PROSECUTION OF A DEATH PENALTY CASE IN PENNSYLVANIA

With Analysis of United State Supreme Court Cases

ERNEST D. PREATE, JR.

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Chief Deputy Attorney General
Commonwealth of Pennsylvania

Office of Attorney General
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

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ABOUT THE AUTHORS

ERNEST D. PREATE, JR.

Ernest D. Preate, Jr., is the Attorney General of the Commonwealth of Pennsylvania. He was elected on November 8, 1988, and reelected November 3, 1992. Prior to becoming Attorney General, Mr. Preate served three terms (12 years) as the District Attorney of Lackawanna County. He received his B.S. from the Wharton School of the University of Pennsylvania in 1962 and was awarded his LL.B from the University of Pennsylvania Law School in 1965.

From 1966 to 1969, he was a member of the United States Marine Corps, achieved the rank of Captain, saw 13 months of infantry duty in Vietnam, and was decorated for combat service.

Mr. Preate's expertise in capital litigation includes both trying cases and litigating appeals. In his 21 years as a prosecutor he has participated in over 90 trials, personally prosecuted 19 murder cases, winning murder convictions in each one of them that went to verdict. Juries returned death penalty verdicts in five of the seven trials in which he requested such a verdict.

His extensive appellate experience includes an appearance in 1989 before the Supreme Court of the United States where he successfully argued to uphold the constitutionality of Pennsylvania's death penalty statute in Blystone v. Pennsylvania. The Court's favorable ruling in Blystone has had an important impact on the statutes of at least thirteen other states with similar laws.

From 1991 through 1993 he served as Chairman of the Criminal Law Committee of the National Association of Attorneys General (NAAG). Since 1990, he has been the official delegate of NAAG to the American Bar Association (ABA). He served as the first Chair of the ABA's newly created Government and Public Sector Lawyer's Division in 1991-92.

He was a member of the National Board of Directors of the Association of Government Attorneys in Capital Litigation (AGACL) for seven years, serving as both a director and a regional vice president, until 1992. In 1993, the AGACL Board honored Mr. Preate by voting him to "Honorary Life Member" status.

Since 1989, Mr. Preate has been a member of the United States Department of Justice Executive Working Group on Criminal Law.

He has testified before Congress on habeas corpus reform and has been a frequent lecturer at state and national conferences of prosecutors and bar associations on death penalty issues, jury election, trial strategy, and closing arguments. He has appeared on the "Today" show and on "Nightline" to discuss the death penalty in the United States.

In June 1990, he delivered the John Price Lecture for the National College of District Attorneys' Career Prosecutor's Course in Houston.

The "Prosecution of a Death Penalty Case" is now in its tenth revised printing.

ROBERT A. GRACI

Robert A. Graci joined the staff of the Office of Attorney General in 1984. He has served as Chief Deputy Attorney General in charge of the Appeals and Legal Services Section of the Criminal Law Division since 1986. Prior to joining the Office of Attorney General he served as an assistant district attorney in Delaware County for three and one-half years, trying cases and handling appeals. He has also served as counsel to a state investigating agency and as counsel to a State Senate investigating committee.

Mr. Graci is a member of the Pennsylvania and American Bar Associations. He is also a member of the Pennsylvania District Attorneys Association and the Association of Governmental Attorneys in Capital Litigation (AGACL). He serves on the AGACL Board of Directors as a Regional Vice President. He also serves on the Pennsylvania Criminal Procedural Rules Committee by appointment of the Supreme Court of Pennsylvania.

He has been involved in capital litigation in the trial and appellate courts of Pennsylvania and in habeas corpus litigation in capital cases in the federal district courts and in the United States Court of Appeals for the Third Circuit. In 1989, he was on the brief and assisted Pennsylvania Attorney General Ernest D. Preate, Jr., in argument before the United States Supreme Court in Blystone v. Pennsylvania which upheld the constitutionality of Pennsylvania's death penalty procedures statute. He was the 1992 recipient of the Regional Vice President's Award for Excellence in Appellate Advocacy from AGACL.

Mr. Graci has written several professional publications including "Recent Appellate Decisions"; 11th Annual Criminal Law Symposium (Pennsylvania Bar Institute, June, 1994) (P.B.I. No. 1994-871), "Search and Seizure and Self-Incrimination"; Basic Prosecutor's Course (Pennsylvania District Attorneys Institute Prosecutor Education, June, 1994), and "The Wiretap Law" with A. Roy DeCaro; The Pennsylvania Lawyer (December, 1981).

He regularly serves as an instructor for the Pennsylvania Bar Institute and the Pennsylvania District Attorneys Institute and has lectured for the Pennsylvania State University, the Pennsylvania Conference of State Trial Judges, the Pennsylvania State Police, the Pennsylvania Department of Environmental Resources, the Delaware State Bar Association and AGACL.

Mr. Graci received his law degree with honors from the University of Miami School of Law in 1977 and his B.A. in Political Science from West Chester University in 1973.

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INTRODUCTION

"Prosecution of a Death Penalty Case in Pennsylvania" is designed for use by the litigator involved in trials, appeals and post-conviction proceedings in capital cases. It is intended as a ready reference for capital litigators and courts, trial and appellate, when confronted with the myriad of issues which arise in these most serious cases in the criminal justice system.

This book addresses issues beginning at the investigative stage of a murder case. It continues through trial preparation and pretrial discovery. It addresses pretrial publicity and bail, along with jury selection, all important considerations in the capital case.

The mental illness of a defendant and related matters are discussed under the topics of incompetency, insanity, diminished capacity, voluntary intoxication and the verdict of guilty but mentally ill, along with the mental infirmity-related mitigating circumstances.

Pennsylvania's death penalty procedures statute, 42 Pa.C.S. § 9711, is examined in detail. Substantial emphasis is given to the interpretations given to the statute's provisions by the Pennsylvania Supreme Court. This explication includes individual sections on each of the aggravating and mitigating circumstances contained in the statute and the interpretations given them by the courts. Also included are discussions of the death penalty hearing procedures with emphasis on the prosecutor's penalty phase closing argument and penalty phase jury instructions. The book also explains the mandatory review function of the Pennsylvania Supreme Court which is required of all death penalty cases.

Of interest are the discussions of the various constitutional challenges which have been leveled against the statute and the procedures employed in capital cases at the guilt and penalty phases and the citations to the appellate decisions which have addressed and resolved them. Of particular note are the United States Supreme Court decisions in the area of capital punishment which are analyzed in light of Pennsylvania's procedures and case law.

This book is an attempt to identify all of the important aspects of the prosecution of a death penalty case and all of the issues which may confront the capital litigator--from the investigation through the appeal--and to provide the capital litigator with the means to address them successfully. You will be the judge of its adequacy.

I. TRIAL PREPARATION

Every successful trial, whether capital or non-capital, begins with proper trial preparation. Clearly, because of the seriousness of the capital case, trial preparation must be extraordinarily extensive. These are cases that cannot be tried by simply "picking up the file."

In the best of all scenarios, trial preparation begins, not after the charges have been filed or submitted for review, but rather, at the time of the discovery of the homicide. It means visiting the crime scene, with the police and/or medical examiner, preferably while the victims' bodies are still there. It means vigilant observation of the investigators' work, encouraging the taking of certain photographs, the saving of certain evidence, recognizing at this very early stage of the proceedings the dramatic persuasive impact you can paint for the jury through these exhibits. This view and the chance to obtain these exhibits with your personal trial foresight imputed into them are only available this one time--at the scene of the crime--and your words at trial can only have more emotional appeal if you have visited the scene at this time because the full import of the tragedy will already be imprinted in your mind. You will remember it and you will have at trial the confidence that can only come from this intimate and personal connection with the murder.

The cases hereinafter cited reemphasize the importance of prosecutors working in close cooperation with the police from the beginning of investigations, particularly in serious cases. Despite traditional "turf battles" between the investigating and the prosecutorial agencies, these cases make a compelling argument for prosecutorial involvement from the beginning.

A. Complete familiarity with the case. As in any case, a capital case begins with preparation for a trial. The prosecutor must be completely familiar with everything that occurred during the investigation of the case, including complete familiarity with the police file and all evidence, physical, documentary, or otherwise, in the case.

B. Confidence. This complete familiarity is necessary so that you will have at trial the confidence to persuade a jury to render this most difficult verdict. If you are unsure of yourself it will surely show in your words and actions and you will not present a convincing case.

C. Disclosure. Complete familiarity with the case. Complete familiarity is important for another reason--so that you, the prosecutor, can properly fulfill your discovery

and constitutional disclosure obligations in a timely fashion. "Trial by ambush" will not be tolerated in any case, let alone a capital case. Commonwealth v. Schwartz, 419 Pa. Super. 251, 615 A.2d 350 (1992) quoting Commonwealth v. Moose, 393 Pa. Super. 379, 574 A.2d 661 (1990), affirmed 529 Pa. 218, 602 A.2d 1265 (1992) (new trial required in non-capital murder case because of untimely disclosures in violation of discovery rules). See also Commonwealth v. Shelton, ___ Pa. ___, 640 A.2d 892 (1994) (reversal ordered where prosecutor violated mandatory discovery rule requiring disclosure of identifications of defendant and used undisclosed information to "ambush" the defendant by disclosing it in prosecutor's opening statement; citing Moose, supra, for the proposition that "[t]rial by ambush is contrary to the spirit and letter" of the rules of discovery "and cannot be condoned"); and Commonwealth v. Thiel, 323 Pa. Super. 92, 100, 470 A.2d 145, 149 (1983) (condemning "gamesmanship in criminal prosecution" in relation to prosecutor's failure to properly respond to discovery requests).

D. Additional investigation. This complete familiarity also benefits the prosecutor by allowing him or her to direct any additional investigation that is required in a timely fashion and to be better prepared to try the case.

E. General Observations.

1. A prosecutor has an affirmative duty to ask the investigating officers if they have provided the prosecutor with all police reports in the case, to obtain any missing reports, to review the entire police file in the case, and to inspect all the physical evidence secured by the police in the case or related cases. Obtaining this knowledge early in this stage will greatly aid the prosecutor's preparation, will assist in the prosecutor's presentation at trial, and will avoid embarrassment and potential problems (including reversals of convictions and possible bars to retrials) caused by untimely disclosures or failures to disclose.

   a. The prosecutor's search should not be limited to the primary police or law enforcement agency handling the investigation. Oftentimes other agencies have rendered assistance. While that activity may be reflected in the prime agency's reports, they will not contain the actual reports of the assisting agency. These might include, for instance, a local police department assisting the State Police or county detectives (or vice-versa) or the

coroner or medical examiner. They could also include non-law enforcement governmental agencies such as fire departments or ambulance associations. An EMT who arrives at a murder scene and takes a dying declaration from the victim who identifies someone other than the defendant as his assailant has exculpatory evidence which must be provided to the defense. The EMT's report (if there is one) must be obtained, particularly if its substance is not otherwise reflected in a police report.

2. If the investigating officer has interviewed a witness or potential witness and prepared a summary of the interview which purports to be based on information provided by the witness, the prosecutor should review the summary with the witness before trial for accuracy. If the witness says that the summary does not accurately reflect the information attributed to the witness, a new report, accurately reflecting the witness' information, should be prepared. Such a procedure will avoid surprise to the prosecutor at trial. It will also avoid the unseemly prospect of the investigating officer being called by the defense to contradict the witness, based on the officer's mistaken report. (NOTE: A summary of an interview is not a statement of the person interviewed unless the person adopts the summary, either by signing it or otherwise. Nonetheless, trial courts frequently ignore this "legal technicality" and allow this type of impeachment. The suggested procedure helps to avoid this problem and assists the prosecutor in better preparing the case. Also, while this suggested procedure will result in yet another witness statement which will be subject to disclosure to the defense either in discovery or for cross-examination, the safer course is to avoid contradictions and surprise.)

3. The wise prosecutor will document his requests for case-related information from the police and other agencies involved in an investigation. This documentation could become crucial if, at some point, it is learned that evidence favorable to the defense was withheld. It could spell the difference between the granting of a new trial and the discharge of a defendant.

II. DISCOVERY.

A. Constitutional Obligations.

1. The Due Process Clause imposes certain disclosure obligations on prosecutors.

   a. A prosecutor may not knowingly use perjured testimony. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); and Commonwealth v. Hallowell, 477 Pa. 232, 383 A.2d 909 (1978). See also Commonwealth v. Bazemore, 531 Pa. 582, 614 A.2d 684 (1992) (reminding prosecutors of their obligation under Pennsylvania Rule of Professional Conduct 3.3(a)(4) which provides that "[a] lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures").

      1) A prosecutor's use of such testimony will result in the grant of a new trial. Hallowell, supra (murder conviction reversed due to use of perjured testimony).

      2) If the use is knowing, retrial will probably be barred under the Pennsylvania Double Jeopardy Clause. See Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992) (retrial barred for intentional non-disclosure of exculpatory evidence). Compare Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993) (explaining Smith as not creating "a per se bar to retrial in all cases of intentional prosecutorial misconduct" but only "in cases where the prosecution intentionally deprived the defendant of a fair trial" or, stated differently, where there is a showing that the Commonwealth "specifically undertook to prejudice the defendant to the point of denying him a fair trial;" asserted misconduct did not bar retrial); Commonwealth v. Rightley, 421 Pa. Super. 270, 617 A.2d 1289 (1992) (Smith rule not violated; retrial not barred); and Commonwealth v. Manchas, ___ Pa. Super. ___, 633 A.2d 618 (1993) (Smith distinguished; Rightley cited; prosecutor's failure to "fully comply"

with discovery rules did not prejudice defendant; no remedy required).

b. A prosecutor may not knowingly fail to correct perjured testimony. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); and Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983). See also Commonwealth v. Bazemore, supra (reminding prosecutors of their obligation under Pennsylvania Rule of Professional Conduct 3.3(b) not to present any testimony that they know to be false and to correct false testimony which comes to their attention after the fact but prior to the conclusion of the proceeding).

1) A prosecutor's use of such testimony will result in the grant of a new trial. Wallace, supra (murder conviction reversed and sentence of death vacated because of failure to correct perjured testimony of star witness).

2) If the use is knowing, retrial will probably be barred under the Pennsylvania Double Jeopardy Clause. See Commonwealth v. Smith, supra. Compare Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993) (explaining Smith as not creating "a per se bar to retrial in all cases of intentional prosecutorial misconduct" but only "in cases where the prosecution intentionally deprived the defendant of a fair trial" or, stated differently, where there is a showing that the Commonwealth "specifically undertook to prejudice the defendant to the point of denying him a fair trial;" asserted misconduct did not bar retrial); and Commonwealth v. Rightley, 421 Pa. Super. 270, 617 A.2d 1289 (1992) (Smith rule not violated; retrial not barred); and Commonwealth v. Manchas, ___ Pa. Super. ___, 633 A.2d 618 (1993) (Smith distinguished; Rightley cited; prosecutor's failure to "fully comply" with discovery rules did not prejudice defendant' no remedy required).

c. A prosecutor may not withhold, and must disclose, material, exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See also United States v.

Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Wallace, supra; Hallowell supra; and Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992).

1) Exculpatory evidence is that which extrinsically tends to establish a defendant's innocence of the crime or crimes charged as opposed to that which, although favorable, is merely collateral or impeaching. Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976), overruled on other grounds Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986); and Commonwealth v. Redmond, 395 Pa. Super. 286, 577 A.2d 547 (1990) appeal dismissed 528 Pa. 601, 600 A.2d 190 (1992). Even without a request from the defense the prosecutor is required to disclose exculpatory evidence to the defense.

   a) The rule of Brady also applies to evidence which is "potentially exculpatory" to the defendant. See Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992).

   b) Neither "the mere existence of other suspects" nor "investigative follow up of a lead" (as by taking a blood sample from a person for comparison purposes) "is evidence favorable to the accused which is material to guilt or punishment." Commonwealth v. Crews ___ Pa. ___, 640 A.2d 395 (1994) (disclosure not required under discovery rules since capital defendant failed to show that information was material or how disclosure would have benefitted defense).

2) For Brady purposes, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. United States v. Bagley, supra; Commonwealth v. Santiago, 405 Pa.

Super. 56, 591 A.2d 1095 (1991) (Bagley test applied; undisclosed evidence was material under this standard; new trial required).

NOTE: Prior to its 1985 decision in Bagley, the United States Supreme Court announced differing tests for materiality in dealing with non-disclosure questions depending on whether there was a general request for all exculpatory information, a specific request, or no request at all. See United States v. Bagley, supra (describing tests). The Pennsylvania Supreme court applied these different tests depending on the circumstances. See Commonwealth v. Hallowell, supra; and Commonwealth v. Wallace, supra. In Bagley, the United States Supreme Court "standardized" the test for materiality. This standard was utilized by the Superior Court in Santiago, supra. Bagley notwithstanding, the Pennsylvania Supreme Court has continued to note the previously announced materiality standards depending on whether the request was "general" (undisclosed evidence is material if it creates a reasonable doubt that did not otherwise exist) or "specific" (undisclosed evidence might have affected the outcome of the trial). See Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992) ("general request" test met; new trial ordered); and Commonwealth v. Green, ___ Pa. ___, 640 A.2d 1242 (1994) (though citing Bagley, supra, Court ruled that where a general request is made "evidence is material 'if the omitted evidence creates a reasonable doubt that did not otherwise exist..."; general test met; conviction reversed; new trial ordered).

3) If undisclosed evidence is not material in a constitutional sense, no relief is required. See Agurs, supra. Accord Green, supra (evidence was material; new trial ordered).

4) The Brady rule applies to evidence favorable to the defense, including impeachment evidence where the reliability of a

given witness may be determinative of guilt or innocence. United States v. Bagley, supra; and Commonwealth v. Moose, supra. See also Commonwealth v. Manchas, ___ Pa. Super. ___, 633 A.2d 618 (1993) ("In some circumstances, evidence tending to impeach the credibility of a witness, if possessed by the Commonwealth, may be material and subject to discovery under Rule 305B(1)"; citing cases).

a) While the disclosure obligations described in this section generally arise in a pretrial context, they may arise before a preliminary hearing, particularly if later use of preliminary hearing testimony is requested by the Commonwealth. In Commonwealth v. Bazemore, 531 Pa. 582, 614 A.2d 684 (1992), the prosecution sought to introduce the preliminary hearing testimony of a witness who asserted his privilege against self-incrimination when called at trial. By invoking the privilege the witness became unavailable. Generally, the prior sworn testimony of the witness would be admissible as a statutory exception to the hearsay rule, provided the defendant against whom the prior testimony was being offered had a full and fair opportunity to cross-examine the witness. In Bazemore, the Court concluded that the defendant was not given that opportunity because, at the time the witness testified at the preliminary hearing, the defendant was not aware of the considerations which had been offered to the witness by the Commonwealth in exchange for his cooperation and testimony. Since the defendant would be denied the opportunity to place this substantial impeachment evidence before the trial jury, the prosecution could not use the prior sworn testimony at trial. While the Bazemore Court was careful to say that it was not advancing the time for discovery to a time before preliminary hearing, the

smart prosecutor will be sure that the defense has this type of information for use at the preliminary hearing in order to overcome the problem encountered in Bazemore.

5) The Brady rule is particularly important in capital cases where there are separate proceedings for the determination of guilt and for punishment; the rule applies to evidence which is relevant to the defendant's guilt or punishment. A prosecutor's failure to disclose evidence which the defense could use to mitigate the sentence, i.e. to call for a sentence less than death, will result in a new sentencing proceeding. Brady itself actually involved evidence relevant only to sentence in a capital case. The violation resulted only in a new sentencing proceeding.

6) For Brady purposes, the intent of the prosecutor is irrelevant; relief, in the form of a new trial (at least), is required even if the non-disclosure of material, exculpatory evidence resulted from the prosecutor's ignorance or a mistaken belief that the information was not exculpatory. It is the character of the evidence, not the character of the prosecutor, that results in constitutional error and requires a new trial. Commonwealth v. Jenkins, 476 Pa. 467, 383 A.2d 195 (1978); Agurs, supra; Moose, supra.

7) If the police are in possession of exculpatory or potentially exculpatory evidence at or before trial and this evidence is not disclosed to the defense, a Brady violation occurs and relief is required, even if the prosecutor is unaware of the existence of the evidence. See Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992). In light of Smith there appears to be an affirmative duty on the part of prosecutors to search out evidence that police or other law enforcement or governmental agencies have in their possession. Even if the defense has equal access to this information, the

prosecutor should acquire it and disclose it. But see Commonwealth v. Ross, 424 Pa. Super. 570, 623 A.2d 827 (1993) (where defense has equal access to information requested in discovery it abuses discovery rules by seeking such information from the prosecution).

8) If the prosecutor withholds exculpatory evidence with the intent to deny the defendant a fair trial, the Pennsylvania Double Jeopardy Clause will bar a defendant's retrial. Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992).

a) In Smith, the prosecutor withheld evidence of favorable sentencing treatment afforded a key Commonwealth witness, as well as physical evidence which supported the defense contention that others committed the crime. This physical evidence was in the possession of police during trial and learned by the prosecutor shortly after trial. This information was withheld from the defense while the prosecution continued to argue to uphold death the penalty on appeal. Application of this new standard of double jeopardy under the State Constitution barred the defendant's retrial for the murders of a mother and her two young children. In discharging the defendant the Court observed, as had the lower courts which considered the case, that neither the prosecutor's office nor the investigating police agency could take any pride in the way this murder case was handled at trial and on appeal.

b) Relying on Smith, a trial court granted a double jeopardy motion after remand for a new trial in Commonwealth v. Santiago, 405 Pa. Super. 56, 591 A.2d 1095 (1991). The trial court ruled that the prosecution had improperly suppressed a statement by a witness who initially identified someone other than Santiago as the murderer of a police

officer. Prior to trial, the witness recanted this statement. Under Brady v. Maryland, the defense was entitled to, but did not receive, the first, exculpatory statement. Also suppressed were other witness statements which would have supported the defense theory. These statements the trial court likened to the undisclosed physical evidence in Smith. Also suppressed was information concerning a sentencing agreement with a witness. The court also found that the original trial court was in possession of Brady material but failed to disclose it to the defense. The court characterized the Commonwealth's arguments against disclosure as "disingenuous and misleading." The court found it "incredible" that these items of favorable evidence were not disclosed due to oversight or unintentionally on the part of the trial prosecutor. The court, in granting the Smith-double jeopardy motion filed on Santiago's behalf said: "I believe that some of the activity...at the original trial was totally unnecessary, and it just serves to further demonstrate, in some person's mind, that the prosecutorial function is win at all costs." Commonwealth v. Santiago, No. 8509-0221-0223 September Term, 1985 (Phila. C.P.; 10/15/92; Mazzola, J.) appeal pending ___ Pa. Super. ___, ___ A.2d ___ (1993) (Commonwealth's appeal from discharge order). Such tactics will not be tolerated!

c) After remand for a new trial in Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992), wherein the Supreme Court referred the matter to the Disciplinary Board of the Supreme Court of Pennsylvania because of its "deep concern over the conduct of the Commonwealth," Id., at 240 n.12, 602 A.2d at 1276 n.12, the defendant asked that the case be

dismissed on double jeopardy grounds. He argued that the prosecutor acted intentionally in not disclosing favorable impeachment material relating to a key witness. The trial court denied relief based on the Superior Court's decision in Commonwealth v. Smith, supra, noting that, while the Supreme Court had granted allowance or appeal and had heard argument, it had not yet ruled. Moose appealed the denial of his motion to the Superior Court. The Superior Court affirmed the denial of the double jeopardy motion, distinguishing Smith in that here, unlike Smith, it could not be construed that the conduct at issue--violations of the criminal discovery rules and the Brady doctrine during Moose's first trial--intentionally deprived Moose of a fair trial. Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993). See also Commonwealth v. Rightley, 421 Pa. Super. 270, 617 A.2d 1289 (1992) (no Smith violation; retrial not barred).

9) If the trial court is aware of material, exculpatory evidence of which the defendant is not aware, the trial court has a due process duty equal to the prosecutor's duty to disclose that evidence to the defendant. Commonwealth v. Santiago, 405 Pa. Super. 56, 591 A.2d 1095 (1991).

B. General Obligations.

1. Prosecutors are well advised to adhere to their obligations under the discovery rules. See Pa.R.Crim.P. 305. Gamesmanship in criminal prosecution will no longer be tolerated. Being overly strict or literal in complying with discovery obligations, whether upon request or as required by constitutional due process, is fraught with danger. A misjudgment will result in the granting of a new trial, may result in the dismissal of the charges and discharge of the defendant, and could subject the offending prosecutor to disciplinary action. See Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992) (Supreme Court, after granting new

trial for discovery and Brady violations, referred prosecutor to Disciplinary Board because of its "deep concern over the conduct of the Commonwealth").

a. Violations of these rules discovered at or before trial may be remedied by the trial court by ordering the offending party to permit discovery or inspection, by granting a continuance, by prohibiting the offending party from introducing the evidence not disclosed, or by entering any order the trial court deems just under the circumstances. Pa.R.Crim.P. 305E. See Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992) (Rule 305E quoted; continuance properly ordered under circumstances; conviction reversed for other rule and constitutional discovery violations). Accord Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993); (under Pa.R.Crim.P. 305E remedy for discovery violation is a new trial). See also Commonwealth v. Shelton, ___ Pa. ___, 640 A.2d 892 (1994) (violation of Pa.R.Crim.P. 305B(1)(d) (relating to mandatory disclosure of circumstances and results of identification of the defendant) required reversal of conviction and new trial since trial court did not otherwise remedy the violation). But see Commonwealth v. Manchas, ___ Pa. Super. ___, 633 A.2d 618 (1993) (since prosecution's failure to "fully comply" with discovery rules did not prejudice defendant no remedy was required).

b. Violations of these rules discovered after trial may result in the grant of a new trial. Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992) (new trial required in non-capital murder case because of untimely disclosures in violation of discovery rules); Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983) (violation of Rule 305B required new trial). Accord Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993) (under Pa.R.Crim.P. 305E remedy for discovery violation is a new trial). See also Commonwealth v. Shelton, ___ Pa. ___, 640 A.2d 892 (1994) (violation of Pa.R.Crim.P. 305B(1)(d) (relating to mandatory disclosure of circumstances and results of identification of the defendant) required reversal of conviction and new trial since

trial court did not otherwise remedy the violation). But see Commonwealth v. Manchas, ___ Pa. Super. ___, 633 A.2d 618 (1993) (since prosecutor's failure to "fully comply" with discovery rules did not prejudice defendant no remedy was required).

1) A new trial may be granted even if the discovery violation was unintentional on the part of the prosecutor. See Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991) (a violation may occur "irrespective of the good or bad faith of the prosecution"). See also Commonwealth v. Jenkins, 476 Pa. 467, 474, 383 A.2d 195, 198 (1978) ("It is the effect [of the concealed evidence] on the right to a fair trial, not the prosecutor's state of mind, that results in reversible error. Cf. United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342, 343 (1976)"). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Jenkins, supra.

   a) Where a prosecutor's failure to fully comply with discovery rules does not prejudice the defendant, no remedy is required. Commonwealth v. Manchas, supra.

2) If a prosecutor intentionally undertakes to violate the discovery rules to prejudice a defendant to the point of the denial of a fair trial, the Commonwealth may be barred from retrying the defendant under the Double Jeopardy Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 10. See Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992). Compare Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993).

3) The prosecution does not violate discovery rules when it fails to provide the defense with evidence that it does not possess and of which it is unaware during pretrial discovery. Commonwealth v. Flood, 426 Pa. Super. 555, 627 A.2d 1193 (1993), citing Commonwealth v. Chew, 338

(1985). This is so even if that evidence is in police custody. Commonwealth v. Bonacurso, 500 Pa. 247, 251 n.3, 455 A.2d 1175, 1177 n.3 (1983). See also Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991); and Commonwealth v. Woodell, 344 Pa. Super. 487, 496 A.2d 1210 (1985). NOTE: The cases addressing this point have found (or at least indicated) that the information that was not disclosed was not "Brady material" (i.e. not exculpatory). A different rule applies (resulting in relief to the defendant) if the information is "Brady material." See Commonwealth v. Smith, supra, and paragraph II.A.1.c.7) "Discovery; Constitutional Obligations," above.

c. Pa.R.Crim.P. 305B(1)(a) which mandates disclosure by the Commonwealth of "any evidence favorable to the accused which is material either to guilt or punishment, and which is within the control of the attorney for the Commonwealth" does not require the disclosure of "[t]he mere existence of other suspects" or "investigative follow up of a lead, as by blood comparison." Neither is evidence favorable to the accused which is material to guilt or punishment. Commonwealth v. Crews ___ Pa. ___, 640 A.2d 395 (1994) ("We decline the opportunity to interpret Rule 305(B)(1)(a) to require disclosure of every fruitless lead followed by investigators of a crime"; even in a capital case).

2. Discovery rules may not be used by defense counsel to compel the prosecution to obtain evidence to which the defense has equal access. Commonwealth v. Schwartz, 419 Pa. Super. 251, 615 A.2d 350 (1992). See also Commonwealth v. Ross, 424 Pa. Super. 570, 623 A.2d 827 (1993) (defense counsel abused discovery rules by seeking from prosecution information it already had).

III. VOIR DIRE.

A. General Points Of Interest.

1. The jury selection phase of trial, i.e. voir dire, in a capital case is considered by many as the most important phase of trial. They may very well be right. You cannot get a death penalty verdict from a jury on closing arguments alone. You must persuade the jury from the very beginning of the trial commencing with the voir dire examination.

2. Please remember that jurors are people with feelings, beliefs and emotions. You are asking them to do something unnatural, that is sentence somebody to death, in essence, to "kill" that person. You must, therefore, prepare them psychologically for this difficult decision through the voir dire process.

3. A significant number of people may say they are "for" the death penalty, but, emotionally and psychologically cannot impose it. Many death penalties are not obtained because prosecutors fail to conduct a searching and thorough voir dire. They choose rather to deceive themselves into thinking that the juror who says he's for the death penalty will automatically vote for it. A good prosecutor will, through voir dire, recognize this juror and either get him prepared psychologically to impose the death penalty, or, strike him either through a challenge for cause or a peremptory challenge.

4. Psychologically preparing a juror and determining the strength of his non-opposition to the death penalty must involve asking the juror not just the one standard question about the death penalty; several searching and probing questions from different perspectives will accomplish this goal without running afoul of a "repetitious" objection.

5. Prepare your voir dire questions prior to jury selection; distribute copies to the trial judge, and defense counsel.

6. Plan ahead for the type of jury you want. Each case is different and you must vary the make up of your jury based upon the facts of your case, and/or who the defendant is, and/or who the victim was, etc.

7. You should follow your own instincts on a juror; don't reject or select a juror based simply on some "stereotype". For example, some people say, "never pick a heavy set, female juror," or, a "physically attractive juror"; some people say "pick community leaders, supervisors or foremen". I say pick intelligent, but strong, law abiding jurors, jurors who are not afraid to make a decision and follow through on their decision. It's their honesty, integrity and strength of character you should look for in each instance.

8. When selecting a juror, it is also extremely important to recognize jury composition, i.e., what jurors have already been selected, and, are waiting in the pool. A good jury for conviction is a compatible one. Remember you have to persuade all 12 jurors. An eccentric person, a loner, someone too intelligent, or too attractive may not fit in.

9. Be sincere and be serious. If you are simply perfunctorily reading or asking the death penalty questions, or, are doing so in a quick or cursory fashion, it will tell the juror you are not serious or sincere about the questions or his or her answers; therefore, when you ask for death in the penalty phase he or she will remember your attitude in voir dire, second guess you and say, "the prosecutor really doesn't want the death penalty." You must treat the subject matter of death on voir dire with all of the seriousness and sincerity it deserves. You, yourself, must personally believe that the defendant is guilty and that the defendant's actions not only deserve, but demand the death penalty. Otherwise, for God's sake, don't ask for it!

B. Subjects You Must Cover In Voir Dire.

1. Whether or not a juror has any moral, religious or conscientious objections to the imposition of the death penalty and whether the juror would vote to impose it on this defendant?

2. That the Commonwealth has the burden of proof-proof beyond a reasonable doubt-but not proof beyond all doubt or to a 100% mathematical certainty. For example, you might ask, "Because this is a case involving the death penalty, would you want to be 100% absolutely sure, even though the law says you still can convict if you have 'a' doubt so long as it is not a reasonable doubt?"

3. That a death penalty case is divided into two separate and distinct parts:

   a. determination of guilt phase - i.e., where the prosecutor must prove guilt beyond a reasonable doubt.

   b. penalty phase - i.e., where the prosecutor must prove the aggravating circumstances, and that they outweigh any mitigating circumstances.

4. Explain the aggravating circumstances statute and whether the juror understands it and can follow it.

5. Decisiveness and Strength of Juror-Can the Juror Impose the Death Penalty?" Ask questions designed to test a juror's ability to follow the law, decide the case, and be a proponent for you in the jury room.

   a. For example, "if you found the defendant guilty of murder in the first degree, and, found that the Commonwealth proved that the aggravating circumstances outweighed the mitigating, would you follow the law and the instructions of the judge and vote to impose the death penalty on the defendant?" See Commonwealth v. Colson, 507 Pa. 440, 459, 490 A.2d 811, 821 (1985).

   b. Also, get the juror to look at the defendant, and then ask, "if you, the juror voted for the death penalty, would you be able to come into open court, face the defendant, and, when the jury is polled, stand and announce that the sentence is 'death'?" Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988); Commonwealth v. Bright, 279 Pa. Super. 1, 420 A.2d 714 (1980). See Commonwealth v. Pacini, 224 Pa. Super. 497, 307 A.2d 346 (1973).

   c. Is there a spouse, friend or family member that will criticize a "death" verdict? Will this have any bearing on your decision?

   d. Has the juror thought about the kind of case that deserves the death penalty? This question is a great question to be used right after the juror says he or she is not opposed to the death penalty. See Commonwealth v. Colson, supra. It gives the juror an opportu-

nity to talk, and he or she just might state that your kind of case is one in which the juror would impose the death penalty. It also tells you the amount of thought the juror has put into this philosophical, but, now, very real issue.

e. "Will you, the juror, avoid finding the defendant guilty of first degree murder in the first half of the case because you don't want to face the admittedly tougher question of life or death in the penalty half of the case?" If the answer is "no", reinforce the juror's assertion by asking a quick follow up question: "So, as I understand your answer if you have to reach the question of life or death, you will not shirk from that duty, if, the evidence warrants, is that correct?"

IV. CASELAW ON VOIR DIRE.

A. Witherspoon Standard.

1. Until 1985, Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), was the key case in terms of what a prosecutor could/could not ask a prospective juror on voir dire in order to determine the juror's views on the death penalty. Witherspoon held that a sentence of death would be vacated where the prosecutor had excluded or excused prospective jurors from the venire simply for voicing general opposition to the death penalty or for expressing conscientious or religious scruples against its infliction. Accord Commonwealth v. Gray, 415 Pa. Super. 77, 608 A.2d 534 (1992).

2. Witherspoon held that the prosecution could challenge a venireman for cause only if the venireman made it "unmistakenly clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." The Court further held, "the most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon, 391 U.S. at 522, n.21, 88 S.Ct. at 1777, n.21, 20 L.Ed. 2d at 785, n.21.

B. Witt Standard.

1. On January 21, 1985, the United States Supreme Court decided the case of Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), which modified the Witherspoon standard. See also Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Under Witt, to excuse a juror on Witherspoon all that is necessary is that the juror's attitudes toward the death penalty be such that they may "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

2. Witt now permits a prosecutor to ask prospective jurors whether they could impose the death penalty, rather than merely if they could consider it.

3. The Witt standard is drawn from Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The Pennsylvania Supreme Court analyzed the Witt/Adams test as follows:

> The Adams test dispensed with Witherspoon requirements for exclusion that it be "unmistakeably clear" that the juror would either automatically vote against the imposition of the death penalty without regard to the evidence, or had an attitude toward the death penalty that would prevent him from making an impartial decision as to the defendant's guilt.

Commonwealth v. Peterkin, 511 Pa. 299, 311 n.8, 513 A.2d 373, 379 n.8 (1986). See also Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989); and Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992)

4. Witt requires the prospective jurors to state that their attitudes toward the death penalty will not prevent them from making an impartial decision as to guilt or innocence, or prevent them from following their oaths as jurors.

5. In Pennsylvania, following Witt, jurors can now be excused if they state that they could not impose the death penalty or could not render a verdict of guilty of first degree murder because of the possibility of imposing death. Commonwealth v. Buehl, 510 Pa. 363, 380, 508 A.2d 1167, 1175 (1986); Commonwealth v. Peterkin, 511 Pa. at 311, 513 A.2d at 379; Commonwealth v. Baker, 511 Pa. 1, 511 A.2d 777 (1986); Commonwealth v. Jones, 501 Pa. 162, 460 A.2d 739 (1983); Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (1987); Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987). Commonwealth v. Colson, 507 Pa. 440, 490 A.2d 811 (1985).

6. The Pennsylvania Supreme Court has ruled that jurors were properly excluded for cause as they were "substantially impaired" where they indicated that it would be "very hard" to impose the death penalty, or, they expressed uncertainty as to whether they could "face" the defendant and "announce" a death verdict. Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988). It is also true that jurors who "wavered" on the death penalty but who, in the discretionary judgment of the trial judge were not excludable for cause, could legally

be peremptorily struck by the prosecution. Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986). In Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989), the Pennsylvania Supreme Court clearly stated that the appropriate criteria for excluding jurors for cause is the standard set forth in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed. 2d 581 (1980) ("a juror should be struck for cause when the juror's views towards the death penalty would substantially impair or prevent the juror from performing his duties").

a. Application of this standard does not offend the State constitutional right to a jury representing a fair cross-section of the community. Pa.Const.art. I, § 9. Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993). See also Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990); and Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986).

7. "[V]enirepersons who are unable to perform their duties impartially and faithfully at the sentencing stage of the trial may be excused for cause. [citations omitted] This includes prospective jurors who clearly express antagonism to testimony by police that they will be prejudiced in the case." Commonwealth v. Jasper, 531 Pa. 1, 8, 610 A.2d 949, 953 (1992) (in addition to upholding exclusions for cause because of "firm," "strong," or "absolute" opposition to the death penalty, exclusion for cause based on "distrust of police so strong that [juror] would not follow the court's instructions" upheld).

8. Where the prosecution seeks to remove a juror for cause under Witherspoon, the prosecution has burden of establishing cause for the removal. Commonwealth v. Jasper, supra.

> If the Commonwealth's questions are sufficiently precise and on point and the venireperson's answers are certain and unequivocal, it is certainly possible for the [trial] court to determine that cause has been shown such that further questioning is unnecessary. A trial judge has wide latitude in supervising the manner in which voir dire is conducted, including the power to prevent further voir dire when responses to death qualification

questions prove that additional inquiry will be fruitless.

Id. at 9, 610 A.2d at 953 (trial court opined that attempts at rehabilitation by defense counsel would have been fruitless and that any excluded venire-person who changed his or her mind if further questioning had been allowed would have been "wholly unworthy of belief").

9. The United States Supreme Court held in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), that if one juror was excluded in violation of the Witherspoon standard, that improper exclusion required reversal of the sentence of death. The Court has reaffirmed Davis v. Georgia in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

10. Gray v. Mississippi, supra, is the case where "two wrongs don't make a right." The trial judge had improperly denied several prosecutorial challenges for cause on veniremen who were unequivocally opposed to the death penalty. The prosecutor then had to use peremptory strikes. Later, a juror initially expressed some confusion and doubt about the death penalty, but then stated she could vote to convict and impose the death penalty. The prosecutor had used up all his peremptory challenges so he made a challenge for cause. The judge acknowledged that he made errors in his earlier rulings, forcing the prosecutor to use up all his peremptory challenges, and, so, even though this last juror was qualified to serve under Witherspoon/Witt, he granted--albeit improperly--the prosecutor's challenge for cause. The Supreme Court held this procedure to be constitutionally flawed and overturned the death penalty. The Court suggested that if the trial judge recognizes that he made erroneous ruling on veniremen, the correct response would be to dismiss the venire sua sponte and start afresh. Gray v. Mississippi, 481 U.S. at 663 n.13, 107 S.Ct. at 2054 n.13 95 L.Ed.2d at 636 n.13 (1987).

11. But, as the Court explained, not every error which affects the composition of the jury requires automatic reversal. In Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the Court refused to vacate a death sentence where the trial court erroneously refused a defense request to remove a juror for cause, thereby forcing the

defendant to use a peremptory challenge. The Court expressly stated that the rule in Gray is limited to the facts of that case. "The loss of a peremptory challenge," wrote the Court, does not constitute "a violation of the constitutional right to an impartial jury." Id. at 88 S.Ct. at 2278, L.Ed.2d at 90. "So long as the jury that sits is impartial," explained the Court, "the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id. at 88, S.Ct. at 2278, L.Ed.2d at 90. The Court noted that none of the twelve (12) jurors who eventually decided the case was challenged for cause by the defendant, and the defendant has never even suggested that any of the twelve (12) was not impartial.

N.B. The key procedural point here seems to be that the juror was requested to be excused for cause by the defense and not the prosecution and the recited facts concerning the eventual composition of the jury were clearly suggestive of an admittedly fair and impartial jury.

Query: Isn't this a "Harmless Error" analysis test for jury selection, which the U.S. Supreme Court expressly rejected in 1987 in Gray v. Mississippi?

12. Despite the general relaxation of Pennsylvania's waiver rules in direct appeals from the imposition of the death penalty, Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), Witherspoon claims are waivable. Commonwealth v. Jasper, 531 Pa. 1, 9 n.6, 610 A.2d 949, 953 n.6 (1992); and Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). Such claims are also subject to a harmless error analysis. Id. (assuming Witherspoon error in improperly excluding four jurors for cause, error was harmless since Commonwealth still had seven peremptory challenges remaining at the conclusion of jury selection; the Commonwealth could have used its remaining peremptories to strike these jurors; error was, therefore, harmless). Cf. Ross v. Oklahoma, supra. But see Gray v. Mississippi, supra (rejecting this argument).

C. Death Qualified Jurors.

In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held that a "death

qualified" jury does not violate a defendant's Sixth Amendment right to an impartial, fairly-drawn jury.

1. Chief Justice Rehnquist, in his majority opinion, stated:

> McCree's impartiality argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be construed only by 'balancing' the various predispositions of the individual jurors. Thus, according to McCree, when the State 'tips the scales' by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last term when we squarely held that an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (emphasis added); see also Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Lockhart v. McCree, 476 U.S. at 178, 106 S.Ct. at 1767, 90 L.Ed.2d at 150-51.

2. When faced with "statistics" allegedly showing conviction proneness of death-qualified juries, the United States Supreme Court and the Pennsylvania Supreme Court rejected them.

   a. In Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984), Justice Larsen wrote in a 6-1 opinion: "Appellant claims that the scientific and sociological surveys and data currently available have now conclusively established the prosecution-proneness of 'death qualified' juries and asks this Court to take judicial notice of this data to find his conviction impermissibly tainted. This we decline to do as we have consistently done in the past. (citations omitted). Appellant has made no showing, on the record that the process of 'death-qualifying' a jury tainted his conviction in any way, and his 'judicial notice' concept must be rejected - such a loose concept of judicial notice would make a

mockery of the adversary system..." Id. at 257, 484 A.2d at 1381.

b. Justice Rehnquist speaking for the majority in Lockhart v. McCree, supra, also rejected the applicability of these studies and statistics, calling some "too tentative and fragmentary," Lockhart, 467 U.S. at 171, 106 S.Ct. at 1763, 90 L.Ed.2d at 146, and of others, that he had "serious doubts about the value of these studies," and that at least one was "fundamentally flawed." Id. at 171-73, 106 S.Ct. at 1763-64, 90 L.Ed.2d at 146-47.

3. It is interesting to note that Szuchon was decided prior to the United States Supreme Court's decision in Witt case and that Mr. Justice Larsen and the Pennsylvania Supreme Court correctly anticipated the Witt decision and the Lockhart v. McCree decision.

4. The Pennsylvania Supreme Court has specifically cited the Lockhart v. McCree decision with approval. Commonwealth v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987); Commonwealth v. Peterkin, 511 Pa. at 310, n.7, 513 A.2d at 378, n.7; (1986) Commonwealth v. DeHart, 512 Pa. at 250, 516 A.2d at 664; Commonwealth v. Bryant, 524 Pa. 564, 574 A.2d 590 (1990); Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990); Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992); and Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992). See also Commonwealth v. Gray, 415 Pa. Super. 77, 608 A.2d 534 (1992). In Lambert, supra, the Pennsylvania Supreme Court specifically noted the holding of Lockhart v. McCree "that the 'death qualification' process is consistent with guarantees of a fair trial." Commonwealth v. Lambert, supra, at 336, 603 A.2d at 576.

5. Allowing the Commonwealth to peremptorily challenge prospective jurors who indicate some difficulty in imposing the death penalty does not violate the fair cross-section requirement of the State Constitution. Pa.Const.art. I, § 9. Commonwealth v. Young, ___ Pa. ___ 637 A.2d 1313 (1993) (citing DeHart, supra, which followed Lockhart, supra).

6. Death qualification of jurors does not violate Article I, § 4 of the Pennsylvania Constitution, Pa. Const., Art I, § 4, which provides: "No person

who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." Asking a venireperson if he or she has any religious, moral or philosophical scruples which would prevent him or her from voting for the imposition of the death penalty in a proper case is not concerned with religion or with the religion of the venireperson. The question goes to the ability of the person to accept responsibility as a juror. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). Accord Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992) (that source of venireperson's opposition to imposition of the death penalty is religious belief is irrelevant to the law).

7. Death qualification is appropriate where a person is tried for first degree murder and the Commonwealth reasonably believes that there are aggravating circumstances at the voir dire. Commonwealth v. Scarfo, 416 Pa. Super. 329, 611 A.2d 242 (1992) (prosecution could reasonably believe that murder prosecution was a capital case because facts indicated that shooting of victim caused a grave risk of death to others).

8. There is no equal protection violation in death penalty cases in that a defendant may request a trial before a judge who is not "death prone" whereas, in a jury trial, the jury is "death qualified." Since the judge is duty bound by the same law as jurors, there is no difference in treatment if the circumstances warrant a death penalty. Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989).

9. A capital defendant is not entitled to two separate juries, one for a determination of guilt and one for a determination of punishment. Such a practice is precluded by section 9711(a)(1) of the Sentencing Code, 42 Pa.C.S. § 9711(a)(1). Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989).

10. COMMENT: In my view, questioning a juror about his ability to impose the death penalty does not make the juror "conviction prone". Death penalty voir dire questions certainly are provocative, and, cause the juror to examine his fundamental beliefs and strengths. But there is nothing wrong with this process. Socrates, through questioning,

stimulated minds to search for truth and creativity. Law school professors emulate his method. Educators at all levels prepare our youth mentally and psychologically for the future every day in our school systems. We are likewise prepared to take momentous and life-altering tests by SAT, LSAT, and BAR Review Schools. Even military units train and prepare their recruits for the duty of killing in time of war. But that does not mean that all who are trained will do it in war, and, most assuredly, the vast majority of military personnel upon returning to civilian life are not "prone to kill" in numbers more significant than any other segment of the population. Indeed, in my view, upon returning to civilian life, they are just like jurors, having been prepared to do their duty they are, nonetheless, capable of examining the circumstances of a situation and freely choosing not to kill but, rather, to seek a non-violent alternative.

In short, death penalty questioning of a juror is a recognition of the tremendous decision with which a juror may be faced. It shows a sensitivity for the juror's feelings in the task that lies ahead, and, it initiates the gradual learning process that will be followed by the evidence and the Court's instructions on the law that will enable the juror to objectively and fairly decide the case. It is, after all, only common decency and common sense.

D. **Voir Dire After Witherspoon And Witt. The Following Are Some Sample Questions Which Can Be Used:**

1. Do you have any personal, moral or religious beliefs against the imposition of the death penalty in any case?

2. Is your opposition to the death penalty such that you would automatically vote against sentence of death for this defendant, regardless of the facts of the case.

3. Knowing that I am seeking a verdict of first degree murder, and that if the defendant is so convicted, I, as prosecutor for the Commonwealth, will be seeking to have the defendant sentenced to death by you, the jury, is your opposition to the death penalty such that it will substantially impair your ability to follow the law and convict the defendant of first degree murder when first degree murder is proven beyond a reasonable doubt?

4. In all fairness can you set aside your opposition (or, your hesitancy) to the death penalty and decide this case based on the law the judge gives you and the facts and circumstances of the case?

5. Are you so irrevocably opposed to the death penalty regardless of the facts and circumstances of the case, that you cannot decide this case following the law the judge gives you?

6. Can I assume from your statements that you cannot impose the death penalty on this defendant even where the law says the circumstances warrant you considering such a verdict?

E. "Reverse - Witherspoon" Question: Life Qualifying The Jury.

1. In Morgan v. Illinois, ___ U.S. ___, ___, 112 S.Ct. 2222, 2225, 119 L.Ed.2d 492, 497 (1992), the Court was asked the following question: "whether, during voir dire for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant." The Illinois Supreme Court had rejected Morgan's claim "that, pursuant to Ross v. Oklahoma, 487 U.S. 81 [,108 S.Ct. 2273, 101 L.Ed.2d 80] (1988), voir dire must include the 'life qualifying' or 'reverse-Witherspoon' question upon request." Morgan v. Illinois, supra, at ___, 112 S.Ct. at 2227, 119 L.Ed.2d at 499. The Supreme Court reversed and vacated Morgan's sentence of death. The Court said:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is im-

posed, the State is disentitled to execute the sentence.

Id. at ___, 112 S.Ct. at 2229-30, 119 L.Ed.2d at 502-503.

2. In Morgan, the venire members answered most or all of the following questions or variations thereon: "'Would you follow [the trial judge's] instructions on the law, even though you may not agree?'"; whether the juror "could be fair and impartial"; "'Do you know of any reason why you cannot be fair and impartial?'"; "'Do you feel you can give both sides a fair trial?'" Each juror who sat in judgment on Morgan "swore an oath to 'well and truly try the issues...between the...State...and the defendant...and a true verdict render according to the law and the evidence." Id. at ___, 112 S.Ct. at 2226-27, 119 L.Ed.2d at 499. The Court held that such questions and oath are insufficient to satisfy the constitutional requirements. The Court observed "that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining [a belief that a sentence of death should be imposed ipso facto upon conviction of a capital offenses] would prevent him from doing so." Id. at ___, 112 S.Ct. at 2233, 119 L.Ed.2d at 507. The Court ruled that "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether the prospective jurors function under such misconception." Id.

3. Seating a juror in violation of the principle announced in Morgan, just as seating a juror in violation of Witherspoon, results only in vacating the sentence of death. Such a violation "has no bearing on the validity of [the] conviction. Witherspoon [v. Illinois], 391 U.S. at 523, n.21 [,88 S.Ct. at 1777, n.21, 20 L.Ed.2d at 785, n.21]." Morgan v. Illinois, ___ U.S. at ___, n.11, 112 S.Ct. at 2235, n.11, 119 L.Ed.2d at 509, n.11.

4. In Commonwealth v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987), the Supreme Court was faced with a claim, before Morgan, supra, that trial counsel was ineffective in failing to "life qualify" prospective jurors during jury selection, "i.e. to eliminate from the jury individuals who would not, in a proper case, impose a sentence of life imprisonment." The court rejected this claim on direct appeal for a variety of substantive and procedural reasons including, inter alia, failure to meet the

test for ineffective assistance and failure to provide the transcript of the jury selection proceedings. The court also observed that there was no authority for the proposition. This claim was later presented in a petition filed under the Post-Conviction Relief Act, Pennsylvania's vehicle for collateral review of a criminal conviction. Jermyn claimed his trial counsel was ineffective for not requesting "life qualification questioning" during jury selection; that his appellate counsel was ineffective for not marshalling the authorities from the other states on this issue and for not obtaining a transcript of jury selection; and that appellate counsel was ineffective for not raising the issue in a petition for writ of certiorari in the United States Supreme Court. The court rejected Jermyn's arguments finding the claim had been previously litigated and, therefore, could not form the basis for relief under the Post Conviction Relief Act. The claim that appellate counsel was ineffective for failing to seek certiorari review in the Supreme Court was similarly rejected because Jermyn was unable to cite any Pennsylvania or federal law requiring life qualification. Commonwealth v. Jermyn, 533 Pa. 194, 620 A.2d 1128 (1993). Jermyn II was argued on May 7, 1992, before the United States Supreme Court's decision in Morgan v. Illinois, supra. This may account for why Jermyn's brief cited no federal authority for "life qualification" proposition. Moreover, Jermyn's case became final on direct appeal in late 1987 or early 1988, several years before Morgan was decided. Morgan came several years after Jermyn's trial counsel selected his jury and several years after his appeal was prepared and argued. Generally, trial or appellate counsel will not be found ineffective for failing to predict changes in the law.

F. Excusing Jurors For Cause - Strategy Suggestions.

1. When a prospective juror equivocates on the Witt/Witherspoon questions, the prosecution must find a way either to educate the juror, bring him around and get him committed to follow and apply the death penalty law, or, in the alternative, to exclude that juror, either through a cause or peremptory challenge. It is essential that a challenge for cause must be presented only after the record clearly demonstrates that the juror's ability to follow the law would have been "substantially impaired" under the Adams-Witt standard.

See Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

2. Disqualification of a juror is to be made by the trial judge based on the juror's answers and demeanor. Commonwealth v. DeHart, 512 Pa. at 248, 516 A.2d at 663; Commonwealth v. Colson, 507 Pa. at 454, 490 A.2d at 818; Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988); Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992).

