PROSECUTION OF A DEATH PENALTY CASE IN PENNSYLVANIA

With Analysis of United States Supreme Court Cases

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ABOUT THE AUTHOR

Ernest D. Preate, Jr., is the Attorney General of the Commonwealth of Pennsylvania. He was elected on November 8, 1988 and took office on January 17, 1989. 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, and saw 13 months of infantry duty in Vietnam.

In his 20 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 5 of the 7 trials in which he requested such a verdict.

In 1989, Mr. Preate appeared before the Supreme Court of the United States and successfully argued to uphold the constitutionality of Pennsylvania's death penalty statute in Blystone v. Pennsylvania. The Court's favorable ruling in Blystone will have an important impact on the statutes of at least thirteen other states with similar laws.

In June 1991, he was elected chairman of the Criminal Law Committee of the National Association of Attorneys General (NAAG), and also serves that association as its Eastern Regional President. Since 1990, he has been appointed as the

official delegate of NAAG to the American Bar Association (ABA), and serves as Chair of the ABA's newly created Government and Public Sector Lawyer's Division.

He has been a member of the National Board of the Association of Government Attorneys in Capital Litigation (AGACL) for six years, and, since 1989, has been a member of the United States Department of Justice Executive Working Group on Criminal Law.

He is a frequent lecturer at state and national conferences of prosecutors and bar associations on death penalty issues, 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 7th revised printing.

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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 thru a challenge for cause or peremptory.

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 commencing; 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 type 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 answers; therefore, when you ask for death in the penalty phase he will remember your attitude in voir dire, second guess you and say to himself, "he 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 his 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, 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;

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 1st 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, and, 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 is not opposed to the death penalty. See Commonwealth v. Colson, supra. It gives the juror an opportunity to talk, and he just might state that your kind of case is one in which he 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 1st 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?"

II. 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 their views on the death penalty.

> Witherspoon held that a sentence of death would be vacated where the Commonwealth has 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.

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

On January 21, 1985, the United States Supreme Court handed down an opinion in 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).

1. Under Witt, to excuse a juror on Witherspoon grounds, what is necessary is that his 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). 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).

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. Additionally, Witt held that the question of a challenge of a prospective juror for bias is a factual issue subject to §2254 (d) presumption of correctness. The state court's conclusion on whether the juror should be excluded under the Witt standard is a factual one that, in federal habeas corpus proceedings, is entitled to a presumption of correctness under 28 U.S.C. 2254(d).

   a. The Court of Appeals for the Third Circuit recently upheld an exclusion for cause applying the Witt standard noting the "requisite deference" which the federal court must give on habeas corpus review to the state trial court's assessment of the prospective juror's demeanor. Lesko v. Lehman, 925 F.2d 1527, 1548 (3rd Cir. 1991).

6. 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, supra.

7. 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").

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

9. 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).

10. But, as the U.S. Supreme 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?

11. Despite the general relaxation of 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. 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

On May 5, 1986, the United States Supreme Court decided the case of Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), which holds 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 their applicability.

Pennsylvania Supreme Court:

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.

United States Supreme Court:

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. Szuchon, 506 Pa. at 253, 54, n.9, 484 A.2d at 1367, n.9., 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. 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, 552 Pa. 445, 563 A.2d 479 (1989); Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990).

5. 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, stimu-

lated 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.

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 philosphical 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).

7. 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, 552 Pa. 445, 563 A.2d 479 (1989).

8. 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).

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. 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 405 (1988).

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 causing reversal seem to state that the challenge was granted before the juror had sufficiently committed himself against the death penalty. This point was recently 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 all counsel:

> 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, point out, extensive "further questioning" is absolutely necessary now in light of the majority opinion.

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 group if any have any objections to the death penalty, do not accept their "silence" as dispositive of the matter. You must explore it one-on-one.

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 langauge that you are serious and sincere, and want an answer to your questions in "all fairness" to the Commonwealth.

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 demension, it could be "waived." 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).

F. 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.

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).

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.

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.

G. 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.

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. It is equally 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.

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).

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

5. Likewise, a juror who had knew 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. 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. Id. 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).

H. Questioning Jurors on Racial Bias

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).

1. 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 4 blacks and 8 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 4 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. But that 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).

I. Peremptory Challenge of Prospective Juror 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. The United States Supreme Court has held that Batson is retroactive to all litigation pending on direct state or federal review or not yet final when Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Pennsylvania also has declared Batson to be retroactive. Commonwealth v. McCormick, 359 Pa.Super. 423, 519 A.2d 422 (1986).

6. Now, under Batson, a prosecutor cannot peremptorily challenge a potential juror soley 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.

7. 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. No longer would a defendant have to establish that such discrimination occurred in case-after-case. The Court changed the rule announced in Swain v. Alabama, 350 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

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

   a. Under Batson, 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, ___ U.S. ____, 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.

      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.

9. 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."

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). 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, ___ U.S. ___, 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).

b. 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 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 ___, 111 S.Ct. at 1866, 114 L.Ed.2d at 405.

c. The prosecutor's explanation need not rise to the level necessary to sustain a chellenge for cause. Batson, supra, at 98, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; Hernandez v. New York, supra, at ___, 111 S.Ct. at 1859, 1868, 114 L.Ed.2d at 395, 408 (plurality), and id., at ___, ___, 111 S.Ct. at 1875, 114 L.Ed.2d at 416 (O'Connor, J., joined by Scalia, J., concurring). 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).

d. 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 ___, 111 S.Ct. at 1873, 114 L.Ed.2d at 412, it appears that, even if a prima facie case of pruposeful discrimination is presented, the prosecutor may rebut the inference of discrimination without offering an explanation for every challenge questioned by the defendant. 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. It is further noted that a determination that even one juror was excused because of his or her race or ethnicity will result in relief under Batson and its progeny.

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 venire persons of defendant's race must be applied across the board to all members of the venire). In Commonwealth v. Jones, ___ Pa. ___, 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.

    a. In Hernandez v. New York, ___ U.S. ___, ___, 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 ___, 111 S.Ct. at 1874, 114 L.Ed.2d at 415.

