.R.Crim.P. 631(A), (C), (F) & Cmt. (emphasis added).

***266** Additionally, the Sentencing Code provides:

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.--

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court **shall** conduct a separate sentencing hearing in which the jury **shall** determine whether the defendant **shall** be sentenced to death or life imprisonment.

* * *

(c) Instructions to jury.--

(1) Before the jury retires to consider the sentencing verdict, the court **shall** instruct the jury on the following matters:

(i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) The mitigating circumstances specified in

subsection (e) as to which there is some evidence.

(iii) Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) The verdict **must** be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict **must** be a sentence of life imprisonment in all other cases.

(v) The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court **shall** sentence the defendant to life imprisonment.

(2) The court **shall** instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it **shall** consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court **shall** also instruct the jury on any other matter that may be just and proper under the circumstances.

(d) **Aggravating circumstances.--** Aggravating circumstances shall be limited to the following:

* * *

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense[,] the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

* * *

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

* * *

(18) At the time of the killing[,] the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim ***267** pursuant to 23 Pa.C.S.[A.] Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

* * *

(f) Sentencing verdict by the jury.--

(1) After hearing all the evidence and receiving the instructions from the court, the jury **shall** deliberate and render a sentencing verdict.

42 Pa.C.S.A. §§ 9711(a)(1), (c)(1)-(2), (d)-(f)(1) (emphasis added).

In sum, the above rules and statute require that, to seek the death penalty, the Commonwealth shall file a compliant notice at or before the time of the arraignment. ***See*** Pa.R.Crim.P. 802. The Commonwealth's notice shall contain at least one aggravating factor pursuant to section 9711(d). ***See*** Pa.R.Crim.P. 802; 42 Pa.C.S.A. § 9711(d). Additionally, the trial court and the parties shall use the "Individual *Voir Dire* and Challenge System" set forth in Rule 631. ***See*** Pa.R.Crim.P. 631(F)(1), Cmt. Further, if the defendant is found guilty, the **same jury shall** sentence the defendant to either death or life imprisonment. ***See*** Pa.R.Crim.P. 810; 42 Pa.C.S.A. §§ 9711(a), (f); ***see also Commonwealth v. Mattison***, 623 Pa. 174, 82 A.3d 386 (2013) (reiterating section 9711 requires "the same jury which renders the verdict of murder in the first degree is the same jury which is to determine whether the sentence is to be death or life imprisonment").

We further observe that there is nothing in section 9711, or any other law that we are aware of, that allows the trial court to deny the Commonwealth's ability to seek the death penalty. ***See Bullock***, ***supra***; ***see also Buonopane***, ***supra***. Indeed, as we stated ***supra***, our Supreme Court has held that the current version of section 9711 continues to provide that the **jury** is the sole factfinder and arbiter of death in a capital case. ***See Buck***, ***supra***.

[9] [10] [11]Instantly, the trial court has denied the Commonwealth's ability to pursue the death penalty.[10] ***See*** Order, 4/5/23, at 1-2. The Commonwealth filed the

requisite Notice and invoked five of the section 9711(d) aggravating factors. Thus, as a matter of law, the parties and trial court were required to use the Individual *Voir Dire* and Challenge System, pursuant to Rule 631(F)(1), to death- and life-qualify the jury.[11] ***See*** Pa.R.Crim.P. 802; 42 Pa.C.S.A. § 9711(d); Pa.R.Crim.P. 631(F); Pa.R.Crim.P. 810. Because the trial court denied **all** *voir dire* questions relating to death and life qualification, denied the parties the ability to death or life-qualify the ***268** jury, and expressly stated "there will be no jury deliberations as to sentence," the trial court has usurped the Commonwealth's authority to seek the death penalty. ***See*** Order, 4/5/23, at 1-2.

As our review reveals, the trial court has acted outside the parameters of the law. ***See*** 42 Pa.C.S.A. § 9711(a), (d); ***see also Bullock***, ***supra***. The legislature has not granted trial courts the authority to intrude into the Commonwealth's exercise of discretion in this realm and, consequently, we reaffirm that a trial court cannot exercise authority over the Commonwealth's discretion to seek the death penalty pre-trial, even where the Governor has imposed a moratorium on imposition of the death penalty.[12] ***See Bullock***, ***supra***; ***Johnson***, ***supra***. Accordingly, we reverse the trial court's order and remand for further proceedings.[13]

Order reversed. Case remanded. Jurisdiction relinquished.

All Citations

322 A.3d 256, 2024 PA Super 188

Footnotes

1 18 Pa.C.S.A. § 2501(a).

2 Rule 802 requires that the Commonwealth notify the defendant, at the time of arraignment, of any aggravating circumstances the Commonwealth intends to submit at the capital sentencing hearing. ***See id.*** Additionally, Rule 802 requires the Commonwealth to list the specific aggravating circumstances as enumerated in section 9711 of the Sentencing Code. ***See id.***

3 We observe that this order, if it was ever written, does not appear in the certified record before this Court. However, it is clear from our review, based upon the citations ***infra***, that the trial court did, in fact, order this hearing.

4 Governor Shapiro publicly stated that "when an execution warrant comes to my desk, I will sign a reprieve each and every time." Opinion and Order, 4/5/23, at 4 (quoting various news articles).

5 In ***Caldwell***, the United States Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." ***Id.*** at 328-29, 105 S.Ct. 2633.