3. Individual answers may seem equivocal, but they must be taken in context to determine if cause is present. There is no set catechism that the jurors must recite to be excused for cause. All the cases where death penalties have been reversed on Witherspoon/Witt grounds seem to state that the challenge was granted before the juror had sufficiently committed himself against the death penalty. This point was driven home by Justice Blackmun, speaking for the U.S. Supreme Court in Gray v. Mississippi, supra. He wrote:

> Although the trial judge acknowledged that some of the venire members had responded to the prosecutor's questioning in language at least suggesting that they would be excludable under Witherspoon, supra, the judge agreed with defense counsel that the prosecutor had not properly questioned earlier venire members. Gray v. Mississippi, 481 U.S. at 662, 107 S.Ct. at 2053, 95 L.Ed.2d at 635.

The Court then gave instructional advice that it directed at the trial judge but has equal applicability to counsel, as well:

> In order to avoid errors based on this type of failure to establish an adequate foundation for juror exclusion, Mississippi law requires the trial judge himself to question the venire members...Had he done so, despite their initial responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker than they originally stated. It might have become clear, that they would set aside their scruples, and serve as jurors. The inadequate questioning regarding the venire members views in effect precludes an appellate Court from determining

whether the trial judge erred in refusing to remove them for cause.

Gray v. Mississippi, 481 U.S. at 662-63, 107 S.Ct. at 2053, 95 L.Ed.2d at 635-36.

4. Therefore, you must pose "follow up" questions to the jurors. Make each give you a direct, unequivocal "yes or no" answer. Then the record will be clear. Even the trial judge, if he is really interested in an error-free voir dire, should help you along in the voir dire of a particular juror if you have "schooled" him in the proper judicial standard under Witt. He himself, on request for help from you, may ask the question which gets the direct answer, or, definitely prints up the juror's vacillation. Indeed, as the dissenters in Gray v. Mississippi, supra, led by Justice Scalia pointed out, extensive "further questioning" is absolutely necessary now in light of the majority opinion. But see Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992) (need not allow defense the opportunity to attempt to rehabilitate a venireperson whose opposition to death penalty is clearly and unequivocally stated at outset).

5. To effectively determine the true feelings of jurors on the death penalty issue, the jurors should be questioned one-on-one. This was not done by the trial court in Gray v. Mississippi and it caused jurors to "lie" to escape jury duty, which eventually upset the judge and prosecutor so much that erroneous judgements were made. Then, too, it has become fashionable to be in favor of capital punishment. Consequently, peer pressure in group questioning may fail to explore actual prejudice against the imposition of the death penalty. Accordingly, even though the judge may have preliminarily informed the jurors that it is a possible death penalty case, and inquired of the venire as a group if any members have any objections to the death penalty, do not accept their "silence" as dispositive of the matter. You must explore it one-on-one. But see Commonwealth v. Gray, 415 Pa. Super. 77, 608 A.2d 534 (1992) (despite defendant's contention that he was denied eye-to-eye contact during trial judge's voir dire on racial prejudice questions asked at interracial capital trial, trial court did not abuse discretion in conducting voir dire as group).

6. Do "one-on-one" questioning in the courtroom in a formal setting, with appropriate distance from the juror. You must make direct eye contact with the juror. Let him know by your tone of voice, the questions you ask, and your body language that you are serious and sincere, and want an answer to your questions in "all fairness" to the Commonwealth. But see Commonwealth v. Gray, supra.

7. Aggressive Questions For the "Wavering" Juror. Here is a set of questions, which, if properly, seriously and carefully propounded, will give you a good insight into the strength and beliefs of a juror.

   a. "Could you follow the instructions on the law, and if the aggravating outweighed the mitigating, would you vote to impose the death penalty on this defendant?" (pointing to the defendant).

   b. "Can you envision any circumstance for which you would vote to impose the death penalty? If so, please state them." See Commonwealth v. Colson, 507 Pa. at 460, 490 A.2d at 821 - and follow up.

   c. "If the Judge were to tell you that it is the law of Pennsylvania that, you could impose the death penalty for one or more circumstances called "aggravating" circumstances, and if the Commonwealth proved beyond a reasonable doubt just one aggravating circumstance and that aggravating circumstance outweighed any mitigating circumstances, would you follow the law and vote to impose death?"

   d. This is my favorite question. This is the one question that really penetrates and gets the juror to think seriously and give you a sincere and honest answer. "In all fairness to the Commonwealth, can you really ever envision yourself voting for the imposition of the death penalty, knowing that it is only your vote and your fellow juror's votes that can impose the death penalty, and that there is a definite and certain finality to your decision?" "Only you know the answer to that question, so please search your heart and mind and be frank and tell us?" (Stress fairness and look the juror sincerely and straight in the eye - do not avert your gaze - and give

him time to fully respond.) I sometimes add during the voir dire: "I'm sorry to press you on this matter so deeply; I mean no offense. But you see we really have only one chance to know if you can be a fair juror - fair to both sides - and, if we are halfway through this trial, and, you, then, realize on second thought that you cannot ever impose the death penalty, I, as the prosecutor will never know that, and, so you would not be giving me or the Commonwealth a fair trial. That's why I ask you these questions now before we ever get to the trial. We need to know your honest and sincere opinion now - could you ever vote to impose the death penalty on this defendant?"

8. Waiver Doctrine Applies to the Voir Dire. If you can get the defense counsel to agree that a juror should be excused for cause, that he has "no objection," under the Witherspoon or Witt standard, then, by all means, do it! The Supreme Court of Pennsylvania has held that, even though the issue of whether the exclusion was proper was one of constitutional dimension, it could be "waived." Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992); Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989); Commonwealth v. Peterkin, 511 Pa. 299, 311, 513 A.2d at 379; (1986); Commonwealth v. Szuchon, 506 Pa. at 255, 484 A.2d at 1380.

9. Harmless Error Doctrine Applies to Voir Dire. If at the conclusion of jury selection the Commonwealth has sufficient peremptory challenges remaining so that it could have used these challenges to strike any juror who was erroneously excluded for cause, the error is harmless. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). (Witherspoon error was harmless where four jurors were arguably improperly excluded for cause but Commonwealth still had seven peremptory challenges remaining). Cf. Ross v. Oklahoma, supra (without saying so, Supreme Court does a "balancing" analysis reminiscent of "harmless error" analysis). But see Gray v. Mississippi, supra (court rejected argument that Witherspoon error is harmless if prosecutor has unused peremptory challenges).

10. When is it too late to strike a juror? In Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987), the Pennsylvania Supreme Court recently allowed the prosecutor's peremptory challenge of a seated but unsworn juror who stated that he could not impose

the death penalty. The juror was also subject to removal for cause although the prosecutor did not make such a challenge. The Court noted that double jeopardy attaches only when the jury is sworn, citing Commonwealth v. Bronson, 482 Pa. 207, 393 A.2d 453 (1978). See also Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991).

11. Does the trial judge have the power to allow more than the allotted number of peremptory challenges? Answered in the negative by the Pennsylvania Supreme Court. Commonwealth v. Colson, 507 Pa. at 461, 490 A.2d at 822; Commonwealth v. Edwards, 493 Pa. 281, 426 A.2d 550 (1981).

G. Examples Of Jurors Properly Excluded For Cause.

1. Juror states that she has "personal but not religious" beliefs against the death penalty, and, that she "thinks" it would interfere with her "judging the guilt or innocence of the defendant."

   HELD: Juror Properly Excluded. The U.S. Supreme Court in Wainwright v. Witt, supra, held these statements sufficient to excuse this juror for cause. Witt, 469 U.S. at 415-16, 105 S.Ct. at 848, 83 L.Ed.2d at 846.

2. Juror states on the death penalty:

   "It's a term used to give life imprisonment, in that sense I'm for it" in the context of the death penalty being an academic question since it is not carried out. But, if death penalties were carried out in Pennsylvania he would not be in favor of it, and, if it were to be carried out in this particular case, he might find some reservation with returning a sentence of death.

   HELD: Under Witt, cause challenge properly upheld. These statements would have permitted his decision "to be influenced by extraneous considerations." (would it or would it not be carried out), and further, "his views exhibit a misunderstanding of the law which would have led him to misapply the court's instructions." Commonwealth v. Peterkin, 511 Pa. at 311, 513 A.2d at 379.

3. Juror states that as regards the judge's instructions on reasonable doubt and the death penalty, he "could not put the two together."

HELD: Under Witt, properly excused. "His view clearly expressed his inability to follow the instructions of the Court." Id.

4. Juror states that she is "against" the death penalty, and, "could not even impose a death penalty."

HELD: Properly excused for cause under Witt or Witherspoon, Commonwealth v. Baker, 511 Pa. at 18-20, 511 A.2d at 787. Accord Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992) (one juror said she "absolutely" would not impose a death sentence; another said her "personal beliefs [are] too strong" to impose death penalty; a third said he had a "fixed opposition to death" penalty; all properly excluded under Witherspoon).

5. Juror states she could "never vote for the imposition of the death penalty."

HELD: Properly excused for cause under the Witt or Witherspoon, Commonwealth v. Baker, 511 Pa. at 18-20, 511 A.2d at 787.

6. Juror states: "it would be very difficult, I don't think so. Really, I don't think I could agree to a death penalty. I don't think I could do that."

Q. You don't know, do you?

A. (Shakes head negatively) The way I feel now, I'd say no.

HELD: Challenge for cause proper under Witt or Witherspoon. Id. at 18-20, 511 A.2d at 789.

7. Juror states: "It will probably be very hard for me to decide for the death penalty....according to my religion, it would be very hard.... I couldn't guarantee I would make the correct decision."

HELD: Juror properly excused for cause. Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988). Accord Commonwealth v. Jasper, supra (one juror "firmly opposed to death penalty on religious grounds"; another expressed "unalterable religious opposition to the death penalty"; both properly excluded under Witherspoon).

8. Juror indicates that he is "not too sure" that he could "face the defendant" and "announce the verdict of the death penalty," and that he would feel uncomfortable sitting as a juror in the case because of that aspect of the case.

HELD: Juror properly excluded for cause. Commonwealth v. Holland, supra.

9. Juror states: "I do not believe in the death penalty," and indicates that he cannot say for certain whether he could put aside his personal feelings if the law required him to impose the death penalty.

HELD: Juror properly excluded for cause. Commonwealth v. Holland, supra. Accord Commonwealth v. Jasper, supra.

10. Juror states she is "opposed to the death penalty" and that she "could not participate in imposing the death penalty, irrespective of" the evidence.

HELD: Juror properly excluded for cause. Trial court (and reviewing court) must consider the prospective juror's demeanor as well as his or her answers. Lesko v. Lehman, 925 F.2d 1527, 1547-48 (3d Cir. 1991).

11. Juror states she has moral reservations about the death penalty, and a "98% fixed opinion against the death penalty, but it is not 100%."

HELD: Challenge for cause not proper under Witherspoon. See Commonwealth v. Griffin, 511 Pa. 553, 572, 515 A.2d 865, 873 (1986) But, Query; Is it now a proper challenge for cause under Witt's "substantial impairment" standard? Also, the prosecution perhaps, should have examined the juror's opinions more searchingly.

12. Juror states that as a nurse she is dedicated to preserving life and would not vote to take it.

HELD: Juror properly excluded for cause. Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992).

H. Improper Defense Questions/Challenges.

1. It must be remembered that the purpose of the voir dire examination is to provide an opportunity to counsel to assess the qualifications of prospective jurors to serve. Commonwealth v. Drew, 500 Pa. 585, 588, 459 A.2d 318, 320 (1983). It is therefore appropriate to use such an examination to disclose fixed opinions or to expose other reasons for disqualification. Id. at 589, 459 A.2d at 320. The Pennsylvania Supreme Court has held:

> The law recognizes that it would be unrealistic to expect jurors to be free from all prejudices.... We can only attempt to have them put aside those prejudices in the performances of their duty, the determination of guilt or innocence. Id.

It is well settled that voir dire is not to be used to attempt to ascertain a prospective juror's present impressions or attitudes. Id. at 589, 459 A.2d at 320. The question relevant to a determination of qualifications, then, is whether any bias or prejudices of the juror can be put aside upon proper instruction of the Court, and whether the juror can then render a fair and impartial verdict based upon the evidence presented at trial. Id. at 589, 459 A.2d at 320-21.

   a. As it goes to the question of a prospective juror's impartiality, a defendant is entitled to ask if the juror will automatically vote for a sentence of death if the defendant is found guilty of a capital crime. An affirmative answer to this "life qualifying" or "reverse - Witherspoon" question allows a defendant to remove such a juror for cause. Morgan v. Illinois, ___ U.S. ___, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

2. Defense lawyers like to use a series of questions that suggest to the jurors that they "place themselves in the shoes of the defendant." Be wary of such questions as they are improper, for example:

> "Are you in such a fair and impartial state of mind that you would be satisfied to have a jury possessing your mental state judge the evidence if you or your child were on trial?"

HELD: Clearly improper and correctly prohibited from being asked. Commonwealth v. DeHart, 512 Pa. at 247 n.7, 516 A.2d at 662 n.7, citing a long line of cases.

3. Defense counsel like to ask about the "weight a juror might give to a police officer's testimony, merely because he is a police officer."

> HELD: "The scope of permissible voir dire must be defined by the factual circumstances of a particular case." Id. at 247, 516 A.2d at 662. Where the evidence presented by the police is not contradicted, and, "thus their credibility was not a significant factor," it is an improper question. Id. But, where the credibility of a police officer is in question, as in most cases then it is a proper question. See Commonwealth v. Futch, 469 Pa. 422, 366 A.2d 246 (1976). See also Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992) (exclusion for cause based on venireperson's stated strong distrust of police that would prohibit venireperson from following court's instructions held proper).

Likewise, in a non-death penalty case, a Connecticut court ruled that it was error for the trial court to restrict the scope of defense counsel's voir dire concerning police testimony. State v. Fritz, 204 Conn. 156, 527 A.2d 1157 (1987). Counsel sought to question the venirepersons to determine whether they believed that the testimony of a police officer is entitled to more weight and credibility than that of any other person simply because of their status, but was prevented from doing so by the trial court. In reversing this decision the Connecticut Supreme Court reasoned that where the testimony from state officials and police officers is "crucial in establishing the State's case," the defendant has a right to inquire as to whether a juror might be more or less inclined to credit their testimony based solely on their status.

4. A trial judge properly rejected defense counsel's challenge for cause to a juror who was the friend of a victim of a homicide where she stated that despite that incident having a great emotional impact in her life, she thought she could judge the instant case solely on its facts "fairly and impar-

tially and in accordance with the law." Commonwealth v. DeHart, 512 Pa. at 248, 516 A.2d at 663.

5. Likewise, a juror who had known or had ties to the victim's and prosecutor's families and prosecution witnesses did not create such a bias as to require her disqualification because the relationships were "remote" and the juror testified that none of these relationships would influence her decision. Commonwealth v. Colson, 507 Pa. at 454-55, 490 A.2d at 818. See also Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993) (where juror said he could be fair and impartial despite having experienced the murder of his future son-in-law and attack on his granddaughter, trial court would have properly refused a cause challenge to this juror; no ineffective assistance for failing to make cause challenge since claim lacks arguable merit). But a challenge for cause should be granted when the prospective juror has such a close relationship - familial, financial, or situational - with the parties that the court will presume a likelihood of prejudice by his or her conduct and answers to questions. Commonwealth v. Colson, supra, at 452-54, 490 A.2d at 818.

6. The trial judge properly refused defense counsel's voir dire questioning whether the jurors had "any strong viewpoints against the drinking of alcoholic beverages." Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973). See also Commonwealth v. Dukes, 460 Pa. 180, 331 A.2d 478 (1975).

7. The defense counsel can inquire into past victimization among jurors of crimes similar to those with which the defendant is charged. Commonwealth v. Fulton, 274 Pa. Super. 281, 413 A.2d 743 (1979).

I. Questioning Jurors On Racial Bias.

1. A defendant accused of an interracial murder is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Accord Commonwealth v. Gray, 415 Pa. Super. 77, 608 A.2d 534 (1992). In Turner, supra, a black defendant killed a white jewelry store owner during a robbery. Even though all jurors said they could give an impartial verdict and a jury of four blacks and eight whites sentenced him to death, the Supreme Court, in a plurality opinion, held that while his murder

conviction should be upheld, his death sentence could not. The plurality of four justices (White, Blackmun, Stevens, and O'Connor) established a per se rule that the jury should have been told of the victim's race and the jurors should have been questioned on their racial attitudes. The Court distinguished Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), saying that Ristaino was a non-capital case and in non-capital cases defendants are not entitled to question jurors about racial prejudice simply because the defendant and the victim are of different races. However, because of the broad discretion jurors have in the sentencing phase and because of the finality of the death sentence, a distinction had to be drawn between capital and non capital cases.

2. The Pennsylvania Supreme Court has interpreted Turner v. Murray in a narrow manner, holding that a trial court did not abuse its discretion in limiting defendant's voir dire examination by refusing to allow defendant to ask questions dealing with the specifics of racial bias, where the court, itself, generally covered this area. Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987).

3. This issue is addressed in Commonwealth v. Gray, supra. Gray was charged with first degree murder and the Commonwealth sought the death penalty (which was not imposed). On appeal, the Superior Court followed Turner v. Murray, supra. There was no error in the trial court's asking the necessary questions collectively of the venire. The rule of Turner was not violated by that procedure.

4. The issue of questioning prospective jurors on racial bias was addressed in Commonwealth v. Glaspy, 532 Pa. 572, 616 A.2d 1359 (1992). Glaspy involved a sex crimes, non-capital prosecution where the defendants were Black and the victim was White. The defendants requested the opportunity to individually question the prospective jurors to explore any racial prejudices they might have in what defense counsel characterized as a "racially sensitive" case. The trial judge exercised his discretion under Pa.R.Crim.P. 1106(e) and denied the request for individual voir dire. During the ensuing group questioning of the venire one juror stated that he could not render a fair verdict because of the race of the defendants. The defense again asked for individual voir dire which the trial court again denied. The defendants were both

convicted and the Superior Court affirmed. The Supreme Court granted the defendants a new trial. A plurality of the Court found that since the prospective juror had introduced racial considerations into the case the trial court had abused its discretion by not allowing individual questioning "to ascertain whether any juror harbored any racial prejudices or biases that would affect the juror's ability to render a fair verdict." Id. at 579, 616 A.2d at 1362. The Court distinguished its earlier holding in Commonwealth v. Richardson, 504 Pa. 358, 473 A.2d 1361 (1984), where the Court had rejected a claim that it was error to deny a request for individual question on racial bias in a case involving a Black defendant accused of raping a White victim. In Richardson, the Court said that asking the questions would have created racial issues in a case where there were none. In Glaspy, supra, on the other hand, the venireperson's answer during group voir dire injected race into the case which then had to be dealt with by individual examination.

a. In Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94), the Supreme Court again addressed the issue of racial bias in the context of a P.C.R.A. proceeding examining the effective assistance of trial counsel in a capital murder trial. In Griffin, the defendant and his victim were both black. Trial counsel testified that he did not view Griffin's case "as involving racially sensitive issues." The defendant asserted that since one venire person told the court during voir dire that he was prejudiced against Blacks and might have trouble being impartial every venire person should have been questioned on this point. The Supreme Court rejected this argument noting that "voir dire examination regarding racial bias is not required in every case which involves a black defendant." Id. at ___, ___ A.2d at ___. Trial counsel was not unreasonable in pursuing a strategy that did not "create a racial issue" of the case. Id. The holding of the Glaspy plurality, where the issue arose because of a juror's response, was not mentioned in Griffin.

J. Peremptory Challenge Of Prospective Jurors On The Basis Of Race. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

1. The Equal Protection Clause of the United States Constitution guarantees that jurors will not be excluded from the venire on the basis of their race, or on the assumption that members of the defendant's race are not qualified to serve as jurors.

2. The United States Supreme Court in Batson v. Kentucky, supra, extended this rule to cover prosecutorial peremptory challenges, holding that the prosecution may not peremptorily exclude prospective jurors from the petit jury simply because they belong to the same race as the defendant.

3. Although not constitutionally guaranteed, Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed.2d 1154 (1919), the peremptory challenge has been used to exclude a juror based solely on such things as a hunch or intuition. By definition, they may be arbitrary, even irrational, totally subjective, and not subject to scrutiny or examination. Commonwealth v. Henderson, 497 Pa. 23, 29, 438 A.2d 951, 954 (1981). Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (1986).

4. But Batson for the first time imposed new, and, indeed, far reaching restrictions on the prosecutor's use of the peremptory challenge.

5. Now, under Batson, a prosecutor cannot peremptorily challenge a potential juror solely on account of his or her race or on the assumption that black jurors as a group will be unable to impartially consider the prosecutor's case against a black defendant.

6. In Batson, the United States Supreme Court determined that racially discriminatory use of peremptory challenges could be established with reference only to the defendant's case. To successfully raise this issue a defendant would no longer have to establish that such discrimination occurred in case-after-case. The Court changed the rule announced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). See Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital appeal Docket; 7/5/94) (noting change from Swain to Batson).

7. Under Batson, the defendant has the initial burden to show "purposeful discrimination."

   a. A defendant must make a prima facie showing of purposeful discrimination by the prosecution. The trial court must examine the totality of the circumstances presented to determine if there is an inference of discrimination necessary to support a prima facie showing of discrimination. Commonwealth v. Stern, 393 Pa. Super. 152, 573 A.2d 1132 (1990).

   b. In order to make a prima facie showing of purposeful discrimination the defendant must establish that:

      1) he is a member of a cognizable racial group and the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire. However, the United States Supreme Court has now held that any defendant, regardless of race or ethnicity, may make a Batson challenge if members of one race are excluded from service on a trial jury because of their race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The rationale for this holding is that a Batson claim involves the rights not only of the criminal defendant who raises it, but also of the persons who are excluded from jury service due to their race through improper use of peremptory challenges in violation of their rights under the Equal Protection Clause of the Fourteenth Amendment. The issue is really one of standing. This holding was presaged by the several opinions issued a year earlier in Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990) (opinion of the Court by Scalia, J., joined by Chief Justice and White, O'Connor and Kennedy, J.J.); Id. at 476, 110 S.Ct. at 811, 107 L.Ed.2d at 906 (Kennedy, J., concurring); Id. at 487, 110 S.Ct. at 812, 107 L.Ed.2d at 906 (Marshall, J., dissenting); and Id. at 504, 110 S.Ct. at 820, 107 L.Ed.2d at 906-7 (Stevens, J., dissenting). See Commonwealth v. Smulksy, 415 Pa. Super. 461, 609 A.2d 843 (1992) (following Powers, a white defendant has standing to

challenge the exclusion of blacks from his jury). See also Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992) (plurality) (recognizing expansion of Batson in Powers); and Commonwealth v. Correa, 423 Pa. Super. 57, 620 A.2d 497 (1993) (after Powers race of defendant need not be same as that of excluded jurors; these "requirements" of a prima facie case under Batson have "essentially been eliminated").

a) In Commonwealth v. Twilley, 417 Pa. Super. 511, 612 A.2d 1056 (1992), the court addressed a Batson/Powers claim raised by a white defendant after the prosecution peremptorily challenged seven Black venirepersons. The Superior Court upheld the trial court's determination that, though there was a prima facie case, the Commonwealth's explanations rebutted it.

2) the peremptory challenges constitute a jury selection practice that permits those who are of a mind to discriminate to discriminate; and

3) the facts and any other relevant circumstances raise an inference that the prosecutor used his peremptory challenges to exclude venire persons on account of their race.

c. In Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992), the Pennsylvania Supreme Court, in a plurality opinion, stated that where the prosecutor strikes five blacks while exercising a total of six peremptory challenges in a trial of a black defendant, and where, despite two separate defense objections to the prosecutor's strikes, the prosecutor refused to justify his challenges, "[t]he inference which arises from this course of conduct...sufficiently satisfies the prima facie requirements to suggest purposeful discrimination under Batson, thus shifting the burden of proof to the prosecution requiring it to provide an adequate and legitimate explanation for striking the potential black jurors in question." Id. at 71, 601 A.2d at 1218. But

see Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94) (no prima facie showing).

d. In Commonwealth v. Correa, 423 Pa. Super. 57, 620 A.2d 497 (1993), the Superior Court concluded that the Commonwealth's use of five of six peremptory challenges to exclude black venirepersons "sufficiently satisfie(d) the prima facie requirement" and shifted the burden to the Commonwealth "to provide an adequate and legitimate explanation for its actions." In Correa, the Commonwealth met its burden.

e. In Commonwealth v. Twilley, 417 Pa. Super. 511, 612 A.2d 1056 (1993), a prima facie case was established where the prosecution used all seven of its peremptory challenges to remove black venirepersons. The Superior Court upheld the trial court's decision that the prosecutor's explanations rebutted the inference of racial discrimination despite a claim that the explanations were "transparent."

8. Only if the defendant makes a prima facie showing of "purposeful discrimination" does the burden shift to the prosecution to establish a "race neutral explanation." See Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993).

a. If after considering all the facts and circumstances, including the reasonable inferences, surrounding the jury selection process the trial court determines that the defendant has made a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for its peremptory challenges. Commonwealth v. Hardcastle, 519 Pa. 236, 546 A.2d 1101 (1988) (defendant, a black, did not make out prima facie case of discrimination so prosecutor did not have to offer neutral explanation); Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989) (same); Commonwealth v. Stern, 393 Pa. Super. 152, 573 A.2d 1132 (1990) (totality of circumstances did not yield inference of purposeful discrimination; no prima facie showing; no neutral explanation required) See also Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992) (plurality) (prima facie

case established; prosecutor offered no explanation; new trial required).

b. That the defendant and victim are the same race does not preclude a Batson challenge. That fact is relevant in determining the existence of a prima facie case, however. Commonwealth v. Stern, supra. See also Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (prosecutor need only offer neutral explanation after trial court determines that there has been a prima facie showing of intentional discrimination; here, prosecutor gave explanation before trial court ruled on whether or not there was a prima facie showing; whether there was a prima facie showing of intentional discrimination was, therefore, moot).

c. When a Batson claim is made, the prosecutor should require the trial court to rule on the issue of whether or not there is a prima facie showing of purposeful discrimination before he or she offers an explanation for any peremptory challenge. See Batson, supra, at 98, 106 S.Ct. at 1723, 90 L.Ed.2d at 88-89 (the trial judge will have to determine if the defendant has established "purposeful discrimination"); see also Hernandez v. New York, supra, at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 405; Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (citing Hernandez, supra, and noting that trial court stated that he did not find that a prima facia case of discrimination had been established; trial court nonetheless asked for reasons (which prosecutor gave) to develop a record; Batson claim rejected); Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993) (since trial court did not find prima facie case, prosecutor was not required to offer any explanation for peremptory challenges); and Commonwealth v. Griffin, ___ Pa. ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94) (no prima facie case established by defendant who raised claim under P.C.R.A.). But see Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992) (plurality) (when defense counsel made Batson objection prosecutor argued that there was no prima facie case and refused to offer any explanation for his strikes of some blacks; the trial court did not state whether or not a prima

facie case was established; appellate courts found prima facie case and reversed).

d. Prosecutor's use of all peremptory challenges to exclude black venirepersons, despite the fact that several blacks actually sat on the jury which tried and convicted the defendant (a white) was found by the trial court to established a prima facie case of facial discrimination under Batson. Commonwealth v. Smulsky, 415 Pa. Super. 461, 608 A.2d 843 (1992) (prosecution did not challenge this determination on appeal; conviction affirmed after appellate court determined that trial court properly found that prosecutor's reasons for challenges were all race neutral).

1) In Commonwealth v. Correa, 423 Pa. Super. 57, 620 A.2d [illegible], the Superior Court concluded that the Commonwealth had sustained its burden of proving that it did not exercise its peremptory challenges in a discriminatory way based, in part, on the fact that the jury "as finally selected was equally divided between Black and White members, and although the Commonwealth had one peremptory challenge still available, it did not use it to exclude another Black venireperson." So while this fact may have little bearing on the question of whether there is a prima facie showing of discrimination, it may be used to rebut the inference.

e. The prosecutor's explanation need not rise to the level necessary to sustain a challenge for cause. Batson, supra, at 98, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; Hernandez v. New York, supra, at 362-3, 111 S.Ct. at 1859, 1868, 114 L.Ed.2d at 395, 408 (plurality), and Id. at 374, 111 S.Ct. at 1875, 114 L.Ed.2d at 416 (O'Connor, J., joined by Scalia, J., concurring); Commonwealth v. Jones, 525 Pa. 323, 326, 580 A.2d 308, 310 (1990) (quoting Batson); Commonwealth v. Smulsky, 415 Pa. Super. 461, 609 A.2d 843 (1992) (same); and Commonwealth v. Correa, 423 Pa. Super. 57, 620 A.2d 497 (1993) (same) See Commonwealth v. Dinwiddie, 529 Pa. 66, 73, 601 A.2d 1216, 1218 (1992) (recognizing that "the differences between peremptory challenges and challenges

for cause should remain viable and distinct"). See also Commonwealth v. Woodall, 397 Pa. Super. 96, 579 A.2d 948 (1990), citing Commonwealth v. Jackson, 386 Pa. Super. 29, 562 A.2d 338 (1989).

f. In Commonwealth v. Jackson, supra, at 53, 562 A.2d at 350, the Superior Court stated: "the prosecutor should independently justify each strike that he exercised against a member of the defendant's minority group...." In Commonwealth v. Woodall, supra, the prosecutor who was unable to recall that he struck a prospective juror who was a member of the defendant's race was unable to offer a clear and reasonably specific explanation for the strike. His reasons were not legitimate. Since the defendant established a prima facie case of purposeful discrimination, he was entitled to a new trial. The continued vitality of Jackson and Woodall may be suspect. Based on the Supreme Court's decision in Hernandez, supra, at 370, 111 S.Ct. at 1873, 114 L.Ed.2d at 412, it appears that, even if a prima facie case of purposeful discrimination is presented, the prosecutor may rebut the inference of discrimination without offering an explanation for every challenge questioned by the defendant. Commonwealth v. Correa, 423 Pa. Super. 57, 63 n.3, 620 A.2d 497, 500 n.3 (1993); See also Commonwealth v. Stern, supra (dicta), citing United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). It should be noted that the problem in Woodall should not recur with any frequency. In that case the prosecutor was asked to give an explanation for a peremptory challenge which he had exercised years before. Now, such challenges will come during the jury selection process and the prosecutor will be able, if needed, to offer an explanation while his memory is still fresh.

1) Correa, supra, followed Stern, supra, and David, supra, observing that "the prosecutor may rebut the charge of racial discrimination without justifying every strike." After noting that the better practice is to justify every challenged strike the court observed that it could glean the reason for one unexplained strike from the record (i.e. the prospec-

tive juror was unemployed and the prosecutor had justified an earlier strike by observing that she wanted "stable" jurors and had struck another venireperson because her husband was unemployed).

g. In Commonwealth v. Dinwiddie, 529 Pa. 66, 72 n.10, 601 A.2d 1216, 1219 n.10 (1992) (plurality), the Pennsylvania Supreme Court noted that "the resulting presence of two blacks on the jury by itself in no way insulates the impanelment of that jury from an inference of discrimination." The Court, relying on Powers v. Ohio, supra, said: "Apparently...the improper exclusion of a single juror based upon race, is sufficient to 'taint' the proceedings and the number of members of his race that survives to remain on the jury is irrelevant for purposes of legitimizing the selection process and the ultimate impanelment." Id.

h. Before an appellate court can rule on a claim that the trial court failed to find a prima facie case under Batson, the person making the claim must make a record of the Batson challenge. Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993); Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992); and Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989). That record should specifically identify the race of the venirepersons removed by the offending party, the race of the venirepersons who served, and the race of the venirepersons acceptable to the offending party who were stricken by the opposing party. See Commonwealth v. Spence, supra (inadequate record so Supreme Court was unable to consider defendant's claim that trial court failed to find a prima facie case under Batson).

10. What is a "neutral explanation?" Batson did not specify what constituted a "neutral explanation" but clearly prosecutors will have to come up with a substantial justification based on the full context of the voir dire. See Commonwealth v. Lloyd, 376 Pa. Super. 188, 545 A.2d 890 (1988) (neutral criteria for removing venirepersons of defendant's race must be applied across the board to all members of the venire). In Commonwealth v. Jones, 525 Pa. 323, 580 A.2d 308 (1990), the defendant raised a Batson challenge because, while the prosecutor

excused a prospective juror of the defendant's race because she lived near a prospective defense witness, the prosecutor did not strike another juror who was not of the defendant's race who lived in the same vicinity. The Supreme Court reversed the Superior Court and the trial court on this issue. The Supreme Court said that had proximity been the sole basis for the challenge to the juror, the Batson claim would have been valid. However, the prosecutor's decision was not based solely on the residence of the challenged juror. Accord Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (white juror who was not struck did not present same situation as black juror who was despite defendant's contrary assertion; no Batson error).

a. In Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991) (plurality), the Court said:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

In a concurrence which was joined by Justice Scalia, Justice O'Connor said: "Batson's requirement of a race-neutral explanation means an explanation other than race." Id. at 373, 111 S.Ct. at 1874, 114 L.Ed.2d at 415.

11. The issue in a Batson claim is really the prosecutor's credibility. See Commonwealth v. Twilley, 417 Pa. Super. 511, 612 A.2d 1056 (1992) ("trial judge's findings...largely will turn on evaluation of credibility"). The ultimate question of discriminatory intent in a Batson claim represents a finding of fact by the trial court which largely turns on an evaluation of the prosecutor's credibility. The Supreme Court has said that it will not review a state trial court's finding on the issue of discriminatory intent unless it is convinced that the trial court's determination on the issue was clearly erroneous. Hernandez v. New York, supra, at 369, 111 S.Ct. at 1871, 114 L.Ed.2d at 412; and Id. at 372, 111 S.Ct. at 1873, 114 L.Ed.2d at 414 (O'Connor, J., joined by Scalia, J.,

concurring). Accord Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) ("trial court's determination as to discriminatory intent is a finding of fact and must be accorded great deference on appeal"; no intent here; Batson challenge rejected). The plurality in Hernandez gave examples of factors which a trial court might consider in deciding whether a prosecutor intended to discriminate, Id. at 369, 111 S.Ct. at 1868, 114 L.Ed.2d at 408, or whether he or she did not, Id. at 364, 111 S.Ct. at 1871-72, 114 L.Ed.2d at 412. These examples are not exhaustive. The Hernandez plurality also observed:

> While the disproportionate impact on Latinos resulting from the prosecutor's criterion for excluding three jurors does not answer the race-neutrality inquiry, it does have relevance to the trial court's decision on this question [of purposeful discrimination]. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another. [citation omitted] If a prosecutor articulates a basis for a peremptory challenge that results in a disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

Id. at 363, 111 S.Ct. at 1868, 114 L.Ed.2d at 408. In her concurrence, Justice O'Connor, in apparent agreement with this statement, said:

> Disproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination.

Id. at 375, 111 S.Ct. at 1875, 114 L.Ed.2d at 416 (O'Connor, J., joined by Scalia, J., concurring).

12. Examples of "neutral explanation" might be:

a. juror's immaturity or lack of recognition of the seriousness of the situation (e.g. laugh-

ing in court, not paying attention), Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993);

b. juror "wavered" on death penalty, Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94);

c. juror's hostile attitude toward the prosecutor or the prosecutor's case, Commonwealth v. Smulsky, 415 Pa. Super. 461, 609 A.2d 843 (1992); Commonwealth v. Young, supra;

d. juror's unresponsiveness to questions, Commonwealth v. Young, supra;

e. juror's confusion in his answers, Commonwealth v. Young, supra;

f. juror's reluctance to apply the law;

g. juror's knowledge of the case, or of the defendant, or of the witnesses;

h. juror lived in same city as defendant, attended same church, may have been a constituent of the defendant (who held public office), and may have been influenced by pre-trial publicity, United States v. Woods, 812 F.2d 1483 (4th Cir. 1987);

i. juror lived in same neighborhood as important defense alibi witness and was the mother of 10 children in the same age group as the witness; this "trait of parenthood" which was not possessed by another juror who lived in the same neighborhood could have subjected the excused to "intrusive information." Commonwealth v. Jones, 525 Pa. 323, 328, 580 A.2d 308, 311 (1990);

j. prosecutor feared that prospective jurors would not accept official translation of Spanish by interpreter, Hernandez v. New York, supra;

k. juror was a drug counselor and prosecutor feared her possible liberal bias and tolerance toward the offenses committed by the defendant and the juror's inclination to accept representations or explanations made by persons with whom she deals, Commonwealth v. Phillips,

411 Pa. Super. 329, 601 A.2d 816 (1992), aff'd, ___ Pa. ___, 633 A.2d 604 (1993);

l. juror exhibited extremely odd mannerisms and avoided eye contact, Commonwealth v. Smulsky, 415 Pa. Super. 461, 609 A.2d 843 (1992); Commonwealth v. Young, supra;

m. juror not forthright in answers and seemed detached, Commonwealth v. Smulsky, supra;

n. juror, in a child sexual abuse case, had no contact with children and was very young. Commonwealth v. Smulsky, supra;

o. juror had son who had been convicted of crime, Commonwealth v. Smulsky, supra;

p. juror had brother who had been prosecuted a year earlier by the prosecutor's office, Commonwealth v. Young, supra;

q. juror, in a child sexual abuse case, had friend who had been accused of rape and juror believed accusation was false, Commonwealth v. Smulsky, supra;

r. juror was unemployed and prosecutor preferred jurors whose personal lives were stable, Commonwealth v. Correa, 423 Pa. Super. 57, 620 A.2d 497 (1993) (this explanation was presumed from the record);

s. juror's husband was unemployed and prosecutor preferred jurors whose personal lives were stable, Commonwealth v. Correa, supra;

t. juror was involved in "social work," Commonwealth v. Correa, supra;

u. juror was difficult to understand when she spoke and prosecutor feared she might have difficulty understanding testimony. Commonwealth v. Correa, supra;

v. juror was young and had relatively short employment history, both qualities which Commonwealth found undesirable. Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (No. 24 Capital Appeal Docket; 7/5/94).

13. If the prosecutor advances a neutral explanation, the defendant would be given the opportunity to show that the explanation is "insufficient or pretextual." State v. Gonzalez, 206 Conn. 391, 398, 538 A.2d 210, 212 (1988). Accord Hernandez v. New York, supra.

14. In a non-death penalty case, Commonwealth v. Lloyd, 376 Pa. Super. 188, 545 A.2d 890 (1988), the Pennsylvania Superior Court dealt with a prosecutor's use of peremptory challenges to remove five out of six black persons who had been drawn as prospective jurors. The defendant complained that the challenges were exercised in a "racially discriminatory manner." The trial court immediately summoned counsel to side-bar where the prosecutor explained his challenges. The prosecutor stated that he challenged two black males because they were "young and unemployed" and one of them had a beard. He challenged a third black person because she lived in Coatesville where the crime was committed and she knew one of the witnesses. He challenged two other blacks because they had been seated on either side of a juror who had been challenged for cause, and were observed "talking, laughing and joking with this juror." The prosecutor also explained that one of the black jurors had been observed "dozing" and "making faces during voir dire." The prosecutor stated that he feared that the two jurors had learned about the case from the juror excused for cause. He further noted that it was his usual practice to exclude unemployed persons from a criminal jury, and that he intentionally sought to exclude people who were young and from the Coatesville area. The trial court determined that these reasons were adequate to rebut the defendant's claim of discriminatory purpose. The court held that trial court's finding that the prosecutor's challenges were racially neutral was supported by the record. "Only if those findings are unsupported by the record or appear to be unreasonable or arbitrary in the face of clear evidence to the contrary will the trial court's findings be disturbed." Commonwealth v. Lloyd, 376 Pa. Super. at 198, 545 A. 2d at 895. See also Commonwealth v. Smulsky, 415 Pa. Super. 461, 609 A.2d 843 (1992) (following Lloyd). Accord Hernandez v. New York, supra, at 375, 111 S.Ct. at 1875, 114 L.Ed.2d at 416 (O'Connor, J., joined by Scalia, J., concurring) ("if...the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is

the end of the matter."); Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (citing Hernandez for proposition that "trial court's determination as to discriminatory intent is a finding of fact and must be accorded great deference on appeal"); and Commonwealth v. Phillips, 411 Pa. Super. 329, 601 A.2d 816 (1992) aff'd, ___ Pa. ___, 633 A.3d 604 (1993) (trial court's finding of no discrimination in jury selection process will be reversed on appeal only if clearly erroneous).

15. In Edmonson v. Leesville, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the United States Supreme Court held that a private litigant's race-based peremptory challenge of a prospective juror in a civil suit is governmental action which violates the Equal Protection Clause. The Court based its decision on the facts that peremptory challenges in civil suits tried in federal courts are provided for by statute and that peremptory challenges could not be made without the "overt, significant assistance of the court" which "summons jurors, constrains their freedom of movements, and subjects them to public scrutiny and examination." Id. at 624, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675.

16. In Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the United States Supreme Court quite logically extended its holding in Edmonson, supra, and held that the Equal Protection Clause of the Fourteenth Amendment "prohibits a criminal defendant from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges." Georgia v. McCollum, supra, at ___, 112 S.Ct. at 2359, 120 L.Ed.2d at 51. Relying on its ruling in Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), wherein the Court held that a white defendant had standing to challenge the prosecution's peremptory challenges of blacks, the McCollum Court held that the prosecution has standing to challenge a defendant's use of peremptory challenges to improperly exclude potential jurors on the basis of race. "[I]f the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges." Id. at ___, 112 S.Ct. at 2359, 120 L.Ed.2d at 51.

17. Relying on Edmonson, Powers and McCollum, the Supreme Court has ruled that the Equal Protection

Clause of the Fourteenth Amendment prohibits the exercise of peremptory challenges on the basis of gender. J.E.B. v. Alabama, ___ U.S. ___, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

a. In Commonwealth v. Correa, 423 Pa. Super. 57, 66-7 n.6 620 A.2d 497, 502 n.6 (1993), a case decided before J.E.B. v. Alabama, supra, the defendant asserted a Batson-type claim not only based on the race of the excluded jurors (Black) but also because all of the prosecutor's peremptory challenges were against women. The court did not specifically address this claim since it had already concluded that the Commonwealth had not exercised its challenges in a discriminatory manner.

K. The Petit Jury and the Fair Cross-section Requirement of the Venire.

The Sixth Amendment, while it requires that the venire from which a defendant's jury is ultimately selected represent a fair cross-section of the community, see Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), does not require that the jury actually selected be a representative cross-section of the community. Accord Commonwealth v. Melson, ___ Pa. Super. ___, 637 A.2d 633 (1994). Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990). As the Court explained in Holland: "The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).... The fair cross-section venire requirement assures, in other words, that in the process of selecting the petit [trial] jury the prosecution and defense will compete on an equal basis." Id. at 481, 110 S.Ct. at 807, 107 L.Ed.2d at 916-17. A fair cross section requirement for petit juries would cripple the jury selection system as it now exists and would eliminate an impartial jury by virtually stripping the state's peremptory challenges. Id. at 484, 110 S.Ct. at 809, 107 L.Ed.2d at 918. See also Commonwealth v. Stern, 393 Pa. Super. 152, 573 A.2d 1132 (1990) (rejecting a similar challenge by citation to Holland).

1. A defendant may not attack the racial composition of jury venires drawn from voter registration lists on the theory that blacks are under-represented in voter lists. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) (rejecting a challenge that use of such lists systematically excludes blacks be-

cause it is claimed that blacks do not register to vote in proportion to their numbers).

2. Where venire is selected impartially (from voter registration lists) exclusion of jurors due to convictions for minor crimes does not violate Duren "fair-cross-section" requirement. Commonwealth v. Henry, supra. In order to obtain relief on a claim that such jurors were improperly excluded in violation of the juror qualifications statute, 42 Pa.C.S. § 4502, a defendant must show prejudice resulting from such exclusion. Id. (requisite prejudice neither alleged nor proved).

3. Batson and its progeny do not apply to the process of compiling the venire from which a jury is ultimately selected. Commonwealth v. Melson, supra. In Melson, the Superior Court rejected a claim that members of Melson's race were underrepresented on his jury. Relying on Commonwealth v. Jones, 465 Pa. 473, 477, 350 A.2d 862, 866 (1976), the Melson court stated: "a defendant in a criminal prosecution is not constitutionally entitled to demand a proportionate number of his race on the jury panel that tries him." To make a prima facie showing of a violation of a defendant's right to an impartial jury the defendant must, at the very least, allege that under-representation of his or her race on the jury panel is due to a systematic exclusion of the roup in the jury selection process. Commonwealth v. Melson, supra (citing Commonwealth v. Henry, supra, and Duren v. Missouri, supra). In Melson, there was no allegation of "any such systematic exclusion." Accordingly, the claim was rejected.

V. PREJUDICIAL PRE-TRIAL PUBLICITY.

A. Pretrial publicity alone does not require a change of venue. Nor does the fact that venire persons have knowledge of the crime. "It is not required...that the jurors be totally ignorant of the facts and issues involved." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 756 (1961). In Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931 (1982), the Pennsylvania Supreme Court said that the fact that the jurors had some knowledge of the case gained from the local media did not, in itself, require a change of venue. Due process only requires that the jurors be able to set aside their opinions and render a verdict based on the evidence presented. If they can, no change of venue is required. Accord Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992) (following Irvin v. Dowd, supra); and Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992) (many venirepersons heard nothing about case; those who had stated they had no fixed opinions, could be fair and impartial, could decide case solely on trial evidence; change of venue properly denied).

B. In Mu'min v. Virginia, 500 U.S. 415, 430, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493, 509 (1991), the Supreme Court said "[t]he relevant question is not whether the community remembered the case, but whether the jurors...had such fixed opinions that they could not judge impartially the guilt of the defendant. Patton [v. Yount, 467 U.S. 1025], 1035 [104 S.Ct. 2885, 2891, 81 L.Ed.2d 847, 856 (1984)]." See also Commonwealth v. Romeri, 504 Pa. 124, 131, 470 A.2d 498, 501-502 (1983) ("[i]n reviewing the trial court's decision, the only legitimate inquiry is whether any juror formed a fixed opinion of [the defendant's] guilt or innocence as a result of the pretrial publicity."). In Mu'min, the Court, after acknowledging that prospective jurors were asked questions during voir dire concerning possible bias from pretrial publicity, held that the Due Process Clause does not require that prospective jurors be asked about the content of what they read or heard about the case.

C. As a general rule, for a defendant to be awarded a new trial due to prejudicial pretrial publicity, he or she must prove actual prejudice in the empanelment of the jury. Commonwealth v. Romeri, 504 Pa. 124, 470 A.2d 498 (1983); Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985) (death penalty case); Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989) (death penalty case); Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989) (death penalty case); Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992) (death penalty case); Common-

wealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992) (death penalty case); and Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992) (death penalty case).

1. Pretrial prejudice may sometimes be presumed. Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992). Among the factors identified by the Pennsylvania Supreme Court which may give rise to a presumption of prejudice are (1) whether the publicity is sensational, inflammatory, and slanted towards conviction rather than factual and objective; (2) whether the publicity reveals the accused's prior criminal record, if any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; and (3) whether the publicity is derived from police and prosecuting officer reports. Commonwealth v. Carter, ___ Pa. ___, ___ A.2d ___ (1994) (No. 5 Capital Appeal Dkt; 4/8/94) (prejudice presumed because pretrial publicity revealed defendant's criminal record). Commonwealth v. Crispell, supra (listing other factors as well). See also Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985). In Crispell, supra, the Court found that, despite pretrial publicity resulting from a statement by the prosecutor that, in the prosecutor's opinion, Crispell was guilty, a presumption of prejudice was not warranted. The Court observed that its earlier cases did not require a presumption of prejudice whenever "a prosecutor's expression of opinion as to the defendant's guilt is publicized." The Court noted: "A prosecutor conveys his view as to the defendant's guilt each time he charges a particular person with a crime."

2. This exception to the general rule requiring a showing of actual prejudice applies if the defendant can show pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice. Commonwealth v. Romeri, supra (citing Commonwealth v. Casper, 481 Pa. 143, 150-151, 392 A.2d 287, 291 (1978)); Commonwealth v. Pursell, supra; Commonwealth v. Holcomb, supra; Commonwealth v. Crispell, supra; Commonwealth v. Tedford, supra and Commonwealth v. Zook, supra; "The publicity must be so extensive, sustained and pervasive without sufficient time between publication and trial for the prejudice to dissipate, that the community must be deemed to have been saturated with it." Common-

wealth v. Pursell, supra, at 221, 495 A.2d at 188 (citing Casper, supra). See also Commonwealth v. Tedford, supra (despite prejudicial publicity, change of venue not required; few jurors who remembered accounts were each excused for cause; reasonably lengthy lapse of time between publicity and trial); Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990) (only if (1) pretrial publicity is inherently prejudicial; (2) publicity saturated community; and (3) there is insufficient "cooling down" period between publicity and trial is a new trial required); Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991) (sufficient "cooling-off" period;" publicity was neither sensational nor prejudicial; voir dire showed that of 70 venire persons examined only 34 had any knowledge; only four of that number indicated they might have been influenced and they were excused); Commonwealth v. McCullum, supra (no change of venue required; most publicity nine months before trial but contained references to defendant prior record and confession so review for prejudice required; 30 of 49 jurors read or heard about crime, 26 recalled only that crime occurred; seven remembered about victim, three remembered prior record; none remembered confession; eight who formed fixed opinion of guilty were excused for cause; nineteen knew nothing from pre-trial publicity; of seated jurors, only six recalled crime at all but no details); Commonwealth v. Crispell, supra (publicity not pervasive, presumption of prejudice not warranted based on publicity surrounding prosecutor's expression of opinion on defendant's guilt); Commonwealth v. Zook, supra (trial court did not abuse discretion in denying change of venue motion since news accounts were primarily factual and objective and were neither sensational nor inflammatory; did not reveal defendant's record or confession; did not discuss possibility of a plea; did not have reenactment of crime; did not contain inflammatory comments on merits of case); and Commonwealth v. Carter, supra (sufficient cooling off period; new trial not required).

3. In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), a change of venue was required due to publicity which the Pennsylvania Supreme Court has characterized as "extensive, pervasive and outrageous." Romeri, supra, at 133 n.2, 470 A.2d at 502 n.2. In Rideau, the defendant confessed during a filmed interview. The film was shown on local television three different times and

was viewed by two-thirds of the people in the community. Such repeated exposure to the defendant's confession by such a large segment of the community in which the trial was to occur required a change of venue.

4. In Commonwealth v. Cohen, 489 Pa. 167, 413 A.2d 1066 (1980), the Pennsylvania Supreme Court found that the following facts demonstrated that the prejudicial effect was pervasive enough to require a change of venue: pretrial polls showed that approximately 57% of the people in the community believed the defendant was guilty; nearly two-thirds of the jurors questioned had an opinion as to the defendant's guilt; 53% of the jurors questioned were excused on the grounds of irrevocable prejudgment of the merits. (Cohen is discussed and distinguished in Commonwealth v. Crispell, supra.)

E. Where a defendant files a motion for change of venue due to allegedly prejudicial pretrial publicity which is denied, the issue (i.e. abuse of discretion in denying motion) is not preserved for appeal where he uses less than all of his available peremptory challenges during jury selection. Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990). See also Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992) (that defendant failed to use all peremptories mentioned though not held dispositive).

F. Realistically assess your case. Agree to a change of venue or venire if you have any doubt. If the defense attorney fails to move for one, make him and his client so state on the record.

G. When is sequestration of the jury required? To be successful on a claim that the trial judge abused his or her discretion in refusing to sequester the jury during trial the defendant must establish actual prejudice by showing that the case is the subject of unusual or prejudicial publicity or that the jurors are subject to extraneous influences or pressures. Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991) (no claim of actual, rather than supposed prejudice; trial court repeatedly cautioned jurors to refrain from reading news accounts of the trial and not to discuss case among themselves or with others). Accord Commonwealth v. Crispell, supra (no mistrial required because of newspaper article published during trial in which jury was not sequestered; "trial court gave sufficient pre-cautionary instructions to insure the integrity of the trial"). Accord Commonwealth v. Crispell, supra (no mistrial

required because of newspaper article published during trial in which jury was not sequestered; "trial court gave sufficient precautionary instructions to insure the integrity of the trial").

VI. BAIL IN A CAPITAL CASE.

A. In Commonwealth v. Spence, ___ Pa. ___, ___n.3, 627 A.2d 1176, 1181 n.3 (1993), the Supreme Court noted, in responding to a Rule 1100 argument, that "[b]ail is unavailable where the defendant is charged with a capital crime pursuant to Article I, Section 14 of the Pennsylvania Constitution."

B. Prior to trial, in order to have a "no bail" decision upheld in a capital case, Commonwealth v. Heiser, 330 Pa. Super. 70, 478 A.2d 1355 (1984), holds that the Commonwealth, at preliminary hearing or at a bail hearing must make out a prima facie case of first degree murder. In strong dicta, the Heiser court suggests that the prosecution must also make a prima facie showing of the existence of at least one aggravating circumstance as well.

C. Where a defendant is convicted of first-degree murder and sentenced to life imprisonment because the jury is unable to unanimously agree on a sentencing verdict, 42 Pa.C.S. § 9711(c)(1)(v), and the defendant is thereafter awarded a new trial because of trial error, the case remains a capital case and, pursuant to Article I, section 14 of the Pennsylvania Constitution, the defendant is not entitled to bail. Commonwealth v. Martorano, ___ Pa. ___, 634 A.2d 1063 (1993) (on retrial jury could sentence the defendant to death so no bail possible).

