Recent Developments in Pennsylvania Death Penalty Law

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Recent Developments in Pennsylvania Death Penalty Law

Bruce Ledewitz*

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I. INTRODUCTION

During the period from October 1992 to the end of 1994,1 the Pennsylvania Supreme Court affirmed death sentences in 34

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1. This article analyzes Pennsylvania death penalty cases from October 1992 to the present, December 1, 1994. The period prior to that is covered by a series of death penalty updates prepared by the Allegheny County Death Penalty Project. As is usual for an article discussing recent developments, there is little discussion of prior case law.
direct appeal cases;\textsuperscript{2} reversed murder convictions in six direct appeal cases;\textsuperscript{3} and reversed death sentences in three direct appeal cases.\textsuperscript{4} In post-conviction relief cases,\textsuperscript{5} the court denied relief in nine cases,\textsuperscript{6} including one in which relief had been granted below,\textsuperscript{7} and granted relief in one case.\textsuperscript{8} In preliminary litigation, the court upheld death eligibility in two cases.\textsuperscript{9} The

2. "Direct Appeal" refers to the review by the Pennsylvania Supreme Court automatically and without review in Superior Court mandated by the death penalty statute. See 42 PA. CONS. STAT. § 9711 (1988) This includes direct review after a resentencing hearing. See 42 PA. CONS. STAT. § 9711(h). The cases affirmed were:


5. Post Conviction Relief Act (PCRA), 42 PA. CONS. STAT. §§ 9541-51 (1982 & Supp. 1994). PCRA cases involving sentences of death are appealable only to the Pennsylvania Supreme Court. See 42 PA. CONS. STAT. § 9546(d).


7. See Maxwell, 628 A.2d at 500.


9. See Commonwealth v. Martorano, 634 A.2d 1063 (Pa. 1993); Common-
court also reinstated murder and other convictions in one death penalty case, remanding for consideration of the remainder of the defendant's post-trial motions. In related litigation, the Superior Court barred death penalty eligibility in one case and the Commonwealth Court, in a notable decision, granted mandamus relief directing the Governor to sign execution warrants in two death penalty cases.

II. CONSTITUTIONAL ISSUES

It is not the purpose of this article to recount federal constitutional analysis as handed down by the United States Supreme Court in death penalty cases during the past two years. Obviously, those pronouncements must be adopted by the Pennsylvania courts. Recounted here are only instances in which constitutional interpretations were dealt with in Pennsylvania cases, or in which recent federal interpretation is so out-of-step with Pennsylvania practice that some adjustment is to be anticipated.

The important example of the latter is Simmons v. South Carolina, in which the Court held that due process was violated by a trial court's refusal to inform a capital sentencing jury that the defendant would be ineligible for parole under applicable state law. While the precise contours of Simmons are not clear, it is likely that Pennsylvania practice concerning the parole issue will now change. Pennsylvania was identified by Justice Blackmun, along with Virginia and South Carolina, as the only states with a sentencing alternative to the death penalty of life-without-parole, which refuse to so inform sentencing juries. In some cases, at least, that must now change, perhaps

14. Simmons, 114 S. Ct. at 2193.
15. Not only was there no opinion of the Court in Simmons, but the prosecution was described as arguing future dangerousness to the sentencing jury as a ground for the death penalty, which would not necessarily be true in every capital case. Justice Blackmun noted that, "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." Simmons, 114 S. Ct. at 2198. On the other hand, it is not clear what the Justices think "arguing future dangerousness" means. Perhaps it happens in every case.
16. Id. at 2196 n.8.
in all cases. Presumably, as well, relief will now be forthcoming in a number of cases already affirmed.\(^{17}\)

No other death penalty decision by the United States Supreme Court affected Pennsylvania uniquely.\(^{18}\) Of course, cases of general application apply in Pennsylvania as well.\(^{19}\)

Insofar as the Pennsylvania Supreme Court is concerned, no new ground was broken on federal constitutional issues. The court held that the weighing of aggravation and mitigation prescribed by the statute is not unconstitutional,\(^{20}\) that application of a statutory amendment allowing resentencing hearings violated neither the federal nor state constitutions,\(^{21}\) that the older Pennsylvania jury instructions did not unconstitutionally require unanimity on mitigation in violation of *Mills v. Maryland*.\(^{22}\) In addition, the court rejected jury selection challenges based on *Batson v. Kentucky*.\(^{23}\) In *Commonwealth v. Moore*,\(^{24}\) the court


\(^{18}\) One case that may affect Pennsylvania is *Tuilaepa v. California*, in which the Court upheld three statutory factors for the trier of fact to consider in death penalty sentencing. See *Tuilaepa v. California*, 114 S. Ct. 2630, 2639 (1994). One of these factors was "[t]he age of the defendant at the time of the crime." *Id.* at 2637. This factor replicates Pennsylvania mitigating circumstance (e)(4). See 42 PA. CONS. STAT. § 9711 (e)(4). *Tuilaepa* may throw doubt on the Pennsylvania Supreme Court's willingness to allow trial judges to restrict the reach of (e)(4) by essentially rewriting it to read "youth or advanced age" instead of "age." See *Commonwealth v. Buehl*, 508 A.2d 1167 (Pa. 1986), cert. denied, 488 U.S. 871 (1988); *Commonwealth v. Frey*, 475 A.2d 700 (Pa.), cert. denied, 469 U.S. 963 (1984). The language of the *Tuilaepa* opinion seemed to recognize that arguments on this factor could be made by both sides "no matter how old or young" the defendant was at the time of the offense. See *Tuilaepa*, 114 S. Ct. at 2639. If this reading is correct, *Commonwealth v. Rivers*, in which the court upheld the refusal of the trial judge to submit to the jury the defendant's age of 34 as a mitigating circumstance, may have been wrongly decided. See *Commonwealth v. Rivers*, 644 A.2d 710, 720 (Pa. 1994).

\(^{19}\) For example, in *Romano v. Oklahoma*, the United States Supreme Court held that the admission of evidence in the sentencing phase of a prior sentence of death did not undermine the jury's sense of responsibility for determining the appropriateness of death in the case under consideration. See *Romano v. Oklahoma*, 114 S. Ct. 2004, 2008-09 (1994). Pennsylvania had permitted the introduction of similar evidence. See *Commonwealth v. Beasley*, 479 A.2d 460, 465 (Pa. 1984); see also *Delo v. Lashley*, 113 S. Ct. 1222 (1993) (upholding the refusal of a trial judge to instruct on a mitigating circumstance — no significant criminal history — when no evidence on the issue was introduced). The Pennsylvania statute also requires instruction only on those circumstances as to which there is "some evidence." See 42 PA. CONS. STAT. §§ 9711 (c)(1)(i), (ii); cf. *Commonwealth v. Craig Williams*, 615 A.2d 716 (Pa. 1992).

\(^{20}\) *Jerome Marshall*, 643 A.2d at 1077; *Meadows*, 633 A.2d at 1089.

\(^{21}\) *Young*, 637 A.2d at 1316-18.


\(^{23}\) *Wilson*, 649 A.2d at 441 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).
rejected creative state constitutional arguments, including the claim that the statute violated the separation of powers and created a special criminal tribunal.25

III. ISSUES OF AGGRAVATION

The Pennsylvania death penalty statute provides that, at the sentencing hearing following conviction of first degree murder, the Commonwealth must prove at least one statutory aggravating circumstance beyond a reasonable doubt.26 Aggravating circumstances are then weighed against any mitigating circumstances. For this reason, examination of death penalty law properly begins with an examination of these statutory aggravating circumstances. The aggravating circumstances that may be considered are set forth in subsection (d) of section 9711.

A. Statutory Aggravating Circumstances

1. (d)(1) Victim a Public Official27

This aggravating circumstance was the subject of pre-hearing litigation in Commonwealth v. Gibbs.28 The court held that a private security guard qualified as a "peace officer" for purposes of (d)(1).29 The holding was based on certain provisions of The Night Watchman's Act.30

see also Young, 637 A.2d at 1319. In Wilson and Young, the court held that the defendant had failed to satisfy the burden of proof on raising an inference of purposeful racial discrimination. Wilson, 649 A.2d at 443; Young, 637 A.2d at 1319.

25. Moore, 633 A.2d at 1130.
26. 42 PA. CONS. STAT. §§ 9711(a), (c)(1).
27. Section 9711(d)(1) provides:

The victim was a fireman, peace officer, or 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 performance of his duties or as a result of his official position.

29. Gibbs, 626 A.2d at 137.
30. Id. See PA. STAT. ANN. tit. 53, § 3704 (1972). The Night Watchman's Act provides that, "all persons so appointed . . . as night watchman shall have, exercise and enjoy all the rights, powers and privileges, now vested by law in constables or police officers." PA. STAT. ANN. tit. 53, § 3704.
2. (d)(2) Contract Killing

This aggravating circumstance was found or discussed in five cases. In Gibbs, the court held in a presentencing proceeding that the victim of the homicide must be the object of the contract to kill in order for (d)(2) to apply. In that case, the contract was arguably for the death of one person, but a different person was actually killed. On the other hand, in Commonwealth v. Hackett, and Commonwealth v. Spence, the court sustained the finding of (d)(2) by holding that the original "contract" included the possibility of killing others.

In Commonwealth v. Mayhue, the court decided the effect on (d)(2) if the original contract for killing is not carried out and someone else, or the defendant himself, then commits the killing. Prior to this decision, the issue had only been discussed in dictum in Hackett and Spence. The court's dictum suggested that (d)(2) might still apply, to which Justice Cappy had objected in concurrence in Hackett. In Mayhue, the court unanimously adopted Justice Cappy's position and reversed the finding of (d)(2) because none of the individuals contracted with fulfilled the contract by killing the defendant's wife. Instead, the defendant committed the murder.

31. Section 9711(d)(2) provides that, "[t]he 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. CONS. STAT. § 9711(d)(2).
33. Gibbs, 626 A.2d at 138.
34. Id.
37. See Spence, 627 A.2d at 1185; Hackett, 627 A.2d at 727.
40. Hackett, 627 A.2d at 727 n.8.
41. Spence, 627 A.2d at 1184 n.9.
42. Hackett, 627 A.2d at 727 (Cappy, J., concurring).
43. Mayhue, 639 A.2d at 439.
44. Id. at 440. Further, the court's decision in Moran established, though there had not been any reason to doubt it, that (d)(2) could be proved by circumstantial evidence of, for example, an unexplained increase in income following a killing. Moran, 636 A.2d at 615. Moran is worth noting, however, because the Commonwealth, in an attempt to gain the defendant's cooperation in other cases, joined the defendant's unsuccessful attempt to reverse the sentence. See Moran, 636 A.2d at 613.
3. (d)(3) *Held for Ransom*\(^{45}\)

This circumstance was found in *Commonwealth v. Daniels*.\(^{46}\) In *Daniels*, the court held that the evidence was sufficient to support the jury's finding because, even though the defendant ultimately abandoned the plan without asking for ransom, the victim was still held for that purpose for a period of time.\(^{47}\)

4. (d)(4) *Hijacking*\(^{48}\)

This circumstance was not found in any cases considered by the Pennsylvania courts during this period.

5. (d)(5) *Prosecution Witness*\(^{49}\)

This aggravating circumstance was found in two cases.\(^{50}\) In both cases there was direct evidence that the killing was motivated by a desire to prevent the victim from testifying.\(^{51}\) Therefore, the court's prior ruling that circumstantial evidence was insufficient to establish (d)(5) was not at issue.\(^{52}\)

\(^{45}\) Section 9711(d)(3) provides that, "[t]he victim was being held by the defendant for ransom or reward, or as a shield or hostage." 42 PA. CONS. STAT. § 9711(d)(3).

\(^{46}\) 644 A.2d 1175 (Pa. 1994).

\(^{47}\) *Daniels*, 644 A.2d at 1179-80.