11. The issue is really the prosecutor's 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. Hernendez v. New York, supra, at ____, 111 S.Ct. at 1871, 114 L.Ed.2d at 412; and id., at ____, 111 S.Ct. at 1873, 114 L.Ed.2d at 414 (O'Connor, J., joined by Scalia, J., concurring). The plurality in Hernandez gave examples of factors which a trial court might consider in deciding whether a prosecutor intended to discriminate, id., at ____, 111 S.Ct. at 1868, 114 L.Ed.2d at 408 or whether he or she did not, id., at ____, 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 there 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 ____, 111 S.Ct. at 1868, 114 L.Ed.2d at 408.

In her concurrence, Justice O'Connor said, in apparent agreement with this statement:

> 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 ____, 111 S.Ct. at 1875, 114 L.Ed.2d at ____ (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. laughing in court, not paying attention);

b. juror "wavered" on death penalty;

c. juror's hostile attitude toward the prosecutor or his case;

d. juror's unresponsiveness to questions;

e. juror's confusion in his answers;

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, ___ Pa. ____, ____, 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.

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 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.

HELD: The trial court's finding that the prosecutor's challenges were racially neutral is 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. Accord Hernandez v. New York, supra, at ____, 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.").

15. In Edmonson v. Leesville, ___ U.S. ____, 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 ____, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675. This rationale, in conjunction with the third-party standing rule of Powers v. Ohio, would seemingly apply to sustain a prosecutor's objection that a criminal defendant was exercising peremptory challenges authorized by statute or rule of court based on the race of a prospective juror. Presumably, the defense would have to provide a neutral explanation if the prosecution made a prima facie showing. Justice Scalia, dissenting in Edmonson, recognized that this was the result (which he concluded was not beneficial to minority defendants) of the majority's holding. Edmonson v. Leesville, ___ U.S. at ____, 111 S.Ct. at 2095, 114 L.Ed.2d at 689. In Pennsylvania, peremptory challenges are specifically authorized by rule of court. See Pa.R.Crim.P., Rule 1126, 42 Pa.C.S.

J. 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. Holland v. Illinois, supra. 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 ____, 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 ____, 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). (No. 3154 Philadelphia 1988; 5/1/90) (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 underrepresented 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 because 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).

III. 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 does not require that the jurors be totally ignorant of the facts and issues of the case. It 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.

B. In Mu'min v. Virginia, __ U.S. ___, ___, 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 ligitimate 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).

1. Pretrial prejudice is presumed if (1) the publicity is sensational, inflammatory, and slanted towards conviction rather than factual and objective; (2) 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) the publicity is derived from police and prosecuting officer reports. Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985).

D. There is an exception to the general rule 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, 508 Pa. 212, 495 A.2d 183 (1985); Commonwealth v. Holcomb, supra; Commonwealth v. Tedford, 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." Commonwealth 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, ___ Pa. ___, 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).

1. 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-thrids 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.

2. 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.

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).

E. 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.

F. 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, ___ Pa. ____, 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).

IV. BAIL IN A CAPITAL CASE

A. 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 showing of the existence of one of the aggravating factors, in addition to showing prima facie case of first degree murder.

V. 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. 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 section 9711(d)(1)-(12). Commonwealth v. Edwards, supra. The sentencer in Pennsylvania is limited to consideration of the aggravating circumstances delineated in the statute, 42 Pa.C.S. § 9711 (l)(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 provided that the defendant and his counsel are not misled into believing that the death penalty is not a possibility. Lankford v. Idaho, ___ U.S. ___, 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. Effective 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.

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. 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.

5. 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).

VI. 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. 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. 1834, 85 L.Ed.2d 135 (1985)(if not useful for guilt or innocence, it might be for mitigation).

VII. 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, the U.S. Supreme Court's most recent ruling, 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, declared in his report that the defendant was "aware of the difference between right and wrong" and, further, when called by the prosecution at the sentencing hearing, the psychiatrist testified on the "dangerousness" question. (Texas law requires that the death penalty be imposed if the sentencing jury affirmatively answers three questions, one of which asks "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," and that he has "no regard" for another human being's life or property, and 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," and that he has "no remorse." Id. at 459-60, 101 S.Ct. at 1871, 68 L.Ed.2d at 367.

3. The United States Supreme Court in overturning the death penalty 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, 451 U.S. 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 5th 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, this lack of notice abridged his Sixth Amendment right to counsel. 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, supra.

a. In Satterwhite, the defendant, shortly after being charged with murdering a woman during a robbery (a capital crime), and prior to being represented by counsel, underwent a court-ordered psychological examination to determine his competency 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 accordance 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 assistance of 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.

3) Three Justices opined in separate opinions that a harmless error analysis is inappropriate where the error is a Sixth Amendment violation under Estelle v. Smith.

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, 101 S.Ct. at 1877, 68 L.Ed.2d at 374. 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, and 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 Estelle v. Smith, 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. McCrecken, 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 such 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 not use these reports at trial, or make reference to them, 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 proferred 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.

VIII. INCOMPETENCY, INSANTIY, 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.

c. The Court concluded that the trial court did not err 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 bizzare '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. Id. 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, ___ Pa. ___, 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 Court then 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.

> 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, ___ Pa. ___, 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 preponderence 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 ____, 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).

The Court in Banks approvingly quoted a 19th 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.

d. 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, determinitive of his legal sanity or competency to stand trial." Id. at 347, 521 A.2d at 16.

e. Relying on Banks, the Supreme Court recently 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.

f. In Commonwealth v. Faulkner, ___ Pa. ____, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Dkt. 1989; 7/16/91), 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 ____, ___ A.2d ___ (slip opinion at 9), 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 Commonwealth v. Young, supra. Id., at ____, n.6, ___ A.2d at ____, n.6 (slip opinion at 9, n.6).

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 premedidate 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, at 396-7, 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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91), the Supreme Court, in a unanimous opinion authored by Mr. Justice Cappy, held that the trial court properly granted the Common-

wealth'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 ___ n.4, ___ A.2d at ___ n.4 (slip opinion at 8 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 ___ n.6, ___ A.2d ___ n.6 (slip opinion at 9 n.6).

