TREASURY DEPARTMENT
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG, PA 17120

THE STATE TREASURER

March 2, 2016

Hand Delivery

The Honorable Senator Pat Browne, Chairman
Senate Appropriations Committee
Room 281, Main Capitol Building
Harrisburg, Pennsylvania 17120

The Honorable Representative William F. Adolph, Jr., Chairman
House Appropriations Committee
Room 245, Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Chairmen Browne and Adolph:

The purpose of this letter is to provide an update of Treasury's consideration of payment requisitions submitted by the Office of Budget for the continuing operating expenses of state prisons. Because these requisitions exceed the existing line-item appropriation level authorization within the 2015-16 Fiscal Year General Fund Budget, a strict application of Article III, Section 24 of the Pennsylvania Constitutional would ordinarily prohibit their payment.

However, in order to prevent a risk to public safety that would occur if services necessary for the safe operation of state prisons were jeopardized as a consequence of a failure to make timely payments to Department of Corrections vendors, I have concluded that there exists a sufficient legal basis upon which I may issue a warrant for the payment of these expenses pursuant to the Fiscal Code. Consistent with my commitment to be transparent in the Department's handling of this matter, I have attached a copy of the legal opinion of Treasury's Chief Counsel, as well as an opinion provided by the Office of Attorney General. Both documents provide a detailed explanation of the legal authority of the State Treasurer to approve payments for prison operating expenses under these particular circumstances.

I am sensitive to both the budgetary implications of my decision as well as the constitutional tensions that this matter has created between co-equal branches of government. Accordingly, I intend to work with the Administration to establish appropriate controls to ensure only those payments that are truly critical and necessary for the Department of Corrections to safely operate prisons and satisfy state and federal constitutional obligations are paid. In

addition, I intend to maintain a monthly account, documenting all non-salary payments approved by Treasury for prison operations. This account will be a public record.

Please do not hesitate to contact my office if you require any additional information.

Sincerely,

Timothy A. Reese
State Treasurer

Attached – Legal Opinions

cc: The Honorable Senator Vincent Hughes
The Honorable Representative Joseph Markosek

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TREASURY
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Pre-decisional Deliberation

Memorandum

To: **The Honorable Timothy Reese, Pennsylvania Treasurer**

From: **Christopher B. Craig, Chief Counsel**
Pennsylvania Treasury

Date: **March 2, 2016**

Subject: **Authorization to pay "critical and necessary" expenses of State Correctional Institutions in excess of an appropriation.**

The purpose of this Memorandum is to outline the legal basis upon which the Pennsylvania Treasurer may approve the issuance of a warrant for the expenditure of public funds for the payment of critical and necessary expenses of State Correctional Institutions in excess of an appropriation. Though the expenditure of public funds for the payment of critical and necessary expenses in excess of an appropriation authorization is a question of first impression without direct precedent, there exists sufficient legal justification for the Treasurer to conclude, in his discretion, that the payment of such expenses is lawful and correct.

Presentment of Agency Expenses

Treasury's authority to cause the expenditure of public funds is reactive in nature – Treasury may only approve or disapprove requests for the expenditure of public funds, it cannot initiate a request. 72 P.S. §§ 307 ("No money shall be paid from any of the funds of the State Treasury, except upon warrant of the State Treasurer, issued upon requisition pursuant to law…."); 1501 ("No money shall be paid out of any fund in the State Treasury…until a requisition therefor shall have been presented…."). With the exception of the Department's own payment requests, Treasury cannot compel or initiate an expenditure of public funds without a corresponding request from the originating agency. *Id.*

In this case, the request to process and pay employee salaries, benefits and operating expenses for State Correctional Institutions is typically initiated / authorized by the Comptroller of the Governor's Office of the Budget. As is common practice, the Comptroller presents to Treasury a requisition identifying the Correctional Institution's expenses to be paid, listing vendor or service provider's depository account information, amount of payment and such other information necessary to complete the payment. 72 P.S. § 1501 ("[T]he respective departments...shall prepare their requisitions, with the written approval of their respective department heads and departmental comptrollers noted thereon, and present them to the Treasury Department.").

Where the Treasurer lacks direct spending authority or receives requests for expenditures in excess of an appropriation, the presentment of a requisition for payment would coincide with an "Expenditure Symbol Notification Number" memorandum issued by the Secretary of the Budget to the Treasurer. Otherwise known as a Ledger 5 memorandum, the purpose is to provide the Treasurer with instructions by which the expenditures are to be accounted and reconciled with the correct appropriations upon the enactment of a current fiscal year budget.

