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Chief Justice Ralph J. Cappy's Death Penalty Dissents: The Important of Statutory Authority and Procedural Protections

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Chief Justice Ralph J. Cappy's Death Penalty Dissents: The Importance of Statutory Authority and Procedural Protections

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INTRODUCTION

In the late 1970s and 1980s, after the Supreme Court of the United States once again approved state death penalty laws, Justices William Brennan and Thurgood Marshall uniformly dissented from each decision of the Court in which a death penalty was upheld.¹ Indeed, for the last fifteen or so years that they served on the Court, Justices Brennan and Marshall dissented from the denial of certiorari in every one of the hundreds of cases

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1. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *Walton v. Arizona*, 497 U.S. 639, 674 (1990) (Brennan, J., dissenting); *Dobbert v. Florida*, 432 U.S. 282, 304 (1977) (Brennan & Marshall, JJ., dissenting) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would vacate the death sentence in this case." (citation omitted)).

in which a petitioner sought to challenge his or her death penalty.² Similarly, just months before he left the Court in 1994, Justice Harry Blackmun dissented from a denial of certiorari in a death penalty case, famously declaring that “[f]rom this day forward, I no longer shall tinker with the machinery of death.”³

By contrast, no recent member of the Pennsylvania Supreme Court regularly dissented from the Court’s affirmance of death sentences or argued that the death penalty was, in all cases, unconstitutional.⁴ Thus, it is no surprise that during his almost two decades serving on the Pennsylvania Supreme Court, former Chief Justice Ralph J. Cappy authored a number of majority opinions upholding the imposition of a death sentence and frequently joined other justices’ opinions upholding the death penalty.⁵ Yet, in a small collection of notable cases, Chief Justice Cappy dissented from the Court’s opinion upholding a death sentence. In each of these cases, the Chief Justice’s dissenting opinion reflected a careful fidelity to statutory authority for imposition of a death sentence or strict adherence to procedural regularity in imposition of society’s most serious punishment. More specifically, these dissenting opinions addressed the need to follow the precise statutory scheme set forth for imposition of the death penalty and the defendant’s right to a fair procedure before such a severe penalty can be rendered and upheld by the state’s highest court. In the discussion that follows, we will parse eight of these dissenting opinions to explicate the importance of the former Chief Justice’s death penalty jurisprudence in dissent.

2. See, e.g., *McCleskey v. Bowers*, 501 U.S. 1282 (1991) (Marshall, J., dissenting from the denial of certiorari); *Boggs v. Muncy*, 497 U.S. 1043 (1990) (Brennan & Marshall, JJ., dissenting from the denial of certiorari); *Alvord v. Florida*, 428 U.S. 923 (1976) (Brennan & Marshall, JJ., dissenting from the denial of certiorari).

3. *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from the denial of certiorari).

4. Section 13 of Article I of the Pennsylvania Constitution prohibits the infliction of “cruel punishments.” PA. CONST. art. I, § 13. In *Commonwealth v. Zettlemoyer*, the Pennsylvania Supreme Court rejected the argument “that the imposition of the death penalty is inevitably ‘cruel punishment’ under Article I, § 13 of the Pennsylvania Constitution.” 454 A.2d 937, 967 (Pa. 1982), *overruled on other grounds by* *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

5. See, e.g., *Commonwealth v. Crawley*, 924 A.2d 612 (Pa. 2007); *Commonwealth v. Rollins*, 580 A.2d 744 (Pa. 1990).

COMMONWEALTH V. COPENHEFER (1991)

David Copenhefer was convicted and sentenced to death in 1989 for kidnapping and murdering Sally Weiner.⁶ The jury based the death sentence on its finding of two aggravating circumstances and no mitigating circumstances.⁷ On appeal, the Pennsylvania Supreme Court unanimously rejected Copenhefer's arguments for vacatur of his conviction, including "the novel claim that state acquisition of documents he mistakenly thought he had deleted from his computer was an impermissible intrusion on his right of privacy."⁸ However, the Court split 4-3 on an issue affecting Copenhefer's death sentence: whether the trial court erred in refusing Copenhefer's request to charge the jury that Copenhefer's lack of a prior record constituted a mitigating circumstance as a matter of law.⁹ The majority summarily rejected Copenhefer's argument.¹⁰

Justice Cappy, joined by Chief Justice Nix and Justice Zappala, dissented "vigorously."¹¹ Quoting the death penalty statute, Justice Cappy noted that the statute "expressly provides that '[m]itigating circumstances *shall include* the following: (1) The defendant has no significant history of prior criminal convictions."¹² Because the Commonwealth and defense had stipulated that Copenhefer did not have a prior criminal record, "the jury should have been instructed that they were bound to find at least one mitigating circumstance existed."¹³ Focusing on the specific language of the statute, Justice Cappy argued "that the General Assembly intended just what it said in enacting § 9711(e)(1); namely, that a sentencing jury *must* consider the absence of a prior record as a mitigating circumstance where such an objective circumstance is present."¹⁴ Because the parties had stipulated the

6. *Commonwealth v. Copenhefer*, 587 A.2d 1353, 1354 (Pa. 1991), *abrogated by Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001).