\(^{48}\) Section 9711(d)(4) provides that, "[t]he death of the victim occurred while defendant was engaged in the hijacking of an aircraft." 42 PA. CONS. STAT. § 9711(d)(4).

\(^{49}\) Section 9711(d)(5) provides that, "[t]he 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 defenses." 42 PA. CONS. STAT. § 9711(d)(5).


\(^{51}\) *Daniels*, 644 A.2d at 1179; *Kindler*, 639 A.2d at 7.

\(^{52}\) See *Commonwealth v. Crawley*, 526 A.2d 334, 345 (Pa. 1987) (holding that evidence that victim witnessed a felony and was killed by defendant insufficient to establish (d)(5)).
6. (d)(6) In the Perpetration of a Felony

This aggravating circumstance was found or discussed in twenty-two cases during this period. In most of these cases, the application of (d)(6) was straightforward. Indeed, in Commonwealth v. Kenneth Williams, the court held that defense counsel had not been ineffective despite essentially conceding that the jury's verdict of homicide and robbery determined the presence of (d)(6). In another case, Commonwealth v. Thompson, the trial judge charged the jury to the same effect.

The issues that did arise with regard to (d)(6) concerned either procedural matters or concerned the scope of the circumstance. In terms of scope, Commonwealth v. Edmiston held that the predicate felony could occur prior to the homicide "as long as the killing occurred so close in time and space to the felony that it could be considered part of the felony."

Edmiston also clarified the felony-as-means-of-death issue. In several cases, defendants argued that where the commission of the felony itself was the means for the killing, that felony should

53. Section 9711(d)(6) provides that, "[t]he defendant committed a killing while in the perpetration of a felony." 42 PA. CONS. STAT. § 9711(d)(6).
56. Kenneth Williams, 640 A.2d at 1266.
58. See Thompson, 648 A.2d at 320.
59. See notes 231-33 and accompanying text for a discussion of procedural matters.
60. 634 A.2d 1078 (Pa. 1993).
61. Edmiston, 634 A.2d at 1091 (citing Commonwealth v. Yarris, 549 A.2d 513 (Pa. 1988)).
not be considered within (d)(6). The court rejected these claims. Edmiston, in rejecting a vagueness challenge to (d)(6), pointed out that aggravated assault, which could not serve as a predicate to (d)(6), was a “lesser included offense” of murder. Thus, the familiar structure of lesser included offenses defines which felonies qualify as (d)(6) predicate felonies and which felonies are excluded.

7. (d)(7) Risk of Death to Another

This circumstance was found or discussed in eleven cases. In most of these cases, (d)(7) clearly applied. Of the eleven, only Commonwealth v. Stokes discussed the substantive elements of (d)(7). In Stokes, the defendant fired three shots into a walk-in refrigerator where he was holding four people. Two of the four were killed. The defendant also shot and killed a third victim, who witnessed the murders and attempted to flee.

The court in Stokes reversed the jury’s finding of (d)(7) in each of the three informations. The trial judge had instructed the jury that “as a matter of logic, the deaths of the other two victims would be an aggravating circumstance.” The court in Stokes asserted that the jury instruction was in error for two reasons. First, the trial judge essentially directed a finding of the aggravating circumstance. Apparently, a trial judge may

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62. See, e.g., Pierce, 645 A.2d at 198; Jermyn, 620 A.2d at 1132.
63. Pierce, 645 A.2d at 198 (arsen); Jermyn, 620 A.2d at 1132 (arsen endangering persons); cf. Kindler, 639 A.2d at 7 (kidnapping).
64. Edmiston, 634 A.2d at 1090.
65. Section 9711(d)(7) provides that, “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. CONS. STAT. § 9711(d)(7).
67. See, e.g., Gibbs, 626 A.2d at 135 (defendant fired a shot “missing the husband but killing the other man”).
69. Stokes, 615 A.2d at 708.
70. Id.
71. Id.
72. Id. at 714. The sentences of death were affirmed, however, because no mitigating circumstances were found. Id. Thus, death remained the mandatory verdict. Id. See 42 PA. CONS. STAT. § 9711 (c)(1)(iv).
73. Stokes, 615 A.2d at 713.
74. Id.
not invade the discretion of the jury in this way. But the court also stated, as an independent ground of reversal, that the instructions "misstated the intent" of (d)(7).\textsuperscript{75} The jury could not have found a grave risk of death to the two victims in the walk-in refrigerator, but only to the two who survived.\textsuperscript{76} Also, there was no risk of death when the third victim was shot and killed because he was alone.\textsuperscript{77}

Two conclusions may be drawn about (d)(7). First, the act of shooting itself does not always create a grave risk of death to another person. Obviously, it was possible in Stokes that a stray bullet might have left the building, wounding a passer-by. Such speculative possibilities apparently are insufficient to establish (d)(7). Second, a homicide victim cannot be "another person" for purposes of (d)(7). When two or more persons are killed, although other aggravating circumstances will apply,\textsuperscript{78} unless survivors are also present, (d)(7) cannot be found.

Although this analysis is a fair reading of Stokes, it is inconsistent with the court's decision in Commonwealth v. Crews,\textsuperscript{79} in which two hikers who were alone were killed in an overnight shelter and (d)(7) was found.\textsuperscript{80} There was no discussion of the (d)(7) issue in the opinion. The difference between Crews and Stokes could possibly be that one victim in Crews was killed later than the other victim.\textsuperscript{81} On the other hand, the difference might only have been that the defendant in Crews did not raise the (d)(7) issue and the court overlooked it.

8. (d)(8) Torture-Murder\textsuperscript{82}

This aggravating circumstance was found or discussed in nine cases.\textsuperscript{83} The application of this aggravating circumstance probably comes closer to unconstitutional vagueness than do any of

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 713-14.
\textsuperscript{78} See, e.g., 42 PA. CONS. STAT. § 9711(d)(11). Section (d)(11) provides, that "[t]he defendant has been convicted of another murder, committed either before or at the time of the offense at issue." Id.
\textsuperscript{79} 640 A.2d 395 (Pa. 1994)
\textsuperscript{80} Crews, 640 A.2d at 396-97.
\textsuperscript{81} See Crews, 640 A.2d at 397.
\textsuperscript{82} Section 9711(d)(8) provides that "[t]he offense was committed by means of torture." 42 PA. CONS. STAT. § 9711(d)(8).
\textsuperscript{83} See Ford, 650 A.2d 423 (Pa. 1994); Antoine Williams, 650 A.2d at 423; Commonwealth v. Fahy, 645 A.2d 199, 200 (Pa.), cert. denied, 115 S. Ct. 742 (1994); Daniels, 644 A.2d at 1178; Kenneth Williams, 640 A.2d at 1262-63; Crews, 640 A.2d at 397; Commonwealth v. Jacobs, 639 A.2d 786, 791 (Pa. 1994); Peoples, 639 A.2d at 449; Edmiston, 634 A.2d at 1090.
the other statutory aggravating circumstances. The court has attempted to avoid this vagueness problem by giving a more concise definition to torture. For example, in Commonwealth v. Edmiston, the court stated that torture “is the intentional infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity” and that “[t]here must be an indication that the killer was not satisfied with killing alone.” There must be an additional, specific intent to inflict pain, beyond an intent to kill. As held in Edmiston, these words are not formulaic as long as their sense was communicated to the jury.

Clearly, the rule is now that some instruction must be given. In Commonwealth v. Fahy, however, the court held that relief would not be granted in Post Conviction Relief Act (“PCRA”) litigation for failure of counsel to request such instruction in cases prior to the court’s holding that it was required. The court’s analysis in Fahy was quite fact specific, however, and in a closer case, perhaps the court would look at the issue differently.

The parameters of torture in (d)(8) are not clear. In some cases, the court’s discussion gives an indirect explanation of why the defendant’s behavior could be considered torture. In other cases, however, findings of (d)(8) have been upheld, sometimes without specific challenge by the defendant, in situations that appear to amount to brutal beatings and stabbings, but seemingly not to torture. It is not clear what aspects of these cases are defining torture.

The only explanation by the court of what specific behavior constitutes torture was given in Commonwealth v. Kenneth Williams. In Kenneth Williams, the court held that it had been

84. 634 A.2d 1078 (Pa. 1993).
86. Edmiston, 634 A.2d at 1091.
87. Id.
88. See Nelson, 523 A.2d at 737-38 (counsel ineffective for failing to object to absence of definition of torture).
91. Fahy, 645 A.2d at 203-04.
92. See, e.g., Daniels, 644 A.2d at 1180 (long ordeal); Jacobs, 639 A.2d at 792 (shallow wounds).
93. See Ford, 650 A.2d at 437; Crews, 640 A.2d at 397; Peoples, 639 A.2d at 450.
error, although harmless, to submit (d)(8) to the jury.\textsuperscript{95} A forensic pathologist had testified that “the victim, on being shot, suffered extreme pain and eventually experienced a sense of impending doom.”\textsuperscript{96} This was insufficient to submit (d)(8) to the jury.\textsuperscript{97} The ferocity of stabblings by itself would also be insufficient.\textsuperscript{98} Absent evidence that such an attack was prolonged purposely, multiple stab wounds would seem to amount simply to the method by which death was brought about.

9. (d)(9) History of Convictions for Violent Felonies\textsuperscript{99}

This aggravating circumstance was found or discussed in thirteen cases during this period.\textsuperscript{100} In several cases, (d)(9) was not analyzed beyond the court’s noting that the evidence was sufficient to sustain the finding by the sentencing jury.\textsuperscript{101}

A few issues of interpretation did arise, however. The court held in three cases that crimes occurring subsequently to the murder at issue could be considered part of a defendant’s “history” for purposes of (d)(9).\textsuperscript{102} The court rejected the argument that there could be no “significant history” unless the crimes committed by the defendant were similar in some way to the murder.\textsuperscript{103} The court reiterated that a single prior conviction could not satisfy (d)(9).\textsuperscript{104} The court held that, in the case of a conviction from another state, the term “felony” in (d)(9) referred to the definition of felony under local law, rather than to an analogy to Pennsylvania law.\textsuperscript{105} The court also held that con-

\begin{itemize}
\item \textsuperscript{95} \textit{Kenneth Williams}, 640 A.2d at 1263. The jury did not return a (d)(8) finding. \textit{Id}.
\item \textsuperscript{96} \textit{Id}.
\item \textsuperscript{97} \textit{Id}.
\item \textsuperscript{98} \textit{Id}.
\item \textsuperscript{99} Section 9711(d)(9) provides that, “[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person.” 42 PA. CONS. STAT. § 9711(d)(9).
\item \textsuperscript{101} \textit{See Birdsong}, 650 A.2d at 28; \textit{Wilson}, 649 A.2d at 445-46 \textit{Rush}, 646 A.2d at 560-61; \textit{Howard}, 645 A.2d at 1303.
\item \textsuperscript{102} \textit{Reid II}, 642 A.2d at 458-59; \textit{Young}, 637 A.2d at 1321; \textit{Reid I}, 626 A.2d at 122.
\item \textsuperscript{103} \textit{Young}, 637 A.2d at 1321.
\item \textsuperscript{104} \textit{Moran}, 636 A.2d at 613 n.1.
\item \textsuperscript{105} \textit{Maxwell}, 626 A.2d at 501-02 n.4. The holding in \textit{Maxwell} is not entirely
spionage to commit murder was a violent felony under (d)(9) even if there was no murder conviction. Possession of a loaded weapon was also held to be a violent felony under (d)(9).

The court also dealt with issues of procedure under (d)(9), specifically the admissibility of evidence of prior convictions and the consequences of error. The court held that at least some details of the prior conviction were admissible and not just the fact of conviction itself. Perhaps more controversial was the court's related holding that the sentence for the prior convictions, even if death, could also be introduced.