C. 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 ___, ___ A.2d ___ (slip opinion at 12-13).

D. Guilty but mentally ill, 18 Pa.C.S. § 314.

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). See also 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. 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). 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, ___ Pa. ____, ___ n.6, ___ A.2d ____, ___ n.6 (1991) (No. 89 E.D. Appeal Docket

1989; 7/16/91; slip opinion, 9 n.6). 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). 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).

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.

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.

This potential verdict poses important questions in death penalty cases. We now know that 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, ___ U.S. ____, 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, ___ Pa. ____, ___ n.7, ___ A.2d ___, ___ n.7 (1991) (slip opinion, 11 n.7).

1. Whether or not section 314 and the procedures set forth in section 9727 are applicable to death penalty cases initially appeared questionable. Section 4 of the Act which provided for section 9727 states that its provisions "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 matter 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.

2. The procedural section 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 mitiga-

ting circumstance that is (or is not) outweighed by an aggravating circumstance present. Accord Commonwealth v. Faulkner, ___ Pa. ____, ___ n.7, ___ A.2d ____, ___ n.7 (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91; slip opinion, 11 n.7). Sohmer teaches 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 erroneously (in violation of Sohmer) instructed 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.

3. The Supreme Court provided further clarification on this issue in Commonwealth v. Faulkner, ___ Pa. ___, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91). In Faulkner, the Court, in an opinion authored by Mr. Justice Cappy, 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 ____, ___ A.2d at ___ (slip opinion at 10). 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, ___ Pa. at ___ n.7, ___ A.2d at ___ n.7 (slip opinion at 11 n.7).

4. 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 offesne 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 or 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 instruc-

tions." Id., at ___, ___ A.2d at ___ (slip opinion at 14). 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.

E. 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, ___ Pa. ___, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91), the defendant argued that the trial court erred in denying his request for a jury instruction on voluntary intoxication. This contention was rejected. The 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 ___, ___ A.2d at ___ (slip opinion at 6-7). Here, the evidence was insufficient to support that conclusion so there was no basis for the requested instruction. See also Commonwealth v. Faulkner, ___ Pa. ___, ___ n.5, ___ A.2d ___, ___ n.5 (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91; slip opinion, 8 n.5).

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

A. Prosecutorial Inconsistency

It is increasingly becoming a tactic of defense counsel, particularly in the Southern states, 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). However, it can be done in Pennsylvania Common Pleas as part of the defendant's pre-trial motions.

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 the legally prevailing means of punishment 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 adhered to. 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 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 the appropriate sentence.

2. Do not discriminate or be capricious. See Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984). In Frey, the Court held that juries and judges can't be arbitrary and capricious in death cases under the Pennsylvania Statute and the Constitution. By analogy, I suggest, neither can prosecutors abuse their discretion. And our Supreme Court has recently so held! See Commonwealth v. DeHart, 512 Pa. at 262, 516 A.2d at 670. "Absent same 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 8th Amendment."

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

5. 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.

6. 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 just been adopted by our Supreme Court in Commonwealth v. DeHart, 512 Pa. 234, 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 standard-less...Id., at 261-62, 516 A.2d at 670.

7. 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 (indeed 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, 293, n.37.

8. The United States District Court for the Northern District of Illinois recently 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 (N.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 concurrence in Gregg v. Georgia, supra, cited favorably on this issue by the Pennsylvania Supreme Court in Commonwealth v. DeHart, supra, where he observed that "absent facts to the contrary it cannot be assumed that prosecutors' will be motivated in their charging decision by factors other than the likelihood that a jury would impose the death penalty if it convicts." The Court 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 eight 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.

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, District Attorney, and 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. 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, and

Commonwealth v. DeHart, 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 Arizona case involving the murder of investigative reporter Don Bolles, the U.S. 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 don't play games with the prosecutor.

X. JURY MUST FIND SPECIFIC INTENT TO KILL:

A. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (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); and Commonwealth v. Chester, ___ Pa. ___, 587 A.2d 1367 (1991) (since defendant convicted of first degree, intentional murder rather than felony murder, Tison's minimum culpability requirement already satisfied).

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. Not so much a problem in Pennsylvania. In Pennsylvania we have intentional, first degree murder. Felony murder is second degree and

there is no death penalty attached to it. See Commonwealth v. Chester, supra. 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. Eg. 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 U.S. Supreme Court in Cabana v. Bullock, 476 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

XI. SPECIFIC AGGRAVATING FACTORS - 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.

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, ___ Pa.Super. ____, 588 A.2d 13 (1991), the Superior 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).

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), 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. Gibbs, ___ Pa.Super. ____, 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 langauge precluded application to an unintended victim. The court refused to apply a transferred intent theory. (NOTE: The Commonwealth has sought allowance of appeal in the Supreme Court on this issue. The petition is pending.)

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).

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. 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); Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986). People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 38 Ill. Dec. 757 (1980). However, Courts have rejected this theory. Commonwealth v. Crawley, supra. Commonwealth v. Christy, supra, People v. Brownell, supra. For example, in Commonwealth v. Crawley, supra, 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. Crawley, supra. 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.

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 #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.

3. 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 perpetration of a felony which the prosecution successfully and properly did in Christy. See Commonwealth v. Christy, 511 Pa. at 509, 515 A.2d at 842.

4. 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 780 (1988), the Court adopted a less restrictive interpretation of aggravating circumstance number 5. In this case, 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 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 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 ..." Appel, 517 Pa. 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.)

5. 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 she saw him 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).

6. Evidence that defendant killed a two year old was insufficient to establish this circumstance. Id.

7. 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).

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. 234, 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 Code felonies. See 18 Pa.C.S. §§ 106(b) and (e), and 107(a).

3. The Pennsylvania Supreme Court also rejected in Commonwealth v. DeHart, supra, 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.

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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91).