Treasury's Consideration of Expenditure Request

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it "appear[s] to be lawful and correct." 72 P.S. § 1502. The statutory standard directs the Treasurer to decide whether it is proper to make a requested payment – a responsibility that is neither shared with nor subject to interference by any other state official. The legislative use of the term "appears" within the Fiscal Code is significant, acknowledging that Treasury may be compelled to make decisions based on an incomplete set of facts or uncertain legal circumstances surrounding a requisition. The Fiscal Code does not require the Treasurer to render decisions that bear upon the legality of obligations except in the context of processing the specific payment request. In short, the Fiscal Code directs the Treasurer to independently exercise his judgment when determining whether there appears to be an appropriate legal basis to approve an expenditure requisition.

It is within this statutory framework that Treasury would ordinarily audit and subsequently approve the expenditure request by the Comptroller for the Secretary of the Budget. As part of its review, Treasury would consider any supporting documentation submitted by the Department of Corrections characterizing the expenditure as "critical and necessary" for the continued safe operations of the state prisons.

Factual Context

On December 29, 2015, Governor Wolf partially approved and signed the Fiscal Year 2015-16 General Appropriations Act[1] (Act 10A). In doing so, the Governor issued a veto message to the General Assembly asserting that he was "compelled to veto some or all of the funding for several meritorious programs in order to maintain the Commonwealth's financial

[1] Act of December 29, 2015 (P.L. ___, No. 10A).

integrity."[2] As it pertains to this matter, the appropriation for State Correctional Institutions was reduced by the Governor from $1.89 billion to the sum of $956 million in his veto message.[3]

However, upon the enactment of the budget, Treasury is required to reconcile payments associated with the State Correctional Institutions line-item that were made during the prior six-month budgetary impasse. As a consequence, it is estimated that the Correctional Institutions appropriation for fiscal year 2015-16 will exhaust its spending authorization this month. At such time, there will be no state budgetary appropriation authority to spend public funds for the continued operations of the state prisons.

Despite the anticipated appropriation shortfall, Treasury has received approximately $24.6 million in expenditure requisitions for the continued operation of state prisons. State Correctional Institutions operating expenses include salaries and benefits for prison employees as well as utilities, food service, facility maintenance, health care, mental health care, drug interdiction programs, security operations and safety systems.

There is an important distinction between expenditures during a budgetary impasse and expenditures that may exceed an appropriation within an enacted budget. Last year, there was no state General Fund Budget as a consequence of a six month impasse between the Administration and the General Assembly. There was no spending authority during this period – a complete lack of directive or guidance that would ordinarily allow the executive branch to expend public funds with clear authority. In the absence of any legislative budgetary directive or authorization, Treasury approved certain expenditure requisitions submitted by the Governor that were necessary and critical to maintain core and essential governmental services and operations of the legislative, judicial and executive branches of government under the state constitution.

The current circumstances are different. There is a Fiscal Year 2015-16 General Fund Budget (Act 10A); there is an appropriation for State Correctional Institutions (albeit reduced pursuant to the Governor's line-item veto). Accordingly, future expenditure requisitions presented to the Treasurer on behalf of state prisons seek payments that are in excess of an enacted appropriation line item. In other words, notwithstanding the Governor's veto, requisitions to pay the necessary operations of state prisons have been submitted in excess of the appropriation amount established by the Governor's veto.

Legal Analysis

Article III, Section 24 of the Pennsylvania Constitution provides, in part:

> "No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers…." Pa. Const. art III, § 24

[2] Veto Message of Governor Wolf (December 29, 2015).
[3] Id. at page 4.

Furthermore, Section 3422 of the Fiscal Code provides:

> "[I]f the state treasurer shall pay out for any appropriation named in an appropriation bill, a greater sum that is named therein for each appropriation...[he] shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, for each and every offence." 72 P.S. § 3422.

Though legislation has been introduced in the Senate that, if enacted, would provide supplemental appropriations for State Correctional Institutions, the existing appropriation for state prison operations will soon be exhausted. Accordingly, future requisitions presented to Treasury for payment would ordinarily implicate the prohibitions embodied in Article III, Section 24 of the state Constitution and Section 3422 of the Fiscal Code preventing the expenditure of public funds in excess of the appropriation for Correctional Institutions in Act 10A. *See, e.g., Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978).

However, there are significant countervailing state and federal constitutional considerations and state common law precedents which provide alternative legal authority for the payment of expenses that are critical and necessary for the continued operation of state prisons. Notwithstanding the lack of budgetary authority, these expenses can appropriately be divided between employee salaries and benefits and direct operating expenses such as prison service providers and goods.