In a few cases, the court dealt with the issue of the consequences of error at trial in proving (d)(9). In Commonwealth v. Moran and Commonwealth v. Smith, sentences of death were affirmed, despite erroneous findings of (d)(9) by the jury, because in the absence of any mitigating circumstances, and in the presence of other aggravating circumstances, the statute mandated the death penalty. In Commonwealth v. Reid, the court held that it was error to admit evidence of a charge that was later withdrawn, but that the (d)(9) finding would not be reversed because the murder conviction arising out of the same evidence "overshadowed" the error. On the other hand, in Commonwealth v. Antoine Williams, the court strictly construed Rule 352 of the Pennsylvania Rules of Criminal Procedure to require notice of aggravating circumstances the Commonwealth intended to use. The court held that because re-

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106. Reid I, 626 A.2d at 122.
107. Maxwell, 626 A.2d at 501 n.4. The court also would have so held in reference to burglary in Rivers, but the trial court excluded the conviction. See Rivers, 644 A.2d at 720.
108. See Reid II, 642 A.2d at 458-59.
111. Smith, 650 A.2d at 866 (mistaken conviction listed); Moran, 636 A.2d at 614 (single conviction).
112. Reid I, 626 A.2d at 122.
114. 626 A.2d at 122.
116. Antoine Williams, 650 A.2d at 429. Rule 352 provides:
The Commonwealth shall notify the defendant in writing of any aggravating circumstances which the Commonwealth intends to submit at the sentencing hearing. Notice shall be given at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for notice is extended by
cords of convictions were “always available” to the prosecution, no late notice under the rule would be permitted. The death sentence in *Antoine Williams* was reversed and the case was remanded for a new sentencing hearing at which (d)(9) evidence was inadmissible.

10. (d)(10) *Prior or Concurrent Murder*

This aggravating circumstance was found in three cases: *Commonwealth v. Sam*, *Commonwealth v. Peoples*, and *Commonwealth v. Ragan*. In *Peoples* and *Ragan*, each defendant had been convicted of a prior, unrelated murder. In *Sam*, more than one murder occurred. In all three cases, (d)(11) would have been equally applicable; so these cases presumably show that in a situation in which a defendant has been convicted of a murder for which a life sentence may be imposed, the prosecution must choose between (d)(10) and (d)(11).

11. (d)(11) *Multiple Murder*

This aggravating circumstance was found in five cases, all of which involved multiple murders. In fact, though the language of (d)(11) would reach prior, unrelated murders, the court

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the court for cause shown.

PA. R. CRIM. P. 352.


118. *Id.* at 430. Inexplicably, the court in *Antoine Williams* failed to cite or discuss *Crews*, decided a few months before, in which non-compliance with Rule 352 was held to be harmless. See *Crews*, 640 A.2d at 404. The cases can be distinguished because in *Crews* there was “constructive notice.” *Id.* at 403. Nevertheless, the approaches to Rule 352 in the two cases seem completely different.

119. Section 9711(d)(10) provides as follows:

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 offense.


121. 639 A.2d 448 (Pa. 1994).


123. *Ragan*, 645 A.2d at 817; *Peoples*, 639 A.2d at 449.

124. *Sam*, 635 A.2d at 604-05.

125. Section 9711(d)(11) provides that, “[t]he defendant has been convicted of another murder, committed either before or at the time of the offense at issue.” 42 PA. CONS. STAT. § 9711(d)(11).

even referred to it as a “double homicide” circumstance. In either situation, that of a prior murder or a concurrent one, there is no difference between (d)(11) and (d)(10) as long as a life sentence could have been imposed for the prior murder.

There are distinctions, however, between both (d)(10) and (d)(11) on the one hand, and (d)(9) on the other. First, a single murder conviction cannot establish (d)(9), which requires a “significant history of felony convictions.” Second, (d)(10) and (d)(11) specifically exclude consideration of offenses committed subsequently to the murder for which the defendant is being sentenced. The court declined in Commonwealth v. Reid to imply a similar restriction for (d)(9). Thus, a defendant who commits a simple killing after the murder at issue will not, by that fact alone, be eligible for the death penalty in the first case.

12. (d)(12) Prior Manslaughter

This aggravating circumstance was found in Commonwealth v. Brown. In Brown, the earlier conviction occurred in 1967, but the court did not consider any issue of possible staleness. The court also held, as it did under other record aggravating circumstances, that the circumstances of the prior crime were admissible.

127. Crews, 640 A.2d at 403.
128. See, e.g., Sam, 635 A.2d at 612 n.1. (defining (d)(10) as “the commission of multiple homicides”).
129. 42 PA. CONS. STAT. § 9711(d)(9) (emphasis added).
130. See 42 PA. CONS. STAT. §§ 9711(d)(10), (d)(11).
132. Reid II, 642 A.2d at 459 n.8.
133. Section 9711(d)(12) provides that, “[t]he defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. §2503 (relating to voluntary manslaughter), committed either before or at the time of the offense at issue.” 42 PA. CONS. STAT. § 9711(d)(12).
136. See Rivers, 644 A.2d at 720; Young, 637 A.2d at 1321; Reid I, 626 A.2d at 122.
137. Brown, 648 A.2d at 1185.
13. (d)(13) - (d)(15) Drug Related Killing or Informant Killing

None of these three circumstances was found in any cases decided during this period.

14. (d)(16) Victims under Twelve

This aggravating circumstance was found in Commonwealth v. Gamboa-Taylor. In Gamboa-Taylor, however, there was no discussion of the circumstance beyond the court's holding that there was ample evidence establishing the age of the victims. The (d)(16) circumstance was also mentioned in Commonwealth v. Sam, in which the court agreed with the defendant that (d)(16) could not apply because it had been enacted after the instant murders. This non-retroactivity observation

138. Section 9711(d)(13) provides:

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. CONS. STAT. § 9711(d)(13).

Section 9711(d)(14) provides:

At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

42 PA. CONS. STAT. § 9711(d)(14).

Section 9711(d)(15) provides:

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. CONS. STAT. § 9711(d)(15).

139. Section 9711(d)(16) provides that, "[t]he victim was a child under 12 years of age." 42 PA. CONS. STAT. § 9711(d)(16).

140. 634 A.2d 1106 (Pa. 1993).

141. See Gamboa-Taylor, 634 A.2d at 1108-09.


143. Sam, 635 A.2d at 612. The court held, however, that (d)(16) had not been
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would presumably apply to any other amendment of an aggravating circumstance.

B. Non-Statutory Aggravation

If one were to look only at the language of the statute, it would appear that non-statutory aggravation — i.e., evidence of aggravation not admitted pursuant to any of the sixteen aggravating circumstances — could not be an issue. The statute specifically provides that the death penalty is to be decided upon with reference only to aggravating and mitigating circumstances and that aggravating circumstances “shall be limited” to the statutory list. Therefore, there simply is no non-statutory aggravation in Pennsylvania.

Nevertheless, the court has allowed what might be termed non-statutory aggravation in argument, for rebuttal and through evidence at the guilt phase of the trial. In this period, the court allowed prosecutorial argument at sentencing with regard to the defendant’s lack of remorse in Commonwealth v. Thompson. The court also allowed prosecutorial argument about the future dangerousness of the defendant in Commonwealth v. Peoples and Commonwealth v. Kenneth Williams. The court was unclear in Williams about whether the argument was proper or harmless error. In Peoples, the argument was clearly viewed as proper. The court did not explain how the jury was to use these arguments since the statute precludes reliance on anything but statutory aggravation. The court did not, however, permit the admission of non-statutory aggravating evidence in these cases.

The second way non-statutory aggravation is introduced is by way of what the court calls rebuttal to defense evidence argument. In theory, this is perfectly straightforward. If, for example, the defense introduces evidence that the defendant was

found by the trial judge. Id.

144. See 42 PA. CONS. STAT. § 9711(c)(iv).
145. 42 PA. CONS. STAT. § 9711(d).
148. 640 A.2d 1251, 1262 (Pa. 1994) (Death penalty “will deter” defendant from ever again shooting someone.).
149. Kenneth Williams, 640 A.2d at 1262.
150. Peoples, 639 A.2d at 452 (“The importance of this comparison in his argument was that there exists a mechanism to correct the problem, and in this instance the only way to prevent the appellant from killing again was to impose the death penalty.”).
151. Kenneth Williams, 640 A.2d at 1262; Peoples, 639 A.2d at 452.
fifteen years old at the time of the murder, and the prosecution has evidence that the defendant in fact was eighteen, that evidence would be admissible.

The court mentioned such rebuttal in four cases. In Commonwealth v. Thompson,\textsuperscript{152} the court permitted general reflections on the defendant's character in rebuttal of the defense's mitigation.\textsuperscript{153} In Commonwealth v. Ford,\textsuperscript{154} the court allowed cross-examination of the length of time the defendant had spent in jail to rebut the defense's implication that the defendant "would be amenable to rehabilitation."\textsuperscript{155} In Commonwealth v. Young,\textsuperscript{156} the court permitted evidence relating to the murder scene, to cast doubt on the defense claim that at the time of the murders appellant could "not fully appreciate the criminality of his actions."\textsuperscript{157} In Commonwealth v. Ragan,\textsuperscript{158} the court permitted evidence that other family members had been charged with crimes "in response to the assertions of appellant's mother on direct examination that appellant had been a warm and loving son whose childhood had been one of playful innocence."\textsuperscript{159}

The final way that non-statutory aggravation influences sentencing is by admission at the trial on guilt. Typically, all of the guilt phase evidence is admitted at sentencing, and in some way referred to by the trial judge. In Commonwealth v. Reid,\textsuperscript{160} the court upheld the admission of the defendant's association with the Junior Black Mafia and the nature of that group.\textsuperscript{161} Although the court held that such evidence was admissible at the trial on guilt, no limiting instructions were required at the sentencing phase to avoid prejudice to the defendant.\textsuperscript{162} In this way arguably proper evidence admitted at the guilt phase can amount to non-statutory aggravation at sentencing.

\textsuperscript{152} 648 A.2d 315 (Pa. 1994).
\textsuperscript{153} Thompson, 648 A.2d at 323.
\textsuperscript{154} 650 A.2d 433 (Pa. 1994).
\textsuperscript{155} Ford, 650 A.2d at 442. It is not clear from the opinion why such evidence would not have been admissible as statutory aggravation.
\textsuperscript{156} 637 A.2d 1313 (Pa. 1993).
\textsuperscript{157} Young, 637 A.2d at 1323.
\textsuperscript{158} 645 A.2d 811 (Pa. 1994).
\textsuperscript{159} Ragan, 645 A.2d at 822. Obviously, the court erred in Ragan, since the evidence in rebuttal did not at all relate to the defendant's character and no doubt seriously prejudiced the jury against the defendant's family. It is surely in no sense either proper aggravation or proper rebuttal that a defendant's youth was one of "constant exposure to violence."
\textsuperscript{160} 642 A.2d 463 (Pa.), cert. denied, 115 S. Ct. 268 (1994).
\textsuperscript{161} Reid II, 642 A.2d at 461.
\textsuperscript{162} Id.
IV. ISSUES OF MITIGATION

A. Definition and Scope of Statutory Mitigation

The structure of mitigation under the statute appears to parallel that of aggravation. There are statutory mitigating circumstances listed and, apparently, only they may be taken into account in sentencing. On the other hand, circumstance (e)(8) is so broad — as constitutionally it must be — that the statutory formula does not function as much of a limit. Thus, issues of definition and scope do not arise in court opinions in the same way that they do in the realm of aggravating circumstances. Nor does the Pennsylvania Supreme Court generally review findings of mitigation, since an error in such a finding would not be reversible.

Some mitigating circumstance findings are discussed or noted in the opinions, though for the reasons mentioned above, the listing is not likely to be complete. Mitigating circumstance (e)(1) was found or discussed in six cases. The only issue concerning (e)(1) was raised in Commonwealth v. Stokes, in which the court stated that just as juvenile convictions are admissible for purposes of aggravation, they may be introduced to aid the jury in determining mitigation.