6 On May 18, 2023, the Commonwealth filed an amended notice of appeal. The Commonwealth's amended notice of appeal included attachments of an amended affidavit with an updated list of transcripts. ***See*** Amended Notice of Appeal, 5/18/23, at 3 (unpaginated).

7 The ***Buonopane*** decision predates the promulgation of Rule 311 and, consequently, does not address it. Nevertheless, ***Buonopane*** has been cited favorably in the Rule 311 context. ***See Woodard, supra.***

8 We note that, under Pennsylvania law, a capital defendant may waive the impaneling of a jury for the sentencing phase. ***See*** 42 Pa.C.S.A. § 9711(b) (providing capital defendant may waive impaneling of capital jury, in which case trial court shall hear evidence and determine penalty).

9 In ***Bullock***, our Supreme Court interpreted a previous version of the Sentencing Code and determined that a trial court may not prevent the Commonwealth from seeking the death penalty where the Commonwealth has met the statutory requirements. ***See Bullock***, 370 A.2d at 313-14. Further, the Court concluded that the appropriateness of the death penalty was solely for the jury to determine, as prescribed by the legislature. ***See id.***

10 We note that, although Zieglar's November 6, 2022 response requested the factual underpinnings of the aggravated factors listed in the Commonwealth's Notice, Zieglar has not formally challenged the Notice itself. ***See*** Trial Court Opinion, 6/28/23, at 4 (concluding Zieglar has failed to formally challenge Commonwealth's Notice). Consequently, Zieglar's request for factual underpinnings does not change our analysis.

11 In our review of the foregoing, we conclude that, under these circumstances, it is statutorily mandated that the jury be both "death-qualified" and "life-qualified." "Death qualification" is the process by which counsel or the court identifies and excludes prospective jurors who stated that "they would not under any circumstances vote for the death penalty." ***Commonwealth v. Colson***, 507 Pa. 440, 490 A.2d 811, 817 (1985). "Life qualification," on the other hand, refers to the process by which counsel or the court identifies and excludes prospective jurors who have a fixed opinion that a sentence of death should always be imposed for a conviction of first-degree murder. ***See Commonwealth v. Keaton***, 556 Pa. 442, 729 A.2d 529, 542 n.9 (1999). To conclude otherwise would permit a trial court to unlawfully reject the Commonwealth's authority to seek the death penalty.

12 In light of our disposition, we need not address the Commonwealth's second claim pertaining to separation of powers. ***See Commonwealth v. Humphrey***, —— Pa. ——, 283 A.3d 275, 295 n.21 (2022) (declining to address constitutional questions where issue had been resolved on statutory grounds); ***see also In re Fiori***, 543 Pa. 592, 673 A.2d 905, 909 (1996) ("sound tenet of jurisprudence that courts should avoid constitutional issues when the issue at hand may be decided upon other grounds").

13 Furthermore, we observe that the trial court relies upon ***Caldwell*** for the premise that it is unable to impanel a death jury. The trial court contends that the moratorium, imposed by Governor Shapiro as the chief executive of the Commonwealth, removes the decision regarding the death sentence from every potential juror in violation of ***Caldwell***. ***See*** Trial Court Opinion, 6/28/23, at 9, 18-21. Additionally, the trial court determined that, in light of the conflict between Governor Shapiro's moratorium and ***Caldwell***, it would be impossible to appoint a jury that could properly consider the death penalty.

We find this rationale to be premature. First, the citizens of this Commonwealth are not presumptively aware of Governor Shapiro's moratorium. Furthermore, even if potential jurors **were aware**, then the proper forum to

discover that alleged taint would be **at *voir dire***. Here, as we discussed, the trial court's order prevents the parties from engaging in *voir dire* proceedings related to the death penalty, which would make it impossible to discern whether any taint exists or what effect, if any, it may have on potential jurors. Thus, the record before us is underdeveloped for review of this argument.

We further observe that Governor Shapiro's moratorium is temporary in nature. Under the laws of this Commonwealth, Governor Shapiro will not hold his position in perpetuity and, thus, we cannot agree that the moratorium will presumptively taint potential jurors in making the difficult determination of death versus life. Furthermore, we note that Governor Shapiro stated that he was "granting a reprieve," not a pardon or commutation of sentence. ***See Commonwealth v. Williams***, 634 Pa. 290, 129 A.3d 1199, 1217 (2015) ("reprieve as set forth in Article IV, Section 9(a) means the **temporary suspension of the execution of a sentence**") (emphasis added, quotation marks omitted). Consequently, any reprieve granted by Governor Shapiro does not remove the decision of death from the jury, but merely delays the implementation of any such decision. Moreover, despite Governor Shapiro's moratorium, the Commonwealth's ability to pursue the death penalty is still the law. ***See*** 42 Pa.C.S.A. § 9711.

Finally, we presume that our legislature is aware of Governor Shapiro's moratorium, just as the legislature was aware of then-Governor Wolf's moratorium. Nevertheless, the legislature has not amended our death penalty laws. Additionally, neither our Supreme Court nor the United States Supreme Court has declared the death penalty to be unconstitutional. Consequently, unless and until either the law changes or the death penalty is determined to be unconstitutional, this Court cannot affirm the trial court's order and we consider the ***Caldwell*** argument to be unpersuasive and premature.

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	CP-02-CR-02096-2022
	)	
DEANGELO ZIEGLAR,	)	

OPINION

MARIANI, J.