7. *Copenhefer*, 587 A.2d at 1358. Under Pennsylvania law, a death sentence must be imposed "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." 42 PA. CONS. STAT. § 9711(c)(1)(iv) (2007).

8. *Copenhefer*, 587 A.2d at 1354.

9. *Id.* at 1358.

10. *Id.* at 1358-61 (quoting at length the trial court's jury instructions and finding no error).

11. *Id.* at 1366 (Cappy, J., dissenting). In our discussion of the cases during Chief Justice Cappy's time on the Court as an Associate Justice (1990-2003), we refer to him as "Justice Cappy."

12. *Id.* (quoting 42 PA. CONS. STAT. § 9711(e)(1) (1980)).

13. *Copenhefer*, 587 A.2d at 1366 (Cappy, J., dissenting).

14. *Id.*

existence of one of the mitigating circumstances that the jury *must* consider, the trial court erred, in Justice Cappy's view, in not instructing the jury that they had to consider this mitigating circumstance and weigh it against any aggravating circumstances.¹⁵

The *Copenhefer* decision has an interesting postscript (or two). Ten years after the decision, the Court reversed course in *Commonwealth v. Rizzuto*,¹⁶ a unanimous decision authored by Justice Cappy, and held that "where a mitigating circumstance is presented to the jury by stipulation, the jury is required by law to find that mitigating factor."¹⁷ Thus, Justice Cappy's position eventually prevailed—but too late to help *Copenhefer*.

Two months after *Rizzuto* was decided, *Copenhefer* filed his third Post-Conviction Relief Act ("PCRA") petition, alleging that he was entitled to relief on the basis of the new rule announced in *Rizzuto*.¹⁸ The PCRA court dismissed *Copenhefer's* petition as untimely and, in another 4-3 decision, the Pennsylvania Supreme Court affirmed.¹⁹ This time, Chief Justice Cappy joined the majority, which held that *Copenhefer* was "not entitled to retroactive application of *Rizzuto*."²⁰

While the original *Copenhefer* decision was issued barely a year after Chief Justice Cappy joined the Court, the later *Copenhefer* decision—in which the Court held that *Copenhefer* could not benefit from the rule Chief Justice Cappy advocated in dissent in the original case and that the Court eventually adopted—came just four days before the Chief Justice left the Court. The *Copenhefer* cases thus act as bookends on Chief Justice Cappy's death penalty jurisprudence.

COMMONWEALTH V. BAKER (1992)

Lee Baker was convicted of first-degree murder for the shooting death of William Gambrell during a robbery.²¹ Baker, who was nineteen years old at the time, had a history of at least seven juvenile adjudications prior to the murder, including a robbery, an aggravated assault, and five burglaries.²² The jury found that this

15. *Id.* at 1366-67.

16. 777 A.2d 1069 (Pa. 2001), *overruled on other grounds by* Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003).

17. *Rizzuto*, 777 A.2d 1069, 1089 (Pa. 2001).

18. Commonwealth v. Copenhefer, 941 A.2d 646, 648 (Pa. 2007).

19. *Copenhefer*, 941 A.2d at 648-50.

20. *Id.* at 650.

21. Commonwealth v. Baker, 614 A.2d 663, 665 (Pa. 1992).

22. *Baker*, 614 A.2d at 665.

prior record constituted an aggravating circumstance, and after weighing it and two other aggravating circumstances against the two mitigating circumstances, rendered a sentence of death.²³ On the case's appeal to the Pennsylvania Supreme Court, the majority affirmed the conviction and sentence in a 4-3 decision.²⁴

Among Baker's arguments for overturning his death sentence was that a juvenile adjudication did not constitute a "conviction" under the death penalty statute and, therefore, could not be considered by the jury in determining whether the defendant had a significant history of violent felony convictions.²⁵ At the time of Baker's conviction, the statute governing juvenile adjudications specifically provided that an "order of disposition or other adjudication in a proceeding under this chapter is *not* a conviction of crime."²⁶ The statute further provided that a juvenile disposition "may not be used against [the child] in any proceeding in any court other than a subsequent juvenile hearing, whether before or after reaching majority," other than as part of a pre-sentence investigation and report following conviction of a felony.²⁷ Relying on an almost 35-year-old precedent in a non-capital case involving a different version of the juvenile adjudication statute, the Court rejected Baker's argument.²⁸

Justice Cappy dissented. Focusing once again on the plain language of the statute, Justice Cappy noted that the "death penalty statute provides a precise formula for narrowly considering those cases in which the extreme penalty of death should be imposed."²⁹ Moreover, the Court was "required to interpret penal statutes in the strictest sense, giving any benefit of liberal interpretation to the accused."³⁰ Reading the "actual words" of the statute, the error of allowing the prosecutor to present to the sentencing jury evidence of Baker's prior juvenile adjudications was obvious: "Under our statutes, the terms 'felony convictions' and 'adjudication of delinquency' are not synonymous."³¹

23. *Id.* at 665 & n.2.