A. Prison Employee Salaries and Benefits

Pennsylvania Courts have consistently held that public employees who are covered by the Federal Fair Labor Standards Act are to be paid, notwithstanding the Article III, Section 24 prohibition against the expenditure of public funds without an appropriation. *See, e.g., Council 13, AFSME v. Casey*, 156 Pa. Cmwlth. 92, 96, 626 A.2d 683, 686 (1993) ("The duty of the Executive Branch, including the Governor, the Budget Office and the State Treasurer, to make payment for the performance of essential work by state employees is therefore undoubted . . . ."); *Council 13, AFSME v. Rendell,* 604 Pa. 352, 383, 986 A.2d 63, 82 (2009) ("[W]e hold . . . that Section 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget . . . ."). In particular, the Pennsylvania Supreme Court in *Rendell* determined that the Federal Supremacy Clause directed that FLSA covered employees are required to be timely paid, despite the lack of an appropriation, thereby superseding the Pennsylvania constitutional limitation in the Article III, Section 24 prohibition against the expenditure of public funds in the absence of a General Fund appropriation.

Most employees paid pursuant to the "State Correction Institutions" line item would satisfy the federal definition of "employee" as used by the Fair Labor Standards Act. Specifically, the Act defines "employee" to include any individual employed by a state governmental agency who is subject to the state's civil service laws of the Commonwealth and who is not an elected official, a member of the personal staff of an elected official, an

officeholder who serves at a policy making level, a legal advisor to an officeholder or who is an employee of the legislative branch of government (excepting legislative librarians).
29 USCA § 203 (e)(2)(C)(i) and (ii).

Prison guards, maintenance workers, health care professionals, food service providers, counselors, supervisors, educators and other prison support staff would be covered by the provisions of the federal Fair Labor Standards Act as they do not fall into one of the statutory exemptions set forth in the Act. Accordingly, unless otherwise deemed non-essential and furloughed, such state prison employees are federally mandated to be timely paid by the Commonwealth, notwithstanding the lack of budgetary authority. *Council 13, AFSME v. Rendell,* 604 Pa. 352, 986 A.2d 63 (2009).

B. Prison Operating Expenses

1. Commonwealth's Duty to Preserve the Health, Safety and Welfare of All Citizens (Police Powers).

The most important function of government is the exercise of the police power for the purpose of preserving the public health, safety and welfare. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339 (1983). Under the police power, the legislature may enact laws to suppress insurrection and to maintain the safety, peace and order of its citizens. *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295 (1929). The scope of the police power of the Commonwealth is necessarily broad and "transcends all other powers of government." *Commonwealth ex. Rel. Woodside v. Sun Ray Drug Co.*, 383 Pa. 1, 116 A.2d 833, 837 (1955). The Supreme Court of the United States has interpreted the concept of "the public welfare" broadly, including public safety, public health, morality, peace and quiet, and law and order as some of the more conspicuous applications of the police power. *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98 (1954).

An inherent function associated with the state's obligation to preserve the public health, safety and welfare is to provide the "critical and necessary" operations required to facilitate this responsibility. Importantly, states may not relinquish their responsibility under the police power and are required to continuously and consistently carry out this obligation. *See, e.g., Coatesville Borough v. Coatesville Electric Light, Heat & Power Co.*, 32 Pa. Super. 513 (1907) ("[A] municipality cannot bargain away its right to exercise at all times its police power...."); *See also Pa. Human Rels. Comm'n v. Sch. Dist. Of Philadelphia*, 681 A.2d 1366, 1383 (Pa. Cmwlth. 1996) ("Where the Commonwealth has delegated a particular obligation to one of its political subdivisions and the political subdivision proves that its resources are inadequate to carry out its functions, the Commonwealth is obligated to adequately fund the political subdivision to satisfy its legally delegated obligations.").

Without sufficient spending authority, the Commonwealth would be unable to fulfill its constitutional obligation to "maintain order and to preserve the safety and welfare of all citizens." *County of Allegheny v. Commonwealth*, 507 Pa. 360, 490 A.2d 402, 410 (1985) (emphasis added). The State's responsibility to preserve the safety and welfare of all citizens necessarily requires the government to provide "adequate and secure facilities for the housing of

those individuals who have demonstrated by their conduct that they pose a danger to the other members of society." *Id.* This responsibility is twofold, meaning the Commonwealth is required to provide "adequate and secure facilities" to protect the general public from individuals who have been deemed a threat to society, while also providing satisfactory "housing" for incarcerated individuals to ensure that their health, safety and welfare is preserved as well. The lack of adequate funding is not a defense against failing to provide "adequate and secure facilities" for inmates. *Id.*