Factual/Procedural History

The defendant in this case, DeAngelo Zieglar (hereinafter, "Defendant"), is charged with multiple offenses, the principal offense being criminal homicide. Defendant is represented by the Public Defender of Allegheny County.[1] The Commonwealth of Pennsylvania (hereinafter, "the Commonwealth") is represented by the District Attorney of Allegheny County. The jury trial in this case is scheduled for September 6, 2023, having been postponed from July 5, 2023, by mutual request of both sides. Defendant was remanded to the Allegheny County Jail on January 21, 2022, to await trial, bail having been denied pursuant to provisions of the Pennsylvania Constitution.

The Commonwealth has filed pleadings which indicate that the Commonwealth believes that evidence in this case will prove that Defendant committed first-degree murder and that the circumstances surrounding this alleged first-degree murder and Defendant's alleged culpability for that crime warrant the imposition of the death penalty as an appropriate sentence.

In furtherance of the Commonwealth's view of the crime it intends to prove and the sentence

[1] Four different Assistant Public Defenders have entered their appearances in this case, two of whom are designated as "Capital Counsel." The Court has also been advised that a "Mitigation Specialist" employed by the Public Defender's Office is assigned to this case to assist with sentencing issues.

APPENDIX B

it intends to request, on April 14, 2022, the Commonwealth timely filed a Notice of Intention To Seek Death Penalty And Notice Of Aggravating Circumstances Pursuant to Rule 802 And 42 PA. C.S. 9711 (hereinafter, "Notice"). The Notice set forth five separate aggravating circumstances/factors which, the Commonwealth contends, support the Commonwealth's seeking the death penalty should Defendant be convicted of first-degree murder.

Sometime after the Commonwealth filed the Notice, the Court indicated that an evidentiary hearing would be scheduled, the purpose of which was to require the Commonwealth to produce evidence which supports the Notice as to aggravating circumstances the Commonwealth contends warrant the imposition of the death penalty.

In response to the Court's indication of its intention to schedule the evidentiary hearing, on June 23, 2022, the Commonwealth filed Commonwealth's Motion to Reconsider Order to Prove Aggravators of Death Penalty Notice. In that motion, the Commonwealth objected to the Court's having an evidentiary hearing and argued that the decision of the Pennsylvania Supreme Court in the case of Commonwealth v. Buck 551 Pa. 184, 70 A. 2d 892 (1998) precludes a review by the Court unless the defendant files a challenge to the notice of aggravating circumstances and makes a showing that no evidence exists to support the aggravating factors alleged by the Commonwealth.

The Commonwealth's Motion To Reconsider correctly recites that this Court's purpose in initiating the scheduling of the evidentiary hearing was to ensure that members of the community of Allegheny County would not be subjected to the probing process of jury selection in a death penalty case and, if the jury returns a verdict of guilty of first-degree murder, the ensuing immeasurably onerous task of having to make the life or death decision of punishment of another member of the community if the entire event was to be an exercise, not of duty of citizenship, but of futility, due to the long-standing moratorium on carrying out the death penalty that had been put into effect by then-

Governor Tom Wolf. The Commonwealth's Motion To Reconsider also noted that Governor Wolf's term would end on January 17, 2023.

The moratorium on carrying out the death penalty put into effect by former Governor Wolf was the subject of a legal action filed by the Philadelphia County District Attorney in Commonwealth v. Williams, 634 Pa. 290, 129 A.3d 1199 (2015). The Philadelphia District Attorney contended that then-Governor Wolf had exceeded his constitutional authority when he granted a reprieve on February 13, 2015, while awaiting receipt of "the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment." In responding to the challenge of the Philadelphia District Attorney, the Office of General Counsel, Governor Wolf's attorneys, argued that, "The Plain Text of the Constitution Expresses No Relevant Limits to the Governor's Power of Reprieve," describing the Governor's power as "unfettered prerogative" and likening the Governor's authority under the Pennsylvania Constitution to the English common law's, "ex mandato regis," meaning, "from the mere pleasure of the Crown." The Pennsylvania Supreme Court ruled that the issuance of a "temporary reprieve" by then–Governor Wolf to await the issuance of the report was an act within his constitutional authority despite the fact that no time limit was placed on the length of time the reprieve was to be in effect. The Pennsylvania Supreme Court emphasized that the holding in that case was based on the determination "that the reprieve issued is, in fact, a temporary suspension of sentence and not a commutation" (citation and footnote omitted).

On November 2, 2022, this Court issued an order directing Defendant's attorneys to file a written response to the Commonwealth's Motion to Reconsider. On November 6, 2022, the Public Defender's Office filed such a response, although apparently somewhat misunderstanding why an **evidentiary** hearing was to be held, essentially agreed with the Commonwealth's legal position:

> Mr. Zieglar concedes that under current law it is improper for this Honorable Court to challenge the Commonwealth's exercise of discretion in seeking the death penalty.

See Defendant's Response to Commonwealth's Motion To Reconsider Order to Prove Aggravators of Death Penalty Notice, par.7. The response did raise a claim that the Commonwealth did not provide discovery materials in support of the Notice but no challenge to the Notice itself was or has been filed by the Public Defender's Office on behalf of Defendant.

After this Court reviewed the Commonwealth's Motion to Reconsider and Defendant's response thereto and reviewed the Pennsylvania Supreme Court's decision in Commonwealth v. Buck, this Court did not schedule the evidentiary hearing because this Court was persuaded that, absent a challenge put forth by Defendant's attorneys, this Court has no authority to order such an evidentiary hearing.