VII. NOTICE OF AGGRAVATING CIRCUMSTANCES.

A. The Pennsylvania death penalty statute does not require specific notice of the aggravating circumstances which may apply and which the Commonwealth intends to submit at the sentencing proceeding. The Pennsylvania Supreme Court has noted that section 9711 does not provide a specific notice procedure. See Commonwealth v. Edwards, 521 Pa. 134, 555 A.2d 818 (1989). If the Commonwealth announces its intention to seek the death penalty at the beginning of the trial, the defendant is put on notice that the Commonwealth will attempt to establish one or more of the statutory aggravating circumstances set forth in the statute. Commonwealth v. Edwards, supra. See 42 Pa.C.S. § 9711(d)(1)-(16). The sentencer in Pennsylvania is limited to consideration of the aggravating circumstances delineated in the statute, 42 Pa.C.S. § 9711 (1)(c)(iv) and (d).

1. The Due Process Clause of the Fourteenth Amendment requires notice to the defendant that he may be sentenced to death. Statutory provisions alone may suffice to provide notice as long as the defendant and his counsel are not misled into believing that the death penalty is not a possibility. Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991) (in response to presentencing order state said it would not seek death penalty; at sentencing hearing there was no mention of death penalty so no arguments against it were advanced; in imposing sentence of death, judge violated due process).

B. Since July 1, 1989, the Pennsylvania Rules of Criminal Procedure require the Commonwealth to notify the defendant in writing of any aggravating circumstances it intends to submit at the sentencing hearing. Pa.R.Crim.P. 352.

1. The notice must be in writing.

2. The notice must be given at or before the time of arraignment unless:

   a. the attorney for the Commonwealth becomes aware of the existence of the aggravating circumstances after arraignment; or

   b. the court has extended the time for notice for cause shown. "Cause" may be shown if the attorney for the Commonwealth is investigating the existence of an aggravating circumstance

in order to determine whether or not there is sufficient evidence to warrant submitting it at the sentencing proceeding. Pa.R.Crim.P. 352 Comment.

3. As used in Rule 352, "arraignment" refers to arraignment in the court of common pleas after the defendant is held for court and not to the "preliminary arraignment" which is held before a district justice shortly after arrest pursuant to Pa.R.Crim.P. 140. See Pa.R.Crim.P. 122, 123 and 130. That the "arraignment" referred to in Rule 352 is the arraignment in common pleas court is made clear by the Comment to Rule 352. See Pa.R.Crim.P. 352, Comment ("For time of arraignment see Rule 303.") Under Pa.R.Crim.P. 303, arraignment must take place after the filing of an indictment or information.

   a. In Commonwealth v. Zook, 523 Pa. 79, 615 A.2d 1 (1992), the defendant argued that he was entitled to notice under this rule prior to his retrial after his original sentence of death had been vacated by the award of a new trial because of a Miranda violation. The Supreme Court said there was no basis for this assertion since Zook's arraignment had occurred several years before the effective date of Rule 352. The Court ruled that under the circumstances of the case notice given a week before trial and two and one-half weeks before the sentencing proceeding was sufficient since Zook was aware of the potential aggravating circumstances.

4. The rule does not specifically address the remedy to be imposed if the required notice is not given. By analogy to Pa.R.Crim.P. 122, 123 and 305 (relating to pretrial discovery), if required disclosure is not made, the offending party may be precluded from introducing the undisclosed evidence or a reasonable continuance must be granted. Under Rule 352, it is possible that if proper and timely notice is not given the Commonwealth would be precluded from relying on the aggravating circumstance(s) which was not disclosed.

   a. The Pennsylvania Supreme Court was faced with the question of the appropriate remedy for a violation of Rule 352 in Commonwealth v. Crews, ___Pa. ___, 640 A.2d 395 (1994). In Crews, written notice was given three days

before the start of the trial. As to five of the six aggravating circumstances which the Commonwealth sought to prove, the Commonwealth had the information as of the date of arraignment. As to the sixth, it did not. there was no violation as to the sixth since "the Commonwealth cannot and need not provide notice of circumstances unknown to the Commonwealth." As to the other five, notice was inherent in the double homicide charges leveled against the defendant. Since the defendant was not prejudiced under these circumstances by the lack of notice no remedy was required for the Rule 352 violation. The Court observed that in some circumstances a remedy would be required which might include a continuance "to prevent prejudice to a defendant" or "the exclusion of evidence might be appropriate."

5. Despite this notice requirement, the trial court has no authority to inquire into the existence of aggravating circumstances in a murder prosecution pretrial. "[A] trial court may not make a pretrial determination as to the capital or noncapital nature of a murder prosecution." Commonwealth v. Buonopane, 410 Pa. Super. 215, 217-18, 599 A.2d 681, 682 (1991). This is a decision properly left to the exercise of the prosecutor's discretion. Id. at 221, 599 A.2d at 684. Absent a threshold showing a purposeful discrimination in the selection process, pretrial inquiry by the trial court into the reasons for the exercise of the prosecutor's discretion "violates the constitutional principle of separation of powers." Id. at 221, 599 A.2d at 684.

6. The attorney for the Commonwealth has a mandatory obligation to disclose evidence favorable to the defendant on the issue of punishment. Pa.R.Crim.P. 305 B(1)(a). See also Brady v. Maryland, 373 U.S. 83, 835 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

VIII. DEFENSE INVESTIGATION AND PSYCHIATRISTS.

A. Be careful if trial counsel fails to request an investigator or is not prepared, or if he fails to request a competency or sanity review by a psychiatrist or psychologist. It might be ineffective assistance of counsel. See Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Also, the Court should never deny a defense requested psychiatric review. Bowden v. Francis, 470 U.S. 1079, 105 S.Ct. 1833, 85 L.Ed.2d 135 (1985) (if not useful for guilt or innocence, it might be for mitigation).

1. In Commonwealth v. Carter, ___ Pa. ___, ___ A.2d ___ (1994) (No. 5 Capital Appeal Docket; 4/8/94), the defendant sought a new trial because the trial court denied his motions to appoint experts in the fields of toxicology, neurology, statistics, jury selection and sociology/criminology. He argued that he was prevented from presenting a defense of voluntary intoxication or drugged condition without a toxicologist and neurologist. In rejecting this argument the Court first observed that there is no obligation on the Commonwealth to pay for the services of an expert. "However, in a capital case, an accused is entitled to the assistance of experts necessary to prepare a defense." Id., at ___, ___ A.2d at ___. Since the trial court had appointed a psychiatrist whose testimony the Court found "would have been helpful in proving that the [defendant] did not have the requisite specific intent for the crime", the Court concluded that the defendant was given sufficient expert assistance to prepare his defense. Id.

IX. COURT ORDERED PSYCHIATRIC EVALUATION OF THE DEFENDANT: ESTELLE V. SMITH AND SATTERWHITE V. TEXAS.

A. Because of the brutality of a particular murder or the defendant's prior history, the Court on its own motion, or that of the prosecution, may order the defendant to be psychiatrically examined to determine the defendant's competency to stand trial. See Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Since this type of court-ordered forensic evaluation is becoming increasingly common in capital cases (and, indeed, can provide important mitigating evidence), prosecutors and defense attorneys should be aware of the pitfalls of such an evaluation.

B. The principal cases in this area are Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and, Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

1. In Estelle v. Smith, the trial judge ordered a psychiatrist to evaluate Smith's competency to stand trial. Smith's attorneys did not know of the court-ordered evaluation, learning of it by accident after jury selection took place. Estelle, 451 U.S. at 458 n.5, 461, 466, 101 S.Ct. at 1871 n.5, 1874-75, 68 L.Ed.2d at 366 n.5, 368, 371.

2. The psychiatrist conducted a 90 minute interview without first giving the defendant his Miranda "type" rights (viz-the right to remain silent, that any statement made could be used against him at the sentencing hearing). He concluded not only that the defendant was competent to stand trial, but went beyond the court order and declared in his report that the defendant was "aware of the difference between right and wrong." Further, when called by the prosecution at the sentencing hearing, the psychiatrist testified on the "future dangerousness" question. (Texas law requires that the death penalty be imposed if the sentencing jury affirmatively answers three questions, including "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.") The psychiatrist testified that the defendant would "commit other similar or same criminal acts if given the opportunity to do so," that he has "no regard" for another human being's life or property, that his sociopathic condition will "only get worse", that there is "no treatment, no medicine...that in any way at all modifies or changes

this behavior," that he has "no remorse." Id. at 459-60, 101 S.Ct. at 1871, 68 L.Ed.2d at 367.

3. In overturning Smith's death penalty, the United States Supreme Court held:

> That the defendant was entitled to be notified of his right to remain silent, that anything he said could be used against him in the sentencing hearing, and, that his attorney must be notified of the nature and purpose of the evaluation.

Estelle v. Smith, supra.

a. Although Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), focused on custodial pre-trial interrogation by police, its rationale applies to a pre-trial court ordered psychiatric review because of the "gravity of the decision to be made at the penalty phase" particularly, where the defendant "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence". Estelle v. Smith, supra, at 463, 468, 101 S.Ct. at 1873, 1875-76, 68 L.Ed.2d at 369, 372.

b. The Court specifically rejected the argument that the Fifth Amendment privilege did not apply to a competency or sanity evaluation because the information was used only to determine punishment after conviction, not to establish guilt. The Court declared that under the circumstances of the case where the psychiatrist "became essentially like that of an agent of the state,"..."we can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." Id. at 462-63, 467, 101 S.Ct. at 1873, 1875, 68 L.Ed.2d 368-69, 371.

c. The second ground for excluding the psychiatrist's testimony derived from the fact that Smith's attorneys were not given advance notice about the nature and possible use of the information obtained during the interview. The Court labeled the clinical evaluation a "critical stage," and, since the lack of notice denied the attorneys the opportunity to

consult with their client about whether he should submit to the interview, Smith's Sixth Amendment right to counsel was abridged. Id. at 470, 101 S.Ct. at 1877, 68 L.Ed.2d at 374.

4. The U.S. Supreme Court has held that a "harmless error" analysis applies to the admission in a death penalty proceeding of psychiatric testimony procured in violation of a defendant's Sixth Amendment Right to counsel. Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

   a. In Satterwhite, the defendant, shortly after being charged with murdering a woman during a robbery (a capital crime in Texas), and prior to being represented by counsel, underwent a court-ordered psychological examination to determine his competence to stand trial, sanity at the time of the offense, and future dangerousness. After Satterwhite's formal indictment, counsel was appointed to represent him, and thereafter the District Attorney filed a second motion requesting a psychological evaluation but, as in Estelle v. Smith, the prosecutor did not serve defense counsel with a copy of this motion. The trial court subsequently granted the prosecutor's motion and ordered the evaluation without determining whether defense counsel had been notified of the prosecutor's request. Pursuant to the court order, psychiatrist James P. Grigson, M.D., reported that, in his opinion, Satterwhite had "a severe anti-social personality disorder and is extremely dangerous and will commit future acts of violence." Satterwhite, 486 U.S. at 253, 108 S.Ct. at 1795, 100 L.Ed.2d at 291. The defendant subsequently was convicted by a jury of the murder, and in accordance with Texas law, a separate sentencing proceeding was held. During the penalty phase, the State produced Dr. Grigson who testified, over defense counsel's objection, that, in his opinion, Satterwhite presented a continuing violent threat to society. At the conclusion of the evidence the jury found that (1) the defendant's conduct was deliberate and there was reasonable expectation that death would result therefrom, and (2) there was a probability that the defendant would commit violent criminal acts, thereby posing a continuing threat to society. Upon this finding, the trial court, in accor-

dance with Texas law, sentenced the defendant to death.

b. On appeal, the Texas Court of Criminal Appeals determined that the admission of Dr. Grigson's testimony in the penalty phase violated the Sixth Amendment right to counsel as set forth in Estelle v. Smith. The Court ruled, however, that the error was harmless because an average jury would have sentenced the defendant to death based upon the properly admitted evidence. Satterwhite v. State, 726 S.W.2d 81, 92-93 (Tex. App. 1986).

c. The U.S. Supreme Court addressed two issues on appeal. First, whether a "harmless error" analysis applies to violations of the Sixth Amendment right recognized in Estelle v. Smith; and, second, whether, in this particular case, the error was harmless beyond a reasonable doubt.

1) Addressing the first issue, the Court rejected Satterwhite's contention that a violation of the Sixth Amendment right to assistance of counsel required automatic reversal of a death sentence. The Court noted that the error in this case did not affect or contaminate the entire criminal proceeding, but only affected the admission of particular evidence, i.e., the testimony of Dr. Grigson. The Court concluded that "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." Satterwhite v. Texas, supra.

2) Applying the harmless error analysis to this case, the Court reversed the death sentence because it could not find that the error was harmless beyond a reasonable doubt. The Court noted that Dr. Grigson was the only licensed physician to take the stand and that the State placed significant weight and emphasis on his "powerful and unequivocal testimony." Id. at 259-60, 108 S.Ct. at 1799, 100 L.Ed. 2d at 296. "[W]e find it impossible," wrote Justice O'Connor, "to say beyond a reasonable doubt that Dr.

Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury." Id. at 258, 108 S.Ct. at 1798-99, 100 L.Ed.2d at 295-96.

COMMENT: WHERE THE COURT INITIATES THE FORENSIC EVALUATION

1. Estelle v. Smith establishes that the period prior to a court compelled competency or prosecution requested sanity or dangerousness evaluation (where the defense gives notice that it intends to introduce evidence on these points) is a "critical stage" of the proceedings. The U.S. Supreme Court, in a footnote, specifically did not decide the question of whether the Sixth Amendment accords a defendant the right to have counsel present during the evaluation itself. Estelle, 451 U.S. at 470 n.14, 101 S.Ct. at 1877 n.14, 68 L.Ed.2d at 374 n.14. Therefore, prosecutors at least are required to give notice to the defense attorney about the subject matter of the evaluation so that he can decide whether to recommend to his client that he cooperate with the psychiatrist. Further, to be safe, even though the Court has reserved decision on the point, the prosecution should not object to the defense counsel's presence at the psychiatric evaluation despite the fact that his presence "would contribute little and might seriously disrupt the examination" Id.

2. As far as "warnings" are concerned, where the prosecutor or the Court seeks a competency, sanity, or dangerousness evaluation, the defendant himself must be accorded warnings that he has the right to remain silent, that anything he says and does may be held against him in this or any trial or sentencing proceedings, and that he has a right to consult with his counsel about the nature and purpose of the evaluation and whether he wishes his counsel to be present.

COMMENT: WHERE THE DEFENDANT OR HIS COUNSEL INITIATE THE FORENSIC EVALUATION, AND INITIATE IT'S USE AT TRIAL OR SENTENCING.

1. The holding of Estelle v. Smith is of limited applicability. The decision does not cover the vast majority of clinical evaluations that are initiated by the defense counsel and used by the defense in trial or at the sentencing phase.

2. In the defense initiated competency evaluation situation, it has been suggested in a review of Estelle v. Smith by Professor Christopher Slobogin of the University of Florida School of Law in 31 Emory L.J. 71 (1982), that the Miranda type warnings of Estelle v. Smith serve neither the interests of the state nor those of the defendant, and are, as the Supreme Court itself recognized, somewhat impractical. Professor Slobogin suggests that a better method of insuring sufficient protection of the defendant's Fifth Amendment interests in the situation where the defense initiates a competency review "is to prohibit the state from using at trial or sentencing any disclosures, or opinions based on disclosures made by the defendant during a competency evaluation." 31 Emory L.J. at p. 92.

3. In the defense initiated sanity, mental infirmity, or, dangerousness evaluation situation, most courts have held that the state may require the defendant to submit to an evaluation of his mental state at the time of the offense based on fairness and waiver concepts. United States v. Greene, 497 F.2d 1068 (7th Cir. 1974); United States v. McCracken, 488 F.2d 406 (5th Cir. 1974); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967). The U.S. Supreme Court in Estelle v. Smith appeared to endorse this view when it stated in dicta that the silence of the defendant "may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case." Estelle, 451 U.S. at 465, 101 S.Ct. at 1874, 68 L.Ed.2d at 370.

C. BUT, IN PENNSYLVANIA - There is no statute or rule of criminal procedure that permits the Commonwealth to 'require' the defendant to submit to its own psychiatrist's evaluation. In fact, the Pennsylvania Supreme Court has specifically rejected, on self-incrimination grounds, the notion that the Commonwealth can require a defendant to answer questions asked of him by the Commonwealth's psychiatrist, Commonwealth v. Pomponi, 447 Pa. 154, 284 A.2d 708 (1971). See also Pa.R.Crim.P. 305 C(2)(a). In Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990), the Pennsylvania Supreme Court said that, pursuant to Rule 305 C(2)(a), "a criminal defendant must be warned against the possibility that what he says to the psychiatrist will be used against him (the defendant's right to be protected against compulsory self-incrimination)." Id. at 293, 571 A.2d at 1040.

1. In Pennsylvania, all that the defense is "required" to do on the issue of sanity or mental infirmity is to give "Notice" to the Commonwealth that it intends to introduce certain evidence on these points from certain witnesses. Pa.R.Crim.P. 305 C. The Commonwealth is only permitted to receive, upon a showing of materiality and reasonableness of the request, "reports of physical or mental examinations" of the defendant. Pa.R.Crim.P. 305 C(2). The Commonwealth may neither use nor make reference to these reports at trial unless the defendant uses them. Commonwealth v. Breakiron, supra. Moreover, if the Commonwealth exploits those reports and gathers additional evidence before trial based on them, any such supplementary evidence would be subject to suppression on defendant's motion. Id.

2. In Pennsylvania, then, the Commonwealth can "request" that the defendant submit to a psychiatric evaluation when the defense gives notice that it intends to use such evidence at trial or sentencing. If the defendant consents to it, usually his attorney is present during the entire psychiatric interview, and, generally the defense lawyers do not permit the psychiatrists to ask questions about the circumstances of the case at issue. See Commonwealth v. Breakiron, supra.

3. For the most part, then, in Pennsylvania, the Commonwealth has to rely on lay witnesses and its own prosecutor's ability to cross-examine the defense witnesses or experts using their own reports and others that were relied upon in the formulation of the proffered opinion. In fact, the United States Supreme Court has held that when a defendant places his mental status in issue, the prosecution may impeach the defendant's mental health evidence with a psychiatric evaluation the defendant requested. Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

4. The prosecution can also use hypothetical questions, and of course, call its own expert to the stand to give his own opinion based upon several sources, i.e., what he heard the defense psychiatrist and other witnesses say about the defendant and his actions, and, any reports the defense psychiatrist used. But, as Professor Slobogin has suggested, "the amorphous idiosyncratic nature of these inquiries makes the prosecutor's evidence gathering chores more difficult than in the typical case," particularly, because "the one essential

ingredient in the opinion formation process is the defendant's own interpretation of events at the time of the alleged offense." 31 Emory L.J. at 101.

Perhaps, the Supreme Court or the Legislature can correct what Professor Slobogin calls this "unfair disadvantage." 31 Emory L.J.at 103.

X. INCOMPETENCY, INSANITY, DIMINISHED CAPACITY, GUILTY BUT MENTALLY ILL AND VOLUNTARY INTOXICATION.

A. The Banks Case.

On September 25, 1982, George Banks shot and killed 13 people and wounded another person in Wilkes-Barre, Pennsylvania. The defendant was subsequently convicted on twelve counts of first degree murder, and 1 count of 3rd degree murder and received twelve sentences of death. On appeal, the most significant issues concerned questions of Banks' alleged incompetency and insanity. Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1 (1987).

1. Incompetency

   a. Banks' principal claim was that the trial court erred in finding him to be competent to stand trial. This claim was based on the defendant's insistence, against the advice of counsel, on pursuing his "conspiracy" theory, i.e. that the police officers, Mayor of Wilkes-Barre, the District Attorney's Office, and the court were concealing and altering evidence, and obstructing his attempts to expose this "conspiracy."

   b. The Pennsylvania Supreme Court reviewed the general standards governing the determination of whether a defendant is incompetent to stand trial:

      1) "the determination of competency rests in the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion";

      2) "a person is incompetent to stand trial where he is 'substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense'";

      3) "the person asserting incompetency has the burden of proving incompetency by clear and convincing evidence."

      Commonwealth v. Banks, 513 Pa. at 340-41, 521 A.2d at 12. Accord Commonwealth v. Sam, ___ Pa. ___, 635 A.2d 603 (1993) (incompetence to stand trial must be proven by clear and convincing evidence; no such showing here; coun-

sel not ineffective for failing to file baseless claim). See 50 P.S. § 7403(a).

a) In Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 120 L.Ed.2d 353, 60 U.S.L.W. 4684 (1992), the United States Supreme Court affirmed the conviction and sentence of death of a defendant who claimed that California's statute which places the burden of proof of incompetency on the defendant. Under the statute, the defendant must establish his incompetency by a preponderance of the evidence. The Court said that this allocation of the burden of proof does not violate the Due Process Clause. The Court ruled that due process is satisfied so long as "the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." Id. at ___, 112 S.Ct. at ___, 120 L.Ed.2d at 367. The Court noted that "[a]lthough an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (In reaching its decision in Medina, the Supreme Court noted that Pennsylvania is among the States which have enacted statutes like California's which place the burden of proof of incompetence to stand trial on the defendant. The Court cited the Mental Health Procedures Act, 50 P.S. § 7403(a), which had been relied upon by the Pennsylvania Supreme Court in Banks, supra. See Medina v. California, supra, at ___, 112 S.Ct. at ___, 120 L.Ed.2d at 366, 60 U.S.L.W. at 4686).

c. The Banks Court concluded that the trial court did not abuse its discretion in finding the defendant competent to stand trial and held that:

> [The] [a]ppellant clearly demonstrated his ability to participate and assist in his defense and his understanding of the nature and object of the proceedings. While presentation of his conspiracy theory was against counsel's advice, his bizarre 'defense' did not...conflict with his defense of insanity.
>
> ...[T]here is ample evidence of record to support the court's determination that appellant understood that he was on trial on thirteen counts of homicide, that he could be sentenced to death if convicted, that he would not be sentenced to death if found not guilty by reason of insanity, that he understood the role and functions of the prosecutors, defense attorneys and judge, and that he was able to assist and participate in his defense even though he chose not to cooperate with counsel nor to heed their advice.

Commonwealth v. Banks, supra, at 343-44, 521 A.2d at 13-14 (emphasis added).

d. The Court's decision in Banks makes it clear that a defendant's unwillingness to cooperate with counsel or heed counsel's advice is not sufficient to demonstrate incompetency. Instead, the Court focuses on the defendant's cognitive ability to cooperate.

2. Insanity

a. At trial, Banks raised the defense of insanity, and on appeal, he argued that the trial court's instructions on insanity were legally deficient. Specifically, Banks claimed that under M'Naghten, a defendant's "knowledge" of the nature and quality of his act entails more than a cognitive awareness that an act is being committed; rather it must also encompass "a rational appreciation as well of all the social and emotional implications involved in the act and a mental capacity to measure and

foresee the consequences of the violent conduct." Id. at 347, 521 A.2d at 15.

b. The Court noted that Pennsylvania continues to apply the traditional M'Naghten test: legal sanity is demonstrated by the murderer's knowledge that he or she has killed, and knowledge that it was wrong. In Commonwealth v. Heidnik, 528 Pa. 458, 587 A.2d 687 (1991), the Supreme Court reiterated that the M'Naghten rule continues to be the test for insanity in Pennsylvania, relying on Banks ("a defendant is legally insane and absolved of criminal responsibility if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of the act or did not know that the act was wrong").

c. The Banks Court rejected Banks' expanded view of the M'Naghten requirement holding:

> For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane, it most certainly does not have to demonstrate that he or she has a "rational appreciation as well of all the social and emotional implications" or the ability "to measure and foresee the consequences" of the act.

Commonwealth v. Banks, 513 Pa. at 346, 521 A.2d at 15.

d. The Court in Banks approvingly quoted a nineteenth century opinion that "to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible...." Commonwealth v. Banks, 513 Pa. at 346, 521 A.2d at 15, quoting Commonwealth v. Mosler, 4 Pa. 264, 268 (1846).

Legal insanity, wrote the Court,

> is not demonstrated by a murderer's appreciation of the social and emotional implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong.

Commonwealth v. Banks, 513 Pa. at 346, 521 A.2d at 15.

e. Finally, the Banks Court acknowledged that the defendant's behavior in murdering thirteen innocent people and during the trial, was "inexplicable" and difficult to comprehend, but concluded that "the incomprehensibility [and] the bizarreness of someone's behavior, is not, nor can it be, determinative of his legal sanity or competency to stand trial." Id. at 347, 521 A.2d at 16.

f. Relying on Banks, the Supreme Court has reiterated that the test for insanity centers upon a defendant's ability to understand the nature and quality of his acts. The court explained that the nature of an act is that it is right or wrong. The quality of an act is that it is likely to cause death or injury. Legal sanity is demonstrated, said the Court, by the murderer's knowledge that he or she has killed and the knowledge that it was wrong. Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990) In Young, the Court concluded that the defendant's mistaken belief that the victims were engaged in homosexual behavior does not reflect an impairment in the reasoning process.

g. In Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991), the Supreme Court, in a unanimous opinion authored by Mr. Justice Cappy, held that the trial court properly granted the Commonwealth's pretrial motion in limine to preclude the testimony of a defendant's experts, a psychiatrist and a psychologist, during the guilt phase of the trial because their opinions did not support the conclusion that the defendant was "M'Naghten insane." Their testimony was relevant only to allow the jury to find that the defendant was "guilty, but mentally ill," 18 Pa.C.S. § 314. This designation could not affect a jury's verdict of guilt. The Court observed that it "has never allowed [this] type of testimony...to be introduced during the guilt phase of a first degree murder case," Id. at 71, 595 A.2d at 36, and stated that "evidence that does not rise to the level of a recognized defense or mitigation of first degree murder is only admissible in the penalty phase" citing Com-

monwealth v. Young, supra. Id. at 71, n.6, 595 A.2d at 35, n.6.

NOTE: By legislation, the burden of proving sanity is no longer upon the prosecution when there is evidence of insanity present. Under section 315(a) of the Crimes Code, 18 Pa.C.S. § 315(a), the burden is upon the defendant to prove insanity by a preponderance of the evidence. Section 315 did not become effective until March 17, 1983. Banks' offenses occurred on September 25, 1982. Section 315 is not mentioned in the Banks opinion. See Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991), (citing section 315(a) in a death penalty case for the proposition that the defendant must prove insanity by a preponderance of the evidence). Despite section 315(a), the Court in Heidnik concluded that the evidence was "sufficient beyond a reasonable doubt to support the jury's conclusion that [Heidnik] was legally sane when he took the lives of [the victims]." Id. at 469, 587 A.2d at 692. Since insanity does not negate any element of the crime which the Commonwealth must prove beyond a reasonable doubt, it is not unconstitutional to place the burden of proving insanity upon the defendant. Commonwealth v. Reilly, 519 Pa. 550, 549 A.2d 503 (1988). In Commonwealth v. W.P., 417 Pa. Super. 192, 612 A.2d 438 (1992), the Superior Court provided some guidance on this issue. Relying on the Pennsylvania Supreme Court's decision in Commonwealth v. Sohmer, 519 Pa. 200, 546 A.2d 601 (1988) (discussed infra), the Superior Court said the "burden remains on the Commonwealth to establish the defendant's guilty beyond a reasonable doubt" and "does not shift where there is sufficient evidence to raise the issue of insanity." Commonwealth v. W.P., supra, at 197, 612 A.2d at 440. The Commonwealth "need not, however, present evidence sufficient to support a finding of sanity beyond a reasonable doubt." Id. at 197, 612 A.2d at 440-1.

B. The Terry Case.

In March 1979, while serving a life sentence for arson and murder in Graterford State Prison, Benjamin Terry, using a baseball bat, brutally and repeatedly clubbed to death Felix Mokychic, a prison guard, who was checking the prisoner's passes at the prison entrance. Terry was subsequently convicted of first degree murder and sentenced to death. On appeal, the defendant raised evidentiary issues concerning his defense of diminished

capacity. Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987).

1. Diminished Capacity

a. To support his defense of diminished capacity, Terry produced testimony from two qualified experts, Dr.Gerald Cooke, a psychologist, and Dr. Glenn Glass, a psychiatrist. Dr. Cooke said that the defendant "suffered from a dyssocial personality with paranoid hysterical and explosive features and organic brain syndrome with epileptic seizures." Dr. Cooke concluded "to a reasonable psychological certainty that appellant lacked the capacity to premeditate and deliberate on the day (of the murder) because of his 'mental illness.'" Id. at 395, 521 A.2d at 405.

b. The Pennsylvania Supreme Court ruled that Dr. Cooke's testimony "fails to meet the Weinstein standard for admissibility." "We have," wrote Justice Hutchinson for the Court, "definitively rejected the concept advanced by Dr. Cooke that impulsive rage negates premeditation." "Only 'mental disorders affecting cognitive functions necessary to form specific intent', ...are admissible." Id. at 395-96, 521 A.2d at 405, quoting Commonwealth v. Weinstein, 499 Pa. 106, 114, 451 A.2d 1344, 1347 (1982).

c. The Court noted that it was unclear from Dr. Cooke's testimony whether he was describing the defendant's personality or claiming that the defendant suffered from a "personality disorder." In either case, however, the testimony was irrelevant:

> If [Dr. Cooke] was merely describing appellant's personality, his testimony is not relevant to the defense of diminished capacity, which requires evidence of a mental disorder.... [I]f Dr. Cooke's diagnosis was that appellant suffered from a dyssocial personality disorder, such a mental disorder does not affect the cognitive functions of premeditation and deliberation.

Commonwealth v. Terry, 513 Pa. at 396-97, 521 A.2d at 406.

d. Dr. Cooke also relevantly testified that Terry suffered from organic brain syndrome, but Cooke did not opine that Terry's brain was so damaged that he could not premeditate or deliberate. This testimony, combined with the preceding testimony of Dr. Cooke, did not support Cooke's conclusion that Terry lacked the capacity to deliberate and premeditate. Therefore, that opinion -- which was offered on the ultimate issue in the case -- was not admissible. "Expert opinions on an ultimate issue are admissible in some situations, but only if supported by prior testimony." Id. at 398, 521 A.2d at 406, citing Commonwealth v. Daniels, 480 Pa. 340, 390 A.2d 172 (1978).

e. The defense psychiatrist, Dr. Glass, testified that the defendant suffered from a dyssocial personality disorder and organic brain disease. He also noted that the drugs prescribed for the defendant may cause unintended effects on some people. But Dr. Glass failed to differentiate or relate the effect of the drugs on the defendant to the defendant's brain damage or dyssocial personality. "Thus," the Court concluded, "none of these factors were shown to be the legal cause of appellant's alleged incapacity to premeditate and deliberate." Furthermore, the Court pointed out, "[i]n Pennsylvania, ...dyssocial personality does not justify beating a guard to death with a bat or reduce the degree of the crime of murder." Thus, the Court concluded that, like Dr. Cooke's testimony, the testimony of Dr. Glass failed to meet the Weinstein standards:

> Where expert testimony indicates that there are multiple causes of an alleged lack of capacity to premeditate and deliberate and one of these causes is not recognized as a matter of law, there must be a showing with unequivocal medical/psychiatric testimony that one or more of the remaining causes was a substantial, contributing factor to the incapacity in order to establish this defense.

Commonwealth v. Terry, 513 Pa. at 399-400, 521 A.2d at 407. Thus, Dr. Glass' conclusion that the defendant did not premeditate or deliberate before clubbing the prison guard, like Dr.

Cooke's, was not supported by his prior testimony and was, therefore, improperly admitted.

f. In Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991), the Court held that the trial court properly granted the Commonwealth's pretrial motion in limine to preclude the testimony of a defendant's experts, a psychiatrist and a psychologist, during the guilt phase of his trial because their opinions did not establish that the defendant suffered from diminished capacity. Quoting from its earlier opinion in Commonwealth v. Walzack, 468 Pa. 210, 220, 360 A.2d 914, 919-20 (1976), the Court described the diminished capacity defense as follows:

> "An accused offering evidence under the theory of diminished capacity concedes general criminal liability. The thrust of this doctrine is to challenge the capacity of the actor to possess a particular state of mind required by the legislature for the commission of a certain degree of the crime charged." Thus, in a first degree murder in which the defendant offers the defense of diminished capacity, he is attempting to prove that he was incapable of forming the specific intent to kill, a requirement of first degree murder.

Commonwealth v. Faulkner, supra, at 70 n.4, 595 A.2d at 35 n.4. In Faulkner, the proffered expert testimony was relevant only to allow the jury to find that the defendant was "guilty, but mentally ill," 18 Pa.C.S. § 314. Such testimony, according to the Court, is not admissible during the guilt phase of a capital trial but is only admissible in the penalty phase. Id. at 71 n.6, 595 A.2d 35 n.6.

COMMENT: Because of the Court's carefully crafted, detailed, and instructional analysis in Terry, virtually directing prosecutors to closely examine defense psychiatric testimony, it is critical to receive, in discovery, the reports of the defense psychiatrist and/or psychologist, and, to receive a very detailed and specific offer of proof well prior to the testimony of defense experts. Since this type of defense is fairly common in murder cases, prosecutors should carefully compare the proffered testimony with that deemed admissible in Terry, Banks,

and Weinstein. This point is emphasized by the Supreme Court's decision in Commonwealth v. Faulkner, supra, where the Court affirmed the trial court's granting of a Commonwealth motion in limine which precluded proffered expert testimony during the guilt phase of the trial because it established neither legal insanity nor diminished capacity. Faulkner is also important for it stands for the proposition that the trial court may compel the defense to require its experts to reduce their opinions to writing and to provide them to the trial court and the attorney for the Commonwealth, at least where the defendant refused to be examined by a Commonwealth's expert. Id. at 73, 595 A.2d at 37.

C. Guilty But Mentally Ill, 18 Pa.C.S. § 314.

1. In 1982, the legislature provided for a verdict of guilty but mentally ill in criminal cases. This verdict is only available when a defendant timely offers a defense of insanity (18 Pa.C.S. § 315) in accordance with the Rules of Criminal Procedure. 18 Pa.C.S. § 314(a). See also Pa.R.Crim.P. 305 C(1)(b) (relating to mandatory notice of insanity or mental infirmity defense); and Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), where the Pennsylvania Supreme Court stated that, since a defendant could not, as a matter of law, rely on the defense of insanity where he claims his mental state resulted from his voluntary ingestion of alcohol, a verdict of guilty but mentally ill was also unavailable. The Court based this determination, in a capital case, on the language of section 314(a). Id. at 149 n.5, 569 A.2d at 936 n.5.

2. A defendant may be found guilty but mentally ill if the trier of facts (jury or, if a jury trial is waived, judge) finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense. 18 Pa.C.S. § 314(a). "Mentally ill" and "legal insanity" are defined for purposes of this section. 18 Pa.C.S. § 314(c)(1) and (2). See also 18 Pa.C.S. § 315(relating to insanity).

3. A person who is legally insane will necessarily be mentally ill. One who is mentally ill, however, is not necessarily legally insane. Legal insanity under the M'Naghten rule (see 18 Pa.C.S. §§ 314(d) and 315(b)) is a defense to criminal charges. A verdict of guilty but mentally ill under section

314 is not. A person found guilty but mentally ill is subject to whatever penalty the law allows for the offense for which the person was convicted. 42 Pa.C.S. § 9729(a); Commonwealth v. Faulkner, 528 Pa. 57, 71 n.6, 595 A.2d 28, 35 n.6 (1991).

4. This verdict requires the sentencing court, after such a verdict, to determine, as of the time of sentencing, if the individual is "severely mentally disabled and in need of treatment "under the Mental Health Procedures Act." 42 Pa.C.S. § 9727(a) (relating to imposition of sentence on person found guilty but mentally ill).

5. When a person commits an offense for which a mandatory minimum term of imprisonment is applicable, (see, e.g., 42 Pa.C.S. § 9712 (relating to offenses committed with firearms)) and is found guilty but mentally ill, the mandatory term must be imposed. Commonwealth v. Larkin, 518 Pa. 225, 542 A.2d 1324 (1988) (trial court must impose mandatory minimum; must provide for treatment as required by section 9727).

6. In Commonwealth v. Sohmer, 519 Pa. 200, 546 A.2d 601 (1988), the Pennsylvania Supreme Court considered section 314 in the context of a first degree murder prosecution. In Sohmer, the defendant was charged with murder and robbery. He raised the insanity defense. He was tried by the court sitting without a jury and was found guilty of murder of the first degree and robbery. His insanity defense was rejected on the basis of testimony from the Commonwealth's experts. The guilty but mentally ill verdict was also rejected. The trial court had placed the burden of proving the defendant's mental illness upon the defense. That court said that mental illness had to be proven by the defendant by a preponderance of the evidence.

7. On appeal, the Supreme Court affirmed the findings of guilt but remanded the matter for reassessment of the evidence presented on the question of Sohmer's mental illness at the time of the commission of the offenses. Id. at 202, 546 A.2d at 602. The Supreme Court agreed with the trial court that mental illness had to be proved by a preponderance of the evidence. It disagreed with the conclusion that the burden of proving mental illness was on the defendant. The Court concluded that the legislative scheme envisioned no assignment of the burden of proof. Instead, the Court determined

that the factfinder could determine the existence of mental illness from the defendant's evidence on the issue of insanity and the Commonwealth's evidence to the contrary. Since mental illness is not an element of an offense and since it presents a penological concern, it need not be proven by the Commonwealth beyond a reasonable doubt.

8. This potential verdict poses important questions in death penalty cases. The Constitution prohibits the execution of insane persons. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). However, mentally retarded people may be subjected to the death penalty. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). (It was reported that a defendant with a 69 I.Q. was executed in Alabama. He had sought a stay of execution in light of Penry which was denied. See Dunkins v. State, 437 So.2d 1349 (Ala. Crim. App. 1983), aff'd sub nom. Ex parte Dunkins, 437 So.2d 1356 (Ala. 1983); Dunkins v. State, 489 So.2d 603 (Ala. Crim. App. 1985); Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988); Dunkins v. Jones, 493 U.S. 860, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989) (order denying stay of execution)). Someone who is mentally retarded may be "mentally ill" as that phrase is defined in section 314. The mental illness (retardation) short of insanity will not necessarily preclude the death penalty. The mental illness will undoubtedly be argued as a mitigating circumstance. See 42 Pa.C.S. § 9711(e)(2), (3), and (8). Accord Commonwealth v. Faulkner, 528 Pa. 57, 73 n.7, 595 A.2d 28, 36 n.7 (1991).

9. Applicability of "guilty but mentally ill" to capital cases.

   a. Whether or not section 314 and the procedures set forth in section 9727 were applicable to death penalty cases initially appeared questionable. Section 4 of the Act which added section 9727 provides that it "shall apply to all indictments or informations filed on or after [its] effective date." See Act of December 15, 1982 (P.L. 1262, No. 286), § 4, effective in 90 days. It appears, however, that a section 314 verdict may be available in a capital case. In Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), the Supreme Court said that a section 314 verdict was unavailable as a matter of law because the defense of insanity was unavailable as a mat-

ter of law due to the defendant's condition being caused by his voluntary ingestion of alcohol. By negative implication, then, if the defense of insanity was permissible, a verdict of guilty but mentally ill would be available.

b. Section 9727 speaks in terms of the court as sentencer after a determination that the defendant is guilty but mentally ill under section 314. See 42 Pa.C.S. § 9727(a) ("Before imposing sentence, the court shall hear testimony and make a finding on the issue of whether the defendant at the time of sentencing is severely mentally disabled and in need of treatment. . . ."). This is seemingly inconsistent with a jury imposing sentence under section 9711, although a jury could determine that a defendant's severe mental disability is a mitigating circumstance that is (or is not) outweighed by an aggravating circumstance present. Accord Commonwealth v. Faulkner, 528 Pa. 57, 73 n.7, 595 A.2d 28, 36 n.7 (1991).

c. Sohmer taught that section 314 is applicable to murder prosecutions. In a death penalty case, the Pennsylvania Supreme Court provided some guidance in this area in Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990). There the Court stated that considerations of a guilty but mentally ill verdict in a capital case are more appropriate in the penalty phase rather than the guilt phase. In Young, the trial court had committed a Sohmer error while charging the jury during the guilt phase on the possible verdict of guilty but mentally ill. Since this verdict is a penalty issue rather than one concerned with guilt or innocence, the Court held that any error in the instruction during the guilt phase was harmless beyond a reasonable doubt.

d. The Supreme Court provided further clarification on this issue in Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991). In Faulkner, the Court, stated that "[i]n a capital case, evidence tending to show a defendant was 'guilty but mentally ill' is properly admitted only at the penalty phase--not the guilt phase." Id. at 72, 595 A.2d at 36. The Court supported this holding

by relying on its earlier opinion in Young, supra, where it said:

> In the usual situation the judge is entrusted with determining the appropriate sentence, and the jury's function is confined to determining the guilt of the accused. The verdict providing for "guilty but mentally ill" represents an exception to this general rule. By rendering this judgment, the jury is permitted to advise the sentencing judge to consider the fact of mental illness in the exercise of his sentencing decision. Capital cases are unique in that the jury and not the judge sets the penalty in such cases. The consideration of a possible verdict of guilty but mentally ill is a matter that would appropriately be rendered by a jury in a capital case during the sentencing phase as opposed to the guilty [sic] phase. We permit the jury to rule upon this penological concern during the guilt phase in all other cases simply because they have no opportunity for input in the sentencing phase. That consideration is not present in capital cases.

Id. at 373, 572 A.2d at 1227. The Faulkner Court explained its reasoning in a footnote, stating:

> Although this Court has stated that "guilty but mentally ill" is relevant only in the penalty phase of a capital case, it is clear that the jury had already found the defendant guilty by the time the penalty phase occurs. What this Court is referring to by use of the phrase "guilty but mentally ill" are the mitigating circumstances concerning mental illness that are available to a defendant in a capital case. These mitigating circumstances include: 42 Pa.C.S. § 9711(e)(2) The defendant was under the influence of extreme mental or emotional disturbance; and § 9711(e)(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Commonwealth v. Faulkner, 528 Pa. at 57 n.7, 595 A.2d at 36 n.7. Accord Commonwealth v. Hughes, ___ Pa. ___, 639 A.2d 763 (1994) (following Faulkner).

e. While the Faulkner case provides substantial guidance on this issue there still may be some confusion because of the different procedures followed in capital cases. Under the statute, a guilty but mentally ill verdict is only available when a defendant "timely offers a defense of insanity in accordance with the Rules of Criminal Procedure" and "the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense. 18 Pa.C.S. § 314(a) (emphasis added). In Faulkner, the evidence proffered to support the defense of insanity was insufficient and was precluded during the guilt phase by the Commonwealth's motion in limine. While it appears that the jury was not instructed on the defense of insanity at the conclusion of the guilt phase of the trial, it is clear that the jury was instructed on neither the guilty but mentally ill verdict nor the defense of diminished capacity. The Supreme Court held that "[s]ince there was no evidence introduced by appellant during the guilt phase with respect to either of these issues, it was not error for the court to refuse to give the requested instructions." Id. at 75, 595 A.2d at 38. The Court did not address the statutory requirements of section 314 in reaching this result. See Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990). What is clear from the Court's decision, however, is that all of this evidence was properly admitted by the defense in mitigation during the penalty phase.

f. In Hughes, supra, the trial court found mitigating circumstance (e)(2) but not (e)(3). The Supreme Court said the trial court was in error in finding (e)(2) because the trial court misinterpreted this circumstance by holding the relevant time frame was the time of sentencing. For both (e)(2) and (e)(3), like the "guilty but mentally ill" statute, the relevant time frame is the time of the

commission of the offense. Since there was no testimony concerning the defendant's mental illness at that time the trial court incorrectly found (e)(2) to be a mitigating circumstance and could not properly find (e)(3).

D. Voluntary Intoxication, 18 Pa.C.S. § 308.

1. The Crimes Code provides:

> Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

18 Pa.C.S. § 308 (relating to intoxication or drugged condition).

2. In Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991), the defendant argued that the trial court erred in denying his request for a jury instruction on voluntary intoxication. This contention was rejected. The Supreme Court, in a unanimous opinion affirming the death penalty authored by Mr. Justice Cappy, said that to be entitled to a charge on voluntary intoxication there must be evidence that the defendant was "'overwhelmed or overpowered by alcoholic liquor to the point of losing his...faculties or sensibilities...' Commonwealth v. Reiff, 489 Pa. 12, 15, 413 A.2d 672, 674 (1980)." Commonwealth v. Tilley, supra, at 136, 595 A.2d at 580. Here, the evidence was insufficient to support that conclusion so there was no basis for the requested instruction. Accord Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993) (same); and Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993) (same). See also Commonwealth v. Faulkner, 528 Pa. 57, 70 n.5, 595 A.2d 580, 35 n.5 (1991).

   a. Tilley was followed in Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993). In Marshall, the Supreme Court acknowledged that there was "scant" evidence to indicate that the defendant was under the influence of drugs when he committed the murders. The Court noted that "the reliability of this evidence

was very minimal." However, there was "no evidence to show that [the defendant was overpowered or overwhelmed by drugs at the time of the murders." In this situation there is no basis for an intoxication defense and the trial court properly refused to instruct the jury on that defense. Id.

b. Edmiston v. Commonwealth, __ Pa. ___, 634 A.2d 1078 (1993), presented a related issue. Edmiston argued that the trial court in a non-jury trial should have convicted him of third rather than first degree murder because of his intoxication relying on section 308. The Court said: "The critical inquiry is whether the defendant was overwhelmed by an intoxicant to the point of losing his rationality, faculties or sensibilities so as to negate or lower the specific intent to kill. Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990)." Id. at ___ , 634 A.2d at 1085. The Court concluded that the Commonwealth disproved the voluntary intoxication defense beyond a reasonable doubt since the trial court was free to disbelieve the defense witnesses who testified about the defendant's intoxication and could conclude that the defendant was capable of forming the specific intent to kill required for a conviction of murder of the first degree.

XI. CHALLENGE TO PROSECUTORS DECISION TO SEEK THE DEATH PENALTY.

A. Prosecutorial Inconsistency.

It has become a tactic of defense counsel to attack the prosecutor's decision to seek the death penalty on the grounds of abuse of discretion, i.e., inconsistency. This is a constitutional challenge, and, as such the suit is usually brought in federal court, via habeas corpus. See Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889 (1976). See also Commonwealth v. Buonopane, 410 Pa. Super. 215, 599 A.2d 681 (1991) (discussed infra).

B. Therefore You Must Be Consistent!

1. Ask for death penalty no matter whether young/old-black/white - male/female-rich/poor. The imposition of the death penalty is required in first degree murder cases where aggravating circumstances outweigh mitigating circumstances, regardless of the defendant being young/old, black/white, male/female, rich/poor. The procedure, set forth in the Pennsylvania death penalty statute, 42 Pa.C.S. § 9711, and applicable case law must be followed. The defendant must first be convicted of first-degree murder. A separate sentencing proceeding is then immediately held. The Commonwealth must present evidence as to aggravating circumstances and prove at least one unanimously and beyond a reasonable doubt. The defense will then have the opportunity to present mitigating circumstances, and it must prove them by a preponderance of the evidence. Where aggravating circumstances outweigh mitigating circumstances, death is required. 42 Pa.C.S. § 9711(c)(1)(iv).

2. Do not discriminate or be capricious. See Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984). See also Commonwealth v. Buonopane, supra. In Frey, the Court held that juries and judges cannot be arbitrary and capricious in death cases under the Pennsylvania statute and the Constitution. By analogy, neither can prosecutors abuse their discretion, and the Pennsylvania Supreme Court has so held! See Commonwealth v. DeHart, 512 Pa. at 262, 516 A.2d at 670:

> Absent some showing that prosecutorial discretion is being abused in the selection of cases in which the death penalty will be sought, there is no basis for appellant's assertions

that the discretionary nature of the prosecutor's decision whether or not to seek the death penalty violates the Eighth Amendment.

See also Commonwealth v. Buonopane, supra.

3. But do not spell out your internal office policy in writing. If you have to declare why you're seeking death in a particular case, state something like this:

> I am merely following the law of Pennsylvania. In my judgement, if sufficient evidence exists to convince a jury beyond a reasonable doubt that an aggravating circumstance as set forth in the Pennsylvania statute and caselaw can be proven, I will ask the jury for the death penalty upon a conviction of first degree murder.

4. Under Commonwealth v. Buonopane, supra, a trial court has no authority to compel a prosecutor to explain his exercise of discretion in seeking a death penalty in the absence of a threshold showing by a defendant of "purposeful abuse." To allow a hearing in the absence of such a showing violates the separation of powers doctrine. Id. at 221, 599 A.2d at 684.

5. The basis for your charging decision as a prosecutor ought to be fundamentally fair and consistent with the law.

6. The motivation for your charging decision must be grounded in the strength of your case and the likelihood that a jury would impose the death penalty if it convicts. In other words, motivation based on race, wealth, age, friendship involving the defendant, or giving in to an unreasonably "sweet" plea bargain in a similar case, or some other arbitrary factor will surely come back to haunt you.

7. The words of Mr. Justice White of the U.S. Supreme Court in Gregg v. Georgia, 428 U.S. at 225, 96 S.Ct. at 2949, 49 L.Ed.2d at 903, have been adopted by the Pennsylvania Supreme Court in Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986):

> Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than

> the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless...

Id. at 261-62, 516 A.2d at 670. See also Commonwealth v. Buonopane, 410 Pa. Super. 215, 219, 599 A.2d 681, 683 (1991) (citing and relying on Gregg and DeHart).

8. In McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the U.S. Supreme Court reaffirmed that prosecutors have broad discretionary powers in seeking the death penalty in individual cases. The Supreme Court dissenters in McCleskey argued that the "discretion afforded prosecutors and jurors in the Georgia capital sentencing system violates the Constitution by creating opportunities for racial considerations to influence criminal proceedings." Id. at 323, 107 S.Ct. at 1783, 95 L.Ed.2d 298. The dissent further contended that in Georgia (as in Pennsylvania) "no guidelines govern prosecutorial decisions...." Id. at 324, 107 S.Ct. at 1783-84, 95 L.Ed.2d at 299. Justice Powell, in writing for a 5-4 majority, astutely pointed out that this very "discretion in a capital punishment system is necessary to satisfy the Constitution." Id. at 313 n.37, 107 S.Ct. at 1778 n. 37, 95 L.Ed.2d at 292 n.37.

> Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case.... Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice.

McCleskey v. Kemp, 481 U.S. at 313 n.37, 107 S.Ct. at 1778 n.37, 95 L.Ed.2d 262, at 293 n.37. See also Commonwealth v. Buonopane, supra (citing McCleskey).

9. The United States District Court for the Northern District of Illinois struck down a death sentence finding that the Illinois death penalty statute violated the Eighth Amendment's proscription against cruel and unusual punishment because of the lack of adequate legislative guidelines for prosecutors on when to seek or not seek the death penalty. United States ex rel. Silagy v. Peters, 713 F.Supp. 1246 (C.D. Ill. 1989). The court said that leaving the decision to a prosecutor who believes he has sufficient evidence to have the sentencer consider a death sentence will not "minimize the risk of wholly arbitrary and capricious action unless the exercise of discretion by the prosecutor is aided, directed and limited by guidelines prescribed by the legislature. The Court of Appeals for the Seventh Circuit reversed this decision and reinstated the death sentence. Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990). In reaching this conclusion, the court relied in large part on Justice White's opinion in Gregg v. Georgia, supra, cited favorably on this issue by the Pennsylvania Supreme Court in Commonwealth v. DeHart, supra. The Court of Appeals said that the prosecutor's decision in each case was guided by his or her determination of whether or not he or she would be able to establish one or more of the enumerated aggravating factors set forth in the Illinois sentencing statute beyond a reasonable doubt. The Pennsylvania statutory scheme provides similar guidance. It is furthered by Rule 352 of the Pennsylvania Rules of Criminal Procedure, Pa.R.Crim.P. 352, which requires pretrial written notice of the aggravating circumstance or circumstances upon which the prosecutor intends to rely in seeking the death penalty in a particular case.

10. In Commonwealth v. Buonopane, 410 Pa. Super. 215, 599 A.2d 681 (1991), the Superior Court noted that the Pennsylvania Supreme Court has held that "a trial court may not make a pretrial determination as to the capital or noncapital nature of a murder prosecution." Id. at 217-18, 599 A.2d at 682. Accord Commonwealth v. Scarfo, 416 Pa. Super. 329, 611 A.2d 242 (1992). In Buonopane, the court determined that the defendant had "failed to show the prosecution abused its discretion in deciding to seek the death penalty." Id. at 220, 599 A.2d at 684. The court observed:

> Testimony [by the prosecutor] revealed the prosecution typically considers the statutory

> aggravating circumstances and any known mitigating circumstances. Considerations such as race, gender, national origin and religion play no role in the decision making process.

Id. at 220, 599 A.2d at 684. The court held that the prosecutor had "no inherent burden to prove pretrial that aggravating factors exist." Id. at 222, 599 A.2d at 684. It was improper, ruled the court, to require the prosecutor "to testify, without any offer of proof or legal basis from the defense, regarding the procedures used by the district attorney in evaluating murder cases for presentation as capital or noncapital offenses." id. at 221, 599 A.2d at 684. Before such compelled testimony is required the defense must make a threshold showing of purposeful prosecutorial abuse. For the trial court to hold a hearing in the absence of such a showing "violates the constitutional principle of separation of powers." Id. at 221, 599 A.2d at 684.