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

   a. Kidnapping - Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984); Commonwealth v. Heidnik, ___ Pa. _____, 587 A.2d 687 (1991); Commonwealth v. Chester, ___ Pa. ____, 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). 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.

b. Robbery, Burglary - Commonwealth v. DeHart, 512 Pa. 234, 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).

c. 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 780 (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); and 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. Cam Ly, ___ Pa. ___, 588 A.2d 465 (1991); Commonwealth v. Rollins, 525 Pa. 335, 580 A.2d 744 (1990); Commonwealth v. Gorby, ___ Pa. ___, 588 A.2d 902 (1991).

d. 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).

e. 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).

f. 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).

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. Smith, 518 Pa. 15, 540 A.2d 246 (1988).

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 richochet, 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); and Commonwealth v. Cam Ly, ___ Pa. ____, 588 A.2d 465 (1991) (same; relying on Smith, supra).

g. Commonwealth v. Heidnik, ___ Pa. ____, 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 454 (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).

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).

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 in a 5-2 decision written by Justice Papadakos declared that the statute was not 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, ___ Pa.____, ____, 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 was in a water-filled pit and that she screamed in agony supported a finding of torture.

2. 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 Florida and Arizona, state 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. 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.

3. Indeed, the Court seems to have moved toward this ground. 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.

4. In another case on this topic, the Pennsylvania Supreme 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.

5. This standard was reiterated in Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987). The Pennsylvania Supreme Court in another 4-3 decision, this one written by Justice Zappala, 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, ___ Pa. ____, 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.

6. In Commonwealth v. Chester, ___ Pa. ____, ____, 587 A.2d 1367, ___ (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 esceptional 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 unncessary, 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 ___, 587 A.2d at ___ (emphasis is original).

7. These cases are reconcilable by reviewing the exact claim presented. Some cases, such as Nelson, Crawley and Proctor, deal with the adequacy of jury instructions on torture. Others, like Heidnik and Chester, deal with the sufficiency of the evidence to support a finding of torture.

8. 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, ___ Pa. _____, 587 A.2d 1367 (1991) (photograph depicting gaping neck wound may have been properly admitted to show torture during penalty phase; dicta).

9. 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" under § 9711(d)(8). 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 2 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. But, the 3 dissenters (Justices Flaherty, 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 tortue 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 diaphram, 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, ___ Pa. ____, 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.

10. Some interesting "torture" cases are collected at 83 ALR 3d 1222.

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 argument 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.

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 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. Cam Ly, ___ Pa. ____, 588 A.2d 465 (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. 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 murder (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. Incidentally, the convictions were obtained after the defendant had been charged with the rape murder, but, of course, well before his trial on the rape murder.

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, ___ Pa. ____, 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. Cam Ly, ___ Pa. ____, 588 A.2d 465 (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.

d. 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 2nd degree murder (now 3rd 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 2 new aggravating circumstances to the previous 10. The Act makes the prior conviction for just one murder (either 1st, 2nd or 3rd) committed before or at the time of the offense at issue the subject of a separate aggravating circumstance (#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).

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). 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. 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.

Williams, 524 Pa. 218, 570 A.2d 75 (1990). See also Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989). 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. However, the Commonwealth is not required to explain the underlying facts of the prior convictions to the jury. Commonwealth v. Cam Ly, ___ Pa. ___, 588 A.2d 465 (1991).

4. 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. Cam Ly, __ Pa. __, 588 A.2d 465 (1991). Since all robberies in New York require the use of force, New York felony robbery convictions satisfy this circumstance. Id.

5. 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. Cam 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, 425 Pa. 554, 307 A.2d 255 (1973). Commonwealth v. Cam Ly, supra.

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 comment 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 #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 699 (1989)(since defendant was convicted of multiple murders, the jury properly used those convictions to establish this aggravating circumstance).

3. In Commonwealth v. Heidnik, ___ Pa. ____, 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. 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 even 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. N.B. He must not only be convicted but also sentenced under this second section.

5. This second clause would also cover the situation where an escaped 1st or 2nd degree murderer murdered someone during the period of his escape. It would even 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).

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).

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 DELIVERYING 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).

XII. 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 in the "aggravating circumstance" statute?

Held: 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

it is not necessary that there be a sentence imposed, 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 sub-section 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.

B. CAVEAT: PROTECT THE PRIOR CONVICTION: THE LESSON OF JOHNSON V. MISSISSIPPI.

1. Prosecutors should use "prior convictions" with prudence, 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 is also likely to be overturned. See Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). You must, therefore, evaluate the prior conviction to see if there is any likelihood of a future reversal. If there is, obviously then don't use it as an aggravating circumstance. If you do use it, thus, you better be prepared to vigorously fight to preserve that conviction. Even then it may not be possible because it lies outside your jurisdiction.

2. The plight of the Mississippi prosecutor who got a death penalty using "prior convictions" plus 2 other aggravating circumstances only to lose the death penalty when a 20 year old 1963 New York State conviction for assault was subsequently quietly agreed to be overturned by the New York State prosecutor unbeknownst to the Mississippi prosecutor. In that case, Johnson v. Mississippi, supra, the U.S. Supreme Court vacated the death penalty even though it only partly rested on the invalid conviction. "Since that conviction [the 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 twenty (20) year old conviction, subsequently reversed was not considered "final" in so far as due process was concerned.

COMMENT: Interestingly 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 (2) other aggravating factors. Perhaps, if the State Court has engaged in a harmless error analysis, and found that the error was harmless beyond a reasonable doubt, the decision of the U.S. Supreme Court may have been different.

C. ANOTHER TWIST: THE EFFECT OF A RE-CONVICTION AFTER A PRIOR CONVICTION REVERSAL.

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.

Subsequent to the jury's decision to impose the death penalty because it found that these two aggravating circumstances (specifically found) 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 his 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.

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.

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.

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 recently 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 is to be 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), 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). Accordingly, in Commonwealth v. Beasley, 505 Pa. 279, 479 A.2d 460 (1984), when the defense asserted that the prosecution's evidence 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. Likewise, in Commonwealth v. Jasper, ___ Pa. ___, 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.