There are about 50,000 persons presently incarcerated in Pennsylvania prisons. Under the "Correctional Institutions" line-item, the Commonwealth maintains and operates 25 correctional institutions, 57 community correctional centers and one motivational boot camp. Approximately 54% of the state, male prison population is composed of violent offenders.[4] The adequacy and security of prisons are a necessary component to the state's obligation under the police power to preserve order and protect the public. Specifically, it is the Department of Correction's statutory directive "to protect the public by confining persons committed to our custody in safe, secure, facilities." *Dep't of Corr. v. Pa. State Corr. Officers Ass'n*, 923 A.2d 1212, 1217 n.9 (Pa. Cmwlth. 2007).[5] The Administrative Code requires the Department of Corrections to provide clothing, food, medical care, academic instruction, vocational education, library services and remedial education. 71 P.S. §§ 310-0 – 310-14. The failure of the Commonwealth to provide adequate resources to ensure confinement of persons deemed a threat to others would undermine the responsibility of the Commonwealth to protect the public.

The state's ability to administer the appropriate confinement of an individual who poses a danger to other members of society is necessary to meeting its constitutional responsibility to protect the public. *See, e.g.*, *Commonwealth ex rel. Ford v. Jeffes*, 260 Pa. Super 432, 434 (1978) (Where an inmate is considered an escape risk due to the nature of his offense and sentence, a greater burden is placed on the prison authorities to protect society from this felon who has nothing to lose from further killing.). When the inherent police power of a state conflicts with a strict application of a competing constitutional provision, such as Article III, Section 24, the police power prevails as an imperative necessity when not exercised arbitrarily. Under these circumstances, the Commonwealth's police power to maintain prisons compels the expenditure of public funds in excess of an appropriation. *See., e.g.*, *Commonwealth v. Wiemienowicz*, 27 Pa. D. & C. 590, 592 (Pa.C.P. 1936) ("the police power is the greatest and most powerful attribute of government; upon it the very existence of the state depends...If the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail. It needs no constitutional reservation or declaration to support it.") (quoting *Commonwealth v. Stofchek*, 322 Pa. 513, 519); *See also Burns v. Paulak*, 63 Pa. D. & C. 388, 394 (Pa.C.P. 1948) ("the exercise of the police power by the legislature is not curtailed by article III, sec. 7, and... that body may delegate a part of the police power to a municipality.").

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[4] E. Ann Carson, Ph.D., BJS Statistician, *Prisoners in 2014,* U.S. Department of Justice, Bureau of Justice Statistics (Sept 2015), available at http://www.bjs.gov/content/pub/pdf/p14.pdf

[5] Courts in other states have similarly determined "custodians of prisoners have a duty to manage the affairs of the prison so as not to create an unreasonable risk of harm to the public." *See, e.g., Wilson v. State, Dep't of Pub. Safety & Corrections*, 576 So.2d 490, 493 (La. 1991). In addition, the Oregon Supreme Court has held "the state has a duty to exercise reasonable care to prevent dangerous prisoners from causing harm to others. *Buchler v. Oregon Corrections Div.*, 316 Or. 499, 853 P.2d 798 (1993).

2. Commonwealth's Obligation to Provide Adequate and Secure Facilities for Housing Inmates (Cruel and Unusual Punishment).

"When a state takes a person into custody and holds him there against his will, the United States Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." *DeShaney v. Winnebago County Dept of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); Pa. Const. art. I, § 13. This duty arises "from the limitation which the state has imposed on the inmate's freedom to act on his own behalf." *DeShaney*, 489 U.S. at 199-200. Prison officials thereby have an obligation to ensure that inmates receive basic needs such as "adequate food, clothing, shelter and medical care, and must take reasonable measures to guarantee the safety." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

The constitutional mandate imposed on the Commonwealth to provide for the safety and well-being of prisoners originates from the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution. Both constitutional provisions contain similar language prohibiting cruel and unusual punishments from being inflicted. US Const. amend. VIII; Pa. Const. art I, § 13.

The principle behind the Commonwealth's obligation to provide for an inmate's basic needs is clear – if the state "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and Due Process Clause." *DeShaney*, 489 U.S. at 200. Specifically, the Eighth Amendment's proscription against cruel and unusual punishment guarantees that "prison officials must provide humane conditions of confinement." *Farmer*, 511 U.S. at 832; U.S. Const. amend. VIII.