24. *Id.* at 666. The lineup of justices in the majority and dissent was the same as in the first *Copenhefer* case.

25. *Id.* at 675.

26. 42 PA. CONS. STAT. 6354(a) (1976) (amended 1995) (emphasis added).

27. *Id.* at § 6354(b)(2).

28. *Baker*, 614 A.2d at 676 (citing *Commonwealth ex rel. Hendrikson v. Myers*, 144 A.2d 367, 371 (Pa. 1958)).

29. *Id.* at 682 (Cappy, J., dissenting).

30. *Id.* (citing Statutory Construction Act of 1972, 1 PA. CONS. STAT. § 1928)

31. *Id.*

Justice Cappy went on to explain that the sentencing guidelines and juvenile adjudications statute strictly limited the situations in which prior juvenile adjudications can be considered—and that those situations do not include capital sentencing determinations by juries.³² Rather, the legislature “purposely excluded juvenile adjudications from the consideration of the jury in death penalty cases.”³³ Like his dissenting opinion in *Copenhefer*, Justice Cappy’s dissent in *Baker* focused on the plain statutory language in arguing that a capital defendant should not be sentenced to death based on a jury’s consideration of inadequate or improper evidence—in this case, juvenile adjudications of delinquency.

COMMONWEALTH V. YOUNG (1993)

Joseph Louis Young was convicted in 1987 of two counts of murder (and other charges) for the stabbing deaths of Ismail and Lois al Faruqui.³⁴ Three years later, the Pennsylvania Supreme Court affirmed his conviction but unanimously reversed his death sentence because of a defect in the verdict slip at the original trial.³⁵ At the time of Young’s crime, as well as the time of his original trial, the death penalty statute provided that, whenever the Pennsylvania Supreme Court affirmed a conviction but vacated a death sentence, the Court must remand the case for imposition of an automatic life sentence.³⁶ However, during the pendency of Young’s appeal, the legislature amended the statute to provide that, except in certain limited circumstances, the Court should remand a case for a new capital sentencing hearing when it had upheld a conviction but vacated a death sentence.³⁷ Because the comment following the amended statute “expressly stated that the amendment applied to cases then on appeal,” the Court remanded Young’s case for a new sentencing hearing after vacating his death sentence in 1990.³⁸

On remand, Young was again sentenced to death for each murder conviction.³⁹ On appeal the second time, Young argued that application of the amended statute to his case violated the *ex post*

32. *Id.* at 682-83.

33. *Baker*, 614 A.2d at 683 (Cappy, J., dissenting).

34. *Commonwealth v. Young*, 637 A.2d 1313, 1315 (Pa. 1993).

35. *Young*, 637 A.2d at 1315.

36. *Id.* at 1316 (citing 42 PA. CONS. STAT. § 9711(h) (1983)).

37. *Id.*

38. *Id.*

39. *Id.* at 1315.

facto clauses of the state and federal constitutions. The Court rejected the argument, holding that the potential punishment did not change from the time Young committed his crime until the time he was finally sentenced; in both cases, he faced the possibility of a death sentence for first-degree murder.⁴⁰ The Court also rejected the argument that the amendment deprived Young “of any substantial right protected by the Ex Post Facto Clause.”⁴¹

Only Justice Cappy dissented. Justice Cappy disagreed with the majority’s view that the amendment caused only a procedural change not implicating the Ex Post Facto Clause.⁴² In his view, “[w]hat has happened in the instant case is that the potential maximum sentence on remand has been increased from life to death . . . and the procedure dictated by the General Assembly (remand for resentencing) has remained exactly the same.”⁴³ Perhaps emphasizing his view that something much more substantive than a change in procedure was at work in Young’s case, Justice Cappy noted that, had the Court heard Young’s original appeal (filed four months before the legislative change) “more expeditiously,” his case would have been remanded for automatic imposition of a life sentence.⁴⁴ “To my mind,” Justice Cappy wrote, “it is unjust, to put it mildly, to hold that appellant must receive the death penalty because this Court did not act more quickly in considering his appeal.”⁴⁵

COMMONWEALTH V. FAHY (1994)

Henry Fahy was convicted of murder and other charges for the killing and torture of 12-year-old Nicky Caserta.⁴⁶ Fahy’s conviction was affirmed on direct appeal, and he eventually filed a counseled PCRA petition raising a single issue: his trial counsel was ineffective for not objecting to the trial court’s failure to define “torture” for the jury before it considered (and found) an aggravating circumstance of committing a homicide by means of torture.⁴⁷

Four years after Fahy’s trial, the Pennsylvania Supreme Court had held that a trial court must instruct a jury that, in order to

40. *Young*, 637 A.2d at 1317.