C. Can The Prosecutor Recommend That The Jury Impose A Life Sentence At The Sentencing Proceeding?

1. In State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979), the North Carolina Supreme Court held that the North Carolina statute (which is similar to Pennsylvania's statute) did not permit the State to recommend to the jury during the sentencing hearing a sentence of life imprisonment, when the state has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt.

2. In another North Carolina case, State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980), where there was evidence from which the jury could have found one or more aggravating circumstances beyond a reasonable doubt, the North Carolina Supreme Court chastised the trial judge, the district attorney, and the defense counsel for entering into an agreement, prior to trial, not to seek the death penalty, to eliminate voir dire examination of jurors with respect to the death penalty, to eliminate the separate sentencing proceeding on the death penalty, and, by consent, to fix the punishment at life imprisonment should the jury convict the defendant of murder in the first degree. The North Carolina Supreme Court held that the judge, district attorney, and defense counsel "had no legal authority whatsoever" to do what they did, and, it warned that "these unauthorized 'homemade' procedures must

not recur." Id. at 312, 261 S.E.2d at 867. Prosecutors Beware!

3. In a related context, the Pennsylvania Supreme Court, in a case decided before the enactment of the present death penalty procedures statute, reasoned that "[i]t may well be desirable or preferable, at least where the prosecution concedes the absence of aggravating circumstances and the court agrees, that the possibility of the death penalty be removed prior to trial..." Commonwealth ex rel. Fitzpatrick v. Bullock, 471 Pa. 292, 301-2, 370 A.2d 309, 313 (1977). Bullock was cited favorably and followed in Commonwealth v. Buonopane, supra, at 218, 599 A.2d at 682, which held that a trial court generally lacked the authority to examine a prosecutor's discretion in bringing a capital homicide charge. Bullock was likewise followed in Commonwealth v. Scarfo, 416 Pa. Super. 329, 611 A.2d 242 (1992).

4. COMMENT: Despite the broad discretion given to prosecutors in deciding whether to seek the death penalty, I reiterate that a prosecutor must be consistent, competent in his judgment, and motivated to seek the death penalty in accordance with the dictates of Gregg v. Georgia, supra, Commonwealth v. DeHart, supra, and Commonwealth v. Buonopane, supra. Adhere to them and you will be true to your oath and consistent with the law.

D. Double Jeopardy.

1. In Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), the United States Supreme Court ruled that a defendant who entered into a plea agreement to a second degree murder charge, and who subsequently violated the agreement's terms by refusing to testify at a re-trial, was not protected by the Double Jeopardy Clause from being subsequently charged with first degree murder, convicted, and sentenced to death.

2. COMMENT: The lesson to the defendant here is do not play games with the prosecutor.

XII. JURY MUST FIND SPECIFIC INTENT TO KILL.

A. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), forbids the imposition of the death penalty on "one...who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place, or that lethal force will be employed." Enmund v. Florida, 458 U.S. at 797, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151.

B. Enmund was narrowed by Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), where the Court held that a defendant's major participation in a felony that resulted in a murder, combined with his mental state of reckless indifference to human life, was sufficient to satisfy the culpability requirement for capital punishment, even though the defendant neither specifically intended to kill the victims nor personally inflicted the fatal wounds. See also Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) (major participation in felony of attempted robbery satisfied standards of Enmund and Tison); Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991) (since defendant convicted of first degree, intentional murder rather than felony murder, minimum culpability requirement of Tison already satisfied); and Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993) (relying on Chester, supra; since jury had already found appellant guilty of murder of the first degree and robbery before it considered the appropriate penalty "a Tison charge was not relevant or warranted").

C. In some states, e.g., Florida, Mississippi, there was a problem where a verdict of guilty of murder covers felony murder and murder by an accomplice, as well as intentional murder. This is not a problem in Pennsylvania. Pennsylvania has intentional, first degree murder. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992). Felony murder is second degree and there is no death penalty attached to it. See Commonwealth v. Chester, supra; and Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991). Where a person other than the defendant is the trigger man, a jury can return a felony murder as well as a first degree murder verdict: e.g. contract killings. But the jury or the trial judge or the state appellate court can make the specific intent factual findings required under Enmund. So held the United States Supreme Court in Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

XIII. EVIDENCE AT SENTENCING PROCEEDING -- 42 Pa.C.S. § 9711(a)(2).

1. Section 9711(a)(2) provides:

> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating and mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

42 Pa.C.S. § 9711(a)(2)

a. In construing this provision the Pennsylvania Supreme Court has said: "In the sentencing hearing, the court may admit evidence as to any matter that it deems relevant and admissible on the question of the sentence to be imposed, and the evidence shall include matters relating to any of the aggravating or mitigating circumstances." Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (challenged evidence properly admitted as relevant to an aggravating circumstance).

2. "[N]othing in the [death penalty] statute says that the Commonwealth's case-in-chief [at the penalty phase] may only prove aggravating circumstances and that it must save for rebuttal its disproof of mitigating circumstances that the defense is obviously going to present and argue." Frey v. Fulcomer, 974 F.2d 348, (3rd Cir. 1992) (held proper for Commonwealth to rebut anticipated "duress" or "domination" mitigation).

3. All evidence relevant to the defendant's character, both good and bad, is admissible at the sentencing proceeding. See Commonwealth v. Baker, 532 Pa. 121, 615 A.2d 23 (1992), quoting Commonwealth v. Beasley, 505 A.2d 279, 479 A.2d 460 (1984).

4. "[The] general rules regarding admissibility of photographs are as applicable to the sentencing hearing as they are to the guilt phase of trial. See Commonwealth v. Marshall, 523 Pa. 556, 572, 568 A.2d 590, 598 (1989)." Commonwealth v. Young, supra, at ___, 637 A.2d at 1321. In Young, a case where the Supreme Court has previously vacated a death sentence and remanded only for a new sentencing hearing, the Court upheld admission of black and white photos because they served to familiarize the jury with the murder scene and the facts and circumstanc-

es of the crime; they corroborated the testimony of one of the victims (who survived); and they were relevant to an aggravating circumstance. The Supreme Court noted that the trial court restricted the time that the jury had the photos, did not allow them to go out with the jury during deliberations, and gave appropriate cautionary instructions.

5. This provision clearly applies to evidence of mitigating circumstances. Commonwealth v. Young, supra. In Young, the Court said:

> A defendant may present evidence of mitigating circumstances at the sentencing hearing, but the evidence must be relevant and admissible. 42 Pa.Cons.Stat.Ann. § 9711(a)(2). Implicit in the fact that the defendant bears the burden of proving mitigating circumstances is the understanding that the jury must assess the credibility of such evidence. Commonwealth v. Abu-Jamal, 521 Pa. 188, 213, 555 A.2d 846, 858 (1989). In order for this to occur, the Commonwealth must have the opportunity "to challenge the veracity of the facts asserted and the credibility of the person asserting those facts, whether the person is a witness or the defendant."

___ Pa. at ___, 637 A.2d at 1322. In Young, the Supreme Court held that the trial court properly excluded proffered mitigating evidence of a defendant because it was inadmissible hearsay.

6. Evidence as to morality of death penalty is not admissible in the penalty proceedings. In Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986), the defendant sought investigative funds for the enlistment of experts to testify at the sentencing hearing concerning the moral and social effects of capital punishment. The Pennsylvania Supreme Court held that the judge properly refused the request for funds because such evidence would not be admissible. Chief Justice Nix wrote:

> This evidence was directed more to the morality of the death penalty in general than to the question as to its appropriateness in this case. To allow the jury to make its own judgment that the death sentence is never to be permitted would represent jury nullification. Id. at 252, 516 A.2d at 665. But the Trial Judge did permit a minister to testify to the effect that capital punishment is immoral. Thus, the prosecution was permitted to argue

in closing that a death verdict would have a legitimate deterrent effect.

Id. at 257, 516 A.2d at 667. Accord Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992).

7. For a discussion of "victim impact" evidence in a Pennsylvania sentencing proceeding see "XVII. Sympathy Plea 2. Sympathy Plea from Family COMMENT and Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), infra.

XIV. SPECIFIC AGGRAVATING CIRCUMSTANCES - 42 Pa.C.S. § 9711(d).

A. **AGGRAVATING CIRCUMSTANCE #1:** THE VICTIM WAS A FIREMAN, PEACE OFFICER, PUBLIC SERVANT CONCERNED IN OFFICIAL DETENTION, AS DEFINED IN 18 Pa.C.S. § 5121 (RELATING TO ESCAPE), JUDGE OF ANY COURT IN THE UNIFIED JUDICIAL SYSTEM, THE ATTORNEY GENERAL OF PENNSYLVANIA, A DEPUTY ATTORNEY GENERAL, DISTRICT ATTORNEY, ASSISTANT DISTRICT ATTORNEY, MEMBER OF THE GENERAL ASSEMBLY, GOVERNOR, LIEUTENANT GOVERNOR, AUDITOR GENERAL, STATE TREASURER, STATE LAW ENFORCEMENT OFFICIAL, LOCAL LAW ENFORCEMENT OFFICIAL, FEDERAL LAW ENFORCEMENT OFFICIAL OR PERSON EMPLOYED TO ASSIST OR ASSISTING ANY LAW ENFORCEMENT OFFICIAL IN THE PERFORMANCE OF HIS DUTIES, WHO WAS KILLED IN THE PERFORMANCE OF HIS DUTIES OR AS A RESULT OF HIS OFFICIAL POSITION, 42 Pa.C.S. § 9711(d)(1).

1. In Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), the defendant shot and killed a Philadelphia police officer who responded to a call that a man with a gun was in a restaurant. In Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983), a police officer was shot to death after he pulled over the car being driven by defendant Travaglia and occupied by co-defendant Lesko who had both just stolen the car and its contents from their owner whom they had drowned in a lake a short time before being pulled over by the officer.

2. In Commonwealth v. Gibbs, 403 Pa. Super. 27, 588 A.2d 13 (1991), aff'd. 533 Pa. 539, 626 A.2d 133 (1993), the Court held that a security guard acting pursuant to his appointment by the court under the "Night Watchmen's Act," 53 P.S. § 3704, is a "peace officer" for purposes of section 9711(d)(1).

3. In Commonwealth v. Flemings, 421 Pa. Super. 110, 617 A.2d 749 (1992), the Superior Court construed the section of the Pennsylvania Crimes Code which makes the misdemeanor simple assault into the felony aggravated assault when the victim is a "police officer...in the performance of duty." 18 Pa.C.S. § 2702(a)(3). The Court held that status as a "police officer" is an element of the offense and that the trial court erred in refusing to give an instruction (requested by the defendant) that before a person could be convicted under this provision it must be shown that he knew that the victim was a police officer. In Flemings, the victims were working undercover and there was disputed testimony as to whether the defendant knew they were police officers. The court held that

"[w]hen the facts call into question whether the defendant knew his victim was a police officer, the jury must be instructed to decide whether the defendant had the requisite knowledge to convict based on the evidence presented." The court said that an undercover officer "has only to identify himself as a police officer to be protected under section 2702(a)(3)." Given the similarity between section 2702(a)(3) and aggravating circumstance (d)(1) it might be argued that this section only applies where the defendant knew the victim was one of the enumerated officials and that the official was killed in the performance of his or her duties. Circumstantial evidence, such as the police officer being in uniform when he or she was killed, would suffice to establish the requisite knowledge. See Flemings, supra.

B. **AGGRAVATING CIRCUMSTANCE #2:** THE DEFENDANT PAID OR WAS PAID BY ANOTHER PERSON OR HAD CONTRACTED TO PAY OR BE PAID BY ANOTHER PERSON OR HAD CONSPIRED TO PAY OR BE PAID BY ANOTHER PERSON FOR THE KILLING OF THE VICTIM, 42 Pa.C.S. § 9711(d)(2).

1. In Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984), the defendant confessed that he hired another to kill his estranged wife. In Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987), this aggravating circumstance was supported by testimony of defendant's cellmate that he overheard defendant tell other inmates that "he was paid" to kill the victim by the victim's wife (death sentence reversed for other reasons). See also Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989).

2. This circumstance does not require a specified amount in the agreement. Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990). Evidence showed that the defendant was employed as a middleman for a drug dealer. When one of the dealer's pushers was in arrears on his payments to the dealer, he told the defendant to "get on the job" whereupon the defendant killed the victim. This evidence was sufficient to establish this circumstance. "The consideration may be what suits the purpose of each, money or services. Here the jury could accept that since [the defendant] worked as a drug middleman for [the dealer] and that murder was part of the job description." Id.

3. In Commonwealth v. Burgos, 530 Pa. 473, 610 A.2d 11 (1992), the Supreme Court said that "[t]he plain language of the statute is limited to instances when a person pays or is paid to kill or contracts to kill another person based upon being paid or making payments." Id. at 480, 610 A.2d at 15. The statutory language makes killing for hire, not killing for pecuniary gain, an aggravating circumstance. The trial court erred in submitting this circumstance to the jury under the prosecution's theory that the defendant contracted with an insurance company when he purchased a policy on his wife's life and was motivated to kill her in order to obtain the insurance proceeds.

4. In Commonwealth v. Gibbs, 403 Pa. Super. 27, 588 A.2d 13 (1991), the Superior Court held that this aggravating circumstance is inapplicable where the defendant contracts to kill one individual and kills someone else whom he had not contracted to kill. The court felt bound to construe the statute strictly and found that its plain language precluded application to an unintended victim. The court refused to apply a "transferred intent" theory. In affirming this decision the Supreme Court said: "The plain language of the statute does not include an unintended victim. Rather, the clear language requires that the defendant was to be paid to kill the victim. The word 'victim' clearly and logically means the person who was killed." Commonwealth v. Gibbs, 533 Pa. 539, 626 A.2d 133 (1993).

5. In the companion cases of Commonwealth v. Hackett, 534 Pa. 210, 627 A.2d 719 (1993), and Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993), the Court found the evidence sufficient to support a finding of this circumstance, despite the fact that the primarily intended victim survived the attack. In these cases, the Court reiterated its holding in Gibbs, supra, but concluded that the defendants, Hackett and Spence, "enlisted an assassin to kill both victims, not just [the primary one]." Of interest here is that the person(s) whom Hackett and Spence contracted with to kill the victims did not participate in the killings. They refused to participate and Hackett and Spence (along with other confederates) killed the victim themselves. The Court noted:

> As a preliminary matter, the record reflects that Spence [and Hackett] entered a contract to kill by paying another person or

> contracting to pay another person for the killing of the victims. [Hackett asked Edgar Torres to find someone to do the killing and offered to pay Torres a sum of money for the murder.] Spence [and Hackett then] contracted with David Carter to kill the victims and paid him a down payment on a VCR. Thus, the record clearly reflects, as the trial court judge found, that a contract to kill existed for purposes of 42 Pa.C.S. § 9711(d)(2).
>
> One might argue, even though Spence [and Hackett do] not, that § 9711(d)(2) should not apply where the acceptor/contractee refuses to perform the contract and, as a result, the offeror/contractor then performs the contract. The plain meaning of § 9711(d)(2) is that once that contract for the killing of the victim has been entered, § 9711(d)(2) is triggered provided causation exists. There is no requirement that the contractee perform the contract as long as the contract to kill directly caused and/or resulted in the killing. Here Spence [and Hackett] entered into a contract to kill with Carter and gave Carter a VCR as consideration for the contract. Carter's refusal to perform the contract to kill directly caused and/or resulted in the killing of the victims by Spence [and Hackett]. Section 9711(d)(2) was properly applied in this case.

Commonwealth v Hackett, supra, at 225 n.8, 627 A.2d at 726 n.8, and Commonwealth v. Spence, supra, at ___ n.9 627 A.2d at 1184 n.9.

a. Following Hackett and Spence, the Supreme Court held in Commonwealth v. Mayhue, ___ Pa. ___, 639 A.2d 421 (1994), that section 9711(d)(2) requires "a causal link between the contract to kill and the death of the victim." The Court held that the evidence in Mayhue was insufficient to support this aggravating circumstance since "none of the three contracts to kill [the victim] caused any harm whatsoever to the victim."

6. In Commonwealth v. Moran, ___ Pa. ___, 636 A.2d 612 (1993), the defendant, after killing the victim, purchased jewelry and deposited money into bank accounts. At the time the defendant was unemployed. The Supreme Court, despite the Common-

wealth's argument to the contrary, held that this evidence was sufficient to prove this "contract killing" aggravating circumstance since reasonable persons could believe that the monies could have been payment for the victim's murder.

C. **AGGRAVATING CIRCUMSTANCE #3:** THE VICTIM WAS BEING HELD BY THE DEFENDANT FOR RANSOM OR REWARD, OR AS A SHIELD OR HOSTAGE, 42 Pa.C.S. § 9711(d)(3).

1. In Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992) (opinion in support of affirmance), three members of the Supreme Court specifically held that the acts of kidnapping the victim and then questioning the victim's value to his parents and demanding his parents' telephone numbers were sufficient to support this circumstance. The other three members of the Court found that either one or two of the other aggravating circumstances found by the jury were not supported by sufficient evidence. None voiced any disagreement with the conclusion this aggravating circumstance. The Chief Justice, in his opinion in support of vacating sentence of death, relied on his opinion in support of reversal filed in the companion case of Commonwealth v. Pelzer, infra, wherein he stated that there was evidence offered to sustain the finding of this aggravating circumstance.

2. In Commonwealth v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992) (opinion in support of affirmance), a companion case to Daniels, supra, the same three members of the Court rejected a challenge to the evidence supporting this circumstance based on Pelzer's argument that while ransoming the victim was contemplated the idea was quickly abandoned. The three justices found the following evidence sufficient to support this circumstance: co-defendant's statements and testimony that part of the plan was to seek ransom from the victim's parents; the plan was communicated to the victim; the victim was ordered to disclose his parents' phone numbers; and the defendant's statement that it was planned to "kidnap the boy for money." As in Daniels, the three justices said that "[w]hether or not they communicated a ransom demand or receive a ransom payment is irrelevant." None of the other justices disagreed with this statement concerning aggravating circumstance (d)(3). See Commonwealth v. Pelzer, supra (opinion in support of vacating sentence of death by Nix, C.J.).

D. **AGGRAVATING CIRCUMSTANCE #4:** THE DEATH OF THE VICTIM OCCURRED WHILE DEFENDANT WAS ENGAGED IN THE HIJACKING OF AN AIRCRAFT, 42 Pa.C.S. § 9711(d)(4).

E. **AGGRAVATING CIRCUMSTANCE #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, 42 Pa.C.S. § 9711(d)(5).

1. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982). Zettlemoyer killed the victim to prevent him from testifying in a criminal proceeding. Note: the Court said it is immaterial that the victim was not an eyewitness; it was sufficient that he was a witness; but, it must not be a misdemeanor criminal proceeding. It has to be a felony, which, in the Zettlemoyer case, it was - burglary and robbery. See also, Commonwealth v. Lark, 518 Pa. 290, 543 A.2d 491 (1988).

2. Evidence that the defendant read the affidavit of probable cause wherein the victim/witness named him as the perpertarator of a burglary for which the defendant was to stand trial, along with the defendant's statement to another person, admitted at the trial, that he had to get rid of the victim/witness, and evidence that the victim/witness was subpoenaed by the prosecution and granted immunity so he could testify against the defendant at a hearing on the burglary was sufficient to establish this circumstance. Commonwealth v. Kindler, ___ Pa. ___, 639 A.2d 1 (1994).

3. Some prosecutors have tried to use this circumstance to cover the killing of an eyewitness to offenses occurring during the course of his or her own murder, such as rape, robbery, burglary, or, another murder. Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987); and Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986). However, Courts have rejected this theory. Commonwealth v. Crawley, supra, and Commonwealth v. Christy, supra. For example, in Commonwealth v. Crawley, the prosecution argued that at least one witness was murdered because that person might have witnessed another murder in the house. The Supreme Court rejected this theory holding that the burden of the Commonwealth will not be met by simply showing that an individual who witnessed a murder or other felony committed by a defendant was also

killed by the defendant. The Court stated that the Commonwealth had to prove that the victim was a prosecution witness who was killed to prevent his testimony in a pending criminal proceeding. Another example is Commonwealth v. Christy where the prosecution argued that the victim, a security guard, was shot a third and fatal time to prevent his being a witness against the defendant, who was surprised by the security guard in the course of a burglary. The Pennsylvania Supreme Court quickly dismissed this argument, writing:

> In this case, there was no evidence to establish that the (security guard) was, or ever would have been, a prosecution witness, or that the defendant killed him to prevent his testimony. The Commonwealth did present evidence... that the defendant had made a general threat against any possible witnesses against him; however, this was not specific enough to prove beyond a reasonable doubt that the defendant killed the security guard to prevent his testimony in a criminal proceeding.

Commonwealth v. Christy, 511 Pa. at 509, 515 A.2d at 842.

4. Similarly, in Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (1987), the Court rejected the prosecution's argument that the defendant's confession, wherein he stated that he killed the victims because of his concern that they could later identify him, proved aggravating circumstance number 5. The Court reiterated its holding in Crawley, that, to establish this aggravating factor, "evidence must be introduced to establish that the victim was a prosecution witness who was killed to prevent his testimony in a pending grand jury or criminal proceeding." Id. at 448, 532 A.2d at 817. In Caldwell, explained the Court, "no grand jury or criminal proceeding involving an offense to which either of the victims was a prosecution witness was pending at the time the murders were committed. Id.

COMMENT: In circumstances such as those outlined in Crawley, Caldwell, and Christy, prosecutors should use other aggravating circumstances to cover the particular case. E.g., multiple murder, as in Crawley, supra, or killing in the perpe-

tration of a felony which the prosecution successfully and properly did in Christy. Id. at 509, 515 A.2d at 842.

5. But a different result inures where the defendant specifically plans and intends to kill potential witnesses. In Commonwealth v. Appel, 517 Pa. 529, 539 A.2d 779 (1988), the Court adopted a less restrictive interpretation of aggravating circumstance number 5. In Appel, the defendant worked out a plan to rob a bank. As a part of that plan, the defendant enlisted the aid of a friend, "believing that his plan would require at least two persons in order to ensure that all persons who might be in the bank at the time of the robbery could be executed before an alarm could be pressed." Id. at 534, 539 A.2d at 782. The defendant and his friend even practiced for the robbery by shooting at "human silhouette targets." Id. at 535, 539 A.2d at 782. During the actual robbery, and in accord with his master plan, the defendant shot and killed two bank tellers, shot at but missed the branch manager, and shot and wounded a customer. The Commonwealth argued and the jury found that this evidence was sufficient to prove aggravating circumstance number 5. The Supreme Court agreed, holding that the evidence showed directly that the "predesigned purpose for the killings was to eliminate the potential witnesses in a prosecution against appellant and his accomplice." Id. at 537-38 n.2, 539 A.2d at 784 n.2. The Court distinguished this case from, and clarified the meaning of, its prior decisions in Caldwell and Crawley. The key factor in proving this aggravating circumstance, explained the Court, was "the fully formed intent prior to the event to kill a potential witness ..." Commonwealth v. Appel, supra at 537-38 n.2, 539 A.2d at 784 n.2. This factor was absent in both Caldwell and Crawley. Thus, there is no requirement that at the time of the killing the victim is a potential witness in a pending criminal proceeding, if the killer's fully formed intent to kill a witness is established by direct, rather than by circumstantial, evidence. Id. (It should be noted that the defendant in Appel expressed his wish to be executed virtually from the time he was apprehended. He filed no brief in the Supreme Court for purposes of the automatic appeal provided by statute in all death penalty cases. If the Supreme Court strictly adhered to Caldwell and Crawley it would have had to strike this aggravating factor because there was

no pending criminal proceeding against Appel when he killed his several victims.)

6. The Pennsylvania Supreme Court has shown increased willingness to literally apply this circumstance. Relying on Appel, the Court has held that a jury need only determine from the direct evidence that the killing was a result of an intention to eliminate a potential witness. Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989). The defendant's statement immediately after the killing, that he was tired of leaving witnesses behind, "provided direct evidence of his intention to eliminate potential witnesses and was sufficient to establish this circumstance. Id. Likewise, direct evidence of a defendant's intention was found in his confessions wherein he said he decided to kill the victim as soon as the victim saw the defendant burglarizing her apartment. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990). In Henry, the Court explained that it is irrelevant when the intent to eliminate a witness is formed. It need not be formed before the commission of the crime which the victim witnesses. Evidence that a victim pleaded for her life in exchange for not reporting the defendant's crime demonstrated the defendant's intent to eliminate an identifying witness and was sufficient to establish this circumstance. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989).

7. Appel was followed in two cases involving co-defendants, Commonwealth v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992) (opinion in support of affirmance), and Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992) (opinion in support of affirmance), aff'd on reargument, ___ Pa. ___, ___ A.2d ___ (1994) (No. 74 E.D. Appeal Docket 1990; 7/7/94) (per curiam opinion adopting previously filed opinion in support of affirmance) In Pelzer, the three justices of the evenly divided court who voted to affirm the death sentence wrote that the defendant's intention to eliminate the victim as a potential witness was established through evidence that the defendant decided to kill the victim because he could identify the defendant's house "where the criminal episode began" and through his co-defendant Daniels' testimony that the defendant (Pelzer) told Daniels that "they 'got to get rid of him because he knows my mom's house.'" Chief Justice Nix, who voted to vacate Pelzer's and Daniels' sentences of death because he found the

evidence insufficient to support one of the other aggravating circumstances found by the jury (i.e. torture), stated that there was evidence offered to sustain the jury's finding of aggravating circumstance (d)(5). Id. at 230, 612 A.2d at 405 (opinion in support of vacating sentence of death by Nix, C.J.). In Daniels, the Court, per curiam on reargument found direct evidence to support the jury's finding in the defendant's own testimony that he and one of his cohorts discussed the need to "get rid of" the victim because he knew where they lived and because the defendant was concerned that the victim would "'tell' if he were released." Even if killing the victim was partially motivated by something other than eliminating him as a witness in a criminal proceeding the jury's finding was still supported by the direct evidence. Again, Chief Justice Nix in dissent voiced no disagreement with this conclusion. Instead, he voted to vacate the sentence of death based upon his opinion in support of vacating the death sentence filed in Pelzer, supra. Commonwealth v. Daniels, supra, at 230-1, 612 A.2d at 405 (opinion in support of vacating sentence of death by Nix, C.J.).

8. Evidence that defendant killed a two year old was insufficient to establish this circumstance. Commonwealth v. Marshall, supra.

9. A jury instruction on this aggravating circumstance must include a statement concerning the element of intent to eliminate a witness. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990).

F. **AGGRAVATING CIRCUMSTANCE #6:** A KILLING COMMITTED IN THE PERPETRATION OF A FELONY, 42 Pa.C.S. § 9711(d)(6).

1. This aggravating circumstance is constitutional on its face. Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989). It is not overbroad. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992). It does not allow imposition of the death penalty for second degree, felony-murder. Id.

   a. In Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993), the Court rejected a series of vagueness challenges to this aggravating circumstance. Edmiston argued "that the term 'felony' is unconstitutionally vague because the term 'felony' is not limited to dangerous felonies and because every murder is by definition committed in the perpetration of a

felony, namely aggravated assault." The Court held that the term "felony" was not vague on the facts presented, observing that it did not address arguments in the abstract but did so, instead, on the facts presented. Here, the murder of the child victim occurred during the commission of rape and involuntary deviate sexual intercourse. "Also, these felonies are not lesser included offenses of murder, as is aggravated assault, but are separate and distinct from the crime of murder." Id., at ___, 634 A.2d at 1090. The Court concluded that '[t]he language used in the statute is specific and does not enable an arbitrary or capricious decision by a jury." Id.

2. The Pennsylvania Sentencing Code does not specify which felonies are included in this aggravating circumstance. This lack of specificity was challenged in Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986), on the grounds that the legislature intended to limit the applicability of this aggravating circumstance to only those six felonies specified in the Crimes Code defining second degree murder, 18 Pa.C.S.A. § 2502(b) and (d), i.e., robbery, rape, deviate sexual intercourse, arson, burglary, kidnapping. Unfortunately for DeHart, he was charged with the commission of murder in the course of robbery and burglary, felonies specified for second degree murder. Since he was convicted of first degree (specific intent) murder, and robbery and burglary, the Supreme Court held that even if he was correct he was not entitled to relief because his challenge ran afoul of the "fundamental principle of constitutional law that a challenge to a statute may not be raised in the abstract but must find its basis in an injury to the party seeking to have the enactment declared constitutionally infirm." Id. at 260, 516 A.2d at 669. Accordingly, based on DeHart, a prosecutor can properly use one or more of the six felonies specified in the definition of murder of the second degree in the Crimes Code to support a death penalty prosecution based on this aggravating circumstance. The statute does not limit this aggravating factor to those six felonies, however.

   a. In Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990), the Supreme Court, in rejecting a claim that the word "felony" as used in this aggravating circumstance is unconstitutionally vague, said "it is adequately

defined by reference to our Crimes Code which specifically designates those crimes which are felonies. 18 Pa.C.S. § 101 et seq." In Basemore, the victim's murder occurred during a robbery/burglary. The Court's holding, however, would apply to murders of the first degree committed during the perpetration of any crime defined as a felony in the Crimes Code. This would also include non-Crimes Code felonies. See 18 Pa.C.S. §§ 106(b) and (e), and 107(a).

3. In DeHart, supra, the Pennsylvania Supreme Court also rejected the argument that there was a "confusing similarity" between this aggravating circumstance and second degree murder. The Court noted that first degree murder requires specific intent to kill, and that, in contrast, the intent necessary to establish second degree murder is "constructively inferred from the malice incident to the perpetration of an underlying felony." Id. at 261, 516 A.2d at 669. Under the Pennsylvania statute, then, a first degree murder committed in the perpetration of a felony is not only a murder of a higher degree (than second degree), it is made further culpable by the commission of the accompanying felony. Id. at 261, 516 A.2d at 669-70. Accord Commonwealth v. Wharton, supra, and Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991).

4. Where the trial court adequately instructs the jury on the phrase "while in the perpetration of a felony" during the guilt phase of a capital trial, there is no error in failing to reinstruct the jury on that phrase during the penalty phase. Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991).

5. In Commonwealth v. Kindler, ___ Pa. ___, 639 A.2d 1 (1994), the defendant clubbed the victim, placed him in a car and drove him seven miles to throw his body into a river. The defendant was convicted of kidnapping based on this evidence. Since the defendant's plan included disposal of the victim's body in this manner, this evidence was sufficient to establish that the victim's murder was committed in the perpetration of the kidnapping and satisfied this aggravating circumstance.

6. In Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993), the Court held that acts before and after the rape were so close in time as to be

considered part of the felony for purposes of this circumstance.

7. Examples of death penalties upheld for first degree murder in the perpetration of a felony are:

a. Arson (Endangering Persons) - Commonwealth v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987) (fact that arson endangering persons, 18 Pa.C.S. § 3301(a)(1), was the means by which the defendant intentionally killed his mother (and was the basis for his first degree murder conviction) did not preclude Commonwealth from relying on this felony at the penalty phase to establish this aggravating circumstance); Commonwealth v. Pierce, ___ Pa. ___, ___ A.2d ___ (1994) (1994) (No. 20 Capital Appeal Docket; 7/1/94) (same; this circumstance applied in this case because defendant chose to commit murder in the first degree by means of arson, a felony).

b. Burglary - Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986); Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990).

c. Involuntary Deviate Sexual Intercourse - Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990).

d. Kidnapping - Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984); Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991); Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991) (Commonwealth must prove either removal of the victim a substantial distance or confining the victim for a substantial period; here Commonwealth proved the former; looked to 18 Pa.C.S. § 2901 (relating to kidnapping) to define applicable felony). Commonwealth v. Kindler, ___ Pa. ___, 639 A.2d 1 (1994), (defendant incapacitated victim and drove him seven miles to dispose of his body); Commonwealth v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992); Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992); Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992). See Commonwealth v. Aulisio, 514 Pa. 84, 522

A.2d 1075 (1987), where the court found the evidence of either removal of victim a substantial distance or confinement insufficient.

e. Rape - Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987); Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986); Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989); Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992); Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993).

f. Robbery - Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987); Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986); Commonwealth v. Baker, 511 Pa. 1, 511 A.2d 777 (1986); Commonwealth v. Appel, 517 Pa. 529, 539 A.2d 779 (1988); Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81 (1988) ("while in the perpetration of a felony" interpreted for robbery as underlying felony, with reference to the robbery statute, 18 Pa.C.S. § 3701(2), to include the time up to the fleeing from the scene after murdering the robbery victim); Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904 (1989); Commonwealth v. Wallace, 522 Pa. 297, 561 A.2d 719 (1989); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v. Morris, 522 Pa. 533, 564 A.2d 1226 (1989); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990); Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991); Commonwealth v. Rollins, 525 Pa. 335, 580 A.2d 744 (1990); Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991); Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992); Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992), Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992).

g. Robbery, Burglary - Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986); Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986); Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1989); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990).

G. **AGGRAVATING CIRCUMSTANCE #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, 42 Pa.C.S. § 9711(d)(7).

1. This section is not unconstitutionally vague. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992).

2. Examples

a. Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764 (1986) (husband wanted to kill wife so he burned down the home; daughter and mother-in-law also killed in fire).

b. Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986) (defendant burglarized and robbed a couple in their apartment, threatened to rape and did assault and attempt to rape the wife; stabbed the husband 28 times during the episode; wife escaped into the street).

c. Commonwealth v. Stoyko, 504 Pa. 455, 475 A.2d 714 (1984) (defendant repeatedly rammed his car into his wife's car as she was driving on a highway and caused wife to crash her car; defendant shot wife in the crashed car with a shotgun; pellets from the shotgun blast slightly injured a passenger in wife's car).

d. Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984) (defendant kidnapped his girl friend and two others, drove them at gunpoint to an isolated area, threatened to kill his girlfriend and others; one escaped by jumping from the moving car, the other ran off while the girlfriend was being shot in the back).

e. Commonwealth v. Heiser, 330 Pa. Super. 70, 478 A.2d 1355 (1984) (defendant's unprovoked actions of approaching the victim's car, shooting the driver in the head by reaching through the passenger side window and shooting across a passenger, constituted prima facie evidence of knowingly creating a grave risk to others).

f. Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246 (1988) (Commonwealth established this circumstance by presenting evidence that there were several people on a porch in very close proximity to the shooting victim who could

have been struck by a ricochet, a "pass through" bullet, or a missed-shot. See also Commonwealth v. Morris, 522 Pa. 533, 564 A.2d 1226 (1989) (evidence was sufficient to establish that, while committing murder, defendant caused a grave risk of death to the person standing next to the victim); Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991) (same; relying on Smith, supra); Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992) (same); Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993) (evidence showed that 12 to 14 others were in the line of fire when the victim was shot and killed).

g. Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991) (defendant killed victim by electrocuting her while she was in a water-filled pit; two other women were bound in metal chains in pit at time electrical charge administered).

h. Commonwealth v. Rollins, 525 Pa. 335, 580 A.2d 744 (1990) (defendant aimed gun at another; during struggle with victim, discharged gun several times before shooting victim; after shooting victim, again pointed gun; returned to victim and shot again; mother and infant son were present throughout; relying on Stoyko, supra, and Smith, supra).

i. Commonwealth v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992) (defendant shot at and killed homicide victim while two other people stood directly behind victim; defendant then shot at one of those two while they and others were fleeing the scene; evidence established that second shooting victim (for whom the defendant was convicted of aggravated assault) "was put in grave risk of death by Appellant during the murder").

j. Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931 (1992) (circumstance established by the fact that defendant fired a gun into a crowded courtyard which resulted in his conviction of six counts of aggravated assault).

k. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (defendant killed two victims, husband and wife; in commission of murders defendant took victims' seven month old infant to

second floor and abandoned baby in the house during the winter after turning off heat; evidence; evidence sufficient to support this circumstance).

1. Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (evidence from daughter of victims who also was attacked by defendant when he killed her parents was properly admitted to established this circumstance).

3. Circumstantial evidence is sufficient to establish this circumstance. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (1989). In Hall, the defendant knew that the victim's children lived in the house where he murdered her and that they might be present. The victim's son was in a closet that was in the defendant's line of fire. See also Commonwealth v. Watson, 523 Pa. 51, 565 A.2d 132 (1989) (defendant "knowingly" created grave risk to others by using a gun in an area where he knows others could be).

4. There is no error in not defining the word "knowingly" as used in this aggravating circumstance during the jury instructions at the penalty phase. Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992). The violent acts themselves enable a jury to find that the defendant knowingly created a grave risk of death to others. Id. Accord Commonwealth v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992) (following Lambert; no need to give specific instruction on word "knowingly" as used in this circumstance as it has a commonly understood meaning).

5. In Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992), the Court found that the trial court had given an erroneous instruction on this circumstance. The trial court had said, in essence, that the fact of multiple killings could support this circumstance. Two of the murder victims were close to two other people when the defendant fired three shots into a walk-in freezer. Such evidence would support this circumstance as to those two victims. The third murder victim was in a separate room when he was shot. No one else was close to him. This circumstance could not apply to him. Moreover, the trial court said that the murder of the third victim could be used to establish this circumstance as to the other two. These misleading instructions required this circumstance to be stricken as to

each of the murders. However, the three death sentences were affirmed since the jury found another aggravating circumstance as to each victim and no mitigating circumstances.

H. AGGRAVATING CIRCUMSTANCE #8: THE OFFENSE WAS COMMITTED BY MEANS OF TORTURE, 42 Pa.C.S. § 9711(d)(8).

1. What is meant by torture? The Pennsylvania Supreme Court has held that this subsection of the statute is not unconstitutionally vague and that torture should be defined to the jury as "the infliction of [a] considerable amount of pain and suffering on victim which is unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity." Commonwealth v. Pursell, 508 Pa. 212, 238-39, 495 A.2d 183, 196 (1985).

   a. In Commonwealth v. Heidnik, 526 Pa. 458, 470, 587 A.2d 687, 692 (1991) the Court sustained a finding of this aggravating circumstance, stating: "For purpose of the sentencing statute, 'torture' is understood as the infliction of considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel manifesting exceptional depravity. Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985)." Evidence that one victim was hung by the wrist from a ceiling hook for several days, was beaten, and was fed only bread and water supported a finding of torture. Likewise, evidence that another victim died from having an electrical charge administered to her while she was in a water-filled pit and that she screamed in agony supported a finding of torture.

COMMENT: In analyzing this section, prosecutors should be aware that not every cruel and atrocious murder is death penalty torture-type murder. While some states statutes, such as those in Florida and Arizona, provide that the death penalty can be given for a "heinous, atrocious, or cruel" murder, Pennsylvania's statute does not so state. See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which declared such statutes unconstitutional on vagueness grounds. Therefore, don't rush to call every brutal murder a death penalty case. Prosecutors should seek this ground only when the evidence shows the act of killing to be carried out over some period of time beyond just mere minutes, and that the defendant

intended to inflict pain or suffering, or both, in addition to intending to kill.

2. Indeed, the Court has moved toward this position. See Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986), wherein the defendant brutally raped a 12 year old girl in her home, then dragged her into the basement, whereupon he unsuccessfully choked her with his hands, told her to "die"; she fought back, he grabbed a washer cord and a T-shirt, wrapped it tightly around her neck; as he was choking her, he continued to tell her to "die" but she fought on; at one point when he thought she was dead, he let go, then she started choking for air so he went upstairs got a knife came back downstairs and stabbed her 18 times in the chest.

3. In another case under this subsection, the Court, in a 4-3 opinion written by Chief Justice Nix, reversed a death sentence on the grounds that the judge's instruction was deficient because it failed to indicate to the jury that in order to find torture, they must find that the defendant intended to inflict pain and suffering. Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987). The Chief Justice wrote:

> Thus subsection 8 of section 9711 must of necessity require more than a mere intent to kill. Implicit in subsection 8 is the requirement of an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killer is not satisfied with the killing alone.

Id. at 279-80, 523 A.2d at 737. Accord Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993).

4. This standard was reiterated in Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987). In another 4-3 decision, this one written by Justice Zappala, the Court found fault with the fact that the Judge never charged the jury on what was meant by "torture" and, in fact, let Dr. Halbert Fillinger, the famous Philadelphia forensic pathologist, give the jury his own definition of torture. But, because there were sufficient other aggravating circumstances proved, and no mitigating circumstances found by the jury, the death penalty was upheld.

a. In Commonwealth v. Proctor, 526 Pa. 246, 585 A.2d 454 (1991), the Court was asked to determine the sufficiency of a jury instruction on torture given during the penalty phase of a capital trial. The instruction did not include a statement as required by Nelson, supra, and Crawley, supra, that "torture is the intentional infliction of pain and suffering." Proctor argued that his counsel was ineffective for failing to object to this instruction. In rejecting this argument, the Court observed that the trial court used the instruction approved in Pursell, supra. Nelson and Crawley had not been decided at the time the sentencing hearing was conducted in Proctor's case. Since the trial court gave a definition of torture which was consistent with the then prevailing law and since there was more than sparse or speculative evidence of torture, counsel was not ineffective for failing to object to an instruction which comported with the law at the time.

b. However, in Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992), the Court, in yet another 4-3 decision, vacated two sentences of death because in instructing the jury on the aggravating circumstances of torture the trial court merely relied on the statutory language. This case had neither a Pursell nor a Crawley/Nelson instruction. Since the instruction was prejudicially deficient and since trial counsel was ineffective for failing to object to it or to seek a more specific instruction, the sentences of death imposed as a result of the killing of two victims were vacated. Though the Court in Proctor observed that Crawley and Nelson had not been decided when Proctor's case was tried, it made no mention of that fact in Wharton. It is unclear from the opinion whether Pursell had been decided before Wharton's case was tried. It is clear that he was formally sentenced after the date of decision in Pursell. Perhaps the existence of the Pursell opinion is the reason for the difference in result between Wharton and Proctor.

1) In Commonwealth v. Fahy, ___ Pa. ___, ___ A.2d ___ (1994) (No. 25 Capital Appeal Docket; 7/1/94), the Supreme Court determined that trial counsel was not ineffec-

tive in failing to request an instruction on torture. On his direct appeal, the Supreme Court had determined that the evidence was sufficient to support this aggravating circumstance. Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986) ("Fahy I"). Fahy was tried in 1984, a year before the decision in Pursell and four years before the decision in Nelson. Since Fahy raised this instruction issue under the guise of a claim of ineffective assistance of counsel in a P.C.R.A. proceeding, rather than as part of a direct appeal from the imposition of sentence as in Wharton, supra, he was not entitled to the benefit of Nelson. Commonwealth v. Fahy, ___ Pa. ___, ___ A.2d ___ (1994) (No. 25 Capital Appeal Docket; 7/1/94) (plurality); and id., at ___, ___ A.2d at ___ (Montemuro, J., concurring). See also id., at ___, ___ A.2d at ___ (Nix, C.J., concurring). Accord Commonwealth v. Fahy, supra, at ___ n.1, ___ A.2d at ___ n.1 (Cappy, J., dissenting).

5. In Commonwealth v. Chester, 526 Pa. 578, 607, 587 A.2d 1367, 1381 (1991) the Court said:

> To establish the aggravating circumstance of torture, the Commonwealth must prove that the defendant intended to inflict a considerable amount of pain and suffering on the victim which is unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity. Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989) [discussed infra]. This proof is separate from that which supports a finding of specific intent to kill. Commonwealth v. Pursell, 508 Pa. 212, 239, 495 A.2d 183, 196 (1985). Implicit in the definition of torture is the concept that the pain and suffering imposed on the victim was unnecessary, or more than needed to effect the demise of the victim. See Id.

In Chester, the defendant argued that the evidence did not establish torture because the victim fell into unconsciousness shortly after the brutal attack began and probably did not feel any pain. This argument was rejected. The circumstance of torture focuses on the defendant's intended result not the result that is ultimately achieved."

Clearly, by slashing [the victim's] throat more times than even the coroner could count, [defendants] intended to inflict more pain and suffering than was necessary to effectuate [the victim's] demise." Id. at 607, 587 A.2d at 1381 (emphasis is original).

6. These cases are reconcilable by reviewing the exact claim presented. Some cases, such as Wharton, Nelson, Crawley and Proctor, deal with the adequacy of jury instructions on torture. Others, like Heidnik, Fahy I and Chester, deal with the sufficiency of the evidence to support a finding of torture. In fact, in Wharton, since the Court determined that the torture instruction was "prejudicially deficient" and that trial counsel was ineffective for not objecting to the instruction as given and for not requesting a more specific instruction, the Court said it was unnecessary to address Wharton's claim that the evidence was insufficient to sustain this circumstance.

   a. In Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993), the court reviewed a challenged "torture" instruction and upheld it noting that the language employed by the trial court was "almost identical" to language previously approved by the Court in Commonwealth v. Thomas, 522 Pa. 256, 277, 261 A.2d 699, 709 (1989). The approved instruction "clearly stated that the jury had to find that [the defendant] had the intent to cause pain or suffering to the victim in addition to the killing of the victim." Edmiston v. Commonwealth, supra, at ___, 634 A.2d at 1091.

7. That the defendant intended to torture his victim may be established by circumstantial evidence. Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904 (1989). See also Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989). Photograph depicting manner in which victims were tied up was properly admitted to establish that deaths were committed by means of torture. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989). See also, Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991) (photograph depicting gaping neck wound may have been properly admitted to show torture during penalty phase; dicta).

8. Other Pennsylvania torture cases include:

a. Commonwealth v. Buehl, 510 Pa. 363, 508 A.2d 1167 (1986), where it was held not to be torture where a victim is tied to a chair, blindfolded and then shot once in the head.

b. Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (1987), where the Court ruled that the deliberate acts of the defendant of binding the husband and wife victims to chairs facing each other and slashing the wife's throat in full view of her husband, and the fact that death did not result instantaneously, did not constitute "torture". These acts, the Court reasoned, were "insufficient to establish that the Appellant specifically intended to cause pain and suffering ..." Id. at 448, 532 A.2d at 817.

c. Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), a plurality opinion upholding a finding of torture, along with two other aggravating circumstances, where the victim died of 28 stab wounds inflicted during an extended period of time while the defendant burglarized the victim's apartment, robbed him and his wife, uttered terroristic threats to kill the husband and rape the wife, and, in fact, assaulted and attempted to rape the wife. The three dissenters (Justices Flaherty and Zappala and Chief Justice Nix) objected to the prosecutor's closing remarks as the sentencing hearing. Nothing was said about the insufficiency of the facts to support a torture finding. Apparently all seven justices would agree that "torture" as defined in Pursell, was proper under these facts.

d. Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988), where the Supreme Court upheld a finding of torture where "the victim was stripped, tied about the wrists with a venetian blind cord, stabbed numerous times with an onion peeler and another knife, jabbed with straight pins about her feet, and sexually assaulted." Id. at 409, 543 A.2d at 1070. Again, the sado-masochistic/sexual perversion murder is what the court seems to look for before it will uphold a "torture" death penalty.

e. Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904 (1989), where the Supreme Court held that the trial court properly submitted the aggravating circumstance of torture to the sentencing jury. The court instructed the jury that it must be shown beyond a reasonable doubt that the defendant intended to torture his victims. The Court opined that taking three elderly, defenseless women to a remote spot to kill them is more than a mere killing to effect a robbery. The Court also observed that it was reasonable for the jury to assume, from the nature and extent of the beatings inflicted, that the victims suffered considerably.

f. Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989), where the Supreme Court held that the length of time a victim withstands the cruel, depraved attacks of her murderer "is not part of the Commonwealth's burden nor is such a consideration part of the aggravating circumstance" of torture. The means used by the actor are reviewed to determine whether he intended to use them in such a way as to cause considerable pain and suffering before death." (emphasis in original) The Commonwealth is not required to prove the length of time the victim felt pain or how much pain she felt. "Medical evidence can be used to establish whether the victim was alive when tortured. In this case, the evidence showed that a crutch was inserted into the victim's vagina and passed twenty three inches from that point through the abdominal cavity, the liver, the diaphragm, the sac surrounding the heart, the right lung and into the upper portion of the plural cavity."

g. Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990), where evidence of multiple stab wounds over large area of body and multiple injuries over large area, including blunt force injuries to head, and evidence that assault started in bar and that defendant then transported victim in bed of his pick-up truck to another location where he "finished her off," was sufficient to establish torture (i.e., the infliction of a considerable amount of pain and suffering on the victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity).

h. Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990), where evidence that defendant and cohort tried to strangle the victim, using his neck as the balance in a tug-of-war before they shot him, was sufficient for the jury to infer that they both intended to torture the victim before they killed him.

i. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), where evidence of beatings, bitings, rape, sodomy and cuts was sufficient to show that defendant intended to inflict pain in addition to the intent to kill. Torture was properly established.

j. Commonwealth v. Proctor, 526 Pa. 246, 585 A.2d 454 (1991), where evidence of 57 stab wounds to the face, head, trunk and limbs of an 84 year old man who lived for 20 to 60 minutes after the "brutal assault" was sufficient for jury to determine that murder was committed by means of torture.

k. Commonwealth v. Jacobs, ___ Pa. ___, 639 A.2d 786 (1994), where the Court recounted the following evidence as "clearly" supporting the jury's finding of torture: "numerous blunt force injuries on [the victim] in addition to more than 200 stab wounds" which "covered many areas of [the victim's] body, including areas where no vital body parts were located" including stab wounds which "were shallow in depth and positioned where they would not be expected to cause a rapid death" such as the "face, hands, arms, shoulders, buttocks, etc." The Court concluded that "[t]his, as well as the sheer number of wounds inflicted, provides ample basis for belief that [Jacobs] intentionally inflicted a considerable amount of pain and suffering and that his actions manifested exceptional depravity." Id. at ___, 639 A.2d at 792.

I. **AGGRAVATING CIRCUMSTANCE #9:** "A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON," 42 Pa.C.S. § 9711(d)(9).

1. What is meant by a "significant history?"

a. The phrase is not "vague." In Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986), the Pennsylvania Supreme Court rejected the argu-

ment that the term "significant history" was "overbroad" and so vague that a court must guess what the legislature intended. Id. at 315, 516 A.2d at 697. Justice Papadakos wrote that the Pennsylvania Supreme Court would follow the holding of the U.S. Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and that of its own opinions in Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), and Commonwealth v. Goins, 508 Pa. 270, 495 A.2d 527 (1985). Those cases declared that the term was not so vague that a jury could not do the "line drawing" that is "commonly required of a fact finder in any lawsuit." Commonwealth v. Fahy, 512 Pa.at 316, 516 A.2d at 698.

1) In Commonwealth v. Rivers, ___ Pa. ___, ___ A.2d ___ (1994) (No. 14 Capital Appeal Docket; 7/1/94), the Supreme Court again rejected vagueness challenges to this phrase. The Court called the defendant's argument "that if a designated list of felonies were established all criminal defendant's [sic] would know in advance that committing two or more of those crimes would lead to the possible imposition of the death penalty and their behavior would be modified accordingly" absurd. The Court rejected the defendant's argument that a criminal defendant has no clear idea whether or not his past record would be deemed "significant' by citing to Fahy, supra, Goins, supra, and Beasley, supra.

b. The phrase means more than one prior conviction. In Commonwealth v. Beasley, supra, and in Commonwealth v. Goins, supra, the majority of the Supreme Court clearly held that significant history obviously means more than one "prior conviction" and that the severity of the crimes involved in the prior is also important. But, in Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985), the Pennsylvania Supreme Court in a plurality opinion written by Mr. Justice Hutchinson, declared that "several convictions arising out of the same criminal episode...are separate convictions for the purpose of establishing a significant history." Commonwealth v. Holcomb, 508 Pa. at 462 n.20, 498 A.2d at 852 n.20. He

also wrote that this was so "even though the two prior convictions were merged for sentencing purposes." Id. at 462, 498 A.2d at 852. Thus, prior rape and assault with intent to rape convictions arising out of the same incident, were a significant history of prior convictions.

1) The Supreme Court has cited Holcomb in majority opinions. See Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991); and Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987) (despite his strong dissent in Holcomb, the Chief Justice concurred in the result in Terry without mentioning his strong opposition to the Holcomb rule).

c. This aggravating circumstances does not require a showing that the prior crimes of violence be similar to the crime with which the defendant is presently charged in order to be "significant." Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993). In resolving the issue the Court in Young called this argument "ridiculous."

d. Some examples of "significant history" are:

1) Commonwealth v. Beasley, 505 Pa. 279, 479 A.2d 460 (1984). Two prior murder convictions definitely constitute a significant history. See, however, Commonwealth v. Sneed, 514 Pa. 597, 526 A.2d 749 (1987), where one (1) prior second degree, felony murder conviction in 1985 was properly found by the jury to be a "significant history." But this decision ought to viewed in light of the fact that the jury also found aggravating circumstance number 10 to be met, and that there were no mitigating circumstances in the case, and that the legislature by Act 87 of 1986, made one prior murder conviction committed before the murder at issue to be a "significant history."

2) Commonwealth v. Fahy, supra, wherein convictions of one prior rape and one prior attempted rape committed just months before the rape-murder of a 12

year old girl were held to constitute a significant history.

3) Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987), wherein the Court held that even though all felony convictions arose from a single incident, they were properly admitted as a significant history of felony convictions for the jury to consider (convictions for arson and three murders resulting from the defendant's setting fire to an occupied structure).

4) Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989). Two felony convictions, one for felonious aggravated assault and one for criminal trespass, were sufficient to constitute a significant history of felony convictions.

5) Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989), wherein the Court held that robbery and relative offense convictions related to an attack on two female victims sufficiently established significant history of felony convictions involving use of violence to the person.

6) Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989), wherein evidence of former murder conviction and two former aggravated assault convictions were sufficient to establish this aggravating circumstance.

7) Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991), wherein evidence of a guilty plea to charges of robbery, aggravated assault and criminal conspiracy was sufficient to support a finding of a significant history of felony convictions. The trial court reviewed the charges in camera before the penalty phase and determined that each was a felony.

8) Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991), wherein evidence of guilty pleas to three separate robberies was sufficient to support this aggravating circumstance. The robberies in question

were committed in New York. The trial court properly determined that the robberies were felonies. This is a question for the court and not the jury.

9) Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993), wherein evidence of convictions for first degree murder in relation to one killing and conspiracy to commit murder in another was sufficient to show "significant history of felony convictions involving use or threat of violence to the person."

e. Some examples of what is not a "significant history" are:

1) Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987), wherein the Pennsylvania Supreme Court held that one prior second degree murder (now third degree murder) did not constitute a significant history of felony convictions.

2) Commonwealth v. Goins, 508 Pa. 270, 495 A.2d 527 (1985). One prior third degree murder conviction was not a significant history. To the same effect is Commonwealth v. Wheeler, 518 Pa. 103, 541 A.2d 730 (1988).

3) Commonwealth v. Frederick, 508 Pa. 527, 498 A.2d 1322 (1985). One prior voluntary manslaughter conviction was not a "significant history."

But the Pennsylvania Legislature has overturned Goins and Frederick by Act 87 of 1986, effective Sept. 7, 1986. The new law adds two new aggravating circumstances to the previous 10. The Act makes the prior conviction for just one murder (either first, second or third degree) committed before or at the time of the offense at issue the subject of a separate aggravating circumstance (number 11). It, therefore, took it out of the "significant history" category argument altogether. The Act further makes a prior conviction one for voluntary manslaughter, committed before or at the time of offense at issue, the subject of

a separate aggravating circumstance (number 12). See Commonwealth v. Wheeler, 518 Pa. at 115, n.2, 541 A.2d at 736 n.2.

2. What is meant by "felony convictions involving the use or threat of violence to the person"?

a. To be included in the "history," the convictions must be "felonies." In Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246 (1988), the Pennsylvania Supreme Court held that a defendant's prior convictions for aggravated assault, recklessly endangering another person and possessing an instrument of the crime did not constitute a "significant history of felony convictions" since only the aggravated assault was a felony. The other charges were misdemeanors and could not be considered for this aggravating circumstance. However, in Commonwealth v. Thomas, 522 Pa. 256, 561 A.2d 699 (1989), the Supreme Court held that a misdemeanor indecent assault conviction that was part of the same criminal transaction or criminal episode as a felony aggravated assault conviction could be submitted to the sentencing jury along with the aggravated assault and, together with a separate conviction for criminal trespass, the two felonies constituted a significant history. See also Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989).

1) In Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992), the Court, relying on Thomas, supra, held that juvenile adjudications for misdemeanors which arose out of the same acts or criminal episodes as the felonies considered under this aggravating circumstance were properly admitted during the sentencing proceeding.

N.B. Aggravated assault, though a crime of violence, is not necessarily a felony in Pennsylvania. See 18 Pa.C.S.A. § 2702.

b. In Commonwealth v. Cross, 508 Pa. 322, 338, 496 A.2d 1144, 1153 (1985), the Pennsylvania Supreme Court held that where the defendant had been convicted of a prior rape and sodomy in Virginia that rape "by it's very definition includes force."

c. In Commonwealth v. Rolan, 520 Pa. 1, 549 A.2d 553 (1988), the Supreme Court observed that "unprivileged entries into buildings and structures where people are likely to be found is a clear threat to the safety of those therein and held that the Legislature's grading of the crime of burglary as a felony of the first degree was intended to guard against this threat of violence." Commonwealth v. Thomas, 522 Pa. 256, 276-77, 561 A.2d 699, 709 (1989) Accordingly, burglary qualifies as a felony involving the threat of violence to the person for purposes of aggravating circumstance (d)(9). See also Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992) (same; following Rolan); and Commonwealth v. Rivers, ___ Pa. ___, ___ A.2d ___ (1994) (No. 14 Capital Appeal Docket; 7/1/94) (same; following Baker and Rolan).

d. In Commonwealth v. Thomas, supra, the Court, relying on Rolan, held that a conviction for criminal trespass, a felony of the second degree, involved the threat of violence and that crime, too, can be used to establish aggravating circumstance (d)(9). In Rolan, the Court rejected language in its opinion in Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986), that burglary was not a crime involving the threat of violence. The Rolan Court characterized this statement in Christy as "obiter dicta."

3. Felony convictions for offenses involving the use or threat of violence to the person occurring after the offense for which the death sentence is sought are admissible to establish this aggravating circumstance. Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993) (part of "history" were murder and conspiracy convictions arising out of a killing committed six days after the killing for which the death penalty was sought). See also Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989); and Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993). The conviction need only precede the sentencing proceeding; the date of the crime is irrelevant. See Commonwealth v. Young, supra. (Court has "consistently held that '[c]onvictions obtained before or after the offense at issue are relevant to the question of whether a defendant has a significant history of prior criminal convictions;'" citing Haag, supra).

4. In establishing that a defendant has a significant history of violent felony convictions involving the use or threat of violence to the person, the prosecution is permitted to examine the facts surrounding those convictions. Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993) (not improper to say prior killing concerned drugs) Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990); Commonwealth v. Beasley, 505 Pa. 279, 479 A.2d 460 (1984); and Commonwealth v. Rivers, ___ Pa. ___, ___ A.2d ___ (1994) (No. 145 Capital Appeal Docket; 7/1/94) (proper in stabbing death case to advise jury that prior aggravated assault involved a stabbing of an elderly victim even though homicide victim, too, was elderly). See also Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989).

   a. In Williams, supra, the Court stated that there was no prejudicial error in advising the jury that the defendant was convicted of the misdemeanor of possessing an instrument of crime in connection with a third degree murder conviction. In Rivers, supra, the Court agreed that it was error for the clerk of courts, in reading a record of the defendant's prior felony convictions, to say that she had been convicted of aggravated assault "among other charges." Since the trial court immediately directed the jury to disregard this comment, the error was harmless beyond a reasonable doubt.

   b. However, the Commonwealth is not required to explain the underlying facts of the prior convictions to the jury. Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991).

5. This circumstance is not limited to felonies which occurred in Pennsylvania. Nor is it required that an out-of-state felony have an exact corollary in the Crimes Code. See Commonwealth v. Reid, supra. If an out-of-state conviction is proffered to establish this aggravating circumstance it is for the trial court to determine if the conviction is for a felony. Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991). Since all robberies in New York require the use of force, New York felony robbery convictions satisfy this circumstance. Id. See also Commonwealth v. Maxwell, 534 Pa. 23, 626 A.2d 499 (1993) (Court held that criminal possession of a weapon, a felony in New York, qualified for this circumstance).

6. Generally, if the Commonwealth relies on a record to establish this circumstance, it must prove that the person named in the record is the same person who is on trial. Commonwealth v. Ly, supra. There is no error in establishing that the defendant is the person referred to in the record by using the defendant's earlier admission from a hearing conducted under Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973). Commonwealth v. Ly, supra.

7. In Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992), the Pennsylvania Supreme Court unanimously approved "the use of a record of [the defendant's] previous crimes compiled by the Federal Bureau of Investigation to prove aggravating circumstances." See Commonwealth v. Jasper, 526 Pa. 497, 510 n.4, 587 A.2d 705 n.4 (1991). The prosecution used this record to establish this circumstance, as well as (d)(10) and (d)(11). The Court found that the F.B.I. "rap sheet," which was introduced by an F.B.I. special agent who testified that it was compiled in the regular course of business by a law enforcement agency, was properly introduced as a business record under 42 Pa.C.S. § 6108(b).

8. It appears that the Supreme Court is willing to examine the facts surrounding a proffered felony to determine if it is one "involving the cause or threat of violence to the person." In Commonwealth v. Maxwell, 534 Pa. 23, 626 A.2d 499 (1993) (plurality), the Court said that a conviction in the State of New York for criminal possession of a weapon qualified under this aggravating circumstance. This crime is a felony in New York. Since "the police officer who arrested [Maxwell] for the crime which resulted in [this] conviction in New York testified that, on the date of the arrest, he had responded to a call of a robbery in progress and encountered [Maxwell], and an individual later named as the complainant, in the hallway of an apartment building" and "that [Maxwell] was holding a loaded gun," the weapons offense involved "the use or threat of violence to the person."

9. The United States Supreme Court has held that a death penalty procedures statute which requires a sentencer in deciding what sentence to impose to "take into account . . . if relevant . . . the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" is not unconstitu-

tionally vague under t he Eighth or Fourteenth Amendments. Tuilaepa v. California, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 62 U.S.L.W. 4720 (1994) (factor asks jury to consider "matters of historical fact" and is permissible).

J. **AGGRAVATING CIRCUMSTANCE #10:** THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE, OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSES, 42 Pa.C.S. § 9711(d)(10).

1. The first clause of this aggravating circumstance applies to the multiple or mass murder situation. For some reason, perhaps because of its complex language, prosecutors were apparently reluctant to use this aggravating circumstance in multiple murder situations. See the comments of Chief Justice Nix in Commonwealth v. Buehl, 510 Pa. at 391 n.11, 508 A.2d at 1181 n.11, and Justice Larsen in Commonwealth v. Stoyko, 504 Pa. at 467 n.3, 475 A.2d at 721 n.3. But, this clause does cover multiple murder because of the use of the words "before or at the time of the offense." See Commonwealth v. Cross, 508 Pa. at 338, 496 A.2d at 1153, wherein a woman and her two children were strangled and stabbed to death in the same episode; the jury found these three first degree murders to be aggravating circumstance number 10. Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1 (1987), where Banks was convicted of "mass murder," - 12 people - during a night-long murderous spree in Wilkes-Barre. Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983), wherein the defendants killed a police officer within two hours after they had abducted and killed another individual and stole his car. At the time of the trial for the killing of the police officer both defendants had entered pleas of guilty to second degree murder and were awaiting formal sentencing to terms of life imprisonment. The Court determined that the word "convicted" in this clause means "found guilty of" and not "sentenced" as that word oftentimes is construed. At the time of their conviction for the murder of the police officer, Lesko and Travaglia had both been convicted of another state offense committed before the time of the offense at issue, second degree murder, and for which a sentence of life imprisonment was imposable. There is no

requirement that the sentence need be imposed to be used for this aggravating circumstance.

> The clear import of the first part of subsection (d)(10) is to classify the commission of multiple serious crimes as one of the bases upon which a jury might rest a decision that the crime of which the defendant stands convicted, and for which they are imposing sentence, merits the extreme penalty of death.

Id. at 496, 467 A.2d at 299. See also Commonwealth v. Sneed, 514 Pa. 597, 526 A.2d 749 (1987) (this circumstance established by showing conviction for second degree murder obtained two weeks before trial for offense committed three days before capital offense). But see Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764 (1986), where three persons were killed in an arson murder but the jury declined to find aggravating circumstance number 10, but rather found number 7 - murder in the course of a felony.

2. Where a defendant commits several first degree murders at the same time, each murder constitutes an aggravating circumstance under the first clause of this section for each of the other murders. In Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904 (1989), the defendant killed three elderly ladies. As to each victim the jury found this aggravating circumstance present. The Supreme Court affirmed these findings. See also Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989) (since defendant was convicted of multiple murders, the jury properly used those convictions to establish this aggravating circumstance).

3. In Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991), the defendant was convicted of two counts of murder of the first degree. The evidence showed that one murder preceded the other. The jury sentenced the defendant to death for the first and then used it to establish this aggravating circumstance for the second.

4. In Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931 (1992), the defendant was convicted of two counts of first degree murder. The jury sentenced him to death for both murders finding the same aggravating circumstances, (d)(7) and this circumstance, applicable to both. A prior conviction for murder of the first degree was sufficient to establish this

circumstance for both murders. Despite its applicability to multiple killings, this case was not decided on that basis.

5. The second clause of aggravating circumstance number 10 (dealing with the defendant committing a murder while undergoing a sentence of life imprisonment for any reason) was meant to cover the situation where the defendant, while in prison on a first or second degree murder charge, kills a prison guard (or another inmate). See Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987), wherein the defendant in jail for life for arson and murder, clubbed a prison guard to death. See also Commonwealth v. Karabin, 521 Pa. 543, 559 A.2d 19 (1989) (death sentence vacated in other grounds). N.B. He must not only be convicted but also sentenced under this second section.

6. This second clause would also cover the situation where an escaped first or second degree murderer murdered someone during the period of his escape. It would also cover the murder by an escaped prisoner from another state who, while serving a life sentence for rape, for example, murdered someone in Pennsylvania. See Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1164 (1980), where the defendant was previously convicted of rape in Virginia for which he could have received a life sentence in that state. However, he apparently was not "undergoing" a life sentence at the time he killed his victim in Pennsylvania. He had been given a term of years and had been paroled. Id. at 338 n.8, 496 A.2d at 1153 n.8.

K. **AGGRAVATING CIRCUMSTANCE #11:** THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER MURDER, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, 42 Pa.C.S. § 9711(d)(11).

1. This aggravating circumstance was enacted to overrule the Supreme Court's decision in Commonwealth v. Goins, 508 Pa. 270, 495 A.2d 527 (1985), which held that a single, prior conviction for third degree murder was not "a significant history of felony convictions" for purposes of aggravating circumstance (d)(9).

2. This circumstance was found to exist in Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992). The evidence to sustain this circumstance, as well as aggravating circumstances (d)(9) and (d)(10),

was found in an F.B.I. "rap sheet." The Supreme Court affirmed the decision to admit the "rap sheet" as a business record and affirmed the sentence of death, finding the evidence supported the finding of an aggravating circumstance in subsection (d).

3. In Commonwealth v. Jacobs, ___ Pa. ___, 639 A.2d 786 (1994), the defendant was convicted of first degree murder in the killings of his girlfriend and her infant daughter to which he confessed. The jury sentenced him to death for the murder of his girlfriend and to life imprisonment for the murder of his girlfriend's daughter. Both victims' bodies were found in the bathtub. The murder conviction for the baby's death was sufficient to establish this aggravating circumstance in support of the death sentence returned for the girlfriend's death.

4. In Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992), the Supreme Court noted the similarity between this circumstance and that found in the first clause of aggravating circumstance (d)(10). It rejected Zook's claim that applying this circumstance to his case violated the Ex Post Facto Clause because (d)(11) was enacted after his crime was committed because the evidence was admissible to establish (d)(10). The Court said: "The Commonwealth could have presented its evidence on the second murder under either aggravating factor." Id. (NOTE: This last quote probably means that in a given case the Commonwealth could not use the same evidence to establish both of these circumstances, i.e. the Commonwealth could not "double dip." That is consistent with the history of aggravating circumstance (d)(11).)

5. In the multiple murder case of Commonwealth v. Gamboa-Taylor, ___ Pa. ___, 634 A.2d 1106 (1993), the Court upheld the finding of this circumstance as to four murder victims each of whom were killed shortly after the defendant killed his mother-in-law at the outset of his murderous spree.

L. **AGGRAVATING CIRCUMSTANCE #12:** THE DEFENDANT HAS BEEN CONVICTED OF VOLUNTARY MANSLAUGHTER AS DEFINED IN 18 Pa.C.S. § 2503, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, 42 Pa.C.S. § 9711(d)(12).

1. This circumstance was enacted to overrule the Supreme Court's decision in Commonwealth v. Frederick, 508 Pa. 527, 498 A.2d 1322 (1985), which held

that one prior voluntary manslaughter conviction was not "a significant history of felony convictions" for purposes of aggravating circumstance (d)(9).

M. **AGGRAVATING CIRCUMSTANCE #13:** THE DEFENDANT COMMITTED THE KILLING OR WAS AN ACCOMPLICE IN THE KILLING, AS DEFINED IN 18 Pa.C.S. § 306(c) (RELATING TO LIABILITY FOR CONDUCT OF ANOTHER; COMPLICITY), WHILE IN THE PERPETRATION OF A FELONY UNDER THE PROVISIONS OF THE ACT OF APRIL 14, 1972 (P.L. 233, NO. 64), KNOWN AS THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT, AND PUNISHABLE UNDER THE PROVISIONS OF 18 Pa.C.S. § 7508 (RELATING TO DRUG TRAFFICKING SENTENCING AND PENALTIES), 42 Pa.C.S. § 9711(d)(13).

N. **AGGRAVATING CIRCUMSTANCE #14:** AT THE TIME OF THE KILLING, THE VICTIM WAS OR HAD BEEN INVOLVED, ASSOCIATED OR IN COMPETITION WITH THE DEFENDANT IN THE SALE, MANUFACTURE, DISTRIBUTION OR DELIVERY OF ANY CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE IN VIOLATION OF THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT OR SIMILAR LAW OF ANY OTHER STATE, THE DISTRICT OF COLUMBIA OR THE UNITED STATES, AND THE DEFENDANT COMMITTED THE KILLING OR WAS AN ACCOMPLICE TO THE KILLING AS DEFINED IN 18 Pa.C.S. §306(c), AND THE KILLING RESULTED FROM OR WAS RELATED TO THAT ASSOCIATION, INVOLVEMENT OR COMPETITION TO PROMOTE THE DEFENDANT'S ACTIVITIES IN SELLING, MANUFACTURING, DISTRIBUTING OR DELIVERING CONTROLLED SUBSTANCES OR COUNTERFEIT CONTROLLED SUBSTANCES, 42 Pa.C.S. § 9711(d)(14).

O. **AGGRAVATING CIRCUMSTANCE #15:** AT THE TIME OF THE KILLING, THE VICTIM WAS OR HAD BEEN A NONGOVERNMENTAL INFORMANT OR HAD OTHERWISE PROVIDED ANY INVESTIGATIVE, LAW ENFORCEMENT OR POLICE AGENCY WITH INFORMATION CONCERNING CRIMINAL ACTIVITY AND THE DEFENDANT COMMITTED THE KILLING OR WAS AN ACCOMPLICE TO THE KILLING AS DEFINED IN 18 Pa.C.S. § 306(c), AND THE KILLING WAS IN RETALIATION FOR THE VICTIM'S ACTIVITIES AS A NONGOVERNMENTAL INFORMANT OR IN PROVIDING INFORMATION CONCERNING CRIMINAL ACTIVITY TO AN INVESTIGATIVE, LAW ENFORCEMENT OR POLICE AGENCY, 42 Pa.C.S.§ 9711(d)(15).

P. **AGGRAVATING CIRCUMSTANCE #16:** THE VICTIM WAS A CHILD UNDER 12 YEARS OF AGE, 42 Pa.C.S. § 9711(d)(16).

1. In Commonwealth v. Gamboa-Taylor, ___ Pa. ___, 634 A.2d 1106 (1993), the evidence established the ages of the child victims as being under 12. The evidence was sufficient to establish this circumstance.

XV. PRIOR CONVICTIONS OR CRIMES IN THE SENTENCING PHASE.

A. When Is A Prior Conviction "Final" In The Penalty Phase? When Is A Conviction "Final" For Purposes Of Admissibility As An "Aggravating Circumstance"?

1. See Commonwealth v. Beasley, 504 Pa. 485, 479 A.2d 460 (1984) and Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983). Clear import of the statute is that it is not necessary that there be a sentence imposed but merely that the defendant has been convicted by a jury or pled guilty.

> We find that, as used in 42 Pa.C.S. § 9711(d)(10), the legislature evidenced a clear intent that "convicted" mean "found guilty of" and not... "found guilty and sentenced."

Commonwealth v. Travaglia, 502 Pa. at 495, 467 A.2d at 300. And in Beasley:

> There is no reason to believe that the meaning accorded by the legislative references to convictions was not consistent in consecutively enumerated provisions listing aggravating circumstances within the same subsection of the sentencing code. Thus, within 42 Pa.C.S. § 9711(d), conviction, for purposes of (d)(9) should be construed as having the same meaning as does conviction for purposes of (d)(10)....

Commonwealth v. Beasley, 505 Pa. at 286, 479 A.2d at 464.

2. Under Travaglia, supra, and Beasley, supra, a sentence is not required in order to establish the "prior conviction" aggravating circumstances. Beasley clearly allows a review of the facts and circumstances surrounding the convictions. See also Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (relying on Beasley for proposition that "construction of the term 'conviction' [is] such as to permit consideration of the essential and necessary facts pertaining to the convictions, including the circumstances of the crimes and the sentences imposed"). In Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, ___ L.Ed.2d ___, 62 U.S.L.W. 4466 (1994), though the state court had ruled that evidence that the defendant had previously been sentenced to death for a murder was irrelevant to the statutory aggravating circumstances that the defendant had previously been

convicted of a violent felony and that he would constitute a continuing threat to society, the United States Supreme Court held that the Constitution did not prohibit the states from informing a capital sentencing jury that the defendant had previously been sentenced to death for another murder.

B. Caveat: Protect The Prior Conviction: The Lesson Of Johnson v. Mississippi.

1. Prosecutors should use "prior convictions" with caution, particularly those prior convictions that are still on appeal at the time of the sentencing hearing. If the prior conviction gets reversed, then your death penalty verdict may be overturned. See Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d [illegible] 988). You must, therefore, evaluate the prior conviction to see if there is any likelihood of future reversal. If there is, do not use it as an aggravating circumstance. If you do use it, be prepared to vigorously fight to preserve that conviction. Even then it may not be possible because it lies outside your jurisdiction.

2. In Johnson v. Mississippi, supra, the Mississippi prosecutor who obtained a death penalty using "prior convictions" plus two other aggravating circumstances lost it when a 20 year old New York State conviction for assault was subsequently overturned by agreement by the New York prosecutor unbeknownst to the Mississippi prosecutor. The Supreme Court vacated the death penalty even though it only partly rested on the invalid conviction. "Since that [1963 New York] conviction has been reversed," the Court explained, "...[the defendant] must be presumed innocent of that charge." Johnson v. Mississippi, supra. The use of that conviction at the penalty hearing was held to be prejudicial. Thus, a 20 year old conviction, subsequently reversed, was not considered "final" in so far as due process was concerned.

3. The Court in Johnson noted that the Mississippi Supreme Court, in denying the defendant post conviction relief, expressly disavowed any reliance on a "harmless error" concept based on the existence of two other aggravating factors. The Constitution allows an appellate court reviewing a death sentence to determine that the jury's consideration of an invalid factor was harmless beyond a reasonable doubt. See Clemons v. Mississippi, 494 U.S.

738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). See also Parker v. Dugger, 498 U.S. 308, 111 S.Ct 731, 112 L.Ed 812 (1991) (relying on Clemons); Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) ("use of vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system" under Clemons); and Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326, 60 U.S.L.W. 4486 (1992) (despite invalidate aggravating circumstance, state supreme court did not reweigh or conduct harmless error analysis required by Clemons; death sentence vacated and case remanded). In Romano v. Oklahoma, supra, the Supreme Court upheld the imposition of a death penalty despite the reversal of an earlier murder conviction and sentence of death which had been relied upon to establish an aggravating circumstance because the state appellate court had reweighed the three aggravating circumstances which still remained against the mitigating circumstances and determined that the sentence of death under review was still warranted.

C. Another Twist: The Effect Of A Re-Conviction After A Prior Conviction Reversal.

1. In Commonwealth v. Karabin, 521 Pa. 543, 559 A.2d 19 (1989), the defendant was convicted of first degree murder and sentenced to death. The jury found two aggravating circumstances: (1) the defendant had been convicted of another state offense committed before the time of the offense at issue for which a sentence of life imprisonment was imposable (Karabin was serving a life sentence for an earlier murder when he killed a fellow inmate giving rise to this case), 42 Pa.C.S. § 9711 (d)(10); and (2) the defendant had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). The "history" which the jury found included the murder for which Karabin was serving the life sentence at the time he committed the instant offense and an aggravated assault to which he had earlier pleaded guilty and been sentenced. The jury was not informed that Karabin had filed a motion to withdraw his guilty plea.

2. Subsequent to the jury's decision to impose the death penalty because it found that these two aggravating circumstances outweighed any mitigating

circumstances, but before the death sentence was formally imposed by the trial court, Pennsylvania's intermediate appellate court reversed the order of the trial court which had denied Karabin's motion to withdraw his guilty plea. On remand to the trial court Karabin was permitted to withdraw his plea of guilty to aggravated assault. Consequently, one of the convictions constituting the "significant history" no longer existed. The trial court determined it could no longer impose the death sentence because it could not determine what, if any, effect the absence of this aggravating circumstance would have had on the jury's weighing process since the jury had found unspecified mitigating circumstances present.

3. The Commonwealth appealed from the sentence arguing that at the time of the sentencing phase proceeding the conviction for aggravated assault was final, relying on Travaglia, supra, and Beasley, supra. During the pendency of the proceeding in the Superior Court Karabin was convicted of the aggravated assault after a jury trial.

4. The Superior Court rejected the Commonwealth's arguments and held that since Karabin had withdrawn his guilty plea, the aggravated assault "conviction" which had been considered by the jury at the penalty phase had been effectively reversed. Since the jury had relied on the "conviction" which resulted from his withdrawn guilty plea in finding one of the aggravating circumstances, and because mitigating circumstances were found, the death penalty was properly reversed. The Supreme Court granted the Commonwealth's petition for allowance of appeal and affirmed the Superior Court.

5. The Supreme Court agreed with the Commonwealth that the aggravated assault conviction was properly considered by the sentencing jury in light of Travaglia and Beasley. The Court found, however, that it did not necessarily follow that a felony conviction arising subsequent to the jury's deliberations in the sentencing phase may be substituted for an earlier conviction which has been overturned. The Court rejected the notion, advanced by the Commonwealth, that a conviction which occurs after sentencing can resurrect a conviction which was overturned. The Court held that when the underlying collateral conviction which forms the basis of aggravating circumstance (d)(9) is overturned, evidence of such conviction may not support

the jury's finding of this aggravating circumstance.

COMMENT: Apparently, the Supreme Court will take notice of the reversal of a collateral conviction used to support a finding under (d)(9) even if the reversal occurs after the formal imposition of the death sentence, although it is not reflected in the record of the case for which the death penalty was imposed.

NOTE: The Supreme Court observed in Karabin that the death penalty statute had been amended to allow a remand for resentencing in death penalty cases where there was an error in the penalty phase but where there was still sufficient evidence of aggravating circumstances upon which a sentence of death could be based. See 42 Pa.C.S. § 9711(h), as amended by the Act of December 21, 1988, P.L. 1862, No. 179, § 2, effective immediately. The Court, without explaining its reasoning, decided that this amendment, which by its own terms applied to all appeals pending as of its effective date (and Karabin was pending at that time), was inapplicable to Karabin's case. The only explanation which can be given for this statement by the Court is that the amendments to section 9711(h), as well as that section before the amendments, apply to cases on direct review by the Supreme Court from the imposition of a death penalty. Karabin was reviewed, not under the death penalty statute's automatic review procedure, as required by section 9711(h)(1), but on a petition for allowance of appeal, from the order of the Superior Court.

D. Proving Prior Convictions In The Aggravating Circumstance Statute - (d)(9), (d)(10), (d)(11) Or Of Another "Criminal Proceeding" In (d)(5).

1. In Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), involving aggravating circumstances (d)(5) - "criminal proceeding" - the district attorney proved that Zettlemoyer killed a witness to prevent him from testifying against him in a burglary and robbery criminal proceeding. In order to establish that there was such a "criminal proceeding," he had the burglary/robbery indictment or information read into the record. This was approved by the Court in Zettlemoyer.

2. However, in a subsequent case, the Supreme Court elaborated on the point as it pertained to "convictions" in (d)(9) and (d)(10). In Commonwealth v. Beasley, 505 Pa. 279, 479 A.2d 460 (1984), when the defense asserted that the prosecution's evi-

dence should have been limited to establishing the mere fact that appellant was convicted of previous murders, without elaboration as to the facts and circumstances, or as to the types of sentence imposed, the Pennsylvania Supreme Court rejected this narrow view, holding:

> Consideration of prior convictions was not intended to be a meaningless ritual, but rather a process through which a jury would gain considerable insight into a defendant's character, and, thus, reason impels that the construction of the term "conviction"...be such as to permit consideration of the essential and necessary facts pertaining to the convictions, including the circumstances of the crimes and the sentences imposed.

Id. at 298, 478 A.2d at 465. See also Commonwealth v. Reid, 533 Pa. 508, 626 A.2d 118 (1993) (no error is saying that prior conviction for murder "concerned drugs"). Likewise, in Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991), the Supreme Court noted that the defendant's argument that it was error to permit the Commonwealth to establish his significant criminal history through the use of a agent of the Federal Bureau of Investigation and his "rap sheet" was meritless. Accord Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949 (1992).

COMMENT: It would seem under Zettlemoyer and Beasley that the proof of prior convictions as aggravating circumstances would be the same as proof of prior convictions for impeachment purposes, to wit, have the information read by the Clerk of Courts along with the verdict entered by the jury or judge, and have someone (the police prosecutor) state that the person charged in the information is the same defendant in the courtroom now. Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983) (prosecutor called to identify indictments/informations charging defendant with criminal homicide and to testify to defendant's pleas to second degree murder thereto). Accord Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991).

3. In Travaglia, supra, the jury had heard the details of the murder involved in the prior conviction during the guilt phase of the trial. That information was relevant during the guilt phase for other purposes (showing motive and intent). Under the

circumstances of these cases, the jury's knowledge of the facts underlying these convictions was not prejudicial in the penalty phase. The Court said that once information is found to be relevant and having a probative value which outweighs its prejudice to the defendant during the guilt phase, that information may be considered by the jury for sentencing purposes as well. These became part of the circumstances of the offense to be considered by the sentencer generally. The Court was cautious, however, to not giving license to prosecutors to get into the facts of collateral convictions or to embellish them during a death penalty sentencing proceeding.

4. On this same issue, a federal district judge granted Travaglia's partner, Lesko, habeas corpus relief. Lesko v. Jeffes, 689 F.Supp. 508 (W.D. Pa. 1988). That decision was based on that court's determination that this evidence was so prejudicial that it denied him a fair trial in violation of the Due Process Clause. The district court also concluded that this information infected the sentencing proceeding. The Pennsylvania Supreme Court had rejected similar claims on direct appeal. Commonwealth v. Travaglia, supra. The Court of Appeals reversed the granting of the writ holding that due process had not been violated. This evidence was properly admitted in the guilt phase and was properly considered in the penalty phase. For penalty purposes, the facts underlying the earlier crime were reflective of Lesko's character, an important consideration in capital sentencing. Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989).

5. In order to prove a significant history of prior felony convictions involving the use or threat of violence to the person, the Commonwealth may rely on juvenile adjudications. Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992) (four juvenile adjudications for burglary and conspiracy and one for robbery, aggravated assault and conspiracy properly used to establish aggravating circumstances (d)(9)). Relying on its earlier decision in Commonwealth v. Beasley, 505 Pa. 279, 479 A.2d 460 (1984), the Baker Court observed that capital sentencing "is 'a function of character analysis...and the central idea of the present sentencing statute is to allow a jury to take into account such relevant information, bearing on a defendant's character and record as is applicable to the task of considering the enumerated aggravat-

ing circumstances." These adjudications are important to individualized sentencing which is central in capital sentencing because the jury "must explore the defendant's prior behavior and dangerousness before sanctions are imposed." Id.

XVI. MITIGATING CIRCUMSTANCES.

A. Statute - 42 Pa.C.S.A. § 9711(e).

1. The Pennsylvania Sentencing Code declares that evidence relevant to eight different mitigating circumstances is admissible at the sentencing hearing in a capital case. The Pennsylvania Supreme Court has declared that "the statute permits the defendants to introduce a broad range of mitigating evidence." Commonwealth v. Peterkin, 511 Pa. at 327, 513 A.2d at 387.

   a. The Supreme Court of Pennsylvania has explained that "[a] defendant may present evidence of mitigating circumstances at the sentencing hearing, but the evidence must be relevant and admissible." Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (letters written by defendant to a Catholic nun while he was incarcerated properly excluded at penalty phase as inadmissible hearsay).

2. The U.S. Supreme Court has held that the sentencer be allowed to consider as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); 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, 2965, 57 L.Ed.2d 973 (1978).

3. In a unanimous decision, the U.S. Supreme Court held that a trial judge improperly barred the consideration of mitigating factors not specified in Florida's death penalty statute. Under the Eighth Amendment prohibition against cruel and unusual punishment, the sentencer may not be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). See also Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), where a five member majority of the Court struck down a death penalty because the jury was not provided with adequate instructions on how it could treat evidence offered by a capital defendant so that it could give mitigating effect to that evidence in imposing sentence. Reading Eddings, Justice O'Connor, writing for the majority, said

> it is not enough to simply allow the defendant to present mitigating evidence to the sentencer. The sentencer must be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, supra. Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence. Woodson [v. North Carolina, 428 U.S. 280,] at 304-05 [,96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976)].' Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.' California v. Brown, [479 U.S. 538], at 545 [, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)] (O'Connor J., concurring).

Penry, supra, at 319, 109 S.Ct. at 2947, 106 L.Ed.2d at 278-279. The instructions given did not provide the jury with guidance as to how the defendant's evidence offered in mitigation could be given effect to possibly preclude the imposition of the death penalty. A jury is constitutionally permitted to dispense mercy based on the mitigating evidence introduced by the defendant and must have a vehicle to do so. Id. at 327, 109 S.Ct. at 2952, 106 L.Ed.2d at 284. By not guiding the jury as to the effect of the mitigating evidence the sentence could not stand under the Constitution because of the risk that the death penalty was imposed in spite of factors calling for a less severe penalty. Id. at 328, 109 S.Ct. at 2952, 106 L.Ed.2d at 284.

4. This requirement is codified in the Sentencing Code as mitigating circumstance number 8 - The "omnibus" or "catchall" provision. See Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). Under it, virtually anything concerning the defendant's character or record is admissible. For example, in Commonwealth v. Cross, 508 Pa. 322, 336, 496 A.2d 1144, 1152 (1985), the Pennsylvania Supreme Court stated that the Pennsylvania Sentencing Code has a "thorough list of mitigating circumstances combined with the opportunity for the defendant to go beyond the listed mitigating circumstances and introduce any other evidence of mitigation...." In Commonwealth v. Fahy, 512 Pa. at 317, 516 A.2d at 698, the Supreme Court stated: "At sentencing the defendant is free to introduce any evidence in mitigation which might

persuade the sentencer to be lenient in determining the penalty." In Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985), the Pennsylvania Supreme Court stated: "Moreover, the defense has an opportunity to present evidence beyond the mitigating factors expressly set out in the statute. The only limitation is that of general relevancy." Id. at 470 n.26, 498 A.2d at 856-57 n.26. See also Blystone v. Pennsylvania, 494 U.S at 305 n.2. 110 S.Ct. at 1082 n.2, 108 L.Ed.2d at 263 n.2.

a. Despite the breadth of this provision, it is proper to exclude proffered testimony that if the defendant is allowed to spend his life in prison he might be able to be an academic tutor or act as a spiritual advisor. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990). The Henry Court said that this testimony was purely speculative and was not evidence of the defendant's character or record or the circumstances of his offense which may be considered under section 9711(e)(8) of the Sentencing Code, 42 Pa.C.S. § 9711(e)(8). Compare Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good adjustment to prison life while awaiting trial may not be excluded from penalty phase and jury's consideration; such testimony is reflective of the defendant's character or record). The Pennsylvania Supreme Court, relying on section 9711(e)(8) and Skipper, held that testimony from prison officials that the defendant had acted to improve prison life for other inmates and had been instrumental in securing the safety of guards and inmates was properly admitted in mitigation. Commonwealth v. Green, 525 Pa. 424, 581 A.2d 544 (1990).

5. In Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987), the U.S. Supreme Court struck down a Nevada law which imposed a mandatory death sentence for the killing of a fellow prisoner while the perpetrator was serving a life sentence. The Court held that it is constitutionally required that sentencing authorities be allowed to consider as a mitigating factor, any aspect of the defendant's character or record, or any of the circumstances of the particular offense. Because a death sentence is not automatically imposed upon a conviction for a certain type of murder, and, since the sentencing jury is permitted to consider and give effect to all relevant mitigating evidence,

and since the types of mitigating evidence are not unduly limited, Pennsylvania's statute is not unconstitutionally mandatory. Blystone v. Pennsylvania, supra.

6. Must all twelve jurors agree on what is mitigation? The U.S. Supreme Court says "No" in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). See also McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). In Mills, the U.S. Supreme Court reversed a death sentence on the grounds that a misleading jury verdict form and misleading court instructions may have resulted in convincing jurors that they were precluded from considering any mitigating evidence unless all twelve (12) jurors agreed on the existence of a particular such circumstance.

   a. In Mills, the defendant was convicted of the first-degree murder of his cellmate in a state prison. In the sentencing phase, the jury found that the state established a statutory aggravating circumstance, namely, that the defendant committed the murder while he was a prisoner in a correctional institution. During the sentencing proceeding, defense counsel offered evidence of the defendant's young age, mental infirmity, and lack of future dangerousness as mitigating circumstances. On the verdict form, the jury marked "no" beside each mitigating circumstance and imposed a sentence of death.

   b. The defendant's conviction and sentence were affirmed by the Maryland Court of Appeals. Mills v. State, 310 Md. 33, 527 A.2d 3 (1987). In his appeal to the U.S. Supreme Court, the defendant argued that the verdict form, as explained by the court's instructions, convinced the jury that they were required to impose the death sentence if they found an aggravating circumstance, but could not agree unanimously on the existence of any mitigating circumstances.

   c. The sentencing form in Mills contained three parts. Part I instructed the jurors to write "yes" next to aggravating factors they unanimously determined to exist, and to write "no" next to those not established. Part II instructed the jurors to write "yes" or "no" next to each listed mitigating circumstance.

Part III instructed the jurors to weigh only those mitigating circumstances marked "yes" in Part II against any aggravating circumstances marked "yes" in Part I. In the instant cases the jurors marked "yes" next to one aggravating circumstance and "no" next to all of the listed mitigating circumstances.

d. The Supreme Court ruled that there was a "substantial risk" that the sentencing form and instructions misled the jury into believing that they were precluded from considering any mitigating circumstances which were not unanimously agreed upon. The Court admitted its inability to determine whether the "no" marked next to each mitigating circumstance meant a unanimous rejection of each mitigating factor or a failure to unanimously agree on each mitigating factor. If the latter, then consistent with the form and instructions, a single juror who rejected the listed mitigating circumstances could conceivably have blocked proceeding to Part III of the form, and blocked consideration of mitigating circumstances that the other eleven jurors found to exist. This possibility was enough for the Court to order that the death sentence be vacated.

e. In State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), the North Carolina Supreme Court was faced with a Mills challenge. The state court ruled that, despite the requirement found in the North Carolina death penalty statute that mitigating circumstances must be agreed upon unanimously by the jury before they may be considered, the statute did not contravene Mills. The North Carolina Supreme Court based its decision on differences between the North Carolina and the Maryland statutory schemes. The United States Supreme Court granted certiorari in this case and reversed. McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The Supreme Court rejected the North Carolina Supreme Court's "inventive attempts to distinguish Mills" from McKoy's case. In a statement relevant to Pennsylvania's statute, the Court said that "Mills was not limited to cases in which the jury is required to impose the death penalty if it finds that aggravating circumstances outweigh mitigating circumstances or that no

mitigating circumstances exist at all." Id. at 439-440, 110 S.Ct. at 1232, 108 L.Ed.2d at 379. "Mills," said the Court, "requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." Id. at 442-443, 110 S.Ct. at 1233, 108 L.Ed.2d at 381. It is irrelevant for mitigating circumstances that aggravating circumstances must be proven unanimously. The Court said: "The Constitution requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." Id. at 442, 110 S.Ct. at 233, 108 L.Ed.2d at 380. Though Justice White concurred in the Court's opinion, he explained his vote with the five-justice majority in a separate concurrence, stating: "There is nothing in the Court's opinion...that would invalidate on federal constitutional grounds a jury instruction that does not require unanimity with respect to mitigating circumstances but requires a juror to consider a mitigating circumstance only if he or she is convinced of its existence by a preponderance of the evidence.... Neither does the Court's opinion hold or infer that the Federal Constitution forbids a state from placing on the defendant the burden of persuasion with respect to mitigating circumstances." McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (White, J., concurring). See also McKoy v. North Carolina, supra, (Kennedy, J., opinion concurring in the result) ("I agree with Justice White, ante, at 1, that the discussion of Lockett in today's opinion casts no doubt on evidentiary requirements for presentation of mitigating evidence such as assigning the burden of proof to the defendant or requiring proof of mitigating circumstances by a preponderance of the evidence."). This position was adopted by a four-member plurality of the Court in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The plurality concluded that placing the burden of proving mitigating circumstances by a preponderance of the evidence upon a capital defendant did not violate the rule of Lockett and its progeny. Justice Scalia, who provided the critical fifth vote on this issue, concluded that Lockett is not sound Eighth Amendment ju-

risprudence and determined that this contention does not constitute an Eighth Amendment violation. Id. at 673, 110 S.Ct. at 3068, 111 L.Ed.2d at 541 (1990) (Scalia, J., concurring in part and concurring in the judgment). In reaching its decision on this point, the plurality said that Mills was not violated by this requirement. The plurality observed:

> Mills did not suggest that it would be forbidden to require each individual juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstances has been proved by a preponderance of the evidence. To the contrary, the jury in that case was instructed that it had to find that any mitigating circumstances had been proved by a preponderance of the evidence. [Mills v. Maryland, 486 U.S. 367], at 387. Neither the petitioner in Mills nor the Court in its opinion hinted that there was any constitutional objection to that aspect of the instructions.

Id. at 651, 110 S.Ct. at 3056, 111 L.Ed.2d at 526-527.

COMMENT: The implications of the Mills decision may be severe and result in the reversal of many death penalty verdicts where verdict forms were used. Most of the Pennsylvania cases are the result of jury verdicts without complex forms being filled in so in those cases it is arguable that the jury was never blocked from considering mitigating evidence. Then, too, in a great many cases the jury simply held "the aggravating outweighs the mitigating" implying a finding of mitigating factors. Thus, the possibility of a blockage condemned in Mills would not be pervasively evident in those cases. The lesson: the more complicated the instructions and the greater we tend to constrain the jury's focus via a verdict form, the more chance for reversible error. I have long been a proponent in the sentencing proceeding of letting the defendant put into evidence that which he wanted, letting the jury consider all of it, and then asking them to determine if the aggravating outweighed whatever evidence was put forward in mitigation; thus, the kinds of errors found in

Hitchcock, Sumner, and Mills, supra, are not likely to be present.

a. The Pennsylvania Supreme Court was faced with a Mills challenge in Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989). In Frey, the trial court instructed the jury as to its sentencing deliberations substantially in the language of the death penalty statute. That language, reasonably read, cannot be interpreted as suggesting that mitigating circumstances must be found unanimously before they can be considered in the sentencing phase and weighed with aggravating circumstances. The Court held that as long as the trial court does not needlessly stray from the statutory language in instructing the jury during the penalty phase no Mills problem will arise. See also Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931 (1992); Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990) (same); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989) (same); and Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992) (same).

b. In Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989), the Supreme Court granted a new trial in a death penalty case because of error in the guilt phase. The Court, recognizing that it did not have to resolve the penalty phase issues because the penalty was vacated by the granting of a new trial, cautioned the trial court not to needlessly deviate from the statutory language of section 9711 in instructing the jury in the penalty phase. The Court found that the trial court had caused a Mills problem by deviating from the statutory language.

c. In Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990), the trial court gave an oral instruction consistent with the death penalty statute and Frey. However, the verdict slip sent out with the jury required that mitigating circumstances be found unanimously by the jury. The jury foreman's answer to a question by the trial court made it impossible to determine whether the jury disregarded the oral instruction and proceeded pursuant to the directions on the verdict slip. Accordingly, pursuant to Mills and Billa, the case was

remanded for a new sentencing hearing in accordance with section 9711(h)(4) of the Sentencing Code, 42 Pa.C.S. § 9711(h)(4).

d. In Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991), the trial court gave the sentencing jury a proper instruction consistent with the death penalty statute. During deliberations the jury asked: "Do we all have to agree whether a circumstance is true or not?" The trial judge responded in the affirmative. Thereafter, the jury returned its verdict finding two aggravating circumstances and no mitigating circumstances and sentenced the defendant to death. Since the question did not differentiate between aggravating and mitigating circumstances the affirmative response may have mislead the jury into believing that unanimity was required to conclude that a mitigating circumstance existed. This ambiguity, which was not clarified by anything else in the record, resulted in a Mills error and a remand for resentencing in conformity with section 9711(h)(4).

COMMENT: The drafters of the Pennsylvania Suggested Standard Criminal Jury Instructions issued revised instructions for use in death penalty sentencing proceedings. See Pa.S.S.J.I. (Crim.) 15.2502 E, F, G and H. (Rev. December 1988). Those proposed instructions might have caused the type of Mills error which they are explicitly designed to avoid. Those instructions were again revised in 1991 and seem to have corrected this possible problem. See Pa. S.S.J.I. (Crim.) 152502H (Rev. April 1991). In Commonwealth v. Williams, ___ Pa. ___, 640 A.2d 1251 (1994), the Court upheld a challenged instruction on the determination of mitigating circumstances stating: "The record reflects that the court's instruction was substantially identical to that which is recommended pursuant to the Pennsylvania Suggested Standard Criminal Jury Instructions Guide."

7. In Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988), the Supreme Court of Pennsylvania ruled that a court's instruction which may have focused the jury's attention on "causative" mitigating factors rather than "accompanying" mitigating factors, did not require a reversal of the death sentence since the defendant was not prejudiced in any way by the instruction. The Court

noted that the defendant failed even to assert any "non-causative" mitigating factors, and that the jury specifically stated that it found no mitigating circumstances.

8. On February 1, 1989, the Supreme Court of Pennsylvania adopted Rules 357, 358A and 358B of the Pennsylvania Rules of Criminal Procedure, Pa.R.Crim.P. 357, 358A and 358B. The new rules, which went into effect on July 1, 1989, require the use of a standard sentencing verdict slip (Rule 357) to be used in all death penalty sentencing proceedings conducted before a jury (Rule 358A) or a judge (Rule 358B). The latter two rules prescribe specific forms which are to be completed by the sentencer, jury (Rule 358A) or judge (Rule 358B). Those forms, when completed, are to be made part of the record for purposes of appellate review. According to the Supreme Court, these forms are "simply designed to provide a uniform statewide procedure." Commonwealth v. Tilley, 528 Pa. 234, 147, 595 A.2d 575, 586 (1991).

   a. In Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992), a case tried after the effective date of these rules, the Court, in an opinion authored by Mr. Justice Larsen, rejected a challenge to a sentence of death based on the jury's failure to list on the verdict slip the mitigating circumstances that it found. The jury had sentenced the defendant to death after determining that the aggravating circumstance which it found (aggravating circumstance 6) outweighed the mitigating circumstances. Without addressing the new rules the majority held that the death penalty statute itself does not require that the jury make specific findings in regard to mitigating circumstances and "that a jury verdict slip which does not require a list of mitigating circumstances is not defective." In a concurring opinion, Mr. Justice Zappala found that the trial court erred in not following the procedure required by these rules. He concluded that the error was harmless beyond a reasonable doubt, however.

9. In Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), the jury found three aggravating circumstances (5, 6 and 8) which the Supreme Court found were each supported by the evidence. The jury also found two mitigating circumstances (1 and 8). The

jury determined that the aggravating circumstances outweighed the mitigating and imposed a sentence of death pursuant to the statute. 42 Pa.C.S. § 9711(c)(1)(iv). On direct appeal, the defendant argued that, based on the weight of the evidence, three other mitigating circumstances (2, 3 and 4) should have been found by the jury. After examining the record the Court found no basis for overturning the jury's determination that these mitigating circumstances were not established. The Court grounded its ruling on the "fundamental rule that a jury may believe any, all, or none of a party's evidence." Id. at 155, 569 A.2d at 939. Also, in Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990), the Court said, in response to a similar challenge, that "once a jury has been properly instructed on the nature of aggravating and mitigating circumstances as defined in the statute, as well as on the statutory scheme for balancing one against the other, it is not for reviewing courts to usurp the jury function and to substitute their judgment for that of the jury. The claim has no merit." Id. at 300, 571 A.2d at 1043.

10. Just because a defendant proffers evidence in mitigation, a jury is not required to find mitigation. Commonwealth v. Breakiron, supra ("'Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances....'"). Accord Commonwealth v. Crispell, supra. See also Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) (jury is not required to accept defendant's proffered evidence of mitigation; jury could reject expert testimony offered to prove that defendant acted under diminished mental capacity).

    a. In Commonwealth v. Copenhefer, 526 Pa. 555, 587 A.2d 1353 (1991), the Supreme Court said that, despite a stipulation between the prosecutor and defense counsel that the defendant had no prior criminal record, the trial court did not err in refusing to instruct the jury that the lack of a prior record constituted a mitigating circumstance as a matter of law. Based on the sentencing verdict slip the Supreme Court determined that this circumstance had, at least, been considered by the jury. The defendant was sentenced to death

based on the jury's finding of two aggravating circumstances.

b. Relying on Copenhefer, supra, the Supreme Court held that there was no error in the trial court's refusing to give a specific instruction, requested by the defense, on how to use unspecified mitigating evidence. Commonwealth v. Peoples, ___ Pa. ___, 639 A.2d 448 (1994). In Peoples, the defendant proffered his good behavior in jail while awaiting trial as mitigating evidence under mitigating circumstance (e)(8). The Commonwealth also stipulated that the defendant evidenced good workmanship in various businesses. No specific instruction, beyond the language of (e)(8), was required as a result of this evidence. Instead, it was defense counsel's obligation during summation to explain to the jury how to evaluate this and any other evidence in mitigation.

c. In Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993), the Supreme Court stated that "[i]mplicit in the fact that the defendant bears the burden of proving mitigating circumstances at the sentencing hearing is the understanding that the jury must assess the credibility of such evidence. Commonwealth v. Abu-Jamal, 521 Pa. 188, 213, 555 A.2d 846, 858 (1989). In order for this to occur, the Commonwealth must have the opportunity 'to challenge the veracity of facts asserted and the credibility of the person asserting those facts, whether the person is a witness or the defendant.' Id." In Young, supra, the Court held that letters written by the defendant to a Roman Catholic nun were properly excluded as inadmissible hearsay.

11. Where there is no evidence to support a mitigating circumstance, it may not be found. Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991). See also Commonwealth v. Hughes, ___ Pa. ___, 639 A.2d 763 (1994) (trial court, sitting without a jury, incorrectly found mitigating circumstances (e)(2) for which there was no evidence; error did not harm defendant). In such a situation there should be no instruction on that circumstance and it should not be included on the sentencing verdict slip. Id. at 143 n.11, 595 A.2d at 583-4 n.11. See Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931 (1992) (defen-

dant offered no evidence of mitigation; defense counsel argued that defendant's age should be considered as mitigating; since nothing in evidence established defendant's age an objection was sustained when defense counsel said he was nineteen; Court noted: "nothing in the record indicates that [defendant's] age, whatever it may have been, was particularly noteworthy"; sentence of death based on two aggravating and no mitigating circumstances upheld).

12. Testimony concerning the defendant's guilt is no longer relevant at the sentencing phase. A defendant's testimony that he did not kill the victim and that he was not present at the scene of the crime was properly objected to by the prosecutor. At the penalty phase, the defendant's testimony is properly limited to a consideration of the appropriate aggravating and mitigating circumstances. Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992) (plurality). See also Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989).

B. Examples Of Mitigating Circumstances.

1. **MITIGATING CIRCUMSTANCE #1:** THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS, 42 Pa.C.S. § 9711(e)(1).

   a. The United States Supreme Court has held that a death penalty procedures statute which requires a sentencer in deciding what sentence to impose to "take into account . . . if relevant . . . the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" is not unconstitutionally vague under the Eighth or Fourteenth Amendments. Tuilaepa v. California, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 62 U.S.L.W. 4720 (1994) (factor asks jury to consider "matters of historical fact" and is permissible).

   b. If a defendant attempts to establish that he has no significant history of prior criminal convictions, his testimony or evidence can be contradicted by showing prior convictions which were obtained after the present offense was committed. In Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989), the defendant

sought to establish this mitigating circumstance. The prosecutor advised that if the defendant's mother testified that the defendant had no significant history of prior criminal convictions he would inquire, on cross-examination, if she was aware of these convictions. The trial court said it would permit this line of cross-examination and the defense attorney abandoned this line of inquiry. The Supreme Court held that the trial court's ruling was proper and that such impeachment was appropriate. What is important for this circumstance is that the conviction be obtained before the sentencing proceeding. It does not matter when the crime and conviction occurred in relation to when the murder giving rise to the penalty proceeding occurred. Accord Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990) (if defendant sought to establish his lack of a significant history of prior criminal convictions as a mitigating circumstance the Commonwealth could have rebutted this contention by showing his prior conviction for a gun-point robbery similar to the offense for which the defendant had just been tried and convicted; counsel was not ineffective for failing to attempt to establish this mitigating circumstance under the facts presented).

1) If a defendant argues that he has no significant history of prior criminal convictions the Commonwealth can rebut this claim by showing juvenile adjudications. See Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992) (counsel not ineffective for not pursuing this circumstance since any such claim would have led to the introduction of the defendant's juvenile record). The Court in Stokes said that its holding followed from Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992) (can use juvenile adjudications for violent or potentially violent felonies to establish aggravating circumstance (d)(9)).

c. Where a defendant places his character in issue during the penalty phase, the prosecutor is free to bring out his prior convictions for either felonies or misdemeanors. Commonwealth v. Rollins, 525 Pa. 335, 580 A.2d 744 (1990).