3. COMMENT: It would seem under Zettlemoyer and Beasley that the proof of priors 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.2s 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. Cam Ly, ___ Pa. ___, 588 A.2d 465 (1991).

In Travaglia, 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.

But on this issue, a federal district judge did grant 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).

XIII. MITIGATING CIRCUMSTANCES:

A. STATUTE - 42 Pa.C.S.A. § 9711(e)

1. The Pennsylvania Sentencing Code declares that evidence relevant to 8 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.

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 pro-

vided 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." 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. Penry, supra, 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...." And 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." And 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 ___, 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 Summer 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 or is not 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 Commonwealth 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 the death sentence 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 ___, 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 ___, 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 Consti-

tution requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." Id. at ____, 110 S.Ct. at 1233, 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, ___ U.S. ____, 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 progency. Justice Scalia, who provided the critical fifth vote on this issue, concluded that Lockett is not sound Eighth Amendment jurisprudence and determined that this contention does not constitute an Eighth Amendment violation. Id. at ____, 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 ____, 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 persvasively 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. Williams, 524 Pa. 218, 570 A.2d 75 (1990) (following Frey); and Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989)(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, ___ Pa. ___, 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 may cause the type of Mills error which they are explictly designed to avoid. It is not recommended that these proposed instructions be used.

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, ___ Pa. ___, ___, ___ A.2d ____, ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91; slip opinion at 20).

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

11. Where there is no evidence to support a mitigating circumstance, it may not be found. Commonwealth v. Tilley, ___ Pa. ____, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91). In such a situ-

ation there should be no instruction on that circumstance and it should not be included on the sentencing verdict slip. Id., at ___ n.11, ___ A.2d at ___ n.11 (slip opinion at 15 n.11).

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. If a defendant attempts to establish that he has no significant history of prior crimial 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 infeffective for failing to attempt to establish this mitigating circumstance under the facts presented).

b. 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 just admitted these convictions in an attempt to use them to the defendant's favor.

c. 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, ___ Pa. ___, 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." Beasley, 504 Pa. 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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91) (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.

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, ___ Pa. ____, ____, n.12 ___ A.2d ____, ___ n.12 (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91; slip opinion 17 n.12).

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. Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986), where 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 declared it was outweighed by 3 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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91) (citing Fahy).

b. See Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986), where the defendant burglarized 2 apartments, robbed the occupants, attempted to rape the wife of the victim and stabbed the husband to death, he 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 (#8). The jury found that three aggravating circumstances (felony murder, 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), 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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91).

f. In Commonwealth v. Faulkner, ___ Pa. ____, ___ A.2d ___ (1991) (No. 89 E.D. Appeal Docket 1989; 7/16/91), 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.

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. Id.

b. 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 8 and 4. The Court, in a 4-3 decision, sidestepped 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 circumstances 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 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.

c. 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); and Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) (jury may have considered defendant's youth as mitigating).

d. 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 (15) years old at the time of the offense. The defendant, age fifteen (15), 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 by a jury of first degree murder. At the penalty phase of the proceedings, the jury found that the murder was "especially heinous, atrocious, or cruel" (an aggravating circumstance), 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 in February 1987.

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 (16) years of age constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution. The four (4) 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 the progress of a maturing society," and found that the imposition of the death penalty on a fifteen (15) 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 (4) Justices determined that the imposition of the death sentence on a fifteen (15) 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..

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 (16) 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 (16) 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 (15) 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.

The three (3) 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 (16) should in all circumstances be sentenced to death.

d. 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 (16) 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 14. 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 16 when he committed his crime offends those standards of decency. The Court determines 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 16 years old when they committed their crimes; 12 states decline to impose it on 17 year old offenders.

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 16 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.

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.

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).

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). This procedure is the reverse of that involving 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 TQ 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, ___ Pa. ____, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91).

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. Employment problems, father's death, alcohol addiction, family problems. 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 3 young children. See also Commonwealth v. Holcomb, 508 Pa. at 479, 498 A.2d at 860 (Larsen, J., concurring and dissenting). The jury held that three aggravating circumstances outweighed any mitigating.

b. 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); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989)(Commonwealth 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).

c. Mercy and Leniency

1) The defendant, in Commonwealth v. Peterkin, 511 Pa. 289, 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," 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).

2) Absolute mercy verdicts are precluded by the death penalty statute. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); 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.").

XIV. 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-Jamal, 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.

   a. Depends on the circumstances:
      Is he denying what the 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."

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 before they 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?

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. The Court extended to rule announced in Booth to statements made by a prosecutor in closing argument to the sentencing jury regarding the personal qualities of the victim. 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 his voter registration card).

Booth and Gathers were expressly overruled in Payne v. Tennessee, ___ U.S. ___, ___ S.Ct. ___, 115 L.Ed.2d 720, 59 U.S.L.W. 4814 (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. 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 ____, ____ S.Ct. at ____, 115 L.Ed.2d at ____, 59 U.S.L.W. at 4816. The United States Supreme Court affirmed.

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 ____, ____ S.Ct. at ____, 115 L.Ed.2d at ____, 59 U.S.L.W. at 4819. The Court said that "victim impact evidence serves entirely legitimate purposes." Id., at ____, ____ S.Ct. at ____, 115 L.Ed.2d at ____, 59 U.S.L.W. at 4818. 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.

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 __, __ S.Ct. at ___, 115 L.Ed.2d at ___, 59 U.S.L.W. at 4820 (O'Connor, J., concurring) (no due process violation here); and id., at ___ , ___ S.Ct. at ___, 115 L.Ed.2d at ___, 59 U.S.L.W. at 4821 (Souter, J., concurring).

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, ___ S.Ct. at ___ n.2, 115 L.Ed.2d at ___ n.2, 59 U.S.L.W. at 4819 n.2. See also Payne v. Tennessee, ___ U.S. ___ , ___ n.1 and ___, ___ S.CT. ___, ___ n.1, and ___, 115 L.Ed.2d 720, ___ n.1 and ___, 59 U.S.L.W. 4814, 4821 n.1 and 4823 (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 ____, ___ S.Ct. at ____, 115 L.Ed.2d at _____, 59 U.S.L.W. at 4819. 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(b). 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. But, in as far as permitting a victim impact statement of the type approved in Payne, Pennsylvania would need an amendment to the Act.