Courts have held that "deliberate indifference" to the basic human needs of prisoners will be considered a violation of the Eighth Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed. 2d. 251, (1976) (The U.S. Supreme Court held the deliberate indifference to serious medical needs of prisoners violates the Eight Amendment proscription against cruel and unusual punishment.). *See also Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (The court found that deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.). Moreover, cases throughout the country have held that "gross deficiencies in staffing" are enough to establish deliberate indifference to prisoners' health needs, and that a "lack of financing" is not a defense to a failure to provide minimum constitutional standards. *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir. 1980); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

Approximately $24.6 million in prison related invoices for electric utilities (*e.g.* PPL, Penelec, Peco), fuel suppliers (*e.g.* UGI, various coal companies), water service (*e.g.* North Penn Water, Chester Water), medical service providers (*e.g.* Guadenzia, Commonwealth Clinical Group, Pharmatech, Gateway Rehab, Redwood Toxicology), food service vendors, office supplies and trash removal necessary for prison operations have been submitted to Treasury for

payment. If these invoices were to continue to be unpaid for an undetermined period, vendors would terminate or significantly curtail providing such critical goods and services, thereby jeopardizing the continued safe operation of the Commonwealth prisons.

In fact, notwithstanding a lack of budgetary spending authority, other states have acknowledged the obligation to provide basic care and services for inmates. For example, in *Duran v. Anaya*, inmates filed an action against the New Mexico prison system to prevent layoffs to staff and require the filling of staff vacancies in prison hospitals alleging that they would be subject to cruel and unusual punishment if they did not receive adequate medical care. *Duran v. Anaya*, 642 F.Supp 510 (D.N.M. 1986). In that case, there was a reduction of more than one-third of the positions authorized in New Mexico's operating budget from the previous Fiscal Year. *Id.* at 525. The court ultimately ordered that the prison system was enjoined from reducing the level of staff below the number of such staff authorized or approved to be employed by the New Mexico Corrections Department during the previous Fiscal Year or a level identified as being <u>necessary</u> to provide a minimum constitutional level of safety and security for prisoners. *Id.* (emphasis added).

The issue in the *Duran* case is analogous to the current problem resulting from the reduced appropriation for state prisons in Act 10A. As in *Duran*, the insufficiency of funds appropriated to Corrections in Act 10A has created an impediment not only to providing adequate and secure facilities necessary to maintain the minimum constitutional level of safety and security for prisoners under the Eighth Amendment, but undermines the Commonwealth's ability to meet its constitutional obligation to preserve the safety and welfare of the general public. As such, critical and necessary government operations, such as State Correctional Institutions, are fundamental to the state and federal constitutional obligation mandating the preservation of order and administration of justice and therefore are required to be paid.

3. Experience In Other States

Other states have encountered similar state budgetary appropriation shortfalls. As far back as 1917, state governments have been forced to make critical and necessary expenditures despite the lack of legislative appropriation authority in order to ensure continuity of core governmental services. *See, e.g., Smartt v. Bd. Of County Comm'rs*, 1917 OK 590, P6 (1917) ("The very purpose of creating a state government by the people is to delegate thereto the performance of certain functions looking to the common safety and welfare, and the necessity for the performance of these functions through the agency of the state and its various subdivisions is the sole object for its creation."). Moreover, courts in Illinois and Minnesota have emphasized that during a budget impasse, where there is a lack of an appropriation, the state is still responsible for maintaining its core government functions in order to preserve the health, safety, and welfare of its citizens. *See, e.g., In re Temp. Funding of Core Functions of Exec. Branch*, 2011 Minn. Dist. LEXIS 61 (Minn. Dist. Ct. 2011) (The court held that the failure to properly fund critical core functions of the executive and legislative branches including matters relating to the life, health, and safety of Minnesota citizens will violate the Minnesota and United States Constitutions.); *See also AFSCME v. State*, 2015 IL App (5th) 150277-U, P36 (Ill. App. Ct. 5th Dist. 2015) (The court determined that if the budget impasse continues indefinitely and the Comptroller is unable to issue paychecks, the state may become unable to provide crucial government services.).

When addressing the question of expending public funds in excess of a legislative appropriation, the courts of other states have reached the same conclusion – approving the expenditure of funds necessary to ensure public safety notwithstanding a constitutional prohibition, similar to Article III, § 24 that could suggest otherwise. *See, e.g., State v. Staub*, 61 Conn. 553, 565-66 (Conn. 1892) (Compelling the Comptroller to make payments where the legislature had not passed an appropriation bill, the Connecticut Supreme Court stated "duties essential to the preservation of order, the administration of justice, and the protection of property...are not imposed by statute but their performance is demanded by the constitution and is of necessity involved in the existence of a government."); *Connecticut Attorney General Opinion*, 1991 Conn. AG LEXIS 79, *10 (1991) ("[I]f conflicting laws cannot be reconciled by a reasonable construction, then the paramount law must control."); *In Re Temporary Funding of Core Functions of the Judicial Branch of the State of Minnesota,* 2011 Minn Dist. LEXIS 88 (Minn. Dist. Ct. 2011) ("When the traditional processes of government have failed, the rigidity of [the law] must give way to the safety and protection of [the public].").