Mitigating circumstance (e)(2) was found or discussed in five cases. There were no significant issues raised in these cases about this circumstance.

163. Section 9711(e)(8) provides that, "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 PA. CONS. STAT. § 9711(e)(8).
164. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the death penalty statute must allow consideration as mitigation any aspect of the defendant's character or record and any of the circumstances of the offense).
165. See, e.g., Commonwealth v. Craig Williams, 615 A.2d 716, 723 (Pa. 1992) (evidence excluded by modifiers in (e)(2) or (e)(5) “can always be considered under sub-section (e)(8)”).
166. See, e.g., Hughes, 639 A.2d at 774.
167. Section 9711(e)(1) provides that, “[t]he defendant has no significant history of prior criminal convictions.” 42 PA. CONS. STAT. § 9711(e)(1).
170. Stokes, 615 A.2d at 714.
171. Section 9711(e)(2) provides that, “[t]he defendant was under the influence of extreme mental or emotional disturbance.” 42 PA. CONS. STAT. § 9711(e)(2).
172. Brown, 648 A.2d at 1188; Hughes, 639 A.2d at 773-74; Jacobs, 639 A.2d at 791; Young, 637 A.2d at 1316 n.3; Craig Williams, 615 A.2d at 723. In addition, the court held in Wilson, that counsel was not ineffective for failing to request instructions on (e)(2). Wilson, 649 A.2d at 450.
Circumstance (e)(3),173 and its relationship to findings of (e)(2) and of guilty but mentally ill,174 were discussed in Commonwealth v. Hughes.175 In Hughes, the trial judge found (e)(2) but failed to find the defendant guilty but mentally ill; nor did the judge find the presence of (e)(3).176 The court in Hughes asserted that in a capital case, evidence tending to establish guilty-but-mentally-ill, as opposed to evidence of insanity, for example, was admissible only at the penalty phase.177 The court did not refuse to review the failure to find (e)(3) but held that the trial judge had not erred in distinguishing between (e)(2) and (e)(3).178

Circumstance (e)(4)179 was found or discussed in Hughes180 and Commonwealth v. Rivers.181 In Rivers, the court upheld the trial judge's refusal to charge the jury on (e)(4) because the defendant was 34 at the time of the killing.182 Essentially, this age was held to be not mitigating.183

The court discussed (e)(5)184 in Commonwealth v. Craig Williams,185 in upholding the action of the trial judge in instructing that there was no evidence in that case of substantial domination.186 The court also held in Commonwealth v. Wilson187 that counsel was not ineffective for failing to request instruction on (e)(5).188

Circumstances (e)(6)189 and (e)(7)190 apparently were not

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173. Section 9711(e)(3) provides that, "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. CONS. STAT. § 9711(e)(3).
175. 639 A.2d 763, 774 (Pa. 1993).
176. Hughes, 639 A.2d at 774.
177. Id.
178. Id.
179. Section 9711(e)(4) provides that, "the age of the defendant at the time of the crime." 42 PA. CONS. STAT. § 9711(e)(4).
180. Hughes, 639 A.2d at 766 n.2.
182. Rivers, 644 A.2d at 720. See note 18 for a discussion of age as a mitigating circumstance.
183. Id.
184. Section 9711(e)(5) provides that, "the defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. §309 (relating to duress), or acted under the substantial domination of another person." 42 PA. CONS. STAT. § 9711(e)(5).
186. Craig Williams, 615 A.2d at 727 n.8.
188. Wilson, 649 A.2d at 449-50.
189. Section 9711(e)(6) provides that, "the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts." 42 PA. CONS. STAT. § 9711(e)(6).
190. Section 9711(e)(7) provides that, "the defendant's participation in the
B. Exclusion of Mitigating Evidence/Argument/Instruction

The general rule about mitigation is that everything is admitted into evidence, everything is argued and everything is instructed. It is likely that any broad restriction on mitigation would be unconstitutional. Nevertheless, during this period, the court did recognize some limits with regard to mitigation. Of course, some aspects of these rulings may well ultimately be reversed, either in the particular case, or in other cases.

In several cases, the court upheld exclusions from evidence at the sentencing hearing, which is the most problematic exclusion. In Commonwealth v. Young, the court upheld the exclusion of letters written by the defendant because, when the defendant did not testify, the letters would amount to allocution— an unsworn statement without cross-examination. In

homicidal act was relatively minor.” 42 Pa. Cons. Stat. § 9711(e)(7).

191. Section 9711(e)(8) provides that, “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” 42 Pa. Cons. Stat. § 9711(e)(8).

192. Thompson, 848 A.2d at 318; Rush, 846 A.2d at 564 n.1; Daniels, 644 A.2d at 1183; Jacobs, 639 A.2d at 791; Hughes, 639 A.2d at 774-75; Gamboa-Taylor, 634 A.2d at 1109; Conforti, 626 A.2d at 132; Craig Williams, 615 A.2d at 723.


194. 634 A.2d 1106, 1109 (Pa. 1993); Conforti, 626 A.2d at 132.

195. For example, an “impairment” under (e)(3) that is not “substantial.” See 42 Pa. Cons. Stat. § 9711(e)(3).

196. Craig Williams, 615 A.2d at 723-24.

197. See, e.g., Rush, 846 A.2d at 564 n.1; Hughes, 639 A.2d at 774-75.

198. See Daniels, 644 A.2d at 1183.

199. After all, once the information is in evidence, argument and instruction, while helpful, are not necessary for the fact-finder to give the evidence appropriate consideration.


201. Young, 637 A.2d at 1322.
Commonwealth v. Stokes, the court upheld the exclusion from evidence of the defendant's continuing assertion that he was innocent of the murder. On the other hand, in Commonwealth v. Wilson, the defendant's sentencing strategy was to continue to deny guilt and the defendant was permitted to testify to that effect. In Commonwealth v. Reid, the court upheld, though in language suggesting harmless error, the exclusion of references to the defendant's conversion to the "Muslim faith."

The court also upheld a trial court's exclusion of defense counsel argument relating to religious objections to the death penalty. In Commonwealth v. Daniels, evidence of a religious objection was said not to relate to the character of the defendant.

The court upheld three trial-court refusals to instruct at sentencing, but in each case, the matter was before the jury and consideration was not excluded by instruction. In Commonwealth v. Peoples, the court failed to instruct that adjustment to prison was a mitigating circumstance. In Commonwealth v. Young, the court upheld a refusal to charge that the jury could render a life sentence on any basis. Both of these approaches to mitigation were assumed to be reachable through (e)(8). In Commonwealth v. Rivers, the court seemed to go further in excluding the submission of (e)(4) to the jury because the defendant's age of thirty-four at the time of the crime was not mitigating.

203. Stokes, 615 A.2d at 715.
204. 649 A.2d 435 (Pa. 1994).
205. Wilson, 649 A.2d at 450.
207. Reid II, 642 A.2d at 459-60. The Reid II ruling is difficult to justify.
210. Id. at 1183.
211. 639 A.2d 448 (Pa. 1994).
212. Peoples, 639 A.2d at 452.
214. Young, 637 A.2d at 1322.
216. Rivers, 644 A.2d at 719-20.
C. Assistance in Introducing Mitigation

The court indirectly raised the issue in *Reid II* whether a defendant has the right to utilize a defense psychologist at government expense as a mitigation specialist. In that case, the court rejected the claim that the defendant had the right to county funds to utilize a particular psychologist. The court pointed out that the defendant was offered other psychologists "for purposes of mitigation." One of the psychologists offered would have been a court-appointed psychiatrist, but it is not clear that the others referred to would have been.

The court also held in *Commonwealth v. Sam* that a defense attorney will not be deemed ineffective for failing to introduce evidence of mitigating circumstances when the defendant specifically so directs. In *Sam*, the court noted that the defendant "knowingly and intelligently, and with full exploration and understanding of the consequences, waived his right to have mitigating evidence argued." According to the court, "an extensive colloquy" was held to establish this waiver, including the mitigating circumstances counsel would have presented.

While the decision in *Sam* establishes that the attorney has no duty to present mitigation over his client's wishes, the procedure utilized in that case also suggests that counsel has an obligation to prepare mitigation even though the defendant does not wish any such evidence to be introduced. Otherwise, the colloquy would be an empty ritual because mitigation had not already been prepared. Of course, since the defendant could always change his mind about mitigation, counsel would, in any event, have to prepare for the sentencing hearing. In *Sam*, the court treated the waiver of mitigation as similar to the waiver of other constitutional rights that must be shown to be knowing, intelligent and voluntary. That would require a colloquy as a matter of course in every case in which no mitigation is introduced.

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218. *Id.*
219. *Id.*
220. *Id.* Obviously, the defense seeks in such circumstances a defense expert rather than a neutral party.
222. *Sam*, 635 A.2d at 611.
223. *Id.*
224. *Id.*
225. *Id.*
D. Unanimity in Mitigation Findings

*Mills v. Maryland* prohibited the requirement of unanimity in mitigation findings by a jury. The Pennsylvania Supreme Court has consistently taken the position that the statutory instructions and verdict slip utilized prior to *Mills* did not require such unanimity. Because the Rules of Criminal Procedure now provide specifically for non-unanimous findings of mitigation, the court now notes such non-unanimity.

V. PRE-TRIAL PROCEDURE

A. Notice of Aggravating Circumstances

Pennsylvania Rule of Criminal Procedure 352 requires notice to the defense of any aggravating circumstances the prosecution intends to submit at the sentencing hearing. In two cases in which the Commonwealth sought to file late notice of additional circumstances, the court did not allow the filing in *Commonwealth v. Antoine Williams* but did allow filing in *Commonwealth v. Crews*.

B. Pre-Trial Challenges to the Death Penalty

It now appears that legal challenges to the availability of the death penalty in general, and to the applicability of particular aggravating circumstances, can be brought pre-trial. In *Commonwealth v. Carter*, the court seemed to apply a due process review to the failure of the Commonwealth to give notice of an aggravating circumstance. See *Commonwealth v. Carter*, 643 A.2d 61, 73-74 (Pa. 1994).
monwealth v. Martorano, the issue of the availability of the death penalty arose in the context of a petition for bail, because bail is not permitted in a capital case. The court held that the Commonwealth could seek the death penalty on retrial despite the imposition of a life sentence after a jury sentencing deadlock in the prior trial. In Commonwealth v. Gibbs, the defendant filed an omnibus pre-trial motion to preclude the death penalty based on alleged insufficient evidence as to three aggravating circumstances and double jeopardy as to two circumstances. The court rejected the double jeopardy argument and decided issues of statutory construction of aggravating circumstances (d)(1) and (d)(2). Although the court will not decide "sufficiency of the evidence" issues, it will permit legal challenges to be filed pre-trial.

C. Jury Selection

Two jury selection issues arose in death penalty cases during this period. One was the issue of "life qualification" — the assurance that potential jurors in death penalty cases are willing to consider mitigation in arriving at a sentence. There is a federal constitutional right to such voir dire. The court in Commonwealth v. Jermyn and Commonwealth v. Blount, held, however, that failure to request life qualification was not per se ineffective assistance of counsel. On the other hand, as suggested in Blount, if such a request were made, it would now be honored.

The other issue that arose concerned application of Batson v. Kentucky, which prohibited the racially discriminatory use of

235. See Martorano, 634 A.2d at 1066 n.5; PA. CONST. art. I, § 14. Article 1, section 14 of the Pennsylvania Constitution provides that, "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." PA. CONST. art I, § 14.
236. Martorano, 634 A.2d at 1071.
238. Gibbs, 626 A.2d at 135.
239. Id. at 136-38. The court held that a security guard may be considered a "peace officer" and that "transferred intent" does not apply in contract killing cases. Id. at 137-38.
240. Id. at 137.
244. Jermyn, 620 A.2d at 1132-33; Blount, 647 A.2d at 203-04.
245. Blount, 647 A.2d at 204.
peremptory challenges. Batson challenges may fail as a prima facie matter because of the omission to make an adequate record in the trial court during jury selection, or because the record made, though formally adequate, fails to persuasively suggest the presence of discrimination.