On February 16, 2023, Governor Josh Shapiro, the successor to Governor Tom Wolf, issued a public statement, proclaiming that, "when an execution warrant comes to my desk, I will sign a reprieve each and every time." Governor Shapiro also stated, "The Commonwealth shouldn't be in the business of putting people to death. Period. I believe that in my heart. This is a fundamental statement of morality." Governor Shapiro then called upon the General Assembly to work with him to abolish the death penalty in Pennsylvania. See https://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty/

On February 21, 2023, this Court issued an order directing counsel for the Commonwealth and counsel for Defendant to file all *voir dire* questions each party would seek to use in impaneling the jury. The Commonwealth filed 34 proposed questions, 16 of which specifically mention the death penalty. Defendant filed a proposed questionnaire containing 70 questions, along with a full page of

instructions. Question 66 of Defendant's questionnaire specifically asks prospective jurors if they believe the death penalty may not be carried out even if the defendant is sentenced to death. The questionnaire submitted on behalf of Defendant requires that the prospective juror provide a "Signature Under Penalty of Perjury." Both filings clearly indicate that the case is a potential death penalty case.

On April 5, 2023, this Court issued an Opinion and Order of Court which denied all *voir dire* questions requested by the Commonwealth per the document filed by the Commonwealth on March 13, 2023.[2] The Order of Court also denied all *voir dire* questions requested by Defendant per the document filed by Defendant, also on March 13, 2023. The Order of Court further indicated that the jury impaneled in this case would not be permitted to deliberate regarding sentencing.

On April 13, 2023, the Commonwealth filed a Motion To Reconsider And Clarify. On April 18, 2023, Defendant filed a Response To Commonwealth's Motion To Reconsider And Clarify. In Defendant's Response To Commonwealth's Motion to Reconsider And Clarify, Defendant raised the protection of the Eighth Amendment to the United States Constitution as explained by the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 (1985). On April 21, 2023, Defendant filed a Supplement To Defendant's Response To Commonwealth's Motion To Reconsider And Clarify.

On April 24, 2023, this Court convened a hearing, during which various issues regarding the above- described Order of Court and subsequent filings were addressed. At the end of that hearing, this Court gave counsel for both sides 20 days to file any additional pleadings and/or documents. The Court advised the parties that the appealability of the Court's ruling should be among the issues addressed in their pleadings and/or documents.

[2] A substantial portion of the April 5, 2023, Opinion forms part of this Opinion.

On May 5, 2023, the Commonwealth filed a Notice of Appeal of this Court's April 5, 2023, Order of Court to the Superior Court of Pennsylvania.

On May 8, 2023, this Court convened a hearing to address the procedural posture of this case. At that hearing, the Commonwealth withdrew the Motion to Reconsider and Clarify. Accordingly on May 9, 2023, this Court issued a Pa. R. A.P. 1925(b) Order. On May 18, 2023, the Commonwealth filed an Amended Notice of Appeal. On May 26, 2023, the Commonwealth filed a Concise Statement of Matters Complained Of On Appeal setting forth the following issues:

> a.) whether the trial court abused its discretion and/or committed an error of law by ignoring its duty under the Sentencing Code and the Riles of Criminal Procedure to seat a death qualified jury in a prosecution where the death penalty is sought, where the Judicial Code provides that "[a]fter a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment", 42 Pa. C.S.A. § 9711 (a) (1), and the Rules of Criminal Procedure require the court to provide a death qualified jury under these circumstances, see e.g. Pa. R.Crim.P. 802 (requiring Commonwealth to file notice of aggravators in capital cases); Pa. R.Crim.P. 810 (imposition of sentence); Pa. R.Crim.P. 631(F) (requiring the individual voir dire method to be used in capital cases unless the defendant waives this procedure)?
>
> b.) Whether the trial court's refusal to permit the assembly of a death-qualified jury constitutes interference with the prosecutor's discretionary functions and violates the constitutional principle of separation of powers, which provides that no branch of government should exercise the functions exclusively committed to another branch?

Legal Discussion[3]

Because this Court believes the Commonwealth mis-perceives this Court's ruling in relation to the Commonwealth's decision to pursue the death penalty in this case, this Court addresses the Commonwealth's issues on appeal in reverse order. In this Court's view, the Commonwealth

[3] This Court considers the Commonwealth's issues without addressing whether a pretrial ruling regarding *voir dire* questions and sentencing procedures is appealable under current appellate standards.

properly exercised its discretion and, believing this case was an appropriate death penalty case, filed the Notice. Contrary to the allegation made in the Commonwealth's 1925(b) statement, this Court's decision is not a rebuke of the Commonwealth's discretionary authority to file the Notice. Rather, this Court's decision rests squarely on the invocation of this Court's discretion in administering jury trials, as courts have authority and discretion in addressing capital case jury trials wholly independent of the prosecutor's discretion with regard to seeking the death penalty. See Commonwealth v. Brown, 649 Pa 293, 196 A. 3d 130 (2018) as more specifically discussed, *infra*. Accordingly, the Commonwealth's second claimed error is based on an erroneous interpretation of this Court's order and that claim of error is without merit.