The Supreme Court in the state of Washington resolved a question similar to that which Pennsylvania currently faces, the issuance of payments in excess of an appropriation for the preservation of the health, safety and welfare of prisoners. In that case, the court stated "[T]he feeding of prisoners is an indispensable governmental function, so far so, that warrants issued for that purpose by a city in excess of its constitutional limit of indebtedness are valid on the score of necessity; and claims for such expenditures made by a sheriff must be paid by a county, although the county's constitutional debt limit be exceeded thereby." *Ass'n Collectors v. King County*, 194 Wash. 25, 32 (1938) quoting *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189 (1903); and *Smart v. Board of County Commissioners*, 67 Okla. 141, 169 Pac. 1101. (1917). The court continued by saying "fires, floods, explosions, storms, earthquakes, riots, and insurrections do not wait for commissioners to adopt resolutions by unanimous vote at meetings had on reasonable notice. Surely, there must be a legal way to relieve a sheriff who exceeds the budget in the face of such emergencies. The feeding of prisoners may not be so actively emergent as in those cases, but it involves a no less mandatory duty." *Id.*

2016 Opinion of Office of Attorney General

Pursuant to Section 204(a)(1) of the Commonwealth Attorneys Act, Treasury sought the opinion of the Office of Attorney General to receive the benefit of a legal opinion, independent of the underlying financial transaction pertaining to the Treasurer's authority to approve expenditure requisitions in excess of an appropriation under these circumstances. Because the Treasurer is not subject to the provisions of Section 204 of Commonwealth Attorneys Act, such an opinion is advisory and not binding upon the Treasurer or the Department.

Recognizing the lack of direct precedent and in an abundance of caution, the following question was presented to the Office of Attorney General:

> Notwithstanding Article III, Section 24 of the State Constitution and Section 3422 of the Fiscal Code, does there exist a legal basis upon which the State Treasurer may conclude that requisitions, which exceed a legislative appropriation yet are necessary and critical to

the continued safe operation of state prisons; to protect the health safety and welfare of the Commonwealth; and satisfy federal constitutional and statutory requirements, are "lawful and correct" pursuant to Section 1502 of the Fiscal Code?

By letter dated February 25, 2016, the Office of Attorney General concluded that "[a]s the Department of Corrections must continue to operate to the level required by the United States Constitution and any applicable federal statutes, the prohibition in Article III, Section 24 of the Pennsylvania Constitution or 72 P.S. § 3422 against Treasury paying any money in excess of that appropriated is superseded to the extent the state law is in direct conflict with the United States Constitution or federal statutes." (emphasis added) Letter of Bruce Beemer, First Deputy Attorney General (February 25, 2016), attached hereto.

Conclusion

Pennsylvania has a legal obligation to maintain and operate prisons to house persons deemed a threat to society. As a fundamental exercise of its police powers, it is a core responsibility of the Commonwealth to ensure and provide for the public safety, an obligation that cannot be avoided when lacking appropriation spending authority. An unforgiving application of the Article III, Section 24 prohibition against the expenditure of public funds cannot be invoked in a manner that jeopardizes public safety – in this case, cutting of funds for the continued operation of state prisons.

Additionally, both the state constitution and the federal constitution (by virtue of the federal Supremacy Clause) mandate the Commonwealth to expend resources necessary to provide basic needs of prison inmates. Shelter, food, medical care, and personal safety represent core responsibilities under both the state and federal constitution owed to each prison inmate. Application of the Article III, Section 24 prohibition under circumstances in which the appropriation level for correctional institutions has been reduced by 50% would render the Commonwealth's ability to satisfy the obligations imposed under the state and federal constitutions practically impossible.