VI. TRIAL ISSUES

At the trial stage, a death penalty case is similar to any other homicide prosecution. Thus, many cases involved discussions, and sometimes reversals, on trial level issues. There is no reason to recount such cases here unless the trial issue involved the death penalty in some way.

There are a number of ways in which trial issues can influence later capital sentencing. One example is the admission of evidence at trial that the jury either is permitted to, or in any event will, consider at sentencing. Evidence of prior crimes, for instance, will certainly influence sentencing decisions, though there is no recognition of this in the opinions of the court in this period. This lack of recognition is possibly because such evidence would usually be admissible at sentencing under one or more aggravating circumstances. In Commonwealth v. Hawkins, admission of another murder led to the reversal of the murder conviction, whereas admissions were upheld in Sam and Rush. Indeed, as if to illustrate the relationship between trial and sentencing, the jury in Rush found (d)(9) during sentencing after the evidence was admitted at trial. Another type of evidence that could influence sentencing would be, as in Commonwealth v. Daniels, evidence tending to undermine

247. Batson, 476 U.S. at 89.
248. Id. at 96-97. This in fact occurred in Spence and Rush. See Spence, 627 A.2d at 1182-83; Rush, 646 A.2d at 564. Rush raised Batson in the context of alleged ineffective assistance of counsel. See Rush, 646 A.2d at 564.
249. Batson, 486 U.S. at 96-97. See Wilson, 649 A.2d at 443. In Young, the court rejected a more detailed Batson claim. Young, 637 A.2d at 1318-19. The defendant also argued that death qualification itself violates the state constitution. Id. at 1319-20. The court summarily rejected this claim. Id.
251. See note 121 and accompanying text.
253. Rush, 646 A.2d at 560; Sam, 635 A.2d at 607.
254. Rush, 646 A.2d at 564.
255. 644 A.2d 1175 (Pa. 1994).
the credibility of the defendant. Admission of evidence at trial may prejudice the defendant by including references to associations protected by the First Amendment, as arguably occurred in Reid II. Such evidence can raise constitutional issues if utilized during sentencing. One final trial issue that must always arise in a death penalty case is whether the defendant is truly guilty of the crime. Regardless whether the jury is supposed to take their confidence in the verdict into account at sentencing, there is no doubt that it is done. Thus, the decision to admit DNA evidence in Crews, for example, may have had consequences at sentencing. In a related vein, the court automatically reviews the sufficiency of the evidence for conviction in a death penalty case. There is no special standard of review, but presumably the court is most careful in such cases.

Trial issues can also impact on sentencing when a specific trial result subjects a defendant to the death penalty. Any issue about such a finding may impact the sentencing. For example, Pennsylvania cases could raise issues concerning the constitutionally requisite involvement of the defendant in the killing. Unlike states that permit the death penalty for felony murder, Pennsylvania requires specific intent to kill for a conviction of first degree, and thus capital, murder. When an error is made in applying the specific intent requirement, as occurred in Commonwealth v. Huffman, the constitutionality of the penalty, in effect, is challenged as well. Similarly, when an aggravating circumstance is essentially found at trial, as occurs in the felony circumstance cases, issues of instruction and sufficiency can raise constitutional questions at sentencing.

A third issue at death penalty trials concerns substantive differences in the law that apply only at such trials. For exam-
ple, the waiver of a jury means either the empaneling of a sentencing jury or a second waiver. Presumably this must be explained in the jury waiver colloquy, though the court did not so state in Commonwealth v. Hughes. In Hughes the court held that a verdict of guilty-but-mentally-ill is not permitted in a capital case. The court, however, did not explain what happens if a defendant was sentenced to life imprisonment after a sentencing hearing. Whatever a guilty-but-mentally-ill verdict means, surely that verdict should be available to all life-sentenced individuals, whether or not the prosecution sought the death penalty in their cases. Finally, the court held in Commonwealth v. Green that the request for exculpatory discovery submitted in almost all criminal cases requires the Commonwealth to provide all evidence "relevant and material to the issue of punishment" including evidence of mitigation. Given the breadth of potential mitigation, this ruling places a substantial burden on the Commonwealth.

VII. ISSUES AT SENTENCING

A. Procedure

A number of procedural issues at sentencing hearings were addressed during this period. In the area of recording verdicts, the court held in Commonwealth v. Young that Mills v. Maryland does not require an individual verdict slip for each juror. In Commonwealth v. Peterkin the court held that a trial court may impose two sentences of death when a jury returns a single verdict of death in a case involving multiple homicides. In the area of mitigating evidence, the court left decisions about introducing mitigation and mitigation witnesses to the defendant, though apparently premised on the traditional findings of knowing and intelligent waivers. In terms of aggravation, the court upheld the admission of pictures of the

266. See 42 PA. CONS. STAT. § 9711(b).
268. Hughes, 639 A.2d at 773-74.
270. See Brady v. Maryland, 373 U.S. 83, 87 (1963); PA. R. CRIM. P. 305.
271. Green, 640 A.2d at 1246.
274. Young, 637 A.2d at 1324.
276. Peterkin, 649 A.2d at 126.
277. See Birdsong, 650 A.2d at 84; Sam, 635 A.2d at 611.
murder victim six months before her death on the theory that the relationship between the defendant and the victim helped demonstrate torture, and that any error was harmless.\(^8\) The court also allowed shackling of the defendant during the sentencing hearing, but in a context in which there was no evidence that the shackles were visible to the jury.\(^7\)

**B. Prosecution Argument and Tactics**

The court tended in this period to permit vigorous argument in favor of the death penalty by the prosecution at the close of the sentencing hearing on the theory that prosecutors need some rhetorical space in their presentations.\(^2\)\(^9\) This characterization included allowing at least some reference to future danger\(^2\)\(^1\) and permitting response to defense argument.\(^2\)\(^2\) Even where, as in *Commonwealth v. Meadows*,\(^2\)\(^3\) prosecution argument was found to be improper, reversal of the sentence did not follow unless trial court admonitions and cautionary instructions were insufficient to guarantee a fair and impartial sentencing decision.\(^2\)\(^4\) The court also allowed the prosecution flexibility in regard to cross examination at the sentencing hearing.\(^2\)\(^5\)

**C. Instructions to the Sentencing Jury**

One issue that arose during this period was unanimity, or lack of unanimity, in the finding of mitigating circumstances. In *Mills v. Maryland*,\(^2\)\(^6\) the United States Supreme Court held that there may be no requirement of unanimity in mitigation findings.\(^2\)\(^7\) Under Pennsylvania law, the court has held that

\(^{277}\) Edmiston, 634 A.2d at 1090; see also Jerome Marshall, 643 A.2d at 1074-75.

\(^{279}\) Brown, 648 A.2d at 1188-89.


\(^{281}\) See *Peoples*, 639 A.2d at 451-52; *Griffin*, 644 A.2d at 1174-75; *Kenneth Williams*, 640 A.2d at 1262.

\(^{282}\) See *Griffin*, 644 A.2d at 1174.

\(^{283}\) 633 A.2d 1081 (Pa. 1993).

\(^{284}\) *Meadows*, 633 A.2d at 1088-89; see also *Young*, 637 A.2d at 1323.

\(^{285}\) See, e.g., *Jerry Marshall*, 633 A.2d at 1109-10 (cross-examination of defendant); *Young*, 637 A.2d at 1322-23 (cross-examination of expert).


\(^{287}\) *Mills*, 488 U.S. at 384.
the statute could not and never did require unanimity.\textsuperscript{288} In the one case in which there was an ambiguous trial court suggestion that non-unanimous mitigation findings were entitled to less weight, the supreme court reversed the sentence.\textsuperscript{289}

Because jury discretion at sentencing is very broad, a judge may not direct the jury to find a particular aggravating circumstance, even one that could hardly be contradicted on the record.\textsuperscript{290} Justice Cappy asserted in a plurality opinion in Commonwealth v. Stokes\textsuperscript{291} that the trial judge improperly invaded the jury's role of applying (d)(7) by instructing that "as a matter of logic" the circumstance was present.\textsuperscript{292}

Judges do limit jury discretion, in a sense, by not instructing on mitigating circumstances. In several cases, the court upheld such refusals to charge.\textsuperscript{293} One surprising case in which the court upheld refusal to charge was Commonwealth v. Cross.\textsuperscript{294} The context in Cross was a Post Conviction Relief Act\textsuperscript{295} action in which the defendant alleged that appellate counsel had been ineffective for not challenging the trial judge's failure to charge Section 9711(c)(1)(v) to the jury.\textsuperscript{296} Section 9711(c)(1)(v) provides that:

The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.\textsuperscript{297}

The court held that section (v) was for the information of the judge, not the jury.\textsuperscript{298} Therefore, the omission was proper and failing to challenge it was not ineffective assistance of counsel.\textsuperscript{299}

\textsuperscript{288} See, e.g., Hackett, 627 A.2d at 725; Kenneth Williams, 640 A.2d at 1262.
\textsuperscript{289} See Blount, 647 A.2d at 209-10.
\textsuperscript{290} Certainly, the judges in Jerome Marshall, Kenneth Williams, and Thompson, came close. See Jerome Marshall, 643 A.2d at 1075-76; Kenneth Williams, 640 A.2d at 1262; Thompson, 648 A.2d at 328; see also Wilson, 649 A.2d at 450 (judge did not foreclose consideration of mitigation).
\textsuperscript{291} 615 A.2d 704 (Pa. 1992).
\textsuperscript{292} Stokes, 615 A.2d at 713-14. The court affirmed the sentence of death despite this error. \textit{Id}.
\textsuperscript{293} See, e.g., Young, 637 A.2d at 1322 (no instruction on mercy verdict); Rivers, 644 A.2d at 719-20 (no instruction on age); cf. Wilson, 649 A.2d at 452 (no sentencing instruction on reasonable doubt).
\textsuperscript{294} 634 A.2d 173 (Pa. 1993).
\textsuperscript{295} See 42 PA. CONS. STAT. §§ 9541-51.
\textsuperscript{296} Cross, 634 A.2d at 178.
\textsuperscript{297} 42 PA. CONS. STAT. § 9711(c)(1)(v).
\textsuperscript{298} Cross, 634 A.2d at 178.
\textsuperscript{299} Id.
What is odd, indeed shocking, about the Cross opinion is that section (v) is always charged to the jury in Pennsylvania death penalty cases because, simply put, the statute says to do so. Section (c)(1) clearly provides that, "[b]efore the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters." Those matters are set forth in a list of five topics, including section (v). Perhaps there was some reason why the plain statutory language was not followed; however, the court in Cross failed even to mention this statutory directive. Despite Cross, trial judges will no doubt go on reading the five-topic list to the jury.

A different sort of instruction that may be challenged occurs when issues that really are not present in the case are put to the jury. In Commonwealth v. Hackett, the court upheld the submission to the jury of the entire list of statutory aggravating and mitigating circumstances, ruling that it did not prejudice the defendant. The court in Commonwealth v. Kenneth Williams, in somewhat different language, held that it was error to submit an aggravating circumstance to the jury that was not supported by the evidence, but that such error was harmless if the jury did not find the circumstance to be present. The better practice would seem to be to limit the instruction.

An instruction issue that arose in Commonwealth v. Peoples involved the judge's attempt to explain the weighing process in familiar terms. The judge compared it to the four- and five-star movie rating system. The court upheld the instruction because the instruction as a whole did not "trivialize the process."