Evidence of prior convictions is always relevant under this mitigating circumstance. Id. Here the jury found that the defendant had no significant prior criminal history despite his second degree misdemeanor convictions for simple assault and unauthorized use of an automobile. The defense admitted these convictions in an attempt to use them to the defendant's favor.

1) In Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992), the Pennsylvania Supreme Court affirmed a sentence of death imposed after the jury found three aggravating circumstance and this single mitigating circumstance. The Court noted parenthetically "relative to this mitigation...that the prosecution refused to offer evidence at the penalty stage of a prior conviction for bank robbery." Id. at 328 n.2, 603 A.2d at 572 n.2 (emphasis added). The Court observed that this circumstance was found by the jury despite the defendant's "express refusal to offer evidence of any mitigating circumstances...." Id. at 338, 603 A.2d at 576-577. The Court noted, Lambert's argument "that the prosecution should have explained to the jury that [Lambert] had no significant history of criminal convictions since the [trial] Judge had found this to be a fact." Id. at 338 n.9, 603 A.2d at 577 n.9. The Court did not decide the issue since this circumstance was found by the jury anyway.

d. Despite its finding of two aggravating factors as to one victim and four as to another in a double homicide, the jury in Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991), found that the defendant had no significant history of prior criminal convictions as a mitigating circumstance as to each victim. As to each the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstance and sentenced the defendant to death.

2. **MITIGATING CIRCUMSTANCE #2:** THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, 42 Pa.C.S. § 9711(e)(2).

a. See Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986), where the defendant burglarized a club, and was caught in the act by a security guard, whom he killed. The defendant alleged a long history of "drug and alcohol abuse." But the jury did not find this mitigating circumstance and sentenced him to death.

b. See also Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 739 (1984), where the defendant's mother testified that the defendant suffered from "Alcoholic blackouts" as a teenager, and, that he received treatment at a psychiatric hospital. But his mother was not permitted to testify as to the duration of the blackouts. The Court held that the defendant was not denied the opportunity to present mitigating evidence, particularly where the blackouts occurred 12 years earlier, and the defendant's defense was not "amnesia" but rather "somebody else shot the cop." Id. at 502, 475 A.2d at 739.

c. See also Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), where the jury rejected the defendant's expert's testimony offered to prove that the defendant operated under a diminished mental capacity.

d. What may not be completely relevant or admissible on the issue of diminished capacity, may very well be relevant and admissible in the penalty phase on the issue of defendant's emotional disturbance or the impairment of defendant's mental capacity. In Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398 (1987), the Pennsylvania Supreme Court held certain expert testimony on the issue of diminished capacity to be inadmissible at trial but, nonetheless, relevant on the issue of mitigation in the sentencing phase of the case. Accord Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991) (evidence which would support guilty but mentally ill verdict is admissible under this circumstance during penalty phase). Where the defendant offers such evidence, the Commonwealth may attempt to rebut it. Id.

1) Faulkner was followed in Commonwealth v. Hughes, ___ Pa. ___, 639 A.2d 763 (1994). In Hughes, the Supreme Court said that

the trial judge, sitting without a jury, incorrectly found this mitigating circumstance because the testimony offered by the defendant in support of it did not relate to any mental illness at the time of the commission of the murders which is the relevant time frame.

e. Evidence offered by the defendant that he was "shaking, crying and extremely upset" when he was confronted by the owner of the house which he was in the process of burglarizing was insufficient to warrant submission of this mitigating circumstance to the jury. Commonwealth v. Tilley, 528 Pa. 125, 145 n.12, 595 A.2d 575, 584-85 n.12 (1991).

f. Relying on its earlier decision in Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), the Supreme Court in Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992), rejected an argument that the use of the word "extreme" to qualify "mental or emotional disturbance" rendered this mitigating circumstance void for vagueness. Therefore, trial counsel was not ineffective for failing to object to a jury instruction on this circumstance on this basis. The Court in Williams also rejected a claim that this adjective unconstitutionally limited the range of mitigating circumstances a jury could consider, relying on Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.E.d.2d 255 (1990).

3. **MITIGATING CIRCUMSTANCE #3:** THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED, 42 Pa.C.S. § 9711(e)(3).

a. In Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986), the defendant raped, choked, strangled and stabbed a 12 year old girl to her death. He had a history of child sexual abuse and admitted he had an inner compulsion to abuse young children sexually. The jury found he had a "substantial impairment" but found it was outweighed by three aggravating circumstances, and sentenced him to death. Id. at 316, 516 A.2d at 698. The Court held a finding of "substantial mental impairment does not bar the death penalty." Id. Accord

Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991) (citing Fahy).

b. In Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), the defendant burglarized two apartments, robbed the occupants, attempted to rape the wife of the victim and stabbed the husband to death. The defendant claimed "substantial impairment" due to alcoholic "intoxication." The jury did not find this mitigating circumstance, but did find evidence of mitigation concerning the character of the defendant (number 8). The jury found that three aggravating circumstances (murder during the commission of a felony, grave risk, and torture) outweighed the mitigating circumstances. Id. at 249, 512 A.2d at 1161.

c. In Commonwealth v. Sneed, 514 Pa. 597, 526 A.2d 749 (1987), the defendant argued that his drug abuse and dependency were mitigating factors because they placed him in a state of extreme emotional and mental disturbance, impaired his capacity to appreciate the criminality of his acts, and that the victim, a drug pusher, cheated him out of his dope. The jury, however, rejected these theories and found no evidence of mitigating circumstances.

d. In Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), a jury refused to find this mitigating circumstance, apparently rejecting the defendant's proffered expert testimony of diminished mental capacity.

e. Defendant's asserted "justification" for killing the owner of the house he was burglarizing was insufficient to require an instruction on this mitigating circumstance. Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991).

f. In Commonwealth v. Faulkner, 528 Pa. 57, 598 A.2d 28 (1991), the Court stated that evidence which would support a verdict of guilty but mentally ill is admissible during the penalty phase under this circumstance. If such evidence is offered, the Commonwealth may attempt to rebut it by expert testimony. (NOTE: The Court also said it was admissible under (e)(2). It is also admissible under (e)(8).) In Faulkner, the jury specified "a degree of

mental illness" as a mitigating circumstance as to each of the murders with which the defendant had been charged and convicted. As to each, the jury determined that the aggravating circumstance as to one and the aggravating circumstances as to the other outweighed this mitigating circumstance and, therefore, imposed the death penalty.

g. In Commonwealth v. Hughes, ___ Pa. ___, 639 A.2d 763 (1994), the Court rejected the defendant's claim that the trial court, sitting without a jury, should have found this mitigating circumstance, saying this circumstance "tracks the language of the 'guilty but mentally ill' statute and thus, provides that only where the defendant lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the offenses will he meet the criteria." Id., ___ at ___, 639 A.2d at 774 (emphasis of the Court).

4. **MITIGATING CIRCUMSTANCE #4:** THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME, 42 Pa.C.S. § 9711(e)(4).

a. Under this mitigating circumstance, the Pennsylvania Supreme Court held that just because the defendant was 42 can "in no way be offered as a factor in mitigating" because "age means youth or advanced age." Commonwealth v. Frey, 504 Pa. at 440, 475 A.2d at 706.

> Age cannot be reasonably interpreted so broadly as to encompass every defendant. Our society recognizes that, for many purposes, the young and the old are in a category apart from the greater majority of the population - the middle aged. The legislature recognized this distinction... There is no necessity to define the exact parameters of youth or advancing age.

b. In Commonwealth v. Rivers, ___ Pa. ___, ___ A.2d ___ (1994) (No. 14 Capital Appeal Docket; 7/1/94), the Supreme Court, relying on Frey, supra, said the trial court properly refused an instruction on age as a mitigating circumstance where the defendant was 34 years old at the time of the offense.

c. In Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (1987), the Pennsylvania Supreme Court was presented with the question of whether it was cruel and unusual punishment to sentence to death a 15 1/2 year old boy who senselessly killed two other neighborhood children-ages eight and four. The Court, in a 4-3 decision, side-stepped the issue, holding that because the evidence to support the "kidnapping" conviction was "insufficient," the aggravating circumstance of killing in the course of a felony had to fall, and with it the death penalty, even though aggravating circumstance number 10-multiple murder-was proven. This case is important because the jury implicitly found age as a mitigating circumstance (aggravating outweighed any mitigating), and because the three dissenters, (Justices Larsen, McDermott, and Papadakos) who found the error to be "harmless," explicitly held that as long as the jury considered the youthful age, the death penalty could stand, and that it was not cruel and unusual punishment. Justice Hutchinson, who concurred in the reversal of the death penalty, did so, not because of the cruel and unusual punishment issue, but rather because he could not say whether the error was "harmless beyond a reasonable doubt" under the particular circumstance of the case, the defendant being 15 1/2 years old.

d. Whether age is a mitigating circumstance is for the jury to decide. Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990). That the defendant was 18 years and four months old at the time he committed murder is not a per se mitigating circumstance. Id. See also Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) (jury was not required to find that, at 20 years of age when he committed offense, defendant's youth or immaturity was a mitigating factor); Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990) (it is for jury alone to determine if proffered evidence has mitigating effect); Commonwealth v. Jones, 530 Pa. 591, 623, 610 A.2d 931, 946 (1992) (Pennsylvania Supreme Court noted: "nothing in the record indicates that [defendant's] age, whatever it may have been, was particularly noteworthy"); Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992)

(jury found that defendant's age, 20, at time of crime, was mitigating circumstance); and Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) (jury may have considered defendant's youth as mitigating).

e. In reviewing California's death penalty procedures statute which allows the jury to consider several factors, if relevant, in determining whether to sentence a death-eligible convicted murderer to death, the United States Supreme Court has held that the factor which allows consideration of "the age of the defendant at the time of the crime" is not unconstitutionally vague in violation of the Eighth and Fourteenth Amendment. Tuilaepa v. California, ___ U.S. ___, ___ A.Ct. ___, ___ L.Ed.2d ___, 62 U.S.L.W. 4720 (1994) (though age could be argued as aggravating or mitigating circumstance and could pose dilemma for sentencer, "difficulty in application is not equivalent to vagueness").

f. The U.S. Supreme Court dealt with the "age" issue in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). That case involved the review of a death sentence imposed on a person who was fifteen years old at the time of the offense. The defendant, age fifteen, along with three older persons, brutally murdered his former brother-in-law, by shooting him twice, cutting his throat, chest, and abdomen, and dumping the body chained to a concrete block in a river. Because the defendant was a "child" under Oklahoma law, the prosecutor petitioned the lower court to order that the defendant be tried as an adult. After a hearing, the lower court concluded that Thompson "should be certified to stand trial as an adult." Id. at 820, 108 S.Ct. at 2690, 101 L.Ed.2d at 709. The defendant was convicted of first degree murder. At the penalty phase of the proceedings, the jury found as an aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" and imposed the death sentence. The Court of Criminal Appeals affirmed the conviction and sentence, Thompson v. State, 724 P.2d 780 (Okl. Crim. App. 1986), and the U.S. Supreme Court granted certiorari.

g. In a 4-1-3 plurality decision (Justice Kennedy did not participate), the Court vacated the death sentence. Four of the justices held that the imposition of the death penalty for offenses committed by persons under sixteen years of age constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution. The four justices reviewed state death penalty statutes, the practice in other nations, and the opinions of professional legal organizations in an effort to determine the "evolving standards of decency that mark he progress of a maturing society," and found that the imposition of the death penalty on a fifteen year old offender is generally abhorrent to the conscience of the community. Thompson v. Oklahoma, 487 U.S. at 832, 108 S.Ct. at 2697, 101 L.Ed.2d at 716-17. In addition, the four justices determined that the imposition of the death sentence on a fifteen year old person fails to serve the recognized social purposes of retribution or deterrence of capital crimes. Id. at 836, 108 S.Ct. at 2700, 101 L.Ed.2d at 720.

h. In a separate concurring opinion, Justice O'Connor voted to reverse the sentence in this particular case, but based her decision on narrower grounds. Justice O'Connor refused to join the sweeping plurality opinion which held that the imposition of the death penalty on any person under sixteen years of age at the time of the offense is in all cases unconstitutional. Instead, she held that the death sentence could not be imposed on a person under sixteen years of age "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Id. at 857-58, 108 S.Ct. at 2711, 101 L.Ed.2d at 734. Since Oklahoma's statute failed to specify a minimum age at which the death sentence could be imposed, she wrote "there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering fifteen year old defendant's death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." Id. at 857, 108 S.Ct. at

2711, 101 L.Ed.2d at 734. Justice O'Connor's opinion leaves open the possibility that had Oklahoma specified a minimum age at which the death penalty could be imposed, her vote may have been different.

i. The three dissenters (Justices Scalia and White and Chief Justice Rehnquist) argued that the plurality opinion is contrary to the original intent of the Framers of the Eighth Amendment, and contrary to "evolving standards of decency" in our society. The dissenters rebuked the plurality for substituting their own personal views and convictions for those of our society as a whole. They rejected the plurality's notion that there is a "national consensus" that no one under the age of sixteen should in all circumstances be sentenced to death.

j. In Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), a five member majority of the Supreme Court held that execution of persons who are sixteen years of age when they commit their capital offenses does not violate the Eighth Amendment ban on cruel and unusual punishment. Such executions were not barred at common law which permitted executions for persons who committed their crimes when they had reached the age of fourteen. The evolving standards of decency that mark the progress of a maturing society do not bar execution of sixteen year olds. There is no national consensus that would show that execution of a defendant who was sixteen when he committed his crime offends those standards of decency. The Court determined the existence of such a consensus, or the lack thereof as in this case, by looking to objective indicia that reflect the public attitude toward a given sanction. The first among such indicia are state statutes. Presently, only 15 states decline to impose a death penalty on offenders who were sixteen years old when they committed their crimes; twelve states decline to impose it on seventeen year old offenders.

k. A four-member plurality of the Court said that the Eighth Amendment jurisprudence did not require it to conduct a proportionality analysis to determine if execution of sixteen year olds constituted cruel and unusual punishment.

Justice O'Connor, who joined the other portions of the court's opinion to constitute a majority, broke ranks with the plurality on this point. Relying on her concurrence in Thompson, supra, she would hold that, under the Eighth Amendment, the Court has a constitutional obligation to conduct an analysis to determine whether the nexus between the punishment imposed and the defendant's blameworthiness is proportional. Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (O'Connor, J., concurring). Justice O'Connor concluded, however, that these cases, involving crimes committed by a 16 or 17 year old could not be resolved by such an analysis. She therefore concurred in the affirmance of the death penalty.

l. The four dissenting justices agreed that proportionality review was part of the Court's Eighth Amendment jurisprudence. They would hold that it is always disproportionate to execute someone who was less than 18 years of age when he committed his crime. It would seem that a majority of the Court (the four dissenters and Justice O'Connor) have ruled that proportionality analysis is a necessary component to a determination of whether a particular punishment is cruel and unusual.

m. It is noted that the four-justice plurality observed that "one of the individualized mitigating factors that sentencers must be permitted to consider [under Lockett and Eddings] is the defendant's age." Stanford v. Kentucky, 492 U.S. at 375, 109 S.Ct. at 2978, 106 L.Ed.2d at 321 (plurality opinion). The Court noted that Pennsylvania is among 29 states which "have codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases." Id. See 42 Pa.C.S. § 9711 (e)(4).

n. Pennsylvania's death penalty statute does not set a minimum age at which the death penalty may be imposed. Under Pennsylvania's juvenile laws, all persons charged with murder are tried as adults unless the trial court certifies the juvenile defendants to juvenile court. 42 Pa.C.S. §§ 6322 and 6355(e). See Commonwealth v. Kocher, 529 Pa. 303, 602 A.2d

1308 (1992). This procedure is the reverse of that followed for other crimes.

5. **MITIGATING CIRCUMSTANCE #5:** THE DEFENDANT ACTED UNDER EXTREME DURESS, ALTHOUGH NOT SUCH DURESS AS TO CONSTITUTE A DEFENSE TO PROSECUTION UNDER 18 Pa.C.S. § 309 (RELATING TO DURESS), OR ACTED UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON, 42 Pa.C.S. § 9711(e)(5).

a. In Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990), the Supreme Court determined that trial counsel was not ineffective in failing to argue that the defendant was subject to the substantial domination of the person who hired him to kill the victim. Such a contention would have been inconsistent with the defense offered at trial that the defendant was not at the scene of the crime. Accordingly, trial counsel was not ineffective.

b. Defendant's assertion, based on his testimony and that of witnesses, that he was afraid of the owner of the house he was burglarizing who arrived at the scene during the burglary, did not require that the jury be instructed on this extreme duress circumstance. The evidence was insufficient to support such a finding. Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991).

c. Relying on its earlier decision in Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), the Supreme Court in Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992), rejected an argument that the use of the word "extreme" to qualify "duress" and the use of the word "substantial" to qualify "domination" rendered this mitigating circumstance void for vagueness. Therefore trial counsel was not ineffective for failing to object to a jury instruction on this circumstance on this basis. The Court in Williams also rejected a claim that these adjectives unconstitutionally limited the range of mitigating circumstances a jury could consider, relying on Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990).

d. Where, at the guilt stage, the defendant contends that another person committed the

killing and does not rely on the defense of duress, there is no requirement for giving any instruction on this mitigating circumstance. Commonwealth v. Carpenter, 533 Pa. 40, 617 A.2d 1263 (1992).

e. "Extreme duress" and "substantial domination" are similar. "[T]he only relevant difference may be that mitigating duress requires an element of force, whereas force may be unnecessary for a 'substantial domination' claim." Frey v. Fulcomer, 974 F.2d 348, 365 n.17 (3rd Cir. 1992).

f. Where it is anticipated that a defendant is going to rely on this circumstance, it is proper for the prosecution to introduce evidence during its case-in-chief on penalty which shows that the defendant planned on killing the victim several months prior to the murder. Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989). See also Frey v. Fulcomer, 974 F.2d 348 (3rd Cir. 1992).

6. **MITIGATING CIRCUMSTANCE #6:** THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE HOMICIDAL ACTS, 42 Pa.C.S. § 9711(e)(6).

7. **MITIGATING CIRCUMSTANCE #7:** THE DEFENDANT'S PARTICIPATION IN THE HOMICIDAL ACT WAS RELATIVELY MINOR, 42 Pa.C.S. § 9711(e)(7).

a. In Commonwealth v. Frey, supra, the defendant claimed that because he did not actually kill his wife (someone else whom he hired did it) that this was a mitigating factor. The Pennsylvania Supreme Court rejected this preposterous argument in a footnote - saying his actions as planner and hirer of the killer could not be considered "minor." Id. at 442 n.4, 475 A.2d at 707 n.4.

b. Without deciding the issue, the Third Circuit said that a defendant who was found guilty of first degree murder and who was an active and willing participant in the events leading up to the murder and who said he wanted to kill the police officer victim but who did not pull the trigger might qualify under this mitigating circumstance. Lesko v. Lehman, 925 F.2d 1527, 1546 and 1551 (3d Cir. 1991) (jury found

unspecified mitigating circumstances and sentenced defendant to death because the two aggravating circumstances outweighed them).

8. **MITIGATING CIRCUMSTANCE #8:** ANY OTHER EVIDENCE OF MITIGATION CONCERNING THE CHARACTER AND RECORD OF THE DEFENDANT AND THE CIRCUMSTANCES OF HIS OFFENSE, 42 Pa.C.S. § 9711(e)(8).

a. The United States Supreme Court has held that a statutory death penalty scheme that requires the sentencer in deciding what penalty to impose to "take into account . . . if relevant . . . the circumstances of the crime of which the defendant was convicted" along with any factors found by the jury to make the defendant eligible for the death penalty is not unconstitutionally vague under the Eighth and Fourteenth Amendments. Tuilaepa v. California, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 62 U.S.L.W. 4720 (1994) (this factor instructs the jury to consider a relevant subject and does so in understandable terms).

b. Employment problems, death in family, alcohol addiction, family problems.

1) In Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985), the defendant himself testified at the sentencing hearing as to his character and record such as his military service, his employment history, his father's death when he was three, his problems with alcohol, and that he had three young children. The jury held that three aggravating circumstances outweighed any mitigating.

2) In Frey v. Fulcomer, 974 F.2d 348 (3rd Cir. 1992), the court of appeals cataloged the following matters under this mitigating circumstance: death of defendant's son two years before murder; impotence following son's death; deterioration of marriage; low IQ and psychological weakness; good work record.

c. Good behavior in jail awaiting trial. In a capital case where a defendant proffers evidence of his good behavior - "that he made a good, adjustment" - during time spent in jail awaiting trial, the evidence is admissible as

relevant evidence of mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

1) If a defendant offers evidence of his "good" prison record as a mitigating circumstance, the Commonwealth may offer evidence to rebut this contention. Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990) (evidence of good record subject to being rebutted by evidence that, while in prison, defendant was passing notes for purpose of suborning perjury); and Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989) (prosecution permitted to introduce evidence in rebuttal in order to correct misleading assertions of defendant in mitigation; Commonwealth could show that defendant's assistance in earlier investigation was not based solely on desire to help but was in hope of gaining favorable consideration on then-pending charges).

2) Relying on Skipper, supra, the Pennsylvania Supreme Court said that evidence from prison officials that the defendant, while incarcerated, had acted to improve prison life for other inmates and, at risk to himself, had been instrumental in securing the safety of prison guards and inmates by providing information that lead to a confiscation of weapons and to abort planned riots was properly admitted in mitigation. Commonwealth v. Green, 525 Pa. 424, 581 A.2d 544 (1990). The prosecutor improperly tried to rebut this evidence through testimony of a deputy sheriff who testified that an unidentified inmate told him the day of the sentencing that the defendant was recruiting other inmates to help him take hostages on the cell block. This testimony was blatantly unreliable hearsay which violated the defendant's State and federal constitutional rights to confront the witnesses against him. The Court concluded that this improper evidence may have led the jury to reject the proffered mitigation. Accordingly, the Court ordered a new sentencing hearing pursuant to 42 Pa.C.S. § 9711(h)(4).

3) The Pennsylvania Supreme Court has properly recognized that "[a]ll Skipper requires is that a defendant be given the opportunity to present all relevant evidence in mitigation." Commonwealth v. Peoples, ___ Pa. ___, 639 A.2d 448 (1994). Skipper does not require a specific instruction on how to use unspecified mitigation. After the trial judge instructs under mitigating circumstance (e)(8) it is for defense counsel to explain to the jury how to evaluate any evidence in mitigation. Id., at ___, 639 A.2d at 452.

d. Remorse. The defendant's remorse for his murderous acts is properly considered as a mitigating circumstance under this provision. Commonwealth v. Gamboa-Taylor, ___ Pa. __, 634 A.2d 1106 (1993).

e. In Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992) (opinion in support of affirmance), aff'd on reargument, ___ Pa. ___, ___ A.2d ___ (1994) (1994) (No. 74 E.D. Appeal Docket 1990; 7/7/94) (per curiam opinion adopting previously filed opinion in support of affirmance), the Supreme Court held that defense counsel could not properly argue the morality of the death penalty under mitigating circumstance (e)(8). Penalty phase closing arguments must be based on evidence and the inferences derived therefrom. Arguments based on morality invade the Legislature's determination that in some circumstances a sentence of death is appropriate. To argue that the death sentence is immoral improperly suggests to the jurors that they may disregard the law. The opinions of the other three justices who voted to vacate the death sentence in this case on grounds of insufficiency of two aggravating circumstances found by the jury do not address this issue.

f. In Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992), the Supreme Court observed that the modifiers "extreme" and "substantial" in mitigating circumstances (e)(2) and (e)(5) "serve to inform, rather than hinder, the jury regarding its discretion with respect to the(se) specific mitigating circumstances." The Court concluded, however, that "[t]o the

extent that relevant evidence nevertheless may not qualify for one of those two enumerated mitigating circumstances, it can always be considered under subsection (e)(8)." The Court noted that this issue was addressed and rejected in Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). Williams argued that "a 'reasonable juror' upon rejecting such evidence for its failure to meet the 'extremity' test, will believe that he is precluded from considering it later as 'non-extreme' mental or emotional disturbance under subsection (e)(8)." The Supreme Court characterized this argument as "severely flawed as it presumes that a reasonable juror will ignore the clearly open-ended nature of the reference to 'any other evidence of mitigation' in (e)(8), and conclude that 'any other evidence' really means 'any other categories' of evidence." Accordingly, the Williams Court rejected claims of ineffective assistance of counsel in failing to make these arguments.

g. Mercy and Leniency.

1) The defendant in Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), argued that the Pennsylvania Sentencing Code was unconstitutional because it allegedly precluded the jury from "consideration of mercy or leniency." Id. at 327, 513 A.2d at 387. The Court held:

> Although it was true that the Pennsylvania death penalty statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of (eight) mitigating circumstances.

Commonwealth v. Peterkin, 511 Pa. at 327-28, 513 A.2d at 387 (emphasis added). It further held that Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) "does not require that the sentencing body be given discretion to grant

mercy or leniency based upon unarticulable reasons," and that the Pennsylvania statute was consistent with the mandates of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) because it allowed the "channelling of considerations of mercy and leniency into the scheme of aggravating and mitigating circumstances. Commonwealth v. Peterkin, 511 Pa. at 327, 513 A.2d at 388 (emphasis added).

a) Peterkin was followed in Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992) where the Court said: "The Pennsylvania death penalty statute does not permit a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency. However, the statute does permit a defendant to introduce a broad range of mitigating evidence that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstance(s) found by the jury." The Court upheld the trial court's instruction on the proper place of mercy or sympathy for the jury's consideration. The trial court had instructed the jury, in pertinent part, as follows: "In making the decision whether or not to impose the death penalty upon [the defendant], it is entirely proper for you to consider sympathy or mercy as a reason to impose a life sentence.... The sympathy or mercy which you may wish to show [the defendant] must be founded upon evidence any one or more of you find to be a mitigating circumstance."

2) Absolute mercy verdicts are precluded by Pennsylvania's death penalty statute. Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993); Commonwealth v. Zook, supra; Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v.

Peterkin, 511 Pa. 299, 513 A.2d 373 (1986); Commonwealth v. Holcomb, 508 Pa. at 472, 498 A.2d at 857 (opinion announcing the judgment of the court).

3) In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), Justice O'Connor wrote for a five member majority that "so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by the defendant." Accordingly, while "mercy" or "sympathy" arising from emotion or some similar subjective basis is inappropriate to a capital sentencing scheme, either consideration may call for a sentence less than death if based on the evidence before the sentencer.

4) The dispositions of the cases against co-conspirators are not mitigating circumstances. Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 284 (1989) (trial court properly kept from Haag's sentencing jury that one co-conspirator was acquitted of murder and other received sentence of life imprisonment). This is so even when someone other than the defendant on trial actually killed the victim. Id. at 404-05, 562 A.2d at 297 (Haag paid someone else who actually killed the victim). See also Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984) (defendant paid another who killed his wife; killer got life imprisonment). The sentence imposed upon a co-defendant or co-conspirator is not evidence concerning the character or record of the defendant or of the circumstances of his offense. See Commonwealth v. Haag, 522 Pa. at 408, 562 A.2d at 299 ("Sentencing is a highly individualized matter...and even where [aggravating and mitigating circumstances applicable to different defendants involved in the same crime] are substantially similar, fine qualitative differences may warrant different sentences."). But see Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (in reciting evidence

of nonstatutory mitigating circumstances presented by a capital defendant in a Florida death penalty case the United States Supreme Court twice mentioned the more lenient sentences imposed upon the defendant's accomplices, including the triggerman, as such evidence and noted that the Florida Supreme Court had found such mitigating evidence as sufficient to preclude a judge's override of a jury's recommendation of a life sentence in earlier cases).

a) In Frey v. Fulcomer, 974 F.2d 348, 306 n.22 (3rd Cir. 1992), the court of appeals, in rejecting claims of ineffective assistance of counsel at the sentencing phase of a capital trial, including a claim that trial counsel was ineffective for failing to attempt to place the life sentence of a co-conspirator before the sentencing jury as mitigation, noted that whether the United States Constitution requires co-defendants' sentences to be admitted as mitigating evidence in a death penalty hearing is an open question.

XVII. SYMPATHY PLEA.

A. What To Do When The Defendant Takes The Stand And Seeks Sympathy In The Penalty Phase?

Usually tells about his bad childhood, his father beat his mother, how poor and deprived he and the family were, his father or mother were alcoholics, how he was constantly beaten, his lack of education or job opportunity, his good service record, his present family (wife and kids) - All calculated to get the jurors sympathy!

1. Should you cross examine him? There had been some question as to whether a defendant was subject to cross-examination if he testified at the penalty phase. See, e.g. Commonwealth v. Karabin, 521 Pa. 543, 559 A.2d 19 (1989). That question was resolved in Commonwealth v. Abu-Jumal, 521 Pa. 188, 555 A.2d 846 (1989). In Abu-Jumal, the defendant claimed he should not have been cross-examined during the penalty proceeding because he was exercising his right of allocution which traditionally does not admit of cross-examination. The defendant did not answer questions posed by his attorney. Instead he read a prepared text to the jury. The Supreme Court rejected his claim. The Court observed that whatever right of allocution existed at common law in capital cases had been abrogated by the procedure adopted by the legislature in enacting section 9711. The right of allocution provided by Pa.R.Crim.P. 1405(a) is inapplicable to capital cases. The sentencing proceeding is part of the "truth-determining process." The Court found "no reason in law or logic why the defendant's presentation of evidence in support of his claim that life imprisonment is the appropriate sentence should be shielded from the testing for truthfulness and reliability that is accomplished by cross-examination." Id. 521 Pa. at 213, 555 A.2d at 858. Relying on Abu-Jamal, the Pennsylvania Supreme Court rejected a similar claim in Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (trial court properly ruled that if defendant took stand to testify and/or to express remorse at sentencing proceeding he would be subject to prosecutor's cross-examination). Accord Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993) (relying on Abu-Jamal, supra, Court said allowing introduction of letters written by defendant to Roman Catholic nun would have amounted to granting capital defendant a right of allocution which does not exist under Sentencing Code).

a. Depends on the circumstances:
Is he denying what they jury found him guilty of?
Is he crying?
Is he sincere?
Does his story have obvious exaggerations or lies?
Is he "laying it on too thick?"
Is he asking for mercy?

Does he admit to his prior convictions of bad acts which his psychiatrist or other of his witnesses says he told them about or observed him do - i.e., "he acts real crazy when drunk; real violent."

b. In Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993), the Supreme Court found no error (or ineffective assistance of counsel) in the prosecutor's cross-examination of the defendant during the penalty phase despite what the Court characterized as the cross-examination having a "harsh" tone "at times." The cross-examination dealt with the defendant's discharge from the military; the fact that he was "in trouble" through most of his military service; his memory loss concerning the murders; how the defendant's remaining children "felt about him" (they were afraid he'd kill them in their sleep); and his "new founded relationship with God." All of these subjects, the Court found, properly responded to matters raised by the defendant during his direct examination and related directly to the mitigating circumstances the defense was trying to establish. Defense counsel was not ineffective in failing to object.

2. Sympathy Plea from Family -

a. Shall a prosecutor cross examine the defendant's father, mother, sister, brother?

Strongly suggest not, because jury knows their testimony will be biased; however, if they commit egregious errors of fact, gently call that to their attention; get them on and off the stand quickly.

NOTE: Get an offer of proof before family members testify. You may be able to get them excluded on

the grounds of relevance or at least have their testimony limited.

b. Shall a prosecutor examine the victim's family or attempt to introduce a victim impact statement during the sentencing phase?

1) In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the Supreme Court ruled that a victim impact statement (used in the penalty phase to provide the jury with information on the impact of the murder on the victim's family) violated the Eighth Amendment. According to the Court, such information created a constitutionally unacceptable risk that a jury may impose the death penalty in an arbitrary and capricious manner.

2) The Court extended the rule announced in Booth to the prosecutor's statements regarding the personal qualities of the victim during closing argument to the jury at the penalty hearing. South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (improper for prosecutor to read contents of a prayer found on victim's person and to make reference to victim's voter registration card).

3) Booth and Gathers were expressly overruled in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), to the extent they held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.

4) In Payne, the Court upheld testimony from the victim's mother concerning the impact of the victim's death on the victim's son/brother. The Court also upheld the prosecutor's argument as it related to that evidence. The prosecutor in Payne argued that this evidence supported the aggravating circumstance that these murders were heinous, atrocious and cruel. The state supreme court stated that the victim impact evidence was "technically

irrelevant" but that its admission was harmless beyond a reasonable doubt. The state court said that the prosecutor's argument was "relevant to [Payne's] personal responsibility and moral guilt." Id. at ___, 111 S.Ct. at 2604, 115 L.Ed.2d at 730. The United States Supreme Court affirmed.

5) The United States Supreme Court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Id. at ___, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. The Court said that "victim impact evidence serves entirely legitimate purposes." Id. at ___, 111 S.Ct. at 2608, 115 L.Ed.2d at 735. This evidence is a "method of informing the sentencing authority about the specific harm caused by the crime in question" and is "evidence of a general type long considered by sentencing authorities." Id. Quoting from Justice White's dissent in Booth, the Court said that "the State has a legitimate interest in counteracting mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. The Court determined that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." Id.

6) Though the Court overruled its earlier precedents in this area and held that the Eighth Amendment is no impediment to victim impact evidence or argument, the Court said that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. This

point was emphasized in two of the three concurring opinions in Payne. Id. at ___, 111 S.Ct. at 2615, 115 L.Ed.2d at 340, (O'Connor, J., concurring) (no due process violation here); and Id. at ___, 111 S.Ct. at 2615, 115 L.Ed.2d at 743, (Souter, J., concurring).

7) In Payne, the Court did not overrule that portion of Booth that held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. Id. at ___ n.2, 111 S.Ct. at 2611 n.2, 115 L.Ed.2d at 739 n.2. See also Payne v. Tennessee, 501 U.S. 808, ___ n.1 and ___, 111 S.Ct. 2597, 2614 n.1, 115 L.Ed.2d 720, 742 n.1, (Souter, J., concurring ("I join the Court in its partial overruling of Booth and Gathers").

COMMENT: While Payne represents a substantial victory, Pennsylvania prosecutors should proceed cautiously in this area. The Court repeatedly said that it is up to the States to "choose [] to permit the admission of victim impact evidence and prosecutorial argument on the subject." Id. at ___, 111 S.Ct. at 2809, 115 L.Ed.2d at 736. The Tennessee Supreme Court, while it found the prosecutor's argument to be proper, found the evidence to be "technically irrelevant" but harmless to the sentencing determination. Pennsylvania's sentencing statute does not speak specifically to victim impact evidence. It limits evidence of aggravating circumstances to the statutory list found at 42 Pa.C.S. § 9711(d). See 42 Pa.C.S. § 9711(a)(2). It does allow the admission of all evidence relevant to sentencing, however. See 42 Pa.C.S. § 9711(a)(2). The Pennsylvania Supreme Court has not yet addressed the admissibility of victim impact evidence and argument thereon during the penalty phase. It has, however, generally construed the statute very strictly. In some circumstances, generally depending on the evidence introduced in mitigation, a prosecutor could properly argue the impact of the crime on the victim's family as negating suggested mitigation. To permit a victim impact statement of the type approved in Payne, an amendment to the Act will probably be required.

B. Does The Defendant Have A Constitutional Right To Have The Jury Instructed In The Sentencing Phase That They Can Consider "Sympathy?"

1. In California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the trial judge in the penalty phase instructed the jury as follows: "[You] must not be swayed by mere sentiment, conjecture, sympathy, passion prejudice, public opinion or public feeling." People v. Brown, 40 Cal.3d 512, 537, 220 Cal.Rptr. 637, 649, 709 P.2d 440, 452 (1985).

2. The California Supreme Court held the anti-sympathy instruction to be error and reversed the death penalty saying that "federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any sympathy factor raised by the evidence." Id. at 537, 220 Cal.Rptr. at 649, 709 P.2d at 453.

3. The United States Supreme Court, [in California v. Brown, supra] held that there is no such constitutional right. In fact, Chief Justice Rehnquist, writing for the majority, approved the judge's cautionary instruction to the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Id. at 542, 107 S.Ct. at 840, 93 L.Ed.2d at 939.

4. The California statutory scheme, which is similar to Pennsylvania's, provides that capital defendants may present any relevant mitigating factors at the penalty phase. See Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The trial court properly instructed the jury to consider and weigh the aggravating and mitigating factors. The Court's additional instruction, to guard against "mere" sympathy did not violate the Eighth or Fourteenth Amendments. Chief Justice Rehnquist emphasized that such an instruction properly directed the jury "to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." California v. Brown, 479 U.S. at 542, 107 S.Ct. at 840, 93 L.Ed.2d at 940. He concluded: "This instruction is useful in cautioning against reliance on extraneous emotional factors." Id. at 543, 107 S.Ct. at 840, 93 L.Ed.2d at 941.

COMMENT: The prosecutor should request that the judge instruct the jury not to be swayed by "mere sentiment conjecture, sympathy, passion, prejudice public opinion, or public feeling." In order to meet constitutional muster the prosecutor should include the word "mere" because Chief Justice Rehnquist, writing for the Brown majority, specified the word "mere" as the "crucial fact" in interpreting the constitutionality of the jury instruction. Any instruction should not lead the jury to believe that it cannot recommend mercy based on the mitigating evidence introduced by a defendant. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The jury should also be instructed that its decision should not be based on an emotional response but should be based on the evidence. But see Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) (instruction that jury may be swayed by sympathy which results from the evidence is proper under (e)(8)).

a. In Commonwealth v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992), the defendant argued that the prosecutor's exhortation "that the jurors should 'show [the defendant and his co-defendant] the same mercy they showed Alexander Porter' [the victim]" was improper. An equally divided court upheld this challenge to the sentencing phase. The three justices voting to affirm the imposition of the death penalty said it "was...proper to argue that the jurors should not base their verdict on mercy, but on the evidence before them, arguing that the defendants had shown no mercy to the victim. Id. at 252, 612 A.2d at 416 (relying on Commonwealth v. Hardcastle, 519 Pa. 236, 253-54, 546 A.2d 1101, 1109 (1988); and Commonwealth v. Banks, 513 Pa. 318, 355, 521 A.2d 1, 19 (1987)). The justices voting to vacate the sentence of death in Pelzer voiced no opinion on this issue.

5. In Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the petitioner challenged a jury instruction during a penalty proceeding which directed the jury "to avoid any influence of sympathy." Id. at 486, 110 S.Ct. at 1258, 108 L.Ed.2d at 423. The Supreme Court observed that the petitioner's "argument relies on a negative inference: because we concluded in [California v.] Brown that it was permissible under the Constitution to prevent the jury from considering emotions not based

upon the evidence, it follows that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence." Id. at 494, 110 S.Ct. at 1263, 108 L.Ed.2d at 428. In response to this argument, the majority stated: "we doubt that this inference follows from Brown or is consistent with our precedents." Id. The Court had earlier said its precedents, particularly Lockett and Eddings, require a "reasoned moral response" to mitigating evidence "rather than an emotional one." Accordingly, it appears that the federal Constitution does not require that a jury consider and give effect to emotions that are based on the evidence. But see Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), where the trial court instructed that the "jurors are permitted to be swayed by sympathy but only where the sympathy results from the evidence." Id. at 160, 569 A.2d at 941 (emphasis in original). Henry argued that this instruction improperly restricted considerations of sympathy or mercy that might relate to his character. Relying on section 9711(e)(8) of the Sentencing Code, which provides that mitigating circumstances shall include "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense "(emphasis in original), the so-called "catchall provision," 42 Pa.C.S. § 9711 (e)(8), the Court said: "The sentencing statute allows for consideration of a defendant's character, but contemplates that a jury's findings and emotional responses will relate to the evidence." Id. (emphasis in original). The court held that this instruction was proper under the statute. Thus, while such an instruction is not required by the Constitution, it is in line with our statutory scheme. NOTE: Henry was decided before Parks. The Henry decision makes no mention of Brown.

6. In Commonwealth v. Lesko, 509 Pa. 67, 501 A.2d 200 (1985), the Pennsylvania Supreme Court sustained a death penalty in a collateral attack where the defendant argued that the following instruction was erroneous:

> Now, the [sentencing] verdict is for you, members of the jury. Remember and consider all the evidence, giving it the weight to which you deem it entitled. Your decision should not be based on sympathy because sympathy could improperly sway you into one decision - into a decision imposing the death sentence,

> or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.

The State Supreme Court said that the penalty phase instructions taken as a whole, including the presentation of the all inclusive mitigating factor, (e)(8), satisfied the requirements of Lockett, supra. This decision should be read in the same light as Penry. Sympathy or mercy based on the evidence and not merely as an emotional response may lead a jury to a sentence less than death. The Third Circuit, considering this claim of error on habeas corpus review, relied on California v. Brown, supra, and Saffle v. Parks, supra, to find that the instruction passed constitutional muster. Lesko v. Lehman, 925 F.2d 1527, 1549-50 (3rd Cir. 1991).

XVIII. WHAT DO YOU DO IN THE PENALTY PHASE WHEN YOU HAVE NO TESTIMONY ON AGGRAVATING CIRCUMSTANCES?

A. When all of your evidence has been introduced in the guilt phase, and you have no additional witnesses to call to prove any aggravating circumstances, the prosecutor should move that all of the evidence admitted at guilt phase be entered into evidence in the penalty phase. While the statute does not say you must do it, the statute does say the Commonwealth has the burden of proving aggravating circumstances. 42 Pa.C.S. § 9711(c)(1)(iii). The practice of incorporating the guilty phase evidence into the penalty phase for the purpose of proving aggravating circumstances has been approved by the Pennsylvania Supreme Court. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992); Commonwealth v. Albrecht, 510 Pa. 603, 628, 511 A.2d 764, 777 (1986).

B. But the prosecution does not have the duty to prove the absence of mitigating circumstances beyond a reasonable doubt because that would require the prosecution to prove "a negative." Commonwealth v. DeHart, 512 Pa. at 259, 516 A.2d at 668.

XIX. WHAT DO YOU DO IN THE PENALTY PHASE WHEN THE DEFENDANT OFFERS NO TESTIMONY ON MITIGATING CIRCUMSTANCES?

A. In Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987), the defendant's counsel, while strenuously arguing against the Commonwealth's evidence of aggravating circumstances, presented no evidence of mitigating circumstances on behalf of the defendant. The Pennsylvania Supreme Court issued procedural guidelines to be applied in future similar situations:

> Because of the finality of a death sentence and the potential for a claim of ineffective assistance of counsel in subsequent P.C.H.A. proceedings under such circumstances, we direct that henceforth a trial judge conduct an in-chambers colloquy with the defendant in the presence of counsel to determine that the defendant himself has chosen not to submit evidence of mitigation and that he is aware that the verdict must be a sentence of death if the jury finds at least one aggravating circumstance and no mitigating circumstances. While a trial court's failure to conduct such a colloquy will not preclude such an inquiry if a claim of ineffectiveness is raised later in a P.C.H.A. proceeding, such a colloquy will serve to insure the integrity of a sentence of death if a defendant and his counsel are or are not in agreement on the advisability of introducing evidence of mitigating circumstances. We caution, however, that ineffectiveness of counsel will not be presumed simply because no mitigating evidence was introduced. Id. at 550-51 n.1, 526 A.2d at 340 n.1.

1. If a capital defendant directs his attorney not to present evidence or argument in mitigation the attorney does not have the discretion to disregard the defendant's wishes. Commonwealth v. Sam, ___ Pa. ___, 635 A.2d 603 (1993) (relying on Pennsylvania Rules of Professional Conduct, Rule 1.2 and Comment).

B. The procedure recommended in Crawley was apparently followed by the trial court in Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81 (1988), affd. sub nom. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). See also Commonwealth v. Sam, ___ Pa. ___, 635 A.2d 603 (1993) ("record makes it exceedingly clear that Sam knowingly and intelligently, and with full explanation and understanding of the consequences, waived his right to have mitigating circumstances argued").

C. The trial court has no duty to force a capital defendant to offer mitigating circumstances, against his wishes, during the sentencing proceeding. Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989). Accord Commonwealth v. Sam, supra. Penalty proceedings are adversarial and a defendant cannot be compelled to offer mitigating evidence. Id. In Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990), the Supreme Court said that trial counsel was not ineffective for not offering more evidence in mitigation where the defendant placed limits on what counsel could present in mitigation. The court also held that counsel was not ineffective for failing to present mitigation which would have been inconsistent with the defense presented at trial. However, a jury may find mitigating circumstances regardless of the position of the defense. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). Such was apparently the case in Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 576 (1992), where, despite the defendant's express refusal to offer evidence of mitigation, the jury found he had no significant history of prior convictions.

XX. SUFFICIENCY OF EVIDENCE UNDERLYING AGGRAVATING CIRCUMSTANCES-AUTOMATIC REVIEW.

A. A sentence of death is subject to automatic review by the Supreme Court of Pennsylvania pursuant to 42 Pa.C.S.A § 9711(h)(1). The Court has independent statutory authority in reviewing a sentence of death to review the record for sufficiency of the evidence to support the aggravating circumstances. These issues can be perceived sua sponte by the Court or raised by the parties. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982).

1. In Commonwealth v. Heidnik, 526 Pa. 458, 587 A.2d 687 (1991), the defendant initially appealed from the imposition of two death sentences. He thereafter instructed his attorney not to pursue the automatic appeal. The Court decided the appeal nonetheless, saying: "The purpose of the automatic direct appeal to this Court of a sentence of death is to ensure that the sentence comports with the Commonwealth's death penalty statute." Id. at 466, 587 A.2d at 689. See also Commonwealth v. Appel, 517 Pa. 529, 539 A.2d 779 (1988).

2. Where a capital defendant becomes a fugitive during the appellate process all appellate issues relating to the trial, including both the guilt and penalty phases, are waived and will not be reviewed by the Supreme Court. Commonwealth v. Judge, 530 Pa. 403, 609 A.2d 785 (1992). This is so despite the relaxed waiver standard generally applicable to capital cases. See Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982).

   a. Where a capital defendant becomes a fugitive while post-verdict motions are pending before the trial court, that court may craft an appropriate remedy for the fugitive status, including dismissal of the post-verdict motions. A trial court dismissal of post-verdict motions will be upheld in a capital case if the defendant's flight has a connection with the trial court's ability to dispose of the defendant's case. Commonwealth v. Kindler, ___ Pa. ___, 639 A.2d 1 (1994) (plurality) (dismissal of post-verdict motions upheld; all issues raised in post-verdict motions held waived).

3. Where a capital defendant waives the right to appeal, Commonwealth v. Heidnik, supra, Common-

wealth v. Appel, supra, or becomes a fugitive during the appellate process, Commonwealth v. Judge, supra, or becomes a fugitive during the post-verdict process and the trial court dismisses the post-verdict motions because of the fugitive status, Commonwealth v. Kindler, supra, the Supreme Court will review "1) whether sufficient evidence was presented at trial to support the conviction of murder of the first degree; 2) whether the sentence of death is the product of passion [,] prejudice or other arbitrary factor; 3) whether the evidence fails to support the finding of at least one specified aggravating circumstance; and, 4) whether the sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." Commonwealth v. Kindler, supra, at ___, 639 A.2d at 4 (plurality) (footnotes omitted) (citing 42 Pa.C.S. § 9711(h)).

B. In determining the sufficiency of the evidence to support an aggravating circumstance the Supreme Court views the evidence in the light most favorable to the verdict winner to determine whether the evidence supports the verdict beyond a reasonable doubt. Commonwealth v. Moran, ___ Pa. ___, 636 A.2d 612 (1993) (citing Commonwealth v. Bryant, 524 Pa. 564, 567 A.2d 590 (1990)). Direct or circumstantial evidence may be considered on the question. Commonwealth v. Moran supra (citing Commonwealth v. Cox, 460 Pa. 566, 333 A.2d 917 (1975)). The test for determining sufficiency is whether reasonable persons could believe that the circumstance existed. Commonwealth v. Moran, supra (since reasonable persons could believe that money used by defendant to purchase jewelry and to deposit into his bank accounts when he had no income could have been payment for killing of victim, evidence was sufficient to support "contract killing" aggravating circumstance).

C. The Court will carefully review whether the Commonwealth proved beyond a reasonable doubt the felonies included in the "significant history of felony convictions" which constituted an aggravating circumstance.

D. In Commonwealth v. Karabin, 521 Pa. 543, 559 A.2d 19 (1989), the Supreme Court held that where one of two convictions constituting a significant history of felony convictions involving the use or threat of violence is reversed on appeal, the evidence supporting aggravating factor (d)(9) will be insufficient even if the evidence of this prior conviction was properly received at the time of the sentencing proceeding. (For a further dis-

cussion of the Karabin opinion and its facts, see discussion under "XV." Prior convictions or crimes in the sentencing phase, C, another twist. The Effect of a Re-conviction After a Prior Conviction Reversal," supra.)

E. In a case similar to Karabin, the U.S. Supreme Court recently vacated a death sentence on the grounds that the defendant's 1963 assault conviction, which served as the basis for one of three aggravating circumstances found by the jury, was reversed twenty (20) years later. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

F. In addition to reviewing the sufficiency of the evidence supporting the aggravating circumstances found by the jury beyond a reasonable doubt, the Pennsylvania Supreme Court is also required to determine if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." 42 Pa.C.S. § 9711(h)(3)(iii); Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984).

1. In Frey, the Court ordered the institution of the Pennsylvania Death Penalty Study and imposed an ongoing obligation on the president judge of each common pleas court to supply data to the Administrative Office of Pennsylvania Courts (A.O.P.C.) on each first degree murder conviction. For each such case information is "compiled 'concerning the age, race and sex of the defendant and the victim, whether the death penalty was sought, the aggravating and mitigating circumstances presented and the evidence relating thereto, the sentence imposed, related charges and the disposition thereof, and data concerning any co-defendants.'" See also Commonwealth v. DeHart, 512 Pa. 235, 260, 516 A.2d 656, 669 (1986). The information is utilized by the Court in performing the required proportionality review. See Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992).

   a. The information compiled by the A.O.P.C. is available to a capital defendant and his or her counsel, to be used for the purpose of arguing disproportionality, without cost. Commonwealth v. Zook, supra, and Commonwealth v. DeHart, supra.

2. In conducting this proportionality review the Pennsylvania Supreme Court examines other first degree murder cases where the jury made similar

findings. Commonwealth v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992); Commonwealth v. Hughes, ___ Pa. ___, 639 A.2d 763 (1994).

a. In McNair, supra, the jury found one aggravating circumstance (knowingly creating a grave risk of death to others) and no mitigating circumstances. The Court compared this case to other cases where that circumstance and no mitigating circumstances were found. The Court concluded that the sentence was neither excessive nor disproportionate by comparison.

b. In Hughes, supra, the Court examined a claim that Hughes' sentence was disproportionate to the penalty imposed in cases in which similar evidence of mitigation was presented. In support of this claim the defendant (who had been convicted of two counts of first degree murder) identified a case where the defendant had been convicted of three counts of first degree murder and received three sentences of life imprisonment. In making this claim he relied on the A.O.P.C. data as did the Court in reviewing and rejecting it. Since the defendant in the other case identified by Hughes did not actually commit the killings the Supreme Court concluded that, for purposes of its "statutorily mandated proportionality review," the two cases where not similar. The Court rejected this claim based on its independent review of the appropriate cases.

3. If the Court determines that the sentence of death in a particular case is excessive or disproportionate, the Court must remand the case for the imposition of a sentence of life imprisonment. 42 Pa.C.S. § 9711(h)(4).

4. This type of proportionality review is not required by the federal Constitution. Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). See also Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (citing Walton).

XXI. IF DEATH PENALTY IS VACATED.

Here we ask the question: is there only "life" after death, or is it possible to have "death" after death?

A. In Pennsylvania.

1. When first enacted, the Pennsylvania death penalty statute provided that if any error occurred in the penalty phase the Supreme Court was required to vacate the death sentence and remand the case to the trial court for imposition of a sentence of life imprisonment. Section 9711 (h)(2) provided:

> In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for imposition of a life imprisonment sentence.

42 Pa.C.S. § 9711(h)(2).

2. The Pennsylvania Supreme Court interpreted this statutory provision as a limitation on its authority. The Court ruled, in several cases, that it could not remand a case for a new sentencing proceeding. See Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987); Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (1985); and Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (1987). Under this line of thinking, the Commonwealth was better off if a new trial on guilt was ordered because the Commonwealth would get a second chance at the death penalty. See Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983); see also Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989) (after granting a new trial due to guilt phase error the Supreme Court offered opinion as to how to properly charge jury in the sentencing phase to avoid a Mills v. Maryland issue).

3. Several members of the Supreme Court, in cases that cried out for the death penalty because of the aggravating circumstances present, called on the legislature to correct this situation. See Commonwealth v. Caldwell, supra. (majority opinion); and Commonwealth v. Williams, supra. (concurring opinion by Nix, C.J., joined by McDermott, J.).