A. Fairness to prospective jurors

As to the Commonwealth's first issue on appeal, this Court has properly exercised its discretion to ensure fairness to all persons participating in the trial process. The Pennsylvania Supreme Court, through Rule 632 of the Pennsylvania Rules of Criminal Procedure, requires that all prospective jurors in all cases complete a confidential questionnaire prior to the beginning of the jury selection process. Personal information about the prospective juror and the prospective juror's family is requested in the first part of the questionnaire. The prospective juror is also required to answer sixteen specific questions and then sign the questionnaire directly below a pre-printed statement that indicates that the prospective juror certifies that the answers given are true and correct and also acknowledges that providing false answers subjects the prospective juror to penalties under 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.[4]

After each prospective juror completes the Rule 632 questionnaire, the *voir dire* questions tendered by the Commonwealth and Defendant could be asked of each prospective juror

[4] A violation of 18 Pa.C.S §4904 subjects the prospective juror to criminal prosecution and a possible penalty of up to two years in state prison.

individually, in the presence of the judge, counsel for each side, Defendant and a court reporter. Many of the questions proposed by the Commonwealth and Defendant ask for personal beliefs about the death penalty. Others ask about how the prospective juror's spouse or partner feels about the death penalty. Questions are directed to the prospective juror's area of study, areas of interest, what television shows the perspective juror watches, what organizations the prospective juror and anyone close to the prospective juror supports or sponsors. Other questions focus on the criminal history and/or victimization of the prospective juror and of family members. Each answer to these individual questions subjects the prospective juror to follow-up questions; each answer to a follow-up question subjects the prospective juror to additional questions from one side or the other, or, most likely, both sides. The process of asking questions during *voir dire* in death penalty cases has been referred to as "death-qualifying" a jury. See Commonwealth v. Woodard, 634 Pa 162,129 A. 3d 480 (2015).

Jurors are not volunteers. Jurors are compelled by Court Order to appear for jury service. Prospective jurors who fail to appear may be cited for contempt of court and face fines and/or imprisonment as sanctions. See 45 Pa.C.S.A. §4584. They are required to put their own personal lives on hold while performing their civic duty. The process of "death-qualifying" a jury generally takes weeks, not a day or two. Death penalty trials also are elongated, not only as to the guilt phase, but also as to sentencing phase, due to the potential penalty should a first-degree murder verdict be returned. [5] It would not be out of the ordinary for this case to require that the jurors who are eventually seated in this case give up at least six weeks of their personal lives.

[5] Recently, in Pittsburgh, a federal capital case jury empanelment required seventeen days to qualify a sufficient number of jurors to be available before another day set for the parties to exercise peremptory strikes. The guilt phase of that trial was estimated to last three weeks. The sentencing phase is expected to take approximately six weeks. See **https://triblive.com/local/jury-set-for-pittsburgh-synagogue-shooting-trial/ "Ward, Paula, May 17, 2023, "Jury Set for Pittsburgh Synagogue Shooting Trial"**

"[T]rial judges of this Commonwealth exercise broad powers while presiding at the trial of cases assigned to them." Commonwealth v. Pittman, 320 Pa.Super. 166, 466 A.2d 1370, 1373 (1983). With respect to *voir dire*, "the process of selecting a jury is committed to the sound discretion of the trial judge." Id. In a legal and factual context unrelated to the matter at issue here, our Supreme Court has affirmed a trial court's acting "in the interests of justice" and it has explained that:

> [it] is the trial judge's review of the conditions and activity surrounding the trial which leaves him or her in the best position to make determinations regarding the fairness of the process and its outcome.

Commonwealth v. Powell, 527 Pa. 288, 590A.2d 1240 (1991).

The Pennsylvania Supreme Court has held that the public statement of a district attorney of one of Pennsylvania's sixty-seven counties, who declared that he was speaking "as the sovereign Commonwealth of Pennsylvania," and who declared publicly that he would not prosecute a certain individual, did legally bind the Commonwealth to that representation. That public statement was sufficient to bar all other prosecutors in the Commonwealth from pursuing criminal charges against the defendant in that case. See Commonwealth v. Cosby, 252 A.3d 1092, 1114 (Pa. 2021). The Pennsylvania High Court observed that the non-prosecution agreement was made by the district attorney "whose public announcement of that decision was fully within his authority and was objectively worthy of reasonable reliance." Id. at 1114.

Similarly, Governor Shapiro, whose authority to grant death penalty reprieves derives directly from the Pennsylvania Constitution, surely issued his proclamation with the intent that the citizens of Pennsylvania believe it and, hence, rely on it. This Court, on behalf of those citizens of Allegheny County, Pennsylvania, who may be called for jury duty in this case, acts in reliance on Governor Shapiro's proclamation. Because there is no possibility that the death penalty will be

carried out in any Pennsylvania case for years to come, no matter what the Pennsylvania Legislature has passed as the law of Pennsylvania, and no matter what a jury, following that law, might determine in a given case, this Court concludes that it is patently unjust to compel members of the community of Allegheny County to endure the grueling and intrusive process and the unreasonable invasion of privacy which occurs in "death-qualifying" any jury. It is also fundamentally unfair to those same citizens to require them to sit through additional days of presentation of evidence in which one side presents evidence as to why Defendant should lose his life while the other side presents evidence as to why Defendant should be sentenced to life in prison with no parole, then be required to listen to hours of arguments directed to those same issues, and then be required to deliberate whether Defendant should live or die, when it has already been decided by Governor Shapiro that Defendant will not be given the death penalty under any circumstances.

This Court finds further support for this Court's exercise of discretion with regard to jury selection in this case in the Pennsylvania Supreme Court's discussion of a capital case jury's sentencing determination in Commonwealth v. Brown, 649 Pa 293, 196 A.3d 130 (2018). In that case, the defendant (hereinafter, "Brown") was sentenced to death for first-degree murder in the Court of Common Pleas of Philadelphia County. After his direct appeal was unsuccessful, Brown filed a petition pursuant to the Post Conviction Relief Act (hereinafter, "PCRA") in which he alleged numerous inter-mixed claims of ineffective assistance of counsel and due process violations. Brown's PCRA petition was denied in the Court of Common Pleas of Philadelphia County.