41. *Id.* at 1318.

42. *Id.* at 1324-25 (Cappy, J., dissenting).

43. *Id.* at 1325 (citing *Miller v. Florida*, 482 U.S. 423 (1987)).

44. *Id.* at 1324 n.1.

45. *Young*, 637 A.2d at 1324 n.1.

46. *Commonwealth v. Fahy*, 645 A.2d 199, 200 (Pa. 1994).

47. *Fahy*, 645 A.2d at 200-01.

find the aggravating factor of homicide by torture, the jury must find that the defendant had the "specific intent to inflict pain, suffering or both pain and suffering."⁴⁸ Fahy argued that this ruling demonstrated that his counsel was ineffective for not requesting a jury instruction that defined torture, but the Supreme Court rejected this argument.⁴⁹ The Court noted that "it is difficult to fathom how trial counsel was ineffective for not requesting an instruction regarding a term which this very Court had at the time of trial found to be commonly understood."⁵⁰

The Court also rejected Fahy's argument that his counsel was ineffective for failing to request a jury instruction regarding the definition of torture "because, pursuant to any conceivable definition of the term, Nicky Caserta was tortured to death."⁵¹ To support its conclusion, the majority recited in graphic detail the facts of Nicky Caserta's death.⁵² The Court concluded that the jury had ample facts before it "to conclude beyond a reasonable doubt that [Fahy] intended to torture his victim as well as to kill her."⁵³ The Court then held that Fahy had failed to demonstrate that he was prejudiced by the omission of a definition of torture, because, given the "overwhelming evidence" of his guilt, he had not shown how the outcome of his case would have been different if a definition had been given.⁵⁴

Justice Zappala dissented on the ground that a "manifest injustice results from the majority permitting [Fahy's] sentence of death to stand when the same would be vacated if it arose on direct appeal today."⁵⁵ Justice Cappy dissented for a different reason: the PCRA trial court never addressed Fahy's contention that his counsel was ineffective for failing to request a jury instruction regarding the definition of torture.⁵⁶ Justice Cappy viewed the majority opinion as resting on the conclusion that Fahy could not establish the prejudice component of his ineffectiveness claim, but "the fact that this Court may have determined that the evidence presented was sufficient to support a finding of torture is a red

48. *Id.* at 201 n.8 (citing *Commonwealth v. Nelson*, 523 A.2d 728, 737 (Pa. 1987)).

49. *Id.* at 202-03.

50. *Id.* at 203.

51. *Id.* at 201.

52. *Fahy*, 645 A.2d at 201-02 & n.9.

53. *Id.* at 203.

54. *Id.* at 204.

55. *Id.* at 206 (Zappala, J., dissenting).

56. *Id.* at 207-08 (Cappy, J., dissenting).

herring.”⁵⁷ According to Justice Cappy, because the test for prejudice was whether *a jury*, not the *Fahy* Court, might not have found that the defendant committed torture or would have weighed the aggravating and mitigating circumstances differently if a definition had been provided, the Court could not review Fahy’s ineffectiveness claim until he was “given a hearing at which he may present facts to establish the three prongs of an ineffectiveness claim.”⁵⁸

Significantly, Justice Cappy disagreed with Justice Zappala that the severity of the death sentence warranted a departure from the general rule that “counsel cannot be found ineffective for failing to anticipate changes in the law.”⁵⁹ Thus, unlike Justice Zappala, Justice Cappy did not believe that Fahy was entitled to relief because of a decision that came four years after his trial; he simply believed that Fahy was entitled to the hearing that the Supreme Court had ordered when it stayed his execution two years earlier.⁶⁰ This basic procedural right was absent; thus, regardless of what the justices on the Court thought about Fahy’s guilt or the heinousness of his crime, a PCRA hearing was required.

COMMONWEALTH V. BUEHL (1995)

Roger Buehl was convicted of a triple murder and sentenced to death for each murder; on direct appeal, the Pennsylvania Supreme Court affirmed his conviction and death sentences.⁶¹ Buehl eventually filed a counseled PCRA petition, raising, among other issues, ineffective assistance of counsel. On appeal to the Supreme Court after the PCRA trial court rejected Buehl’s claims, a plurality of the Court (three of the participating six justices) agreed with Buehl that his “trial counsel was ineffective for failing to request a cautionary instruction regarding [his prior] crimes because it cannot be said with any reasonable certainty that but for this omission the outcome of [Buehl’s] trial would not have been different.”⁶² However, the plurality ultimately affirmed the trial court’s denial of PCRA relief on the ground that “the PCRA

57. *Fahy*, 645 A.2d at 208.