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 (1986).

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 Cal.Rptr. at 649, 709 P.2d at 453. But 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.

The California statutory scheme, which is similar to Pennsylvania's, provided 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 emotion factors." Id. at 543, 107 S.Ct. at 840, 93 L.Ed.2d at 941.

2. COMMENT: The prosecutor should, in response to sympathy pleas from the defendant, 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 to prosecutor should include the word "mere" because Chief Justice Rehnquist specified the word "mere" as the "crucial fact" in interpeting the constitutionality of the jury instruction. Id. at 940. 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 be instructed that its decision should not be based on an emotional response but should be based on the evidence.

3. 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 ____, 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 ____, 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.

4. 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).

XV. 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 an 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 doesn't say you must do it, the Statute does say the Commonwealth has the burden of proving aggravating circumstances. 42 Pa.C.S. § 9711

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.

XVI. 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.

B. This recommended procedure 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).

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). 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).

XVII. SUFFICIENCY OF EVIDENCE UNDERLYING AGGRAVATING CIRCUMSTANCES-AUTOMATIC REVIEW

A. A sentence of death shall be 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, ___ Pa. ____, 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 ___, 587 A.2d at 689.

B. 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.

C. 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 discussion of the Karabin opinion and its facts, see discussion under "XII." Prior convictions or crimes in the sentencing phase, C, another twist. The Effect of a Re-conviction After a Prior Conviction Reversal," supra.)

D. 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, supra.

E. 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). 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). This type of proportionality review is not required by the federal Constitution. Walton v. Arizona, ___ U.S. ____, 110 S.Ct. 3047, 111 L.Ed.2d 511, 58 U.S.L.W. 4992 (1990); Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). See also Lewis v. Jeffers, ___ U.S. ___, 110 S.Ct. 3092, 111 L.Ed.2d 606, 58 U.S.L.W. 5025 (1990) (citing Walton).

XVIII. 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

Until recently, 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). 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 only. 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 as Mills v. Maryland issue). 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.).

The Legislature accepted the Supreme Court's invitation and amended the statute. 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. Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511, 58 U.S.L.W. 4992 (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, ___ U.S. at ___, 110 S.Ct. at 3058, 111 L.Ed.2d at 530, 58 U.S.L.W. at 4996. See also Lewis v. Jeffers, supra.

1. 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, ___ Pa. ___, 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.

B. Reimposition Of The Death Penalty On Remand Is Not Necessarily Unconstitutional. Poland v. Arizona

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. But since the sentencing judge erred in interpreting the applicability of a

second aggravating factor, and so did not rule on the sufficiency of the evidence put forward in support of said second 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 circumstances. 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, ___ U.S. at ____, 110 S.Ct. at 3054, 111 L.Ed.2d at 524, 58 ___U.S. L.W. at 4992. See also Lewis v. Jeffers, ___U.S. , at ____, 110 S.Ct. at 3103, 111 L.Ed.2d at 623, 58 U.S.L.W. at 5025.

2. The Superior Court has applied Poland and held that the Commonwealth may rely on aggravating circumstances not found at the first trial. Commonwealth v. Gibbs, ___ Pa. ____, 588 A.2d 13 (1991).

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. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

XIX. INEFFECTIVENESS 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, [446 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).

XX. 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).

2. 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).

3. 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, ___ Pa. ___, 587 A.2d 1367 (1991).

4. 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). A prosecutor may respond to an attack on a witness' credibility. Commonwealth v. Strong, supra.

5. 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).

B. Prosecution closing comment on Failure of Defendant to Express his 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, ___ Pa. ____, ____, 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) (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). (NOTE: A petition for writ of certiorari has been filed in Lesko v. Lehman.)

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 guilty 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 presumption of innocence and 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.... Travaglia, 502 Pa. at 499, 467 A.2d at 300.

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 in Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982) in his penalty closing told the jury to consider in their verdict "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 "soley 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.

2. Did he 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; a petition for certiorari has been filed in this case).

3. 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.

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, 50 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).

2. The United States Supreme Court has said that testimony 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. 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, ___ U.S. ____, ____, ___ S.Ct. ____, ____, 115, L.Ed.2d 720, ____, 59 U.S.L.W. 4814, 4818 (1991). See also Payne v. Tennessee, supra, at __, ___ S.Ct. at ____, 115 L.Ed.2d 720, ___ at ____, 59 U.S.L.W. at 4820 (O'Connor, J., concurring); and id., at ____, ___ S.Ct. at ____, 115 L.Ed.2d at ____, 59 U.S.L.W. at 4821 (Souter, J., concurring) (citing Lesko v. Lehman, 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 vengence. 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.

2. 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.

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 same 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 3 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. Whitney, 511 Pa. at 259, 512 A.2d at 1166 (Hutchinson, J., concurring).

4. 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, even 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.

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. Respond by saying: "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.

2. The Pennsylvania Supreme Court, in chastizing 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. In Sawyer v. Smith, ___ U.S. ____, 110 S.Ct. 2822, 111 L.Ed.2d 193, 58 U.S. L.W. 4905 (1990), the Supreme Court, in an appeal from a denial of a writ of habeas corpus in a death penalty case, held that the rule announced in Caldwell was a new rule of constitutional law. Following its decision in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Supreme Court held that such a rule is not to be applied on collateral review to cases which had become

final on direct review before the new rule was announced. Under Teague, new rules will be applied to cases that have become final (or announced in such cases) in only two circumstances: 1) where the new rule places an entire category of primary conduct beyond the reach of the criminal law or prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense; or 2) where the new rule is a "watershed rule of criminal procedure that is necessary to the fundamental fairness of the criminal proceeding. Sawyer v. Smith, ___ U.S. at ____, 110 S.Ct. at 2831, 111 L.Ed.2d at 211, 58 U.S. L.W. at 4905. See also Saffle v. Parks, 494 U.S. __ , 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Butler v. McKellar, 494 U.S. 347, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990); and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The rule announced in Caldwell was a new rule because it was "not dictated by precedent existing at the time the defendant's conviction became final." Sawyer v. Smith, ___ U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206, 58 U.S. L.W. at 4905 (citing Teague). The first exception to the Teague rule was not implicated in Sawyer. The second exception was not satisfied because, while the rule of Caldwell was designed to improve the accuracy of the capital sentencing proceeding, it did not alter "'the bedrock procedural elements' essential to the fairness of the proceeding." Id. Accordingly, the petitioner in Sawyer, whose conviction had become final before Caldwell was decided, was not entitled to collateral relief based on the Caldwell rule.