Where an actual error was found in instruction, the court did not hesitate to reverse the sentence. For example, in Commonwealth v. DeHart, the omission of an "s" in the phrase "mitigating circumstances" on the verdict slip, affected the jury's weighing process, and therefore, caused the court to reverse the

300. See 42 PA. CONS. STAT. § 9711(c)(1).
301. Id.
302. Id.
304. Hackett, 627 A.2d at 726. The court also upheld references in the charge to all four defendants as not suggesting a "collective verdict." Id. at 726 n.7.
306. Kenneth Williams, 640 A.2d at 1263.
308. Peoples, 639 A.2d at 450-51.
309. Id.
310. Id. at 451.
sentence. 312

D. Resentencing

There are two situations in which a defendant may face a second death penalty sentencing hearing. In Commonwealth v. Martorano 313 and Commonwealth v. Gibbs, 314 the court had previously reversed murder convictions, leading to new trials. 315 In contrast, in Commonwealth v. Jerome Marshall 316 and Commonwealth v. Young, 317 the court had previously reversed sentences of death and remanded for new sentencing hearings only. 318

Both Martorano and Gibbs raised pre-trial double jeopardy issues relating to the second sentencing hearing. 319 In Martorano, the previous jury had deadlocked as to sentence, thereby leading to judicial imposition of a life sentence pursuant to Section 9711(c)(1)(v). 320 The defendants argued that under the statute, jury non-unanimity was as much a verdict as was any other jury action. 321 The Martorano court, however, ruled that a life sentence based on such deadlock was merely a “default judgment” and therefore, death could be sought on retrial. 322 In Gibbs, the court held that failure to find a particular aggravating circumstance did not bar the prosecution from seeking the same aggravating circumstance in a new sentencing hearing. 323 The court in Gibbs asserted that, when death was imposed in a prior case, in order to seek the death penalty again, the prior jury must only have found one aggravating circumstance. 324 If that occurred, the prosecution may treat a new sentencing hearing as a wholly new case. 325

The language of Gibbs is in some tension with the language in Martorano because in the latter case, the original sentencing jury did not find “that the presence of one or more factors weighed

312. DeHart, 650 A.2d at 48-49.
315. Martorano, 634 A.2d at 1064-65; Gibbs, 626 A.2d at 135.
316. 643 A.2d 1070 (Pa. 1994).
318. Jerome Marshall, 643 A.2d at 1072; Young, 637 A.2d at 1315.
319. See Martorano, 634 A.2d at 1067-68; Gibbs, 626 A.2d at 136.
320. Martorano, 634 A.2d at 1064. See notes 296-302 and accompanying text for discussion of section 9711(c)(1)(v).
321. Martorano, 634 A.2d at 1070.
322. Id.
324. Id. at 137.
325. Id. at 136-37.
against other circumstances warranted the death penalty.\(^{326}\)
Further, Martorano invites defense attorneys to distinguish between true deadlock and a non-unanimous verdict of life imprisonment by the sentencing jury. If the jury is not instructed as to the consequences of true deadlock, which the court held they need not be in Cross,\(^{327}\) then the jury instruction of subsection 9711(c)(1)(iv) directs the jury to return a verdict of life if they are not unanimous for death.\(^{328}\) If the jury were actually to do that, even under Martorano, the decision would presumably be final for double jeopardy purposes.

The other resentencing issues involve new sentencing hearings only. In both Jerome Marshall and Young, the court held that a statutory change permitting a resentencing hearing — as opposed to imposition of a life sentence — was not an unconstitutional ex post facto law as applied to a defendant whose first sentencing hearing took place under the prior rule.\(^{329}\) In both cases, the court held that the change was merely procedural and violated neither the state nor the federal constitution.\(^{330}\)

The other issues that arose in both cases concerned the amount of evidence about the underlying murder that could be introduced at the second sentencing hearing.\(^{331}\) The court held, in effect, that the jury at the second sentencing hearing was not to consider only aggravation and mitigation, but also had to understand the crime for which the defendant was being sentenced.

VIII. POST-TRIAL ISSUES

This section concerns actions taken by trial judges after a verdict of death has been returned and before the case goes to the Pennsylvania Supreme Court for automatic review. Generally, after a verdict of death is returned, the trial counsel files post-trial motions and then handles the appeal. When this is done, issues of trial counsel ineffectiveness are handled in some later proceeding, perhaps PCRA. On the other hand, trial counsel may

\(^{326}\) Id. at 137.
\(^{327}\) See notes 294-302 and accompanying text for a discussion of Cross.
\(^{328}\) Section 9711 (c)(1)(iv) provides:
The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
\(^{329}\) Jerome Marshall, 643 A.2d at 1073; Young, 637 A.2d at 1316-18.
\(^{330}\) Jerome Marshall, 643 A.2d at 1073; Young, 637 A.2d at 1318.
\(^{331}\) Jerome Marshall, 643 A.2d at 1073-74; Young, 637 A.2d at 1320-22.
withdraw after the filing of post-trial motions, and another attorney will handle the appeal. In the latter instance, issues of ineffectiveness by trial counsel can then be included in an amended post-trial motion.\(^{332}\)

In terms of the authority of the trial judge at the post-trial stage, \textit{Commonwealth v. Moran},\(^{333}\) in which the prosecution argued for a life sentence after extensive cooperation by the defendant, stands for the proposition that there is no general discretion to refuse to impose a sentence of death after the jury has so found.\(^{334}\) On the other hand, in the same case, the court implicitly endorsed the trial judge’s decision to reverse (d)(9), post-trial, on the ground that the evidence failed to support the circumstances as interpreted by the courts.\(^{335}\) It thus appears that the trial judge may review the sentence within the same parameters as will the state Supreme Court on appeal.

In three cases, arguments for new trials on the basis of after-discovered evidence failed.\(^{336}\) The court treated these as unexceptional claims and applied a traditional standard—that is, a standard unrelated to the death penalty.\(^{337}\) The court did not address the issue in these cases of the proper standard if after-discovered evidence were to be argued as the basis for a new sentencing hearing.

\section*{IX. ISSUES ON APPEAL}

\subsection*{A. What Kind of Appeal and Where?}

Under the death penalty statute, an appeal to the Pennsylvania Supreme Court is automatic.\(^{338}\) The only situation in which

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\(^{332}\) See, e.g., \textit{Thompson}, 648 A.2d at 318. The court did, however, uphold the refusal to hear pro-se post-trial motions filed by a represented defendant. \textit{Edmiston}, 634 A.2d at 1092. The court called this “hybrid representation.” \textit{Id.}


\(^{334}\) \textit{Moran}, 636 A.2d at 613-14.

\(^{335}\) \textit{Id.} at 613 n.1.

\(^{336}\) \textit{See Wilson}, 649 A.2d at 448-449; \textit{Kenneth Williams}, 640 A.2d at 1263-64; \textit{Moore}, 633 A.2d at 1135-36.

\(^{337}\) The standard utilized in \textit{Kenneth Williams}, for example, was taken from \textit{Commonwealth v. Mosteller}, a non-capital case:

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After-discovered evidence can be the basis for a new trial if it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely to impeach the credibility of a witness; and 4) is of such nature and character that a different verdict will likely result if a new trial is granted.


\(^{338}\) 42 \textit{Pa. Cons. Stat.} § 9711(h)(1). Section 9711(h)(1) provides that, “[a]
an appeal following a sentence of death would be heard by the superior court is a case in which the trial court granted post-trial relief. On automatic appeals, the state supreme court always engages in a four part review. Beyond that, the court reviews the usual run of issues that can be raised in any other appeal.

B. What Issues Will Be Reviewed?

The court's basic approach, as stated previously, is to decide any issues in a death penalty case that could be raised in any other criminal case. But the court goes further, for example reviewing issues raised pro se by a defendant who is represented by counsel.

The best-known illustration of the court's willingness to decide issues in death penalty cases is the no-waiver rule. From the beginning of the court's review of death penalty cases under the statute, the court has reached issues on the merits that would have been considered waived in a non-capital case. The court has consistently adhered to the no-waiver policy. This means that Pennsylvania will not face the situation that other states have faced of executing a defendant whose constitutional rights, though waived, had clearly been violated.

sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules." Id.

339. See, e.g., Commonwealth v. Douglas, 645 A.2d 226, 227 (Pa. 1994) (Following a sentence of death, the court of common pleas granted a new trial; the superior court reversed and remanded; and the supreme court affirmed.).

340. The court always determines:

1) whether sufficient evidence was presented at trial to support the conviction of murder of the first degree; 2) whether the sentence of death is the product of passion prejudice, or any other arbitrary factor; 3) whether the evidence fails to support the finding of at least one specified aggravating circumstance; and, 4) whether the sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.


341. The court conducts only the minimum review in cases in which the defendant chooses to raise no issues on appeal. See, e.g., Commonwealth v. Gamboa-Taylor, 634 A.2d 1106, 1107 (Pa. 1993); cf. Kindler, 639 A.2d at 4 (when the defendant was a fugitive during the appellate process).


343. See Commonwealth v. Zettlemoyer, 454 A.2d 937, 955 n.19 (Pa. 1982), cert. denied, 461 U.S. 970 (1983) ("We will not adhere strictly to our normal rules of waiver . . . . Accordingly, significant issues perceived sua sponte by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved.").

344. See, e.g., Commonwealth v. Billa, 555 A.2d 835, 842 (Pa. 1989); Kenneth Williams, 640 A.2d at 1261.

Nevertheless, issues can still be waived in death penalty cases. Some issues can be waived because the underlying legal right can be waived. In such a case, there is literally no issue once that waiver is found. Other claims may be called “waived” when in fact the defendant simply has failed to offer proof supporting the claim. Actually, in such situations, the claim fails on the merits. Non-preserved claims under Batson v. Kentucky fail in this way because although the court does review the challenge, the post-hoc review on appeal generally finds a failure to make out a prima facie showing of purposeful discrimination. The no-waiver rule also arises under the PCRA. For example, in DeHart, the court reached an issue that had been waived and reversed the sentence of death.

One set of issues the court seems not to reach concerns fact-finder decision-making, specifically whether mitigating circumstances exist and how much weight they should be given. Nevertheless, in two cases the court asserted that it would and does review the weighing of aggravation and mitigation “as a matter of law” through the statutory review mandated by Section 9711(h)(3)(i). While the court will not impose its “own evalu-

346. See Wilson, 649 A.2d at 447-48 (defendant made a knowing and voluntary waiver of right to be present during penalty phase arguments). This language in Wilson is in some tension with that in Commonwealth v. Ford, in which the court seems to hold that a defendant could not waive his right to be present because he was obligated to be present. See Commonwealth v. Ford, 650 A.2d 438, 440 (Pa. 1994). The court hedged this holding by suggesting that the defendant was not prejudiced by the requirement that he attend. See Ford, 650 A.2d at 440 n.6.

347. See, e.g., Ford, 650 A.2d at 440 (no proof of interference with jury deliberation, therefore issue was “waived”).


349. See, e.g., Wilson, 649 A.2d at 442; Spence, 627 A.2d at 1182-83.

350. See DeHart, 650 A.2d at 48 (noting that the verdict slip issue was “technically waived” but would be decided “because we have not been strict in applying our waiver rules in death penalty cases”); cf. Peterkin, 649 A.2d at 125 (approving of a stricter PCRA standard, but nevertheless, reaching all issues on the merits).

351. See, e.g., Gamboa-Taylor, 634 A.2d at 1109. In Gamboa-Taylor the court noted that, “[a]s to Valerie’s death, the court found that these two mitigating circumstances did not outweigh the one aggravating circumstance, and since sufficient evidence supports the aggravating circumstance found, there is no basis upon which we can reverse the court’s conclusion as to the penalty.” Id.; cf. Rivers, 644 A.2d at 719 (asserting that only the jury can decide whether criminal history was “significant”).