Brown filed a direct appeal of that denial to the Pennsylvania Supreme Court alleging thirteen claims of error. On September 19, 2017, the Commonwealth, represented by the District Attorney of Philadelphia County, filed a brief in which the Commonwealth opposed all claims of relief

advanced by Brown. Brown filed a reply brief in November of 2017.

On April 9, 2018, before the Pennsylvania Supreme Court issued a ruling, Brown and the Commonwealth filed a joint motion in which the Commonwealth agreed (stipulated) to Brown's claim of ineffective assistance of counsel as alleged in his sixth claim of error. The Commonwealth and Brown jointly asked the Pennsylvania Supreme Court to vacate Brown's death sentence and remand the case to the Court of Common Pleas of Philadelphia County for the purpose of sentencing Brown to life without parole. [6]

The Pennsylvania Supreme Court ordered supplemental briefs and also invited the Attorney General of Pennsylvania to file an amicus curiae brief. [7] Brown and the Philadelphia District Attorney argued that the Pennsylvania Supreme Court was required to defer to the District Attorney's prosecutorial discretion and that only district attorneys have the "power to decide whether to seek or continue to seek the death penalty..." See Brown, 649 Pa at 315. The Philadelphia District Attorney also argued that the Pennsylvania Supreme Court could not "second-guess" the District Attorney of Philadelphia County with regard to his decision to stipulate away the death penalty in Brown's case. Id.[8] The Pennsylvania Attorney General argued that while courts should give substantial consideration to district attorneys' positions on such matters, if the Pennsylvania Supreme Court (or any other court) were required to defer to the District Attorney as argued by Brown and the Philadelphia District Attorney, "they would not be acting as judges but rather as mere rubber stamps." Brown, 649 Pa at 316.

The Pennsylvania Supreme Court rejected the Philadelphia District Attorney's (and

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[6] The November, 2017, election resulted in the installation of a new District Attorney of Philadelphia County whose term started in January of 2018.

[7] The Attorney General of Pennsylvania at that time was now- Governor Josh Shapiro.

[8] The Commonwealth also suggested that the Pennsylvania Supreme Court could, alternatively, remand the case to the PCRA court to allow that court to address the matters set forth in the joint motion.

Brown's) position completely. The Pennsylvania Supreme Court began its analysis by making the following declaration:

> During the penalty phase of Brown's trial, a jury of Philadelphia citizens was called upon to make the enormously difficult decision of whether to impose the death sentence, after hearing the evidence and instructions on the law. A representative cross section of the community must, of necessity, bear the responsibility to "express the conscience of the community on the ultimate question of life or death" in particular cases. Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The jury in this case having done so, neither the parties, by agreement, nor this Court, absent a finding of legal error, have the power or ability to order that the jury's verdict be commuted to a life sentence without parole (emphasis added).

The Pennsylvania Supreme Court went further:

> A representative cross section of the community has issued its decision, and the prosecutor, having sought and obtained the death sentence, may not thereafter unilaterally alter that decision. The community now has an interest in the verdict, which may thereafter be disrupted only if a court finds legal error.
>
> * * *
>
> Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review.

Id. at 320-321.

In Brown, the Pennsylvania Supreme Court acknowledged the magnitude of the sentencing jury's role in a death penalty case and emphatically respected the result reached by that jury. In this Court's view, the same acknowledgement of the jury's "enormously difficult" task and the same respect for the jury's role should be shown to prospective jurors who are being impaneled in a potential death penalty case by not requiring the impaneled jury to endure the intrusive, grueling process of death qualification and "enormously difficult" sentencing deliberations when the result has already been determined by the Governor.

The use of a court order (jury summons) to conscript citizens to this meaningless impaneling by ordeal and completely purposeless sentencing deliberation is an abuse of process and, if this Court

were to enforce such an order, an abuse of discretion.[9]

B. Constitutional Issues

Defendant raised a second basis for this Court's exercise of discretion in this case. In Caldwell v. Mississippi, 472 U.S 320, 105 S. Ct 2633 (1985), the United States Supreme Court ruled that the Eighth Amendment of the United States Constitution is violated when a death sentence has been issued by a sentencer who has been led to believe that responsibility for determining the appropriateness of a defendant's death sentence rests elsewhere. In Caldwell, the prosecutor's closing argument as to sentence included the following statements:

> "ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it, Yet they…
>
> "COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
>
> "ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.
>
> "THE COURT: Alright, go on and make the full expression so the Jury will not be confused, I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> "ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're

[9] This Court recognizes that no Pennsylvania appellate court decision specifically endorses a trial court's use of discretion in this manner with regard to the jury selection process. Likewise, however, no Pennsylvania appellate court has ruled that a trial court may not exercise discretion in this manner. Most likely the issue has never arisen since no previous governor has determined that all death penalty sentences will be granted reprieves before the jury is sworn to hear the case.

> gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." (emphasis in original).

Caldwell, 472 U.S. at 325-326..

In vacating the death sentence and reversing the judgment of the Mississippi Supreme Court, the United States Supreme Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct.2978, 49 L.Ed.2d 944 (1976). Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.
>
> The problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision that has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.

Caldwell, 472 U.S. at 333.