3. The prosecutor's remarks during summation in the penalty phase that the defendant would have endless appeals and asking the jurors if they could remember 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. NOTE: 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 929 (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.

4. It may be proper for the trial court to instruct the sentencing jury that a sentence of life imprisonment is not subject to parole, 61 P.S. § 331.21, but is subject only to commutations or pardon by the Governor. See Commonwealth v. Cam Ly, ___ Pa. ___, 588 A.2d 465 (1991).

J. Prosecutor's Comment That Defendant Might Receive Parole Or Escape From Prison.

1. 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, or you, Mr. Carey, you sleep with it."

   HELD: 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.

2. 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.

3. It may be proper for the trial court to instruct the sentencing jury that a sentence of life imprisonment is not subject to parole, 61 P.S. § 331.21, but is subject only to commutations or pardon by the Governor. See Commonwealth v. Cam Ly, ___ Pa. ___, 588 A.2d 465 (1991).

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.

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.

HELD: Although the Supreme Court found the remarks to be "extremely prejudicial," it nonetheless affirmed the death sentence.

> 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 first 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 did not object nor move for a mistrial at the time the alleged prejudicial remark was made. (The defense counsel in Bricker did object but the

defense counsel in Anderson did not.) The issue, then, on appeal in 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 has just been adopted in Pennsylvania, which now follows Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). One explanation 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/innocence 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 is becoming reluctant to find prosecutorial misconduct in closing argument because to do so would allow a defendant to escape the death penalty on remand. Now that section 9711(h)(2) has been amended to allow 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.

XXI. SUGGESTED ANSWERS TO TYPICAL DEFENSE COUNSEL'S CLOSING:

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 no vengeance, but we seek 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-Jamal, 521 Pa. 188, 555 A.2d 846 (1989). 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-Jamal 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 non-statutory 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. See California v. Brown, supra, and Penry v. Lynaugh, supra. 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 not under oath, not 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 that 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."

XXII. DEATH PENALTY HEARING PROCEDURE

A. EVIDENCE AS TO MORALITY OF DEATH PENALTY

In Commonwealth v. DeHart, 512 Pa. 234, 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.

B. PENALTY HEARING INSTRUCTIONS

1. 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). See also Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989)(instruction did not follow statute resulting in Mills error); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989)(since jury instructed in conformity with statute, no Mills problem); Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990)(conflict between oral instructions and verdict slip led to Mills problem); Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479 (1989)(jury is directed to follow death penalty statute and to confine its considerations to aggravating and mitigating circumstances).

2. A jury may find any mitigating or aggravating circumstances regardless of the positions of either the defendant or or the Commonwealth. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989). See also Blystone v. Pennsylvania, 494 U.S. at ___, 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.").

3. For an instruction 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 compare Saffle v. Parks, 494 U.S. ___ 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). For a detailed discussion of these cases see "XIV. Sympathy Plea, B, 4," p. 107, supra.

4. 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, ___ Pa. ___, ___ A.2d ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91).

5. 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 ___ n.11, ___ A.2d at ___ n.11 (slip opinion at 15 n.11); and Pa.R.Crim.P. 357.

C. 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.

HELD: 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 610 (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 ____, n.4, 110 S.Ct. 1078, 1083, n.4, 108 L.Ed.2d 264 n.4. This position was adopted by a four-member plurality of the United States Supreme Court in Walton v. Arizona, ___ U.S. ____, 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, ___ U.S. at ____, 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 1257 (3d Cir. 1991).

D. 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.

E. JURY 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. Effective 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 circumstances (e) (8) shall 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, ___ Pa. ____, ___, ___ A.2d ____, ___ (1991) (No. 165 E.D. Appeal Docket 1987; 7/18/91; slip opinion, 20), 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).

F. 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 requested 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, ___ Pa. ____, 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 reconvening and deliberting 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.

G. 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.

H. 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).

XXIII. 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 can 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 or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." 42 Pa.C.S. § 9711(c)(1)(iv).

2. The Commonwealth can present evidence only as to the aggravating circumstances set out in the statute - 42 Pa.C.S. § 9711(a)(2), and these must be proved 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.

3. 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 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).

4. 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). 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).

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 94 (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." 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 acting. Gregg v. Georgia, 428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d 883, Commonwealth v. Cross, 508 Pa. at 334, 496 A.2d at 1151. 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. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

e. In what many observers consider the last major broad challenge to the constitutionality of the death penalty, the United States Supreme Court 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, 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.

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, ___ Pa. ____, 587 A.2d 705 (1991) (death sentence vacated on basis of Mills). Commonwealth v. Chester, ___ Pa. ____, 587 A.2d 1367 (1991). Commonwealth v. Gorby, ___ Pa. ____, 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, ___ Pa. ____, ____, n.4, 587 A.2d 705, 712, n.4 (1991) (death sentence vacated on other grounds). See also Commonwealth v. Chester, ___ Pa. ____, ____, 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 also Godfrey v. Georgia, 446 U.S. 420 (1980) ("outrageously or wantonly vile, horrible or inhumane" is unconstitutionally vague language upon which to base a finding of an aggravating circumstance). Pennsylvania has none of the above language as an "aggravating circumstance" in its Sentencing Code so this decision 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. Compare Walton v. Arizona, ___ U.S. ___, 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 that 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 ___, 110 S.Ct. 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.

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?

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, 494 A.2d 367 (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." Id. at 69, 494 A.2d at 376.