352. See Brown, 648 A.2d at 1188. In Brown, the court contended: While this court does not perform a weight-of-evidence analysis of the jury’s balancing of aggravating and mitigating circumstances, it nevertheless reviews the sentence pursuant to 42 Pa.C.S. § 9711(h)(3)(i), which requires review for “passion, prejudice or any other arbitrary factor.” This is tantamount to reviewing the fairness of the jury’s evaluation of the aggravating and mitigating circumstances “as a matter of law.”
An example of this sort of review may be found in Commonwealth v. Rush, in which the court responded to the defendant’s challenge of the no-mitigation finding by pointing to the inadequacy of the defense’s evidence. Similarly, in Commonwealth v. Hughes, the court held that the trial judge sitting as fact-finder did not err in failing to find (e)(3).

C. Standards of Reversal in Death Penalty Cases

In reviewing alleged errors in the finding of aggravating circumstances, the court did not reverse, despite such error, if another aggravating circumstance was present and no mitigation was found. The court also did not reverse if error did not lead to a finding of aggravation. On the other hand, if there was error in the finding of one of multiple aggravating circumstances, and mitigation was present, reversal of the sentence was automatic. There is no re-weighing of the sentencing evidence.

The other standards utilized by the court in death penalty review are the usual ones in criminal cases or are adaptations of statutory review provisions. For example, the harmless error standard the court uses renders error harmless only when “it is clear beyond a reasonable doubt that the error could not have contributed to the verdict.”

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Id.  
353. See Thompson, 648 A.2d at 321.  
354. 646 A.2d 557 (Pa. 1994).  
355. Rush, 646 A.2d at 564.  
357. Hughes, 639 A.2d at 774.  
358. See, e.g., Commonwealth v. Smith, 650 A.2d 863, 868 (Pa. 1994); Stokes, 615 A.2d at 714. Death is mandated in such a case, despite the error. See 42 PA. CONS. STAT. § 9711(c)(1)(iv).  
359. See Kenneth Williams, 640 A.2d at 1263 (harmless error to submit torture aggravating circumstance because circumstance not found).  
360. See Antoine Williams, 650 A.2d at 430.  
361. Edmiston, 634 A.2d at 1090; see also Young, 637 A.2d at 1323 (Improper prosecution sentencing argument not ground for reversal unless the “unavoidable effect was to prejudice the jury so that it was unable to weigh the evidence objectively and render a true verdict.”); Commonwealth v. Carpenter, 617 A.2d 1263, 1268 (Pa. 1992) (For death sentences to be reversed, erroneous sentencing instruction must “inject ‘passion, prejudice or some other arbitrary factor’ into jury deliberation.”); accord Daniels, 644 A.2d at 1184.
D. Proportionality Review

The death penalty statute prescribes proportionality review in every death penalty case. In fulfillment of this obligation, the court in 1984 ordered the Administrative Office of Pennsylvania Courts to begin compiling information about first degree murder cases in Pennsylvania.

By and large, it is impossible to tell what sort of review the court conducts pursuant to Section 9711 (h)(3)(iii). The language the court utilizes in the opinions to describe the process conveys no information at all, beyond the assertion that a review was carried out. Obviously if the opinions simply repeat this, it does not matter if, as in Jerry Marshall, there was no reference to the “study” that set forth the universe of comparison.

In part, the perfunctory quality of proportionality review may be premised on the view that when no mitigation is found, and death is mandated by law on the finding of one valid aggravating circumstance, death is by definition proportional and non-excessive. At least the court suggested this in Commonwealth v. Craig Williams, when it asserted:

In addition, upon our review of the data and information compiled and monitored by the Administrative Office of Pennsylvania Courts, we find no excess or disproportionality when compared to the sentences imposed in similar cases. We emphasize that the statute requires a verdict of death in those instances where the jury finds at least one aggravating circumstance and no mitigating circumstances, 42 Pa.C.S. §9711(c)(1)(iv). Therefore, all similarly situated defendants receive the same sentence, and thus, the death penalty cannot be considered excessive or disproportionate to the penalty imposed in cases involving these circumstances. Furthermore, upon consideration of the manner in which appellant com-

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362. Section 9711(h)(3)(iii) provides that, “[t]he Supreme Court shall affirm the sentence of death unless it determines that . . . (iii) 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. CONS. STAT. § 9711(h)(3)(iii).


364. See, e.g., Hackett, 627 A.2d at 727. In Hackett, the court noted: We now comply with our duty under 42 Pa.C.S. § 9711(h)(3)(iii) to review sentences of death from the standpoint of the proportionality to sentences imposed in similar cases. We have reviewed the sentences imposed on Hackett in light of sentencing data compiled and monitored by the Administrative Office of Pennsylvania Courts. We perceive no excess or disproportionality in the sentences imposed.

Id. (citations omitted).

365. Jerry Marshall, 633 A.2d at 1111 (simply “similar cases”).

mitted this homicide, together with his character and record, we find no basis upon which to conclude that his sentence is excessive or disproportionate to the penalty imposed in similar cases.367

But even if no review is needed in no-mitigation cases, that does not explain a perfunctory approach to proportionality review in a case like Commonwealth v. Conforti, 368 in which the jury found that the single aggravating circumstance of murder during the commission of a felony outweighed substantial mitigation of no prior record, physical disability and "mental state."369 If the point of proportionality review is to avoid imposing the death penalty when more egregious cases receive life terms, then surely the proportionality of Michael Conforti's sentence was sufficiently in doubt to warrant some specific detail as to what cases his was compared to.

For that matter, even in Craig Williams, when no mitigation was found, the court, in fact, did say more about its review.370 More thorough analysis should be required in such cases. For one

\[367. \textit{Craig Williams,} 615 \text{A.2d at 728. Of course, if the Justices really thought that the matter was automatic, why was the last sentence added?} \]

\[368. 626 \text{A.2d 129 (Pa. 1993). The court in Conforti asserted:} \]

\[\textit{At the penalty hearing, the jury sentenced appellant to death, based upon its finding that the one aggravating circumstance, that the defendant committed the killing while in the perpetration of a felony (42 Pa.C.S.A. § 9711(d)(6)) outweighed the two mitigating circumstances, that the defendant has no significant history of prior criminal convictions (42 Pa.C.S.A. § 9711(e)(1)) and the defendant's physical disability and mental state at the time of the crime (42 Pa.C.S.A. § 9711(e)(8)). In accordance with our statutorily mandated review, we find that the evidence overwhelmingly supports the finding of at least one aggravating circumstance, since the killing occurred during the commission of five felonies, i.e. kidnapping, rape, and conspiracy to commit the crimes of murder, kidnapping, and rape.} \]

\[\text{The record also supports our conclusion that the sentence of death is a product of the evidence and not a product of "passion, prejudice or any other factor." 42 Pa.C.S.A. § 9711(h)(3). Additionally, based upon information accumulated by the Pennsylvania Death Penalty Study and supplied by the Administrative Office of Pennsylvania Courts, we conclude that the circumstances of the crime and the record of the appellant justify the sentence of death and that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases.} \]

\[\textit{Conforti,} 626 \text{A.2d at 132.} \]

\[369. \textit{Id.} \]

\[370. \text{See Craig Williams,} 615 \text{A.2d at 727. The court asserted:} \]

\[\text{Appellant argues that the death sentence is excessive in this case because he did not intend to kill Gordon Russell and was convicted of murder of the first degree based upon "transferred intent." This position is ludicrous. The jury found that Appellant \textit{did} intend to kill and \textit{did} kill, and he has no basis to compare himself with those who did not. One who intentionally kills, but whose fatal blow fall on a mistaken victim, is if anything more culpable than murders who do not carelessly kill innocent bystanders.} \]

\[\textit{Id.} \]
thing, juries do not always return sentences of death when the statute mandates it, as the court acknowledged in Reid I. For another, there can be more to a case than a simple “no-mitigation” finding suggests, as Craig Williams shows.

The uncontradicted evidence in Craig Williams was that two days before the killing, Erica Riggens had severely knifed Williams’s girlfriend, who was seven months pregnant. The murder victim, Gordon Russell, had the misfortune to walk into the line of fire two days later, when Williams found Erica Riggens and shot at her. The only aggravating circumstance found was grave risk of death to another.

While Williams was obviously guilty of first degree murder, the court’s conclusion that transferred intent did not render the sentence disproportional ignored the underlying issue of “similar case” review. Even without a study, one can say that the circumstances of many first degree murder cases in Pennsylvania are far worse than the circumstances in Craig Williams, and clearly more culpable defendants have been before the court. The court should have openly reviewed similar cases — and more egregious ones — to determine whether those other defendants routinely received life sentences.

The problem may be that the Justices are not prepared to expose to public discussion the decision-making process they are using. Perhaps it is not clear to the Justices what proportionality review requires of them. To date, they have not reversed a sentence of death under the statute on the basis of proportionality review.

371. Reid I, 626 A.2d at 123 (In a case of no mitigation, “[o]ur review indicates that the death penalty has been imposed in a substantial number of such cases.”).
372. Craig Williams, 615 A.2d at 720.
373. Id.
374. Id. at 728. See note 65 for the text of section 9711(d)(7) providing for risk of death to another as an aggravating circumstance.
375. Id. at 727-28.
376. In two cases, the court did address proportionality in more substantive terms. In Young, the court rejected claims that the proper database for purposes of comparison was the county in which the murder occurred and that the trial judge should have conducted that review. Young, 637 A.2d at 1331. In Hughes, the defendant actually attached a comparison case to his brief. Hughes, 639 A.2d at 775. The court took pains to distinguish that life-sentenced case from Hughes. Id. The court’s care suggests that defense counsel should work harder to present specific cases to the court for proportionality comparison.
X. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are raised in almost every death penalty case. But under that general heading, such claims actually raise two different types of issues.

One set of ineffectiveness challenges represents a way of raising claims that have not been properly preserved below. For example, in Commonwealth v. Blount,377 the court reversed the sentence of death because the defendant received ineffective assistance of counsel at the sentencing phase.378 In reality, however, ineffectiveness was merely a "guise"379 for challenging the trial court's sentencing instruction, to which trial counsel should have, but did not, object. Thus, the real issue was simply whether there was prejudicial error at the sentencing.380 The same sort of ineffectiveness challenge was raised concerning a failure to request guilt phase instruction in Commonwealth v. Chmiel.381

Given the no-waiver rule,382 it is not clear whether this sort of ineffectiveness claim is really needed. It would appear that the court would reach a challenge like the one raised in Blount simply on the merits, even though trial counsel had failed to object to the instruction at the sentencing.383 In any event, these sorts of ineffectiveness claims are best understood as challenges on the merits.384

379. Id. at 208-09.
380. See also Brown, 648 A.2d at 1185 (no ineffectiveness for failure to object to the method of proving (d)(12) because the method was proper).

It is not that the court in Blount did not cite an ineffectiveness standard, for it did do so. See Blount, 647 A.2d at 203. The court noted:

In order for appellant to prevail on a claim of ineffectiveness, he must demonstrate that: (1) the underlying claim is of arguable merit; (2) the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3) counsel's ineffectiveness prejudiced him. Counsel can never be found ineffective for having elected not to raise a meritless claim. Moreover, we begin with the presumption that trial counsel was not ineffective. Id. (citations omitted). Rather, the court simply did not consider anything other than the merits of the underlying claim. Id. at 209-10.

381. 639 A.2d 9, 12 (Pa. 1994) (failure to give an accomplice instruction was reversible error).
382. See notes 343-45 and accompanying text for discussion of the no-waiver rule.
383. Ineffectiveness claims can only be raised on appeal if the defendant is not represented by trial counsel. See Birdsong, 650 A.2d at 30. If trial counsel could raise these same issues on appeal through the no-waiver rule, no substitution of counsel would be necessary.
384. In Chmiel, the court applied ineffectiveness analysis, but it is not certain
The other major form of ineffectiveness claim, and one which truly does go to the competence of counsel, concerns counsel's conduct at the trial and sentencing. Perhaps the best example of this sort of claim was Commonwealth v. Perry, in which the court found that counsel had woefully failed to prepare either for the trial or for the sentencing and that he had not even been aware on the eve of trial that his client was facing the death penalty. The court remanded for a new trial.