The Pennsylvania Supreme Court has relied on the reasoning in Caldwell to vacate death penalty sentences. In Commonwealth v. Baker, 511 Pa 1, 511 A.2d 777 (1986), the Pennsylvania Supreme Court affirmed the defendant's conviction of first-degree murder but set aside the defendant's death sentence due to the following:

> The Assistant District Attorney began his argument to the jury by attempting to minimize their expectations that a verdict of death would ever be actually carried out, and hence minimized their sense of responsibility for a verdict of death-suggesting that ultimate responsibility rested with this Court. He stated: "You get an appeal after appeal after appeal after appeal, if you think the Supreme Court is going to let anybody get executed until they're absolutely sure that that man has a fair trial, make no mistake about that."

Baker, 511 A.2d at 782.

The Pennsylvania Supreme Court further reasoned:

> We conclude that the inherent bias and prejudice to Appellant engendered by the Assistant District Attorney's remarks necessitates reversal of the death sentence in the instant case, and that under the circumstances said remarks also violated Appellant's rights under the Eighth Amendment of the United States Constitution as set forth in Caldwell v. Missouri, supra, as well as violating Appellant's rights under Article I, § 13, of the Constitution of the Commonwealth of Pennsylvania.

Baker, 511 A.2d at 790.

In Commonwealth v. Jasper, 558 Pa. 281, 737A. 2d 196 (1999), the trial court gave the following instruction to the jury:

> Now, with regard to death penalty, you know what that implies. Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out. I won't go into all the various reviews that we have. That shouldn't concern you at this point.

Jasper, 737 A.2d at 196.

The Pennsylvania Supreme Court ruled that, despite the fact that the trial court also advised

the jury three separate times that its determination was not merely a recommendation, but the actual sentence, the jury's death sentence had to be vacated:

> We disagree that these instructions cured the remark set out above, for the plain import of the court's remarks is that although the jury may impose the death penalty, it may not be carried out, thus removing from the jury responsibility for imposing the death penalty.

Jasper, 737 A.2d at 197.

In Commonwealth v. Montalvo, 651 Pa. 359, 205 A.3d 274 (2019), the Pennsylvania Supreme Court affirmed the granting of a new penalty hearing to a defendant sentenced to death by the PCRA court. In that case, the prosecutor referred to the jury's penalty decision as a recommendation six different times. The trial court endorsed that characterization during defense counsel's closing argument in the following exchange:

> DEFENSE COUNSEL: But again, that is why I chose you folks because I thought you would all try to be fair. So don't look at him and say I hate that guy, he's got to get the death sentence. That is not what this is all about. And [the prosecutor] certainly gave an impassioned plea. But you don't have to kill anybody. You don't have to kill anybody.
>
> PROSECUTOR: I object to that argument. They are not doing it. They are recommending the sentence.
>
> THE COURT: Objection sustained. That is an improper statement, ladies and gentlemen. I am the sentencing person. Your decision is a recommendation to the court.

Montalvo, 205 A.3d at 295.

In its final charge to the jury, the trial court instructed: "Remember that your verdict is not merely a recommendation. It actually fixes the punishment of life or death." Montalvo, 205 A.3d at 295.. The trial court made no reference to its previous statement to the jury.

In affirming the grant of the new penalty phase (sentencing) hearing, the Pennsylvania Supreme Court provided the following analysis:

> We agree with Appellant's characterization of this case as demonstrating a "textbook example of Caldwell error." As discussed at length *supra*, the prosecutor told the jury six times, without objection or correction, that the jury's sentencing verdict was a mere recommendation, leading the jury to believe that it was not responsible for determining Appellant's final sentence. The last of these misleading comments came during defense counsel's closing argument, where defense counsel was attempting to appeal to the jury's proper sentencing role when the prosecutor interrupted with an objection and a reminder that the jury's "decision is a recommendation to the court." N.T., 1/21/2000, at 136. To compound the impact of these erroneous assertions upon the jury's deliberations, the trial court sustained the prosecutor's objection, and expressly conveyed to the jury, "I am the sentencing person. Your decision is a recommendation to the court."
>
> These statements reflect the precise sentiments that the High Court in Caldwell condemned as "constitutionally impermissible" because it "rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29, 105 S.Ct. 2633. The instant case is arguably more egregious than Caldwell because the improper comments made herein were more pervasive and did not merely reference the appellate court's role in the sentencing process, but specifically directed the jurors that the trial court, and not the jury, would determine whether Appellant would receive a sentence of life imprisonment or death.
> We reject the Commonwealth's contention that the trial court's final jury charge cured any error that arose from the improper comments of the prosecutor and the trial court during the penalty phase closing arguments. While the final charge correctly stated that the jury's "verdict is not merely a recommendation" and that it "actually fixes the punishment," N.T., 1/21/2000, at 168, the trial court did not acknowledge that it had given an entirely inconsistent directive to the jury only a few hours earlier. Significantly, nothing in the trial court's final charge made clear to the jury that one of the contradictory instructions was erroneous. See Francis v. Franklin, 471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (holding that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"); Commonwealth v. Cain, 484 Pa. 240, 398 A.2d 1359, 1363 (1979) (stating that "[w]here a court gives two instructions, one erroneous and prejudicial and the other correct, reversible error occurs"). (footnote omitted).

Montalvo, 205 A.2d at 299.

Through Question 66, Defendant has already raised an issue concerning whether the Governor's proclamation will have an effect on jury sentencing deliberations. Though the question itself may contain a general inquiry as to whether a potential juror may believe that the death penalty won't be enforced even if the jury returns with a death sentence, a follow-up question could certainly be presented with regard to the Governor's proclamation. Alternatively, Defendant may well, perhaps, should, request that each prospective juror be questioned concerning the Governor's proclamation so as to ensure that a seated juror doesn't become informed about it for the first time by another juror during sentencing deliberations.