58. *Id.* at 208-09 (Cappy, J., dissenting).

59. *Fahy*, 645 A.2d at 209 n.1.

60. *Id.* at 208-09.

61. *Commonwealth v. Buehl*, 658 A.2d 771, 774 (Pa. 1995) (plurality opinion), *abrogated by Commonwealth v. Kimball*, 724 A.2d 326, 330 (Pa. 1999).

62. *Buehl*, 658 A.2d at 778-79.

renders more stringent the prejudice requirement which must be satisfied before relief can be granted"—and Buehl did not meet that more stringent standard.⁶³

Chief Justice Nix concurred in the judgment. He disagreed with the plurality's contention that prejudice under the PCRA was more stringent than prejudice generally, but he agreed that PCRA relief should be denied because he did not believe that counsel was ineffective for failing to request a cautionary instruction regarding Buehl's prior crimes.⁶⁴

Justice Cappy (joined by Justice Flaherty) dissented on the grounds that, in enacting the PCRA, the legislature could not constitutionally create a higher standard for ineffective assistance than the existing one, and that even if it could, it did not do so.⁶⁵ First, Justice Cappy noted, the United States Supreme Court and the Pennsylvania Supreme Court had established the proper tests for determining whether a defendant's Sixth Amendment right to effective assistance of counsel had been violated, and the state legislature could not create a higher standard.⁶⁶ Second, relying on language in the United States Supreme Court's decision in *Strickland v. Washington*,⁶⁷ Justice Cappy argued that it was "logically impossible" to impose a higher standard than the existing one, which already focused on the reliability of a verdict rendered without the assistance of effective counsel.⁶⁸

Justice Cappy believed that the plurality actually was applying a sufficiency of the evidence or harmless error test, neither of which would be appropriate.⁶⁹ In his view, a sufficiency of the evidence test had nothing to do with determining whether a trial error harmed the defendant (the purpose of the prejudice prong of ineffectiveness), and the harmless error analysis was equally illogical: "Once there is a determination that the defendant suf-

63. *Id.* at 777, 779-80. At the time, the PCRA required "a defendant to prove that counsel's ineffectiveness 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.'" *Id.* at 777 (quoting 42 PA. CONS. STAT. § 9543(a)(2)(ii) (1988)).

64. *Id.* at 782-83 (Nix, C.J., concurring in the judgment).

65. *Id.* at 783-84 (Cappy, J., dissenting). Chief Justice Nix effectively joined in Justice Cappy's reasoning, but not in the result Justice Cappy would have reached in Buehl's case. *See id.* at 782 (Nix, C.J., concurring in judgment) ("I am in agreement with the criticisms expressed in Mr. Justice Cappy's dissenting opinion concerning the plurality's interpretation of the test for ineffectiveness of counsel . . .").

66. *Id.* at 784 (Cappy, J., dissenting) (citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987)).

67. 466 U.S. 668 (1984).

68. *Buehl*, 658 A.2d at 784 (citing *Strickland*, 466 U.S. at 686-87).

69. *Id.* at 785.

ferred prejudice under the *Pierce*⁷⁰ test which could lead to a different result (verdict)[,] it would not make sense to essentially 'back up' and argue that the defendant was in fact *not* prejudiced under a harmless error analysis."⁷¹ Thus, Justice Cappy would have held "that that the verbiage set forth in [the PCRA] is by constitutional mandate and logical application, nothing more than a recitation of the *Pierce* standard of prejudice."⁷²

As with his dissent in *Copenhefer*, Justice Cappy would eventually see his dissenting position in *Buehl* prevail. Almost four years after *Buehl* was decided, the Court expressly rejected the plurality's view and held that "the PCRA does not impose a more stringent prejudice requirement than that applicable to direct appeals."⁷³

COMMONWEALTH V. HANNIBAL (2000)

Sheldon Hannibal and a co-defendant were convicted of first-degree murder for the beating and shooting of Peter LaCourt.⁷⁴ Hannibal was sentenced to death while his co-defendant received a life sentence.⁷⁵ On appeal to the Pennsylvania Supreme Court, Hannibal argued that the jury instructions erroneously allowed the jury to convict him of first-degree murder based solely on his alleged accomplice's specific intent to kill.⁷⁶ The trial court had instructed the jury that if it found "that *a defendant* intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant, *his accomplice* or co-conspirator had the specific intent to kill."⁷⁷

A plurality of the Court (again, three of the six justices participating in the decision) rejected Hannibal's argument, finding that the instructions were the equivalent of telling the jury that it "may find the accomplice guilty if it finds that the defendant *and* his accomplice (or you may think of him as a co-conspirator) acted

70. *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). Justice Cappy noted that the test set forth in *Pierce* was the same as that set forth in *Strickland*. See *Buehl*, 658 A.2d at 785 n.4 (Cappy, J., dissenting).