4. The Legislature accepted the Supreme Court's invitation and amended the statute in 1988. The Supreme Court now has the authority to remand for

resentencing when it finds an error in the sentencing proceeding. This authority is only limited in the situation where none of the aggravating circumstances is supported by sufficient evidence or where the sentence of death is disproportionate to the sentence imposed in similar cases. In both of those instances the Court is still obligated by the statute (and probably by the Constitution, as well) to remand the case for the imposition of a life sentence. In all other cases where the Court determines that the death penalty must be vacated, the Court is required to remand for a new sentencing proceeding in conformity with the death penalty statute. 42 Pa.C.S. § 9711(h)(2) and (h)(4), as amended by the Act of December 21, 1988 (P.L. 1862, No. 179), § 2, effective immediately. NOTE: The proportionality review required by Pennsylvania's death penalty procedures statute is not a constitutional imperative. See Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); and Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In Walton, the petitioner challenged the proportionality review conducted by the Arizona Supreme Court which found that Walton's sentence was proportional to sentences imposed in similar cases. The Supreme Court stated that "the Arizona Supreme Court plainly undertook its proportionality review in good faith" and that the "Constitution does not require [the United States Supreme Court] to look behind this conclusion." Walton, 497 U.S. at 656, 110 S.Ct. at 3058, 111 L.Ed.2d at 530. See also Lewis v. Jeffers, supra.

a. For cases tried before the effective date of this change in procedure where appeals were pending on the effective date, the new procedure was to be applied according to the clear terms of the statute. The Pennsylvania Supreme Court has ruled that applying this changed procedure to such defendants did not violate the Ex Post Fact Clause of either the State or Federal Constitution. Commonwealth v. Young, ___ Pa. ___, 637 A.2d 1313 (1993).

5. Cases remanded for resentencing:

a. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (1989). Prosecutor's unduly prejudicial argument in sentencing proceeding, that parole was possible if a sentence of life imprisonment

was imposed and that defendant might kill again, required new sentencing hearing.

b. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989). Jury found that two aggravating circumstances outweighed mitigating circumstances. Supreme Court found insufficient evidence to support one of the aggravating circumstances. Death sentence vacated and case remanded for a new sentencing hearing.

c. Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990). Trial court gave erroneous instruction during sentencing proceeding in violation of Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The sentence of death was vacated and the case remanded to trial court for resentencing pursuant to section 9711(h)(4).

d. Commonwealth v. Green, 525 Pa. 424, 581 A.2d 544 (1990). Prosecutor used prejudicial hearsay to rebut sole evidence of mitigation. Case remanded for new sentencing hearing.

e. Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991). Ambiguous response to jury question concerning need for unanimity led to Mills v. Maryland, supra, problem. Case remanded for new sentencing hearing.

f. Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991). Prosecutor's penalty phase closing argument relying on the biblical passage "and the murderer shall be put to death" resulted in a death sentence which was the "product of passion, prejudice or other arbitrary factor" in violation of the statute. Case remanded for resentencing.

g. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992). Trial court's instruction on "torture" was "prejudicially deficient." Since jury found this aggravating circumstance along with others, all of which were weighed against three mitigating circumstances, sentence of death was vacated and case remanded for resentencing.

B. **Reimposition Of The Death Penalty On Remand Is Not Unconstitutional.** The double jeopardy clause of the U.S. Constitution does not bar reimposition of the death penalty on remand after an appellate court, reviewing the original death sentence, had held that the evidence supporting the only statutory aggravating factor on which the sentencing judge relied was insufficient. Since the sentencing judge erred in interpreting the applicability of a second aggravating factor, and did not rule on the sufficiency of the evidence put forward in support of that factor, and there was no "acquittal" on the second aggravating circumstance, the sentencing court on retrial could lawfully impose the death penalty on the basis of the second aggravating circumstance. Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

1. In Poland, the Court said that "[a]ggravating circumstances are not separate penalties or offenses...." Id. at 156, 106 S.Ct. at 1755, 90 L.Ed.2d at 132. In Walton, in rejecting a claim that the Constitution required that a jury rather than a judge determine the existence of aggravating circumstances, the Court concluded that such circumstances are not elements of the offense. Walton, 497 U.S. at 648, 110 S.Ct. at 3054, 111 L.Ed.2d at 524. See also Lewis v. Jeffers, 497 U.S. at 782, 110 S.Ct. at 3103, 111 L.Ed.2d at 623.

2. The Pennsylvania courts have applied Poland and held that the Commonwealth may rely on aggravating circumstances not found at the first trial. Commonwealth v. Gibbs, 403 Pa. Super. 27, 588 A.2d 13 (1991), aff'd 533 Pa. 539, 626 A.2d 133 (1993). See also Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992) (following rationale of Superior Court on Gibbs, supra).

3. If the first capital jury determines that a convicted defendant shall be sentenced to life imprisonment rather than death and the defendant obtains a reversal of his underlying conviction on appeal, the Double Jeopardy Clause prohibits the State from trying to obtain the death penalty after conviction on retrial. Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993) (following Bullington). See also Commonwealth v. Gibbs, supra, and Commonwealth v. Zook, supra (distinguishing Poland from Bullington and following Poland where first jury had imposed sentence of death).

a. If the jury in the first trial is unable to unanimously agree to a sentencing verdict and the trial judge imposes a sentence of life imprisonment (as required by the sentencing statute in those circumstances, 42 Pa.C.S. § 9711(c)(1)(v)) and the defendant obtains a reversal of her conviction on appeal, the defendant may be sentenced to death upon conviction of first-degree murder on the retrial without violating the double jeopardy principles of Bullington, supra, because the first jury made no findings on the merits of the penalty (i.e. it was deadlocked). In imposing the life imprisonment sentence required by the statute, the trial court makes no factual findings relating to the sentence. Commonwealth v. Martorano, ___ Pa. ___, 634 A.2d 1063 (1993).

XXII. INEFFECTIVE ASSISTANCE OF COUNSEL.

A. In Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987), the Pennsylvania Supreme Court, after years of conflicting and vacillating decisions, adopted the Strickland v. Washington, [466 U.S. 668 (1984)] standard, holding that defendants who claim ineffective assistance of counsel must establish their counsel's ineffectiveness and that they were prejudiced by their counsel's actions or omissions before a new trial will be granted. Proving prejudice - that the jury would have decided the case differently - is a tough standard, and this case should be very helpful to prosecutors in all kinds of ineffective assistance of counsel cases. This standard has been applied to claims of ineffectiveness of trial counsel at both the guilt and penalty phases of capital proceedings. Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990); Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990); Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (counsel ineffective for failing to request proper "torture" instruction and for failing to object to "prejudicially deficient" instruction given).

1. Where a capital defendant claims ineffective assistance during the sentencing phase, in order to establish prejudice required for relief under Strickland, supra, the defendant "must show a 'reasonable probability' that, if he had had effective assistance, at least one juror would have decided differently and held out for a verdict of life imprisonment." Frey v. Fulcomer, 974 F.2d 348, 368 (3rd Cir. 1992) (though trial counsel's performance was deficient in many regards the defendant was not prejudiced; the court's confidence in the outcome of the sentencing proceeding, i.e., the sentence of death, was not undermined).

2. It is clear that the standard for judging claims of ineffective assistance of counsel announced in Pierce, supra, applies equally to capital and non-capital cases. Commonwealth v. Fahy, ___ Pa. ___, ___ A.2d ___ (1994) (No. 25 Capital Appeal Docket; 7/1/94) (Montemuro, J., concurring and Cappy, J., dissenting) (both relying on Commonwealth v. Yarris, 519 Pa. 571, 549 A.2d 513 (1988)). But see Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94) (despite waiver of ineffectiveness claims for failure to raise them at earliest possible time Court reviewed merits of claims because of severity of appellant's death sentence).

3. Trial counsel is not ineffective for failing to override a client's decision. Commonwealth v. Pierce, ___ Pa. ___, ___ A.2d ___ (1994) (No. 20 Capital Appeal Docket; 7/1/94) (no ineffectiveness where counsel attempted to obtain military and employment records and defendant refused to sign required releases; also, no ineffectiveness in failing to develop psychological evidence as mitigation where defendant refused to cooperate in preparation).

4. "[C]laims of ineffective assistance of counsel are not cognizable during post-trial proceedings, including the PCHA [and PCRA], when the claimant has previously insisted on self-representation... Having knowingly and voluntarily waived the right to counsel, an appellant is not permitted to rely upon his own lack of legal expertise as a ground for a new trial.'" Commonwealth v. Griffin, ___ Pa. ___, ___, ___ A.2d ___, ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94).

B. Specific cases addressing ineffective assistance claims:

1. Counsel is not ineffective for failing to present available mitigating evidence and for failing to argue in mitigation of death penalty where defendant directed counsel not to introduce or argue such evidence. Commonwealth v. Sam, ___ Pa. ___, 635 A.2d 603 (1993) (record reflected that defense counsel was prepared to introduce and argue evidence in mitigation, including testimony about the defendant's character, but defendant, after thorough colloquy by trial court, knowingly and intelligently, with a full explanation of the consequences, waived his right to present and argue mitigating circumstances). See also Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987) (no presumption of ineffectiveness simply because no mitigating evidence was introduced at the penalty phase; describing procedure to be followed when defendant elects not to offer mitigating evidence). See also Chapter XIX, "What do you do in the penalty phase when the defendant offers no testimony on mitigating circumstances'," above.

   a. Trial counsel is not ineffective for failing to override a client's decision. Commonwealth v. Pierce, ___ Pa. ___, ___ A.2d ___ (1994) (No. 20 Capital Appeal Docket; 7/1/94) (no ineffectiveness where counsel attempted to obtain military and employment records and

defendant refused to sign required releases; also, no ineffectiveness in failing to develop psychological evidence as mitigation where defendant refused to cooperate in preparation).

2. Counsel was not ineffective for failing to call character witnesses at the penalty hearing where counsel was not given the names of these witnesses and where there is no explanation about how these witnesses would have been helpful to the defendant. Commonwealth v. Carpenter, 533 Pa. 40, 617 A.2d 1263 (1992).

3. Counsel was not ineffective for failing to request an instruction on a mitigating circumstance for which there was no evidence. Commonwealth v. Carpenter, supra.

4. Counsel was not ineffective for failing to make meritless arguments challenging the constitutionality of various mitigating circumstances which had already been rejected in earlier decisions. Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992); Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992).

5. Only when a jury instruction injects "passion, prejudice or some other arbitrary factor" into the sentencing deliberation process will a sentence be vacated. Failure to object to an instruction which does not involve such a factor will not constitute ineffective assistance. Commonwealth v. Carpenter, supra.

6. Though counsel's performance was deficient in that he referred to an unconstitutional statute in explaining mitigating circumstances, the defendant was not prejudiced since all the evidence of mitigation was before the jury and had been argued as having mitigating effect, the prosecutor conceded at least one mitigating circumstance, the judge properly instructed on all circumstances supported by the evidence, and jury found mitigation (which was outweighed by aggravating circumstances). Accordingly, prejudice prong of Strickland was not satisfied. Frey v. Fulcomer, supra.

7. In Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993), the defendant argued that trial counsel was ineffective for failing to take any action when he learned at the beginning of the penalty

phase of the trial that a juror was an incest victim. One of the aggravating circumstances which the prosecutor was attempting to establish was a significant history of prior criminal conviction involving violence, including a prior rape conviction. The juror reported that her father had raped her many years earlier. She told this to a court officer who, in turn, advised the court. No one, including defense counsel, sought to question the juror. At an evidentiary hearing the defense counsel said he did not act because he had never faced this situation before and did not know what to do or what he could do. The Supreme Court held that this inaction by trial counsel was not designed to effectuate the defendant's interests. Nevertheless, the Court concluded that the defendant was not entitled to relief. "A showing of ineffectiveness alone is not enough." Id., at 505, 633 A.2d at 1108. Here, the defendant did not carry his burden of showing how counsel's inaction prejudiced him or had an adverse impact on his trial, the necessary third prong to obtain relief on an ineffective assistance of counsel claim.

8. Trial counsel not ineffective for failing to try to establish that defendant had no significant history of prior convictions where Commonwealth could have refuted that assertion by prior misdemeanor convictions or prior juvenile adjudications. Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989); Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992).

9. Trial counsel was not ineffective for failing to request a torture instruction in conformity with Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987), where defendant was tried four years before decision in Nelson. Commonwealth v. Fahy, ___ Pa. ___, ___ A.2d ___ (1994) (No. 25 Capital Appeal Docket; 7/1/94) (plurality); and id., at ___, ___ A.2d at ___ (Montemuro, J., concurring) See also id., at ___, ___ A.2d at ___ (Nix, C.J., concurring). Accord Commonwealth v. Fahy, supra, at ___ n.1, ___ A.2d at ___ n.1 (Cappy, J., dissenting). In addition, the plurality in Fahy determined that the ineffective assistance claim failed because the defendant was unable to establish the required prejudice. Fahy could not show that giving a Nelson instruction would have lead to a different result.

XXIII. PROSECUTION PENALTY CLOSING.

A. Generally.

1. During the penalty phase, the prosecutor must be afforded "reasonable latitude" in arguing its position to the jury and may employ "oratorical flair" in arguing in favor of the death penalty. Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990); and Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993).

2. "Generally, comments by a prosecutor [during summation at the penalty phase of a capital trial] do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the Defendant so that they could not weigh the evidence objectively and render a true verdict. Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990)." Commonwealth v. Peoples, ___ Pa. ___, ___, 639 A.2d 448, 451 (1994) (no error in challenge comment by prosecutor).

3. A prosecutor may draw fair deductions and legitimate inferences from the evidence and may engage in rhetoric to dispel a defendant's assertions. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989). In Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990), the Supreme Court found that a prosecutor's guilt phase argument that a witness feared retaliation for testifying, and that by testifying and cooperating, the witness received nothing but problems, was proper, based on the inferences from the record since the murder victim was killed for not paying his drug debts. See also Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990) (not improper for prosecutor to call defendant a "racist" where characterization based on facts in record).

4. A prosecutor's argument during the penalty phase is not required to be sterile. The prosecutor is entitled to describe the sordid, mordant tales. Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989). See also Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991).

5. A prosecutor may respond to an attack on a witness' credibility. Commonwealth v. Strong, supra.

6. A prosecutor may make a legitimate, unimpassioned response to evidence presented by a defendant to prove mitigating circumstances. Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990) (could argue that facts presented were not mitigating factors or that they did not outweigh aggravating circumstances).

7. A prosecutor may make fair response to the defense summation. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (1989) (response here went beyond fair response; death penalty vacated). However, under Pa.R.Crim.P. 356 which became effective on July 1, 1989 at the prosecutor's argument in the penalty phase now precedes the defense summation.

B. **Prosecutor's Comment On Defendant's Failure To Express Remorse.** Can the prosecutor in his penalty phase closing call attention to a defendant's lack of remorse (failure to say "I'm sorry" when he testifies in the penalty phase)? See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983).

1. Yes...so long as it is done without the prosecution launching into an "extended tirade on this point." Apparently, then, it is not improper to make a single reference to it, and suggest to the jury that this is one of many factors that they can consider. But, I suggest that you urge the trial judge give the standard charge that the jury is to draw no adverse inference for failure of the defendant to testify. Id. at 499, 467 A.2d at 301. See also Commonwealth v. Chester, 526 Pa. 578, 600, 587 A.2d 1367, 1378 (1991) (relying on Travaglia the Court held that the prosecutor's comment on the defendants' lack of remorse, under the circumstances, "was a factor that legitimately could be weighed by the jury in assessing the presence of any mitigating factors"). But see Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 273, 116 L.Ed.2d 226 (1991) (reviewing this argument in habeas corpus appeal brought by Travaglia's co-defendant the court of appeals found that the comment did not relate to the defendant's demeanor and that it violated his Fifth Amendment right not to incriminate himself at the penalty phase).

2. In the case of Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988), the Supreme Court ruled that a prosecutor's comment on the defendant's failure to show remorse is not improper, even when

the defendant never took the stand at the guilt or penalty phase of the trial. The Court explained that the prosecutor's remark "was brief, and was reasonable in relation to defense counsel's earlier argument to the jury that appellant was begging for mercy and for a chance to become a better and more compassionate human being, thereby inferring, perhaps, that appellant was remorseful." Id. at 423-24, 543 A.2d at 1077. The Court, citing Travaglia noted that "comment upon a defendant's failure to show remorse is permitted at least where the comment does not amount to an extended tirade focusing undue attention on the factor of remorse." Id. at 423, 543 A.2d at 1077.

3. The Supreme Court in Travaglia clearly suggests that the presumption of innocence and the privilege against self-incrimination do not apply in the sentencing phase since defendant no longer is presumed innocent but has been found guilty, i.e., incriminated, by the same jury. The Court stated:

> We must keep in mind that the sentencing phase of the trial has a different purpose than the guilt phase and that different principles may be applicable. For example, the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed... (L)ikewise the presumption of innocence....

Commonwealth v. Travaglia, 502 Pa. at 499, 467 A.2d at 300. See also Edmiston v. Commonwealth, ___ Pa. ___, 634 A.2d 1078 (1993) (privilege against self-incrimination has no direct application to penalty phase because presumption of innocence has no direct application to sentencing determination; prosecutor's reference to defendant's possible penalty testimony in opening statement during penalty phase held not improper; if improper, error was harmless). But see Lesko v. Lehman, supra (relying on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), and Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), court of appeals held that the privilege against self-incrimination is applicable to the penalty phase of a capital trial and that a prosecutor's "no remorse" comment violates the privilege where the defendant testifies at the penalty hearing only about his character and background and not the merits of the charges against him).

C. **Prosecution's Closing Argument In Favor Of The Death Penalty: "Deterrence".**

1. The prosecutor is permitted under 42 Pa.C.S. § 9711(a)(3) to argue in favor of the death penalty and may engage in "oratorical flair" in doing so. It is not improper for the prosecutor to comment or remark about the deterrent effect of the death penalty. Commonwealth v. Williams, ___ Pa. ___, 640 A.2d 1251 (1994) (citing Commonwealth v. Whitney, 511 Pa. 232, 245, 512 A.2d 1152, 1159 (1986)).

2. In his penalty phase closing argument, the prosecutor in Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), told the jury to consider "what, if any, deterrent effect your decision would have..." Id. at 55, 454 A.2d at 957. The Pennsylvania Supreme Court held that even though the "deterrent effect" of the death penalty has not been proven and there was no evidence concerning the deterrent effect introduced in the sentencing hearing, nonetheless, the brief comment was not improper because it was delivered in a "calm...and professional" manner, was based on "a matter of common public knowledge," and, was preceded by the District Attorney's explicit directions to the jury to determine a verdict of death "solely and exclusively as the law indicates it may be imposed, based on the circumstances of this case..." Id. at 54, 454 A.2d at 958.

3. Did the defendant show the victim any sympathy when he killed him as he pleaded for his life? Show him that same kind of sympathy he showed "no more, no more." See Commonwealth v. Travaglia, 502 Pa. at 500, 467 A.2d at 301. But see Lesko v. Lehman, 925 F.2d 1527, 1540 and 1545-46 (3rd Cir. 1991) (examining this closing argument the court of appeals found this statement, coupled with the prosecutor's remark that "the score is John Lesko and Michael Travaglia two, society nothing," constituted an improper "appeal to vengeance" which rendered the penalty phase fundamentally unfair in violation of the Due Process Clause requiring a new sentencing proceeding).

4. In Commonwealth v. Banks, 513 Pa. 318, 521 A.2d 1 (1987), the prosecutor, in his death penalty closing, stated: the defendant "did it by showing no sympathy or mercy to his victims, and I ask that you show him no sympathy, that you show him no mercy." The Supreme Court, per Justice Larsen, held

that such comments did not warrant overturning the death penalty.

> [t]he prosecutor's remarks regarding no mercy or sympathy were within the oratorical license and impassioned argument that this Court has consistently allowed during the sentencing phase, particularly where prompted by remarks of defense counsel. See Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986).

Commonwealth v. Banks, 513 Pa. at 355, 521 A.2d at 19. See also Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993) (prosecutor may give impassioned argument for the death sentence and may state that the defendant showed no sympathy or mercy to the victims).

5. It is proper to argue that jurors should not base their verdict on mercy but on the evidence before them and that the defendants had shown no mercy to the victim. Commonwealth v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992) (opinion in support of affirmance) (relying on Commonwealth v. Hardcastle, 519 Pa. 236, 253-54, 546 A.2d 1101, 1109 (1988), and Commonwealth v. Banks, supra).

D. Prosecution Closing Comments About The Victim In The Penalty Phase.

1. Normally, the Pennsylvania Supreme Court has disapproved of prosecutorial arguments which invite consideration of the murder victim during the guilt phase. However, in the penalty phase, because the defendant has already been found guilty, a prosecutor may make reference to the victim so long as it is minimal and "does not have the effect of arousing the jury's emotions to such a degree that it becomes impossible for the jury to impose a sentence based on consideration of the relevant evidence according to the standards of the statute." This is a new standard enunciated in Commonwealth v. Travaglia, 502 Pa. at 502, 467 A.2d at 301. Generally, the defense attorney will make some reference to the victim not being able to be "brought back." Therefore, a fair, minimal response is "invited." See also Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990) (referring to the victim, remarking on victim's effort to prevent his or her death, and asking the jury to show defendant same sympathy exhibited toward victim not outside bounds of permissible argument).

But see Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) ("same sympathy" argument denied defendant due process and was not a "fair response" to defense counsel's argument).

NOTE: To the extent that any of these cases rely on an "invited response" rationale they are suspect and provide little guidance since, after July 1, 1989, the prosecutor's argument in the penalty phase precedes that of the defense. Pa.R.Crim.P. 356.

2. The United States Supreme Court has said that testimony and argument concerning the victim and the impact on the victim's death should be admitted at the sentencing hearing. The Eighth Amendment does not erect a per se rule prohibiting such testimony or argument. In some circumstances, however, such testimony or argument thereon may render the proceeding fundamentally unfair in violation of the Due Process Clause. Payne v. Tennessee, 501 U.S. 808, ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720, 736 (1991). See also Payne v. Tennessee, supra, at ___, 111 S.Ct. at 2612, 115 L.Ed.2d 720, at 740, (O'Connor, J., concurring); and Id. at ___, 111 S.Ct. at 2614-15, 115 L.Ed.2d at 743, (Souter, J., concurring) (citing Lesko v. Lehman, supra). (For a more complete discussion of Payne and victim impact evidence and argument, see Section XIV A. 2. b, supra.)

E. Prosecution Comment That "Jury Should Seek Vengeance On Behalf Of Society."

1. The prosecutor in Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), in response to a defense penalty closing saying that the jury was not here for "vengeance or revenge," declared that you the jury "are" here for vengeance. Id. at 244-45, 512 A.2d at 1157-58. The Pennsylvania Supreme Court held:

> While we have recognized that considerations of vengeance have no place during the guilt phase of the trial..., the sentencing phase...in essence asks the jury to bring the values of society to bear in determining the appropriate sentence. To say that no part of the rationale for having a death penalty involves society's interest in retribution is to ignore the values held by our citizenry

which influenced our General Assembly to enact such a law.

Id. at 244, 512 A.2d at 1158. Accordingly, the Court, in a plurality decision, declared that, as the comment was invited - "made in rebuttal to defense counsel's urging" - and, was not dwelt upon, it was "within the degree of oratorical flair permitted a prosecution at a sentencing hearing." Id. at 245, 512 A.2d at 1159. (The invited response rationale has little application under Pa.R.Crim.P. 356.)

F. Prosecutor's Reference To "Evil Figures" - Did It Impermissibly Influence The Jurors?

1. In Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), the prosecutor in his closing declared that the defendant was "without pity, without feeling,... that evil exists in the world, that the jury must acknowledge it, that history has recorded people who do evil (mentioning Iago, the Devil, Hitler) that based on the evidence the defendant is a person who doesn't care for anybody or anything." Id. at 245, 512 A.2d at 1159.

2. The Pennsylvania Supreme Court held, in a plurality opinion, that the comments were not improper because:

   a. they were invited by and "responsive to the arguments of defense counsel" (defense argued that defendant had mental deficiencies which diminished his capacity to restrain his behavior but the prosecution said, no, his actions were a manifestation of an evil disposition);

   b. the prosecution "did not attempt to equate appellants' deeds with theirs (Hitler, etc.).... Rather he referred to them as examples of those whose horrible deeds were manifestations of evil and not the result of some exculpatory deficiency." Id. at 247, 512 A.2d at 1160.

   c. they were not so inflammatory as to have caused the jury's sentencing verdict to be the product of passion, prejudice, or other arbitrary fashion, based on Commonwealth v. Zettlemoyer, and Commonwealth v. Travaglia. See also Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), wherein

the U.S. Supreme Court held a prosecutor's reference to the defendant as a "vicious animal," and that he wished someone "had blown his head off," did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

3. COMMENT: It is a wise prosecutor, however, who recognizes that Whitney is only a plurality opinion, that the three dissenters strongly criticized the prosecutor, and that Justice Hutchinson, in a concurring opinion, also called the prosecutor's comments ill-advised and unnecessary, but found "harmless error" in a strong case. He declared:

> prosecutors with strong cases would be well advised...to let the facts speak for themselves. Juries can be trusted to appreciate them.

Commonwealth v. Whitney, 511 Pa. at 259, 512 A.2d at 1166 (Hutchinson, J., concurring).

4. **NOTE:** Under Pa.R.Crim.P. 356 the prosecutor's summation at the penalty phase is now delivered before the defendant's. Accordingly, there will be no opportunity to respond to defense arguments. This will not be a basis on which to salvage an objectionable closing argument.

5. Commonwealth v. Whitney, supra, was cited and followed by a majority of the Court in Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), where the court held that the prosecutor's argument in the penalty proceeding in which he compared the defendant to Charles Manson and other mass murderers was not so extreme as to taint the sentencing proceeding. The Court referred to these remarks as "oratorical flair." The Court noted that a defense objection to this argument was sustained and the trial court gave a cautionary instruction. The court, while it found no reversible error in this case, warned prosecutors about continuing to make such arguments, describing them as "a dangerous practice we strongly discourage." Id. at 158, 569 A.2d at 940.

G. Prosecutor's Comment Calling The Defendant A "Manipulator."

1. In Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986) the prosecutor called the defendant a

"Great Manipulator...he is so bad we can't keep him in jail...close the door don't let it revolve. You are not going to be another victim of this manipulator."

2. The Pennsylvania Supreme Court said that although the statements were inappropriate, they were based on evidence of the defendant being in an out of jail and that he had been in rehabilitation clinics.

H. Prosecutor's Comment That The Defendant Should Not Be Excused For Criminal Conduct Because He Could Not Read, Or Write, And Had A Low I.Q. - How Many People Do You Know Who Cannot Read Or Write, Yet Are Honest...And Law Abiding?

1. Many defense lawyers will bring up in the penalty closing their client's bad educational background, his low I.Q., etc. - suggesting that somehow he should be excused from killing, that it was society's fault. In Commonwealth v. Whitney, supra, the prosecutor eloquently and pointedly responded to this "invitation" saying:

> How many people do you know who cannot read or write, yet are honest as the day is long and law-abiding?
>
> In fact, the Supreme Court of the United States ruled a number of years ago that the fact that a person cannot read or write should not bar that person from voting, because the court reasoned that there are lots of people who can't read and write who are, nevertheless, intelligent, law-abiding, well-informed citizens. So how much of a part does that play in whether a person should be excused from criminal conduct?

Id. at 242, 512 A.2d at 1151. While under Pa.R.Crim.P. 356 a prosecutor will no longer be able to respond to defense arguments on these points, the prosecutor will be able to argue from any facts submitted on these points that they do not call for a sentence less than death.

2. And don't let the jury fall for the defense counsel's "[i]t's society's fault" argument! He's merely trying to lay a guilt trip on the jury. Argue: "Society didn't kill the victim. The

reason why we are here today is because the defendant killed the victim and you have already so found by your first degree murder verdict."

I. Prosecutor's Comment That There Will Be "Appeal, After Appeal, After Appeal"--What Not To Say.

1. The prosecution in Commonwealth v. Baker, 511 Pa. 1, 511 A.2d 777 (1986), argued that the jury death verdict would be scrutinized in "appeal after appeal" and that the appellate courts would not let the man be executed until they were sure he had a fair trial. The Pennsylvania Supreme Court, in chastising the prosecutor, set aside the death penalty verdict holding that the prosecutor's comments tended to minimize the jury's responsibility for a verdict of death and to minimize their expectations that such a verdict would even be carried out. Id. at 20, 511 A.2d at 788, based upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

   a. The federal Constitution does not prohibit giving an accurate description of post-sentencing proceedings. Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, ___ L.Ed.2d ___, 62 U.S.L.W. 4466 (1994) (O'Connor, J., concurring), citing Caldwell, supra, at 342, 105 S.Ct. at 2646, 86 L.Ed.2d at ___ (O'Connor, J., concurring). But see Commonwealth v. Beasley, 524 Pa. 34, 568 A.2d 1235 (1990) (Pennsylvania prosecutors are forbidden from discussing appellate process in penalty closing argument).

   b. A Caldwell error occurs only if the sentencing jury is given inaccurate information that misleads the jury in a way that diminishes the jury's sense of responsibility for imposing a sentence of death. Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, ___ L.Ed.2d ___, 62 U.S.L.W. 4466 (1994); and id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4469 (O'Connor, J., concurring). There is no Caldwell error in telling a sentencing jury that the defendant has been previously convicted of murder and sentenced to death. Romano v. Oklahoma, supra.

2. The prosecutor's remarks during summation in the penalty phase that the defendant would have endless appeals and asking the jurors if they could remem-

ber the last execution in Pennsylvania, though irrelevant and unnecessary, did not lessen the jury's sense of responsibility as the ultimate determiner of sentence. The Superior Court's reversal of the death penalty on a P.C.H.A. appeal was set aside and the death penalty was reinstated. Commonwealth v. Beasley, 524 Pa. 34, 568 A.2d 1235 (1990). Though these remarks were not prejudicial, the Court adopted a prospective rule for future trials precluding all remarks about the appellate process in death penalty summations.

3. While it is now clearly improper for the prosecutor to mention the appellate process in a death penalty summation, nothing precludes the trial court from instructing the jury that "If the court is mistaken on the law, that will be corrected on review or appeal." Commonwealth v. Porter, 524 Pa. 162, 569 A.2d 942 (1990). Such a statement merely emphasizes "the importance of the jury's role in applying the law given them by the trial judge." Id. at 171, 569 A.2d at 946.

J. Prosecutor's Comment That Defendant Might Receive Parole Or Escape From Prison.

1. The Supreme Court has said that "[a] prosecutor may not argue that death should be imposed because imprisonment may be short." Commonwealth v. Ly, 528, Pa. 523, 599 A.2d 613, 623 (1991) (holding that defense argument which may have suggested parole eligibility after many years if jury sentenced defendant to life imprisonment rather than death was not ineffective). In Ly, the Court said: "It is well established that it is prejudicial error for a prosecutor to suggest that a jury should impose a sentence of death to prevent a defendant from receiving parole." Id., citing Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966).

2. In Commonwealth v. Floyd, 506 Pa. 85, 484 A.2d 365 (1984), the defendant argued that his death sentence should be reversed because the prosecutor in his summation during the penalty phase argued that the jury should impose a sentence of death because of the possibility that Floyd might get out of prison if he received a life sentence. The prosecutor initially argued that Floyd "is a predator. He is done it before and he will do it again. He's escaped from prison once." He followed this up by saying, "you go to sleep at night not following the

law in this case, and if you read ten years from now that the parole board let Calvin Floyd out and he killed somebody like you, Mrs. Brown, or you, Mrs. Smithers, you, Mr. Carey, you sleep with it." The Supreme Court reversed the death sentence, reasoning that "[i]t is extremely prejudicial for a prosecutor to importune a jury to base a death sentence upon the chance that a defendant might receive parole...or the possibility of escape from prison,...particularly where, as here, the jury was cognizant of the facts that Floyd had previously been convicted of prison breach, and, also, that he had attempted to escape from custody the very morning of the sentencing hearing." Id. at 95, 484 A.2d at 370.

3. Relying on Floyd, the Supreme Court vacated a sentence of death and remanded for resentencing where the prosecutor argued that if the defendant were sentenced to life imprisonment he would be paroled and kill again. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (1989). This statement was particularly prejudicial in this case because the jury knew that the defendant was on parole when he committed the murders for which he was then on trial. The court observed that while the Commonwealth is entitled to make fair response to the defense summation, this argument went beyond such a response. **NOTE:** Since the defense now closes last in the penalty phase, the Commonwealth will no longer be able to respond to defense argument. See Pa.R.Crim.P. 356.

   a. In addressing a prosecutor's penalty phase closing argument on a claim of ineffective assistance of counsel arising in a case that was tried before the change to Rule 356 the Supreme Court distinguished its holding in Floyd holding that by the following remarks "[t]he Commonwealth argued its position, employed oratorical flair, and fairly responded to remarks made by Appellant's trial counsel":

> I want to speak to you now on behalf of the prison guards, the social workers, the teachers, the nurses, the refuse haulers, the ordinary people that have to work in a prison. These people need protection... Will he [the defendant] stop? That's what you have to ask yourselves. Will he stop in prison, or who

> is going to be next? It [sic] that the kind of man who will do it again? ... Do you think that he is the type who would try to use force to escape from prison... Do you want to put those sheriffs, those pedestrians on the street [in danger]; do you want to take that chance.

Commonwealth v. Griffin, ___ Pa. ___, ___, ___ A.2d ___, ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94). These remarks, according to the Court, were fair response to the defense counsel's argument that

> [I]f you give [Appellant] a life term imprisonment, he is not a threat to the community; he is not a threat to you; and more than likely, he is going to remain in jail all of his life. If you feel you must punish him, punish him in that manner.

Id; at ___, ___ A.2d at ___ . NOTE: The United States Supreme Court has stated, in response to a due process challenge, that "[t]he State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff." Simmons v. South Carolina, ___ U.S. ___, ___ n.5, ___ L.Ed.2d ___, ___ n.5, 62 U.S.L.W. 4509, 4512 n. 5 (1994) (plurality opinion per Blackmun, J., joined by Stevens, Souter and Ginsburg, JJ.). In a concurring opinion Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, noted that "the prosecution is free to argue that the defendant would be dangerous in prison." Id. at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4516 (O'Connor, J., joined by Rehnquist C.J., and Kennedy, J., concurring).

K. Prosecutor's Comment Reminding Jurors Of Judge's Remark During Voir Dire Indicating That "This Case... Is The Appropriate Case To Impose The Death Penalty."

1. In Commonwealth v. Sneed, 514 Pa. 597, 526 A.2d 749 (1987), the defendant requested the Court to reverse his death sentence, arguing that he has deprived of a fair and impartial sentence by the

following remark of the prosecutor during the penalty closing:

> The point here is this, ladies and gentlemen, this case, in the words of Judge Ivins when he first directed his comments to you when you came in here with your respective panel and talked to you about the death penalty, is the appropriate case in which there exist the appropriate circumstances to impose the death penalty.

The Court rejected defendant's claim, reasoning that:

> It is apparent in this instance that the prosecutor's remark was intended to remind the jurors that they had been made aware of the possibility of such a sentence before they were selected to hear the case, and that this was the phase of trial when the potential for considering that penalty had ripened. The prosecutor informed the jury that the time to consider the death penalty for Willie Sneed had arrived by affirmatively referring back to the interrogatory which introduced that penalty into their consciousness. Considered in this context, the prosecutor's argument was not of a character to inflame the passions and prejudice of the jury or to evoke the imprimatur of the trial judge with respect to a death sentence.

Id. at 613, 526 A.2d at 757. The Court concluded that "the prosecutor must be permitted to argue the appropriateness of the death penalty as applied to the circumstances because that is the only issue before the jury at the penalty phase of the trial." Id.

a. The prosecutor in Commonwealth v. Meadows, 534 Pa. 450, 633 A.2d 1081 (1993), gave a similar argument, stating:

> > [Defense counsel] is going to get up, and he is going to talk to you. I say to you now, that anything he says--he is going to have to--he has no choice--he is going to have to ask you to give the wrong sentence for the wrong reason, because the law is against him, and the law is not on his side.

> I suggest to you that he is going to have to try and get you to forget about the law, and to forget about the oath you took, and to break the oath you took. I have faith in you. I have faith in your strength. I have faith in your courage. I have faith in your will, the will inside each of you to follow through with your oath. I have faith, ladies and gentlemen of the jury, in you, that you will, no matter how impleasant it is, that you will do what the law requires in this case.

The defense objected to this line of argument and the trial court gave a cautionary instruction saying she considered the use of the word "wrong" to be "very improper" and she admonished the jury to disregard that characterization by the prosecutor. The Supreme Court affirmed the conviction although it agreed with the trial court that the "prosecutor's remarks were improper and should not have been spoken." Id. at 465, 633 A.2d at 1089. The Court reiterated that every improper remark by the prosecutor does not call for reversal. Here, the cautionary instructions given by the trial court "were adequate to dissipate the potential prejudice of the prosecutor's remarks." Id.

L. Prosecutor's Comment That Death Sentence Would Send Message To Judicial System.

1. In Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987), the defendant sought to overturn his death sentence on the basis of a prosecutor's comment urging the jury to impose the death penalty in order to send a message to a judge who had sentenced this same defendant following his 1971 guilty plea to second degree murder. The prosecutor stated: "Let's say that there was mercy shown by that judge: there was compassion. And I hope you -- I know I will -- send this judge a message that had you done your job back in 1971, David Smith would be here today, Terri Smith would be here today, Leslie Smith would be here today." Id. at 559, 526 A.2d at 344. Although the Supreme Court found the remarks to be "extremely prejudicial," it nonetheless affirmed the death sentence. The Court said:

> It is extremely prejudicial for a prosecutor to exhort a jury to return a death sentence as a message to the judicial system or its officers...while such remarks will ordinarily necessitate that the death penalty be reduced to life imprisonment, we sustain the death penalty in this case for the following reason. Of the five aggravating circumstances submitted by the Commonwealth and found by the jury, we find that the jury properly found that the Appellant committed a killing while in the perpetration of a felony and that he had been convicted of an offense before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable. No mitigating circumstances were found by the jury. The jury was required therefore to return a sentence of death. 42 Pa.C.S. § 9711(c)(IV). Because the two aggravating circumstances properly found by the jury are neutral in character, as contrasted with other aggravating circumstances which interject a subjective element into the jury's consideration, there was no weighing process which could have been adversely affected by the prosecutor's improper comments. Id. at 559-60, 526 A.2d at 345.(emphasis added).

2. Justice Larsen, in his concurring opinion in Crawley, reasoned that "the General Assembly has expressly directed this Court to affirm a sentence of death unless we determine that such improper commentary or some passion, prejudice or any other arbitrary factor his produced the sentence of death."

M. Prosecutor's Comment That The Defendant Was A "Clever, Calculating And Cunning Executioner."

1. In Commonwealth v. D'Amato, 514 Pa. 471, 526 A.2d 300 (1987), the Pennsylvania Supreme Court, in a unanimous decision written by Justice Larsen, held that in the guilt/innocence phase of the case the prosecutor did not commit reversible error by calling the defendant a "clever, calculating and cunning executioner." While the Court stated that the prosecutor used "poor judgment" it held that the comments were made in response to the defense portrayal of the defendant as an uneducated and ignorant man who was duped and psychologically coerced into rendering a confession and who could

not have voluntarily waived his Miranda rights. The Court held:

> The prosecutor's use of the term executioner was unfortunate, but we cannot say the unavoidable effect of this isolated characterization was to prejudice [D'Amato].

Id. at 498, 526, A.2d at 313.

2. COMMENT: It is difficult to square D'Amato with Commonwealth v. Bricker, 506 Pa. 571, 487 A.2d 346 (1985), wherein the Pennsylvania Supreme Court held it was reversible error for a prosecutor in his guilt phase closing to refer to the defendant as a "cold blooded killer," and, with Commonwealth v. Anderson, 490 Pa. 225, 415 A.2d 887 (1980), wherein the Pennsylvania Supreme Court also held it was reversible error for a prosecutor in a guilt/innocence phase closing to refer to the defendant as an "executioner."

   It should be noted that in D'Amato the defense counsel neither objected nor moved for a mistrial at the time the allegedly prejudicial remark was made. (The defense counsel in Bricker did object but the defense counsel in Anderson did not.) The issue in D'Amato was defense counsel's ineffectiveness for his failure to so object. Under Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, (1987), a much more stringent standard of review of ineffectiveness applies 1984). One explanation, then, is that Anderson was decided pre-Pierce and in Bricker the defense counsel did timely object.

   But, nonetheless, Sneed, Crawley, and D'Amato seem to demonstrate that the Court will now grant a prosecutor more leeway in both guilt phase and sentencing phase closings. Virtually the entire Court is trying to send the same message to defense lawyers as it did to prosecutors in Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987). The Court apparently expressed some reluctance to find prosecutorial misconduct in closing argument because to do so would allow a defendant to escape the death penalty on remand. Since 9711(h)(2) now allows for a new sentencing hearing on remand, the Court might again subject prosecutors' closing speeches in penalty phases to more scrutiny.

3. In Commonwealth v. Porter, 524 Pa. 162, 569 A.2d 942 (1990), the Supreme Court held that the

prosecutor's expression that the facts argued a "cold blooded" killing was not unduly prejudicial given the clear, palpable evidence in the case. The court cautioned, however, that characterizations such as "cold blooded killer" are not favored and have, in appropriate circumstances, been condemned as improper expressions of the prosecutor's personal belief in the defendant's guilt. **NOTE:** This statement was apparently made during the guilt phase. The opinion does not expressly identify when it was made, however.

XXIV. SUGGESTED ANSWERS TO TYPICAL DEFENSE COUNSEL'S CLOSING.

NOTE: Much of the discussion in this section is for historical purposes only. Under Rule 364 of the Rules of Criminal Procedure, the defense counsel now closes last during the penalty phase of a capital trial. Pa.R.Crim.P. 364. Accordingly, the prosecutor will no longer have the opportunity for an "invited" response. Several death penalty cases were tried before July 1, 1989, the effective date of Rule 364, and are still under review in the trial and appellate courts. Cases and principles cited herein will still be pertinent for the foreseeable future.

A. The Bible says: "Vengeance is mine sayeth the Lord". "So jurors don't be a part of it; don't sentence the defendant to death."

Answer: As an "invited response" the prosecution can state: The defense counsel's citation of the biblical passage was taken out of context. The Bible was referring not to due process of law extracting justice, but rather "revenge" by an affronted party.

Further: The prosecution seeks not vengeance, but JUSTICE! And JUSTICE in this case demands the death penalty.

B. Bible says: "He who is without sin cast the first stone."
Answer: Again, as an invited response, the prosecutor can say that the passage quoted referred to a mob which stoned an innocent woman to death, i.e., they "lynched" her without a trial. In a court trial, the defendant is protected from mob violence; death by due process of law is supported by the Bible.

C. Defendant personally "closes" to the jury. It should be noted that a defendant in Pennsylvania has no right to address the jury in the penalty proceeding and not be subjected to cross-examination. Commonwealth v. Abu-Jumal, 521 Pa. 188, 555 A.2d 846 (1989). Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992). The death penalty statute permits "counsel to present argument for or against the sentence of death" after the prosecution of evidence. 42 Pa.C.S. § 9711(a)(3) (emphasis added); Id. at 212-13, 555 A.2d at 857-58. But see Pa.R.Crim.P. 356, which provides that each party is entitled to present one closing argument for or against the death penalty and that the "defendant's argument shall be made last." Given the death penalty statute's function of

channelling sentencing discretion, and given the Brown and Penry cases in the United States Supreme Court, as well as Lesko and Abu-Jumal in the Pennsylvania Supreme Court, pleas for mercy or sympathy not based on mitigating evidence placed before the jury should not be permitted. If the defendant gives factual material in an attempt to establish either a statutory or nonstatutory mitigating circumstance, the prosecutor should attempt to contradict the information through cross-examination or through other witnesses. The prosecutor's evidence and argument is not "limited to the enumerated aggravating circumstances." Id. at 213-214, 555 A.2d at 858. The prosecutor can introduce evidence to contradict the defendant's mitigating circumstances. See Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989). If the defendant merely pleads for mercy or sympathy and asks the jury to sentence him to life imprisonment, tell the jurors in your closing argument that they should not consider mere sympathy and that sympathy or mercy can be considered in making their decision if those matters arise from the evidence. The jury is not supposed to make its decision on penalty based on emotions but on the evidence. See California v. Brown, supra, Penry v. Lynaugh, supra, and Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990). The prosecutor is cautioned not to prohibit the defendant from addressing the jury in the penalty proceeding. The more cautious approach is to allow him to address the jury and to deal with the implications in your argument.

Answer: These statements are neither under oath nor tested by cross examination. They are self-serving. He obviously has an interest in the outcome.

N.B. Get the judge to give a cautionary instruction.

D. Defense lawyer tearfully pleads his client's case "take my hand and together we will save the defendant; he is still a rehabilitatable human being."

Answer: Remind jury of evidence at trial how the defendant rejected the victim's pleas for life and mercy; keep the jurors' focus on the criminal act itself. If there is a picture of a "defense wound" in the hand or arm, show that to the jury. "Here's what the defendant did when the victim extended her hand."

E. The Bible says: "Thou shalt not Kill."

Answer: Exodus 21:12
Numbers 35:16

"...and the murderer shall be put to death."

1. In a case tried before the effective date of Rule 364, the Pennsylvania Supreme Court, in an opinion authored by Justice Papadakos, vacated a death sentence and remanded the case for a new sentencing proceeding because of the prosecutor's penalty phase closing argument wherein he said: "[The defendant] has taken a life...As the Bible says 'and the murdered shall be put to death'." Commonwealth v. Chambers, 528 Pa. 558, 586 599 A.2d 630, 644 (1991). This argument was not in response to any biblical reference by the defense attorney in his sentencing phase summation. The Court held "that reliance in any manner upon the Bible or any other religious writing in support of the imposition of the penalty of death is reversible error per se..." Id. The Court also admonished all prosecutors that any such reliance "may subject violators to disciplinary action." Id. The Court explained its holding as follows:

> this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murder shall be put to death" the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance.

Id. at 586, 599 A.2d at 644. The Court said "there is no reason to refer to religious rules or commandments to support the imposition of the death penalty." Id. The Court vacated the death penalty under its statutory authority because the prosecutor's argument "reached outside of the evidence of the case and the law of the Commonwealth" and because it was "not convinced that the penalty was not the product of passion, prejudice or an arbi-

trary factor..." Id. at 587, 599 A.2d at 644. See also 42 Pa.C.S. § 9711(h)(3)(i) ("The Supreme Court shall affirm the sentence of death unless it determines that...the sentence of death was the product of passion, prejudice or any other arbitrary factor..."). The Court reasoned:

> Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.

Id. at 596-7, 599 A.2d at 644.

2. The rule of Chambers, supra, has been addressed by the Pennsylvania Supreme Court in the context of the defense attorney's summation at the penalty phase of a capital trial. Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992), the defendant argued that his trial attorney was improperly restricted by the trial court from arguing the morality of the death penalty. Defense counsel attempted to make Biblical and religious arguments to which the trial court sustained the prosecutor's objections. The court admonished defense counsel to keep religion out of his argument. After a second objection was sustained the trial court instructed the jury to "disregard religion." The trial court later directed defense counsel to concentrate his argument on aggravating and mitigating circumstances. On appeal, the defendant argued that his counsel's arguments should have been permitted under mitigating circumstance (e)(8). The three justices of an equally divided Pennsylvania Supreme Court voting to affirm the death sentence rejected this claim of error. They said:

> [B]y the express terms of § 9711(e)(8), consideration may be given only to evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. Although commenting on religion is not per se improper, it is improper when it goes beyond the bounds of consideration of the character and record of the accused. The

> arguments of counsel to which objections were sustained were not relevant to appellant's background, character, or to the circumstances of the crime. Instead, the arguments were intended to persuade the jurors that they would betray their religious beliefs if they sentence appellant to death. The jury's duty was not to decide the propriety or morality of the death penalty in general, but to decide the appropriateness of the death penalty as applied to the circumstances of this particular case.

Id. at 227, 612 A.2d at 403 (opinion in support of affirmance by Larsen, J.). These justices explained that the rationale underlying the Chambers decision, that the jury should only consider factors which flow from the evidence and/or the inferences drawn therefrom, applies to defense counsel, as well as prosecutors.

> For the same reasons, defense counsel must also refrain from references to the Bible in opposition to imposition of the death penalty. The boundaries of proper advocacy are exceeded if we allow counsel to make arguments calculated to inflame the passions or prejudices of the jury, or to divert the jury from its duty to decide the case on the evidence by introducing broad social issues that are not based on evidence in the record.

Id. at 228, 612 A.2d at 404 (opinion in support of affirmance). The justices explained that the Legislature has expressed its opinion that the death penalty is proper for some intentional murders and that, while "defense counsel should not be unduly restrained in his closing argument, we will not permit an attack on the legislative enactment of the death penalty." The justices reasoned that

> To do so would suggest to the jury that they may go beyond their proper function, and invade the province of the Legislature. It is wholly improper to urge jurors to disregard the law as it presently exists, or suggest to them that they have the power to do so. Jurors have an obligation to apply the law; the law, under certain circumstances, mandates death. Jurors may not ignore their oath and obligation to apply the law by choosing to

> reject the death penalty due to moral opposition.

Id. at 228, 612 A.2d at 404 (opinion in support of affirmance). Accord Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986) (evidence concerning the moral and social effects of capital punishment would not be admissible; to allow jury to make morality judgment would represent jury nullification). None of the three justices who voted to vacate the death sentence imposed in this case voiced any disagreement with this discussion of this issue. See Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992) (opinion in support of vacating sentence of death by Nix, C.J.) (expressing disagreement with finding that evidence was sufficient to support "torture" aggravating circumstance); and Commonwealth v. Daniels, 531 Pa. 210, 612 A.2d 395 (1992) (opinion in support of vacating sentence of death by Zappala, J., joined by Cappy, J.) (expressing disagreement with finding that evidence was sufficient to support "torture" and "killing witness" aggravating circumstances). This issue was not expressly discussed in either of those opinions.

XXV. DEATH PENALTY HEARING PROCEDURE.

A. Penalty Hearing Instructions.

1. The jury should be directed to follow the death penalty statute and to confine its considerations to aggravating and mitigating circumstances. Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989).

   a. A trial court properly rejects a request for an instruction during the penalty phase at a capital trial that the jury "is free to impose a sentence of life [imprisonment] for any reason...since such an instruction would inject arbitrariness and capriciousness into the capital sentencing process." Commonwealth v. Young, ___ Pa. ___, ___, 637 A.2d 1313, 1322 (1993).

   b. Any instruction on weighing aggravating and mitigating circumstances should mirror section 9711(c)(1)(iv). Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993) (finding no error in instruction as given).

   c. In instructing the jury on the weighing process during the penalty phase of a capital trial, "it is imperative that the trial court instruct the jury that the weighing process required under Section 9711(c)(1)(iv)... involves a qualitative, not quantitative, analysis. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989)." Commonwealth v. Peoples, ___ Pa. ___, ___, 639 A.2d 448, 451 (1994) (approving instruction given as providing "clarification to the jury in everyday terms").

   d. The United Sates Supreme Court has held that nothing in its Eighth Amendment jurisprudence requires that the capital sentencer be instructed "how to weigh any particular fact in the capital sentencing decision." Tuilaepa v. California, ___ U.S. ___, ___, ___ S.Ct. ___, ___, ___ L.Ed.2d ___, ___, 62 U.S.L.W. 4720, 4723 (1994). "The States are not required to conduct the capital sentencing process in that fashion." Id. Once the states narrow the class of death eligible defendants the sentencer may consider a myriad of factors in decid-

ing what penalty to impose and may be given unbridled discretion in doing so. Id.

2. Generally, instructions at the penalty hearing must follow the language of the sentencing statute. Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989) (no Mills v. Maryland problem if verdict slip and oral instruction complied substantially with the statute); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989) (since jury instructed in conformity with statute, no Mills problem); and Commonwealth v. Hackett, ___ Pa. ___, 627 A.2d 719 (1993) (same; under Pennsylvania's statute a finding of no mitigating circumstances must be unanimous). Compare Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989) (instruction did not follow statute resulting in Mills error); Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990) (conflict between oral instructions and verdict slip led to Mills problem).

3. A jury may find any mitigating or aggravating circumstances regardless of the positions of either the defendant or the Commonwealth. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). See also Blystone v. Pennsylvania, 494 U.S. at 306, n.4, 110 S.Ct. 1083, n.4, 108 L.Ed.2d at 264, n.4 (despite fact that defendant refused to present any evidence of mitigation during sentencing proceeding, "jury was specifically instructed that it should consider any mitigating circumstances which petitioner had proved by a preponderance of the evidence, and in making this determination the jury should consider any mitigating evidence presented at trial, including that presented by either side during the guilt phase of the proceedings.").

4. For instructions on the role of sympathy arising from the evidence as a mitigating circumstance, see Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), and Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992); and compare Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). For a detailed discussion of these cases see "XVIII. Sympathy Plea, B", supra.

5. Where the trial court adequately instructs the jury on the concept of reasonable doubt during the guilt phase of the trial, there is no error in failing to reinstruct the jury on that concept during the penalty phase. Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991). The same is true for the

phrase "while in the perpetration of a felony" as used in aggravating circumstance number 6. Id.