In this Court's view, the prospective jury in this case, if it were permitted to deliberate as to sentence, will have been informed by Governor Shapiro's proclamation that the responsibility for any determination as to whether Defendant will actually receive the death penalty has already been made by a respected Pennsylvania legal authority who, the juror(s) may perceive, has a greater right to make that determination. Deliberating jurors who might be reluctant to vote for a death sentence could nevertheless give in, knowing that Governor Shapiro has already made the ultimate decision. The possibility that the jury or any particular member of the jury might rely on Governor Shapiro's authority without openly acknowledging that the Governor's proclamation had an effect on the juror's decision, thereby causing a bias toward returning a death sentence, is simply too great. To borrow from the Jasper Court:

> [T]he plain import of the [Governor's proclamation] is that although the jury may impose the death penalty, it [will] not be carried out, thus removing from the jury responsibility for imposing the death penalty.

The argument that a new governor with a different view of the death penalty may be elected in four or eight years is of no avail. The risk presented currently is that a capital case jury deliberating as to sentence while Governor Shapiro is in office, particularly at the beginning of his first term, may

be influenced by Governor Shapiro's proclamation. The exact result forbidden by Caldwell, Jasper, Baker, and Montalvo could occur if the jury, having been improperly affected by the Governor's proclamation, returns a death sentence, the case proceeds through the appeal process over a period of years during which a new governor is elected and then the new governor signs the execution warrant based on the tainted death sentence.

This Court understands that this Opinion relies on a degree of speculation as to how Governor Shapiro's proclamation might affect a capital case jury's sentencing deliberations. That same degree of speculation, in this Court's view, was the foundation for the holdings in Caldwell, Jasper, Baker, and Montalvo. In all of those cases, the Supreme Court of the United States and the Supreme Court of Pennsylvania invalidated capital case jury death sentences without proof that improper argument made by a prosecutor and/or improper and/or inconsistent instructions given by a trial judge actually affected the jury's decision. All of the decisions in these cases were premised on the presumption that the jury did not adequately appreciate or understand the importance of its role in sentencing because the defective comments and/or instructions could have caused a minimization, in the mind of at least one juror, of the jury's sentencing function.[10] This Court believes the risk of minimization of the jury's sentencing function in this case is even greater since the Governor's proclamation did not announce the continuation of a moratorium (temporary halt) but, instead, announced a total cessation of the carrying out of the death penalty.

[10] The jury's having heard the improper comments/instructions was enough to cause the High Courts to overturn the death sentences in those cases. Whether by design or otherwise, Governor Shapiro's proclamation was delivered in a way to ensure that citizens of Pennsylvania, the pool from which jurors are chosen, were made aware of his intentions as to how he will exercise his ultimate authority in death penalty cases.

Even were the jury to be instructed by the court to not let the Governor's proclamation affect their deliberations, a death sentence verdict would still be subject to question. As has been observed by the United States Supreme Court, and endorsed by the Pennsylvania Supreme Court:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

See Commonwealth v. Rainey, 593 Pa 67, 86, 928 A.2d 215, 227 (2007), quoting, Bruton v. United States, 391 U.S. 123, 135-136, 88 S.CA. 1620 (1968. This Court is of the view that no pre-sentencing deliberation instruction given by this Court can assure that the Governor's proclamation will not cause a result otherwise not reached by a capital case sentencing jury.

Conclusion

This ruling is not based on any particular view as to whether the death penalty should be available as a sentence for any offense. Nor is it based on any particular view of the morality or legality of the death penalty. Whether Governor Shapiro's proclamation may be regarded as "temporary" while he tries to convince the Legislature to abolish capital punishment in Pennsylvania or whether the Governor's proclamation violates Article 1, Section 12 of the Pennsylvania Constitution is a matter arguably central to but not presented in this case. The fact that the Governor has announced that he will grant preemptive reprieves in all cases, without any consideration as to legal merit, directs the action taken by this Court.

Requiring citizens to undergo the intensive and intrusive process of death qualification and sentencing deliberations, when the outcome has already been determined, is patently unreasonable

and fundamentally unfair. All juries should be shown the same respect for their critically important role in all parts of a trial, from impanelment through verdict. Instructing jurors to ignore the public pronouncement of the highest-ranking executive officer in the Commonwealth, who has the ultimate authority to carry out the death penalty, is unrealistic, if not outright disingenuous. [11]

Death is different. [12] All death sentences otherwise issued in compliance with all legal requirements must be free from doubt that even one member of the jury deferred to the authority of the Governor in arriving at the decision to sentence another person to death. Governor Shapiro's proclamation, as it stands currently, makes any death penalty sentence issued after the date of the Governor's proclamation suspect under the Eighth Amendment of the United States Constitution and under Article 1, §13 of the Constitution of the Commonwealth of Pennsylvania.

By the Court:

Date: JUNE 28, 2023

Anthony Mariani

J.

[11] In effect we are asking jurors to respect an instruction that tells them to disregard the fact that Governor Shapiro will not respect their decision if it doesn't align with his personal sense of morality, regardless of its legality.

[12] Because "execution is the most irremediable and unfathomable of penalties... death is different." Ford v. Wainwright, 477U.S. 399, 411, 106 S.Ct. 2595 (1986).