71. *Buehl*, 658 A.2d at 785 (Cappy, J., dissenting).

72. *Id.* at 786.

73. *Commonwealth v. Kimball*, 724 A.2d 326, 330 (Pa. 1999). Only one of the Court's seven justices disagreed with this conclusion. See *id.* at 337-39 (Castille, J., concurring).

74. *Commonwealth v. Hannibal*, 753 A.2d 1265, 1267 & n.6 (Pa. 2000).

75. *Hannibal*, 753 A.2d at 1267.

76. *Id.* at 1271.

77. *Id.* at 1270-71 (emphasis added).

with specific intent to kill and malice.”⁷⁸ Thus, the plurality held, the instructions correctly “referred to the need to consider whether each individual in the case possessed the requisite specific intent to kill.”⁷⁹ Justice Nigro concurred in the judgment, finding that any error in the trial court’s instructions was harmless.⁸⁰

Justice Cappy, joined by Justice Zappala, dissented.⁸¹ Justice Cappy noted that he would agree with the plurality’s conclusion if the trial court had given the instruction as rewritten by the majority.⁸² But, “this is not the instruction that was given. Rather, it is a concoction derived from the majority’s hopes that the jury was privy to the same book of grammar that it had at its disposal.”⁸³ Thus, because the actual instruction given by the trial court “informed the jury that it could find [Hannibal] guilty of first degree murder even if only his accomplice or co-conspirator, rather than [Hannibal] himself, had the specific intent to kill,” it ran afoul of Pennsylvania Supreme Court precedent requiring the jury to find that each defendant “harbored the specific intent to kill.”⁸⁴

As in *Fahy*, the important point for Justice Cappy was that the procedure leading to conviction for first-degree murder and imposition of a death sentence must provide every assurance that the jury truly intended to impose society’s most severe sanction on the defendant. Without a proper jury instruction on an element of the crime, the Court could not be confident that this was the case.

COMMONWEALTH V. RICE (2002)

Timothy Rice was convicted at a non-jury trial for the murder of Bernard Jackson and James Jefferson in a Philadelphia bar, and a jury then sentenced Rice to death for each murder.⁸⁵ Rice challenged his conviction and sentence on numerous grounds, including that the statutory scheme allowing the jury to consider victim impact evidence was unconstitutional and that “the trial court erroneously instructed the jury on how it should consider [victim

78. *Id.* at 1271.

79. *Id.*

80. *Hannibal*, 753 A.2d at 1276 (Nigro, J., concurring in the judgment).

81. *Id.* (Cappy, J., dissenting).

82. *Id.* at 1277.

83. *Id.*

84. *Id.* (citing *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994) and *Commonwealth v. Bachert*, 453 A.2d 931 (Pa. 1982)).

85. *Commonwealth v. Rice*, 795 A.2d 340, 344-45 (Pa. 2002) (plurality opinion), *overruled on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003).

impact] evidence” during the sentencing phase of his trial.⁸⁶ The year before Rice’s case came to the Pennsylvania Supreme Court, the Court had rejected a challenge to the constitutionality of the Commonwealth’s statutory provisions allowing consideration of victim impact evidence and the procedures for admitting such evidence, and thus, the Court summarily rejected Rice’s challenge to the statute.⁸⁷

Rice’s jury instruction argument was not so easily dismissed. In fact, a plurality of the Court (three of the seven justices) concluded that “the trial court failed to present the law accurately to the jury.”⁸⁸ Pennsylvania’s death penalty statute allows a jury to consider victim impact evidence if it finds any aggravating circumstance and any mitigating circumstance.⁸⁹ However, the trial court had instructed the jury to consider victim impact evidence only if it found an aggravating circumstance and the catch-all mitigating circumstance, and to consider the victim impact evidence only in determining how much weight to afford the catch-all mitigating circumstance.⁹⁰ Yet, because the plurality found the erroneous instruction to be *more* restrictive than was permitted under Pennsylvania law, it held that the error was harmless and Rice was not entitled to a new sentencing trial.⁹¹ Justice Saylor concurred in the result, without writing an opinion, and Justice Nigro concurred in the judgment, on the ground that the instruction was not erroneous.⁹²

Justice Cappy dissented (as did Chief Justice Zappala). Justice Cappy noted that the Pennsylvania statute “permits a jury to consider victim impact evidence as part of the general deliberative process in reaching a conclusion on the moral culpability of a particular defendant.”⁹³ The trial court’s instruction, however, was modeled after New Jersey’s victim impact provision, which “enabled consideration of victim impact testimony as linked to testimony relevant to the character of the defendant.”⁹⁴ Unlike the plurality, Justice Cappy did not find the given instruction to be

86. *Rice*, 795 A.2d at 350-51.