Therefore, for the foregoing reasons, there exists a sufficient legal basis upon which the Treasurer may conclude that requisitions for the critical and necessary operations of the state prisons appear to be lawful and correct, notwithstanding the provisions of Article III, Section 24 and 72 P.S. 3422.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

February 25, 2016

Christopher B. Craig, Esq.
Chief Counsel
Pennsylvania Treasury
129 Finance Building
Harrisburg, PA 17120

Dear Mr. Craig:

On behalf of the State Treasury, you have requested a legal opinion, pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-204, concerning the authority of the State Treasurer to issue his warrant for the payment of requisitions submitted by the Governor's Office of Budget to pay the continuing operational expenses of the state correctional institutions that exceed the appropriation level established in the Fiscal Year 2015-16 General Appropriation Act, Act of December 29, 2015 (P.L. ___, No. 10A) ("Act 10A of 2015"). After careful review, we have concluded that the prohibition in Article III, Section 24 of the Pennsylvania Constitution and 72 P.S. § 3422 against the Treasury paying any money in excess of that appropriated is superseded to the extent the state law is in direct conflict with the United States Constitution or federal statutes.

As a threshold matter, Section 204(a)(1) of the Commonwealth Attorneys Act provides that, "[u]pon the request of the Governor or the head of any Commonwealth Agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the Governor or agency." 71 P.S. § 732-204(a)(1). The Commonwealth Attorneys Act further provides that the State Treasury shall not be considered a Commonwealth Agency for purposes of Section 204(a). 71 P.S. § 732-102 (defining the State Treasury to be a Commonwealth Agency only for purposes of Section 204(b) and 204(f) and 42 Pa.C.S. § 5110). As a result, this legal opinion is not binding on the State Treasury. Furthermore, please be advised that the protection from liability afforded recipients of binding opinions from the Attorney General under Section 204(a)(1) also does not apply to the State Treasury; therefore, reliance on this opinion is at the Treasury's discretion.

Factual Background

On December 29, 2015, Governor Wolf partially approved and signed Act 10A of 2015. As it pertains to this matter, the appropriation for state correctional institutions was reduced by the Governor from $1.89 billion to the sum of $956 million. You have indicated that the Treasury imminently expects the Department of Corrections to exhaust all funds appropriated for the

continued operations of the state correctional institutions. Despite this anticipated appropriation shortfall, you also indicated that the Treasury anticipates the receipt of requisitions from the Office of Budget to pay for continued operations of the state correctional institutions, including requisitions for salaries and benefits for employees, as well as food service, facility maintenance, health care, mental health care, drug interdiction programs, security operations, utility service, and safety systems.

State Law

Article III, Section 24 of the Pennsylvania Constitution provides:

> No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.

Pa. Const. Art. III, § 24.

This provision establishes a constitutional requirement that the Treasury not disperse any money without an appropriation made by law and a warrant issued by the proper officer. These requirements are further supported and supplemented by Section 3422 of the Fiscal Code which provides, in relevant part, that, "[i]f the state treasurer shall pay out for any appropriation named in an appropriation bill, a greater sum than is named therein for each appropriation, . . . they shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, for each and every offence." 72 P.S. § 3422.

The Fiscal Code also establishes the procedures by which expenditure requisitions are submitted to the Treasury and by which the Treasury evaluates such requisitions. Of particular importance to the issue at hand, Section 1502 of the Fiscal Code provides that, "[r]equisitions shall be audited by the Treasury Department in accordance with generally accepted auditing standards and if they appear to be lawful and correct, the State Treasurer shall issue his warrant for the payment thereof." 72 P.S. § 1502.

The United States Constitution and Federal Statutes Have Supremacy Over Conflicting Provisions of State Constitutions and State Statutes.

The Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2, makes the United States Constitution and federal laws the supreme law of the land governing anything to the contrary in state laws or state constitutions. *Testa v. Katt,* 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *Knoll v. White*, 141 Pa. Cmwlth. 188, 194, 595 A.2d 665, 668 (1991). It is a

fundamental principle that state law that conflicts with federal law is without effect. *Council 13, AFSCME, AFL-CIO v. Rendell,* 604 Pa. 352, 380, 986 A.2d 63, 80 (2009). (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819)). Such a conflict arises where compliance with both state and federal laws or regulations is an impossibility or where state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress. *Id.* at 81 (citing *Hillsborough County, Fl. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)). Accordingly, if a conflict exists between the United States Constitution or federal statutes and the Pennsylvania Constitution or Pennsylvania Laws where it is impossible to comply with both federal and state law, the United States Constitution or federal statute would supersede the conflicting provision of the Pennsylvania Constitution or state law. However, the state law is displaced only to the extent that it actually conflicts with federal law. *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996).

In this matter, strict adherence to Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422 would act as a complete bar to any and all payments for the Department of Corrections once it has completely exhausted all appropriated funds. However, from that moment going forward until such time as a new appropriation is made, zero payment would result in complete cessation of operation of the Department of Corrections and its state correctional institutions. Complete cessation of operation of the Department of Corrections would undoubtedly conflict with the requirements set forth by the United States Constitution. To the extent that the United States Constitution or federal statutes require action of the Department of Corrections, those provisions would supersede Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422 and would be limited to the time period in which the Department of Corrections has completely exhausted all appropriations and to the scope of the actual conflict with the federal law.