6. The trial court should instruct the jury only on the aggravating and mitigating circumstances of which there is evidence which might support them. See Commonwealth v. Tilley, supra, at 143 n.11, 595 A.2d at 583-4 n.11; and Pa.R. Crim.P. 357. See also Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992) (instruction on mitigating circumstances properly limited to those of which there is some evidence; 42 Pa.C.S. § 9711(c)(1)(ii)); and Commonwealth v. Carpenter, 533 Pa. 40, 615 A.2d 1263 (1992) (since defendant claimed innocence and not duress, there was no error in not instructing jury on mitigating circumstance of duress at penalty hearing).

   a. However, "[a] trial court's failure to indicate which of the statutory aggravating circumstances is supported by the evidence does not prejudice the offender. Commonwealth v. Morales, 508 Pa. 51, 494 A.2d 367 (1985). Indeed, such a practice is more prejudicial to the Commonwealth, which must prove any aggravating circumstance beyond a reasonable doubt." Commonwealth v. Hackett, 534 Pa. 210, 224, 627 A.2d 719, 726 (1993) (defendant could not explain any prejudice resulting from trial court's reading of all aggravating circumstances; claim rejected).

   b. Where a defendant proffers evidence of unspecified mitigation (such as a good work record or good behavior in jail while awaiting trial) under (e)(8), the trial court must instruct the jury in the terms of (e)(8), as must be done in every case, but is not required to give a specific instruction on how to use unspecified mitigation. That is a function of defense counsel in his or her summation to the jury. Commonwealth v. Peoples, ___ Pa. ___, 639 A.2d 448 (1994).

7. Where conspiracy is the basis for the aggravating circumstance, there is nothing misleading or improper for the trial court in a joint trial to indicate to the jury that it is using the terms "the defendants" collectively to include all the defendants in order to avoid having to repeat each instruction by the number of defendants. Commonwealth v. Hackett, supra, at ___ n.7, 627 A.2d at

726 n.7 (verdict slip required jury to consider each defendant's sentence separately).

8. Since the word "knowingly" as used in aggravating circumstance (d)(7) has a commonly understood meaning, there is no need to further define it during jury instructions at the penalty phase of a capital trial. Commonwealth v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992); and Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568 (1992).

9. Merely reading the statutory provision relating to the aggravating circumstance of "torture," 42 Pa.C.S. § 9711(d)(8), does not provide the jury with sufficient guidance. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (death sentence vacated and new sentencing proceeding ordered due to deficient "torture" instruction).

10. The phrases "grave risk" as used in aggravating circumstance (d)(7) is not vague. "The jury is quite capable of understanding the meaning of 'grave risk' and of applying its common sense and experience to the facts to determine whether a grave risk had in fact been created." Commonwealth v. Wharton, supra, at 152, 607 A.2d at 723. "Grave risk," therefore, does not require further definition during the penalty phase instructions.

11. For instructions on the defendant's burden of establishing mitigating circumstances by a preponderance of the evidence which were approved by the Supreme Court, see Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992) and Commonwealth v. Baker, 531 Pa. 541, 615 A.2d 716 (1992). See also Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993) (trial court's isolated reference to a defendant's duty to produce "testimony" rather than general evidence of mitigation did not require reversal of death penalty where court immediately corrected itself).

12. Where the trial court gives an instruction consistent with section 9711(c)(i)(iv) that the verdict must be a sentence of death if there is at least one aggravating circumstance and no mitigating circumstances, or if the aggravating circumstances outweigh the mitigating circumstances, and that the verdict must be a sentence of life imprisonment in all other circumstances, there is no necessity to instruct the jury that, if the mitigating circumstances outweigh the aggravating circumstances the

verdict must be life imprisonment. The "in all other circumstances" language covers this situation. The statute gives a "tie" (equal balance of aggravation and mitigation) to the defendant. Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992), citing Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982).

a. There is no requirement that the sentencing jury be instructed under 42 Pa.C.S. § 9711(c)(i)(v) that if the jury is unable to reach a unanimous penalty verdict that the defendant will be sentenced to life imprisonment. Commonwealth v. Cross, ___ Pa. ___, 634 A.2d 173 (1993). That provision of the death penalty procedures statute is for the trial court, not the jury. Id.

13. In instructing the jury on the weighing process during the penalty phase of a capital trial, "it is imperative that the trial court instruct the jury that the weighing process required under Section 9711(c)(1)(iv)... involves a qualitative, not quantitative, analysis. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989)." Commonwealth v. Peoples, ___ Pa. ___, ___, 639 A.2d 448, 451 (1994) (approving instruction given as providing "clarification to the jury in everyday terms").

14. Under Pennsylvania's death penalty procedures statute, in jury trials, after a defendant has been found guilty of murder of the first degree, the same jury must "determine whether the defendant shall sentenced to death or life imprisonment." 42 Pa.C.S. § 9711(a)(1). The jury must be instructed, as part of the penalty proceeding, that "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," and that "[t]he verdict must be a sentence of life imprisonment in all other cases." 42 Pa.C.S. § 9711(c)(1)(iv). In addition to instructing the jury on other matters related to sentencing as required by the statue, 42 Pa.C.S. § 9711(c)(1)(i), (ii) and (iii), the trial court must instruct the jury "on any other matter that may be just and proper under the circumstances." 42 Pa.C.S. § 9711(c)(2). One question which has received attention from the United States Supreme Court is whether the sentencing jury must

be instructed that a person sentenced to life imprisonment is not eligible for parole.

a. Under Pennsylvania law "a sentence of life imprisonment is not subject to parole, 61 p.S. § 331.21, but is subject to only commutations or pardon by the Governor." Commonwealth v. Ly, 528 Pa. 523, 544, 599 A.2d 613, 623 (1991). See also Pa. Const. art. IV, section 9 (establishing Board of Pardons and defining Governor's authority to grant pardons and commutations of sentences on the recommendation of a majority of the members of the Board of Pardons and providing for temporary reprieves by the Governor). The Pennsylvania Board of Probation and Prole has no statutory authority to grant parole to an inmate serving a life sentence. A person becomes eligible for parole only after serving his or her minimum sentence. A sentence of life imprisonment has no minimum (or has a minimum of life and a maximum of life). Therefore, a life prisoner never becomes eligible for parole. With some regularity, however, life prisoners petition the Board of Pardons seeking commutations asking the Governor to set a minimum term for years on their life sentences. While such commutations are generally rare, if a majority of the Board of Pardons recommends a commutation to the Governor and the Governor agrees with the recommendation and commutes the life sentence to a minimum sentence of a specified number of years and a maximum sentence of life imprisonment, the life prisoner would become eligible for parole upon the expiration of the specified minimum period. The life prisoner would only be released at that time (or some later time) after the Board of Probation and Parole approved his or her release after submission of a plan as in the case of prisoners sentenced to ordinary prison terms.

b. Traditionally, capital sentencing juries receive no instruction on the meaning of life imprisonment in Pennsylvania (i.e. that life imprisonment means without the possibility of parole).

1) In Commonwealth v. Johnson, 368 Pa. 139, 148, 81 A.2d 569, 573 (1951), the Supreme Court said "that whether the defendant

might at any future time be pardoned or have his sentence commuted is no concern of their's [the jury's] and should not enter in any manner whatsoever into their consideration of the proper penalty to be imposed which should be determined solely in light of the relevant facts and circumstances as they then existed."

2) Johnson was followed in Commonwealth v. Edwards, 521 Pa. 134, 158, 555 A.2d 818, 830 (1989). In Edwards, the jury asked the following question during its deliberations on sentence: "Does the jury have the option to condition their verdict of life in prison to include no parole?" The court then described the parole process and said any decision on parole was [illegible]le Board. Later, the court attempted to correct this instruction and described the Governor's commutation authority and said: "He's the only one who can, in other words, parole someone." Id. at 157, 555 A.2d at 830. The court then reiterated its sentencing instructions on aggravating and mitigating circumstances and the sentencing decision-making process. The jury then sentenced Edwards to death. The defendant in Edwards argued that the trial court's initial instruction was in error and required the imposition of a life sentence. The Supreme Court, while it agreed that the initial instruction on parole was erroneous, found that the subsequent instruction corrected any problem and that no relief was warranted. The Supreme Court said that the trial court, when it attempted to explain who had parole authority, "deviated from the standard [the Supreme Court has] prescribed when such a question is raised by a jury." Id. at 158, 55 A.2d at 830. The Court then repeated the above-quoted language from Johnson and said that is what the response to the question should have been. Id.

3) Johnson was also followed in Commonwealth v. Strong, 522 Pa. 445, 458-460, 563 A.2d 479, 485-486 (1989). In Strong, the jury asked, while it was deliberating on the

penalty question: "Would life imprisonment result in the possibility of parole at any time." The trial court refused to answer the question and reiterated its general instructions to confine the deliberations to aggravating and mitigating circumstances and the determination of the appropriate sentence under the statute. The Supreme Court upheld this response on the authority of Johnson because "it did stress to the jurors that the future possibility of parole was not to enter into their decision process."

4) Strong was followed in Commonwealth v. Henry, 524 Pa. 135, 160, 569 A.2d 929, ___ (1990). In Henry, the defendant complained when the trial court refused to instruct the sentencing jury "that a sentence of life imprisonment means life imprisonment without an opportunity for parole." The Supreme Court held that "[s]uch an instruction would have been improper, and it would have introduced parole as a sentencing consideration." Id. Citing Strong, the Court ruled that the instruction was properly denied, observing: "[w]e have held that parole, pardon, and commutation of sentence are matters that should not enter in any manner into a jury's deliberations regarding the sentence to be imposed in a first degree murder case. Commonwealth v. Henry, supra, at 160, 569 a.2d at ___.

c. The United States Supreme Court has recognized Pennsylvania as one of only three states which "have a life [imprisonment]-without-parole sentencing alternative to capital punishment for some or all convicted murders but refused to inform sentencing juries of this fact." Simmons v. South Carolina, ___ U.S. ___, ___ n.8, ___ S.Ct. ___, ___ n.8, ___ L.Ed.2d ___, ___ n.8, 62 U.S.L.W. 4509, 4513 n.8 (1994) (plurality) (citing Henry, supra; and Strong, supra). Simmons, may, and probably will, require a change in Pennsylvania practice and could lead to appellate relief in some cases in which death sentences have been imposed.

1) In Simmons, the defendant was convicted of capital murder. Because of prior

convictions for violent crimes, if he was sentenced to life imprisonment for the murder, he would not be eligible for parole under South Carolina law. The prosecution did not challenge the defendant's parole ineligibility because of his prior convictions. The defendant also sought to establish that parole ineligible life offenders are not eligible for or granted any kind of work-or early release programs. In his closing argument the prosecutor argued that the defendant's future dangerousness was a factor for the jury to consider in determining the defendant's sentence. The prosecution objected to the defendant's request that the trial court instruct the jury that the defendant would not be eligible for parole if he was sentenced to life imprisonment. The trial court refused to give the requested instruction but indicated that it might give it if, during deliberations, the jury inquired about parole eligibility. That situation presented itself when the jury asked: "Does the imposition of a life sentence carry with it the possibility of parole?" The judge, over Simmons' objection gave the following response:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning.

Shortly after receiving this instruction the jury returned a sentence of death. Simmons argued that he was denied due process by not being able to respond to the state's future dangerousness argument by explaining that he would not be eligible for parole or obtaining an instruction to that effect if he received a sentence of life imprisonment. The Supreme Court agreed and vacated Simmons' sentence of death. While seven justices

agreed in the result, there was no majority opinion.

2) Justice Blackmun authored an opinion in Simmons for himself and Justices Stevens, Souter and Ginsburg. He observed that while South Carolina's capital sentencer statute does not mandate consideration of a defendant's future dangerousness, the state's "evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." Simmons v. South Carolina, supra, at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4512. He noted that "prosecutors in South Carolina, like those in other States that impose the death penalty, frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a dangerous to the public if released from prison." Id. He concluded that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant" and that "[i]ndeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole" Id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4512. The plurality repeatedly emphasized that the prosecutor had urged a sentence of death because of the defendant's future dangerousness. However, the plurality broadly held that "[b]ecause [Simmons'] future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility" as a matter of due process. Id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4514. This may be done, said the plurality, either by defense counsel's argument or court instruction. Id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4514.

3) Justice O'Connor wrote an opinion concurring in the judgment in Simmons which was joined by Chief Justice Rehnquist and

Justice Kennedy. Justice O'Connor would hold that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury--by either argument or instruction--that he is parole ineligible." Id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4516. (O'Connor, J., concurring). She concluded that the prosecutor had put Simmons' future dangerousness at issue and that Simmons was not permitted to argue his parole ineligibility. She, therefore, concurred in the Court's judgment that Simmons was denied due process.

4) Both Justice Blackmun's opinion and Justice O'Connor's concurrence agree that the prosecutor is free to argue that a apital defendant, if sentenced to life imprisonment, would pose a danger in prison and should, therefore, be sentenced to death. Simmons v. South Carolina, ___ U.S. ___, ___ n.5, ___ S.Ct. ___, ___ n.5, ___ L.Ed.2d ___, ___ n. 5, 62 U.S.L.W. 4509, 4512 n.5 (1994) (plurality); and id., at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4516 (O'Connor, J., concurring).

5) Justice Ginsburg, who joined Justice Blackmun's four-member plurality opinion, also wrote a concurring opinion to explain her understanding of Justice Blackmun's opinion and why she joined it. she said: "When the prosecution urges a defendant's future dangerousness as cause for the death sentence, the defendant's right to be heard means that he must be afforded an opportunity to rebut the argument. To be full and fair, that opportunity must include the right to inform the jury, if it is indeed the case, that the defendant is ineligible for parole. Justice Blackmun's opinion is in accord with Justice O'Connor's on this essential point." Simmons v. South Carolina, ___ U.S. ___, ___, ___ S.Ct. ___, ___, ___ L.Ed.2d ___, ___, 62

U.S.L.W. 4509, 4515 (1994) (Ginsburg, J., concurring) (citation omitted). Justice Ginsburg also noted that Justice O'Connor's opinion made it clear that due process was satisfied if the relevant information was imparted to the jury either by the judge in instructions or by defense counsel in argument and that she did not read Justice Blackmun's opinion to require otherwise. Id. Justice Ginsburg's concurrence, therefore, seems to provide the controlling rationale of Simmons.

d. The effect of Simmons on Pennsylvania capital punishment jurisprudence is unclear.

1) Different from South Carolina law as explained by the United States Supreme in Simmons, aggravating circumstances in Pennsylvania are limited to those set forth in the death penalty procedures statute. See 42 Pa.C.S. § 9711(d)(1)-(16). See also 42 Pa.C.S. § 9711(a)(2) ("Evidence of aggravating circumstance shall be limited to those circumstances specified in subsection (d)").

2) Future dangerousness is not a statutory aggravating circumstance under Pennsylvania law.

3) Under Pennsylvania law, "[i]t is well established that it is prejudicial error for a prosecutor to suggest that a jury should impose a sentence of death to prevent a defendant from receiving parole. Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966)." Commonwealth v Ly, 528 Pa. 523, 544, 599 A.2d 613, 623 (1991). See also Commonwealth v. Floyd, 506 Pa. 85, 484 A.2d 365 (1984) (reversing death penalty because of improper prosecutorial argument including possibility of killing again if defendant released on parole); and Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (1989) (same; relying on Floyd).

4) Pennsylvania prosecutors may argue that a capital defendant, if sentenced to life imprisonment, would pose a danger to

other inmates or corrections personnel. Commonwealth v. Griffin, ___ Pa. ___, ___ A.2d ___ (1994) (No. 24 Capital Appeal Docket; 7/5/94) (argument responded to defense argument that imprisoning defendant would eliminate any possible danger).

5) Simmons will have to be reconciled with Johnson, supra, Edwards, supra, Strong, supra, and Henry, supra. Reconciliation is possible provided the prosecutor does not put future dangerousness if released on parole at issue. In that situation, the Constitution will not require any explanation of parole ineligibility and the Johnson response not to consider parole in setting the penalty will be appropriate. Simmons v. South Carolina, supra, at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4516 (O'Connor, J., concurring) ("if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole").

   a) Since Simmons, as explained in the concurrences by Justices O'Connor and Ginsburg, requires an explanation of parole ineligibility only when the prosecution puts future dangerousness in issue, no explanation will be required if the jury asks a question on its own during deliberations as in Strong.

6) If parole ineligibility is addressed by the trial court in instructions or by defense counsel in agreement it would not be inappropriate to give truthful accurate information, by way of argument or instruction, on the pardons, commutation and parole process described above. See Commonwealth v. Ly, 528 Pa. 523, 599 A.2d 613 (1991) (it may be proper for the trial court to instruct the sentencing jury that a sentence of life imprisonment is not subject to parole but is subject

only to commutations or pardon by the Governor). See also Simmons v. South Carolina, supra, at ___, ___ S.Ct. at ___, ___ L.Ed.2d at ___, 62 U.S.L.W. at 4516 (O'Connor, J., concurring) ("the State may also though it need not) inform the jury of any truthful information regarding the availability of commutation, pardon, and the like").

15. For additional guidance or instructions for aggravating and mitigating circumstances see notes under the specific circumstances catalogued under headings XII, XIV, XV and XVI, supra.

B. Defendant Has The Burden Of Proving Mitigating Circumstances.

1. In Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), the defendant argued that § 9711 of the Sentencing Code improperly allocated the burden of proof by placing the risk of non-persuasion on the defendant, who is required to convince the jury that mitigating circumstances exist by a preponderance of the evidence. The Court said that

> Since the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt, this allocation to the defendant to prove mitigating by a preponderance of the evidence does not violate due process.

Id. at 66, 454 A.2d at 963.

2. The death penalty statute is not unconstitutional in placing burden of proof on the defendant to prove mitigating circumstances by a preponderance of the evidence. Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989). See also McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (White, J., concurring opinion; and Kennedy, J., opinion concurring in the judgment); and Blystone v. Pennsylvania, 494 U.S. at 306 n.4, 110 S.Ct. 1078, 1083 n.4, 108 L.Ed.2d at 264 n.4. This position was adopted by a four-member plurality of the United States Supreme Court in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, 58 U.S. L.W. 4992 (1990). Justice Scalia, who provided the critical fifth vote on this issue, concluded that this contention did not constitute

an Eighth Amendment violation. Walton v. Arizona, 497 U.S. at 673, 110 S.Ct. at 3068, 111 L.Ed.2d at 541-542 (Scalia, J., concurring in part and concurring in the judgment). Accordingly, though there is no single rationale for its decision, a majority of the Court has concluded that a statute which places the burden of proving mitigating circumstances by a preponderance of the evidence upon the defendant is not unconstitutional.

a. Relying on the combination of the Walton plurality and Justice Scalia's concurrence, the Third Circuit found no constitutional defect in Pennsylvania's requirement that a capital defendant prove mitigating circumstances by a preponderance of the evidence. Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991).

3. For instructions on the defendant's burden of establishing mitigating circumstances by a preponderence of the evidence which were approved by the Supreme Court, see Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992) and Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992). Compare Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993) (trial court promptly corrected erroneous instruction).

C. Who Argues Last In The Penalty Closing.

The Pennsylvania Supreme Court held in Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1985), and Commonwealth v. DeHart, 512 Pa. at 259 n.12, 516 A.2d at 669, n.12 (1986), that the Commonwealth is permitted to argue last. However, pursuant to a change in the rules of criminal procedure effective July 1, 1989, the defendant's argument shall now be made last. See Pa.R.Crim.P. 356.

D. The Sentencing Verdict Slip.

1. The death penalty statute provides that "in rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based" and "shall set forth in writing whether the sentence in death or life imprisonment." 42 Pa.C.S. § 9711(f)(1) and (2).

2. For cases tried after July 1, 1989, the Supreme Court has promulgated sentencing verdict slips for use in all cases subject to the death penalty.

Pa.R.Crim.P. 357, 358A and 358B. In a jury trial, the trial judge must identify the aggravating and mitigating circumstance(s) submitted for the jury's consideration. In all cases mitigating circumstance (e) (8) must be submitted to the jury. The jury must then complete the remainder of the form showing the sentence imposed (death or life imprisonment) and the basis for the determination. These questions comport with the statute. 42 Pa.C.S. § 9711(c)(1)(iv) The jury must specifically identify, in the language of the statute, the aggravating circumstance(s) unanimously found and the mitigating circumstance(s) found by any member of the jury. In Commonwealth v. Tilley, 528 Pa. 125, 147-8, 595 A.2d 575, 586 (1991), the Supreme Court said that a "claim that the comment to Pa.R. Crim.P. 358 A, governing the sentencing verdict slip, suggests that the former procedure used in the case sub judice violated Mills [v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988),] is...meritless. Rule 358A was simply designed to provide a uniform statewide procedure. It does not conflict with this or prior decisions of this Court."

3. The verdict slip is not to be a substitute for jury instructions in the penalty phase, however. Those instructions should follow the statute. Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989); Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989); and Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990).

   a. In Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992), the Supreme Court rejected a claim that the verdict slip sent out with the jury created a Mills problem.

4. In Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992), the Pennsylvania Supreme Court held, in a case tried after July 1, 1989, that the jury's failure to list on the sentencing verdict slip the mitigating circumstances that it found did not result in any relief to the defendant. In reaching this result the Court relied on its earlier rulings in Commonwealth v. Carpenter, 511 Pa. 429, 515 A.2d 531 (1986), that the death penalty statute does not require that the jury make specific findings regarding mitigating circumstances, and Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989), 520 Pa. 338, 554 A.2d 27 (1989), "that a jury verdict slip which does not require a list of mitigating circum-

stances is not defective." The majority in Crispell made no mention of the new verdict slip rules. Justice Zappala, in a concurring opinion, found that the trial court erred in not using the newly-promulgated verdict slip form. He concluded, however, that this error was harmless beyond a reasonable doubt. Id. (Zappala, J., concurring).

E. Deadlocked Jury; Poll Of Jury; Instructions By Court.

1. In Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1987), the jury, during the penalty phase, after deliberating several hours, sent a note to the trial judge indicating that they were unable to reach a decision, and requesting that the judge advise the jury as to its responsibilities. The jury was called back and the court asked each juror to write on a piece of paper his or her name and to give his or her opinion as to whether further deliberations would be helpful in obtaining a verdict. Eight jurors responded that further deliberations would be helpful; four disagreed. Upon returning to the courtroom, the jury notified the court that some of its members misunderstood the court's initial question. The judge polled the jury again and this time eleven jurors indicated that further deliberation would be helpful in reaching a verdict. The Court then reinstructed the jury with a supplemental charge which encouraged the jury to reach a verdict but also instructed them not to surrender their individual honest beliefs for the mere purpose of returning a verdict. The jury deliberated thirty minutes more and returned with a verdict imposing the death sentence. The defendant argued on appeal that the jury's sentencing verdict was the product of "coercion." The Supreme Court held that the combination of polling the jury and issuing a supplemental instruction which encouraged the jury to reach a sentencing verdict "was not 'coercive' in such a way as to deny petitioner any constitutional right." Id. at 241, 108 S.Ct. at 552, 98 L.Ed.2d at 579.

2. In Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991), a jury deliberating the fate of two capital defendants indicated after only three hours that it could not reach a verdict and that it could not do so at any time. The trial court excused the jurors for the evening. After the jury reconvened and deliberated for approximately five hours and fifteen minutes more, the judge queried the jury

foreman as to the possibility of a verdict for either or both of the defendants. The foreman indicated that he felt "very strongly" that there was no possibility of a unanimous verdict. He then said there might be some possibility of reaching a verdict. The judge directed the jury to continue deliberations for a short time but told them that if they concluded there was no hope of unanimity to report that to the court. The defendants' attorney sought mistrials and the imposition of life sentences. Both requests were denied. The jury deliberated for an additional hour and a half and returned sentences of death as to both defendants. On direct appeal, the Supreme Court said the trial court did not abuse its discretion in having the jury continue its deliberations. Nor was the jury coerced into reaching a verdict. Factors considered included: the issue which the jury was considering (life imprisonment or death for kidnap/murderers); the length of deliberations; the judge's interpretation of the foreman's answers that there was hope for a unanimous verdict; and the judge's candid instruction to the jury that if unanimity could not be achieved it was free to return to the courtroom and so advise the judge.

3. The Supreme Court was faced with a situation similar to Chester in Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992). There, after a five day trial, the jury foreman indicated that after four and one-half hours of deliberations there was no reasonable probability of the jury being able to reach a unanimous verdict on the penalty. The judge told the jury to deliberate further to try to reach a verdict without doing violence to any juror's individual sense of justice. The defense requested a verdict of life imprisonment under section 9711(c)(1)(v) which was denied. The jury deliberated another two and one-half hours at which point the foreman indicated that he thought that, with more time, a unanimous verdict could be reached. The trial court recessed for the night. The next morning, after further deliberations, the jury sentenced Zook to death. The Supreme Court affirmed the sentence and rejected Zook's challenge based on the above facts. The Court found no abuse of discretion by the trial judge. Since the trial had lasted five days, four and one-half hours of deliberation was not lengthy for a capital sentencing verdict. In addition, the record did not indicate that the verdict was the product of a coerced or fatigued jury.

F. Defendant Has No Absolute Right To Waive A Jury For Sentencing.

A defendant in a capital case who elects to have a jury trial on the issue of guilt is precluded from waiving the jury at the sentencing proceeding under section 9711(b) of the Sentencing Code, 42 Pa.C.S. § 9711(b), which provides that the same jury determines guilt and punishment. Commonwealth v. Bryant, 524 Pa. 564, 574 A.2d 590 (1990). Only if a capital defendant waives a jury trial on the issue of guilt may he elect to have the sentence determined by the court alone.

G. Separate Juries For Guilt And Punishment Prohibited.

A capital defendant is not entitled to two, separate juries, one for guilt and one for punishment. Such a practice is precluded by section 9711(a)(1) of the Sentencing Code, 42 Pa.C.S. § 9711(a)(1). Commonwealth v. Haag, 522 Pa. 388, 562 A.2d 289 (1989).

XXVI. THE JURY'S DECISION-FINDING AGGRAVATING AND MITIGATING CIRCUMSTANCES, IF ANY.

A. Statute - 42 Pa.C.S.A § 9711(c)(1).

1. The Pennsylvania Sentencing Code provides the two scenarios in which a jury must sentence a defendant to death upon a conviction of first degree murder:

> (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 circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

42 Pa.C.S. § 9711(c)(1)(iv).

a. A jury's finding of an aggravating circumstance must always be unanimous. See Commonwealth v. Hackett, ___ Pa. ___, 627 A.2d 719 (1993).

b. A jury must unanimously agree that there is no mitigating circumstance. Commonwealth v. Hackett, supra.

c. A jury's finding of mitigating circumstances need not be unanimous. Pa.R.Crim.P. 368A. A requirement of unanimity for mitigating circumstances is unconstitutional. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Pennsylvania's statute contains no such requirement. Commonwealth v. Hackett, supra; Commonwealth v. Tilley, 528 Pa. 125, 595 A.2d 575 (1991); Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989); and Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989).

2. At the sentencing hearing, "evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e)." 42 Pa.C.S. § (a)(2). "Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d)." Id. This section limits the jury's consideration of aggravating circumstances

to those specifically enumerated in section 9711(d). However, it does not limit the Commonwealth's evidence concerning other matters relevant to the question of the sentence to be imposed.

3. Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt. 42 Pa.C.S. § 9711(c)(1)(iii) Commonwealth v. Holcomb, 508 Pa. at 457, 498 A.2d at 849-50; Commonwealth v. Beasley, 505 Pa. at 287, 479 A.2d at 465.

4. The defense may present any mitigating evidence relevant to the imposition of the sentence under 42 Pa.C.S. § 9711(a)(2). The defense must prove the mitigating circumstances by a preponderance of the evidence. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982); Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (plurality); id. (Scalia, J., concurring in part and concurring in the judgment); and Lesko v. Lehman, 925 F 2d 1527 (3d Cir. 1991) (relying on combination of Walton plurality and concurrence).

5. The statute is not unconstitutionally vague for failing to provide a standard for weighing aggravating and mitigating circumstances. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982); and Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931 (1992). See also Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990) (where jury finds no mitigating circumstances, the defendant may not challenge this portion of the statute); and Commonwealth v. Hackett, 534 Pa. 210, 627 A.2d 719 (1993) (same).

   a. In instructing the jury on the weighing process during the penalty phase of a capital trial, "it is imperative that the trial court instruct the jury that the weighing process required under Section 9711(c)(1)(iv)... involves a qualitative, not quantitive, analysis. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989)." Commonwealth v. Peoples, ___ Pa. ___, ___, 639 A.2d 448, 451 (1994) (approving instruction given as providing "clarification to the jury in everyday terms").

      1) The United States Supreme Court has held that nothing in its Eighth Amendment jurisprudence requires that the capital

sentencer be instructed "how to weigh any particular fact in the capital sentencing decision." Tuilaepa v. California, ___ U.S. ___, ___, ___ S.Ct. ___, ___, ___ L.Ed.2d ___, ___, 62 U.S.L.W. 4720, 4723 (1994). "The States are not required to conduct the capital sentencing process in that fashion." Id. Once the states narrow the class of death eligible defendants the sentencer may consider a myriad of factors in deciding what penalty to impose and may be given unbridled decision in doing so. Id.

B. Case Law - Is The Sentencing Scheme Unconstitutionally "Mandatory"?

1. Even though the statute uses the phrase "must be a sentence of death," it is not a mandatory and therefore unconstitutional statute. Commonwealth v. Cross, 508 Pa. at 334, 496 A.2d at 1151; Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982); Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986); and Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81 (1988) affd. sub nom. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). In Blystone, the Supreme Court, in finding Pennsylvania's death penalty statute constitutional on its face, held that the statute satisfies the Constitution's requirement that a capital jury be allowed to consider and give effect to all relevant mitigating evidence and does not unduly limit the types of mitigating evidence that may be considered. Death is only imposed after a jury determines that aggravating circumstances outweigh mitigating circumstances present in the crime committed by the defendant or if there are aggravating circumstances and no mitigating circumstances. See also Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (California's statute, containing language similar to Pennsylvania's, upheld under Blystone).

   a. The U.S. Supreme Court has struck down as "mandatory," a sentencing scheme which provided for "automatic" sentences of death upon a finding of first degree murder, i.e., where only aggravating circumstances could be considered by the jury. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 298, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 3005, 49 L.Ed.2d 974

(1976). See also Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). Pennsylvania does not have such a statute. Blystone v. Pennsylvania, supra. A misleading jury sentencing form which may have convinced individual jurors that they were precluded from considering mitigating circumstances, thus mandating a death verdict, required a reversal of the death sentence. See Mills v. Maryland, supra.

b. A jury must be allowed to consider, on the basis of all relevant evidence, not only why a death sentence should be imposed, but also why it should not be imposed. Jurek v. Texas, 428 U.S. 262, 271, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929, 938, (1976). "(T)he jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime" in deciding whether or not to impose the death penalty. Penry v. Lynaugh, 492 U.S. at 327-328, 109 S.Ct. at 2946, 106 L.Ed.2d at 277. There can be no limitation on the use to which mitigating evidence may be put. The use of adjectives, such as "extreme" mental or emotional disturbance, "substantially" impaired, or "extreme" duress, does not preclude the jury's consideration of lesser degrees of disturbance, impairment, or duress where jury is instructed to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." Blystone v. Pennsylvania, supra. Accord Lesko v. Lehman, 925 F.2d 1527, 1553-54 (3rd Cir. 1991).

c. Lockett v. Ohio, 438 U.S. at 602, 98 S.Ct. at 2964, 57 L.Ed.2d at 988, requires that the jury give an "individualized sentence." In Sawyer v. Whitley, ___ U.S. ___, ___, 112 S.Ct. 2514, 2521, 120 L.Ed.2d 269, 285, (1992), the Court explained that Lockett and its progeny "held that the defendant must be permitted to introduce a wide variety of mitigating evidence pertaining to his character and background. [After eligibility for the death penalty has been established the] emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant." Commonwealth v. Cross, supra, 508

Pa. at 333, 496 A.2d at 1150. Pennsylvania's statute allows for an individualized sentence. Blystone v. Pennsylvania, supra.

d. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d at 883; Commonwealth v. Cross, 508 Pa. at 334, 496 A.2d at 1151. See also Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188. A death penalty statute must "'channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Creech, supra, at ___, 113 S.Ct. at 1540, 123 L.Ed.2d at 198, 61 U.S.L.W. at 4289 (quoting Lewis v. Jeffers, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)). See also Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398, 406 (1980). To determine if aggravating circumstances perform this function a court must ask whether the circumstance, as construed by the courts, provides some guidance to the sentencer. Creech, supra, following Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511, 528 (1990). In conformity with Furman, a State's death penalty statute cannot narrow a sentencer's discretion to consider relevant evidence that might cause the sentencer not to impose the death penalty. See Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

1) The possibility of a governor's pardon or commutation (reducing a sentence of death to one of life imprisonment or a term for years) does not make the death penalty arbitrary or capricious. Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992). The governor's power in this regard is found in Article IV, § 9 of the Pennsylvania Constitution. Pa. Const. art. IV, § 9. It may only be exercised following a full

hearing before the Board of Pardons (made up of the lieutenant governor, the attorney general, and three appointees of the governor) and with the concurrence of a majority of the board. Such a process is not without guidelines. It does not render the death penalty unconstitutional. Zook, supra.

e. The United States Supreme Court has rejected arguments against the death penalty based on the Baldus study which indicated that blacks are more likely than whites to receive the death sentence. The Court held that in order to reverse the death sentence, the defendant must prove that purposeful discrimination entered into the jury's sentencing decision in his case. McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). To prevail under the Equal Protection Clause of the Constitution, the Court explained, "petitioner must prove that the decision-makers in his case acted with discriminatory purpose." Id. at 279-80, 107 S.Ct. at 1760, 95 L.Ed.2d at 270 (emphasis supplied). The Court held:

> Petitioner offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence and the Baldus study is insufficient to support an inference that any of the decision makers in his case acted with discriminatory purpose. Id.

The Court concluded that, "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect.... Constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible." Id. at 281, 107 S.Ct. at 1761, 95 L.Ed.2d at 272.

f. Pennsylvania's statute permits an individualized sentence because it "allows the jury to determine when the death penalty should be imposed in an individual case but only upon a defined set of circumstances." Commonwealth v. Holcomb, 508 Pa. at 470, 498 A.2d at 856. Its decision must be based on the narrowly

defined aggravating circumstances set out in the statute only after they were weighed against the broader, extensively allowed mitigating circumstances (if any), particularly that mitigating circumstance which permits the jury to consider any aspect of the defendant's character and record and the circumstances of his offense. Id. at 470, 498 A.2d at 856, and Commonwealth v. Cross, 508 Pa. at 334, 496 A.2d at 1152. See also Blystone v. Pennsylvania, supra.

1) In Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992), the Supreme Court of Pennsylvania said "it is exclusively the function of the jury to determine whether any mitigating factor is to be given determinative weight" under Pennsylvania's legislative scheme. Likewise, in Commonwealth v. McCullum, 529 Pa. 117, 602 A.2d 313 (1992), the Court said that "[u]nder our death penalty statute, it is exclusively a jury question and within its sole province to determine how much weight should be accorded to any mitigating factor when balanced with other mitigating and aggravating circumstances in the case."

g. The jury's decision is not invalidated by the fact that under Pennsylvania's statute a death penalty is "required" where the prosecution proves beyond a reasonable doubt at least one aggravating circumstance and the defendant has not presented or proved any mitigating circumstances or the jury has not found any mitigating circumstances. Commonwealth v. Holcomb, 508 Pa. at 472, 498 A.2d at 857-58; Commonwealth v. Maxwell, 505 Pa. 152, 168, 477 A.2d 1309, 1318 (1984); Commonwealth v. Beasley, 505 Pa. 279, 287, 479 A.2d 460, 464 (1984); Commonwealth v. Beasley, 504 Pa. 485, 500, 475 A.2d 730, 738 (1984). Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986); and Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81 (1988) affd. sub nom. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (1991) (death sentence vacated on basis of Mills). Commonwealth v. Chester, 526 Pa. 578, 587 A.2d

1367 (1991). Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991).

1) In Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd Cir. 1991), the Third Circuit applied Blystone to a case where the defendant had offered evidence in mitigation. Blystone had steadfastly refused to offer any mitigating evidence and the jury returned the death sentence finding aggravating circumstances and no mitigating circumstances. For the reasons announced in Blystone, the Third Circuit upheld the statute in a "weighing" context. Accord Commonwealth v. Jasper, 526 Pa. 497, 510 n.4, 587 A.2d 705, 712 n.4 (1991) (death sentence vacated on other grounds). See also Commonwealth v. Chester, 526 Pa. 578, 612 n.11, 587 A.2d 1367, 1384 n.11 (1991).

h. The U.S. Supreme Court has upheld as constitutional the Louisiana sentencing scheme which allows the jury to sentence a defendant to death where the sole aggravating factor found by the jury -- the defendant knowingly created a risk of death or great bodily harm to more than one person -- was identical to an element of the capital crime of which the defendant was convicted. "To pass constitutional muster," wrote the Court, "a capital sentencing scheme...[need only] 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder'." Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568, 581 (1987).

i. In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the U.S. Supreme Court determined that the statutory language of an Oklahoma sentencing statute, which allows the jury to find an aggravating circumstance if the murder was "especially heinous, atrocious or cruel," does not adequately inform the jury as to what it must find to impose the death penalty. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) ("outrageously or wantonly vile, horrible or inhumane" is unconstitutionally vague language upon which to

base a finding of an aggravating circumstance). See also Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (use of vague "especially heinous, atrocious or cruel" factor under Mississippi statute to determine sentence invalidates sentence; such factor may have tipped the balance in weighing).

1) Pennsylvania has none of the above language as an "aggravating circumstance" in its Sentencing Code so these decisions will have little impact in Pennsylvania. In other states which have this language the impact may be great causing the loss of many death penalties. Pennsylvania does have a "torture" aggravating circumstance which has been very tightly defined by the Pennsylvania Supreme Court. See Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992) (vacating sentence of death because previously approved instruction clarifying "torture" not given). Compare Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111, L.Ed.2d 511, 58 U.S.L.W. 4992 (1990) (finding "especially heinous, cruel or depraved" aggravating circumstances as defined by Arizona Supreme Court constitutional under statute that provides for judge rather than jury sentencing).

j. The use of the words "shall" or "must" in death penalty statutes which require sentences of death if the sentencer determines that aggravating circumstances outweigh mitigating circumstances or that mitigating circumstances are insufficient to call for leniency in the face of a finding of one or more aggravating circumstances does not create an unconstitutional presumption that death is the appropriate sentence. Walton v. Arizona, supra, (plurality) (citing Blystone v. Pennsylvania, supra, and Boyde v. California, supra). Justice Scalia concurred only in the judgment on this issue determining that it did not state an Eighth Amendment violation. Id. at 674, 110 S.Ct. at 3068, 111 L.Ed.2d at 542, 58 U.S.L.W. at 5001 (Scalia, J., concurring in part and concurring in the judgment).

C. Aggravating And No Mitigating Circumstance Cases.

1. QUESTION: When the jury finds several aggravating circumstances and no mitigating circumstances and, on appeal, the court determines one of the aggravating lacks sufficient basis in the record, or, is improper, can the death verdict still be upheld?

2. ANSWER: Yes. See Commonwealth v. Holcomb, 508 Pa. 456 n.16, 498 A.2d at 849 n.16, and Commonwealth v. Morales, 508 Pa. 51, 69, 494 A.2d 367, 376 (1985), where the court stated:

> Since the jury is required to return a sentence of death where it finds at least one aggravating circumstance and no mitigating circumstance, 42 Pa.C.S. § 9711(c)(iv), the sentence of death, would, it seems, retain its integrity even though one of the several aggravating circumstances is later declared to be invalid for some reason.

EXAMPLES:

a. Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246 (1988), Commonwealth v. Beasley, 504 Pa. at 500, n.31, 475 A.2d at 738, n.31, where there were two aggravating and no mitigating found, and, one was invalidated on appeal. Nonetheless, the verdict of death was upheld. Accord Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991) (alternate holding); and Commonwelath v. Maxwell, ___ Pa. ___, 626, A.2d 499 (1993).

b. Commonwealth v. Christy, 511 Pa. at 509-10, 515 A.2d at 842, wherein three aggravating and three mitigating were presented, the jury found two aggravating and no mitigating. Even though one of the aggravating was without evidentiary support, the remaining aggravating was valid and the sentence and the sentence was upheld (citing Beasley, supra.)

c. Commonwealth v. Buehl, 510 Pa. 363, 508 A.2d 1167 (1986), where jury found three aggravating and no mitigating, but verdict of death still upheld where one aggravating on appeal is found insufficient.

d. Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987), where jury found five aggravating

and no mitigating, but verdict of death still upheld where three aggravating were invalidated on appeal.

e. Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992) (plurality), where jury found same two aggravating circumstances as to both homicide victims. One circumstance (grave risk) was stricken as to each victim; but since other circumstance (killing in perpetration of felony) was valid and no mitigation, sentence of death affirmed.

f. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), wherein under the Florida statute, similar to Pennsylvania's, the sentencing trial judge found five aggravating factors and no mitigating circumstances, but, on appeal one of the aggravating was declared invalid under state law. The Court held that the death penalty need not be vacated, but cautioned that even in the "no mitigating circumstance" case, a death penalty would be vacated under certain circumstances where nearly all aggravating were declared improper, and only one "weak" aggravating circumstance was left standing. Id. at 955, 103 S.Ct. at 3427, 77 L.Ed.2d at 1147. Barclay was cited in Commonwealth v. Holcomb, 508 Pa.at 482, 498 A.2d at 863 (Larsen, J., dissenting)

g. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), wherein under Georgia statute (which is dissimilar to Pennsylvania's in that there is no requirement of weighing aggravating against mitigating) the Supreme Court held that although one aggravating was improper, the death penalty should stand because it was supported by sufficient other aggravating circumstances.

h. In Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), the United States Supreme Court considered the effect of the invalidation of an aggravating circumstance in a "weighing" State, i.e. a jurisdiction where aggravating circumstances are used not only to narrow the class of those defendants who are eligible for the death penalty but where aggravating circumstances must be weighed against mitigating circumstances in

determining whether or not to impose a sentence of death. See also Stringer v. Black, ___ U.S. ___, ___, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367, 378 (1992). Florida is a "weighing" State. In Sochor, the Court concluded that an Eighth Amendment error occurred when the trial court, the sentencer under Florida law, considered an invalid aggravating circumstance in imposing a sentence of death. This circumstance was one of four found by the trial judge. Of importance is that the judge found "no circumstances in mitigation" as noted by the Supreme Court. Id. at ___, 112, S.Ct. at 2118, 119 L.Ed.2d at 342. Despite this finding of no mitigating circumstances, the Court, relying on Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), and Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), said that the Eighth Amendment error could be cured by either appellate reweighing or a review for harmless error. Sochor v. Florida, supra, at ___, 112 S.Ct. at 2123, 119 L.Ed.2d at 344. The Court observed that the Florida Supreme Court does not engage in appellate reweighing. The Court also decided that the Florida Supreme Court's decision in the case was ambiguous on whether or not it conducted a harmless error analysis. The Florida Supreme Court "did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained'." Id. at ___, 112 S.Ct. at 2123, 119 L.Ed.2d at ___, 60 U.S.L.W. at 4489. The Court remanded the case to the Supreme Court of Florida for proceedings not inconsistent with the Court's opinion.

i. In Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), which is cited in Sochor, supra, the Court said:

> In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the Godfrey [v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)] and

Maynard [v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)] line of cases.

Stringer v. Black, supra, at ___, 112 S.Ct. at 1136-37, 117 L.Ed.2d at 378-39. Stringer involved an aggravating circumstance that was unconstitutionally vague. Sochor, supra, involved an aggravating circumstance which the state appellate court had determined was not supported by the evidence. Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), like Sochor, also involved an appellate determination that the sentencer had considered aggravating circumstances that were not supported by the evidence. In light of Clemons, supra, each said that the death penalties imposed could not stand absent appellate reweighing or a determination that the complained of error was harmless beyond a reasonable doubt.

j. It would appear that the Pennsylvania Supreme Court's practice of affirming sentences of death provided that at least one valid and supported aggravating circumstance exists where the jury (or judge) finds no mitigating circumstances is consistent with Sochor and Stringer. The Pennsylvania statute differs from the Florida statute construed in Sochor in that "the jury is required to return a sentence of death where it finds at least one aggravating circumstance and no mitigating circumstance, 42 Pa.C.S. § 9711(c)(1)(iv)." Commonwealth v. Morales, 508 Pa. 51, 69, 494 A.2d 367, 376 (1985). In this situation, as required by Stringer, supra, the Pennsylvania Supreme Court has determined that since our statute mandates a sentence of death where the jury finds at least one aggravating circumstance and no mitigating circumstance the sentencer would have reached the same result absent the invalid factor. While Pennsylvania might be considered a "weighing" state when any juror finds the presence of any mitigating circumstance, no weighing is permitted under the statute where the jury finds at least one aggravating circumstance and no mitigating circumstance. In that situation "the verdict must be a sentence of death." 52 Pa.C.S. §9711(c)(1)(iv).

D. Aggravating Circumstances Outweigh Any Mitigating Circumstance Cases.

1. QUESTION: When the jury finds several aggravating circumstances which outweigh any mitigating, and, on appeal, the Court determines one of the aggravating lacks sufficient basis in the record, or is improper, can the death verdict still be upheld?

2. ANSWER: The Pennsylvania Supreme Court has held that if one of several aggravating circumstances is invalidated on appeal, and the jury has found mitigating circumstances, the death sentence must be vacated. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992); Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (1987); and Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (1987).

   a. In Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Supreme Court held, however, that while appellate court reweighing of aggravating and mitigating circumstances where one of several aggravating circumstances is found to be invalid or improperly defined is not required, appellate reweighing is not unconstitutional. In doing so, the appellate court must actually reweigh the aggravating and mitigating circumstances. It may not merely affirm a death sentence under those circumstances merely because there remains at least one valid aggravating circumstance. Such a rule of automatic affirmance would violate Lockett and Eddings.

   b. The Pennsylvania Supreme Court has apparently determined not to follow the appellate reweighing procedure allowed by Clemons. In Commonwealth v. Wharton, supra, a bare majority of the Court vacated a death sentence and remanded for a new penalty proceeding after it invalidated one of three aggravating circumstances because of a faulty jury instruction. The jury had also found three mitigating circumstances (which were outweighed by the three aggravating). The majority, without mentioning Clemons, merely remanded pursuant to 42 Pa.C.S. § 9711(h)(4). The three dissenters in Wharton would have engaged in the appellate reweighing of the remaining valid aggravating circumstances which were supported by the record against the three mitigating

circumstances found by the jury as found constitutionally permissible in Clemons. Conducting this reweighing, the dissenters would have affirmed Wharton's death sentences.

E. Harmless Error In The Aggravating Outweighs Any Mitigating Cases.

1. In Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the United States Supreme Court said that it is constitutionally permissible for an appellate court to apply a harmless error analysis to sentencing proceedings where a jury finds several aggravating circumstances which outweigh mitigating circumstances and one of the aggravating circumstances is later found to be invalid or improperly defined. In reaching this decision the Court relied on the plurality opinion in Barclay v. Florida, supra. The Court noted that while a harmless error analysis is permitted, it is not required. The Court cautioned that such an analysis, like appellate reweighing, may be extremely speculative or impossible in a given case. For further discussion of Clemons, supra, see Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); and Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), discussed at XXVI.C, supra.

2. Over the years, several Pennsylvania Supreme Court justices have urged application of a harmless error analysis to this situation. See, e.g., Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985) (Larsen, J., dissenting); Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1144 (1985) (Nix, C.J., joined by Flaherty, J., dissenting); and Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (1987) (Larsen J., joined by McDermott and Papadokos, JJ., dissenting). This position has never commanded a majority of the Court, however. Writing for the plurality in Holcomb, supra, Justice Hutchinson explicitly rejected a harmless error analysis in this situation. He observed, as the United States Supreme Court would five years later, that the jury, without specifying exactly what mitigating circumstances it considered, left no record for "meaningful appellate review of the weighing process." Id. at 458, 498 A.2d at 850. (This point is of less concern today since the sentencing verdict slip must now list the specific mitigating circumstances found by one or more of the jurors.

Pa.R.Crim.P. 358A. But see Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992) (no error in jury's failure to list mitigating circumstances that it found on verdict slip since such listing not required by death penalty statute and such a slip is not defective).

3. Despite the Supreme Court's ruling in Clemons which allows (but does not require) application of a harmless error analysis in this situation, the Pennsylvania Supreme Court continues to remand for resentencing whenever it finds an invalid aggravating circumstance which was found, along with other valid aggravating circumstances, to outweigh the mitigating circumstances found by the jury. See Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992). Three justices dissented in Wharton and would have engaged in the appellate reweighing allowed by Clemons. Interestingly, the Wharton dissenters made no mention of the utilization of the harmless error analysis which Clemons also approved. Commonwealth v. Wharton, supra, at 155, 607 A.2d at 724 (Larsen, J., joined by McDermott and Papadakos, JJ., dissenting). It appears, therefore, that there is little likelihood that the Pennsylvania Supreme Court will apply a harmless error analysis in this situation.

4. As noted above, the remedy where the Supreme Court rejects one or more but not all of the aggravating circumstances found by a jury which outweighed mitigating circumstances found will be a remand for resentencing under section 9711(h)(2) and (4). Before this section was amended, the remedy was a remand for the imposition of a sentence of life imprisonment.

   a. The remand procedure provided for in section 9711(h)(2) and (4) was used where a jury found aggravating circumstances which outweighed mitigating circumstances and imposed the death penalty as required by the statute and the Supreme court determined that the evidence was insufficient to establish one of the aggravating circumstances. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989) (evidence insufficient to establish killing of prosecution witness; in light of other properly found aggravating circumstance and finding of mitigating circumstances, case remanded for new sentencing proceeding). This procedure was also used where the Court determined that

the jury instruction on the aggravating circumstance of "torture" was deficient where the jury had found other aggravating circumstances and mitigating circumstances. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (1992).

XXVII. INVESTIGATING THE JURY DELIBERATIONS.

A. The U.S. Supreme Court, in a civil case refused the plaintiff's request to hold an evidentiary hearing to allow jurors to testify as to alleged juror drug and alcohol use during the trial. The Court endorsed the traditional common law prohibition against investigating the jury's deliberations. Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987).

B. In a Pennsylvania criminal case, however, the Pennsylvania Supreme Court did inquire into the effect of alleged juror misconduct -- including mingling with hotel guests, drinking alcoholic beverages with "tipstaves", being furnished liquor in their hotel rooms -- on their verdict, and as a result, set aside the murder conviction. Commonwealth v. Fisher, 226 Pa. 189, 75 A. 204 (1910).

C. In Commonwealth v. Jones, 531 Pa. 591, 604-5, 610 A.2d 931, 937 (1992), the Court said: "Incidents involving juror misconduct do not warrant the declaration of a mistrial unless there is prejudice to the accused. Commonwealth v. Gockley, 411 Pa. 437, 457-58, 192 A.2d 693, 703-04 (1963)." In Jones, a capital case, two jurors both engaged in two incidents of misconduct involving fraternizing with non-jurors in violation of a jury sequestration order and drinking alcoholic beverages on two separate occasions. After each incident, the trial court conducted a hearing to determine if the trial had been tainted in any way. During the fraternization, the case was not discussed. The trial court found no prejudice to the trial from this incident. Likewise, no prejudice or bias resulted from the drinking episode since it could not be connected to the defendant on trial. The Supreme Court upheld the trial court's determination that there was no prejudice to the defendant from these occurrences. The Court noted that neither incident occurred during the jury's deliberations (implying a different result of this misconduct occurred during deliberations). Both happened during the guilt phase. After rejecting Jones' remaining claims, the Court affirmed his convictions and death sentences.

D. In Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992), the defendant argued that "'mere contact'" between jurors and third parties requires a mistrial. In Crispell, a newspaper reporter telephoned two jurors the day jury selection was completed. He solicited background information from them (address, information, age). The jurors reported the contact to the trial judge who then questioned the reported in the presence of counsel.

The reporter confirmed the jurors' report. The trial court denied the mistrial request. The Supreme Court held there was no error in this denial since the defendant did not show that he was prejudiced by this contact as required by earlier rulings of the Supreme Court. The Supreme Court, while it condemned all contact between the press and jurors during an ongoing trial, dubbed the contact here "innocuous."

E. In two cases involving co-defendants, the Supreme Court of Pennsylvania vacated death sentences and remanded to the trial courts for imposition of sentences of life imprisonment because the jury, during the penalty, learned of "extraneous and improper information...as to prior criminal activity." This evidence of juror misconduct came to light after trial during an evidentiary hearing. The evidence improperly before the sentencing jury was rumors of two pending murder charges against one of the co-defendants and general allegations of criminal misconduct as to the other. The Court said "that under those circumstances a death penalty was not sustainable." Commonwealth v. Williams, 522 Pa. 287, 561 A.2d 714 (1989); and Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987).

XXVIII. MISCELLANEOUS CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY STATUTE.

A. Equal Protection.

1. The death penalty procedures statute does not violate the Equal Protection Clause of the Fourteenth Amendment or Article I, Sections 1, 9 and 15 of the Pennsylvania Constitution for failing to provide for a presentence report prepared by a parole or probation officer as for other offenses. Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993).

B. Separation of Powers.

1. The death penalty procedures statute which mandates a sentence of death when the jury determines that there are aggravating circumstances and no mitigating circumstances or where aggravating circumstances outweigh mitigating circumstances does not violate the separation of powers between the legislative and judicial branches of government contained in the Pennsylvania Constitution. Commonwealth v. Moore, supra. These procedures, like other mandatory sentencing statutes, are "constitutional with respect to the doctrine of separation of powers and procedural due process." Id. at 549, 633 A.2d at 1130.

C. Special Temporary Criminal Tribunals.

1. The death penalty procedure statute does not create "special temporary criminal tribunals to try particular individuals or particular classes of cases" in violation of Article I, section 5 of the Pennsylvania Constitution. Commonwealth v. Moore, supra (rejecting claim that jury in capital case is such a forbidden "tribunal"; defendant was tried by court of common pleas, a court of ordinary general criminal jurisdiction).