87. *Id.* at 351 (citing *Commonwealth v. Means*, 773 A.2d 143 (Pa. 2001) and *Commonwealth v. Natividad*, 773 A.2d 167 (Pa. 2001)).

88. *Id.* at 353.

89. *Id.* (citing 42 PA. CONS. STAT. § 9711(c)(2) (1999)).

90. *Id.* at 353.

91. *Rice*, 795 A.2d at 354.

92. *Id.* at 359 (Saylor, J., concurring in the result); *id.* at 363-64 (Nigro, J., concurring in the judgment).

93. *Id.* at 362 (Cappy, J., dissenting) (citing *Means*, 773 A.2d at 156, 159).

94. *Id.* at 361 (citing *State v. Muhammad*, 678 A.2d 164 (N.J. 1996)).

more restrictive in terms of the victim impact evidence it allowed the jury to consider than what was permitted by Pennsylvania law.⁹⁵ Nor did he view the instruction as offering a greater benefit to the defendant than a correct instruction.⁹⁶ Rather, he viewed it as different from what was permitted under the Pennsylvania statute.⁹⁷ Thus, he posited that the erroneous instruction was not harmless, and the Court should have remanded the case to the trial court for a new penalty hearing.⁹⁸

COMMONWEALTH V. BANKS (2007)

In one of Pennsylvania's most notorious murder cases, George Banks was convicted in 1983 of twelve counts of first-degree murder and one count of third-degree murder for a shooting spree in which most of the victims were his children and their mothers.⁹⁹ Banks was given the death sentence for each of his first-degree murder convictions, but in 2005, after two rounds of state appeals and two trips to the United States Supreme Court, the Court of Common Pleas for Luzerne County declared Banks not competent to be executed.¹⁰⁰ On appeal to the Pennsylvania Supreme Court, the Court reversed in an opinion issued just days before Chief Justice Cappy retired from the bench.

Before addressing the issues raised by the Commonwealth in its appeal, the majority recited the lengthy procedural history that followed the United States Supreme Court's second ruling on the case in 2004: In December 2004, after Banks's mother had filed a "next friend" petition on his behalf, the trial court denied that petition for want of jurisdiction, and the Pennsylvania Supreme Court then assumed plenary jurisdiction over Banks's case.¹⁰¹ The Supreme Court ordered the trial court to hold a competency hearing expeditiously to determine Banks's competency to be executed and "to determine whether [Banks] possessed the mental capacity to initiate clemency proceedings or to designate someone to initiate them on his behalf."¹⁰² Over the next year, the Supreme Court issued a series of "directives" to the trial court, which, according to

95. *Id.* at 362-63.

96. *Rice*, 795 A.2d at 363.

97. *Id.* (citing 42 PA. CONS. STAT. § 9711(a)(2) (1999)).

98. *Id.*

99. *Commonwealth v. Banks*, 943 A.2d 230, 231 & n.2 (Pa. 2007).

100. *Banks*, 943 A.2d at 231-32, 236.

101. *Id.* at 232.

102. *Id.*

the majority, were necessitated by the trial court's delay in carrying out the Supreme Court's original December 2004 order.¹⁰³ During this time, the Commonwealth's and Banks's attorneys battled over the Commonwealth's request to have its psychiatrist examine Banks and interview correctional personnel outside the presence of Banks's counsel.¹⁰⁴ The trial court sided with Banks and, when the competency hearing finally took place in January 2006, Banks "presented three expert witnesses who opined that he lacked a rational and factual understanding of his death sentences and the reasons for and implications of the same," in response to which the Commonwealth produced "no evidence."¹⁰⁵

On appeal to the Supreme Court following the trial court's finding that Banks was not competent to be executed, the Supreme Court held that the trial court erred in precluding the Commonwealth's experts from examining Banks or interviewing correctional personnel outside the presence of Banks's counsel.¹⁰⁶ The Court held that there was no constitutional requirement that counsel be present when a prisoner sentenced to death is examined by a government expert.¹⁰⁷ The Court further held that the trial court had no authority to impose such a requirement in Banks's case, given the narrow scope of the Supreme Court's December 2004 order, and that, in fact, the trial court had not issued any such order requiring counsel's presence.¹⁰⁸ Clearly irritated with the trial court's failure to follow its original directive, the majority closed with the command that "with the exception of scheduling and logistical matters, the trial court is not to be diverted by tangential motions and assertions by counsel: **this** Court retains jurisdiction over such matters. The trial court is to act expeditiously in conducting the rehearing."¹⁰⁹

103. *Id.* at 232-34.