The Pennsylvania Commonwealth Court has held that budget impasses and the absence of state funding appropriations do not allow the Commonwealth to forego its obligations with regard to certain federal programs. *Knoll*, 141 Pa. Cmwlth. at 195. In *Knoll*, the Commonwealth Court found it lawful for the Treasury to continue payment for distribution of benefits to recipients of federal programs based on the supremacy of federal law over Article III, Section 24 of the Pennsylvania Constitution. *Id.*

The Department of Corrections, likewise, has duties mandated by the United States Constitution and federal statutes that would be impossible to meet with complete cessation of operation. "When the state takes [a person] into custody and holds him there against his will, [both the United States and Pennsylvania Constitution impose] upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989); Pa. Const. Art. I, § 13. This affirmative duty to protect arises "from the limitation which [the state] has imposed on the [inmate's] freedom to act on his own behalf." *Id.* at 190.

The principle behind the Commonwealth's obligation to provide for an inmate's basic needs is relatively straightforward – the state "so restrains an individual's liberty that it renders him

unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* at 200. Specifically, the Eighth Amendment's proscription against cruel and unusual punishment guarantees that prison officials "must provide humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994); US Const. amend. VIII. To that end, prison officials have an obligation to ensure that inmates receive basic needs including "adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee [their] safety." *Id.*

Courts have held that "deliberate indifference" to the basic human needs of prisoners will be considered a violation of the Eighth Amendment. *See e.g. Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d. 251 (1976) (holding that the deliberate indifference to serious medical needs of prisoners violates the Eight Amendment proscription against cruel and unusual punishment.); *See also Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (finding that deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.).

Additionally, the Department of Corrections has certain obligations under the First Amendment to protect expressive activities for all inmates including speech, the free exercise of religion and access to courts. See US Const. amend. I; see also *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972).

Taken together, these myriad of duties impose inescapable requirements on the Department of Corrections to provide a minimum level of basic service and protection to inmates in its custody and control. If the Department of Corrections was forced to completely cease operation of state correctional institutions as a result of the application of Article III, Section 24 and 72 P. S. § 3422 prohibiting any payments following exhaustion of appropriated funds, it would be impossible to comply with these minimum requirements of federal law. *Council 13,* 604 Pa. at 380. Due to this conflict between the Pennsylvania Constitution and the myriad of applicable federal laws during the period once the Department of Corrections has completely exhausted its appropriations until any new appropriation is made, the applicable federal law supersedes Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422.

Treasury Has Authority to Issue a Warrant for the Payment of any Requisition that Appears to be Lawful and Correct.

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it "appear[s] to be lawful and correct." 72 P.S. § 1502. The statutory standard employed by the Treasurer is not one of absolute legal certainty, but rather, if the requisition "appears" to the Treasurer, in his sole discretion, to be "lawful and correct." The

legislature's purposeful use of the conditional term "appears" is noteworthy, as it is an acknowledgment of the large number of expenditure requisitions that are presented daily to the Treasurer often accompanied by little legal guidance and lack in absolute legal certainty. As a consequence, the Fiscal Code permits the Treasurer to exercise his independent judgment when considering the legality of an expenditure requisition. This independent judgment would certainly apply to his analysis of whether an individual requisition for payment of a Department of Correction's operating expense would be authorized due to the supremacy of the United States Constitution or federal statute over Article III, Section 24 of the Pennsylvania Constitution or 72 P. S. § 3422.

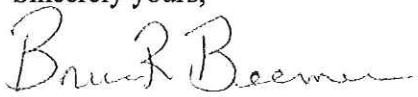
It will be at the discretion of the Treasury whether any individual requisition "appear[s] to be lawful and correct" based on the supremacy of the United States Constitution or federal statute superseding Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422.

Conclusion

As the Department of Corrections must continue to operate to the level required by the United States Constitution and any applicable federal statutes, the prohibition in Article III, Section 24 of the Pennsylvania Constitution or 72 P. S. § 3422 against the Treasury paying any money in excess of that appropriated is superseded to the extent the state law is in direct conflict with the United States Constitution or federal statutes.

Finally, you are advised that, in accordance with Section 204(a) (1) of the Commonwealth Attorneys Act, 71 P.S. §732-204 (a) (1), you are not required to follow the advice set forth in this Opinion and are not protected from liability for doing so in any way.

Sincerely yours,



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