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, ___ Pa. ___, 588 A.2d 902 (1991) (alternate holding).

b. Commonwealth v. Christy, 511 Pa. at 509-10, 515 A.2d at 842, wherein three aggravating and 3 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 3 aggravating and no mitigating, but verdict of death still upheld where 1 aggravating on appeal is found insufficiently proved.

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. 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.

HELD: Death penalty need not be vacated. But the U.S. Supreme Court 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; cited in Commonwealth v. Holcomb, 508 Pa.at 482, 498 A.2d at 863 (Larsen, J., dissenting)

f. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), wherein under Georgia statute, dissimilar to Pennsylvania's, in that there was 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.

D. AGGRAVATING CIRCUMSTANCES OUTWEIGH ANY MITIGATING CIRCUMSTANCE CASES.

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?

ANSWER:

The Pennsylvania Supreme Court in Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (1987), and in Commonwealth v. Aulisio, supra, and Commonwealth v. Williams, supra, held that if one of several aggravating circumstances is invalidated on appeal, and there are mitigating circumstances present, the death sentence must be vacated. In Clemons v. Mississippi, 494 U.S. ____, 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.

1. Commonwealth v. Holcomb, supra, is an interesting case in this area but carries no precedential weight because it is a plurality opinion. But even though it is limited to its own facts, nonetheless, the reasoning of the various Justices is worth exploration.

In Holcomb, Justice Hutchinson wrote for the plurality of the Court declaring that in this type of situation:

> ...We hold that if the prosecution presents to the jury an aggravating circumstance that is not supported by sufficient evidence, the sentence must be vacated. Commonwealth v. Holcomb, 508 Pa. at 458, 498 A.2d at 850.

In Holcomb the jury found 3 aggravating which out-weighed any mitigating. But 2 of the 3 so called aggravating bore no relation to the aggravating circumstances statute; one was "willfully taking the life of another" and the other was "failure of rehabilitation." Id. at 474, 498 A.2d at 858 (Nix, C.J., dissenting). The only other valid aggravating was "repeated offenses" - most likely aggravating circumstance #9 (significant history) - a prior rape and assault with intent to ravish. Apparently the jury did not find the Commonwealth's other proferred aggravating "killing in the course of a felony - rape, of which the jury did, indeed, convict the defendant). Mr. Justice Hutchinson argued that because the jury heard no improper evidence and, considered only proper aggravating circumstances, and because the two prior crimes, even though arising out of the same criminal episode and merged for sentencing purposes, were significant in quantity and quality and relevant to this rape murder, the three "aggravating" circumstances found were supported by the record and the verdict was not arbitrary.

Chief Justice Nix, in dissent, argued that two of the three aggravating were irrelevant and invalid because they did not correspond to any of the statutorily enumerated aggravating circumstances. Holcomb, 508 Pa. at 474, 428 A.2d at 858 (Nix, C.J. dissenting). He further argued that even the one aggravating arguably present had to fail under Commonwealth v. Goins, 508 Pa. 270, 495 A.2d 527 (1985) because the "rape" and "assault" with intent to ravish "arose out of the same episode" and were, therefore not a "significant history." Id. at 475, 498 A.2d at 859. He, therefore, finding none of the three aggravating circumstances, would vacate the death sentence.

E. HARMLESS ERROR - IN THE AGGRAVATING OUTWEIGHS AND MITIGATING CASES.

1. Mr. Justice Larsen, in his Holcomb dissent, also found no correlation in 2 of the aggravating circumstances between what the jury found and the aggravating circumstances statute. Unlike Chief Justice Nix, however, he found that the rape and assault with intent to ravish, though from the same episode, would constitute "significant history." He argued that the California v. Chapman, supra, concept of "Harmless Error" could be applied "where the sentence has found both proper and improper aggravating circumstances which outweigh any mitigating." Holcomb, 508 Pa. at 486, 498 A.2d at 865 (Larsen, J., dissenting). But he held that the "Significant history" here was not the strongest and the mitigating were not "de minimus," and since the consideration of the two improper aggravating may well have affected the jury's balance, the error was not harmless beyond a reasonable doubt and the death penalty had to be vacated. Holcomb, Id. at 486-87, 498 A.2d at 865 (Larsen, J., dissenting).

2. In Holcomb, Justice Hutchinson explicitly rejects a "harmless error" analysis, in the case where the jury finds that aggravating "outweigh any mitigating", because the jury, without specifying exactly what mitigating it considered, left no record for "meaningful appellate review of the weighing process." Holcomb, supra, at 458, 498 A.2d at 850.

3. Apparently, on the other hand, Chief Justice Nix and Justice Flaherty in their dissent in Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1144 (1985), did apply the harmless error concept to the "aggravating outweigh mitigating" analysis. They believed that although rape and sodomy were not a significant history because of eminating from a single episode, nonetheless the existence of a brutal triple homicide of a mother and 2 children under aggravating circumstances #10, and the existence of only vague and unconvincing mitigating evidence, warranted keeping the death penalty because the erroneous inclusion of #9 was "harmless" error. Cross,508 Pa. at 344, 496 A.2d at 1156 (Nix, C.J., dissenting).

4. In Commonwealth v. Aulisio, supra, Justices Larsen, McDermott, and Papadakos, in dissent accepted and applied the "harmless error" concept where one aggravating circumstance was declared insufficient but another was deemed validly proven.

5. COMMENT:

a. In the appropriate case, then, Pennsylvania may in the future adopt the harmless error concept. See Commonwealth v. Holcomb, 508 Pa. at 484, 498 A.2d at 864 (Larsen, J., dissenting). In Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the 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.

b. While it is unlikely that the Pennsylvania Supreme Court will adopt a harmless error analysis in this context, 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 in light of the amendments to section 9711(h)(2) and (4). Before the amendments, the remedy was a remand for the imposition of a sentence of life imprisonment. This new remand procedure 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 (1990)(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).

XXIV. 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 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 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. Ronald Williams, 522 Pa. 287, 561 A.2d 714 (1989); and Commonwealth v. Raymond Williams, 514 Pa. 62, 522 A.2d 1058 (1987).