The court examines this sort of ineffectiveness challenge on a case by case basis. Even the failure to present any specific mitigation evidence was held not to be ineffective per se. The defendant must be able to specify what mitigating evidence should have been offered. In judging ineffectiveness claims that go to conduct of the trial and sentencing, the court gives deference to "any reasonable basis" that counsel may proffer. The defendant must also show prejudice.

Other claims of ineffective assistance of counsel have also been rejected. In several cases, the defendant argued that counsel had been ineffective for following the defendant's instructions. The court rejected these claims.

A claim related to ineffectiveness was raised in Commonwealth v. Carter, in which the defendant argued that he was entitled to two attorneys in a death penalty case. The court rejected the claim, in part because of a failure to show prejudice. Perhaps the court would be more amenable to this argument on a
nally, ineffectiveness claims are raised routinely in PCRA cases. These will be discussed below.

XI. POST CONVICTION ISSUES

The Pennsylvania Post Conviction Relief Act is a highly specialized mode of relief for persons whose convictions have already been affirmed. The first question about the PCRA is whether the Pennsylvania Supreme Court, which hears capital PCRA appeals, applies PCRA law as it would apply in any non-capital case, or whether the court takes account of the capital nature of the case, as it does on direct appeal.

There are indications that the court takes the death penalty into account. In Commonwealth v. Maxwell, for example, Justice Larsen's plurality opinion stated that the challenge to the use of a certain New York conviction to prove (d)(9) was not cognizable because it had been previously litigated. But Justice Larsen then added in a footnote that, "[e]ven assuming that appellee's claim is cognizable for the purpose of this appeal (and we make the assumption only because this is a death penalty case), [the claim is without merit]." The court also reached the merits of a claim of ineffectiveness in Commonwealth v. Griffin, after stating that the ineffectiveness was not cognizable because of the defendant's prior self-representation and that the court would not treat the case differently just because it was a death penalty case. The court then immediately added that, "[i]n light of the severity of appellant's sentence, however, we will discuss the merits of Appellant's claims of ineffectiveness of counsel." On the other hand, in Commonwealth v. Peterkin, the court applied both the previously litigated and waiver standards, although it is not clear that any issues were actually avoided.

While no absolute rule can be deduced from such an array, it is clear that the court hesitates to send someone to death because

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different record.

398. See DeHart, 650 A.2d at 42 n.5; Griffin, 644 A.2d at 1169.
400. Maxwell, 626 A.2d at 501; see also 42 PA. CONS. STAT. § 9543(a)(3).
401. Maxwell, 626 A.2d at 501 n.4; see also Jermyn, 620 A.2d at 1133 (holding that the issue had been previously litigated and was without merit).
403. Griffin, 644 A.2d at 1171.
404. Id.
405. 649 A.2d 121 (Pa. 1994).
406. See Peterkin, 649 A.2d at 123-25.
of a failure to comply with procedural and timing rules. If issues are without merit, the court prefers to deny relief directly.

The best illustration of reaching the merits is Commonwealth v. DeHart, the one PCRA case in which relief was granted. In DeHart, the court reversed because of an error in the sentencing verdict slip. The court began its discussion by acknowledging the procedural bar. The court asserted:

Although Appellant concedes that this issue is technically waived because it was not previously raised below, we will nonetheless address it because we have not been strict in applying our waiver rules in death penalty cases. See Commonwealth v. Billa, 521 Pa. 168, 181, 555 A.2d 835, 842 (1989).

Not only does this language show that the court will reach meritorious issues in death penalty cases despite the limitations of PCRA, but the reference to Commonwealth v. Billa, a direct appeal case, suggests that the court will be as ready to do so in PCRA actions as it is on direct appeal.

In contrast to this willingness to reach arguably barred issues, the court did rely on non-retroactivity to affirm a death sentence in another PCRA case, Commonwealth v. Fahy. In Fahy, the court held that the law had "changed" in 1987 as to requirements for instruction on torture and that Fahy would not be granted relief because his trial had occurred before the change was announced.

In terms of the substantive standards under PCRA, the opinions tend to treat ineffectiveness in much the same way as on direct appeal and with similar results. In Commonwealth v. Cross, for example, the defendant claimed ineffectiveness for failure to object at the trial and the failure to raise on appeal two sentencing instruction issues. The court resolved these issues by holding that there had been no error as a matter of substantive death penalty law.

In Commonwealth v. Jermyn, the defendant challenged tri-
al counsel's conduct of the sentencing hearing. The court held that counsel's failure to fully cooperate with the defendant had been consistent with the attorney's ethical obligations.

The court's treatment of successor PCRA petitions acknowledged the strict statutory standards for such petitions. In Commonwealth v. Szuchon, the court set forth the standard as follows:

Finally, our cases require that a second or subsequent petition for post-conviction relief will not be entertained "unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred."

This standard is met if the petitioner can demonstrate either: (a) that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate, or (b) that he is innocent of crimes charged.

On the other hand, the court showed flexibility even here. In Szuchon itself, for example, the opinion strongly suggested that the issues raised were without merit. In Griffin, the court treated what was "[a]s a technical matter" a successor petition as if it were the defendant's first post-conviction petition, in part because of "the severity of Appellant's sentence."

One issue the court did not rule on expressly is the proper standard for a stay of execution under PCRA. In Griffin, a stay of execution was issued "pending disposition of [the] PCRA petition." The court did not express any view about the propriety of the stay in its opinion. In Fahy, the court recited its grant of a stay of execution upon the filing of a Petition for Stay of Execution and Appointment of Counsel, but the court again did not state whether such stays were automatic upon the filing of a PCRA petition or whether some standard of review should be applied.

419. Id. at 1131; see also Commonwealth v. Smith, 650 A.2d 863, 866-67 (Pa. 1994) (counsel's failure to present mitigation reasonable).
421. Szuchon, 633 A.2d at 1099-100 (citations omitted).
422. Id. at 1099.
423. Griffin, 644 A.2d at 1170. The court also noted that the "mere assertion of ineffective assistance of counsel" would not be sufficient for relief in a successor petition; rather, there must be a showing of a miscarriage of justice. Id. at 1170 n.2 (citing Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988)).
424. Griffin, 644 A.2d at 1169.
425. See Fahy, 645 A.2d at 201.
XII. THE ROLE OF THE GOVERNOR

The death penalty statute provides that upon affirmance of a death penalty by the Pennsylvania Supreme Court, "the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record [of the case]." Pennsylvania law further provides that upon the receipt of the record, the governor "shall issue a warrant." No execution can be carried out without a warrant from the governor.

In Morganelli v. Casey, the district attorney of Northampton County sued in Commonwealth Court for a writ of mandamus directing Governor Casey to sign warrants for two death-sentenced individuals. The court granted this relief.

Obviously, the Morganelli litigation raises important issues of separation-of-powers. One would have expected a number of district attorneys, frustrated over the pace of warrant signings, to file similar suits, until the Pennsylvania Supreme Court finally resolved the issues of the governor's power and discretion.

That may not happen, however. With the election of Governor Tom Ridge, the warrant situation is changing. Governor Ridge said repeatedly during the election campaign, and has repeated since then, that the warrant process should be expedited. It may be that Morganelli will be rendered moot by changes in the law and/or in procedures in the Governor's office.

426. 42 PA. CONS. STAT. § 9711(h)(3)(iii).
427. PA. STAT. ANN. tit. 61, § 2123 (1964) ("After the receipt of the said record the Governor of the Commonwealth shall issue a warrant, directed to the Secretary of Corrections, commanding that such inmate be executed within the week to be named in said warrant, and in the manner prescribed by law.").
428. PA. STAT. ANN. tit. 61, § 2123.
430. Morganelli, 641 A.2d at 676-77.
431. Id. at 678.
433. On Monday, February 26, 1995, Governor Ridge ordered the mandamus appeal in the Morganelli case to be dropped and signed warrants in the two cases at issue. See PITTSBURGH POST-GAZETTE, March 6, 1995, at B2. The scope of review of death penalty cases in federal habeas corpus is beyond the scope of this article. See 28 U.S.C. § 2254 (1988). Such review applies to federal claims only and in theory will be applied in the same way in every state. Of course, federal review does depend upon state procedural and substantive law. For example, the issue of procedural default will be influenced to a great extent by Pennsylvania's no-waiver rule. Cf. Coleman v. Thompson, 501 U.S. 722 (1991). Ultimately, however, federal standards will govern.
XIII. EPILOGUE

During the period when this article was being readied for publication, events involving the death penalty continued to unfold. The Pennsylvania Supreme Court decided four cases relating to the death penalty, three affirmances on direct appeal and one denial of a stay of execution, and newly elected Governor Tom Ridge signed three warrants of execution, that of Martin Appell for the week of April 2, 1995; that of Joseph Henry for the week of April 16, 1995; and that of Keith Zettlemoyer for the week of April 30, 1995.\(^{434}\)

In terms of the cases, the court affirmed the sentence of death in *Commonwealth v. Rompilla*,\(^{435}\) *Commonwealth v. Bond*\(^{436}\) and *Commonwealth v. Jones*.\(^{437}\) The cases do not break new ground. All three indicate problems in representation. In *Rompilla*, the defendant attempted unsuccessfully to supplement motions and briefs.\(^{438}\) In *Bond*, the defense raised no sentencing issues on appeal. In *Jones*, appellate counsel was at least the defendant's fifth attorney.\(^{439}\) The Supreme Court had previously remanded the case after submission of briefs without argument for the appointment of new counsel because "the efforts of appellant's [prior] counsel [were] less than adequate."\(^{440}\) The defendant challenged the failure of trial counsel to present character witnesses or investigate for sentencing purposes, but made no showing on appeal of what should have been done nor what it would have produced.\(^{441}\)

The court in *Rompilla* affirmed a finding of aggravating circumstance (d)(8), torture, upon direct, expert evidence that the wounds were inflicted with the intent to cause pain.\(^{442}\) The emphasis upon this evidence may suggest that multiple stab wounds by themselves do not establish torture. The court also reiterated that burglary is not admissible under (d)(9), history of violent felony convictions, unless there is a showing at sentencing, which there was in *Rompilla* that in the course of a prior burglary the defendant had used or threatened violence.\(^{443}\)

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\(^{434}\) *See* Pittsburgh Post-Gazette, March 6, 1995, at B2.


\(^{436}\) 652 A.2d 308 (Pa. 1995).

\(^{437}\) 651 A.2d 1101 (Pa. 1994).

\(^{438}\) *See* Rompilla, 1995 Pa. LEXIS 71, at *2 n.8.

\(^{439}\) *See* Jones, 651 A.2d at 1104 n.1.


\(^{441}\) *Jones*, 651 A.2d at 1109.


\(^{443}\) Id. at *21.
In Commonwealth v. Jermyn, the court affirmed the denial of a stay of execution. The case was unusual because the court previously had denied PCRA relief. The stay request was not treated as a successor petition, however. Instead, the application for a stay, which apparently was premised exclusively on grounds of mental incompetence to be executed, was treated as an independent action. Competency for execution may thus be an issue separate from PCRA litigation.

On the merits, the court concluded that the trial judge had applied the proper standard in judging competency — whether the defendant's mental illness "now prevents him from comprehending the reasons for the death penalty or its implications." The court also held that the mental competency standard of the Mental Health Procedures Act does not govern proceedings at the execution stage.

446. See Jermyn, 652 A.2d at 822.
447. Id. at 822-23.
448. Id. at 823.