104. *Id.* at 232-36. The Commonwealth's initial expert examined Banks and interviewed correctional personnel outside the presence of Banks's counsel. *Id.* at 233. As a result, the trial court granted Banks's motion to preclude that initial expert from testifying at the competency hearing. *Id.* at 235. The Commonwealth then retained a new expert, but that expert declined to conduct the necessary interviews in the presence of defense counsel. *Id.* at 235-36.

105. *Banks*, 943 A.2d at 236. Although the majority claimed that the Commonwealth produced "no evidence," Chief Justice Cappy, in his dissent, indicated that the Commonwealth presented the testimony of an expert at the competency hearing, albeit not the expert who had examined Banks. *Id.* at 240 (Cappy, C.J., dissenting).

106. *Id.* at 238 (majority opinion).

107. *Id.*

108. *Id.*

109. *Id.* at 239.

Chief Justice Cappy dissented in an opinion joined by Justice Baldwin. Chief Justice Cappy found, contrary to the majority, that the trial court *had* required the Commonwealth (though not in a written order) to inform defense counsel of any plan to examine Banks or interview correctional personnel so that defense counsel could be present.¹¹⁰ Because the Commonwealth failed to comply with this order, Chief Justice Cappy believed that the trial court was well within its discretion in precluding the Commonwealth's experts from testifying at the competency hearing.¹¹¹ In his view, that was the beginning and the end of the case. Indeed, he noted, the Commonwealth had failed in its appeal to develop the argument that the trial court erred in requiring defense counsel's presence during the expert's examination of Banks.¹¹² Thus, the Supreme Court should not even have addressed the issue. Chief Justice Cappy concluded by reviewing the trial court's competency determinations and finding them to be well supported by the evidentiary record.¹¹³

CONCLUSION

In the modern death penalty era,¹¹⁴ the Pennsylvania Supreme Court has not seen the likes of Justice Thurgood Marshall or Justice William Brennan—jurists who consistently voted against the death penalty in every single case that came before their court. Yet, while generally voting to uphold death sentences imposed on first-degree murder defendants in Pennsylvania, Chief Justice Ralph Cappy carved out a small, but important, death penalty jurisprudence in dissent during his eighteen years on the Court.¹¹⁵ In that jurisprudence, which, in some cases, later became the controlling law of the Commonwealth, the former Chief Justice re-

110. *Banks*, 943 A.2d at 239 (Cappy, C.J., dissenting).

111. *Id.*

112. *Id.* at 239-40.

113. *Id.* at 240-41. According to Chief Justice Cappy, "[T]he evidence presented establishing Banks'[s] incompetency is nothing short of overwhelming and a second competency hearing is unwarranted." *Id.* at 241.

114. That is, since the Supreme Court once again approved state death penalty laws in 1976. *Gregg v. Georgia*, 428 U.S. 153 (1976).

115. Chief Justice Cappy also authored at least a dozen opinions in which the Pennsylvania Supreme Court vacated either a death sentence or a capital murder conviction. In addition, he wrote a number of concurrences in capital cases in which he agreed with the Court's ultimate ruling (which, in some cases, consisted of an overturning of a death sentence or conviction), but differed with the majority's reasoning or application of precedent. These majority and concurring opinions do not offer as clear a lens through which to view and analyze Chief Justice Cappy's death penalty jurisprudence, and thus we leave their consideration for another day or other scholars.

mind his colleagues, lower court judges, and practitioners of the importance of strictly construing the death penalty statute in favor of capital defendants and of affording such defendants the procedural rights they are due. Whatever one's views may be of the morality, constitutionality, or benefits of the most serious and irrevocable criminal sanction, the former Chief Justice is to be credited for taking a stand in these important cases by reiterating the importance of fidelity to statutory authority and commitment to procedural protections in death penalty cases.

POSTSCRIPT

This article was written before the untimely passing of our former Chief Justice. I was pleased to work on it with Bruce Merenstein, who was the principal author of this piece, because of my great admiration and respect for Ralph Cappy. Those of us who served on the Civil Procedural Rules Committee or on the Judicial Council while he was the liaison to those committees, and who worked with the Administrative Office of Pennsylvania Courts on legal matters involving the judiciary, saw Ralph Cappy at work. The energy, enthusiasm, and dedication that he demonstrated in his continuing efforts to improve and strengthen the entire judicial system was inspiring. While many of us have lost a valued friend, we have all lost a remarkable man who did much to make our courts work better for all of the citizens of our Commonwealth.

Paul H. Titus

